THE BROOKINGS INSTITUTION

The Third Annual Raymond Aron Lecture:

"JUDGES AND CONSTITUTIONS IN THE UNITED STATES AND EUROPE"

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The Brookings Institution
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C O N T E N T S

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P R O C E E D I N G S

MR. GORDON: Ladies and gentlemen. My name is Phil Gordon. I'm the director of the Center on the U.S. and Europe here at Brookings. It's a great pleasure to welcome you to the Third Annual Raymond Aron Lecture.

As a lot of you I think already know, we launched this lecture three years ago around the time of the centenary of Aron's birth, and we did it not only to honor the great French scholar and writer and philosopher at the time of the centenary but also to give ourselves a platform for inviting distinguished French and American scholars, practitioners and experts to come and address important issues to the two countries, and we certainly have an opportunity to do that this evening. As you probably remember, at the first Aron lecture three years ago we had three of Aron's most distinguished students. We had Jean-Claude Casanova, who is the editor of *Commentaire*, the journal that Aron founded; Pierre Hassner, the well-known scholar, writer, and everything else; and Stanley Hoffmann of Harvard University, all of whom were Aron's students, and they engaged on French/American relations and international relations for the first lecture.

Last year we had Tony Judt of New York University. He gave a brilliant talk on the defense of decadent Europe, echoing a book of Aron's, and a response by Gilles Andréani, who was the head of the Policy Planning staff in Paris. So, there's a great legacy that's being built. We're delighted to build on that this evening with our distinguished guests that Brookings's president, Strobe Talbott, will introduce in a moment.

Before I pass the microphone to him to do that, I would just like to thank the sponsors of the lecture, starting with *Centre d'Analyse et de Prévision* in Paris, the policy planning staff of the French foreign ministry, which is represented tonight by Pierre Lévy, who just flew in from Paris, reading *Commentaire*, Aron's journal, on the way, so we're delighted to see Pierre here. French Ambassador Jean-David Levitte, who's been a great supporter of ours in all sorts of ways over the years -- it's very nice to see him. Let me also thank the German Marshall Fund of the United States, which has supported -- I see John Glenn representing them, sitting here -- supported what we do on France and other issues. Karen Donfried as well. And I thank the European Commission -- my friend Jonathan Davidson is also here and all of them have contributed to our work on France, Europe, and the United States.

Let me also finally welcome the graduate students in my French politics course at SAIS, which meets Thursday evening, and these are the best guest lecturers I suspect you will have all year. In fact, I'm certain of it.

(Laughter)

MR. GORDON: And with that, it remains only for me to get out of the way and turn this over to Strobe for the discussion.

MR. TALBOTT: Thank you very much, Phil.

And before saying a few words of introduction of my own, I just want to thank Phil for the leadership that he has brought to our Center in the United States and Europe. As I think many in the room know, this is a relatively

new enterprise at Brookings, and the Center in the United States and Europe grew out of what is now our program on France, further evidence that many good things in this world, and indeed in this town, began with France, speaking of which Jean-David Levitte is a superb diplomat as so many of you know, and he's been a very good personal friend and colleague and extremely good friend to this institution and to this enterprise.

Now, this is billed, of course, as a lecture, but as you can tell from the format, we are going to depart from the usual lecture style and have this be much more of a conversation and indeed a trialogue among the three distinguished people to my immediate right. And what a terrific trio it is and how proud we are to have them here at Brookings.

In addition to their individual distinctions, which are many, collectively, our three guests represent what I would call a couple of welcome antidotes to some lamentable facts about national and international life. Here in the United States, as everyone in this room knows, we are in the midst of what seems like an endless poisonously partisan season, which is all the more reason to be grateful for the relationship that has developed between Sandra Day O'Connor and Stephen Breyer. Even though one of them was appointed by a Republican president and the other was appointed by a Democratic president, they not only become close friends, they have traveled the world together as frequent flyers to China and many other parts of the world both to learn about how law is made and practiced elsewhere and also to impart knowledge about how the system works in

this country, and they have been able to find a great deal of common ground between them on judicial issues.

