Musings on the Rule of Law in Troubled Times

By Robert T. Hall, Esq.

I come to you today as Hunter Thompson might, full of fear and loathing. Fear that I have nothing to contribute to your already great body of knowledge about the rule of law. Self-loathing about my inability to convey to you the importance of this subject.

As the Academy grows with the China Program -- the program which Ray and Audrey Tam have done so much to build and which brings so much credit to the Academy -- we must be prepared to discuss with our Chinese guests our view of the rule of law.

When our guests arrive in Hawaii for their annual orientation week, Ray and Audrey host a reception and dinner for them. In the years my wife, Sally, and I have had the privilege of attending, Ray has introduced our Chinese guests to the wonderful collection of Fellows and Hawaiian judges and lawyers he has assembled to teach our guests about our system, “Welcome to America and the rule of law.”

Sally and I had hosted two Chinese guests prior to September 11, 2001. It was very easy and very comfortable to hear Ray say “Welcome to America and the rule of law.” But after September 11th and our response to that dreadful day, I have become less comfortable with and less clear of its meaning. What do we convey to our Chinese guests when we welcome them to America and our rule of law? The phrase seems much more complex now.

The Virginians here know Justice Donald Lemons of the Virginia Supreme Court well. Don is one of the younger members of our Court, and a wonderful, insightful, and dynamic justice committed to the rule of law.

Not long ago he returned to the United States from an Inns of Court meeting in England. While we were exchanging e-mails about his trip, I asked him what he thought we mean when we speak of the rule of law now.

He said, “I'm glad you asked. I'm the chairman of the joint task force to create the rule of law program for the 400th anniversary of the founding of Jamestown. People will be coming from all over the world to that conference. The working committee has crafted a working definition of the rule of law.”

I'll share Justice Lemons’s definition with you in a minute because Justice Lemons ended on a note I think is so important.

After getting his e-mail, I went and did what we do so often these days, I ran a Goggle on the rule of law, looking for a working definition. I found hundreds if not thousands of references to the rule of law, but, with one exception, not a single working definition of the rule of law and what we Americans mean by it.

I turned to our search of the state laws and federal laws, the cases decided since we started automating our cases, and found no case definition -- surprising -- no case that helped define the rule of law.

Let me return to Justice Lemons's e-mail to me. Please bear with my reading it for a moment because I want to quote him accurately.

> "The planning committee for the conference began with the question what does the rule of law mean?
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> At the outset we all had to acknowledge that a nation's aspirations are often at odds with its practices.
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> We also had to acknowledge that the rule of law will have different manifestations in different places, different cultures, and at different times in our history.
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> Whatever it means in aspirational terms, we concluded that the rule of law refers to governing principles which include, at the very least, the following concepts:

private ownership of property, *(by the way, the constitution of China was recently amended to guarantee rights of private property)*

the integrity of contract,

an independent system of enforcing the first two concepts,

recognition of the dignity and worth of the individual,

freedom of expression,

freedom in worship and belief,

predictable and reasonable rules and procedures to maintain order,

representative government that makes such rules and procedures, and

government that does not concentrate power exclusively in particular people or institutions."

Justice Lemons concluded with a comment I thought most poignant:

"While it is true that in the United States we look back in shame and embarrassment at episodes in our history that seem contrary to our aspirations, it is nonetheless proper to reaffirm aspirations lest we forget them altogether."

We, as a nation, have had many occasions to be ashamed and embarrassed. The ink was barely dry on our Constitution when our rule of law was challenged. The French Revolution unleashed new forces in Europe, and there was concern that France might attack the United States. Out of a fear of war, and little more, we passed not just the Alien Sedition Act but the Alien Friends Act.

The Alien Friends Act gave complete authority to the President of the United States to seize aliens and have them deported without a hearing, without counsel, and without formal charges. The deported alien didn't have to be from a country with whom we were at war or with whom were about to go to war.

Fellow Dicky Grigg, our President-Elect, and I had the pleasure of doing a pilot trip to Russia on behalf of the Academy. We were privileged to meet, and the Academy ultimately inducted into the fellowship of the Academy, the Director of the Institute of State and Law, Boris Topornin.

