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## Corruption, Transparency and Rule of Law

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focused on Latin America, and these are our most extraordinary opportunities. I am grateful to be here today, and I am certainly grateful to have the opportunity to see our Special Envoy MacKay. The idea that the position even exists in the United States means ever so much to the Caribbean and to Latin America. No matter where I am traveling throughout Latin America, if there is an important event, I will know that it is important only because Governor MacKay is there as well. I am always pleased when I run into him because I know that I must be in the right place internationally and for Latin America.

The preceding text is edited from remarks delivered by Secretary Harris to the University of Florida School of Law on May 6, 2000.

## II. CORRUPTION, TRANSPARENCY AND RULE OF LAW

*Kenneth H. (Buddy) MacKay, Jr.\**

JON MILLS, INTERIM DEAN

Now, it is my honor to introduce the fellow that Secretary Harris has been alluding to. Sometimes I feel as though I have known Buddy MacKay all my life, although Buddy is not that old. After an exemplary career in public service to the citizens of Florida, as a legislator, a Congressman, a Lieutenant Governor, and Governor, today, he is the distinguished representative of the United States as the Envoy to Latin America. For over one year, he has served as President Clinton's Special Envoy for the Americas. In this role, he advises the President and the Vice President on hemispheric issues, concerns and works to advance Administration policies.

We are especially proud to have him here today, as not only a Floridian, but a graduate of the University of Florida College of Law.

SPECIAL ENVOY MACKAY

Good morning, I am very pleased to be here. I am energized every time I hear Katherine Harris. I hope the people of Florida know what a tremendous asset we have, and I believe she is providing the model for what this state will be in the future. She is at the center for what is happening in this hemisphere. It is the policy center. Policies will be set in the Capitols. We all understand that. We are not a sovereign nation, we are

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\* Special Envoy for the Americas, Executive Office of the President of the United States. Previous Lieutenant Governor of Florida from 1990 through 1998, and became Governor of Florida upon the death of Governor Lawton Chiles. He served three terms in the U.S. House of Representatives.

a state. Florida will be a place where the transactions take place, and a place where the culture of the hemisphere is expressed and experienced. This is happening before our eyes, and I believe that Katherine's having a great deal to do with that.

A few weeks ago I was in Rio, and I attended a breakfast Katherine hosted. It was a fascinating experience. One of the things cited during the breakfast was a poll done by a business magazine in Latin America. The question on the poll asked CEO's throughout Latin America, "What is the best city to do business in Latin America?" The reply was Miami. It is not just a story we are telling but it is an example of what the people are experiencing who are doing business internationally.

Enclosed in the packet given to you earlier are two pages of charts. I am going to be referring to a report I received this past week from the Inter-American Development Bank called "Development Beyond Economics." It is extraordinary that this report is exactly the topic of the forum this morning. It will be the focal point of what I want to discuss today.

Let me begin with the chart from the packet. I received this information from a briefing held by SOUTHCOM. SOUTHCOM is the Southern Command, and it is being led by a Marine General who many of you have met and worked with: General Wilhelm. He is a graduate of Florida Southern College. He has a broad vision of what the future and what the role of the military in a democratic institution should become. He is making tremendous progress often unrecognized by helping militaries to begin understanding their role as defenders of democracy.

This chart is very interesting because what it shows in the green are the democracies and the red is everything else. The chart describes, beginning in 1958, most of the Southern hemisphere as being democratic. By 1978, it turned around to the other way. Then, in 1998, everything in the hemisphere except Cuba is democratic. The thought provoking part is, in the year 2000, you have got caution in a number of countries that are democratic. If you look at where those caution marks are, they are in the exact same place that was in the red in 1958.

This background sets the tone for the comments I want to make this morning. When I started, almost a year-and-a-half ago, we were congratulating ourselves that the hemisphere is democratic, and the countries of this hemisphere have committed themselves to free markets. We have almost won the battle. Now, we are beginning to realize the battle is not over at all, but the battle is just beginning.

The peace and prosperity we all want will not be possible until we are able to meet the challenge of corruption, transparency, and the rule of law. There are many of you in the audience today whom I know, and I have worked with. You are at the interface of the public and private sector, and you know of the transactions taking place in these countries and across borders. You also realize investors, many of whom you represent, are very

hesitant to commit millions of dollars in a society where people do not have confidence that the system is going to work in a predictable and orderly fashion.

And so, the real question comes down to whether we have the institutions to make democracy work. You start talking about that, not philosophically, but as a practical matter in the everyday world that we live in. These are the institutions that lawyers work with day in and day out.

The relation between the viability of public institutions and the general well-being of society is now being studied in ways that it has never been studied before. We have all instinctively known that there is this relationship between the rule of law and corruption, on the one hand, and economic development on the other. Now, there are econometric studies going on that in many ways are beginning to identify this very closely.