Another very unfortunate trend in recent years has been the seemingly chronic attention and friction between the United States and France, which, by the way, is one more reason that we have a France program here at The Brookings Institution, and it's also one more reason to be grateful that Jean-David Levitte is the French ambassador here in Washington. Jean-David's presence in this town is sort of like a drip of aspirin into a system and into the relationship. And I might add that there is a comparably analgesic and salutary effect that the friendship between Stephen Breyer and Robert Badinter has had. They have developed not only a close personal friendship but an intellectual partnership that has had a public and published dimension to it, and I think you will get a little bit the flavor of that this evening.

So, we have the makings of a great discussion with, I hope, as much participation as possible by you, the audience, and in that spirit the three guests of honor are going to confine their opening remarks to some brevity and succinctness so that we can get into a little bit of a discussion among the three of them, and then we will open it up to all of you.

I thought I might begin by framing the issue with a brief quotation from Raymond Aron himself. In a book that Aron wrote in 1970 with the rather provocative title *In Defense of Decadent Europe*, he worried that liberal regimes would suppress the very freedoms that those regimes were designed to protect. In

so doing, they would erode the very source of their strength and vitality in the struggle against rivals and enemies. "The freedoms that we enjoy in the West," he wrote, "are humanity's most precious and more tenuous acquisition." So, the question before the house and before our guests is how we simultaneously protect those freedoms and our societies in an age of terror.

And Senator Badinter, I'm going to begin with you as the guest who's come the greatest distance to be with us this evening, and then we'll follow up with comments and reactions from Justices O'Connor and Breyer.

I would like to say just a word of introduction about Senator Badinter. He is a former law professor and, as Brooke and I discovered last night having dinner with Senator Badinter and Stephen Breyer, he is still an outstanding teacher. I learned a lot listening to him last night. He's a well-known barrister, a former minister of justice, a former president of France's constitutional court. And, by the way, 25 years ago I believe, if I'm not mistaken, this month he introduced legislation that abolished the death penalty in France, and the abolition of the death penalty is a subject of no less than three books that he has written. And three years ago he was appointed by Kofi Annan to a high-level panel, on threats, challenges, and change, a phrase that resonates, I think, with our topic for this evening.

So, with that Senator Badinter, I think I could probably summarize the question for you with one word, a rather exotic word, "Guantánamo." As you know, we're having a lot of debate in this country about interrogation, detention,

and surveillance, and it would be interesting to hear your reactions to this debate, both as it's playing out on this side of the Atlantic and also some observations about how you are coping with this dilemma on your side, both in France and in Europe.

SENATOR BADINTER: I shall speak from here?

MR. TALBOTT: No, why don't you sit here and we'll have a chat.

SENATOR BADINTER: Okay.

Well, thank you for the introduction, and obviously I'm more than delighted to be in this great institution to speak with my two, how would I say, former collegian and close friend about one of the most difficult problems that of course the United States faces, but not only does the United States, which is the relationship between fighting terrorism and keeping your fundamental freedoms.

I feel more than honored by the fact that I speak of the Raymond Aron auspices, to tell you the truth, we were not always in absolute agreement on French politics, but Raymond Aron and I had a special connection. He had been the teacher of my wife Elizabeth, and they were very, very close friends until his end.

These personal remarks of course, when they are made, I will approach the subject, if you allow me, not by the angle of what we in Europe and particularly in France feel about the policy of the United States President and Congress in terms of laws dedicated to fight terrorism. The criticism would probably be too harsh for a guest.

The two topics to start the debate are our sad experiences and the lesson we learned from it.

When you speak of terrorism, it's a word. The reality is complex. In fact, immediately before I became the Minister of Justice, I wanted to make a course, a special course, a seminar on terrorism, because terrorism at the time was spread all around Europe. Terrorism was present in Spain, in England -- mostly in Ireland but in England. Terrorism was present in Germany, terrorism was very, very rampant in Italy. And we also had a problem. So, the matter of fighting terrorism was crucial.

Now, if you do consider terrorism -- in fact, you have different species of terrorism and they should be fought differently. The first one is what I would call anarchist terrorism -- terrorists who want to overthrow a society by using terrorism, expecting a general revolution will arise from it. It never arises and the only way to deal with it is through law, ordinary law, applicable law, because the public rejects them. That's how it has been done with anarchists notably in the whole of Europe during the 19th century and the early 20th century.

