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Stephen G. Breyer

THE PRESENT AND FUTURE OF THE EUROPEAN COURT OF HUMAN RIGHTS

INTRODUCTION OF PRESIDENT LUZIUS WILDHABER*

STEPHEN G. BREYER**

It is a great privilege for me to introduce my fellow judge Luzius Wildhaber, the President of the European Court of Human Rights. That court, as many of you know, is responsible for adjudicating claims filed by individuals and organizations asserting violations of the European Convention on Human Rights. This tribunal is responsible, then, for protecting the fundamental rights of many European citizens against discrimination, unfair trial procedures, and impermissible prison conditions. It would be difficult to exaggerate the importance of this judicial body's undertaking.

President Wildhaber has served as a judge on that court, which is based in Strasbourg, France, with distinction for sixteen years now, holding the top position since 1998. And the administrative responsibilities alone that accompany his job as President are staggering. There are forty-five member states of the European Court of Human Rights. You might be forgiven for thinking that forty-five states does not seem like so large a number because we, after all, have fifty states in America and more than three hundred million people. But those forty-five states in the European Court of Human Rights are nation-states and those forty-five states contain some eight hundred million people. And those eight hundred million people, like our three hundred million, have been known to file lawsuits. Last year, President Wildhaber's court received more than

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** Associate Justice of the Supreme Court of the United States.

forty-one thousand case applications and delivered judgments in more than one thousand cases.

But President Wildhaber is responsible for far more than managing an enormous caseload. Indeed, quite apart from volume, President Wildhaber's position is demanding because the cases that his court considers often address most vexing legal questions. Consider three cases that the Strasbourg Court decided within a single three-month stretch during the last calendar year. In October 2005, the Strasbourg Court invalidated the United Kingdom's voting ban of prison inmates. One month later, in November 2005, the European Court for Human Rights found that Istanbul University was permitted to prohibit the wearing of headscarves. And in December 2005, the court required Turkey to settle property disputes that arose from its military invasion of Cyprus in 1974.

When I contemplate President Wildhaber's legacy at the European Court for Human Rights, though, I think most about neither the size of its docket nor even about the significance of its cases. Instead, I think about his efforts to achieve respect for the rule of law. When a relatively new judicial institution like the European Court for Human Rights issues a decision, there is initially concern that the decision will not be worth the paper on which it is written. There is a very tangible concern that parties will not recognize the legitimacy of the judicial institution that issued the decision. That concern is only heightened when, as is sometimes true of decisions issued by the Strasbourg Court, a judicial opinion determines that a nation-state has somehow infringed upon its citizens' human rights. No nation, I believe, draws satisfaction from being informed that it has violated the European Human Rights Convention. But the question becomes whether the nation that has been told that it has erred accepts the tribunal's legal determination or whether the nation deems that ruling illegitimate.

Our own country has been grappling with a version of this question since its very inception. Acceptance of the rule of law is not an issue that can simply be taken for granted. Indeed, there have been times in our nation's history when the rule of law has resembled more of a hope than a reality. Here, I am thinking of the reaction to a decision issued by the Supreme Court of the United States in a case

called *Worcester* v. *Georgia*[1] during the 1830s. In that case, the Court considered a land dispute between white Georgians and Cherokee Indians. After the case worked its way up to the Supreme Court, the great Chief Justice John Marshall wrote an opinion for the Court validating the Cherokees' ownership claim. But the executive branch had yet to accept fully the Supreme Court's authority to issue binding interpretations of law, and thought that the Court was incorrect in finding that the Cherokees owned the land. This case may be familiar to many in the audience because President Andrew Jackson is purported to have said in response: "John Marshall has made his decision; now let him enforce it." Moreover, President Jackson dispatched federal troops to Georgia, not to enforce the Supreme Court's order, but to evict the Indians.

Despite this setback to the rule of law in *Worcester*, our Nation has gradually grown to accept the legitimacy of judicial decisions. Compare President Jackson's chilly reception of *Worcester* with President Dwight Eisenhower's reception of *Cooper* v. *Aaron*,[2] a case that I remember from my childhood. After the Supreme Court handed down *Brown v. Board of Education*,[3] Arkansas Governor Orval Faubus deployed the state militia to prohibit the racial integration of Arkansas' public schools. In *Cooper* v. *Aaron*, nine Supreme Court justices issued an opinion invalidating efforts to maintain racially segregated educational facilities. Although it is important that nine justices signed *Cooper*, nine thousand judges could have signed the opinion and they still could not have guaranteed the integration of Little Rock Central in the face of the state militia. The executive branch also deployed troops in response to the Supreme Court's desegregation decisions. However, unlike President Jackson, President Eisenhower sent in paratroopers not to subvert the rule of law, but to enforce it. And while that moment represented an essential victory in America's quest for racial equality, it also represented an essential victory in America's quest for the rule of law.

1. 31 U.S. 515 (1832).
2. 358 U.S. 1 (1958).
3. 347 U.S. 483 (1954).

Rolling the film forward to the present day, many people were upset with the Supreme Court's decision in *Bush* v. *Gore*.[4] But while that decision has inspired a wide range of different responses and emotions, I have yet to read about the need for deploying paratroopers. Tracing the trajectory of the rule of law in this country reveals that we have arrived at the point where people will accept the fundamental legitimacy of judicial decisions even if they disagree with the outcomes of those decisions. This acceptance of the rule of law has come to exist only over time in this country. And it is an ideal that is not yet universal.

When one pauses to reflect on how long it has taken this country to accept the validity of Supreme Court decisions, it provides a sense of the daunting task that President Wildhaber has confronted during the last sixteen years. As I noted earlier, the Strasbourg Court has forty-five different member states. Many of those nations have widely differing legal cultures and legal traditions. In addition, each of those nations enjoys a distinct relationship to judicial independence and the rule of law. Under President Wildhaber's leadership, however, the European Court of Human Rights has helped these disparate countries take strides toward realizing a common baseline for human rights.

Building support for the rule of law requires judicial statesmanship of the highest order. The legal community remembers the judges who have performed the valiant work of creating conditions in which the rule of law can thrive. And just as the United States has not forgotten the contributions of judges who have contributed to this process, so the European legal community will not soon forget the contributions of Luzius Wildhaber.

4. 531 U.S. 98 (2000).