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OPENING REMARKS

By The Right Honourable the Lord Phillips of
Worth Matravers
President of The Supreme Court of the United Kingdom

*The eighty-eighth Annual Meeting
of The American Law Institute
convened in the Grand Ballroom
of The Westin St. Francis, San Francisco, California,
on Monday morning, May 16, 2011.
President Roberta Cooper Ramo presided.*

President Ramo: Other than leading your able Council to the best that anybody can lead a group of such distinguished people, and trying to keep us on track to be the most significant and to be the most important, but more importantly, the most valuable part of the discussion and work of the American justice system and in reforming the law, I haven't had much to do. So let me begin by introducing our first speaker.

Our first speaker and our great guest is Lord Phillips of Worth Matravers, and Lord Phillips is a key person in the history of the law of Great Britain because he is the first president of their new Supreme Court. He was the Lord Chief Justice and so he is responsible for putting together, in a historic way, a very different court.

I first met Lord Phillips several years ago, through the good offices of a friend of all of ours, and that is Lord Harry Woolf, who has spoken to us and is a wonderful member of ours. And, in talking to him, I realized that when we are talking about law reform, what could be a more transformative event, really, than starting an entirely new Supreme Court in a history that has as glorious a legal tradition as Great Britain does, a legal tradition that we, of course, share and have, and we are the great-godchildren and children of that legal tradition as well.

I will tell you that, in addition to the things that you have seen in the biography that you have before us, Lord Phillips, Nick Phillips, is quite a remarkable man in many ways. One is that I have decided actually that he must be the equivalent of a Navy SEAL, because I knew he had been in the Royal Navy, but I was stunned yesterday morning to discover that he got up early, and the Bay to Breakers Race wasn't really quite exciting enough for him, so instead he went and swam in the ocean. Now those of you who were outside yesterday will have some appreciation of what a really significant thing that is. I mean, I feel unless my swimming pool that I am about to enter is about 94 that I am really putting myself in for a bracing experience.

Lord Phillips has been the Lord Chief Justice of his country, and I think that it is very significant that it is he who has been given the responsibility of making this new Supreme Court work, and we look

forward in every way to hearing from him how he does that. But I want to add one honor that he received, just in the last few weeks, that he will be formally given in June.

The highest order of chivalry in the United Kingdom is to be made a Knight of the Garter. This is something that was established in Great Britain in 1348, so it hasn't been around for very long—and indeed some of our members I think were there when it (*laughter*) was established—but you are the only person that I know who has actually been given the award.

There are only 24 members of this enormously prestigious group. It is one of the things that the Queen herself selects, and in fact there is not always anyone from the legal profession at all in that Order. That the Queen has called upon Lord Phillips to become a member of the Knight of the Garter is a very meaningful thing. It speaks to the high regard in which he is held by everyone in the United Kingdom, but I think it also speaks to the high regard that he will bring in every way to our joint profession by being given such a great honor.

It is my true honor and just a lot of personal happiness that I bring to you a man who flew from India to London to San Francisco to get here, my friend Lord Phillips. (*Applause*)

The Right Honourable the Lord Phillips of Worth Matravers:

Thank you, Roberta, for those generous remarks.

Ladies and gentlemen, The American Law Institute is held in high regard in my country, and it is an honor to have been invited to give the opening address at your Annual Meeting.

I was preparing this some three weeks ago in Bhutan. You are all very learned and so I know you all know where Bhutan is. Just in case somebody doesn't, it is a small Himalayan kingdom tucked away between India and Tibet.

I had gone there at the invitation of their Chief Justice to celebrate the opening of their new Supreme Court. This court is the guardian of Bhutan's new Constitution, which changed the country from an absolute hereditary monarchy to a democracy. The first thing that their

new Supreme Court did was to strike down the government's budget on the grounds that it was based on legislation purporting to delegate the power to impose taxation, which was unconstitutional and void. The Bhutan Supreme Court thereby proved that it really is supreme.

Do go to Bhutan if you get a chance; it is a wonderful country. Its Constitution is the product of a peaceful transition to democracy. The same is not true of the Constitution of the United States. (*Laughter*)

But your Constitution also created a Supreme Court that is really supreme, as it demonstrated in the great case of *Marbury v. Madison* [5 U.S. (1 Cranch) 137 (1803)].

Those who drafted the American Constitution included many lawyers who had learned their law at the Inns of Court in England. They made provision, by that Constitution, for the separation of powers. In doing so, they were not seeking to copy the English constitutional position; rather they were reacting against it.