The second form of terrorism is -- and it's a very different one and very difficult to oppose -- in fact, you don't oppose it, you fight it but always you almost lose it. It's a question of terrorism for national independence. This is widely spread and has always been. And the only answer is not by repression at the variance; it's by a political solution. Otherwise, it doesn't stop. And we have

many experiences on which I will not go into in many countries of many periods whenever a population feels that it's kept by a foreign power and you have the illustration/the whole theme of decolonization -- you always have terrorism, which makes the use of terrorists as an anathema, something to be dealt with, with cautiousness, because -- remember that some terrorists of yesterday become heads of state the following morning after independence, and we have a strong example among the Israelis where you had many former illegal terrorists who became the most important personnel of the Israeli democracy.

Now, what we face now is different. It's a form of international terrorism. Its aim remains vague. In other terms, al-Qaeda, Islamic terrorists fight and fight mostly their opponents in the Islamic world, and what they call their allies. The Western world, mostly the United States, the Crusaders and the Jews on the basis which do know a law an impossible political solution. You can look for it, and you don't see how you can pass a political agreement, with people would say that what they want is the world, especially the Islamic -- that not only the Islamic countries -- respect the Sharia law, because nobody can think really that we shall convert to the sharia and therefore we are in a type of threat on terrorism, which is different from the ones I mentioned before.

Now, once you consider that, you must go a step further and try to see what experiences have been carried on to fight terrorism in France, and you decide the first type of terrorism, and I come to the second one because it's the most interesting one.

When we had the decolonization problem in France and, most notably, the Algerian War of Independence for the Algerians, not that the beginning is considered as such by the French, we used all proceedings -- not only the legal ones but the ones that violated absolutely the fundamental rights absolutely.

It was one of the most disgraceful periods of our history. We used permanent detention without warrant or without knowing any -- without having any form of legal control for an unlimited period -- of course till the end of the war but unlimited period. We used special military jurisdictions. We used special laws, granting full powers of such of arrest to the army, notably to the paratroopers. Even one became famous, Mr. Le Pen. We allowed, without admitting it but letting it practice the use of torture for questioning.

I will have to go further. We went even as far as to practice political assassination under the various pretexts. Result on the ground -- no victory. Result four years afterward a little more perhaps, the disgrace of it still remains vivid, not only in France but outside of France; not only with our relationship with the Algerian people but most commonly with many of the Muslim population. The war with Algeria not only did we lose -- losing meaning leaving Algeria -- but we lost somewhere part of our soul.

Time elapsed, terrorism started again in France, and we thought about how should we defeat or fight it. The lessons of the war with Algeria were present. One word- just personal. I personally have always been an opponent of

these measures. And during the period of '80/'86 -- '81/'86, the only way that we felt, President Mitterrand and myself, to deal with terrorism -- we had Iranian problems, we had Armenians versus Turks, got problems tied up with policy in Lebanon and many, many wild *attentats* in Paris was never, never go back to what had been practiced during the Algerian war.

There was one special jurisdiction inherited from the past called the *sûreté de l'état*, military judges, special proceedings, even civilians judged by military during peacetime for attempt against *sûreté de l'état*. This was suppressed, and we came to the concept that the only efficient, not only legal approach but efficient approach, would be to use all the tools that the law grants us in respect of fundamental laws just with modifications we were absolutely required for this special solution. In other terms, no legislation of exception; no jurisdiction of exception but when it was needed for action just increase the power of police or prosecuting authorities but under the control of the magistrates who are independent.

If I summarize very briefly examples. *Garde à vue* -arresting somebody and keeping him in police custody for permanent interrogations. In common French law, it is allowed for 2 twenty-four hour periods. Renewal after 24 hours by decision of the judge. In terrorism cases, *garde à vue* has been extended to six days. Six days. Renewable at the -- after two days by a judge, presence of the lawyer commonly admitted from the start. Here it can be -- not always but can be deferred until after 72 hours. Medical care every 24 hours.

