

THE BROOKINGS INSTITUTION

THE COURT IN THE WORLD:
THE FIRST ANNUAL JUSTICE STEPHEN BREYER
LECTURE ON INTERNATIONAL LAW

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Introduction:

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P R O C E E D I N G S

MR. TALBOTT: Good afternoon, everybody. While these two gentlemen get mic'd and ready, let me say a word of welcome and a little bit of background on what is going to be, I think, a terrific afternoon.

I'm Strobe Talbott and it is my great privilege and honor to welcome all of you to the inaugural Justice Stephen Breyer Lecture on International Law to be delivered by its namesake. And what could be more appropriate than that?

We here at Brookings are very grateful to the Netherlands Embassy. Thanks particularly to Ambassador Bekink and we're very glad that you could be with us, as well, Madam Bekink. And thanks also to our co-hosts, The Hague Institute for Global Justice, and its president, Abi Williams, who will be conducting a conversation with Justice Breyer after he makes some opening remarks. I said to Abi earlier that we'd like to think that among the things that we work on here at Brookings is global justice, so it's particularly appropriate that you and your institute would be part of this program.

I would also like to acknowledge somebody who could not be here today and that's Jozias van Aartsen, the mayor of the Hague. He is somebody that I had the honor of working with back in the 1990s on some very tough issues, particularly in the Balkans. And he was, at that time, the foreign minister of Netherlands. Jozias was, in a very real sense, present at the creation of the idea for this lecture series. He took part in a couple of events here at Brookings that were intended to bring the work of the international courts and tribunals that are headquartered in the Hague to the attention of the Washington policy community.

So, Mr. Ambassador, I hope you will tell Jozias that he's here with us today in spirit. He might be having even more fun here today than back home since he's dealing with the politics of Europe at this moment.

Now let me say a few words about our honoree and our lecturer. I think many of you here in this room know that Justice Breyer has been, in an institutional sense, a unique friend to The Brookings Institution. And for quite a number of us here in the room, he has also been a very important personal friend indeed, and that certainly goes for Joanna Breyer, his wife who is also with us this afternoon.

Justice Breyer's first book, *Energy Regulation by the Federal Power Commission* -- (Laughter).

JUSTICE BREYER: Sorry.

MR. TALBOTT: That's the first of many laughs you're going to get this afternoon, I promise you. A scintillating title. You may remember the movie that was made out it. (Laughter)

It was published by The Brookings Institution Press in 1974. So flash ahead 40 years to yesterday. Justice Breyer cited one of our own scholars, Tom Mann of our Governance Studies Program, in his dissent on the *McCutcheon* decision, which has gotten, deservedly, quite a bit of attention. Over the past dozen years, Justice Breyer has spoken in this auditorium and at other Brookings events many times. As many of you know, it's always been a unique experience for the audience. He's not just a great jurist. He is also a great teacher, so be prepared to learn something over the next hour and a half, not just about the law, but also about how a fine mind works.

The internationalization of law is a subject that Justice Breyer has been thinking about for a long time. Two years ago, he gave our annual Raymond Aron Lecture on that subject, together with Mireille Delmas-Marty from the College of France. What we will hear today will give us a preview of what may well be his next book, still in gestation, that might well be titled, as is his lecture, "The Court in the World." Justice Breyer will set forth some of the key aspects of his thinking on this very important subject

and then Abi will moderate a discussion before opening it up to questions from all of you.

A technical note here. In the old days, I would always end these introductions by saying please turn off your mobile devices. You can keep them on as long as they're silent and as long as you Tweet. And if you would like to engage in the conversation that will now take place in the Twittersverse, please use the hashtag #justicebreyer. (Laughter)

Do you know what a hashtag even is?

JUSTICE BREYER: No.

MR. TALBOTT: Which gets to my next point. That may lead some of you to wonder if you can follow Justice Breyer on Twitter. And I checked that out this morning and, sure enough, if you put in @justicebreyer, you go to his home page. There he is, big smile on his face, in his robes. But then I looked more closely and saw that he has only 11 followers. (Laughter) And he's following about six people and he has exactly one Tweet, which is considerably shorter than 140 characters. It reads, "Dammit, Clarence." (Laughter) I'm not making this up.

And then in very small print there's a disclaimer, I think you would call it. "Parody account; no affiliation with" the man that it is now my pleasure to introduce to you, the real, the honorable Justice Stephen Breyer. (Applause)

JUSTICE BREYER: Thank you. And thank you, Ambassador, for coming. The Netherlands is tulips, bicycling, the Hague, schmaltz herring, and justice. Because when you go to the Peace Palace, you suddenly think it's a beautiful building. Carnegie gave the money for it in 1914, 100 years ago. And architecture so often tells us what people are thinking and what they value, and he didn't get it quite right. There wasn't peace for quite a long time, but he really meant that this is the start of or it's the continuation or it's really going to symbolize the work of thousands and thousands and

thousands of people, and that's pretty much what it's done. So we have your institute, we have all of the different people working on this. It's a slow process, but thank you for being involved in it and thank you for lunch and for being here.

And Strobe, what am I supposed to say about Brookings? He keeps bringing that up every time I'm here. It is a Brookings book called *Regulation by the Federal Power Commission*. That was the regulation of energy and it's a really interesting book. (Laughter) And I continuously refer to it every time I talk here. And despite my continued references, at last check it was number 2,873,900 on the Amazon.com list. But thank you, Strobe, and thank you for your introduction. You had me worried for a minute. I don't actually have a Twitter account, but, nonetheless, maybe I should, I don't know.

I'm going to talk about international -- no, I'm not. You see, I'm not an expert on international law and I'm not an expert on the law of other countries. But I have spent a certain amount of time working as a judge in our Court, so really what I want to do is talk from my point of view as a judge on our particular Court. And I want to explain to people how the work has changed in what some call -- it's not a very happy word, but it's all right -- transnational law, meaning law of other countries, international law, why that has become part of my life, and I want to explain how.

And I want to say when we first went off to Europe, which our Court does from time to time, it goes to other places on exchanges and we hear other people and we talk to them, and I came back, I thought it was pretty interesting. And I said to I think it could have been, if Claudia Grossman's here, it might have been at AU, I don't know, but I said, well, it was very interesting. We learned a lot of useful things.

And a man from Finland, who was a professor, got up and said name one. (Laughter)

So I thought for a minute or two and I did come up with something. Well, that wouldn't be so hard to answer today. The number, if you look at the docket -- and that's what I'm really talking about, our docket -- has increased, and I want to tell you what it's like and I want to tell you a few of the questions that we have to answer. And, of course, part of my motive for doing this is that there's a tremendous political issue. A political issue is best illustrated when I was, a few years ago, on a panel with one of the Republican congressmen from Virginia, who was very good, I mean, a very thoughtful person, and there were some professors and some others, how those things normally go. And he, at some point, launched into what I would call pretty strong criticism of referring to other countries' courts. And I said, I guess that's aimed at me.

And he said, yeah. He said, it is actually.

So I said, well, you know, let me tell you, they don't bind us, what other countries do. It's not binding, but they have problems like we do and they're similar and they have constitutions more and more like ours and trying to protect liberty and trying to protect a democracy. And they have jobs where the judges have some role to play. So if I have a person with a job like mine, problem like mine, you know, a Constitution like mine, why don't I read what he says? I don't have to follow it, but why not read it? I might learn something. I thought that was a great answer, you know, brilliant.

So he says, yeah. He says, go, read it. He says, great, just don't refer to it in your opinion.