As we sat down in his office, in an ancient building, to discuss the Russian rule of law, he said, "You know, we have jury trial here in Russia." I said, "Yes, I've heard. How's it working?" He remarked that in criminal cases it wasn't working very well. "What seems to be the problem?" I asked. He responded, "They acquit some of those people."

A recent survey of Russian district courts and their handling of criminal cases demonstrated that at the first pass roughly 30 percent of the defendants might choose trial by jury. I say at the first pass because as part of the Russian constitution there is no double jeopardy. If you get acquitted by a jury, the government has an automatic right of appeal and the remedy is a retrial.

If you get acquitted again, the government has an automatic right of retrial, and your acquittal is reversed and remanded, you can be tried to a jury again. As a result, those who would rather not remain in jail until the ultimate disposition of the charges frequently elect to be tried by a judge sitting without a jury on the thesis that they'll spend less aggregate time incarcerated.

There are two district courts within Moscow itself in which in the last decade there have been no acquittals. There are judges in the system who are reviewed for their qualifications to hold that office only if they acquit. So, having a constitution is not much of a barometer for the presence or absence of the rule of law.

We had another crisis during World War I. Shortly before the Armistice was signed, the Congress passed, and the President signed, the Alien Act of 1918 which authorized the government to deport any alien who was a member of an anarchist organization.

The proceeding was administrative. No judge or jury was called to determine if the deportee was a member of an anarchist organization or held anarchist beliefs. The administrative hearing was held in secret. There was no right to counsel, no right to appeal, and even naturalized citizens could be swept up in the scheme. In 1918 alone the United States deported 11,625 individuals.

As these patterns of national behavior emerge, we might consider defining the essential ingredients of the rule of law in terms of the values ignored and the freedoms denied in the Alien Act of 1918 and the earlier Aliens Friends Act.

Here are the questions posed: Before someone is deprived of liberty, are they entitled to be charged with an offense or some specific conduct which triggers their seizure? Once charged, are they entitled to a hearing to challenge the factual basis of the seizure? If so, are they entitled to the aid of counsel to navigate the nuances of the law and develop a record? Finally, and of critical importance, will the hearing be conducted by someone who is genuinely independent of the charging party?

Most of us would consider these components of procedural due process essential to our basic freedoms. We rebel at the notion that unilateral, non-reviewable governmental action comports with our rule of law. Nevertheless, much of our history of shame and embarrassment has come when people, citizens or not, were deprived of these fundamentals.

By the time of the second World War, we were no longer drawing a distinction between the way we treated citizens and non-citizens. In 1940, in response to the risks thought to be posed by aliens, and before America's entry into the war, the Congress passed the Alien Registration Act. Of the almost five million aliens who registered under the Act, 600,000 were Italian nationals, 260,000 were German nationals, and 40,000 were Japanese nationals.

Immediately after the attack on Pearl Harbor, the government classified all 900,000 of those as enemy aliens under the 1798 Alien Enemies Act. They were then subject to being apprehended and summarily deported.

Our shame and embarrassment deepened. On February 19, 1942 President Roosevelt signed Executive Order 9066, and over the following eight months 120,000 individuals of Japanese descent were ordered to leave their homes in California, Washington, and Oregon. Of these 120,000, 80,000 were citizens of the United States.

The issue, I think, as Justice Lemons has framed it, is “How do we react to our times of shame and embarrassment?”

In the next minute or two, I'm going to tread a potentially thin line. The Academy is bipartisan or, more precisely, nonpartisan. We not only do both plaintiff's and defendant's work and handle civil and criminal cases, we are made up of Republicans and Democrats, and conservatives and liberals. We are a blending of all that makes America great.

When I say the things that follow, if it sounds unduly partisan, I should apologize.

The late Justice Howell Heflin gave me an out, however. What a great man Heflin was. He was not just a former Chief Justice of the Supreme Court of Alabama, and a former United States Senator, he was a lover of the law and the rule of law.

He was one of the giants who passed away this past year. What a sad year -- Pope John Paul II, the Pope of peace, Howell Heflin, and Johnnie Cochran. Johnnie was a Fellow in the Academy. His critics knew him as O.J.’s lawyer, but critics like that don’t understand good lawyering. Johnnie will also be remembered as Abner Louima’s lawyer. Where but in America could a Haitian immigrant get a lawyer like Johnnie Cochran?

