

# **The Economic Club of New York**

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**100<sup>th</sup> Year**

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**392<sup>nd</sup> Meeting**

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**Wednesday, September 26, 2007**

**Hilton New York  
New York City**

# **Program**

## **GUEST OF HONOR**

**THE HONORABLE ANTHONY M. KENNEDY**  
*Associate Justice Supreme Court of the United States*

## **PRESIDING OFFICER**

**BARBARA HACKMAN FRANKLIN**  
*Chairman of the Club*

## **QUESTIONERS**

**H. Rodgin Cohen**  
*Chairman*  
*Sullivan & Cromwell*

**Arthur B. Culvahouse, Jr.**  
*Chairman*  
*O'Melveny & Myers LLP*

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**Barbara Hackman Franklin – Presiding Officer**

Good afternoon. I'm Barbara Hackman Franklin, Chairman of the Economic Club of New York. It's my great pleasure to welcome each and every one of you, our members and our guests, to this, the 392<sup>nd</sup> meeting in the 100<sup>th</sup> year of this esteemed club.

We are honored to welcome, as our Guest of Honor today, the Honorable Anthony M. Kennedy, Associate Justice of the Supreme Court of the United States. It's a great privilege to have him with us, and I know we all look forward to hearing from him, an opportunity you will have in just a few minutes. We are pleased to have Justice Kennedy's wife, Mary, as well and two of his children, spouses, and other family members. We extend an especially warm welcome to all.

Before we turn to the program, I want to acknowledge the founding members of the Club's Centennial Society. We launched the Society to celebrate our centennial year, and to date 75 members have each contributed \$10,000 in personal, tax deductible moneys to the Centennial Fund. This will ensure the stability of the Club as the nation's premier speaking platform well into this century. The names of the Society's founding members are listed in your program, and I want to thank them, once again, for their generosity.

Now, turning to today's program: we will first hear from Justice Kennedy, then have our usual question period, during which two of our own Club members, one on either side of the dais, take turns asking questions of our speaker. The speaking program will last an hour and at 1:15 your luncheon will be served.

In this Centennial year of the Club, we thought it appropriate to have one meeting with a Guest of Honor who represents one of our nations' most enduring and admired institutions, the Supreme Court of the United States. The Court was created in accordance with Article III of the Constitution and by authority of the Judiciary Act of 1789. It was organized February 2, 1790. Our Guest of Honor today is one of just 98 Americans in our nation's history to sit as an associate justice. Justice Kennedy is widely considered one of this court's most influential members.

Anthony Kennedy grew up in Sacramento, CA, earned an A.B. degree from Stanford University, having also studied at the London School of Economics. He attended Harvard Law School, graduating cum laude.

After Harvard Law, Justice Kennedy returned to California, worked for a law firm in San Francisco, and then moved to Sacramento to take over his father's law practice. Over the ensuing years, he practiced law and taught Constitutional Law, until 1975 when President Ford tapped him to sit on the Court of Appeals for the Ninth Circuit. He was then the youngest federal judge of his day.

When Justice Powell retired in 1987, President Reagan turned to Judge Kennedy to fill that seat. The Senate confirmed him 97 to 0, and he took his seat on the court in February 1988.

During his nearly 20 years on the court, Justice Kennedy has earned an enviable reputation as a thoughtful, down-to-earth, hard working, and practical jurist.

The Supreme Court begins a new term next month, and legal observers will again closely watch Justice Kennedy. Many see him as the court's "swing vote", not because he has a wobbly judicial philosophy but because he sits in the middle of a court divided along ideological lines. In 24 Court decisions decided last term by a 5-4 vote, Justice Kennedy was in the majority in every one.

We are most honored to have this distinguished jurist and public servant with us. Please welcome Justice Anthony Kennedy.

**Justice Kennedy:** Thank you very much. Secretary Franklin, and my fellow citizens, in a world which must strive ever to come closer to the idea and the reality of the rule of law, and thank you Secretary Franklin for discussing the finances of the club and not saying it was necessary to attract better speakers. (Laughter)

My daughter pointed out to me in the reception earlier that Justice Brandeis of the Supreme

Court addressed this club in the 1920s. Brandeis was the one who said that a judge who does not know economics is apt to become a public enemy. So perhaps my appearance here will be the beginning of my inoculation against that status.