So I said, oh, okay. Then not knowing when to quit, you know, people who are elected to office know what they're doing quite often, and I said, well, look, many of these countries have courts that are newer and they don't have the same degree of prestige. They refer to our cases, we sometimes refer to theirs. Then they can go to their legislators and they can say, you know, what we do is important, please pay us this

year, or some such thing, and that's an important thing.

He says, fine. He says, that's fine. He said, send them a letter.

So I realized I'm not going to win this debate until I figure out what these people who are thinking about this politically, what are they actually concerned about.

And I think, though I don't know, that that's who I want to talk to in this book. Because I think what they're concerned about is that they see a world that's changed a lot, and indeed our docket has changed a lot, and they think we have something uniquely American. Well, that is not a surprising thought. You can go back heard Madison and Madison described our Constitution and our federal government. He says, "The Constitution is a charter of power granted by liberty, not," and he's thinking, as in Europe, "a charter of liberty granted by power." You see, what he's thinking is the basic condition of the American is freedom and they grant to the federal government a power to do something. But if it's not granted, they can't do it. The difference were it Louis XIV, et cetera, controls the power and grants liberty. Whether or not you end up at the same place, the starting places are different, and you can see that reflected often today in the law.

So they have a point. And what I want to say to them and what I'm working on, and we'll just give you a sketch of it this afternoon, I want to stay to them I see if you're worried. Lots of Americans are worried. But I'll tell you something. Whether we refer to or don't refer to questions that come up abroad or answers that foreign courts give or what the law's like in some other places has nothing to do with what you're worried about. It is the world that's changed and our docket has changed.

And if you want to preserve -- I'll come back to this because this is really the conclusion, then you can leave immediately, but the conclusion is if you want to preserve our American values, you better learn something about what's going on

elsewhere because that affects directly what we do. Now, of course, nobody's going to accept that who doesn't already believe it, so I want to give a few examples of kinds of very serious questions that we face where, of course, it's helpful and sometimes necessary to know something about what's happening somewhere else in the world. And I will say I've picked out maybe -- if 20 years ago there were 2 or 3 out of a docket of 80, I would say the number's closer today to 10 or 15. That's a very high percentage where you have to know what's going on in some place or it's extremely helpful. Let me give you five kinds of problems that we face.

One, something that's absolutely classic. It's been around for 200 years at least, certainly 100, and that is what people refer to as the conflict between civil liberties traditionally defined and security. You know, everyone knows that. It's almost trite. And this document, the Constitution, gives to the Congress and the President of the United States the duty as well as the power to worry about our security. It doesn't give that duty primarily to judges. But it does give to courts, as they have evolved, responsibility to see that basic liberties as defined in the Constitution are not infringed.

And so what happens when these conflict? Well, there I can go back into history. You know, I can say we've had some sorry examples and some not so sorry, but, nonetheless, I can tell you the state of the art. And it's so surprising I can tell you the state of the art, but I spent a little bit of time reading on this and I'll give you a hint of what the state of the art is, in my opinion.

First, you go back to the Civil War and you will see, and perhaps necessarily so, but sometimes not, Seward, who was the Secretary of State, saying to his colleague, the British ambassador, you know, he said, I can push a button on my table over here with my right hand and have a man arrested in New York, and I can push one over here with my left hand and have a man arrested in Illinois, and no one can free them

unless they get to the President of the United States. Can the Queen of England say as much?

Hmm. Well, you say, necessity. Yes, perhaps. But when it came to the Supreme Court, it didn't get there cases raising this kind of thing really, really directly until after the war was over.

The government argued one of four possible positions on this issue. What they argued was the position taken by Cicero about 2,000 or more years ago and he said when the guns roar, the laws fall silent. Now, actually, he didn't say that because someone pointed out to me exactly like that because there were no guns at that time. (Laughter) Nonetheless, he said something like it.

And that's what the attorney general argued to the Court. Because, they said, the military and no one else has the power to arrest several people, one of whom was named Milligan and became famous because of this case, in Indiana, who, he said, were leading a conspiracy. Well, the Court unanimously said, I'm sorry if the civil courts are open, which they were in Indiana. You cannot try this American citizen in the military. So they rejected position one.

Well, what is the position then? We know one was rejected, but we don't know what it is. Let's try two, which was certainly dogma for many years.

There's something called the political question doctrine. And the political question doctrine has many forms, but I simplify it greatly. I'd say, Judge, don't get involved where there's too much of a political question. You say what's that? Well, that's to be decided, dah, dah, dah. Okay, that's typical legal dah, dah, dah.

But I had a little experience with that a year or so ago, where we had a case involving a statute passed in Congress that said if an American citizen who was born in Jerusalem applies for a passport, the Passport Office has to put in the passport

“Born in Jerusalem,” as he would say, comma, “Israel.” And the President said I’m not doing that.

And the person sued. And he said, but the statute says you have to.

And the President says, this kind of thing is up to me. Congress has no business there.

And my own thought was I don’t want to get involved in the war between -- if there’s something that is political, it is going to be the condition and the circumstances and what goes on when you do something one way or the other here. And in Palestine, that is a political question if I’ve ever seen one. And I wrote that down and you can read it in better terms. And you know how many people agreed with me? Nobody. (Laughter) All right. I’m used to that.

But you see, not quite. I mean, Justice Sotomayor agreed sort of in part. But I said, well, what happened to Frankfurter’s political question doctrine? He would have loved it, but, I mean, he isn’t -- all right. But anyway, you see it’s pfff. Not quite. Nothing ever disappears in the Supreme Court, but it does get submerged sometimes. So I don’t think you can rely on the second.

Well, there’s the third position and the third position is to say we will review this. We have the power to review what the President does in a security matter where civil liberties are involved, but I’ll tell you what, the President always wins. That’s a parody, but it’s a parody of a famous decision, *Curtiss-Wright Corporation*, where the Court said Congress can delegate to the President the power to declare something a crime. Remember, the Congress isn’t saying it’s a crime, the President is, and he said it’s a crime to sell weapons in the Chaco, which I didn’t know where it was, but it’s somewhere between Paraguay and Bolivia, and there was some kind of war and they prosecuted people and they threw them into jail.

And those people said you can't have a President making up criminal laws as he goes along. Congress has to do it in writing. Congress can't delegate an open-ended thing like that to the President, you know.

The Court says they can. But what's interesting is which court? This was the New Deal anti-New Deal. This was the Four Horsemen. These were the people that didn't think that you could get any power overstated, but they were against delegating power to the President, but they said here you can. The President's in charge, you're not.

Then we had some experience with that. We had the experience in World War II, where we threw into jail -- no, internment camps 70,000 citizens of the United States of Japanese origin. And the Court said that was okay. Pfff.

And who? Black, Douglas, Frankfurter, the people who later wrote *Brown v. Board of Education* or signed it. I mean, amazing.

So I think, well, why did they do that? And the reason they did it is they're thinking as follows: Well, somebody has to run this war. I mean, by the way, it was 1944. By that point, there was no danger from the Japanese invasion, but they're thinking somebody has to run the war. Either Roosevelt runs it or we run it. And we can't, therefore, he does. Therefore, *Curtiss-Wright*. We're not going to overturn him on a security matter.

But there was a pretty bad reaction to that case, and I think properly so. It was not a happy case.

And now you get the two most recent cases, one of which was a long time ago, and that's the fourth position. And the fourth position was the position, I think, of the Court in the steel seizure case. Some of you will remember or have read about where President Truman during the Korean War seizes the steel mill. Why did he seize

it? Because he didn't want a strike. Well, why not let them strike and stop the strike?

You try to stop a strike where the workers really want to strike.