We never had a revolution that led to a written Constitution, and we are one of the only two countries in the world that doesn't have one. We did, of course, have a revolution when in 1649 we chopped off the head of King Charles I. As a special concession, his head was restored to his body so that his family could pay their respects. But after only 11 years as a republic, the monarchy was restored in the form of his son, Charles II. Thereafter, the transition from monarchy to democracy took place gradually and peacefully.

Today, we have three arms of state: the legislature, the executive, and the judiciary. But each of these has inherited powers that used to be exercised by the Crown, that is, the King or Queen, and each still exercises those powers in the name of the Queen.

The King used to live in the Palace of Westminster in London. He would summon to Westminster his advisors. Initially these were noblemen; the King had created Lords. Once the King made a man a Lord, the title passed on his death to his heir, so that there grew up a body of hereditary peers. Later, the King took to summoning to advise him representatives from different regions of the country who were not

Lords, and these two bodies of advisors developed into the two houses of Parliament, the House of Commons and the House of Lords. They still sit at Westminster, although this is no longer a royal palace. They are the first arm of the state, the legislature.

In the Great Hall at Westminster, which survives to this day, the King's judges used to sit to administer law on his behalf. He appointed them, and he could dismiss them. Their successors are the independent judiciary, of whom I am one. They are the second arm of state, the judiciary.

The third arm of state, the executive, consists of the ministers and officials who control the ever more complex administration of the country. Once again, the power that they exercise was originally delegated to them by the King, who appointed them and who could dismiss them, but they also are now independent of such control.

The Queen remains as the constitutional head of state. She has to assent to Acts of Parliament before they can take effect as laws. She appoints the judges. The ministers are her ministers, but her powers are largely illusory. The way that she exercises them is determined by others.

When I entered the legal profession some 50 years ago, the separation of powers was well established in the United Kingdom, but it is fair to say that it was more real than apparent. There were some startling anomalies.

Take the Lord Chancellor. His is one of the oldest offices of state, and it used to be the most important. He was the King's right-hand man and advisor. As such, he used to hear petitions and administer justice in his own court. In recent times, the Lord Chancellor retained both his administrative and his judicial functions. He was appointed by the Prime Minister, so that his office became a political office. He was the most important member of the Prime Minister's cabinet, so he was a leading member of the executive. He had particular responsibility for the administration of justice and the upholding of the rule of law.

One of his most important duties was recommending who should be appointed as judges. But he was also an important member of the

legislature, for he presided over the legislative business of the House of Lords. He was, in effect, the Speaker of the House of Lords. Nor was that the end of it. The Lord Chancellor retained his judicial functions. He sat as a judge, the most senior judge in the land, so he was head of the judiciary. He was the very antithesis of the separation of powers. He was the combination of powers.

In my time in the law, the Lord Chancellor always performed his judicial duties in a manner that was impartial and free from political bias. When he sat as a judge, he was careful to see that it was in cases in which the government didn't have an interest. When he made judicial appointments, he consulted widely, taking in particular the views of the senior judiciary, and the appointments were made on merit.

I said that the Lord Chancellor sat as a judge, but I didn't say where he sat. Where he sat was in the House of Lords, and the judges who sat with him under his presidency were also members of the House of Lords. This calls for a little explanation. From the time of its creation, Parliament would entertain petitions from citizens, sometimes brought directly and sometimes by way of appeal, from the decisions of the courts. In the 18th and early 19th century, the House of Lords sat in the morning to do judicial business, which consisted largely of appeals from the courts.

Peers who had no judicial experience could vote on the result of the appeals. In defiance of the doctrine of the separation of powers, legislators were acting as judges, and most of them were not competent to perform this role.

In the 19th century, things changed. There were a number of members of the House of Lords who had judicial experience, and it was agreed that they only should hear and vote on appeals from the courts. And then in 1876, a statute was passed which provided for conferring peerages on senior judges so that they could conduct the judicial business of the House. They were known as the Law Lords. Their peerages were not hereditary. Their titles died with them. But only they and any hereditary Lords who happened to have had judicial office were entitled to sit, hearing appeals from the courts. Those appeals could be brought

from any court in the United Kingdom, save that no appeal could be brought from Scotland in criminal matters. The Law Lords were in effect a supreme court of the United Kingdom, in effect, but not in appearance.

I was made a Law Lord some 11 years ago, and I found myself in a very strange world. There were by this time 12 Law Lords. We were accommodated in little attic rooms in the Palace of Westminster. Our law clerks—or judicial assistants, as we call them—were lodged in a garret in the roof, and there was only room for four of these, so we had to share them between us.