Not long ago my wife and I were returning to Raegan National Airport from a trip and the carousel went around without our baggage on it, so I went to the claims desk and said, I would like to report some lost luggage. And the clerk looked at me and said, "Has your plane landed yet?" I said, no, you are seeing just a faint reflection of the existential self.

What you see here today is a judge, a jurist, a justice who is privileged to address you. The law follows industry, the law follows business, the law follows technology, not necessarily vice versa. And what you do for the people of the United States and for the people of the world and for the cause of freedom is of inestimable value.

Let me just talk a little bit about the Constitution because the court is often seen as one of the principle voices for the meaning of the Constitution. I warn people, I warn my students, the Constitution doesn't belong to a bunch of judges and lawyers, it is yours. And Americans are I think unique in the rest of the world because they find their identity, they find their self definition in the founding documents of this country. And there is a reason for that. When we rebelled against the English, the rest of the world asked, what is it that the Americans wanted. And we said, well we wanted freedom and the rest of the world was quite puzzled by that. They said,

freedom, the Americans don't pay taxes unless they choose it, they have all the land they want, what are these people talking about. So it was necessary for us to devise, basically a statement which defined our purpose, our destiny, our meaning as a nation. And these were the seminal documents, the Declaration of Independence and the Constitution of the United States.

From that time on, America, which comes from different ethnic backgrounds, different religions, different cultures, finds a common meaning, a common identity, a common purpose, in the Declaration of Independence and the Constitution of the United States. And that is why it is a great privilege, of course, for Federal judges to participate in defining its meaning over time. Now, from the very beginning the court was involved in deciding issues that were politically explosive. McCulloch versus Maryland in 1819 decided whether or not it was Constitutional for the United States government, the national government to charter a bank as the Bank of the United States. This was the most divisive, political issue in the United States for over 20 years, other than slavery. Slavery was so divisive that nobody even talked about it. But whether or not there should be a Bank of the United States was the great defining issue of American domestic politics. The Second Bank of the United States was established with a capital of \$35 million in 1810. You can see how huge and powerful that bank would be if it remained today. And there were many people, most on the Jeffersonian side of the political equation that attacked this bank as being dangerous to the liberties of the people. What does the Supreme Court do, it steps right into the middle of the controversy. But it is important to note that the court then and the court now decides an issue with great political consequences but it does not decide it in a political way.

The court uses the language of the law to decide its cases and the language of the law is neutral with reference to politics. The language of the law, the language that lawyers speak, the language that judges use, is not better than that of the political branch, it is not better than that of the public discourse generally, it is not worse, it is just different. The language of the law has an ethic, a grammar, a chronology, a restraint, or a formality, a history, a tradition, that is all its own. And this is the language the court uses to decide its cases.

When the court decides a case that is controversial, it draws down to use an economic metaphor, on a capital or a reservoir or a deposit of trust. And we have to replenish that deposit of trust when we draw down on it, as we so often do. How do we replenish it. We do so by adhering faithfully to the neutral language of the law. We do so by adhering to our formality, our traditions. You know the black robe, and the raised ... judges always like to be very high and they look down on people. That is designed to remind the judges themselves and to remind America that the law is bigger than we are. It is not just to pump up the judges. And so we must obey these traditions.

And we have a new Chief Justice now—A wonderful Chief Justice. He is the youngest man at the conference room. He is finding that article III judges are kind of like tenured faculty members on a university, there is nothing much you can do with them. (Laughter) But we follow, we adhere very closely to the etiquette, the tradition of the court, the Chief Justice speaks first, announces the case and then the most Senior Justice, Justice Stevens and Justice Scalia, then me and so on and so forth.