The Inter-American Development Bank this year had, as its major study, the issue of development beyond economics. Let us refer to the three sets of charts from the packet. Figure 1.48 is a bar chart that describes: the gap in per capita income between developing countries and the Latin American countries is \$10,600. The gap is an average figure. In this study, focus is on four factors constituting most of the gap: demographics, geography, the quality of institutions or corruption, and the rule of law. Geography is described in yellow. Geography accounts for \$2,000 of the \$10,000 difference — geographically isolated mountains, and a distance from markets. In the green color is demography. Demography accounts for almost \$2,000, and you all know their dependency ratio has been the highest in the world. There is a huge number of young people and old people and not an awful lot of people working. This does not mean they are not working. Demographically the working group has not been a large group. Therefore, they work it out econometrically and that accounts for another \$2,000.

The remaining \$6,000 a year is caused by the weakness in the rule of law and the prevalence of corruption. We are not talking about an academic issue today. We are talking about the real world, about what must happen in this world and in Latin America. If Latin America is to progress from a Third World status or from a developing status — to what we want today — a trading partner, a First World developed nation.

Progressing backwards in the chart, refer to Figure 1.47. How much of it is related to the issue of rule of law and corruption as contrasted to government effectiveness and regulatory burden? By regulatory burden, what is meant is not what we understand in Florida, but refers to, “are the agencies stifling you with bureaucracy?” What they mean by regulatory burden is this, “is the government committed to free markets?” and “is the government allowing the free markets to work?” Under that definition of regulatory burden, South America is actually doing much better than Asia and a number of other developing areas.

As you look at these charts, the place where Latin America is really hurting is in the rule of law and corruption which is Figure 1.46. In this area, they are worse than everybody except Africa. Now, we have gone from philosophical to pinning the issue down. If we want to see these countries really develop, the issue must get addressed.

Referring to the countries on the chart in the yellow color, we see a lot of the political unrest comes about because of corruption, and a lack of confidence in government institutions. Especially when the people are saying, "we committed ourselves to democracy and free markets, and it's been a decade of that commitment, and we don't see that it's helping the common people at all."

The real issue becomes how to make government work in a way that people have confidence that the institutions are actually helping them. Figures 1.44 and 1.45 from the first page of the handout show very dramatically, you can document and graph these relationships between GDP and institutional quality, life expectancy and institutional quality, infant mortality and institutional quality, GDP and the rule of law, GDP and corruption. I commend this report to you. I believe it is going to change the debate and the focus in a major way.

We will argue about econometric models. Certainly this work goes beyond anything I have seen, and there may be ways this work can be better accomplished. It is clear, until we get the foundations of the rule of law in place, it will be impossible for a society to efficiently develop itself to realize its full potential. No one is interested in investing in an environment in which their investment may be lost without any hope of redress in the courts.

Throughout this region, there is a growing momentum for progress. Trade is the engine which is driving this momentum for progress. Trade and technology are changing things rapidly. We have the ironic situation in Washington where there is discussion about "fast-track" and the question of why Congress will not grant fast-track authorization so we can negotiate more effectively the Free Trade Area of the Americas. But the true fast-track does not have anything to do with Congress. The true fast-track has to do with the Internet. It has to do with faxes. It has to do with cell phones. It has to do with the fact people are now talking to each other across borders, and the thing holding progress back is government.

Yet, the progress that is there is easily undermined by the lack of court and enforcement systems that strike at the ability of people or companies to trust their claims will be fairly heard and adjudicated. At stake is taking advantage of what opportunities at this moment are presented to us. A huge market that can benefit all of the nations of the Americas lies within our grasp. But it is only there if we have the vision to understand it, and we have the discipline to put into effect the reforms that can allow society to gear up to make the most of it.

Katherine Harris spoke a little bit about NAFTA. People are present today who have knowledge and expertise on NAFTA. This is one of the most successful international trade agreements in history. Despite the controversy on the subject in the presidential election context, NAFTA is a huge success. It is a huge success for the U.S. as well as Mexico and Canada.

Many people in this country do not understand that NAFTA is larger than the European Union. This is not a peripheral issue that we are working on. It is currently the biggest free trade area in the world. Forty percent of all of U.S. exports go to Canada and Mexico. Nor do people realize we are well on the road to the creation of the Free Trade Area of the Americas, which will be the entire hemisphere, except Cuba. It will have 800 million consumers, and it will make NAFTA and the European Union look modest in comparison. By 2010, U.S. exports to the Americas will exceed our combined exports to Europe and Asia.

The huge potential market we now have includes the income gap that is now at least \$10,000, and in some of these countries significantly much more money. What is the potential of the Free Trade Area of the Americas if their income grows? The fact of the matter is the potential is unlimited because they are our market. Culturally, they are part of us, and we are part of them. Currently, we have 30 million people of Hispanic descent in this country.

Fifteen percent of the entire population of El Salvador has located to the United States. Fifteen percent or more of the population of other countries of Central America are now in the United States. Their economies would collapse if we sent those people back because their earnings are the biggest foreign exchange resource that all of these countries have.

