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"Rule of Law Alive and Well in Today's Society"

Centre College Convocation

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Good evening and thank you for inviting me to be here tonight. Thanks to my colleague and your Justice Mary Noble for the generous introduction.

I am grateful to the Centre Law Society for giving me the opportunity to address some of the sharpest minds in Kentucky. I especially want to thank Julie Crocker, who is from my part of the state, for her hard work in coordinating my attendance this evening.

Having once been a college student myself, I understand that evenings are usually dedicated to other endeavors, such as preparing for the next day's classes. In campus jargon, I hear this is called the Convo. I have been referring to myself as your convocalist for the evening. So I appreciate your attendance and attention.

I was given some freedom in choosing my topic for this convocation, although I was told the audience would be expecting me to discuss the Kentucky legal system. And since the law itself is the basis for any discussion about the legal system, I would like to start by talking to you generally about the importance of the "rule of law" in society.

There is no denying that "the law" touches our lives on a daily basis, mostly in ways we don't realize or appreciate. Recognizing this widespread lack of awareness, the American Society of International Law published a document in 2006 that lists 100 ways international law shapes our lives.[1]

And this list at 100 entries isn't really exhaustive. But it does give some concrete and specific examples. For instance, we always know what date and time it is anywhere on the planet because of the universal recognition of the Prime Meridian and Greenwich Mean Time. This happens because of an international agreement at the 1884 International Meridian Conference.[2]

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[1] American Society of International Law, "International Law: 100 Ways it Shapes Our Lives," 2006.
[2] *Id.*, at 2.

We can feel confident that mail – snail mail I'm talking about here – we send anywhere in the world will arrive reliably and relatively quickly because there exists worldwide delivery requirements set forth in the 1964 Constitution of the Universal Postal Union.[3]

And, thanks to the 1996 World Intellectual Property Organization Copyright Treaty, the same software that you use on your computer is available to computer users worldwide. [4]

To use an illustration literally close at hand for all of you, the wireless and broadband services you use every day are available because of rules, regulations and licenses established by the Federal Communications Commission. The content on your Facebook page is subject to a Statement of Rights and Responsibilities and a Privacy Policy. And the videos that you watch on YouTube are subject to the Digital Millennium Copyright Act.

These are just a few examples, but they illustrate a larger point. Virtually everything from the wholesomeness of the food we buy, the purity of the water we drink and the cleanliness of the air we breathe is regulated to some extent by the rule of law. In the U.S., we don't even think twice about these things.

A dedication to pursuing the rule of law has been a pillar of the American ethos since well before the United States became a country. And many notable Americans have talked about the importance of the rule of law.

Our Declaration of Independence rang loud with the word that railed against King George III, charging that he had usurped the rule of law in favor of arbitrary and capricious policies. Two of the most vociferous accusations directly dealt with courts, alleging that the king had "obstructed the Administration of Justice" and had "made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries." In short, the actions of George III corrupted the intent of laws to secure the people in the living of their lives in a free society.[5]

In his 1776 pamphlet, *Common Sense*, the revolution-stirring pamphleteer, Thomas Paine, wrote of the rule of law in terms that were well understood and described the principle at the time: "For as in absolute governments," Paine wrote, "the king is law, so in free countries the law ought to be king; and there ought to be no other."

Paine's contemporary, John Adams, included perhaps one of the most well-known statements regarding the rule of law and the separation of powers in the 1780 Massachusetts constitution, in which he stated: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."

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[3] *Id.* at 2.
[4] *Id.* at 3.
[5] American Bar Association, http://www.abanet.org/publiced/lawday/talking/independentcourts.html (last visited March 1, 2010).

But history teaches us that the concept of the rule of law is not static and, in fact, is relative to the time, places and circumstances under which it is cited. For instance, according to the American Bar Association, the rule of law "refers to a system of transparent, predictable, understandable, and fair rules and institutions that facilitates the efficient and just functioning of societies."

Black's Law Dictionary provides five different definitions for the rule of law. It can mean anything from "a substantive legal principle" to "the doctrine that general constitutional principles are the result of judicial decisions determining the rights of private individuals in the courts."