We had been, before Chief Justice Roberts and Justice Alito, together for 11 years. And during that time we were careful to treat each case as a new case to be re-examined on its own terms. When you have been ... when you are first a judge, you think everybody in the room is result orientated except you. But other judges feel the same way. And you learn that each of your colleagues has given the case the same careful thought, the same careful deliberation that you did. So we rely on these traditions, these formalities in order to sustain our place in the judicial system. When we write, we write in order to command allegiance to the result. And we are judged by what we write in the United States Reports. We don't have a press conference; we don't have a press cohort. We don't go around giving speeches saying what a great dissent I wrote last week, or what a wonderful majority opinion. We simply rest on what we write. And we depend for our defense, we depend for part of the allegiance I described, we depend for restoring the capital trust, a large part, on the members of the legal profession. In the Anglo-American system, our tradition is that we draw our judges from the ranks of the practicing bar to the Federal bench and we in turn depend on the legal profession to explain our function and to preserve our place in the constitutional system. Now I know that most of the lawyers that you talk with on a day to day basis don't rush to the office every morning to read what we wrote in the United States Reports. They are transaction lawyers. But they use this wonderful language of the law, the language of which we are the most formal spokesman. They use that same language to engage in the transactions and the great enterprises and the dynamic developments that are done throughout the United States, throughout the world, where there is a free market, all without intervention of the government, all without the intervention of the courts, because

lawyers speak in the value of this language of the law. I can pick up a telephone and talk to a lawyer whom I have never met and he may be a continent away, she may be three generations removed from me, but I know him or I know her because we speak this common language.

I think maybe we might have some questions afterwards, Mr. Cohen about the state of the legal profession, all is not in order in the legal house. The judges on our court and the judges on all federal courts decide enough cases or are pivotal in resolving enough cultural issues that we must be in a reactive mode. We wait for a case to come before us. I don't drive to work and say, Oh I think I will decide an election case today. Or I think I will talk about free speech today. No, we wait until the cases come up in an orderly way and we have arguments and we write ... I talk to a businessman one time and explained our function, and he said, that is the way you control the people who work for you, the district judges. He said, I have a big business, if some regional manager is doing it wrong, I pick up the telephone and I say, knock it off. You wait for six months, you write this thing. (Laughter) But you see that is the way the law is made. And making the law in that way assures that we seek, that we aspire, that we reach towards that rationality which is the basis of legal institutions. And so the people of the United States I think retain this loyalty to their constitution.

But I am concerned about the status of our civic discourse generally and particularly about the state of knowledge of our history and our tradition on our heritage with the young people of the United States. You all have families, you know young people, and there is always good news and bad news. I mean, these are such talented and wonderful people I have taught for many

years, I see in today's students, an altruism, a civic amendment, a decency, a moderation that I haven't seen in years. And yet, in many respects they don't know anything. I had a group from a famous university in the United States, they were science students, they came to Washington, they came to visit me, they didn't know the three branches of government. I was astounded. I talk sometimes with David McCulloch who is also interested in civics teaching. He is a fine historian. He wrote the book about Adams. And he told me he went to a college in the mid-west and a university junior, a junior came up and said, you know, I am so glad that you have come to give your lectures on the Constitution. I never realized all 13 colonies were on the east coast. You know, my friend, democracy, the idea, the heritage of freedom, it is not inherited, you don't take a DNA test to see if you believe in freedom. It is taught. And teaching is a conscious act. The court is a teacher. The law is a teacher. And society must be a teacher. And we must realize that our freedom, our institutions, our heritage is in the hands of these young people that will soon be the trustees of our tradition. And there is so much we can tell them. The Declaration of Independence, talks about life, liberty and the pursuit of happiness. You know, Jefferson and the other founders, the other thinkers of that time, used the word; it didn't have the materialistic hedonistic connotation that it does today. Happiness meant that feeling of satisfaction and self worth that you attain from civic contributions. That is what it meant. And we must once again re-instate a rationale, civic, balanced, moderate, decent, discourse in this political society of ours.