Heflin had -- besides a great mind and a love of the law – a wonderful sense of humor. As Chief Justice, Heflin reviewed the docket for one upcoming term of court: wills, estates, contracts, leases, land use, zoning. Something had to be done, he thought, lest boredom set in.

Before the court was a *pro se* petition for appeal in a criminal case that would, if a writ of appeal was granted, seem a waste of the Court's time. There were 200 years of precedent against the issue the *pro se* petitioner had raised. The Chief saw it, however, as an opportunity. He granted the petition and appointed counsel.

I talked to Fellow Jim Thompson about the incident, and he thinks appointed counsel was probably Rodderick Beddow, a gentleman who used to practice law with Jim's dad. If it was Beddow who was appointed to represent the law *pro se* petitioner by the Court, he was appointed because, while the cause was hopeless, Beddow was so eloquent, imaginative, and creative, he would at least give the justices a lively and entertaining hour of oral argument.

That magic moment came when counsel for this hopeless cause approached the podium. His brief was pencil thin because there was no law to support his position. For the longest time he just looked up and down the bench without saying a word. Finally he commenced:

"Mr. Chief Justice and Justices of the Supreme Court of Alabama, I come to ye as John the Baptist urging that ye repent from these 200 years of clear error."

The most junior Justice down on the Chief Justice's left, counsel's right, was first to respond. "Counsel is well advised of what became of John the Baptist, is he not?"

Counsel responded, "Yes, Mr. Justice, he was beheaded at the instance of a whore. And, unless Your Honor wishes me to draw the analogy further, I'll resume my argument..."

Behead me, if you will, if what I'm about to say transgresses that line between law and politics in some forbidden or uncomfortable way. I don't think one can comment about the rule of law in troubled times without running the risk of offending someone's political sensibilities.

It has always been my assumption that the rule of law contemplates a hierarchy of values. Without life, liberty doesn't matter; without liberty, property rights don't matter. During slavery we subjugated one person's liberty to another person's property rights in him.

During the United States's response to the terrorist acts of September 11, 2001, thousands have been deprived of their liberty. The executive branch has justified their detention on the grounds they were aliens, were enemy combatants, or were outside the jurisdiction of our courts. The first two grounds are mixed questions of fact and law while the last ground is purely a legal argument.

The executive branch compounds these contentions with the further argument that whether the detentions were based on fact or law, they were not reviewable. Consequently, it argues, the courts have no role to review the manner in which the detainees are treated.

Let me read to you -- I apologize for reading, but I read for two reasons: I want to insure accuracy, and I want to establish a proper context for the comments. Jefferson said:

"Laws are made for men of ordinary understanding and should, therefore, be construed by the ordinary rules of common sense. Their meaning is not to be sought for in metaphysical subtleties which may make anything mean everything or nothing at pleasure."

Some of you may see in these simple words a refrain from Lewis Carroll's Alice in Wonderland:

"If I had a world of my own, everything would be nonsense. Nothing would be what it is, because everything would be what it isn't. And contrary wise, what is, it wouldn't be. And what it wouldn't be, it would. You see?"

Let me turn to what laws we were bound by our agreement and consent as of September 11th.

Article I of the United Nations Convention Against Torture provides:

"For the purpose of this convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him, or a third person, information or a confession."

The United States seized tens of thousands of people during the war on the Taliban in Afghanistan and the war in Iraq. What restrictions did the rule of law impose on our handling of these prisoners?

Notwithstanding the plain language of the Convention Against Torture, the legal opinion provided the President of the United States concluded that for torture to be prohibited under this convention the pain inflicted, or the injury accompanying it, must be such as to expose the detainee to organ failure or death. Short of that, and I quote from a legal opinion provided to the President:

"A significant range of acts that though they might constitute cruel, inhuman, and degrading treatment or punishment, fail to rise to the level of torture."

And the Geneva Conventions? On January 9, 2002, two Justice Department attorneys wrote that because Afghanistan was a failed state, its militia did not have any status under international treaties:

"Any customary international law of armed conflict in no way binds as a legal matter the President or the U.S. Armed Forces concerning the detention or trial of members of Al Qaeda and members of the Taliban."

