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REMARKS AT OPENING SESSION

By Stephen N. Zack, Esquire
President of the American Bar Association

President Ramo: Well, this is a special day for me because it is not often that you get to introduce two distinguished people. One is a new friend and one is a very old friend.

It is part of our tradition that we hear from the President of the American Bar Association. We were very proud last year to hear our Council member, Carolyn Lamm, and I am equally proud this year to introduce you to Stephen Zack, the current President of the American Bar Association. His extraordinary biography is in your materials, and I won't repeat it again, Steve. Instead, I want to talk about a few personal characteristics that are so enormously important, I think, in our country, and I think Steve's becoming the President of the American Bar Association, because of the life experience that he has had, makes his role, both for the American Bar Association, and we hope you will find a little time for us when you are done and recovered from this, Steve, so important to us as well.

Many of you know that you first saw Steve on television during *Bush v. Gore* [531 U.S. 98 (2000)], which I think may have been the longest-running legal reality show that we ever had on television. Steve was an enormously distinguished lawyer before that, but the whole country got to watch his great skills as an advocate and to hear him explain what, to many of us, was foreign, and that is what was going on in Florida with a national election at the time.

What some of you don't know, though, is that Steve is one of those people who came to the United States in a particular way, and it is, I think myself, what has led to the enormous strength of intellect and diversity that our country has.

Steve Zack came from Cuba as a child, and it wasn't an easy coming to the U.S. It was a very scary time, and he knew what it felt like to be put in a room without anybody else in Cuba, wondering if they were going to let him on the plane or not. So he has a kind of acute sense about what it means to be in a democracy where there are appeals, where there are rules, where there is a sense that there are some fundamental things about the legal system and about the rights of each of us that cannot be taken away by the government and cannot be taken

away by the majority. And I think that the passion that he has brought to his work as President of the American Bar Association this year and the passion that he brings to the legal system and every client that he represents, comes not just from his own belief in these things but from that kind of appreciation that those of us who came from other places to this country understand in a way that some of us who were lucky enough to be born here don't.

It is my honor and delight to introduce you all to President Steve Zack of the American Bar Association. (*Applause*)

President Stephen N. Zack: Thank for that very kind and, frankly, moving introduction. I was thinking that *Bush v. Gore* was more like *Survivor* than a reality show, and I was the first one to get voted off the island. But today, I am absolutely delighted to be here, and Lord Phillips, thank you for your inspiring and very informative discussion and fun discussion. I didn't see you when I was out swimming in the ocean today. (*Laughter*) My shower was quite toasty.

And Roberta, thank you for guiding this association with the brilliance and the determination and the wisdom that you showed while you were President of the American Bar Association.

You all deal with millions of words. Today, I am going to talk to you only about four words and two letters. The words actually are ones that I assume most of you have seen as you walked through the giant columns of the United States Supreme Court, and you looked up and you saw four words: "EQUAL JUSTICE UNDER LAW."

Equal justice under law is a promise that we make to all Americans, and it is a promise that is very much in jeopardy today. It says equal justice. It doesn't say equal justice for the rich and for the powerful and for the privileged and for the intelligent, just for lawyers; it says equal justice.

There is no equal justice in America today when we have a justice gap where 80 percent of poor people have no access to our court system. We are fighting around the world to establish the rule of law, as well we should, but the rule of law begins with one word, and that is access.

There is no access when Legal Services Corporation cannot answer one out of every two phone calls that they receive because of underfunding. There is no equal justice when 11 states spend less than one percent of their entire budget for their system of justice; not for their payment of judicial salaries, their entire system of justice, victim rights, family issues, prosecutors. Matter of fact, I would hope that each of you today sometime, if you don't buy a *New York Times*, read the editorial that is in today's *New York Times*. Another \$170 million was removed from the New York justice budget, already strained to its maximum, everything from providing jurors with lunches while they are deliberating to closing the small-claims court and every other aspect of the court system in New York.

Now that would be bad enough if it was unique, but we established a task force called the Preservation of the Justice System Task Force. It is chaired by David Boies and Ted Olson. Some people call them the odd couple; I call them a force of nature. And I put on that commission 28 of the most distinguished lawyers in this country, from both sides of the aisle, all ethnicities and genders, to look at the issue. We had our first hearing in Atlanta at the midyear meeting, and this is what we learned.

In New Hampshire, the Chief Justice suspended all civil jury trials for one year. Is that equal justice, where you can't go to court to get a decision on a civil case?

The Chief Justice of Georgia spoke to us, and it's gotten so bad that she is asking LexisNexis to donate pencils and pens for her law clerks. Pretty soon it will be a bake sale.

In some states in America today, you have to bring your own paper or they will not file your process. I just returned from Vietnam, and I assure you that they have plenty of paper. They don't have our justice system yet, but our justice system is genuinely at risk.

I saw today, earlier, Lee Edmon was here. Lee and I have had many conversations about what is going on in California. As you know, she runs the court system in Los Angeles. If the original recommended budget went through, she would have had to close 180 courtrooms—180

courtrooms. With the budget that went through, she still had to close 18 courtrooms.