Look at the names of some of the radio and talk shows, hardball, cross fire. We need to have

creative compromise. Rationality in order to protect the legal system, which has serious problems. In order to make advances. One way to do this I think is to engage in our young people, in the task of ensuring our national security and our national security, ultimately is in the world of ideas. And in many respects we are losing the ideologic battle. The verdict of history, the verdict of millions, as to whether or not the ideas that shape and aspire the American constitutional system, the ideas that are shared by so many countries in the free world, will in fact be accepted by the rest of the world and it is difficult to do when the rest of the world finds itself confronting dire poverty. You know the statistics. I am sure you have heard them before. I read about water systems a lot. I am from Sacramento California, northern California, water is very important. I will go to lectures and there will be a water jug. And the speaker will put a little pill in, it is a brown water. And after he has spoken for a while, the water is clear on the top and he will drink it. To show you that this not rocket science. But close to 2 billion people have no adequate water. You see that stately or quaint, whatever word you want to use, woman in Africa, with the jug of water on her head, it looks wonderful. That weighs as much as the luggage allowance at Heathrow Airport. Estimates are hard to make, but it appears that 12 billion hours a year are spent in bringing clean water to the family in Sub-Saharan and it is woman's work. There are over 11 million infant deaths annually around the globe. A high percentage of those are traced to water borne diseases. Sometimes the water is unhealthy; you can fix this, but you can't fix it if you don't have a decent non-corrupt governmental system to do so. Unless you can attract investors. Whether they be investors for profit or NGO's to come in and make the necessary investment and this is just one example. As you know in some

countries in Africa, the life expectancy is 30, 31 years. Women have no access to the legal system. They find that when the husband dies, as often is true in their 30's, their most productive years, that they are thrown out of the house. In Uganda, a woman who is raped has to pay \$5 to file a complaint with the police department before they will even investigate. In Bangladesh, judges have told me that over 1000 people a year serve, 365 days in jail for a \$3 fine. This is our world.

Now young people, the press information is now lateral. You move outside of conventional boundaries through the Internet and so forth. It is important for our young people to talk about these things and to realize that this magnificent machine we have, called "free enterprise" and the "free market", and the "rule of law" must be exported to these countries if they are going to accept our view, as opposed to rising up in protest for our indifference to their plight.

Trafficking in persons is the second biggest illegal industry in the world. It is right after drugs. But it is even before arms control. Eight hundred thousand persons a year are illegally taken in captivity across national lines. Most of them are women. Some are children. Eight or nine year old girls held in brothels, so that American tourists and tourists from other places can commit the most debased of acts. These are the kind of things you must recognize. When we are asking the rest of the world to follow our law, to follow our legal system, to embrace our constitutional values, to embrace the idea of democracy, to trust their judges, to find judges who will be willing to defend these values. My friends, we have a tremendous amount of work to do.

I will just say one more thing. Mary and I were in Poland, about this time, in September. Maybe a week earlier last year. And I was visiting the courts. When you go to ... at the request of the state department, when you go to visit a European court, you usually visit three courts. There is a constitutional court, an administrative court and a court of general jurisdiction. And I was going to talk with the faculty about the legal curriculum. And they said, well our students won't be here, they are not coming here until next week. So you can't address the students. But then they came in during the faculty meeting and they said, we forgot, our entering law students are here. Now law in most of the world is undergraduate, and these were entering students, so they are basically high school seniors, beginning in September their first year of college. So they said they want you to talk to them. So I went in, I said, I am Justice Kennedy, I am going to tell you about the Constitution. And I encouraged their questions. I was drawing the design of the Constitution with a dry erase marker. And a student raised her hand, and she said, now federalism, you are very proud of, but you know a lot of money goes to Washington and then it goes back to the states with conditions, doesn't that undercut the idea of federalism. And then another student said, you know, you are interested in separation of powers, the congress checks the president, the president checks the congress, who checks the courts. And then another student raised her hand, it was a lady, and said, were John Marshall's decisions all popular when he wrote them. I said, wait a minute. I don't speak much German, but I said, is this a trick, have you planned this. And they said, no, no, you don't understand. They said, it took you, roughly from 1775 to 1787 to have your Constitution. It has taken us 11 years and we have studied the history of the American Constitution since we have been in the 6<sup>th</sup> grade. We know your history.

