KCF Remarks
Harvard Law School Association Award
October 27, 2018

Dean Manning, thank you for that generous introduction. I would like to express my sincere thanks to Dan Eaton and the Harvard Law School Association for this award.

I also want to thank my wife, Andréa, and the members of my first-year study group (which still gets together annually): Reggie Thomas, Keith Williamson, Judge Fern Fisher, Professor Deborah Post and Professor Charles Ogletree.

As I stand before you today, I must admit that my feeling of overwhelming gratitude is mixed with a sense of trepidation. I'm reminded anew of how anxious I was upon my arrival here as a 1L 43 years ago. Indeed, this is the first time I can remember voluntarily speaking in law school!

[pause]

Back then, neither I nor anyone else would have thought that I would be standing here today receiving this award — just as no one would have thought that I would have the privilege of leading one of the world's largest and most important companies.

But then again, the very fact that I received my degree from Dean Sachs 40 years ago marked an important juncture in what was already an improbable

journey — a sentiment I trust Dean Manning can relate to as a first-generation college graduate himself.

You see, I was born and raised in what was then referred to as the ghetto of North Philadelphia to a father with a third-grade education, who after my mother died, raised three children by working overtime as a janitor to put food on the table while also trying to keep us out of trouble.

Kids from my old neighborhood weren't supposed to go to college, let alone Harvard Law School. But I am here, in large part, because HLS was committed to educational equity and to ensuring that the legal system and profession were broadly inclusive. As a result, it went looking for kids like me — looking because two great graduates of this school, Charles Hamilton Houston and William Hastie, inspired Thurgood Marshall to lead a campaign to rescue the promise of our great democratic institutions from the lingering stains of slavery and Jim Crow which, from the founding of our Republic, had made a mockery of the words carved atop the Supreme Court's marble edifice: "Equal Justice Under Law."

It was the spirit of this crusade that inspired me to go to law school, and it is that same spirit that gives me the impetus to speak with you today.

I believe the very institutions and values that lawyers like Marshall, Houston and Hastie helped preserve are under attack. And I also believe that we as lawyers — no matter our political inclinations or our particular job or career path — have a special responsibility to do something about it.

It is typical on these occasions to talk about how things were so much better 40 years ago. Well, we certainly can't say that about the campus experience here at HLS since we didn't have anything as nice as Wasserstein Hall!

But while we didn't have an amazing student center, we were lucky enough to graduate at what looking back can only be characterized as the "golden age" of reverence for and belief in the efficacy and fairness of law and legal institutions.

Marshall's campaign leading up to *Brown vs. Board of Education*, and the civil rights struggle that followed *Brown*, were not just about securing basic rights for black Americans. They are also about reinforcing a kind of "civic nationalism" in which our sense of belonging is based on our common allegiance to the founding ideals of American democracy -- rather than the "tribalism" that has too long divided us as a nation — and as a nation from the world.

Martin Luther King summed up this ideal of universal rather than tribal humanity brilliantly in his iconic "I Have a Dream" speech on the steps of the Lincoln Memorial. [Interestingly, King had given many versions of that speech. One version was called "Normalcy Never Again" – about how we as a country could never return to an unjust normalcy.]

And we became new lawyers breathing in that heady air convinced of the law's potential to help create a better and more just world.

Some of us went on to pursue careers that were in direct service of this goal as public interest or government lawyers or judges.

But even those of us who went into private practice or business believed in the civic institutions of our society and in our responsibility to support and enhance these institutions to create a more perfect union.

Notwithstanding the problems around us, we firmly believed, as Dr. King said, that the moral arc of the universe may be long but it bends towards justice — and that we had a responsibility to help tug it in the right direction.

In the 40 years since we graduated, we have seen the incredible fruits of this faith, both in the United States and around the world. More and more groups, LGBTQ people, those with mental and physical disabilities, women seeking social and economic equality, many immigrants including most recently “Dreamers” have been welcomed more fully into “We the People.”

And we have seen the creation of enormous wealth and prosperity at home and the spread of our influence abroad.

When we graduated, six out of every ten governments in the world were authoritarian. Forty years later, six out of ten are democracies.

We graduated never doubting that democratic values would prevail. That openness and tolerance would come to be — if they weren’t already — the defining ideologies of the world order into which we were stepping.

We thought these basic values — fairness, respect, tolerance, justice and open mindedness — were hallmarks of what our democratic society would continue striving toward.

For all that we debated when we were here, there were certain things we did not need to debate: The rule of law. Respect for the courts and the role of a free press. The inevitable triumph of democracy over authoritarianism.

But in recent years, this unifying vision of America has been steadily eroding to the point where the viability of our institutions — and the open and democratic society that vitally depends on these institutions for its survival — are at risk.

So what is attacking these institutions?

There are many factors, but I want to identify three:

First, many of us have undercut these institutions by refusing to allow for or trust in our system of governance which is based on the "indirect representation of people."