And, according to the ultimate in modern reference materials, the Wikipedia dictionary, or "Wiktionary," the "rule of law" is "the doctrine that no individual is above the law and that everyone must answer to it."

The principle of the rule of law is not something we consciously think about every day. But it is something that constantly orders our lives. As President Eisenhower once stated, "The clearest way to show what the rule of law means to us in everyday life is to recall what has happened when there is no rule of law."

Regardless of its definition, the rule of law is the foundation of our government and of our court system. It stands for the idea that government authority can only be exercised in accordance with publicly disclosed and widely accepted laws. It provides the basis for due process and separation of powers. And it serves as a safeguard against arbitrary governance.

Abraham Lincoln, a native Kentuckian, was a firm believer in the rule of law. Lincoln, a lawyer by profession and an accomplished orator even before he became our 16th president, often spoke about the importance of compliance with the rule of law.

On January 27, 1838, Lincoln addressed the Young Men's Lyceum of Springfield, Illinois, on a topic entitled "the perpetuation of our political institutions." Lincoln spoke in reaction to recent mob violence across the country, and particularly in Mississippi and St. Louis. Lincoln's fears regarding these instances of violence and the public's apparent disregard for the rule of law were evident in his speech. In Lincoln's words: "I hope I am over wary; but if I am not, there is, even now, something of ill-omen amongst us. I mean the increasing disregard for law which pervades the country; the growing disposition to substitute the wild and furious passions, in lieu of the sober judgement [sic] of Courts; and the worse than savage mobs, for the executive ministers of justice."

But, despite his concerns, Lincoln offered advice on how the American people could "fortify" against these dangers. In fact, Lincoln asserted that the solution to the unraveling of civilization was "simple," stating: "Let every American, every lover of liberty, every well wisher to his posterity, swear by the blood of the Revolution, never to violate in the least particular, the laws of the country; and never to tolerate their violation by others. As the patriots of seventy-six did to the support of the Declaration of Independence, so to the support of the Constitution and Laws, let every American pledge his life, his property, and his sacred honor;—let every man remember that to violate the law, is to trample on the blood of his

father, and to tear the character of his own, and his children's liberty. Let reverence for the laws, be breathed by every American mother, to the lisping babe, that prattles on her lap—let it be taught in schools, in seminaries, and in colleges;—let it be written in Primers, spelling books, and in Almanacs;—let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice. And, in short, let it become the political religion of the nation; and let the old and the young, the rich and the poor, the grave and the gay, of all sexes and tongues, and colors and conditions, sacrifice unceasingly upon its altars."

Lincoln's words were powerful in the 19th century. And even in their 19th century rhetoric they are still potent today, 172 years later. The rule of law is still viewed as our protection against, in Lincoln's words, "the mobocratic spirit." And although we do not have the lawless mobs threatening the tranquility of out cities and towns as Lincoln decried in 1838 – which included extrajudicial judgment against gamblers, abolitionists and suspected slave insurrectionists – we do have our own problems.

Defining the "rule of law" may be difficult. But there is no doubt that the principles the rule of law embodies are still alive and well in our society. Continued recognition of and adherence to the rule of law will give us the strength and opportunity to address the challenges that face us today.

The founding fathers recognized the importance of the rule of law by establishing the judiciary as a separate and independent branch of government in Article III of the U.S. Constitution. Because of the history of political and economic abuses of the colonies by Great Britain, framers of the Constitution took great pains to insulate the courts from partisan political pressure and to allow the courts to rule autonomously by giving federal judges life tenure during good behavior and providing their salaries could not be reduced during their tenure.

In strong support of the importance of judicial independence to the rule of law in this new republic, Alexander Hamilton, wrote in The Federalist Papers that the power of judicial review was vested in an independent court because Hamilton feared "the encroachments and oppressions of the representative body" and "the effects of those ill humors, which the arts of designing men … sometimes disseminate among the people themselves and [which] … occasion … serious oppressions of the minor party in the community." Without independent courts, Hamilton concluded, "all the reservations of particular rights or privileges would amount to nothing."

Kentucky embraced for itself the precept of judicial independence from the inception of the Commonwealth, stating in Article I, Section 1 of the original 1792 Constitution: "The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative, to one; those which are executive, to another; and those which are judicial, to another."