On January 25, 2002 the President was advised that the Department of Justice had issued a formal legal opinion that the third Geneva Convention on the treatment of prisoners of war did not apply to Al Qaeda.

The Counsel to the President wrote that "the new war placed a premium on the ability to quickly obtain information from captured prisoners and the need to try them for war crimes." In his judgment, these needs rendered the Geneva Convention's strict limitations on interrogations "obsolete" and rendered other of its provisions "quaint".

To those of us trained in the law, the position there stated is sophomoric and untenable. Reduced to its simplicity, the opinion argued that if the executive branch no longer wished to be bound by a law, a unilateral declaration that the law was "obsolete" or "quaint" would render it a nullity.

We're at the end of my political commentary on that because in December 2004, the Department of Justice withdrew those opinions and replaced them with opinions more reflective of true rule of law opinions.

What I thought of interest, of the gentlemen who offered the suspect opinions, one went on to become a United States Court of Appeals Judge. I will not identify him. You may or may not know the gentleman. The other went on to become Attorney General of the United States.

Perhaps, and as lawyers we've had this happen, these gentlemen didn't have client control. In my view, even if the President of the United States advised his counsel what he wanted the opinion to hold, it was their responsibility to advise the President, as client, that the opinion couldn't so hold and be faithful to the rule of law.

I understand in the political world things happen differently than they might in our law offices, but I was reminded how another attorney handled it when his President proposed legal action the attorney thought improper. Elliott Richardson resigned.

I was also interested in an interview the Assistant Attorney General, who authored one of the torture opinions, gave after his confirmation for the Court of Appeals. He said he had a particular interest in the rule of law going back to ancient times, particularly as the rule of law was reflected in the bible. He had been the gospel doctrine teacher in his ward:

"From the fifth chapter of Matthew, before a man can offer gifts to God he must first be reconciled to his brother; and as a judge I will see to it that the parties come before me and attempt to reconcile."

"To reconcile," he said, "comes from the Latin meaning to be seated with or to be invited back to the table."

Quoting the judge:

"What a great image that is of everyone being brought back to the table, included once more in an intimate setting among friends."

"Both parties," he said, "in a dispute, the offended as well as the offender, need more compassion as they work toward resolution."

As the lawsuits concerning the treatment of the detainees have progressed, as FOIA requests, made to the agencies involved in tracking the detainees, have generated responses, as more information has been garnered about these detentions through aggressive investigative reporting, some interesting facts have percolated to the surface.

Firstly, in the records obtained by the American Civil Liberties Union, and there are some 20,000 pages of them now produced under FOIA requests, there are memoranda from battalion commanders, from the head of Abu Ghraib, and from subordinates.

Among the documents was one saying, “Of the 15,000 people seized, it was our conclusion that only one in ten had anything of intelligence value. That many of those swept up and detained had no connection to intelligence-worthy information but happened to be in the wrong place at the wrong time.”

When did we first start to live under the rule of law? Most of the people who respond to that question think it was when we adopted our Constitution. Not a bad guess. Not a bad choice. Some here might tend to agree with it. However, the rule of law at that time not only allowed slavery, it was a rule of law in which women could neither vote nor own property.

We fought a war, the Civil War, because the rule of law failed to resolve the disagreements among our people. After the Civil War and after the abolition of slavery, we spent the next hundred years in which our rule of law accommodated segregation of the races in public services and schools. That rule of law accommodated the fiction that if these services were equal they could, under our rule of law, be separate.

So, I must tell you I'm not terribly comfortable with saying to you that our rule of law commenced with our Constitution. Many nations have constitutions but don't have the rule of law as we know it.

Despite the absence of valuable information, their detention continued because the authorities had “releaseaphobia”. That was the word the Army used in the case of a large batch of detainees: *Releaseaphobia.* While they believed they had no intelligence value to yield, “We were afraid to release them because we might be wrong.”

Let’s put that into further context. How long will the detainees be held? A story which appeared on January 2, 2005, gave a surprising answer. The Department of Defense has requested that $25,000,000 be appropriated to build a more permanent home for the detainees, the ones for whom there is insufficient evidence to charge them with any crime. The Department of Defense wants to build a brand new prison for these detainees because it may hold them for life.