Now, he was nervous about doing that. So he said, I'll seize it, give them the pay raise, and then they'll stay at work. And they had the whole cabinet coming in and saying if you don't let him do that, Mr. Justices, if you don't let them do that, we might lose the Korean War. This is critical, important, and you have to let him do that.

And the Court struck it down. They struck it down. And I've read it pretty recently and gone through it in some depth. My own opinion? On what basis are they striking it down?

Well, the classical basis is you read what Justice Jackson wrote and he said, well, the President may have power when Congress goes along with him, he may have power when he does it on his own and Congress says nothing, but he doesn't have power to do this here where Congress forbids him to do it. There was only one problem with that argument, in my opinion: Congress didn't forbid him to do it. Indeed, you can suggest that Congress went along with it.

So what's actually going on? Well, what's going on, I think, is the Court is saying don't go too far.

Now, why do I say? Because if you're interested, read four opinions on Guantanamo, and what is the theme of that, where every one of those cases was decided in favor of the detainee and against the President. My own view is that the line that is the key line was what Sandra O'Connor wrote when she said the Constitution does not write the President a blank check. No, no.

You say, well, surely, it said more than that. That's a 4th of July speech. Oh, did it? All right. That's where we are. No blank checks.

And how you compare the other three positions and you might say, well,

we're glad we're there. All right? But the Court has been criticized for not going further. And why does it not go further? Again, my opinion, because it doesn't know, that's why.

Now, look where I am. That's the biggest problem. You're having nine human beings over there. They're not nine computers and they are not experts on security and they are not experts on foreign relations, but they do know that the President and Congress sometimes go too far, so they write that. Well, we're now in a world where, in fact, security problems are international and they come up in all kinds of different forms. And we're also in a world where not everyone, not every country has the same system for dealing with it. And maybe we can learn something.

I mean, Japan has decided, I'm not saying we should do this, but Japan has decided to put a foreign policy expert on its Supreme Court, someone who was a legal advisor in their equivalent of the State Department. England decided, and then it was struck down, but they decided in similar situations that they wouldn't give certain people suspected of terrorism a lawyer. No, they'd give them a lawyer, but they wouldn't let the lawyer talk to the client.

You say, well, why not? Obviously they should. Oh, really? They thought any conversation between the lawyer and that client might lead to somebody saying, well, tell my mother I'm fine and that means blow up the Piccadilly Circus or something.

And if you think that's just a made-up problem, put yourselves in the shoes of the Israeli Supreme Court, where they really have problems like that, and where they've tried to develop a system where if you can show to the judge ex parte that communication is not desirable, and the judge believes it, you can hold him for a while ex parte without communication, but then you have to come back two days later and explain why it's still necessary. And you keep having to come back, and each time it's harder for

the government to show it.

So there are many systems in the world, there are many problems, and we have a problem: What is the content of blank check, no blank check, don't go too far? And I call that first problem, and that's just the first one -- and as you can see, it comes up quite a lot -- I call that the problem of how do you give to these people who are not experts the necessary foreign intelligence, domestic security, whatever it is, information so they can make sense out of this decision?

All right, problem two. Again, right on our docket, a case called *Kiobel*. We're living in a world where more and more you are seeing human rights become an international issue. I mean, we're all against torturers and we're all against genocide. But here, in a sense, the United States is out in front because it has a statute called the Alien Torte Statute, which says any person who is harmed or injured by a violation of international norms or international laws or international law can recover damages in an American court. So the victim of the torture in Paraguay, if he can find that torturer in the United States, even though he's Paraguayan, can go into court in New York and sue that individual and get damages.

Well, what was this statute on the books for? It was passed in the 1790s. Why? Because, in fact, pirates, that's why. And the rule at that time, in the 1790s, was if you find a pirate, you hang him. By the way, if he has any money, get that first. And when you get that first, any victim can come and sue and get rewarded, get the money. Oh, that's where that statute came from.

So now we have the problem of saying who are today's pirates and how does this work? And you can it's fine, it's fine, the sky's the limit. Go over there and if they show a violation of international law, give them money. And, of course, if we do it, others can do it.

And you say, well, it's a wonderful thing in Spain that, in fact, the judges there said Pinochet should, in fact, be sent back because he violated international norms, so we'll send him to Chile. And then you can say, and it's a fine thing that Secretary Kissinger, when he goes to Belgium, is going to be arrested. Oh. Oh, yes.

And what about Israel? And what about unpopular regimes? And what about and what about? Now, do you see the problem? The problem is to interpret that statute in a way that everyone can apply it without running into each other.

Now, that's not such an easy thing. And if you want a sentence that describes the problem, I would choose the sentence there is no Supreme Court of the world. And since there isn't, you have to have a legal system that can operate under those circumstances.

And I can tell you the word that solves the problem. The word that solves the problem is a technical legal word. It's called comity. And that technical legal word, which you often read, means what Senator Kennedy used to say to me and Ken Feinberg when we worked for him, and we came up against something we'd want to renegotiate with the Republicans, he'd say work it out, work it out. I'd say how do we work it out? He'd say that's your problem. (Laughter)

Okay. That's what comity means. Now, that's a little bit of an exaggeration, but you see our problem? How do we take this statute?

Well, I say it applies to torture. Certainly, fine. Genocide, certainly, yes. And beyond that? Maybe. And to what extent? Maybe. And how? Well, we've got to get it to work out. And if you think that's a problem, it's not just a problem in the area. It's not just a problem in the area of human rights.

Plaintiff, Ecuador; Defendant, the Netherlands; Case, anti-trust damages. Where's the suit? New York. Why? Treble damages, that's why, probably. I don't want

to -- nonetheless. (Laughter)

Does the American law allow you to sue in New York? Well, to answer that question we better know what goes on in Europe. And the EU files briefs, they tell us what's happening. So does France, so does Japan, so does Germany, so do a lot of places. But we, if we're going to solve that technical, jurisdictional, statutory problem in the United States, have to know what's going on elsewhere. Same kind of problem as with the human rights area. It's called comity.

Fourth, how do we interpret treaties? No, let me be more specific. Let's take a treaty that, in fact, has been signed, ratified, but it doesn't say whether it automatically becomes internal law in the United States. You see, we're a domestic court. We enforce domestic law, which may, of course, pick up international law.

But, I mean, the treaty in question, of course, was a dramatic question. It said that you have to tell people whom you arrest who are citizens of a foreign country, like Mexico, that they have a right to see their counsel. That's not legal counsel, that's their political -- it's you. It's the ambassador. And they have a right to see them. And, of course, in Texas -- and I say "of course," please strike it. In Texas, they happen not to tell the defendants of that right, probably because they didn't know, and the person and several from Mexico were convicted and sentenced to death. And they go to the Hague; they're in the International Court.

And the International Court of Justice, by the way, we had signed another clause to the treaty where we said that they have the last word. And they gave the last word. They said we have to have a hearing. You see, Texas has to have a hearing or somebody has to have a hearing in the United States to see if this individual was prejudiced by the fact he wasn't given this information.

And, of course, the President of the United States, President Bush, wrote

a letter to Texas, and said do it, give them a hearing. Well, Texas being Texas, said no.
(Laughter)

So the question comes up to us. Is what I just told you part of our domestic law? We split on it, and I thought it did, but, sad to say, the majority thought it did not. But the rights and wrongs of that case are not at issue. The question right before me right now is, well, how do we decide?

And I had my law clerks look up every case like this in 1790, and they found quite a few and they found an answer which was given by John Marshall. He says to see whether it's internal law without Congress acting -- I mean, of course, they can make anything they want internal law. I mean, not anything, but they could have made -- but they hadn't acted except to ratify the treaty.