And I repeated the story the same way I told it here, at dinner that evening at the rector's house. And he said, were they right. The other thing we have to remember is, we couldn't say anything good about the comments. But there is one thing that was a fallout of communist rule, if you wanted to be a doctor, a lawyer, an engineer, an architect, a scientist, you couldn't do it. So you went into the public schools. And you have seen the product of the best teachers in the world for 30 years. We have to think about that. We have to think about arming, about informing, our young people and the rest of our community so that we can have a civic dialogue, so that they can have a responsible political structure.

I am not going to talk to you about the criminal system but let me just say, we have two million people behind bars. Our sentences are 8 times longer than for similar crimes in Europe. It costs close to \$30,000 per year per prisoner. And we are not doing anything about it. And lawyers, and I used to practice law, are obsessed with the guilt, innocence process. After that we throw away the key. We are not interested in rehabilitation. And a decent society, a progressive society. I simply must address this. But you know what happened in California, where they have a so-called three strikes law. So if you commit a third penalty, it is a mandatory life sentence. That was an initiative and referendum sponsored by one of the most powerful lobbyists in the state of California, which is the Prison Guards Association, and that is sick. We simply must have a public dialogue, where the amount of campaign contributions does not control the outcome. We must have a political system that is properly designed. It is a common explanation for what is happening now. That it used to be the voters picked the legislators, now

the legislators pick the voters. They draw districts. And again, in my state of California, 100 percent of the incumbent candidates for the state assembly were re-elected. There is something very wrong here. And we must begin to address the status of our society. If you are going to protect this wonderful legal system we have. If you are going to protect the heritage of our freedom. Thank you very much.

**Barbara Hackman Franklin:** Thank you Mr. Justice for such thought provoking remarks. I think we all need to be reminded of our heritage and our Constitution and the importance of the rule of law in our democratic process. And then you have challenged us to do some things that ought to be done to protect that heritage and that rule of law and we really thank you for those comments. Now we have two fine questioners. On this side of the dais is Rodgin Cohen who is Chairman of the law firm of Sullivan and Cromwell. On that side of the dais we have A.B. Culvahouse who is Chairman of the law firm of O'Melveny and Myers. And he was Counsel to the President and that would be President Reagan. For the first question, I am going to turn to A.B.

**A.B. Culvahouse:** Justice Kennedy, in the last term of the court, there were at least 29 cases or roughly 40 percent of the docket that are regarded, broadly speaking as involving business centers, from anti-trust to patents, to punitive damages. And a substantial number of the cases on the announced docket for the upcoming term are similarly viewed. A number of commentators have cited the district will \_\_\_\_ a dramatic and an intentional shift in the courts docket, away from

personal constitutional rights type of cases and signals a more pragmatic bent. Do you agree with that observation.

**Justice Kennedy:** No. (Laughter) It is dramatic only in the sense that each term seems to have its own case mix. As I have indicated, we are reactive, we don't take a case simply because we are interested, we wait until the system needs guidance because different courts have reached different conclusions. In fact, you would be surprised, I couldn't tell you very much about Sarbane Oxley, and you are probably shocked about that. Well I don't go read every new statute that the congress writes. I wait until a case comes to me. And in fact, I don't have time. I understand some of the dynamics of corporate disclosure. So we wait. In the patent case, just to take an example, we were finding that we had a patent system in which you could get a patent for a plastic garbage bag because it had a pumpkin on it. We thought that the, put in an appeal to the district of Columbia Circuit, which is the court that hears patent cases, had gone too far down the line of protection of patent. And so we issued that case which I think was unanimous. I believe that was unanimous. There was another case in the area of anti-trust, you can't fix prices, don't do it. Or you will be seeing a criminal lawyer very sooner than you ought to, if you fix it at the retail level. What about territorial restrictions? When you have just one distributor so that in effect that sets the price, or what about retail price maintenance. The economists for years have been arguing about that and we took that case in order to overrule what we thought was an outmoded doctrine of the per se violation. You still have to be very careful if you have retail price maintenance, but we said that it is not per se unlawful. And we heard economic data. My