As we all know, the faith of our citizenry in government itself and the ability of elected political officials to make sound and fair public policies – not overly influenced by special interests -- has declined substantially. And as our social, political and economic divisions have grown, the political center seems less and less a viable place for elected officials to reside. This has

made our politics a bitter “zero-sum game” in which compromise is a dirty word. And sadly, this hyper partisanship seems on its way to draining objective ethics from political leadership altogether.

Consider the deplorable Supreme Court confirmation hearings we’ve just seen and think, that in 1986, Justice Scalia was confirmed by the Senate 98 to 0.

In 1993, Justice Ginsburg, who had spent much of her career as an activist-lawyer fighting on behalf of the ACLU, was confirmed by the Senate 96 to 3.

Back then, many (including the Senators who had the power to confirm Supreme Court Justices) were willing to believe that when those people put on their robes they would actually construe the law the way we were taught to in law school, even though we knew that they had opposite political points of view.

But now some are demanding narrower and narrower “litmus tests” for Supreme Court Justices and other judges as we tend to do for our elected representatives. We want guarantees that they’ll vote “our” way.

Something related has happened in business, with the rise of activist investors.

Some investors are unwilling to allow CEOs and boards to exercise their independent judgment about what’s in the long-term interests of the

company and all of its shareholders. Too often they'd like CEOs to function as the direct agents of a subset of investors, and that tends to encourage a damaging form of short-termism.

This brings me to a second issue: the move toward tribalism.

In the late '70s, we had a great deal of hope for multi-lateral institutions like the United Nations and the World Bank. We thought that if we had certain values, we could overcome the ancient and tribal feuds that divided us.

One only has to look at how the European Union is increasingly under attack by nationalist movements in the member states (e.g., Brexit), or what is happening in American politics, to see the trend toward identification with narrower, more isolationist and sometimes xenophobic groups.

Tribe against tribe is, frankly, the only way of thinking that allows people to justify separating children from parents at the border, and a lot of other things we're seeing in our country and our world today.

And that's compounded by a third factor: our need to be right.

It is hard to bridge gaps in society when it's so much easier to find constant validation of one's beliefs and opinions than it is to be confronted by a different argument or viewpoint. In fact, some of us have stopped listening altogether to alternative views.

You can watch a news network that confirms your point of view, and then see it echoed on whatever social media platform you use. And somewhere along the way, you forget that your point of view is just that, a point of view, and instead it becomes a gospel belief, and those who hold a different point of view aren't just wrong, they're your enemy.

When those feelings become the most important things to us — that is, our need to belong to our tribe and our need to be right — there can be no commonality. There can be no progress. And, inadvertently, we've helped weaken our institutions because those are the places where we enshrine our common beliefs and our common humanity.

Last year, I had the privilege of speaking with His Holiness Pope Francis. One of the things the Pope said that stuck with me was that, "As the head of the church, I have the responsibility for presiding over the customs, the rituals and the relics of the church, including the naming of the saints. But between the two of us, he said, it's probably less useful to think about the world as being divided between saints and sinners. After all, we're all sinners."

He continued, "It's really about the rational versus the irrational and we have to guard against the irrational."

I thought that was an interesting thing for the Pope (the leader of one of the world's largest religious denominations) to say. And a prescient warning.

We all know the line from Shakespeare's *Henry VI.* "The first thing we do, let's kill all the lawyers."

It's often told as just another bad lawyer joke.

But, that's not quite right. As any good textualist like Dean Manning knows, by putting those words in the mouth of Dick the Butcher, a separatist seeking to foment revolution and chaos, Shakespeare was really calling attention to the critical role lawyers play in preserving our basic freedoms and our civic nationalism.

The law is the bulwark between democracy and everything that threatens it – from anarchy to authoritarianism.

It is because of our reliance on the law that we have only fought one war against ourselves — a war that remains the bloodiest in our history. If we are to avoid the risk of being at war with ourselves, we need lawyers more than ever to commit to supporting and rebuilding our democratic institutions and the spirit of civic nationalism that underlies them.

Civic nationalism does not instill itself.

We need to be the defenders, the instillers, the leaders that our country so desperately needs at this moment.

Of course, it's easy to extol the virtues of the law. But in this moment, what is required of us to be its defenders?

I believe we lawyers have a special responsibility to build a stronger civic nationalism whether we are in government or the private sector.

For as long as we've had a republic, there's been a debate about the role of government and how expansive or contained it should be.

But I think we need to think more deeply about the role of government and the responsibility of those who govern to unite us rather than divide us.

To me, government is just the name that we give to the things that we choose to do together.

Put differently, government represents an institutionalized understanding that we have a shared responsibility to one another.