Here's what you do, says John Marshall, read the provision of the treaty. Then if it's something that seems addressed to judges, i.e., it's pretty technical, it's automatically internal law. And if, on the other hand, it seems political, like stop the war, bring back the troops, or have a base or something, it's not internal law, it's addressed to the political branches. I'm oversimplifying things, but that is what John Marshall said and I thought that was a very good rule. And I got all these cases together and we all did quite a lot of work over there and got them all in to a dissenting opinion.

And by the way, I then find within the next eight months, I was at some meeting somewhere and I described this. And the man who had formerly been foreign minister of the Netherlands gets up and said, but that's our rule. Now, I promise, I looked through a lot of treatises and my law clerks certainly looked through more, and they didn't find anybody that said that. Now, you see what I am saying. This is a problem for our treaty negotiators. And it still is because they can negotiate something into a treaty that says that it should be internal law, but they're not used to doing that, at least not too

often.

So how do we decide? And by the way, it's not just the death penalty that sits in front of us. It's a question of how to interpret treaties, and treaties are very often in front of us as the relevant source of law in a particular case. So my oversimplification of the problem here is how to get the treaty negotiators and the legislators on the same page, and that's a big problem.

And I'll tell you a fourth problem related to that, and it hasn't directly hit us yet, but it likely will. I mean, treaties today are very often -- very, very often -- not of the form you do this and I do that, then I do this and that, and you do that and this. Rather they are of the form let's create an international organization, like the ITO or maybe the International Health Organization or some other organization, and that treaty will say we'll have a little bureaucracy here. And those whom we call administrators or some call bureaucrats are going to write a lot of rules and those rules will bind the nation.

And now suppose they become internal law. Are they effective? I mean, the House of Representatives didn't pass them. I mean, the Senate ratified the treaty. It's a win. And suppose they have a power that they give to Congress that the Constitution didn't delegate to it? Another question rising there.

And how will we deal with -- and by the way, if we say they don't count for anything, how are we going to get together and solve problems like environment, like commerce, like -- and I can name a few others? And Strobe does in his book, by the way. And how?

But if you say, oh, hey, they're just like domestic law, well, wait a minute. I mean, what happened to the Constitution's power delegated to Congress to make the law of the United States? And where are we? In my own mind I've never had to face the problem directly yet, though aspects have come up. We're at a point that's rather like the

Supreme Court facing the New Deal. They had something called an administrative agency and they never really grappled with it before. And in opinions like (inaudible) or *Crowell v. Benson*, I mean, great administrative law opinions, suddenly the Court, for the first time, comes to grips with a very difficult new entity. And it has to figure out a way, which it did, to integrate that entity into the constitutional system we have.

Well, there are others. I mean, there is a fifth problem we just had. *Kiobel* -- not *Kiobel*, but I can't remember the case. I wrote it down, the copyright. What was copyright? We had a student from Thailand and he went to Cornell. And lo and behold, he discovers that his textbooks are expensive, but he remembers the same textbook in English is on sale in Thailand for about half the price. He has a great idea. He tells his parents send me one. And then he has a better idea: send 10, I'll sell them to my friends. And then he has an even better idea: hey, send 10,000, I'm going to sell them all over the place. And the question is, does that violate the copyright law?

Well, there's something called first sale doctrine and it's really technical, written into the statute, where we're going to find an answer to this question. And suddenly, I start looking at the briefs and we have briefs from all over the world. And when I want to find out why, it turns out that we can't answer this question without knowing something about copyright law in a lot of different places and how it works together. And by the way, we are told that over a trillion dollars, well over a trillion dollars of international commerce is at stake. That's the world. All right?

I could give you other examples, but I they're enough so you see the point. And in each of these instances, whether it's how to get the right briefing, how to get the right intelligence, how to get the treaty writers to focus on our problem, whether we are really faced with something that only arose once before in the New Deal. How do we decide these problems where security and civil liberties conflict?

How we answer those questions is important. And maybe you want a little more from us -- maybe, maybe not -- than simply saying don't go too far. That's a judicial way of saying I don't have a clue what the answer is. But you see the problems? Now that's what's in front of us and that matters how we answer those questions.

And there's one other changes that's taken place a lot in the last 20 years. I find that I am more of a diplomat -- I'm not a diplomat, but judges see each other from different countries. I actually, in the last few months, saw several judges, quite a few Ouagadougou. Try the eighth grade on where that is. And it's important to them and it's important to us what Burkina Faso does with its judicial system and certainly South Africa and certainly Maputo and certainly France and Luxembourg and they're talking to each other. And whereas the conversations 20 years ago were like my day at camp, you know -- I call it my day at camp -- I do this; oh, I do that; I do this. No, they're not like that now.

There are substantive conversations that we had with the court from the EU in Luxembourg. And there are substantive conversations when the Supreme Court of India comes and decides to spend a day with us or two and have an agenda when we're talking about substantive law. And what's going on? What's going on? Because I see it in the way of the cases. I see in the way of the people I meet. I see it in the subjects they bring up.

What's going on is I would call it a gradual weaving of a rule of law. Because from a judge's point of view and a lawyer, rule of law simply means the opposite of the arbitrary. The arbitrary is that which is capricious, it's that which is irrational, it is that which is tyrannical, despotic, autocratic. And the rule of law is supposed to be, and sometimes is, in fact, normally, the opposite of that.

And these judges don't even have to talk to each other, but they're

working on it. We're not political people. We aren't. We are technicians. When I tell them that, they agree. We're technical people. We're professional people. And the professionals are sort of weaving this web. And gradually, I think we make progress, but I usually call it like Penelope weaving her bridal gown in *Ulysses*. You know, you weave it during the day and somebody unravels it at night. And then you try to make a little progress and maybe sometimes we do.

And then if I'm in a French-speaking country, it depends, I'll say to them, you know, it isn't just the Magna Carta. That's easy. All you have to do is start talking to an Englishman about the Magna Carta and tears come to their eyes. (Laughter) But it's not different if you're in a country that has the Code Napoleon. I mean, I'll usually say to them read Camus, which I like. Read *The Plague* because he writes a great book. It's about the plague coming to Iran, but really it's about the Nazis coming to France. And they survive the plague, but at the end he has Dr. Rieux, who's the hero, and he says now why am I telling you this story? He says, I'm telling you because I wanted you to know how these people struggled. I'm telling it because I want you to know what a doctor is. A doctor is somebody who helps somebody without having too much theory. He just goes and helps. But he says, above all, he says, I'm telling you this story because the plague germ never sleeps. It goes into remission. It stays there and lurks in the hallways, in the file cabinets, in the cupboards, one day to reemerge and to reawaken its rats and, once again, send those rats, he says, for the education or the misfortune of mankind, forth into a once happy setting.

That, I say to the judges, that's why we're there. We can't stop them, but we are and more and more countries have seen that a rule of law administered in part through judges, lawyers, et cetera, is one possible weapon against the day which all too often is a day when we see those rats reemerge and the germs send them once again

into our once happy setting. Well, that's what I do in this area and why I do it.

Thank you. (Applause)

MR. WILLIAMS: Well, thank you very much, Justice Breyer, for that stimulating and thought-provoking set of remarks, but before I proceed to the questions let me just say what a great pleasure and privilege it is for The Hague Institute for Global Justice to be co-hosting this event with Brookings. We're a young and vibrant think and do tank in the Hague and, of course, Brookings has been a source of inspiration. And I'm also deeply grateful for the strong support that we have received from the government of the Netherlands. Thank you, Ambassador. And of course, from the municipality of the Hague, whose mayor is Jozias van Aartsen.