We have a system of justice that is genuinely in peril, and part of the reason is we get in the way. We just get in the way, and legislators have used the economic situation as an excuse to further underfund the coequal branch of government. It is not that there are not economic problems, because surely there are. But the justice system, the judiciary, is not another road. It is not another library. Matter of fact, I have heard legislators say that it frankly is just another agency. Which brings me to “under law” and to the two letters I want to talk to you about, and that is the difference between the rule “by” law and the rule “of” law.

The rule by law is what exists in most countries around the world today. It is where a majority get together and decide what rights, if any, a minority will enjoy. It is the basis of the Nuremberg Laws. It is what made Nazi Germany one of the most lawful and least just societies that history has ever known. It is a situation where the tyranny of the majority is not challenged.

Matter of fact, I honestly believe, Lord Phillips, a lot of folks, if they like our legislators, would like to have a parliamentary situation where there is no Constitution, because the Constitution of the United States protects the minority from the tyranny of the majority, and that is the very definition of a constitutional democracy.

In the Federalist Papers, which I know we read nightly, particularly when we are tired, in Federalist Paper No. 51, the writer talks about the difference between our branches of government. We have two branches of government that are controlled by the majority. They are the executive and the legislative branches, and they do a good job. They listen very carefully to what the majority wants.

But the third branch is a constitutional democracy, and it is why Justice Roberts recently, in the opinion when he was speaking for the majority, regarding what was happening at the military funerals [*Snyder v. Phelps*, 562 U.S. ___, 131 S. Ct. 1207 (2011)], and also Justice Kennedy who was talking in *Texas v. Johnson* [491 U.S. 397 (1989)] about the flag burning, they both said the same thing. They said: You

know what? We hate what we see. It is abhorrent to us and it is abhorrent to virtually all Americans, but we have to protect the rights of those individuals because our Constitution demands it, and if we don't protect their rights, all our rights are at issue.

I think Sandra Day O'Connor says it, frankly, better than anybody when she says that in all societies there must be a safe place, but in a democracy that safe place must be the courts, and that must be a safe place for everyone, and that safe place today is at risk. It is at risk for underfunding, and it is also at risk because of the failure of Americans to understand the role of our third branch of government.

Two out of every three graduating high-school students today believe the three branches of government are Democrat, Republican, and Independent. That is a recent poll. I think there will be a fourth branch called the Tea Parties. Fifty percent of the people that were read the Bill of Rights on the street thought it was a Communist doctrine; Communist doctrine.

Now there is a great story that Archibald Cox talks about in his biography of Learned Hand, and of course Learned Hand was one of the early members of the ALI, and he also understood. One of his great quotes is that "Thou shalt not ration justice." That is the first commandment, he said, "Thou shalt not ration justice," and that is what we are doing today by failing to provide access.

And he also tells the story about his first day with Judge Hand, and Judge Hand asked him a question—scary thought—and to quote Archibald Cox, he said, "Sonny"—I can't imagine calling Archibald Cox "Sonny"—but, "Sonny, to whom am I responsible? Nobody can fire me. Nobody can cut my pay." He wasn't a justice, but he was a judge who was on for life. And, of course, Archibald Cox did what we all do, we kind of mumble a little bit and say, "Well, what do you think?" And Learned Hand turned around and there was a wall, a precedent behind him in the United States Constitution, and he said, "To those books about us. That's to whom I am responsible." "That's to whom I am responsible."

And today, in America, most Americans say the courts should be responsive to the majority. That is the rule by law. Matter of fact, you know, why not? It's a democracy. And it is up to us, each one of us, and particularly the people here today, not to talk to each other, because we understand these things. We have to remind ourselves of them from time to time, but we understand them. But we have to talk to others who are not lawyers every opportunity we can, to explain why the third branch of government must remain a constitutional democracy.

In sharing my last night in Cuba with you, we had learned that our businesses had been taken, and we knew what happens at that point in time. I was 13 years old. We knew the minute the military would come in and take your business, they drive directly to your house and they arrest you, because you were an enemy of the state for having done something with your life. And we were leaving with the shirts on our back, going to the airport, where we were detained for some time, which is a story for another day, but I looked at my grandfather and I said, "Grandpa, how do you feel tonight?" And he says, "I'm obviously very sad. Everything I've worked for my entire life is being taken from me. But I am happy about one thing." I said, "What, what could you be happy about at this time?" And he looked at me and he said, "I'm happy that I'm going to the United States. And I know that I will never be a refugee again, because if the United States falls there will be no place to go."

Thank you very much. (*Applause*)

President Ramo: We have just a few minutes, and Steve has said he would happily answer, maybe not happily, but he will answer questions. So anybody want to raise anything with Steve?

Steve, I can't imagine anything more important than what you have talked about today. Our job is the job of law reform in the American context. If we don't have a strong and able and well-understood judicial system, then law reform doesn't have any meaning. We thank you for everything we do, and each of us will walk out of here as your ambassadors, I hope, to the rest of the American people to explain these key things. Thank you very, very much. (*Applause*)