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**THE NINTH ANNUAL JOHN W. HAGER LECTURE, THE 2004
TERM: THE SUPREME COURT MEETS INTERNATIONAL
LAW**

Harold Hongju Koh[†]

I am deeply honored to be invited to give this lecture in honor of an historic figure at the University of Tulsa College of Law, John W. Hager. I am especially proud to follow to this podium such distinguished Hager Lecturers as Judge Richard Posner and my own predecessor as Dean of Yale Law School, Judge Guido Calabresi.

I come here by way of St. Louis, where by remarkable coincidence, last night I was sitting in Busch Stadium when my beloved Boston Red Sox finally won the World Series after eighty-six long-suffering years! I know that it sounds silly for a grown man to spend forty-five years of his life rooting for a baseball team, but do you know what? We all have dreams, large and small. And last night reminded me that if you are patient enough, someday, one of your dreams can come true. That thought gives me great hope that other dreams that I have hoped for might also come true some day.

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Let me start by giving my fondest gratitude to Linda Lacey and to my brilliant friend and colleague Professor Janet Koven Levit, for organizing this lecture and this conference. For those of you who do not know them, it is clear to me that Janet Koven Levit and her husband Kenny Levit are the Franklin and Eleanor Roosevelt of Oklahoma. As you know, one of the Roosevelts was a politician; the other was an internationalist, a human rights specialist, and a lawgiver. I am not sure whether Janet is Eleanor and Ken is Franklin, or the other way around, but in any event, I think they will be just as important in our lives, because of their similar and very deep moral and legal commitments. Let me also give my fondest thanks to President Steadman Upham, to the Provost, to the Dean, to Professor Martin Belsky, to the trustees, to Judges Seymour, Chapel, Lumpkin, Morris, Morrissey (and to anyone else here who has the power to hold me in contempt of court!) for their remarkable hospitality during my visit to Tulsa.

Another dream I have had, after being in the law teaching for more than twenty years, is that if you have enough time, the day will come when you can spend a few days with some of your most wonderful students and dearest friends, talking about issues that you have worked on together and all care about deeply. For me, that issue is building bridges between international and domestic law: a subject to which I have devoted my career, and now my deanship. In an important sense, another dream of mine has been fulfilled in the last year: that the U.S. Supreme Court would someday meet international law. When I first came to Yale looking for a teaching job twenty years ago, I interviewed with a professor who is now my colleague. At the end of our discussion about international law, he asked, "But how often do these cases get to the Supreme Court?" At that time, my answer was: "about once every other year." But as you will see in a moment, that has changed. The time has come in the 2004 Term where the U.S. Supreme Court has finally met international law.

For me, this Supreme Court term has explored four themes that run through my own academic work. First, why does the President almost always win in foreign affairs?¹ What is the relationship between Congress, the President, and the courts in international law and foreign affairs? That is the subject of the first panel of this conference tomorrow: The War on Terror, the Executive Power, and the Detention of Enemy Combatants in Guantanamo and at Home.

A second theme that I have written about over the years has been what I call "transnational public law litigation": the litigation of international human rights cases in domestic courts, in an effort to try to clarify norms of public law.² That topic will be the subject of the second panel tomorrow, which covers the *Sosa v. Alvarez-Machain* decision³ and the Alien Tort Claims Act.⁴

A third topic of my writing is what I call "transnational legal process," the legal process of norm-internalization, or internalization of international legal norms into domestic law. How do you make nations obey the law?⁵ I have suggested that we do this through compliance generated by a combination of factors: coercion, self-interest, "liberal theories" – including legitimate rules and liberal political identity – appeals to community, and what I call "legal process." To put it intuitively, how do you get a scofflaw student to obey the law? One easy way is to put the student on the disciplinary committee. Why? Because once he or she participates in the process of enforcing norms on others, he or she is personally far more likely to come into compliance with those norms. That is

1. HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990).

2. Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991).

3. 124 S. Ct. 2739 (2004).

4. *See id.* at 2746; Alien Tort Statute, 28 U.S.C. § 1350 (2000).

5. Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (reviewing ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1997) and THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995)).

the process of bringing international rules home, and persuading individuals or countries to internalize external norms into their internal value sets. That is the subject of the third panel tomorrow regarding the Supreme Court, constitutional courts, and the role of international law in constitutional jurisprudence.

Fourth and finally, I have written about two types of American Exceptionalism after 9/11: “good exceptionalism” and “bad exceptionalism.”⁶ In the world today, America is an exceptional country in two ways. On the one hand, it exhibits exceptional leadership in international affairs and human rights, but at the same time, America exhibits a troubling tendency toward double standards, often placing itself on a different plane than others, “bad exceptionalism.” The question after 9/11 is: how to make sure that America’s “bad exceptionalism” does not diminish its international reputation and limit its capacity to engage in global exceptionalism in areas around the world where we desperately need American leadership, such as the Middle East, North Korea, Afghanistan and the like?

How has the Supreme Court met international law, and what is the relationship between that meeting and the four themes that I have just identified? In the last year or so, sixteen cases have reached the U.S. Supreme Court that involve international law. Three come out of 9/11, and I’ll talk about these in more detail.⁷ Another, *Sosa v. Alvarez-Machain*, involves the Alien Tort Claim Act.⁸ Two are foreign sovereign immunity cases,⁹ an extraterritoriality case,¹⁰ two immigration cases,¹¹ a case arising out of NAFTA,¹² a case involving the common law revenue rule,¹³ a transnational discovery case,¹⁴ three death penalty cases,¹⁵ and a case from the Warsaw Convention, *Olympic Airways v.*

6. Harold Hongju Koh, *Foreword: On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003).

7. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004); *Padilla v. Rumsfeld*, 124 S. Ct. 2711 (2004); *Rasul v. Bush*, 124 S. Ct. 2686 (2004).

8. *See Sosa*, 124 S. Ct. at 2746.

9. *Republic of Austria et al. v. Altmann*, 124 S. Ct. 2240 (2004); *Dole Food Co. v. Patrickson et al.*, 538 U.S. 468 (2003).

10. *F. Hoffman-La Roche, Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004).

11. *Jama v. Immigration and Naturalization Service*, 2002 WL 507046 (D. Minn. 2002), *writ of habeas corpus granted*, 329 F.3d 630 (8th Cir. 2003), *cert. granted*, 124 S. Ct. 1407 (2004), *aff’d*, 125 S. Ct. 694 (2005); *Benitez v. Wallis*, 337 F.3d 1289 (11th Cir. 2003), *cert. granted*, 124 S. Ct. 1143 (2004) (mem.), *rev’d sub nom.* *Clark v. Martinez*, 125 S. Ct. 716 (2005).

12. *Dep’t of Transp. v. Pub. Citizen*, 124 S. Ct. 2204 (2004).

13. *Pasquantino v. United States*, 305 F.3d 291 (4th Cir. 2002), *rev’d en banc*, 336 F.3d 321 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 1875 (2004) (mem.).