That's all that is allowed. No more than that and with those guarantees. And, of course, the decision of continuing after the two first days is taken by a judge, and every 24 hours decision of the judge should be required. Now, after that, executing a warrant at a private domicile at night authorized only by a magistrate (*le juge*). Same thing for putting on devices which allows us to hear what's going on in a room private. That can only be decided by a magistrate, even practiced by the police. And all the way through (inaudible), this has been the same policy. Use the principles; accommodate them if needed for the special requirements of terrorists; and save above all the guarantees that the presence of judges give because as it was said by an English judge limited attention without the control of the judge is an anathema in any country which respects the rule of law. I can't think of saying a better formula.

Then how you improve. By the technicalities themselves. Fighting against terrorism requires, among judges and prosecutors, special -- I would say special skills, knowledge, experience. So, the prosecution versus terrorism were regrouped in one section in the Palace of Justice of Paris one chamber which deals with that. Seven judges, seven members of the -- like would be here -- the general attorney services prosecuting seven judges, and they take all the cases, special units of police, much, much concern with crossing as much information as possible, and traditionally the use of what we consider the best weapon -- intelligence, infiltration in the milieu which are suspected to be terrorists with special possible accommodations for this infiltration by the police

in order that we try to prevent the *attentats* instead of afterwards fighting to find out who are the others.

Very close cooperation with foreign friendly states, notably Europe and also the United States is a very, very strong cooperation at the police level on information, and it's through this approach that we have been working for about 20 years.

There have been laws, but they never departed from these principles. Why? Because the *conseil constitutionnel* from the very first decision '86 -- September '86 -- I changed my office, said if special requirements are necessary to fight against terrorism, there should be special provisions. They should never, never depart from the fundamental guarantees of the principles or the rule of law.

From there on, as new rules come, we check, they check at the council that they fit with these principles, which are clear and simple. And at the very end for the judge for the trial, as I said we had many special commissions in the French history. Many. All of them with bad reputation in history.

We stick to the same jurisdiction as the one which is commonly used, except on what ground we had to depart from juries, because juries -- jurors were threatened and notably threatened during problems with the Corsican terrorists. So, they didn't want -- and we couldn't ask them to sit on the bench and therefore instead of 12 jurists there's 12 judges *tirés*- not appointed but chosen by -- you know, by the Parisian court with double degree of jurisdiction, and of

course the traditional control of the C*our de Cassation* (France's highest court).

Usually that's the way that it has been handled. Success -- what success in this field you have about a hundred now terrorists in jail. Some have been judged, sentenced to hard sentences.

Will that prevent us from *attentats*? I doubt it. I really doubt it. But we know that through that we stick to the fundamental principles which are not only ours, but which are also the ones that have been expressed in the whole of Europe.

Remember that one of the specificities of Europe today is that we all live on the principles of the European convention of *les droits de l' homme*, and this is controlled by an international jurisdiction composed of members from all over Europe, *la Cour Européene des droits de l' homme*, which can condemn any state which would violate the convention of human rights. And in the convention of human rights, we have two principles very clearly expressed fair trails and all the principles that go with it and Article XV in case of a threat to the life of the equilibrium of the nation, a real threat versus the life of a nation, you can take measures, but measures which will always respect the fundamental principles, and there are three matters which should never, according to the juris prudence du Cour, never be touched. No torture under any form or any reason whatsoever. Never use of torture. Never detention without control by a judge. And I must say it's exactly today when the law came into force in France 25 years ago. No death penatly. That's the three points which cannot be challenged by

European states now.

MR. TALBOTT: Thank you very much, Senator Badinter.

Justice O'Connor, I would invite you to respond to anything that comes to mind listening to Senator Badinter, and perhaps maybe, if you feel it appropriate to pick up on one point, he mentioned the increasing importance, and explained the reason for it, of judges themselves in handing this new set of challenges we face. As you know so much better than pretty much all of us in the room with the possible exception of Justice Breyer, there is some controversy here in the U.S. that the increasing importance of judges is going to touch off, or has already touched off, a kind of backlash in accusations of the suppressions of the powers of the other branches, and I'd be interested, and I think the audience would, too, be interested in hearing your assessment both of the extent to which that is something we should be concerned about and the extent to which the backlash is something we should be concerned about.