We sat to hear appeals, usually in panels of five, in committee rooms of the House of Lords, just like any other Parliamentary committee. Technically, we weren't judges, and so we wore no judicial robes. So far as delivering judgments were concerned, the old formalities were observed. We moved to the floor of the House at 9:45 in the morning, before the hour at which the other business began.

Proceedings had to be commenced in the normal way of the business of the House, with a huge mace being carried in and put in place, to which we all bowed. Then the duty Bishop would read prayers while we knelt on the benches. The Senior Law Lord would then sit to preside on the woolsack, a large cushion stuffed with wool dating back to the 14th century, although I daresay they occasionally changed the wool. (*Laughter*) The rest of the Law Lords who had heard the appeal would sit on the Parliamentary benches. The Senior Law Lord would propose a motion that the appeal be allowed. Each Law Lord would then in order of seniority get to his feet to deliver his speech or opinion in relation to the motion, and this was, of course, in reality his judgment. The Senior Law Lord would then put the matter to the vote and announce whether the appeal had been allowed or dismissed.

Although our function as Law Lords was to transact the judicial business of the House, we were full members of it. We could take part in the legislative business, speaking in debates and voting on bills, although by convention we ceased to do this when the bill had any political implication.

One Law Lord recently flouted this convention. The last government introduced a bill to prohibit foxhunting. Lord Scott, a keen huntsman, was so outraged that he attended the debate and voted against the bill, to no avail. The bill was passed. Now in our country, huntsmen ride only to exercise their hounds, although if the hounds take off after a fox, who is to stop them? (*Laughter*)

I had only the briefest of spells in this fascinating world before returning to the Court of Appeal to preside over its civil business as Master of the Rolls. It was in that capacity that, on the 12th of June 2003, I found myself in a delightful inn called The Swan, in the depths of the country outside London. The Swan had been converted into a conference center. I was one of a number of England's top judges, headed by Lord Woolf, the Lord Chief Justice, who were taking part in a two-day meeting with the most senior officials at the Lord Chancellor's department to discuss the future of our justice system.

When we came down to breakfast, it was to hear that Tony Blair, the Prime Minister, had just announced some sweeping constitutional changes. The Lord Chancellor was to be abolished, to be replaced with a Secretary of State for Constitutional Affairs, who would have no judicial functions. Lord Irvine, who was the Lord Chancellor, was standing down to be replaced by Lord Falconer, who had become a temporary holder of the office until it could be abolished. There would be a new independent judicial appointments commission to appoint judges. Last, but not least, the Law Lords were to be abolished, to be replaced by a new Supreme Court.

Can you imagine the consternation? None of the officials in the Lord Chancellor's department had had the slightest inkling of the proposed abolition of the Lord Chancellor and with him their department. Lord Woolf had not been consulted. Indeed, there had been no consultation. It seems that not even the Queen had been informed of the imminent demise of the official who had, for a millennium or more, been her most senior officer of state.

Tony Blair was subsequently to explain that he hadn't consulted about these changes because he knew that Lord Irvine, who would

have been the natural person to conduct the consultation, was opposed to them. (*Laughter*) He conceded that the way in which he set about making the changes was “muddled” and “messy.” Lord Strathclyde, the leader of the opposition in the House of Lords, described the changes as “cobbled together on the back of an envelope.”

In any event, it proved impossible to abolish the office of Lord Chancellor, which was firmly entrenched in a very large number of statutes, but he was stripped of all of his judicial functions. A new judicial appointments commission was set up to appoint the judges, and the new Supreme Court was created.

But the latter didn't happen very quickly. It took no less than six years to identify a suitable building—the old Middlesex Guildhall, placed opposite the Houses of Parliament and next to Westminster Abbey—to obtain planning permission, and to convert it into the new Supreme Court. By this time, I had been promoted first to the Lord Chief Justice, and then to be Senior Law Lord, and thus I became the first President of our new Supreme Court, because the Law Lords were automatically converted into the first Justices of the Supreme Court.

Well, what was the object of this rather expensive exercise? It was the final step in the establishment of the separation of powers in the United Kingdom. The Law Lords had, in fact, operated as a Supreme Court that was totally independent of the legislature and the executive, but it was not perceived as such. Indeed, so far as the man in the street was concerned, it wasn't perceived at all. (*Laughter*) He had no idea who the Law Lords were, or what they did.

It was very difficult for the public to find their way to the committee rooms where the Law Lords sat. The ceremony of delivering judgment, which I have described, was incomprehensible to anyone who attended it, but no one ever did, apart from the mandatory Bishop. (*Laughter*) It was all too easy for the Law Lords to be confused with members of the government.