Despite significant changes to the Kentucky Constitution in 1850 (the most significant of which was to provide for the popular election of state court judges) and again in 1891, those words supporting a separate and independent judicial branch in this state survived the test of

time. They can be found today in Section 27 of the current Constitution. The powers and responsibilities of the Judicial Branch are further described in Sections 109-124.

Because I believe that the rule of law demands it, the lessons of history support it, and the Constitution of the Commonwealth requires it, I have an obligation as the chief justice to do everything I can to maintain Kentucky's judiciary as a separate and independent branch of government. And the independence of Kentucky's judicial branch has, over the 200-plus year history of the Commonwealth, been more of an aspiration than a reality. And we face challenges of historical proportions today.

Allow me to offer a brief civics lesson on your state government. Kentucky's court system is like only a handful across the country. It is a unified system; this is something we ought to be proud of because 35 years ago Kentucky did the bold and innovative thing of overhauling its entire court system. A unified court means that our trial and appellate courts at every level across the state are subject to a centralized administration, operated from a single judicial branch budget that is funded by the General Assembly and subject to oversight by the Supreme Court. The chief justice serves as the executive head of the judicial branch.

One of the chief justice's explicit Constitutional roles is to propose to the General Assembly every two years the budget needed to fund the operation of the courts statewide. We do not generate funds by any other source.

The current economic downturn has decimated most state budgets, Kentucky's included. This has resulted in a funding crisis for the state courts across the country and it is particularly difficult for those of us who are unified systems wholly dependent on state appropriations for our source of funding.

And while we, like the rest of the citizens of the Commonwealth, still await word from the House of Representatives of the fate of our proposed budget request for the upcoming two-year budget cycle, we are confident that further budget cuts lie ahead for the state's court system.

So, for the first time in our 35-year history as a unified court system, I am very concerned that decreased funding for our courts will impede our ability to serve the people of the Commonwealth at the level they have come to expect from us. And ultimately, if the court system is not funded at a level adequate to perform its Constitutional role, then the rule of law in Kentucky is at grave risk.

Under our Constitution, the legislative branch was given the power of the purse, which means that we are totally dependent upon that branch for funding. And this dynamic sets the stage for a sometimes uncomfortable tension between these branches. Our founders built this system of checks and balances not for our comfort but so that the power of each branch is somehow kept in check by the other.

One of the tensions that seems naturally to flow from the legislative control over the funding of the courts is the historically consistent tendency on the part of the legislative branch to seek control over how the appropriated funds are spent within the judicial branch. We view this

legislative impulse to manipulate the inner workings of the judicial branch as an encroachment on our independence and a violation of the separation of powers. But, realistically, it is very difficult for us to control it.

Another tension appears when courts perform their constitutional task of judicial review of laws enacted by the legislature and make rulings in cases brought before the courts. Often the court must rule in such a way that causes popular legislation to be overturned. It has happened repeatedly in our history that disappointed legislators then attempt to retaliate by manipulating or reducing funding to the courts. This, too, is an encroachment on the independence of the judiciary and there is little we can other than decry retaliation.

In the final analysis, the judicial system itself must take primary responsibility to guard its independence.

The empowerment and independence of the court system floats, as Justice Stephen Bryer has said, upon the sea of public opinion. The judiciary is, to a great measure, dependent upon the public's fundamental acceptance for its legitimacy.[6]

And if a growing segment of the population comes to believe that judges are not deciding cases according to the rule of law, much is at stake. Chief Justice John Marshall warned: "The people have made the Constitution, and they can unmake it." An erosion of the public's trust and confidence in the courts will undermine the judicial independence that is the bedrock of the rule of law.

For that reason, judges must do more than simply undertake to do their jobs deciding cases as best they can. Judges must also, in this day of speedy communication, try to explain or to teach why that institution and independence are important, not simply to the judges or to the lawyers, but to the people our institution seeks to serve.

I appreciate your attendance and attention this evening.

I'll open the floor to questions from the audience.

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[6] Stephen Breyer: Judicial Independence, www.georgetownlawjournal.com/issues/pdf/95-4/breyer.pdf (last visited February 26, 2010).