What courts, if any, may review these life sentences? Our government argued that the courts were powerless to review the detentions of non-citizens held by our military outside the physical confines of the United States. Abu Ghraib was clearly such a place, but so was Guantanamo Bay, it said. The Supreme Court disagreed with respect to the detainees held at Guantanamo Bay.

Ordered to provide a process under which the detainees could have the basis of their detention reviewed, the government elected to have the Guantanamo detentions reviewed by military panels, not federal judges.

Do these panels meet the requirement for an independent and neutral review? In some instances the panels have seemingly ignored substantial evidence favoring release in favor of weak evidence for continued detention. There are cases now pending in the United States District Court for the District of Columbia challenging the detentions and the manner of review. If detentions at Guantanamo Bay are reviewable because the

United States controls that portion of Cuba, then would removing the detainees from Guantanamo Bay eliminate the jurisdictional basis for review altogether?

The executive branch apparently believes so. It is attempting an end run around judicial review called “renditions”. Under renditions, physical custody of a detainee is transferred to the agents of a foreign government willing to accept responsibility for his/her custody. We are to take comfort, we are told, in our government’s assurances that the receiving states, including Yemen and Egypt, have orally agreed to the safety and humane treatment of its new charges.

Again the courts have interceded. The majority of recent rulings by the United States District Court for the District of Columbia have enjoined renditions pending further hearings.

What is our government’s view of the rule of law as it applies to detainees held in foreign countries at our request? The Department of Defense has remained strangely silent on the subject. The Department of State has been more forceful.

Let me turn to a speech made by former ambassador, Larry Napper. At the time of his speech he was the head of the U.S. delegation to the Office for Security and Cooperation in Europe.

Ambassador Napper approached the rule of law this way. When he came to the Organization for Cooperation and Security in Europe, he said, "We must recognize that unless there is an independent judiciary and a separation of powers and transparency in government, there will be no rule of law."

When Ambassador Napper made those statements, he wasn’t talking about the United States. He was about to lodge complaints against Belarus, Kyrgyzstan, Turkmenistan and others. They were members of the Organization for Cooperation and Security in Europe. Ambassador Napper took particular aim at Turkmenistan because it had seized people without charging them, had held them without counsel, and had subjected them to show trials, following which they disappeared; there was no record kept of what had become of them.

Two weeks ago the Washington Post released documents it had obtained about “ghosting”. There was a wing on Abu Ghraib, a wing in which “ghosted” detainees would be brought by the CIA. “Ghosted” referred to the fact they had no name, were given no identity other than a serial number, and among other things, they were not allowed to be interviewed by the International Red Cross.

The precise number of ghosted detainees remains unknown. They were considered under the “jurisdiction” of the CIA. What became of some of them is known. One body was removed from this wing of Abu Ghraib packed in ice because the discovery of his death in his cell had been delayed by a number of days. A local taxi driver was paid to take him away.

Two other ghosted detainees were removed in the custody of an Other Government Agency (or OGA - a well-known pseudonym for the CIA) agent. Their bodies were found in shallow graves outside of Baghdad. In terms of Ambassador Napper's constituent ingredients of the rule of law, we didn't seem to be doing too well.

A large study was conducted about our handling of detainees. The report was 360 pages long. It was to be submitted by the Department of the Army to the Congress. Only 21 pages of executive summary have been released. In there is supposed to be as much detail as is available to the Department of Defense about the ghosted detainees. But the CIA and DOD, while they had a working agreement that the ghosted detainees could be kept at Abu Ghraib, had a further agreement that the details of those detentions would be the exclusive province of the CIA.

When the admiral who was conducting that study reported in his 21 page executive summary, people observed that the summary was in direct conflict with three other Pentagon reports obtained by others under FOIA requests in which of the 70 ghosted detainees, six were known to have died in captivity without ever being seen by International Red Cross, let alone counsel.

How should we discuss the rule of law with our Chinese guests? Sally and I have discovered a couple of things about our Chinese guests. They know a lot about us. They know a lot about O.J. They wanted to talk about, “How did O.J. get off.” They also know a lot about our political institutions. Will this be the year they want to know our position on the ghosted detainees and the rule of law?