The format for this afternoon's discussion will be as follows. I will pose an initial set of questions to Justice Breyer to frame the conversation. And then I will provide an early opportunity for you the members of the audience to engage with Justice Breyer. I will take the questions in groups of three to maximize the opportunity for discussion.

Justice Breyer, you said at the outset that if we want to preserve American values we have to know what's going on around the world. Is there such a thing as global justice? And if so, is this something with which American judges should be concerned?

JUSTICE BREYER: Yes, there is. But it doesn't necessarily mean we're going to have Immanuel Kant and universal rule of law. I rather was taken, as I said, Strobe wrote a book which I read, which is where he talks about it, and that's the experience I have, that on different problems, different nations get together in different ways through different institutions and sometimes they can set examples. And I think that's just sort of what you see in the area of law, as well. You see that for certain kinds

of problems you will find cooperation over here helpful and you'll feel that you can -- for example, proportionality, very much a European notion. I read about it, the technical matter, dah, dah. But I find it pretty useful, in my opinion. I'm not going to find that necessarily in Japan. I'm not going to find it in some other place. That has nothing to do with whether you're for human rights. It has to do with how you write certain opinions in certain areas, many of them involving human rights.

You might get some other group in some other place. But the goal, I mean, that's where they put it. In the Bible, you know, justice, justice shall you pursue. I don't think -- I think that's natural to people. I think, of course, there is no group of people that does not want justice. And I can't prove it, but it's ancient and it's everywhere. And people everywhere recognize that it's an ideal and they want to work for it. That's why they support the rule of law. So that's pretty obvious and I can't really go much beyond that.

MR. WILLIAMS: Following up on the argument which you've made about the importance of international law and foreign law for American jurisprudence, has the relevance of international and foreign law in the rulings of American courts grown in credence over the past decade?

JUSTICE BREYER: Absolutely. Absolutely. I mean, I've only given you a few examples. I mean, why don't we try the Hague Treaty on the abduction of children? We just had a very difficult case in that area. Or what about the Warsaw Convention in respect to airline liability? I mean, we've had several on that.

It's sort of what I'd call the hardest -- not hard in the sense of difficult, but, I mean, hornbook tough, law school class law involves much more than it did. Treaties? It can involve an effort here to apply the law in some -- all you have to do to get a law of some other place to apply in many courts is you write a contract. And in the

contract the parties specify that the law of X will apply. Well, when commerce becomes more and more international, you'll get cases like that.

I just wrote a case, I'm very surprised that everybody here hasn't read this really, but it's a question -- this is the question in the case of what happens when a country enters into a treaty providing for fair treatment of investors, particular provisions, and arbitration to resolve disputes in that. And where they have a procedural precondition of a certain kind, who is to give that an initial and weighty interpretation, the arbitrator or the judges? Who do you pay more attention to? Should the judges give weight to the arbitrator's decision? It's amazing you haven't read that case.

But you see, technical, detailed, but important to investors, and right in front of us two weeks ago. I mean, lots of examples. And, of course, I could not -- and there's no disagreement between the judges on our Court about whether foreign law applies in such circumstances or whether the Warsaw Convention applies or whether looking to other countries is the proper way to interpret a treaty. We all think it does. All of us. Because that's what it is.

And so yes, the answer is, a lot more. And that reflects not the views of particular judges. That reflects the state of the world where you have more and more of this interchange, whether people say it's good, bad, or indifferent. I don't know. I have my own views on it as a person, but as a judge, I will take it for what it is. And I say as a judge I will have to decide more and more of these cases, and I do.

MR. WILLIAMS: If there's a consensus, as you say, in the Court on the importance of foreign law or international law, is there a right answer as to whether or how much foreign law should be used in interpreting U.S. law? Or is it a question of judicial philosophy for each judge to decide for her or himself?

JUSTICE BREYER: That's a good question and the answer is

sometimes one and sometimes the other. That is, it depends on the area that you are talking about. If, for example, you're talking about this copyright case or you're talking about the anti-trust case, I think there'd be pretty uniform disagreement -- agreement, rather, there wasn't necessarily agreement on the need to look in particular ways to other places.

If you're talking about, and this is where a lot of the controversy has come from, if you're talking about interpreting the Constitution of the United States in a particular provision, let's say free speech to speak of something that's on my mind, and as applied to election cases, well, there was an election case. It's fairly well-known, involving a very similar issue involving British law and the Strasbourg court, and I read it. And all right, I wasn't totally convinced, but, nonetheless, read it. Maybe some of my colleagues would say why bother reading it, as they would? That's philosophy.

Or I'd say when we're talking about a federalism case, I found it interesting and significant that Switzerland and the EU have a federalist system where the laws that are made at the national level, the equivalent -- i.e., the laws that are made in Brussels or the laws that are made by the Federal Swiss Parliament -- are executed by judges and others from the member states. There is no federal EU bureaucracy that executes in Belgium the law that's made in Brussels or in -- you see what I'm saying?

But we have a different system. They're both federal systems. I found it interesting and pertinent that you could go either way on that. And there, whether you agreed with me or not, would depend, but you'd have to read another couple of opinions. But there we disagreed on that question that you're raising because some of my colleagues said no.

The major disagreements that raised a lot of political questions were, in two cases, involving the provision of the constitution that forbids cruel and unusual

punishment as applied to death penalty. And one involved the question of homosexual rights in Texas. And there, they were 5-4 cases; they were close. And the Court did in the majority refer to practices in other countries in rather limited ways. But that did produce a political reaction, not a legal reaction so much.

But there my wife, Joanna, is a clinical psychologist and she has explained to me the phenomenon of displacement. And displacement, of course, is you're angry at A, so you blame B, a well-known feature in many families. (Laughter) There, I think, maybe people who didn't like the result were beginning to blame the foreign law, which I don't think was the cause of the result. But anyway.

MR. WILLIAMS: You focused in your remarks and, of course, in the discussion so far on the desirability of international foreign law influencing U.S. law, but you also mentioned the growing contacts that you and I imagine the other judges are having with judges from other countries. Could we look at the other side of the coin and think about the influence of U.S. law on foreign and international law? Could you comment on this?

JUSTICE BREYER: Yes. I mean, I don't know if I can comment, what can I say, usefully. Because sometimes you see articles that say, well, people support -- people in foreign countries, courts have been referring less to American Supreme Court cases. My own feeling about that? Fine. Fine. I don't mind. We're not there either necessarily to be cited by other courts or not to be cited. And judges in other countries will feel the same way. We're there to decide a case and we have enough to worry about trying to figure out how that case ought to go and worrying about the arguments on the two sides.

And if, in fact, I think, for example -- but this is my view as American -- that we have a form of jurisprudence which used to be called, and probably still is,

purposive jurisprudence where the consequences and the purposes of a statute or a constitutional provision play a particularly important role. I think maybe some other countries will find that concept useful, maybe they won't. It's up to them.

And I think that I've found useful the concept of proportionality. Some of the things that are done in other countries I don't find particularly useful. And these are areas I'm talking about unlike what I was talking about before, where there is considerable discretion in the judge whether he's going to pay attention. He's not bound by what the other country does.

But there we are. That's where I say you will find, I suspect, clusters of judges and countries and people who find each other's approaches to different kinds of problems useful and in certain areas you will and in others you won't.