14. *Intel Corp. v. Advanced Micro Devices, Inc.*, 124 S. Ct. 2466 (2004).

15. *Torres v. Oklahoma*, 962 P.2d 3 (Okla. Crim. App. 1998), *aff’d sub nom.*, *Torres v. Mullin*, 317 F.3d 1145 (10th Cir. 2003), *cert. denied*, 124 S. Ct. 562 (2003) (mem.) (Breyer, J., dissenting), *cert. denied*, 124 S. Ct. 919 (2003) (mem.) (Stevens, J., dissenting); *State v. Simmons*, 944 S.W.2d 165 (Mo. 1997), *aff’d*, 112 S.W.3d 397 (Mo. 2003), *cert. granted sub nom.* *Roper v. Simmons*, 124

Husain,¹⁶ totaling sixteen cases. When you consider that the U.S. Supreme Court now hears only about eighty cases a year, these international cases now constitute a remarkable one-sixth of the docket. It is an extraordinarily high percentage of the Court's workload.

Let me talk you through these cases to give you a sense of the themes that are starting to emerge from the U.S. Supreme Court's encounter with international law. But let me precede that discussion with a bit of theory. How is international law enforced? Many people believe that the primary way to enforce international law is through what I call "horizontal enforcement": namely, national governments and international organizations pressing countries to obey at the international level. My own view is that a more powerful way of enforcing international law is through "vertical enforcement," or "domestication," that is, by internalizing international norms into domestic legal systems through legislation, executive rulemaking, and judicial action. American judges have increasingly helped to build the bridge between the international and domestic law through a number of interpretive techniques. They are: (1) constitutional interpretation, (2) treaty interpretation, (3) incorporation of customary international law into domestic law, (4) direct statutory interpretation of statutes that expressly incorporate international law, (5) indirect statutory interpretation, by applying the canon that requires courts to construe ambiguous federal statutes to comport with governing rules of international law,¹⁷ and finally (6) by interpreting state law in light of rules of international law. Through these techniques, federal courts have come to play their key role in this process of domestication or norm-internalization, and federal judges have come to serve as a vital link between the international and the domestic legal spheres.

How did this judicial role begin? As we all know, in 1776, the Declaration of Independence announced that in an interdependent world, the United States should pay "decent Respect to the Opinions of Mankind."¹⁸

But why should this new country want to pay decent respect to the opinions of mankind? The answer is quite simple: we were a tiny country. We had very little law of our own. Our ability to be accepted in the international environment was a direct function of how much we obeyed international rules.

If you look at a country like East Timor, the newest country in the world today, its constitution celebrates acceptance of international law. The East Timorese want to be players in international law by saying that they are part of

S. Ct. 1171 (2004) (mem.); *Medellin v. Dretke*, 371 F.3d 270 (5th Cir. 2004), *petition for cert. granted*, (No. 04-5928).

16. 540 U.S. 644 (2004).

17. This is the so-called "Charming Betsy" canon, derived from *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804) (holding that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains). The analysis presented here derives from Harold Hongju Koh, *International Law as Part of Our Law*, 98 Am. J. Int'l L. 43 (2004) [hereinafter *International Law as Part of Our Law*].

18. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

the international system, and that they play by the international rules. Those of you who have taken constitutional law know that in Article III of the U.S. Constitution, the federal courts are but one channel by which international law can become part of our law.¹⁹ Federal courts can decide cases “arising under” treaties and the laws of the United States as “federal questions,”²⁰ and the Constitution gives Congress the power to define and punish offenses against the law of nations by enacting statutes which courts are then empowered to construe through acts of statutory interpretation.²¹

Early on, in *Marbury v. Madison*,²² Chief Justice John Marshall said famously, “[i]t is emphatically the province and duty of the judicial department to say what the law is.”²³ But only a few years later in a case charmingly called, *Murray v. Schooner Charming Betsy*,²⁴ John Marshall suggested that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.²⁵ What was he saying? That when Congress passes a law and a court is asked to look at that law, it should assume that Congress did not intend by that enactment to create an international incident; the Court should assume that Congress meant for that law to be construed consistently with international law. In short, there is a “transnationalist” tradition in our U.S. Supreme Court, which has come down to us from the beginning of our Republic to modern times. What we are talking about is not a new development at all; rather, it is quite traditional.

Look, for example, at John Marshall and John Jay. John Jay was the first Chief Justice. Both John Marshall and John Jay were Secretaries of State before they were Justices of the Supreme Court. They were accustomed to international law, and learned how to navigate by it. Then Justice Horace Gray said in a famous opinion, the *Paquete Habana*, that international law is a part of our law, and should be determined by courts of appropriate jurisdiction as the proper cases are presented to it.²⁶ Chief Justice Fuller, William Howard Taft (a former U.S. President and Chief Justice), Justice Brewer, and Justice Day all helped form the American Society of International Law and carried that tradition forward. Looking closer to the present, in the Warren Court, Justice William J. Brennan became a leader of the internationalist movement. William O. Douglas, while a Supreme Court Justice, wrote some 36 books and traveled to over 50 countries. Justice Byron White, in his famous dissenting opinion in the *Sabbatino* case, evinced a marked transnationalist bent.²⁷

19. U.S. CONST. art. III § 2.

20. *Id.*

21. *Id.* at art. I § 7.

22. 5 U.S. 137 (1803).

23. *Id.* at 177.

24. 6 U.S. 64 (1804).

25. *Id.*

26. 175 U.S. 677 (1900).

27. *Banco Nacional de Cuba v. Sabbatino*, 84 S. Ct. 923, 946 (1964) (White, J., dissenting).

Finally, my former boss Justice Harry Blackmun, became one of the leaders in the transnationalist movement during the Rehnquist Court.²⁸ On the current U.S. Supreme Court, I would argue, there are now four Justices who are direct heirs to the transnationalist tradition: Stephen G. Breyer, Ruth Bader Ginsburg, John Paul Stevens, and Justice David Souter. At the same time, there are three Justices who are firmly nationalist in their orientation: Antonin Scalia, Clarence Thomas, and Chief Justice William Rehnquist. Justices Sandra Day O'Connor and Anthony Kennedy represent the swing votes. And if 2004 proved to be a pivotal year, it was because the swing voters, Justices O'Connor and Kennedy, cast their lot with the transnationalist faction of the Supreme Court, thereby bringing the Court into the modern international era.

What is the core of the transnationalist philosophy? Justice Blackmun put it well in an opinion he wrote in the *Aerospatiale* case in 1987.²⁹ He said, U.S. courts must look beyond national interest to the "mutual interests of all nations in a smoothly functioning international legal regime,"³⁰ and U.S. courts must "consider if there is a course that furthers, rather than impedes, the development of an ordered international system."³¹ By so saying, he suggested that American judges should not simply worry about the United States of America, they should render rulings that are consistent with the development of an orderly international legal regime.