So far we've been lucky. Our Chinese guests are extremely polite and haven't confronted us with many hard questions. "What do you mean by the rule of law, at least with respect to these detainees – ghosted or otherwise?”

Transparency in government, as Ambassador Napper called it, doesn't come easily. While this is a serious topic, transparency has taken some silly turns. The FBI did an investigation of the abuse of detainees at Guantanamo Bay. The FBI reached two particular conclusions that Senator Carl Levin learned belatedly because in the first draft of the FBI report they had been redacted.

The FBI concluded, for example, that torture, abuse or cruel or inhumane treatment doesn't tend to produce useable intelligence. In fact it is likely to provide bad intelligence rather than good. Many people in the intelligence service have known that for a long time. That's what the FBI reaffirmed after it investigated the incidences at Guantanamo.

It made one other observation. These abuses, whether they are technically torture or not, are likely to get in the way of the prosecution of any of the detainees for war crimes because they are confessions or information gathered illegally and improperly.

The FBI decided as a courtesy that it would circulate the draft report of its investigation before it was released to Congress. The Department of Defense said, "Oh, you can't let anyone know that the intelligence we've gotten is suspect and probably of little value. Redact that." The second directive, this from the Department of Justice was, "Oh, redact the part about that using these techniques would make it difficult to prosecute these people for war crimes." At the insistence of the Congress, both redactions were "unredacted." Those were hardly international secrets or intelligence secrets that anyone in the world wouldn't have known.

Has anybody here done any litigation under the Patriot Act? The Act provides, among other things, for the issuance of national security letters. The FBI can send a letter as an administrative subpoena, if you will, to someone requesting records with respect to a third party. There's a gag order as part of the Patriot Act that says if you get a national security letter, you're not supposed to let anybody know you got a national security letter. Just turn over the documents.

The ACLU, on behalf of an internet service provider prepared a lawsuit attacking the national security letter features of the act, but because of the gag order provisions, the lawsuit had to be filed under seal and using pseudonyms.

After the case was filed and came before a United States District Judge, a dispute arose about what part of the existence of this lawsuit could be disclosed or released. In the initial skirmishes some claims of national security were framed by our Department of Justice.

I apologize if I'm a little harsh, but among the redactions that the United States District judge ordered unredacted was a memorandum letter prepared by the ACLU citing a federal case and quoting from that case.

The Department of Justice had requested that the name of the case and the holding in the case be redacted even though it was a United States Supreme Court case. The judge said, "You're going to have to unredact that". The Department of Justice then filed a supplemental memorandum of law proposing that the ACLU be allowed to quote the case name, but not the text from the opinion. The United States District judge ruled the public was allowed to know what the prior court held and that the ACLU was relying on it.

I need to talk to you briefly about another rule of law crisis. Our time of crisis is not just terrorism times. There are troubling attitudes in a significant portion of our political community, and even in parts of our legal community about judicial independence.

In our bedroom communities, the crisis is reflected in the findings of a study from the University of Connecticut. Over 100,000 high school students were surveyed, 80,000 teachers and 15,000 administrators, in what was deemed to be the largest survey of its kind of this age group. The survey was addressed to the First Amendment of the Constitution of the United States and the freedom of press, freedom of speech, and freedom of religion.

The specific freedoms guaranteed by the First Amendment were proposed to these high school students not as existing Constitutional protections, but as proposals. The students were asked what they would think if we had protections like that. One out of three felt that the protections were too broad. To some they even seemed un-American. That's pretty frightening.

The conclusions educators reached from this polling are obvious. We have not educated our young people to understand and appreciate our Constitution and our rule of law.

Senator Byrd from West Virginia has proposed legislation that would require that September 17th of every year we devote a school day to the reading and review of our Constitution so that our young might have a better appreciation of it growing up.

In the Connecticut survey, the students surveyed thought, for example, that flag burning was clearly illegal. Eight out of ten thought that flag burning was illegal and should be. I really don't endorse flag burning, but I've consistently opposed legislative efforts to declare this form of speech illegal. I've never had a sense that flag burning created a clear and present danger, but suppressing expression surely would.

There's another movement that poses a danger for us and our rule of law -- media consolidation.