concern A.B. is that we may just frittering around the edges. As I indicate, we streak across the scene briefly and then go on to something else. I think, in large part, in some part the courts are responsible for the shape of the commercial litigation system, the civil liberty litigation system. In large part they are remitted to congressional control. But I think, perhaps it is time for us to have a broad based look between the private bar and the business sector, and the Congress of the United States as to what is happening to the civil litigation system. I don't think that there is any idea, that oh well, let's help business this term, that is just not the way it works.

**Rodgin Cohen:** Thank you so much Justice Kennedy for those terrific remarks. Two points that you made, one was the importance of teaching and the second, the value of recent discourse. For me, it is difficult to imagine anything that so well captures the majesty of our political system and how recent discourse can actually occur, as arguments before the Supreme Court. And so my question is, whether there is anything that you think can be done from televising the arguments that often raise issue, to videotaping them perhaps for showing after the decision is rendered. So that wide spectrum of the public could really be exposed to the virtues of the system.

**Justice Kennedy:** There are a number of attorneys and certainly a number of members of the press that would like television in our courtroom. My colleagues and I are generally against it. Mr. Cohen, if you and I had an Oxford style debate, and you drew the affirmative and I drew the negative, you would make more points. I said the Supreme Court is a teacher. I have already

said that. We want people to know that we are an open system. We want people to know how hard the judges work. We want people to know that we are generalists across a great range of issues, from capital cases to anti-trust. So of course there are good reasons to do this. The downside is this. The dynamic is now wonderful. If there are nine of us here on the Supreme Court, if there is a good oral argument, basically the council can participate in a conversation that justices are having among themselves. I will say, now isn't it true council that this is a clean water act case and the Congress has said that this person can sue. And I am basically saying, Justice Scalia, don't worry about the constitutional problem notwithstanding. And then he will say, but isn't it true council that there has to be some minimal interest. And he is saying, not so fast, Justice Kennedy, I am interested. And a good council can participate in this conversation. If it works, and sometimes it doesn't, because of us, sometimes it doesn't because of the attorney, it is a beautiful process. But I wouldn't want to introduce the insidious dynamic of being tempted to think that one of my colleagues asked the question because he or she is on national TV. The other thing is, that by excluding the press, we teach again, as I said, that we are different. We are judged by what we write. We are not a debating society. There is kind of a slippery slope, Mr. Cohen, that we have videotapes that we release after the fact, and in the election tapes Bush versus Gore, we had I think simultaneous audio because everybody was kind of learning about the case at the same time. So we are going to continue to get that question. We are concerned about teaching what we are, and not behaving for the crowd. But you can make some very good arguments for it. And come and see us sometime. We have, what is it, over 100,000 people a year see us.

**A. B. Culvahouse:** Justice Kennedy, speaking of Justice Scalia, in Roper V. Simmons, where you wrote the majority opinion, decided two years ago, on which the court overruled the imposition of capital punishment on juveniles as constituting cruel and unusual punishment under the 8<sup>th</sup> amendment. You cited international law and the laws of other nations and Justice Scalia, vehemently criticized that approach. Does this foreshadow an ongoing debate in the court or is this a rare case, limited to those unusual circumstances.

**Justice Kennedy:** I am familiar with the case. (Laughter) Our court had held that it is unconstitutional under the 8<sup>th</sup> amendment of cruel and unusual punishment because to execute a person who is 16 or under at the time of commission of the crime, and the question was whether that should be extended to 18. And I was very careful to say that, as I examined our own precedence and our own Constitution, that this was unconstitutional. I then said that our judgment, the judgment of the court is 5 to 4, was confirmed by looking at the practices of the rest of the world. And I thought it of some relevance that only China and the Sudan did this. I thought that was confirmatory of the fact, that this right that we found within the United States Constitution was important and had this great force. The Declaration of Independence taught the decent respect for the opinions of mankind. Of course, it is somewhat relevant as a check on what we are doing as a reality check to know what other people ... what other countries have done. This is not to say that we are controlled. This is not to say that we are controlled by what other countries do in interpreting the Constitution. Now, look John Marshall I mentioned, I think probably a fourth of the cases he wrote were international law cases. We have international law