MR. WILLIAMS: Well, in recent weeks, of course, there is an issue which has been on the minds of many people in this country, around the world, and that, of course, is Crimea. I know, of course, that judges may not always want to comment on burning foreign policy issues, but the issue in Crimea, international law has been invoked by both sides on this issue. As you look at the situation in Crimea, not what exactly what is going on on the ground, but could you reflect on the standing of international law and whether it can have a relevance within the current political and moral context, if you will?

JUSTICE BREYER: I agree with what you said about Crimea except for the order of two words. You said judges do not always want to comment on hot political matters. I would reverse the order and I would say judges always do not want to comment on hot political matters. (Laughter) I can say having nothing to do with Crimea that we have had cases, such as in some of the Guantanamo cases, where the Geneva Conventions entered into after the war were relevant to the decision and we had to go into them and we did. And so sometimes they are quite relevant. With that sort of cliché,

I will leave hot political matters to those who are more knowledgeable on such things, including you, than I am. (Laughter)

MR. WILLIAMS: Well, I think we should now give an opportunity for members of the audience to pose their questions. As I said, we'll take it in sets of three. And I think there are roving mics. If you can just raise your hand, let us know who you are, and your institutional affiliation.

MR. CASSEL: Doug Cassel from the University of Notre Dame. The phrase in these discussions "international and foreign law" is often employed as if it were a single set of issues. I wonder, Justice Breyer, if you could comment on whether you see an important difference in the role of international law as opposed to foreign law in the United States Supreme Court and whether that difference is important? Thank you.

MR. WILLIAMS: Yes, the gentleman at the back.

SPEAKER: All right. This is not a hot political question. This is a hot legal question. My name's Carl. I'm with the Coalition for Court Transparency.

You referenced five areas that American judges might do well to consult foreign sources or foreign legal thought. High courts in Canada and the UK and many, many other countries have cameras. I don't want to know if you support cameras because I already know where you stand on cameras in the Supreme Court, but there's a nice lounge at the Supreme Court where Supreme Court bar members are allowed to listen to live audio. Why don't we allow the live audio to be transmitted outside the building to everybody else who might not have the money or means to come to Washington, D.C., and wait in line outside in the cold to be able to listen to such audio?

MR. WILLIAMS: Yes, the gentleman with the glasses.

MR. STAPP: Hi, there. My name's Alec Stapp. I work for an education startup company. In one of the current cases before the Court, the *Alice Corp.* case,

deals with software patents. It's a technical issue, like you mentioned in your talk, and it's also one that software often spans international boundaries. I was wondering if the variation in software patents and laws in other countries and the effects of innovation and the consequences of those is going to enter your thinking or is something you're considering. Thank you.

MR. WILLIAMS: Good, all right.

JUSTICE BREYER: As used, is there a difference between international and foreign law? You say what is the difference? Well, it depends. You know, that's one thing, it depends on what case we're talking about. Sometimes we're talking about a treaty, that's international law. Sometimes we're talking about the norms of international law that are applied to allow damages under the alien tort statute. Sometimes we're talking about whether that plaintiff in Ecuador could bring his case, in which case the EU anti-trust authority was relevant. And sometimes we're talking about what is the copyright law in some particular country? So it depends. Of course there is a different and of course it does depend. So an unsatisfactory answer there.

Now, to give my unsatisfactory answer to question number 2 about cameras in the courtroom under the guise of radio -- (Laughter) -- you have to understand that it's a pretty tough question and we're pretty conservative, with a small "c," when you start talking about our institution. I mean, we don't know what would happen if we let cameras in the courtroom. And the risks would be that, too, and we don't know what the answer is. Three actually.

One risk is that people would begin to think that the oral argument, which is about 5 percent, almost all of our material is submitted in writing, they would begin to think that that was what we were about, the oral argument. That would be misleading, but not deadly.

What might be worse is that people do relate to people. That's good. You relate more to your family than you relate to your friends than you relate to people you don't know. Then the people you see you relate to more than the people you just hear about, and statistics you relate to not at all. Okay? That's the human condition and I think it's probably a good one. But the job of an appellate court, and particularly our Court, which about three levels of appellate courts or two, is to think about how our decision is affecting the 300 million people who aren't in the courtroom. They're not there, but they will possibly be affected by our ruling.

And people might well just look to the good guy and the bad guy, and that might have an impact on the effectiveness of the Court; or what is the most obvious thing, and you get privately opposite advice from different members of the press on this one, it won't affect us. I mean, we're grown up, we hope, and there's the press there anyway. And why will it affect what questions I ask? I have to watch what I say anyway. Apparently I don't, but, nonetheless, you have to watch. It's public and the press is there and so why would this make a difference? To which some members of the press will say you just wait till you see how you react when you ask a question in good faith on A and then it's reported on various shows on television and they show a picture of you, and you'll be pretty careful and maybe you'll be careful to stop asking. That might be a public benefit, but, nonetheless, you see the point. (Laughter) And you say go see what happens in the Senate or the House, which perhaps has to respond to public opinion.

But the reason you have a Court, the reason we decide constitutional questions, if you go back to Alexander Hamilton, is why? Because this document is written -- where did I put it; it's up there. Oh, here it is, good. It's written not just -- it treats exactly the same way the least popular and the most popular person in the United States. That's what it's supposed to be.

And by the way, he said we better give the Court the power to review laws. Why? Because if we give the President the power to say whatever he does is constitutional or not, he'll always say it's constitutional, and he has enough power already. Well, why not give the power to Congress? After all, they're elected. Many countries have done that. To which Alexander Hamilton says -- he doesn't say it in these words -- he says, what happens when the decision is right, but unpopular? He says, I'll tell you about Congress. They are experts in popularity. He says, believe me, they know popularity. But what will they do when it's unpopular? So let's take these judges nobody's ever heard of, they don't have the power of the purse, they don't have the power of the sword -- fabulous, they're weak -- and give them the authority. You see?

And it's when it's unpopular -- unpopular -- and important and, by the way, possibly wrong -- I mean, I've participated on both sides of 5-4 decisions. Not as many as you'd think. There may be 20 percent are 5-4; 50 percent are unanimous. But somebody's wrong in those cases. All right.

And that is the question that I get from the president of the Supreme Court of Ghana, a woman who is trying to try to further democracy and human rights in Ghana and from Ouagadougou and from countries all over the world: Why do people do what you say? You see? And that's a pretty good question. And it's taken us -- I'd say there is no answer in this document and Hamilton didn't answer it either. He didn't know. Nobody knew. It's 200 years of history.

And you want people in your country to follow the courts and the rule of law, go out to the villages. Don't just talk to the lawyers. Don't just talk to the judges. By the way, there are in our country, contrary to popular belief, 309 of the 310 million are not lawyers. (Laughter) all right? And I say they're the ones that had to support sending the troops to Little Rock to enforce integration. They're the ones that have to decide they will

follow decisions that they think are really wrong and really unpopular, and that takes time, but that's part of our job. And who knows, you see?

So I say we're conservative with a small "c." And the radio? I mean, the radio, fine. I mean, they tried that in the D.C. Circuit; it didn't hurt anything. Could we experiment with that? Maybe, but that's not right in front of us. So, therefore, that's non-answer number 2.

As far as *Alice Corp.*, which is a big patent case which we heard Wednesday, it was a very difficult, very interesting case. We received 42 briefs. And I can't talk about a pending case. I can you that one of the briefs did go into how the Europeans handle it and other briefs went into -- they go into all aspects of the problem. So we learned. We learned what happens in other countries. I hope we learned it pretty systematically. I don't know how much, et cetera, but that's going back to my main point.

MR. WILLIAMS: Good, right. Let's take another round of questions.

