11th South Pacific Judicial Conference

February 5 - 10, 1995

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Tumon, Guam

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It was an unusually large group that convened in Guam in 1995, 73 judges including, for the first time, judges from Taiwan and the Philippines. United States Supreme Court Justice Anthony Kennedy, who, representing the US Circuit Court of Appeals for the Ninth District, had attended several of these conferences in the past, gave the keynote speech and set the tone of this 11th South Pacific Judicial Conference.

Justice Kennedy engaged in some judicial introspection in his address to the delegates. He acknowledged the geopolitical realities of the day, saying that as many emerging nations, including those in the former Soviet Bloc, are building their judicial systems, many using the American example as a model, it's important to examine that justice system, to be sure that as an example of the Rule of Law, it is working as it should. It is particularly important, he said, to look at it from an outsider's perspective because both the perception and the reality may be decisive in the balance as other countries decide how to best order their own legal systems.

New judiciaries, he said, face certain obstacles. The transition period after a totalitarian regime is removed is delicate. Once the totalitarian regime is removed, he explained, a vacuum emerges because when the old regime was in place, there was no independent moral and social culture permitted to exist. So during the transition, the forces of crime

and anarchy compete with counter-revolutionary forces, resulting in a race to fill the gap with re-established law and custom, based on respect for individual liberty. The dynamics of freedom and constitutional rule may not be fully grasped or fully understood.

Another obstacle is the difficulty of establishing an independent judiciary without a strong and independent bar to support it. The whole idea of a public law, sustained by a bar committed to defending freedom in a larger sense, is, he said, simply missing from the legal and cultural experience in much of the world.

So just how good is the example set by the American judicial system? Taken as a whole, he said, it operates in an efficient and fair manner. No other legal system in the world can ensure its citizenry stronger protections against arbitrary and improper government action. But by necessity, whenever one speaks of and examines a legal system, one focuses on areas in which that system can improve, and he said there is no greater danger to freedom than for us to ignore the fragility of our own institutions.

A constitution, he declared, is only as strong as the continued commitment people have to it. Americans have a good understanding of the meaning and purposes and essentiality of most of their liberties, especially the freedom of speech and freedom of the press, which the public and the courts are quick to defend against encroachment. But, he added, there are other essential parts of the constitutional order that get shoved aside in the turbulence of political and social dialogue. One that he maintained is ignored too often is

federalism, or the idea that having two levels of government rather than one increases freedom. The balance between them has to be protected. If it is to be altered, it must be done only after deliberate, explicit consideration of the consequences. "Constitutional values must not be sacrificed by default."

Justice Kennedy rejected what he termed moral relativism, which attempts to justify selective withdrawal of consent from the Rule of Law. This is wrong as a matter of law, he explained, because unilateral withdrawal of consent has only one logical conclusion, which is anarchy. It is wrong as a matter of ethics because the web of social obligation implicit in our legal system is destroyed when someone withdraws. And moral relativism is wrong as a matter of morals because denial of personal responsibility cannot be tolerated in a society, which exalts the freedom of the individual.

"Society has the legitimate legal and moral right to govern recalcitrants by force," he said. But, he added, if the enforcement of criminal law by the use of judges and bailiffs and handcuffs and prisons has to be done on a great scale, it is a sign of failure where there ought to have been teaching. It is an admission that the law is used for the primary purpose of punishment when it ought to be used to inspire hope and respect.

Justice Kennedy likened the American heritage and cultural experience to an extended conversation or series of conversations that continue over time. These conversations are what unite us as a people and enable us to explore and express the shared traditions that define us as a community. They are, or ought to be, civil conversations. The privilege

of free speech that underlies them carries with it a responsibility to strive for standards of decency and decorum. The legal profession, as do other arts and professions, has its own forms and conventions for participating in a national conversation. It relies in part upon a technical, specific kind of vocabulary that provides a common bond among legal professionals across geography and time. Only by adhering to this formal structure can we as an institution talk about the problems of race or religion or speech in a long and continued and sustained conversation.

In conclusion, Justice Kennedy tipped his hat to conference host Guam, saying that it contributes to the national conversation in a most vital way. With its unique cultural heritage, Guam embodies in a real and tangible sense the commitment to pluralism that Madison though was the very essence of a free society.

His keynote address was followed over the next few days by panel discussions on a variety of topics, including the judicial response to domestic violence, customary law, sentencing, reducing trial and sentencing delays, criminal procedure, the Exxon-Valdez oil spill, and court automation.

anything else of note?

After approving the invitation from Sydney, Australia, to host the next conference, in 1997, the group adjourned.