Is this approach novel or radical? Recall that in the 1950s, when a national legal debate raged over issues of federalism, law schools began to teach something called the "federal courts and the federal system."³² The U.S. Supreme Court decided that its role was to develop the federal system through the jurisprudence of the federal courts. What is happening now is simply another version of a parallel phenomenon: the federal courts and the *transnationalist* system, i.e., a transnationalist legal system is developing in part through the interpretive activities of the U.S. federal courts.

What are the basic tenets of the transnationalist and the nationalist jurisprudence? Simply speaking, the transnationalists tend to believe in interdependence, the political and economical interdependence of the world economy. By contrast, the nationalists are far more focused on American autonomy. The transnationalists believe that there is something called transnational law, which is a blending of the international and the domestic. Nationalists would rigidly divide domestic and foreign law. But how realistic is the Nationalist approach in this day and age? Is the metric system, for example, an international concept or a domestic concept? The answer is that the metric

28. See, e.g., Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 YALE L.J. 34 (1994).

29. *Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522 (1987) (Blackmun, J., concurring in part).

30. *Id.* at 555.

31. *Id.* at 567.

32. HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM, (Richard H. Fallon, et al. eds., 4th ed. 2004).

system is a domestic concept in every country in the world, a global idea which has now been internalized into nearly every domestic system.³³ Similarly, is “dot-com” an international or a domestic idea? Again, the answer is that “dot-com” has become a global concept, which is now incorporated into the jargon of every country in the world that uses the internet. International and domestic are now blended, and are hard to differentiate. The concepts shared by international and domestic law are what I mean by transnational law.

A third difference between these two schools is who can internalize these laws. The Transnationalists believe the domestic courts have a critical role to play in norm-internalization. The Nationalists tend to believe that only the political branches can internalize. The Transnationalists believe the U.S. courts should use their interpretive powers to help develop a global legal system, as Justice Blackmun’s statement in *Aerospatiale* specifically envisioned.³⁴ The Nationalists believe that courts should focus solely on the development of a national system. The Transnationalists believe that the power of the executive branch should be constrained by the concept of comity and by the institution of judicial review, while the Nationalists believe federal courts should give extraordinarily broad deference to executive power, particularly in matters of foreign affairs. My argument is that the difference between these two philosophies explains much of the struggle that is going on in the federal courts these days over issues of international law.

Let me illustrate these philosophical differences by talking about constitutional and statutory interpretation. In my academic writing, I have argued that there are three different areas in which the U.S. Supreme Court has used international and foreign law in construing our Constitution.³⁵ Let me illustrate by looking at some recent cases involving constitutional interpretation.

The first are cases involving rules in the United States that have parallels abroad or that rise out of the common heritage of U.S. law and foreign law. Some good examples of this are the concepts of privacy and equality. These are not purely American concepts – citizens abroad have also embraced the concepts of privacy and equality. At almost the same moment that we created the Bill of Rights, the French adopted their Declaration of the Rights and Duties of Man, a parallel set of human rights. So when our Supreme Court is asked to construe the constitutional notion of privacy, should the Court do so by looking only at American law, or should the Court also look at how our neighbors have construed that idea? To put the issue in everyday terms: if you have a tough problem, and your neighbor has already addressed it, do you simply ignore what

33. Just last night, looking out at the outfield at Busch Stadium, under the words “314 feet,” I could see the same measurement in meters. In short, the metric system has become a genuinely transnational concept.

34. See 482 U.S. 555-56.

35. *International Law as Part of Our Law*, supra note 16.

he did, or do you look at what your neighbor decided to see if his solution is sensible for you as well?

Two years ago, in *Lawrence v. Texas*, the Supreme Court was asked the question of whether the Texas same-sex sodomy law violated the constitutional right to privacy.³⁶ In 1986, the Supreme Court had addressed a similar question in the context of the Georgia sodomy statute and upheld the statute. Chief Justice Burger suggested that this was an issue of first impression, and that the legality of sodomy had not been decided anywhere in Western civilization.³⁷ Yet embarrassingly, at the very time that the Chief Justice wrote those words, the European Union had struck down sodomy statutes for the entire European Union five years earlier in *Dudgeon v. United Kingdom*.³⁸

The notion that sodomy statutes violated a constitutional right to privacy was good law for millions of people in over fifty countries. In the *Lawrence* case, the lower court focused on the history of Western civilization going back to Montesquieu, Roman law, and Blackstone. But the court never looked sideways at modern European human rights law.³⁹ When the U.S. Supreme Court finally looked at European human rights law in a decision by the transnationalist justices – Breyer, Ginsberg, Stevens, Souter, O'Connor, and Kennedy – the Court found that the constitutional right to privacy, or in the case of Justice O'Connor, the right of equality – required invalidation of the Texas same-sex sodomy statute.⁴⁰

In a second category of constitutional cases, the Court can draw empirical lessons from the practical experiences of other countries. In *Printz v. United States*, Justice Breyer pointed out that in constitutional cases, foreign courts sometimes function as experimental laboratories in which American judges can analyze proposed solutions for our country by studying whether such governmental solutions have succeeded in other countries.⁴¹

A third category of constitutional cases are what we call “community standard” cases. In our Constitution, we find a variety of concepts – “reasonableness,” “cruel and unusual punishment,” and evolving standards of human decency – that make reference to a community standard that is implicit in a constitutional provision. Consider the death penalty. In *Atkins v. Virginia*, the question was whether a state of the United States could execute someone who suffers from mental retardation?⁴² In *Atkins*, my students and I submitted a brief

36. 539 U.S. 558 (2003).

37. *Bowers v. Hardwick*, 478 U.S. 186 (1986) (Burger, J., concurring).

38. 4 Eur. Ct. H.R. (ser. A) at 149 (1982).

39. *Lawrence v. Texas*, 41 S.W.3d 349 (Tex. App. 2001), *rev'd sub nom*, *Lawrence v. Texas*, 539 U.S. at 579 (2003).

40. *Lawrence*, 539 U.S. at 572.

41. 521 U.S. 898, 976 (1997) (Breyer, J., dissenting).