MS. CRIM: First, I want to say thank you for joining us. My name is Chelsey Crim and I work here at Brookings. And my question for you is you previously stated how there is no international Supreme Court to preside over international law. And so for young professionals looking to get into the advocacy of global justice, what would be your advice? Like what institutions or what organizations would you advise young professionals to go into to pursue this career?

JUSTICE BREYER: Oh, there are a lot. I mean, I say there's no Supreme Court in the sense that we cannot easily iron out differences in domestic international law. There is the ICJ which can deal with international law in grand terms and work out differences among nations. But I've said to my own law clerks, and I think you could do this, is why don't you consider being an intern at the EU in Luxembourg or maybe in the Strasbourg court? There are lots of international institutions.

And actually we were in Luxembourg and they've done a fairly remarkable job because they've grown, you know, from 15 to 27. I thought how are they ever going to do this? But Stavros is -- the president of the court has integrated it. They've done a good job of bringing this together, in my opinion. And I said, well, couldn't you take some American law clerks? Yes, he said, we don't have money to pay them.

But there are institutions here. Many of the law schools have funds and they probably would absorb costs of somebody who wanted to go over there for a year. And what's his name, Cassese, the administrative lawyer, Sabino Cassese, who's Italian, who studies these things, really a great scholar, has had his various students at work for some time and has written on this, trying to figure out how many institutions are there in the world now that are international in the sense that they make law that binds more than one nation, and he's come up with several hundred.

So I think there is no shortage of opportunities and get his list and start asking people what they think of which institution.

MR. WILLIAMS: And I know Ted has a question. We'll just stay in this corner, Ted, and then the gentleman in the back.

MR. PICCONE: I want to build on this question. I'm Ted Piccone, Foreign Policy at Brookings. Thank you for this. And it's really more of a comment than a question, but it might be for both of you.

Building on your comments about comity and the role of not bumping into each other, but on these really fundamental questions of human rights and really horrendous cases of genocide and torture, what happens when the comity doesn't work? In other words, in the case of Pinochet, you had a case where there was a developing democracy with some sense of an independent judiciary that could handle a case like

this. And it was a democratic system that was emerging out of years of dictatorship that maybe could handle the stress of dealing with a former head of state in front of these charges. But then there are many other cases where we know the judicial system, let alone the state, is failing, failed, and would not be able to handle those kinds of cases.

So isn't there a role for an International Criminal Court? And I'm just wondering how do you deal with those range of cases? Because comity, I think, only gets you so far.

MR. WILLIAMS: And I'll take a third question.

MR. LUCKETT: Thanks for the forum today. Steve Lockett, I study policy here in the city and work here likewise. Justice Breyer, you'll forgive me if I don't stand. I don't want to get altitude sickness. I'm pretty tall.

I read your dissent yesterday. I'm a bookworm and really appreciate the Oscar Wilde reference, so thank you very much. Is the majority opinion essentially the obituary for *Buckley*? That's the first of three questions.

Second is you ride circuit. I spoke recently with Judge Sentelle and we were talking about the crisis of the Court, the longer hours, some of the judges being brought in from retirement, heavier caseloads. So could you look at the crisis at the federal level?

And not to disappointment you in thinking you wouldn't get one question on this subject today, you mentioned Burkina Faso, France, Ghana. What do your peers overseas say to you about *Bush v. Gore*? Thanks.

JUSTICE BREYER: Okay. Comity, I'm not saying you always comity or not. I'm saying it's a kind of -- if I have an opinion and I'm writing and I'm trying to shape a rule of law, that is it's an open question and it involves something like the *Kiobel*, the alien tort statute, if I have come up with a rule of law or an interpretation that I know

couldn't be applied -- I'm not saying whether it would be or not, but couldn't be applied -- without people creating a big problem, well, that's a strike against it. I'm not saying it's fatal, but it's a strike against it.

Now, there are many legal doctrines that serve this kind of a purpose. There's something called *forum non conveniens*, which means that the court that has the case should transfer it to a place where there is more connection, but the courts have to be functioning in that other place. And there are ways of -- there are about five different doctrines and they're all in -- that have the same function. And I'm saying simply that that is an important consideration in a world where -- I'm not saying it's always binding, but it's an important consideration.

And, of course, what I'm hoping for is that those like you and others who are interested in these areas, when you write your articles, when you write your treatises, and so forth, we'll think about this. And it's always best to think of it in terms of a case that you totally disagree with, and that's helpful.

As far as *Buckley* is concerned, I wrote only 30 pages and several -- maybe 20 more very fascinating appendices and so forth, and I have to let that speak for itself. I don't know what will happen next, nobody does, and there we are. And that's why I hesitate to make any comment on that.

As far as our caseload is concerned, I'd be more interested in Judge Sentelle's opinion than mine because he's right in the midst of it. I mean, he's in the D.C. Circuit. I gather that, this has been true for a while, some courts are having caseload problems and others are not, so you're more expert on that. So I don't answer number two because that's not something I've thought about since I was on the Court of Appeals. I've thought about it, but I don't have the experience necessary to give an intelligent answer since I was on the Court of Appeals. I had lots of answers at that time, but that

was some time ago.

As far as *Bush v. Gore* is concerned, I say the same thing to audiences now and anywhere, that's the perfect example. I thought the best thing about that case was with Senator Reid. I heard him say this and I told this to the law school students abroad or wherever, people do talk about it. He said -- he said, Reid -- and I agree with this, he said the most remarkable thing about that case is something that is very rarely remarked, and that is although it was certainly an important decision -- that's certainly true -- and although it was an unpopular decision with at least half the population, maybe a little more than that -- (Laughter) -- but, in any case, it was certainly, in my opinion, wrong. I was in the dissent.

Now, despite that, there were no -- no one was killed. No one was throwing rocks and stones. There were no hospital casualties. There were no violent manifestations or demonstrations or any other thing. People did accept it. And if I'm at Stamford or I'm in a college audience I say, no, at least 20 percent of you when I say this are thinking: and too bad there weren't a few, too bad there weren't. So I say I know what you're thinking, but before you reach that as your final conclusion, you turn on the television set and you go and look and see what happens in countries that decide their major differences through force.

So I say, of course, I'm a judge, I'm self-interested in this, but I think it's true. I mean, we have, and I see it every day -- and I've said this 10,000 times, so it might as well be 10,001 -- the most remarkable thing I see in that Court is that you have people of every race, every religion, every point of view possible. And I tell the same joke. My mother used to say, you know, there's no view so crazy there isn't somebody in this country who doesn't hold it. And I said we were from San Francisco. She said they all lived in Los Angeles. (Laughter) But still, you see the point and there they are in front

of us in a court. I say that is a truly remarkable thing.

And the woman who is the president of the court in Ghana or whether it's Ouagadougou or whether it's some other place, I say that's taken a long time. We did have a Civil War. We did have slavery. We did have 80 years of segregation. There have been lots of ups and downs and it's never a sure thing. And that's why I sort of like to talk about it to the younger ones. I say that's what we have to do, we have to transmit what is so important to us and has been to this country to the next generation.

And that's why I sort of weep when I see civics are not being taught in some of the high schools and why I think it's terribly important, whatever country you're in, that that be taught and that they understand it's their responsibility, too. You know, they're not just observers. And above all, they're not to grow up to be cynical observers. They're to grow up to be part of it.

Anyway, there we are. That's what I say about *Bush v. Gore*.

MR. WILLIAMS: Let me take another round of questions. Yes, the gentleman.

MR. GREENHOUSE: My name is Don Greenhouse. I'm from the Robert H. Jackson Center in Jamestown, New York. My question goes to precedent. In view of the increasing role of international law or the coming of international law, I wonder how you see precedent in that arena affecting any of the domestic issues along those lines.