Twenty five years ago the press would follow debates on domestic and international issues, and report on them.

Today, five companies own the broadcast networks, own 90 percent of the top 50 cable networks, and produce 75 percent of all prime time programming. People of color constitute over 30% of America, but they own only 4.2% of the nation's radio stations and around 1.5% of TV stations.

There are studies, that I can share with you, which rather conclusively demonstrate the decline in overall air time for issues of national and international importance. You have been witnesses to a transformation of our information networks. We have transitioned from relatively neutral broadcasting of news items to overtly political slants on stories. We have seen stories promoted as news by otherwise respected journalists who in fact had been hired or planted to feed stories in support of a particular public policy. News "hours" are only 30 minutes long and include up to 9 minutes of commercials. In-depth coverage of issues has been replaced by summary stories. USA Today is a natural for today's market, but it is not alone. Without regard to the reporting media, instead of in-depth reporting, we get the headlines and their bias, but not the meat underneath.

Over the last 25 years the media has produced less and less material dealing with our Constitution and the important decisions of the Supreme Court, unless they happen to reflect specific issues important to particular constituencies. While we hear a great deal about Roe v. Wade, the Ten Commandments, and "In God We Trust", little was reported about the Courts' decisions on the detainees. Death penalty decisions make the headlines only if the Court reverses a sentence of death. Supreme Court opinions which make reference to the laws of other nations attract vitriolic commentary from critics who fail to appreciate our 200 year reliance on the wisdom of others.

Until recent days, little was said about judicial independence and the rule of law. Perhaps the most disturbing recent developments have been rather relentless attacks on the judiciary itself.

President Hunter addressed the Conference of Chief Justices at their dinner in New York. In our journal is his brief address. It was eloquent and it was poignant. He assured them that we stood with them in the fight for judicial independence. The Chief Justices from 47 of the 50 states were in attendance and responded enthusiastically to his remarks. They feel under attack. The nature of the attack? The chairman of the House Judiciary Committee has been quoted as saying, "There's a misconception in this country that we're supposed to have an independent judiciary!"

There was a conference recently held in Washington, D.C. attended by a number of well-known conservatives and members of Congress. The conference took three positions of note:

1. Let's commence bills of impeachment for the following Supreme Court justices based upon their "bad conduct". (You can pick four, can't you? There was a surprise in that there were five on the list. It would have only been four had Justice Kennedy not written the majority opinion in a case holding it unconstitutional to execute someone who was under age at the time he committed the crime of murder.)
2. Members of Congress, House and Senate, in attendance at this session said that, " If bills of impeachment don't pass, then those in the House and Senate who will not vote for impeachment should be impeached."
3. If that doesn't work, "We should cut off the money to the courts. When we get their budget under control, we will get their attention."

One writer stood, and I'll leave his name for a later time, but he's well known in his field -- and he said Joseph Stalin had an answer for Justice Kennedy, "No man, no problem." The full statement of Stalin was, "You get rid of the man, you get rid of the problem."

We know of the tragedy in Atlanta, the killing of the judge, his courtroom clerk, his staff, the deputy sheriff. By all evidence it was not politically motivated in any sense, but was the act of a man charged with a drug offense who saw an opportunity to escape.

We know of the killing of the family members of the federal judge in Chicago. Again, an act not associated with political conclusions reached by the killer, but by personal reasons of retaliation. Nevertheless, a member of the Senate from the great State of Texas rose on the Senate floor to suggest those killings were manifestations of the people's unhappiness with the judiciary.

One last thing and I'll leave you and we'll have a reception. A book about the Supreme Court has been as high as third on the New York Times bestseller nonfiction list. Ordinarily you'd think it would be a good thing to have Americans express such an interest in the court. The title, however, is alarming: Men in Black, the Judges Who Are Destroying America.

Unless we as individuals, as Fellows within the Academy, as members of our law firms, as leaders in our communities, join with responsible political leaders to counter this all out attack on judicial independence, the existence of which is absolutely essential to the rule of law, we will face dark, dark days.

President Dwight David Eisenhower said that "Only America can bring America down", and he added, "How far can we go without destroying from within what we are trying to defend from without?"

Thank you for this opportunity to be with you this morning. I appreciate it.