42. 536 U.S. 304 (2002).

on behalf of a group of U.S. diplomats in which we pointed out that only two countries in the world execute persons with mental retardation – the United States and Kyrgyzstan.⁴³ But as soon as we submitted the brief, the ambassador of Kyrgyzstan sent a letter to the *New York Times* saying that, in fact, Kyrgyzstan had banned the death penalty in 1999.⁴⁴ His implication was that only the United States could be so barbaric as to execute people with mental retardation in this day and age! Now, ladies and gentlemen, I submit that if we are the only country that executes persons with mental retardation; that practice is *unusual*. And remember, the 8th Amendment to the United States Constitution specifically bans “cruel and unusual punishments.”⁴⁵

Most recently, in *Roper v. Simmons*,⁴⁶ the question arose whether a state of the United States could execute an offender who was a juvenile at the time he or she allegedly committed the murder. Currently, there are only five other countries in the world that execute juvenile offenders: Iran, Iraq, Congo, Pakistan, Nigeria and the United States. In the last few years, Texas and Virginia have apparently executed more juveniles than the rest of the world combined. Last year the Missouri Supreme Court held that the execution of juveniles in Missouri violated the 8th Amendment, in part because the widespread international condemnation of juvenile executions suggests that such punishments are cruel and unusual.⁴⁷ On October 13, 2004, that case was argued before the U.S. Supreme Court. If you read the transcripts of the argument, you see that Justice Breyer’s questioning focuses on why it is relevant to consider foreign law in deciding a constitutional case.⁴⁸ Justice Kennedy repeatedly asked the lawyer for Missouri’s Attorney General’s office, isn’t it relevant to our constitutional determination that the juvenile death penalty is unusual?⁴⁹ The Missouri lawyer simply did not understand that what the Justice was getting at was that the job of the U.S. Supreme Court in 8th Amendment cases is to determine when punishments are cruel and unusual.

In *Simmons*, my students and I submitted an amicus brief on behalf of U.S. diplomats opposed to the juvenile death penalty. Justice Stevens asked the

43. Joint Motion of all Amici in *McCarver v. North Carolina*, No. 00-8727, to Have Their *McCarver* Amicus Briefs Considered in this Case in Support of Petitioner, *Atkins v. Virginia*, 2001 WL 1682012 (U.S. 2001).

44. Baktybek Abdrysaev, *Penalties in Kyrgyzstan*, N.Y. TIMES, June 30, 2001, at A14, available at LEXIS, News Library, NYT File.

45. U.S. CONST. amend. VIII.

46. 124 S. Ct. 1171 (2004) (mem) (No.06-633).

47. *State v. Simmons*, 944 S.W.2d 165 (Mo. 1997), *aff’d*, 112 S.W.3d 397 (Mo. 2003), *cert. granted sub nom.*, *Roper v. Simmons*, 124 S. Ct. 1171 (2004) (mem.) (No.03-633).

48. Oral Argument at 12, *Simmons*, 124 S. Ct. 1171 (2004) (mem.) (No. 03-633).

49. *Id.* at 38.

lawyer from Missouri if he had read our brief.⁵⁰ He answered: "yes." But when Justice Stevens asked whether the Court should give any credence to our position, the lawyer answered: "no."⁵¹ Justice Stevens responded by asking why the opinions of foreign states are not relevant to the Court's 8th Amendment determination.⁵² To which the lawyer from Missouri answered, in effect: this is not the job of the courts, it is the job of the legislature.⁵³ Justice Stevens asked rhetorically what sense it made to "leave it up to the legislature of the State of Missouri to resolve those questions" of foreign policy and international relations.⁵⁴ You can see my point. I predict that the U.S. Supreme Court will strike down the juvenile death penalty before the end of this term by a vote either of five to four or six to three, with the swing Justices again being Justices O'Connor and Kennedy.

Moving now to cases involving statutory interpretation, Congress has passed a number of statutes that implement international law, and a number of these have been the subjects of cases before the Court. In *Pasquantino*, the Court considered whether the enforcement of the federal wire fraud statute violated the common law revenue rule, an issue that resembles the time-honored act of state doctrine.⁵⁵ There were also two cases last term involving the Foreign Sovereign Immunities Act of 1976 (FSIA).⁵⁶ The first, *Republic of Austria et al. v. Altmann*, explored whether the FSIA applied retroactively to expropriations of holocaust assets in Austria.⁵⁷ The second, *Dole Food Co. v. Patrickson*, asked whether the FSIA applied to corporations that are wholly controlled, but not owned, by foreign companies.⁵⁸ In *F. Hoffman-La Roche, Ltd. v. Empagran S.A.*, the question was whether the Sherman Act, the Foreign Trade Antitrust Improvements Act, should be extended to purely foreign injury.⁵⁹ Justice Breyer, writing for a unanimous Court, first invoked the *Charming Betsy* principle, holding that that Court should construe the Sherman Act consistently

50. *Id.* (Justice Stevens: "May I ask one -- have you read the brief of the former U.S. diplomats in the case?"; Mr. Layton: "Yes."; Justice Stevens: "Do you think we should give any credence whatsoever to the arguments they make?"; Mr. Layton: "No.").

51. *Id.*

52. *Id.* (Justice Stevens: "The respect of other countries for our country is something we should totally ignore.").

53. *Id.* (Mr. Layton: "That's not for this Court to decide. Congress should consider that. The legislatures should consider that. It's an important consideration, but it is not a consideration under the Eighth Amendment.").

54. Oral Argument at 38, *Roper*, 124 S. Ct. 117 (Justice Stevens: "We should leave it up to the legislature of the State of Missouri to resolve those questions.").

55. 305 F.3d 291.

56. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. § 1605 (2000).

57. 124 S. Ct. 2240 (2004).

58. 538 U.S. 468 (2003).

59. 124 S. Ct. 2359.

with international law.⁶⁰ He then said the Court should construe that law in a way that promotes a smoothly functioning global legal system, echoing the words of Justice Blackmun in the *Aerospatiale* case.

There are two other areas of statutory interpretation that should be mentioned: immigration and refugees, and the Alien Tort Claims Act, which we will discuss on a panel tomorrow. In the immigration and refugee area, there are two cases before the Court this term. The first asks whether the Immigration and Nationalization Service (INS) can return an alien to a country that does not want him, in this case – Somalia.⁶¹ Somalia, as you may know, has no recognized government. The basic position being asserted by international lawyers in the briefs filed in that case is that it is illegal under international law to return someone to a country where it is unsafe because there is no government, and that the Court should construe the statute⁶² in light of these international law principles.

In a second case from the 11th circuit, the question presented is whether a Mariel Cuban, who has been here for fifteen years, can be detained indefinitely when he has not entered our country formally.⁶³ In an amicus brief authored by one of our panelists at this conference, Professor Sarah Cleveland of the University of Texas, a group of international law professors argued that this doctrine, the so called “Entry Doctrine” in *Mezei*,⁶⁴ should be struck down by the U.S. Supreme Court because it is inconsistent with both constitutional law and international law principles.

This brings me to the Alien Tort Claims Act (ATCA).⁶⁵ In 1789, Congress passed a statute, which said federal courts “shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁶⁶ But when is a tort committed in violation of a law of nations or a treaty of the United States? In *Filartiga v. Pena-Irala*, in 1980 the New York federal appellate court decided that when an act represents a definable, specific, universal, and obligatory violation of international law, an alien can sue under the ATCA and be awarded civil

60. *Id.* at 2366.

61. *Jama v. Immigration & Customs Enforcement*, 125 S. Ct. 694 (2005) (holding that Jama’s removal was not precluded by the inability of Somalia to consent in advance to his removal).