In his dissenting opinion in *Olmstead v. United States*, Justice Brandeis wrote that: "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." Justice Brandeis was saying that the government teaches by example whether or not it means to do so and its example of indifference to the law would, in turn, encourage public lawlessness. Almost 70 years later in *Chandler v Miller*, Justice Ginsburg described this statement, in which "Justice Brandeis recognized the importance of teaching by example," as trail blazing.

Applying Justice Brandeis' logic, we lawyers might describe ourselves also as potent and omnipresent teachers, with respect to core democratic values. In society, lawyers teach their fellow citizens how to understand their rights and responsibilities as members of a community -- their obligations to obey the law, aspirations to fulfill the spirit of the law, and their responsibilities to their neighbors and fellow citizens. Like the government, we lawyers teach for good or for ill and whether or not we intend to do so.

By insisting on more open, accountable and representative systems of governance at the local, state and federal levels, we can help rebuild trust in our political institutions.

And those of us in business also have special opportunities to strengthen civic nationalism.

Most corporate leaders don't want to take public stands. They're much more interested in the pragmatic benefits associated with being non-controversial. However, what these business leaders are missing is the long-term detriment to society that comes from structural disadvantages like poor health, poor education, and even the breakdown of institutions like the press that can create all kinds of problems because of instability.

There is a common theory that corporations owe their sole allegiance to their shareholders. But the best corporate leaders understand that this has never been true — and it certainly cannot be true in an age in which many corporations are as powerful and influential as some governments.

Society gives us a license to operate, and we need to ensure that we are behaving and operating our businesses in a way that brings benefit back to society.

I joined Merck because it was a company that always emphasized its broader social mission and commitment to achieving societal objectives. At its core, Merck is committed to developing lifesaving medicines and vaccines. As it so happens, sometimes the lives that need saving will never be able to afford the cost of those treatments. But that makes them no less worth saving.

And this year we developed the first vaccine to prevent Ebola which has been described by the WHO as a "game changer" in terms of controlling deadly Ebola outbreaks. From the perspective of short-term profits, pursuing inventions like the Ebola vaccine makes no sense given the investment required to yield them. But from the vantage point of Merck's longer-term ability to attract top talent and to maintain our social license, these kinds of actions are key to ensuring that Merck will be as strong 100 years from now as it is today.

The decision to speak out on broader, societal issues is not easy in today's world of business. There are those who say that business leaders should avoid taking stands on public controversies because to do so is to put one's corporate brand at risk. When I decided to resign from the President's business council after his remarks seemingly equated neo-Nazis marching in Charlottesville chanting racist and Anti-Semitic slogans with those

citizens who came to protest them, I had to confront a non-trivial choice. Some criticized my withdrawal as a blatantly partisan act rather than one based on principle. I faced similar criticism from the other side when I joined President Trump's business council in the first place. I thought it was important to participate in the work of our government despite the fact that I disagreed with the President on many issues.

Look at other companies. Things are changing. Businesses are taking a stand in many industries. Now I'd argue, by and large, these stances aren't partisan. They are instead affirmations and expressions of our nation's most fundamental values.

Perhaps that's why Nike made Colin Kaepernick, the former NFL quarterback who took a knee during the national anthem in protest against "racial injustice," the face of their brand and why Hyatt Hotels refused to host an anti-Islamic group. These businesses are not fighting against people, they are fighting for a kind of civic nationalism, and those ideals shouldn't be seen as partisan, but human.

I believe that business leaders have to act bravely, more bravely than we have in the past. We have to earn our societal license to operate. And we have to help re-instill the civic and humanitarian values upon which our very democracy depends.

Americans of good will, like all of you, fervently hope that we will find leaders who can help us bridge the gaps — or really, the chasms — of understanding that seem to make us unable to come to workable solutions

to the problems we face, or even to have respectful conversations about the issues.

And I hope that next week, Americans choose elected officials who understand our history, and have an inclusive vision of our future rather than those who would sow more fear, mistrust and dysfunction within our politics.

Those of us who remember the idealism of our youth might still hold out hope that we will learn to address our differences in ways that promote healing rather than a deepening of long festering wounds.

We want to see "*e pluribus unum*" — out of many, one — be more than a quaint rhetorical relic in a nation that seems more and more like a collection of warring tribes.

When we came to HLS in 1975, due to the tireless work of lawyers dedicated to the public good, including HLS graduates like Charles Hamilton Houston, the promise of creating a common civic nationalism out of the rich diversity of the American tapestry seemed tantalizingly attainable.

Harvard Law School nourished our belief that it was both possible and worthy of our best efforts as lawyers. So, as we embark on the next stage of the lives and careers that will occupy us for the next 40 years (I am nothing if not an optimist!), let's resolve to continue to use the tools given to us. We need to help ensure that HLS and other institutions that form the

necessary foundation of our civic nationalism continue to bend the arc of the moral universe toward achieving the noble goals and values on which this nation was founded and for which we as a diverse collection of rational, fair and free people stand.

Thank you again for this award and for your generous listening.

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