So the fact is, we are becoming integrated. We are becoming integrated in ways that go far beyond government. I was very pleased to be here last night when Mr. Valdes-Fauli was recognized. He is the patriarch of a very influential family in the State of Florida. His son is the mayor of Coral Gables, and himself a very distinguished international lawyer. Mr. Valdes-Fauli is recognized as a person who came here after a career in Cuba. He had to start all over again from nothing, with nothing. I am proud the University of Florida instituted this program, and some of you in this room were a part of it for eighteen months, two years, in training this group of distinguished Cuban lawyers so that they could, without having really a comfortable grasp of the English language, pass the Florida Bar and practice law in this country making an extraordinary contribution.

This hemisphere is becoming integrated. [In] Miami-Dade county, sixty-three percent of the population is Hispanic, twenty-one percent of the population is African-or Caribbean-America, and the rest of the population is referred to as "Anglo." Some of the Anglos in Miami say, "I'm not Anglo, I'm Italian." or "I'm not Anglo, I'm Jewish." It is important to think

about what is going on culturally, and realize Florida has progressed further into the twenty-first century when compared to the rest of America.

The commitment we make to the issue of the rule of law will decide just how far we can go in this hemisphere. We must aim high. We should not stop until we find ways to make sure the vast potential of the Americas, embodied in its people, is not wasted.

The concept to now focus upon, as I look at this report from the Inter-American Development Bank, which is, after all, a financial institution, and showing through these econometric studies, in dollars and cents, is the fact having to do with the rule of law. This concerns rooting out corruption.

We are at a time when it is highly appropriate that colleges of law advance to the forefront, step across the more traditional boundaries, and ask, "what can we do to lead?" I have discussed with Attorney General Janet Reno and Interim Dean Jon Mills a program operating in Chile. It is a Hemispheric Center for Justice. They are addressing the fact that it is impossible to efficiently handle the drug problem, and problems of international crimes, until a system of justice where lawyers across this hemisphere are better able to understand each other. We need common laws where people indicted in one country can be extradited to another country for prosecution. Extradition in some of the countries of this hemisphere is considered a matter of sovereignty. "Of course, we will not allow one of our citizens accused of a crime in another country to be tried in that country." If this attitude does not change, we are not going to be able to make any of this work. As a result, Attorney General Reno is trying to start an institute which we will work on multi-laterally. The institute will train lawyers, judges, prosecutors, and police in how to make cases, how to prosecute cases, how to appeal, and how to have due process rights that will be dependable, reliable, and understandable from one end of this hemisphere to the other.

I am pleased the College of Law is clearly ahead of the curve. I think this conference is a further indication of what has been going on from Fletcher Baldwin's Center for the Study of International Financial Crimes, which I think is clearly ahead of its time; to Michael Gordon, with his focus on alternative dispute resolution, which is proving to be one of the major parts of the solution in this hemisphere; and now joined by Stephen Powell, a state-of-the-art expert on international trade negotiations, who you will hear leading one of the forums today; and Berta Hernandez, a nationally-recognized expert on human rights. Anyone who thinks that anything is going to get resolved without us paying attention to human rights has not really thought it all the way through.

This is an extraordinary agenda. The real question posed by this IDB study is, "How to strengthen the rule of law?" The final panel today is potentially the most significant of the day and addresses, "What is the Role of the Law Schools?" What is the role of the law schools in exercising

leadership and helping us cross this hurdle now which must be crossed if we are going to reach our full potential?

### III. FORMS OF DISPUTE RESOLUTION IN THE NORTH AMERICAN FREE TRADE AGREEMENT

*Michael Wallace Gordon\**

What are the dispute resolution procedures and why were they formed?

Chapter 19 of NAFTA deals with dumping and subsidies  
(Handled inside NAFTA)

Chapter 11 of NAFTA addresses investment disputes  
(Handled mostly outside NAFTA)

Chapter 14 covers resolution of financial disputes (If non-  
investment, moves into a Chapter 20 framework with  
possibility of Chapter 14 characteristics, using panelists with  
financial experience. If an investment financial issue, it goes  
outside the Chapter 11 process)

Chapter 20 of NAFTA deals with all other disputes (Handled  
inside NAFTA)

All of these dispute processes, except the investment procedure, are processes where the *government* is challenging another *government*, referred to in the NAFTA as a Party. In the case of dumping under Chapter 19, it might be the U.S. government that has stepped in on behalf of the U.S. industry. In the case of Chapter 20, it is also the government that has stepped in, challenging the action of another government. The same is true in the financial dispute area, unless the dispute involves a financial *investment*.

Contrastingly, Chapter 11, which deals with investment, allows a *private* individual to bring an action against another government. Chapter 11 is proving to be a very serious problem within the framework of NAFTA.

Why were these dispute resolution procedures created? There is a fairly easy answer. If we did not create some kind of *international* resolution to these trade disputes, they would be dealt with by *national* courts. For example, if the dispute involved questions of dumping or subsidies, or other interpretations of a Party's trade law, national domestic courts would have to resolve the dispute. That might not be perceived as satisfactory to the foreign parties. Even though the domestic courts may function very well, there is often a perception of national favoritism. The NAFTA's dispute

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\* Chesterfield Smith Professor of Law at the University of Florida Levin College of Law since 1968.