62. Immigration and Nationality Act, 8 U.S.C. § 1231 (2000).

63. *Clark v. Martinez*, 125 S. Ct. 716 (2005) (holding that in applying *Zadvydas v. Davis*, 533 U.S. 678 (2001), aliens found to be inadmissible to the United States may be detained for an amount of time that is reasonably necessary – presumptively six months).

64. Brief of Law Professors as Amici Curiae in Support of the Petitioner at 5, *Benitez v. Wallis*, 124 S. Ct. 1143 (2004) (No. 03-7434).

65. 28 U.S.C. § 1350.

66. *Id.*

damages for the tort.⁶⁷ In that case they were talking about torture. But in subsequent cases, the lower federal courts held that torture, genocide, summary execution, disappearance and other kinds of gross violations also fit within the category of specific, definable, universal, and obligatory offenses. Courts in four of the U.S. circuits: the 1st, 2nd, 9th, and 11th had all, without disagreement, ruled in favor of *Filartiga's* theory of the Alien Tort Claims Act.⁶⁸

Four other theories of the ATCA have been asserted, which I can quickly review. First is the idea that courts should not hear these cases because they raise political questions. This theory was asserted by only one judge, Judge Robb, in the *Tel-Oren* case back in 1984.⁶⁹ But if courts are construing a statute, the Alien Tort Claims Act, and the words being interpreted are the words "torts in violation of law of nations," it is hard to see why construing those words is not a quintessential judicial question. No wonder that Judge Robb's opinion has not been followed by any other courts.

Another view of the ATCA expressed by two law professors, Curtis Bradley and Jack Goldsmith, and also pressed by some of the briefs in the *Sosa v. Alvarez-Machain* case, is that the courts should recognize no cause of action unless the political branches expressly consent.⁷⁰ But notice that under this theory, if there is no implementing act by the national political branches, international law either has no status in U.S. law, or it must be construed as some species of state law. I have argued, at some length, in the *Harvard Law Review* why I do not believe that international law is state law: it makes no sense.⁷¹ Suffice it to say that I know of no court that has followed the Bradley/Goldsmith position, while all of the other circuits have gone the other way (and now the U.S. Supreme Court has as well, in the *Alvarez-Machain* case).

A third originalist position was taken by Judge Bork in his concurring opinion in the *Tel-Oren* case in 1984.⁷² He acknowledged that certain kinds of claims could be heard in these ATCA cases but argued that this could only happen if they existed in the 18th century, when the statute was first enacted. His position was essentially that the kinds of "law of nations" claims that could be heard in ATCA cases should be frozen in time, and limited to piracy, attacks on diplomats, and violations of safe conduct. Suffice it to say that no other court

67. 630 F.2d 876 (2d Cir. 1980).

68. See, e.g., *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995).

69. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) (Robb, J., concurring).

70. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997).

71. Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998).

72. 726 F.2d at 775.

has adopted this position either, although the Bush Administration urged it strongly in the *Alvarez-Machain* case.⁷³ Nor does this position make much sense. Why, for example, should courts be able to award money damages for violations of safe conduct but not for the modern day war crime of genocide?⁷⁴ Doesn't international law evolve, and shouldn't the federal courts be allowed to construe the norms of international law as they evolve as a part of a broader approach to statutory interpretation?

This leads us to the U.S. Supreme Court decision in *Alvarez-Machain*, which was decided the last day of the 2003 Term. Six of the Justices, who you will recognize as the transnationalist Justices – Justices Souter, Stevens, O'Connor, Kennedy, Ginsberg, and Breyer – ruled that when there is a norm of international character accepted by the civilized world, and defined by specificity comparable to recognized paradigms, an alien can sue for violations of those norms under the Alien Tort Claims Act.⁷⁵ The lawyers in the room will recognize that what we are talking about is a kind of an international law version of the *Bivens* remedy,⁷⁶ a federal common law, civil remedy for a very limited class of gross human rights violations. So the big question following the *Alvarez-Machain* decision is whether the U.S. Supreme Court's position is actually the same as the original *Filartiga* position adopted by the 2nd Circuit in 1980? At various points, the U.S. Supreme Court cites the *Filartiga* decision favorably, but its reasoning does not embrace it wholeheartedly. So this question will undoubtedly be answered in time.

One of the questions raised by all of this is: To what extent are federal officials bound by international law? That brings us to the three 9/11 cases decided by the Court last term. Most of you have heard of these cases, so I will run through them quickly: *Hamdi v. Rumsfeld*, which involved a so-called U.S. citizen "enemy combatant" captured on the battlefield in Afghanistan;⁷⁷ *Padilla v. Rumsfeld*, which involved a U.S. citizen enemy combatant captured in a U.S. airport;⁷⁸ and *Rasul v. Bush*, which involved alien detainees on Guantanamo seeking writs of habeas corpus after having been detained there for long periods of time.⁷⁹

Each of these cases raised essentially four issues. First, does the executive branch have authority to hold detainees indefinitely as enemy combatants, either in Guantanamo or in the United States? Second, if they are holding these

73. 124 S. Ct. 2739 at 2764.

74. *Xuncax*, 886 F. Supp. 162.

75. *See id.*

76. *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

77. 124 S. Ct. 2633.

78. 124 S. Ct. 2711.

79. 124 S. Ct. 2686.

detainees, do the detainees have any rights to process, and what is the source of those rights? Is the source international law, treaties, or constitutional law? Third, what is the role of the courts in analyzing these claims? And fourth, can our law recognize such concepts as “rights-free people” and “rights-free zones”?

In the *Hamdi* case, which involved an American enemy combatant who was captured on the battlefield, a plurality of the Justices – four of the transnationalist Justices, but also, surprisingly, Chief Justice Rehnquist – concluded that statutory authority to hold a detainee is limited; that the constitutional principle of due process demands notice and opportunity to be heard, a higher standard of proof than “some evidence,” and a right to counsel.⁸⁰ But the plurality justices, led by Justice O’Connor proposed as acceptable modifications to traditional judicial process military tribunals, hearsay, and shifting of the burden of proof to the detainee.⁸¹ Notice that only four Justices joined this opinion, and that the last part, regarding acceptable modifications to judicial process, was not joined by the other two justices who made up the majority, Justices Souter and Ginsburg. These two justices argued that in fact the President had no authority to detain Mr. Hamdi, and that perhaps the source of Hamdi’s rights might not be the Due Process Clause of the Constitution, but the Geneva Conventions.⁸² In an odd opinion, Justice Stevens and Justice Scalia argued that the process being used required Congress first to suspend the writ of habeas corpus, which it had not done.⁸³ Finally, only one Justice, Justice Thomas, agreed with the U.S. government.⁸⁴ So despite the divisions in the Court on reasoning, on the result, the Justices ruled eight to one against the U.S. government.