all the time. We have treaties, we have covenants, we have international agreements. All of which we interpret all of the time. So with respect to my colleague and I have told him this, I think he was talking about an issue that wasn't present in the case. I think, A.B. that you are going to see most references to foreign law in the context of conventions, treaties, international agreements. Sometimes, two people have a contract, does that constrict your rights. Or does that give you a new platform from which to build. Treaties are the same way. The fact that you enter a treaty doesn't necessarily mean that you are restricting your rights. It means that you have a new area of commonality on which you can build.

**Rodgin Cohen:** Staying for a moment with the international theme, but a different aspect. When I talk with lawyers and businessmen from other countries, one of their most serious complaints about the U.S. is what they view as U.S. legal imperialism. Which they say is the attempted enforcement of our legal code and our legal principles abroad. There are numerous manifestations of this, our economic sanctions programs, our anti-trust laws, our anti-gambling codes, and the question I would ask, in your travels, do you hear these concerns as well, and how do you respond and specifically if we apply our law extra-territorially, do you see this as a threat to Americans and American interest in other countries where the rule of law is not well established.

**Justice Kennedy:** I think that is a fascinating and difficult question. I am very careful with foreign audiences to not comment on what I think is the prerogative of the executive branch, the

implementation and the negotiation of covenants and treaties. And probably it's a normative or even moral question, take the child abuse that I was talking about, there is a federal statute as I understand it, I haven't looked carefully at the cases, which makes it a crime for an American to leave the United States to commit these bestial acts on a young person. Should that be a United States law. There is actually, I think some litigation in the system. At some point you have to make a choice whether or not you are going to impose this normative obligation. On the other hand, many of you are engaged in enforcing and interpreting the Foreign Corrupt Practices Act, which means that we have a higher standard than others. I am very concerned about this. Dubai, which is now going to be a huge financial center. If you go to Dubai, you will see 125,000 to 150,000 workers every morning come into Dubai from the desert, in buses with broken glass and their passports are taken away. I suspect, that there is some serious issues, violations of labor rights for those people. I think we have to begin, in order to have a level playing field, to insist with our trading partners and our friends that certain minimal norms, be observed. And perhaps one way to begin, Mr. Cohen, is to impress upon our young people, and in our population in general and the rest of the world, the importance of reaching out to impoverished populations, to show that we are in good faith. And that will be the basis upon which I think we can have reciprocal concern. Some people tell me, and you would know better than I, that it could be that London will become the financial capital of the world. And I saw some figure of, something like this, 25 major IPO's last year, 24 were brought outside of the United States. So this is a real concern. Delaware is what lawyers look to for corporation law. You know why, because Delaware had the first modern corporation law. All the other states and most other states track

that. But Delaware had a track record. It had judges and some of the most highly paid judges in the state systems to do this and it became very popular. And it was first. So we have to be careful that the financial capital doesn't go somewhere else first because it is hard to get it back. The Delaware experience. I think there is a real problem and we can talk a bit more maybe, about the judges. I have a lifetime job, you have to eat lunch, what are we doing here.

**Barbara Hackman Franklin:** No, no, we are fine. We have a bit more if you can stand it. A. B.?

**A. B. Culvahouse:** Justice Kennedy you have been perceived as willing to enforce an enumerated rights, personal rights, economic rights that are not clearly and explicitly set forth in the text of the Constitution. For instance in 2003 you wrote the opinion in State Farm Mutual, the Campbell, where the state limited state awards of punitive damages, which was seen as conservative. In Lawrence v. Texas the court struck down the state law criminalizing homosexual sodomy, which was seen as liberal. And neither opinion cited a textual provision of the Constitution. But at least one scholar has seen them as very much alike. And I guess my question is, do you see a connection between economic liberty and personal liberty and can the court protect one without the other.