It was important that the public should become aware of the existence of a final Court of Appeal and that this court should not only be independent but be seen to be independent. I believe that we have

achieved that objective. Our magnificently refurbished building has an open door, and we are already attracting 300 visitors a day. Our website has 19,000 visitors a month from all over the world.

Uniquely in the United Kingdom, all our proceedings are filmed by cameras that are permanently in place, and we permit the media to broadcast them if they wish. They haven't shown a great eagerness to do so except when we deliver judgments in high-profile cases. When we do this, the judge responsible for the lead judgment gives a very short summary of what the case was about and our decision, in his own words. This often goes straight out on the national news.

This means that we are beginning to become public figures, but not in the same way as Justices of your Supreme Court. The appointment of a new Justice of the Supreme Court of the United States receives considerably more media coverage in England than the appointment of one of our own Justices. (*Laughter*)

Is the Supreme Court of the United Kingdom really supreme, as it is in Bhutan and in the United States? The answer is that it is not. The fundamental principle of our unwritten constitution is that it is Parliament that is supreme. Parliament can make and unmake any law that it chooses; it is subject to no constitutional restraints. The courts—including the Supreme Court—have to give effect to every law that Parliament enacts.

There is one exception to this. When we joined the European Community, Parliament passed a statute that required the courts to prefer European legislation to our domestic law should the two be in conflict. Thus, our Parliament has chosen to forgo its absolute supremacy. But it remains open to Parliament, at least in theory, to take us out of the European Union and to reassert its absolute right to control our lives.

What difference has the transition from Law Lords to Justices of the Supreme Court made? In the days of Chief Justice John Marshall, when the Supreme Court of the United States moved to Washington, no courthouse was provided for the Justices. They sat, I quote, “in a half-finished committee room, meanly furnished, and very inconve-

nient” on the ground floor of the Capitol. But when they were sitting in Washington, they not only sat together, they lived together in Conrad and McMunn’s boardinghouse, a bachelor existence, for their wives did not accompany them to Washington.

Justice Story, writing to a friend, commented, “My brethren are very interesting men with whom I live in the most frank and unaffected intimacy. We are all united as one, with a mutual esteem which makes even the labors of Jurisprudence light. . . . We moot every question as we proceed, and familiar conferences at our lodgings often come to a very quick and, I trust, a very accurate opinion, in a few hours.” And to his wife, he wrote, “[T]he Judges live with perfect harmony. . . . Our intercourse is perfectly familiar and unrestrained, and our social hours when undisturbed with labors of law, are passed in gay and frank conversation, which at once enlivens and instructs.” Well, I wouldn’t suggest that our move has had quite this effect, but we are certainly much more collegial than we were.

May I end by extending a warm invitation to all of you to look in on us when you are next in London, but, please, not all at the same time. (*Applause*)

President Ramo: Well, am I going to be your delegate to the Supreme Court to suggest that they repair to a boarding house and we will see how they all get along?

Lord Phillips very kindly has said that he would happily take a few questions. So if anyone has questions, if you would come to a microphone, that would be great.

I think you have enlightened everybody perfectly, so thank you again in every way. (*Applause*)

I’m sorry, did I miss somebody with a question? Oh, I did, sorry, one.

Professor Kenneth L. Hirsch (Pa.): Would Lord Phillips comment briefly on the work of The American Law Institute and what institutions perform a similar function or should perform a similar function in the United Kingdom?

Lord Phillips: Well, the answer is we certainly should have an institution to perform the same function, but we don't. I always believed that your institution was unique in the world, but that is not quite right because I understand there is one in India. We have a Law Commission which proposes new laws and changes in the laws for legislation but not one that has anything like the ambiance of your Institute.

President Ramo: Justice Durham.

Chief Justice Christine M. Durham (Utah): In the United States, we are facing significant problems, particularly in our state courts, having to do with adequate funding and with judicial selection. How would you describe the primary issues facing the British courts?

Lord Phillips: We have funding issues as well. We are having to make economies, and this is undoubtedly going to have an adverse effect on access to justice.

We have growth areas that we are finding it difficult to cope with. I think the most difficult area is immigration and asylum. We have an increasing flood of people claiming asylum who, for obvious reasons, will resort to any expedient to remain in the country rather than be sent home. So they take advantage of any right of appeal that there is, and this at the moment has been swamping the judicial capacity to deal with these cases. We have created a new administrative structure, and I am sitting on a judgment at the moment in relation to the thorny question of whether there should be a right to judicial review from the decision of the upper tribunal of the administrative courts.

President Ramo: We thank you. We take with great interest many of your thoughts, and we look forward to seeing the enormous success of the new Supreme Court of your country under your leadership. Thank you, Nick, very much. (*Applause*)