Why was the U.S. government’s extreme position rejected? Because the Geneva Conventions protect American soldiers. I went around the world for several years as Assistant Secretary of State looking at the ways in which the Geneva Convention protects American soldiers. Many of you saw the movie *Blackhawk Down*,⁸⁵ a movie in which, after a pitched battle between the U.S. and the Somalis, an American helicopter pilot, Michael Durant, was captured. Many viewers of the movie expected that the prisoner would be killed. But in fact, what happened in real life was that the Somalis finally released him. The

80. *Hamdi*, 124 S. Ct. at 2640, 2548.

81. *Id.* at 2649.

82. *Hamdi*, 124 S. Ct. at 2658; Geneva Convention Relative to the Treatment of Prisoners of War of Aug. 12, 1949, art. 4, 6 U.S.T. 3316, 3320, T.I.A.S. No. 3364.

83. *Hamdi*, 124 S. Ct. at 2672.

84. *Id.* at 2674.

85. BLACKHAWK DOWN (Columbia Pictures 2001).

Geneva Conventions probably saved his life.⁸⁶ The next time you hear that the U.S. government is trying to create exception to the Geneva Conventions, you should wonder whether that would create a situation of severe danger for our soldiers; if we can cart foreign soldiers into extra-legal zones or treat them as extra-legal people, then why can't our own our soldiers be treated the same way? That is an extraordinarily dangerous result for any American fighting for his or her country abroad.

The next 9/11 case, the *Padilla* case, went off on a bit of a technicality. An American was captured at O'Hare Airport in Chicago and was sent first to New York and then to South Carolina. The procedural question raised was who is the proper respondent when such a detainee seeks a writ of habeas corpus.⁸⁷ A majority of the Court concluded that this had to be done in South Carolina. This strikes me as an absurd result; it is very obvious that the Secretary of Defense, Donald Rumsfeld, who is in Washington and does business in New York, could move Padilla wherever he wanted. So the notion that the writ of habeas corpus can only be filed wherever the Brigade Commander is, as opposed to whichever court has jurisdiction over the real detaining party, the Secretary of Defense, makes little or no sense. Significantly, in footnote 8 of the dissent, four of the Justices suggested that the President had no authority to detain Padilla,⁸⁸ and that very issue is now being litigated on remand before the District Court in South Carolina.

How should these cases have been decided? Hamdi seems to have been a POW; he should have received his Geneva Convention rights. Padilla was really a common criminal defendant; he should have either been charged or released. For those of you who are first-year law students, these cases were basically controlled by *Marbury v. Madison*⁸⁹ and *Youngstown Sheet & Tube Co. v. Sawyer*.⁹⁰ *Marbury v. Madison* says it is the province of the judicial department, not the executive branch, to say what the law is. And the holding of the Steel Seizure case, *Youngstown Sheet & Tube Co. v. Sawyer*, was that in a time of undeclared war, the President has no power in the face of a contrary statute to hold American property indefinitely without due process of law. If under our Constitution, the President has no authority in the face of a contrary statute in a time of undeclared war to hold American property without due process of law, how does he have the power to hold an *American citizen* indefinitely without due process of law? I believe that the proper result in both the *Hamdi* and *Padilla* cases would have been to hold that the President had no authority to detain

86. See Neil McDonald and Scott Sullivan, *Rational Interpretation in Irrational Times: The Third Geneva Convention and the "War on Terror"*, 44 HARV. INT'L L.J. 301, 310 (2003).

87. *Padilla*, 124 S. Ct. at 2715.

88. *Id.* at 2718 n.8.

89. 5 U.S. 137 (1803).

90. 343 U.S. 579 (1952).

American citizens indefinitely, incommunicado, and without due process of law. If the President has that authority, theoretically, any American citizen on U.S. soil could be called an enemy combatant and be detained indefinitely without due process, even if the civilian courts are open and functioning.⁹¹

What about extra-legal places? In *Rasul*, aliens being detained on Guantanamo were seeking a writ of habeas corpus.⁹² As a lawyer for Haitian refugees, I spent many hours at Guantanamo, a naval base made famous in the Rob Reiner movie, *A Few Good Men*.⁹³

The question really raised in *Rasul* is whether Guantanamo is a land without law? The commonsense answer seems obvious: Guantanamo is a land that is pervasively subject to U.S. law. When my students and I litigated the Haitian refugee case back in the early 1990s, we learned early on that the Federal Anti-Slot Machine Act⁹⁴ applied on Guantanamo.⁹⁵ So, how can it be that the Due Process clause of the 5th Amendment did not apply on Guantanamo?

In *Rasul*, the U.S. Supreme Court majority conclusively rejected the extralegal view that the Administration offered. The dissenters, the Nationalist three – Rehnquist, Thomas, and Scalia – basically argued that Guantanamo is not U.S. territory, and that the Court should defer to the executive branch, and rule that the federal habeas statute has no extraterritorial effect in Guantanamo. Suffice it to say that their reasoning was rejected: the net result of *Hamdi*, *Padilla*, and *Rasul* is that there is no black hole in U.S. law; under our law, there are no extra-legal persons, and there are no extra-legal places. Had the Court recognized such an exception, how long would it be before the Indonesians began holding Acehnese refugees on an offshore island, or the Russians began holding Chechnyans on offshore islands, or the Chinese Government began holding the Falun Gong on off-shore islands? Such a result would have created

91. This conclusion is reaffirmed by the Nondetention Act, 18 U.S.C. § 4001(a) (2002), which provides that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress,” and the U.S.A. Patriot Act, which “authorized the detention of alien terrorists for no more than seven days in the absence of criminal charges or deportation proceedings, 8 U.S.C. § 1226a(a)(5) (2000 ed., Supp. I).” As Justice Souter notes in his *Hamdi* concurrence, “[i]t is very difficult to believe that the same Congress that carefully circumscribed Executive power over alien terrorists on home soil would not have meant to require the Government to justify clearly its detention of an American citizen held on home soil incommunicado.” *Hamdi*, 124 S. Ct. at 2659 (Souter, J., concurring).

92. 124 S. Ct. at 2691.

93. *A FEW GOOD MEN* (Columbia/Tristar Studios 1992). We all remember one of the most famous cross-examinations in cinematic history, when Tom Cruise, as a JAG lawyer, asks Colonel Jessup, played by Jack Nicholson, “Did you order a Code Red?” When Cruise shouts, “I want the truth,” Nicholson answers, “You can’t handle the truth!” And then of course he breaks down completely. Don’t we wish all of our cross examinations went so well?

94. Anti-Slot Machine Act, 15 U.S.C. § 1175 (1989).

95. See Harold Hongju Koh, *Executive Branch Interpretation of the Law: Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513, 521 (1993).

large pockets in the world that are lands outside of the law, a fundamental assault on the concept of human rights as a universal imperative. Happily, the U.S. Supreme Court rejected that idea.