**Justice Kennedy:** In State Farm Insurance, the insurance company wanted to defend a suit after a man, its insured, when the wrong way on a highway and crashed into the oncoming vehicle on

a two-lane road. The insurance company tried to defend it. There was an excess policy and for a while it looked like the man's house had to be sold, the insurance company then stepped up and paid the balance of the judgement. But he had headaches, he couldn't sleep, so he was given \$20 million in compensatory damages and \$145 million in punitive damages. This is just wrong. The Congress has not changed this. Now, I have to be careful about criticizing the trial lawyers because they would say, well, the Chamber of Congress lobbies on the other side, why can't we. I am concerned that lawyers are lobbying for their own self interest. American College of Trial Lawyers, or trial lawyers generally, I should say, gave more to political campaigns last year than GM did. And I thought it was time for us to assert the primacy, the fairness of courts, and we struck down that punitive damages that is excessive, is a violation of due process. And in the Lawrence case, the police barge into a bedroom and found two adults, males, engaged in sexual activity. I thought that too was improper exercise of governmental power. Both opinions, were interpretations of the meaning of the word liberty. In the Constitution of the United States. You know if the framers knew all of the elements of a perfect society they would have written them down. But they didn't. They knew that your times, the times can blind you to the injustices of your own generation. So they used expansive words like liberty. We have to be very careful that this objective used, and the judges are not perceived as controlling our jurist prudence. And every judge, if they disagree, we are going to say you are being subjective. We hear this whole thing. So it is important to find some consistency, to define some consistent principles, but I see those two as consistent.

**Barbara Hackman Franklin:** One last short question.

**Rodgin Cohen:** I will try and make it short. There is, I think, in the United States business community, a growing trend towards arbitration as opposed to settling disputes through the judicial system. There is the unpredictability of the jury system, the reluctance of trial courts, which we have already just referred to, to rein in those decisions and it is simply the length of the judicial process. Do you see this as a concern and if so, do you have any thoughts as to remedial action.

**Justice Kennedy:** I wanted to be a Federal Judge when the position was finally offered to me because I thought the Federal Courts were and should be the fairest forum for adjudication of disputes in the world. They are not perceived of that way. In part, we are losing some of our best judges to be arbitrators and that is a whole different story. The quality of the Federal Bench, I am very concerned, we are not recruiting from the ranks of the practicing bar, the eminent practitioners. It used to be if you were in Sacramento California, Des Moines, St. Louis, the best attorneys in town were told by the Bar, please go on the Federal Bench and they did. Now, they are being recruited by arbitration firms. And clients see this as a preferred mode. And I think this is a very unhappy development that we are not perceived as being fair. And that is why I think we have to have a national dialogue about this. When I became a judge, I think when I started to practice, in the 60s, 11 percent of cases went to trial. Now it is less than 1 percent. And the process, major companies don't want to face juries. You can't change this without

changing the Constitution of the United States, as far as the Federal Court is concerned. But I think you can educate jurors. I mean, you can talk to them about who pays the cost. You know in malpractice cases, the hospitals are liable for three times the amount or are usually hit for three times the amount of the damages than the doctor. That shows you that the big company, as seen by the jury, is able to withstand this verdict. And this is very detrimental business and really ties in Mr. Cohen with this idea of maybe we will lose our leadership as being the financial center of the world. I think there is a real problem. And part of it is the fault of the courts. And part is the fault of the Congress. I think we can correct this, because it is, and must be a tenant of our philosophy that under the United States Constitution, the United States District Courts are perceived as being open, fair, neutral forums that search for justice and nothing more. Thank you very much.

**Barbara Hackman Franklin:** Thank you now we can have lunch. Thank you very much for such thoughtful, eloquent, candid comments and for such an insight into how the court operates, and again, how important our rule of law is. I am glad you are on the court. Thank you for your service to our country and thank you for being here today. And now a round of applause for our two fine questioners, Rodgin and A.B. That concludes the formal part of our program. Your luncheon will now be served. Please enjoy that and your table companions and thank you for joining us today.