MR. WILLIAMS: All right.

MR. SCHOETTLE: Hi. I'm Peter Schoettle, retired from State Department, and I would like to get your comment on what seems to me a contradiction in American foreign policy as follows. On the one hand, I can't think of a country that is stronger in the support of the rule of law than the U.S. On the other hand, when it

becomes a question of do we the United States support strengthening international law, like joining the International Criminal Court, we frequently don't. Why this contradiction?

MR. WILLIAMS: The gentleman at the back row, last row.

MR. MOOREVILLE: Hello. My name is Ishai Mooreville from the firm of Baker & Miller. I wanted to ask how do you think lower court judges should apply foreign law, especially in transitory tort? You know, usually each side hires an expert and says, you know, Japanese law says this and the other one says Japanese law says that. How are judges supposed to decide in that situation?

JUSTICE BREYER: (inaudible) in terms of precedent, Jackson's -- interesting that you were -- he was a great justice, Jackson. I mean, you know what he said about the -- one of his great things was in that -- when he's talking about the power of the presidency in the --

MR. GREENHOUSE: Steel case?

JUSTICE BREYER: Yeah, in the steel case. And, I mean, he says, you know, we read the opinions that describe the power of the president. I can't say it as well as he did. He said you'll be amazed by the paucity of usable precedent over a long period of time. There just -- and to try to figure out what the Founders said, he said, it's like Joseph being asked to interpret the dreams of Pharaoh. (Laughter) Right?

As far as the rule of precedent is concerned, generally the countries will follow what they do. Most of them use precedent even if they don't say it. And we use precedent, but there is no rule exactly as to how. And we all know that precedent doesn't answer most of the questions in front of us, but it sometimes does give us a clue. So all judges do that. All judges read the text. Of course it's useful. All judges. And often determinative, but usually not in our Court, that body, because it's open the questions. But they'll use precedent, they'll look at the history, they'll look at text, tradition, history,

precedent, purposes, and consequences, consequences viewed in light of the purpose of the statute of the Constitution. Everybody does that. You go to any country you want and you'll see them -- and some place more weight on some and some on the other. And so that's how it will continue, but everybody places some weight on some -- I mean, on all. Everybody gives some weight on all.

As far as the ICC is concerned, I'd ask our negotiators. But the only thing I know about that, and the International Court of Justice and the negotiations, is I did once talk to Robert Badinter, who had been in charge of their French problem, where they faced a problem. A lot of people in France were very suspicious of this and they worked something out where they could join, I think, for a short period of time and see how it worked, and then they wouldn't be members. And so there was some flexibility in negotiating. So I would say that question is better directed at negotiators than me.

And as far as how you should decide Japanese expertise is concerned, I would say the first thing is learn Japanese, which is virtually impossible for anyone who isn't born speaking it. (Laughter) But failing that, I don't have useful light to shed. There are only a small -- there are a certain number of questions where that becomes an issue of the kind that you say, typically where you're interpreting a contract and the contract says interpreted according to Australian law, for example. And then you'll have to have experts telling you what the Australian law is and the judge will just have to do his best to figure out in light of what he's told, and that's true of many things that judges say. So I've given several more not very helpful answers.

MR. WILLIAMS: Good. Well, thank you very much. We'll take the final round of questions. I know there are many more of you who want to ask questions. I'm conscious of the time, so three final questions.

SPEAKER: Yeah, my name is Helmut from the Occupy Wall Street. I

just wanted you to comment about this changing world and the issue you have mentioned and how they could influence or be related to the debate as to the necessity or not to change the U.S. Constitution.

MR. WILLIAMS: And the lady in the next row.

MS. SMITH: Hi. My name is Kristin Smith. I'm a law student from Washington University in St. Louis and an intern at the American Bar Association Center for Human Rights this semester. My question is in your lecture, Justice Breyer, you mentioned a little bit about our complicated treaty interpretation and integration regime. And I was wondering if you could comment on maybe what you see as some of the strengths or shortcomings in applying custom, customary international law in cases, such as the Guantanamo detainee cases or in general if you'd rather just speak on that.

MR. WILLIAMS: And the final question.

MS. COLEMAN: Monica Coleman, Inside Capitol Hill, PWR Network. In quasi-government and government agencies in the U.S., we're seeing an increasing number of international partnership developments. To what extent, if any, would decisions rely differently when dealing with cases involving U.S. agency partnerships and private and commercial enterprises?

MR. WILLIAMS: Good.

JUSTICE BREYER: Well, as to amending the Constitution, it's not going to happen. And do I think that that's good? Yeah. Why? Well, I'd say this is my own personal experience in that.

In San Francisco, in 1932, the city fathers at that time got together and they wrote a pretty good city charter and in there was a provision that said in 50 years -- no, 25 years, we will have a new gathering of the convention and we'll rewrite it to bring it up to date. So my father, who had been a school administrator and he was a lawyer, but

he basically -- he said he always wanted to do that and he ran to be a charter commissioner and he won. All right? So he sat there with the other charter commissioners. They met for about three or four weeks and they couldn't reach agreement about anything. You see?

So heaven knows, you see, what would happen you get into the business of starting to amend the Constitution. I don't know. And because I'm conservative in these things, I would sort of hesitate to try to amend the Constitution and would be pretty nervous about what might or might not occur.

As far as using custom, custom, of course, is sometimes relevant and I don't have an absolute rule to tell you when it is and when it isn't. Certainly one of the things that is relevant when in interpreting a treaty, which we've used and Justice Scalia has, I have -- we don't disagree about these things -- in interpreting the treaty look to what other courts have done and how the treaty has been interpreted to work out there. You see? It's a form of custom. You're thinking of something more specific, which I know less about. So that's unsatisfactory, but nonetheless.

As far as international partnerships are concerned, very interesting. Why do I say that? You know what he called to mind, which isn't quite a partnership, but is well, I think, worth looking into? I did use to teach anti-trust and I did use to teach about the regulation of energy by the Federal Power Commission. It was a great subject. People never really appreciated it for what it was. (Laughter)

But one thing that seems, from what I gather, to have worked out pretty well is the relationship among the Anti-Trust Division in the Federal Trade Commission here and their European counterparts. And you find that they've reached -- they don't do things without the other's understanding and they talk about it and they meet all the time. And that seems an example of something that's worked pretty well. And then there are

others that haven't worked so well, were at cross-purposes half the time.

So do courts take like that into account? Yeah, I think so. I used to teach this book at administrative law and one of things we read, used to read, was Louis Jaffe. He was a great professor at Harvard. And he said, you know, you can't really understand these decisions very well except by understanding that the Court just has confidence in certain agencies and it doesn't have confidence in certain others, and we're not going to say which is which. (Laughter) And there we are.

And if you're talking bi-partnership, you mean public-private things, there are a lot of issues that come up and they depend on the specific area. Like the 14th Amendment, does it apply? You know, it's a government action. Is there enough government here that it will apply or not? So there can be specific issues, too. I think that's a subject that's very interesting.

MR. WILLIAMS: Justice Breyer, on behalf of Brookings, the Royal Netherlands Embassy, and The Hague Institute for Global Justice, I would like to thank you most sincerely for your remarks. It's not mere formality when I say they're judicious and also humorous. (Laughter) I think you've also demonstrated that the Court has competences in a wide range of areas. So thank you very much indeed. (Applause)

And you've set the bar high for others who will come after in the lecture series. So thank you.

JUSTICE BREYER: Thank you. (Applause)

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