That brings me to the final issue I want to discuss: inter-judicial comity, by which I mean the respect paid by one court to the rulings of another. What is the relationship between international and domestic courts? This is increasingly important in a world in which we have international tribunals under NAFTA, the World Trade Organization, and the Law of the Sea Convention, among others.⁹⁶ Many of you know the decision of the Oklahoma Court of Criminal Appeals in *Torres v. Oklahoma*, in which Judge Chapel, who is here tonight, as well as Judge Lumpkin, ruled on the legal significance of a ruling by the International Court of Justice that the United States has violated the Vienna Convention on Consular Relations⁹⁷ by not giving consular notification to a Mexican national on death row. Both opinions asked whether such a Mexican national has a right to some kind of post conviction relief, based on the undisputed treaty violation that had occurred?⁹⁸ This issue has now come before the U.S. Supreme Court three times: in a 1998 case called *Breard* involving Paraguay,⁹⁹ and a couple of years later in a case involving Germany.¹⁰⁰ The issue was then raised again in *Torres v. Oklahoma*,¹⁰¹ but the Governor granted clemency after the courageous opinion of Judge Chapel before the Court of Criminal Appeals (which is discussed in Professor Levit's contribution to this symposium).¹⁰²

All of these issues are now before the Court again in *Medellin v. Dretke*, which the Supreme Court will hear on the merits in March 2005.¹⁰³ Can Texas execute a Mexican national who was uncounseled under the Vienna Convention

96. Third United Nations Conference on the Law of the Sea: Final Act, Dec. 10, 1982, 21 I.L.M. 1245.

97. *Torres*, 962 P.2d 3 (order granting stay of execution and remanding case for evidentiary hearing); Vienna Convention on Consular Relations and Optional Protocol on Disputes, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820.

98. *Torres*, 962 P.2d 3 (Okla. Crim. App. 1998), *aff'd sub nom*, *Torres v. Mullin*, 317 F.3d 1145 (10th Cir. 2003), *cert. denied*, 124 S. Ct. 562 (2003) (mem.) (Breyer, J., dissenting), *cert. denied*, 124 S. Ct. 919 (2003) (mem.) (Stevens, J., dissenting).

99. *Breard v. Greene*, 523 U.S. 371 (1998).

100. *Lagrand (F.R.G. v. U.S.)*, 2001 I.C.J. 466 (June 27).

101. 317 F.3d at 1148.

102. Janet Koven Levit, *A Tale of International Law in the Heartland: Torres and the Role of State Courts in Transnational Legal Conversation*, 12 TULSA J. COMP. & INT'L L. 163 (2004).

103. 371 F.3d 270 (5th Cir. 2004), *petition for cert. granted*, (No. 03-20687). For my view of the merits, see the Amicus Brief that I filed on behalf of numerous United States Diplomats, including former Secretary of State Madeleine Albright, in *Medellin v. Dretke*. Brief of Former United States Diplomats as Amici Curiae in Support of Petitioner, *Medellin v. Dretke*, 371 F.3d 270 (2004) (No. 04-5928).

on Consular Relations, despite a World Court judgment in Mexico's favor?¹⁰⁴ Obviously, the Vienna Convention serves the interest of Americans. If you were traveling overseas and were falsely arrested, who would you rather see – a Mexican lawyer or your U.S. diplomat? Most of us would obviously prefer to see someone from our embassy. Foreigners arrested in the United States have a constitutional right to a lawyer. So, they have far less need for consular representation than we Americans do abroad, where, if you do not get consular representation, you are in deep trouble. Clearly, it is not in our interest for our states to refuse to give foreigners their consular rights. Why? Because American citizens also travel abroad and are also sometimes arrested and charged with murder; they need assurance that their reciprocal rights under the Vienna Convention will be scrupulously honored.

Now it turns out that other U.S. administrations have recognized this point. In 1954, the United States went to the World Court to sue to enforce the Vienna Convention, and again in 1980, when American hostages were held in Iran, the United States went to the World Court to enforce the Vienna Convention on Consular Relations. So it has historically been in our national interest to enforce the Vienna Convention. One of the key issues raised in *Medellin* is: who is the organ of treaty compliance of last resort in the United States? Is it the governor of the state or is it a federal court, such as the U.S. Supreme Court? Can state procedural default rules cut off the exercise of the federal treaty rights? Does an individual whose treaty rights have been violated have a domestic judicial remedy in a federal habeas court? Must federal courts comply with binding treaty obligations? Some or all of these issues will be decided by the Supreme Court before July of 2005.

So what conclusions can we draw from the Supreme Court's most recent encounter with international law? First, despite my writings, the President sometimes loses in foreign affairs. Second, Transnational Public Law Litigation works. The net result of thirteen years of litigation about Guantanamo has been that courts have finally subjected Guantanamo to judicial review to hear various kinds of constitutional claims arising on writs of habeas corpus. Third, transnational legal process can succeed in internalizing norms into the U.S. domestic system. Finally, global law can play an important role both in promoting good American exceptionalism and restraining bad exceptionalism.

In short, the last Supreme Court term largely confirmed the conclusions in my academic writings, with the exception that the President lost most of these foreign affairs cases. But why was this so? Why did the President lose the *Rasul* and *Hamdi* cases at the Supreme Court last term? The answer can

104. *See id.*

probably be stated in two words: Abu Ghraib.¹⁰⁵ In the oral arguments for the *Hamdi* case and in the *Padilla* case, the executive branch said, essentially, “trust us.”¹⁰⁶ We need authority to detain, so “trust us.” If you trust us, alien detainees don’t need judicial process. And if you trust us, the courts don’t have to play any role. And if you keep detainees as extra-legal persons in extra-legal places, they will be humanely treated because the United States does not permit torture. But then, as the Justices were deciding the cases, what did they see? That such trust was not warranted.

We saw, stunningly, memos by Justice Department officials suggesting that torture can be justified.¹⁰⁷ The Justice Department defined “torture” so narrowly as to require that the interrogator have the precise objective of inflicting “[p]hysical pain . . . equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.”¹⁰⁸ Yet before the Bush Administration invaded Iraq to oust Saddam, it pointed out that his security services had used such “*torture techniques* [as] branding, electric shocks administered to the genitals and other areas, beating, pulling out of fingernails, burning with hot irons and blowtorches, suspension from rotating ceiling fans, dripping acid on the skin, rape, breaking of limbs, denial of food and water, extended solitary confinement in dark and extremely small compartments, and threats to rape or otherwise harm family members and relatives.”¹⁰⁹ Yet under the absurdly narrow legal definition in the Justice Department Opinion, many of these heinous acts by the Iraqi forces would not have constituted torture!

105. For discussions of the Abu Ghraib tragedy, see generally MARK DANNER, *TORTURE AND TRUTH: AMERICA, ABU GHRAIB, AND THE WAR ON TERROR* (2004); SEYMOUR M. HERSH, *CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB* (2004); STEVEN STRASSER & CRAIG R. WHITNEY, *THE ABU GHRAIB INVESTIGATIONS: THE OFFICIAL INDEPENDENT PANEL AND PENTAGON REPORTS ON THE SHOCKING PRISONER ABUSE IN IRAQ* (2004); *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* (Karen J. Greenberg & Joshua Dratel eds. 2004).

106. Oral Argument at 45, *Hamdi*, 124 S. Ct. 2633 (2004) (No. 03-6696); Oral Argument at 19, *Padilla*, 124 S. Ct. 2711 (2004) (No. 03-1027).

107. See, e.g., Memorandum of August 1, 2002 from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, for Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A, available at <http://news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf> [hereinafter Bybee Memorandum].

The discussion below follows from a Statement of Harold Hongju Koh, Dean and Gerard C. and Bernice Latrobe Smith Professor of International Law, Yale Law School, before the Senate Judiciary Committee regarding The Nomination of the Honorable Alberto R. Gonzales as Attorney General of the United States, January 7, 2005, available at http://judiciary.senate.gov/testimony.cfm?id=1345&wit_id=3938

108. Bybee Memorandum, *supra* note 106 at 1.

109. See Saddam Hussein’s Repression of the Iraqi People available at <http://www.whitehouse.gov/infocus/iraq/decade/sect4.html> (last visited Feb. 25, 2005) (emphasis added).

Moreover, the Justice Department grossly overread the inherent power of the President under the Commander-in-Chief power in Article II of the Constitution. The Opinion claimed that criminal prohibitions against torture do “not appl[y] to interrogations undertaken pursuant to [the President’s] Commander-in-Chief authority.”¹¹⁰ Yet the 8th Amendment does not say “nor [shall] cruel and unusual punishments [be] inflicted” *except when the Commander-in-Chief orders*. Nor does any part of the 5th Amendment’s Due Process Clause jurisprudence sanction torture by executive officials.¹¹¹ If the President has the sole constitutional authority to sanction torture, and Congress has no power to interfere, why should the President not also have unfettered authority to license genocide or other violations of fundamental human rights? And if the U.S. President has authority, as Commander-in-Chief, to authorize torture in the name of war, then why did Saddam Hussein not have similar constitutional authority to authorize torture under his parallel Commander-in-Chief power?

Perhaps most shocking, the Justice Department suggested that lower executive officials can escape prosecution for illegal torture on the ground that “they were carrying out the President’s Commander-in-Chief powers.”¹¹² The DOJ opinion asserts that this would preclude the application of a valid federal criminal statute “to punish officials for aiding the President in asserting his constitutional privilege.”¹¹³ By adopting the doctrine of “just following orders” as a valid defense, the opinion undermines the very underpinnings of individual criminal responsibility, principles set forth in the landmark judgments at Nuremberg. Nuremberg changed the valence of personal responsibility. Before the Nuremberg trials, lax rules of responsibility had created conditions under which gross atrocities could be committed and yet nobody would be held responsible. Street-level officials who had committed torture and genocide could claim that they were “just following orders.” Yet at the same time, their commanders could claim that they were so high in the chain of command that they did not know what was going on, and therefore should not bear command responsibility for illegal acts committed by their subordinates. After Nuremberg, the law recognized that commanders bore command responsibility to know what atrocities were being committed in their name, and that street-level officials could not escape accountability by saying that they were “just following

110. Bybee Memorandum, *supra* note 106 at 35.

111. *See, e.g., Chavez v. Martinez*, 538 U.S. 760, 796 (2003) (Kennedy, J., concurring) (“[I]t seems to me a simple enough matter to say that use of torture or its equivalent in an attempt to induce a statement violates an individual’s fundamental right to liberty of the person.”).

112. Bybee Memorandum, *supra* note 106 at 35.

113. *Id.*

orders.”¹¹⁴ These principles are now embodied in the basic instruments of international criminal law.¹¹⁵ Yet the Justice Department sought to reverse half a century of history by declaring the “superior orders” defense presumptively legal.

Recently we have heard that the United States is currently holding some 100 ghost detainees in U.S. custody in various offshore locations, where presumably, they are being subjected to various forms of coercive interrogation tactics.¹¹⁶ By now you have figured out my message: who is at risk? If we can do this to foreigners, what is to prevent American citizens who are captured from being taken to offshore locations and similarly tortured, relying upon the U.S. Government’s own legal positions?

My message is simple: in a world of human rights we need to have accountability, and we must respect rights. When I was a lawyer for Cuban refugees on Guantanamo, a lawyer for the U.S. Government asserted before a federal judge that aliens on Guantanamo have no rights. But trust us, he said, we will make sure to treat them humanely. When it was my turn to argue, I said “I thought it was a founding principle of this nation that ‘We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness,’ and that we, as Americans, should pay ‘a decent Respect to the Opinions of Mankind.’”¹¹⁷ In *Rasul*, about ten years later, the Supreme Court vindicated that belief.

In short we are witnessing a process here, one in which we cannot afford to simply be passive observers. I have two brothers who are doctors, and when they graduated from medical school, my father said to each of them, “before you understood how the human body worked, you had no duty to heal. But now that you understand that process, you have a duty to influence it. You have a duty to heal these sick people.” In the same way, I believe, when lawyers are ignorant about transnational legal process, they have no duty to influence it. But once you understand the relationship between domestic and international law, it is

114. In *In re Yamashita*, 327 U.S. 1 (1946), the U.S. Supreme Court recognized the doctrine of command responsibility, under which commanding officers are liable if they exercised effective control over subordinates who engaged in torture and other mistreatment of detainees in violation of the law of nations, knew or had reason to know of their subordinates’ unlawful conduct, but failed to take reasonable measures to prevent their subordinates’ conduct.

115. See, e.g., Article 7(4) of the Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted by UNSCR 827 (May 25, 1993) (“The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility.”), available at <http://www.un.org/icty/legaldoc/index.htm>.

116. See ENDING SECRET DETENTIONS, HUMAN RIGHTS FIRST (2004), available at http://www.humanrightsfirst.org/us_law/PDF/EndingSecretDetentions_web.pdf (last visited Feb. 24, 2004).

117. THE DECLARATION OF INDEPENDENCE para. 1-2 (U.S. 1776).

your duty as American citizens to heal the body politic by fighting for fidelity to the rule of law.

Marbury v. Madison tells us that ours is “a government of laws, and not of men.”¹¹⁸ And when American judges and officials swear oaths to uphold the Constitution and the laws of the United States of America, those laws include the treaties of the United States, those principles of international law which are part of our law.

At stake is nothing less than America’s position in a globalizing world. As Americans we face a choice: will our country pursue internationalism based on power alone, or will we pursue internationalism through a strategy based on power coupled with principle? In an age of globalization, I believe, it is our duty as citizens and lawyers to use our knowledge of the law to prod our country to follow the law. By so doing, we can urge this country we love to follow the better angels of its national nature.

Thank you very much.

118. 5 U.S. at 163.