JUSTICE O'CONNOR: I want to open my remarks with a little bit of history rather than a direct answer to your question, and I know we've run out of time, so how much time do I have?

MR. TALBOTT: We're doing, actually, pretty well. If you could maybe talk for ten minutes, that would be great.

JUSTICE O'CONNOR: I'll try.

(Laughter)

MR. TALBOTT: Can't ask for more.

JUSTICE O'CONNOR: All right.

Now, I want to describe a conflict between the executive and judicial branches of the United States government, and not long after the outbreak of a war the President of the United States altered our traditional understanding of civil liberties by finding that standard jury trials couldn't meet the necessities of wartime. And the executive -- the Chief Executive decided that some defendants should be tried by special military courts rather than by traditional courts and juries. That decision went before the Supreme Court in time in the case of *ex parte* Milligan. The President was Abraham Lincoln. The war was the Civil War. And in *ex parte* Milligan the Supreme Court held that military tribunals did not have jurisdiction of civilians who were suspected of aiding the Confederacy so long as the traditional civilian courts remained open and functional.

The opinion of the court was written by Justice Davis, and he wrote that the Constitution provides law for rulers and the people equally in times of war and peace.

That was *ex parte* Milligan back in the 1860s. I started on that note because I want to remind us all that this is not the first age and not the first time in which governments have tried to consider how best to strike the delicate balance between protecting civil liberties on the one hand and protecting national security on the other. And we've had other such conflicts in this country.

Most of you probably remember Justice Robert Jackson. He's the one who went over and sat on the tribunals after World War II to try German

defendants, and he was quite a remarkable man. In a case involving freedom of speech he wrote a dissent and he said this: "The choice is not between order and liberty. It's between liberty with order and anarchy without either." He warned that unqualified demands for liberty threatened to convert the constitutional Bill of Rights into a suicide pact.

So there you are. You have these pressures. You want to respond to the crisis, but you don't want to engage in a suicide pact. And I don't think that our court has always struck the right balance. Maybe they did in *ex parte* Milligan. But along came World War II and this nation was at war with Japan. It was a decision of our government to put citizens of this country of Japanese descent in internment camps, because they were all considered threats. That also went to the U.S. Supreme Court, and in that case, the Korematsu case, the Supreme Court upheld it. Justice Black wrote for the court and he said that national security demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily. That case I think gave our Court sort of a black eye, and it has been much criticized. In fact, Justice Jackson then wrote about that piece and he said that Korematsu lies about like a loaded weapon ready for the hand of any authority that can bring forth a plausible claim to an urgent need. I'm glad to say that no one since Korematsu has brought it out and relied on it again, and I think it would be hard to do that today.

Nevertheless, our nation does face some threats. There's no question about it, and they can be very dangerous as September the 11th

illustrated and as the recent plot discovered in London illustrated. Our Supreme Court has handed down three cases so far in a general subject of the war on terror: The *Hamdi v. Rumsfeld* case; *Rasul v. Bush*; and *Hamdan v. Rumsfeld*.

The first case, Hamdi, involved an American citizen who was captured in Afghanistan. He was designated by our government as an enemy combatant, and his father filed a suit saying that he ought to be able to challenge his designation. The Supreme Court, in an opinion, which I authored for the Court, said that he was entitled to notice of the factual basis for his classification as an enemy combatant and a fair opportunity to rebut the government's assertions before a neutral decision maker. We said in that majority opinion that a state of war is not a blank check for the President when it comes to the rights of the nation's citizens.

The Rasul case, on the other hand, involved noncitizens. Rasul brought a habeas corpus petition in connection with detention at Guantanamo Bay, and the Supreme Court held that federal courts did have jurisdiction to determine the legality of the alleged indefinite detention of those people and that Guantanamo was within the jurisdiction of the courts for those purposes.

More recently, in the spring after I left the Court, it handed down the Hamdan case, which no doubt Justice Breyer can tell you more about than I can, but it considered the possibility of the use of military tribunals set up by the President with limited rights in those tribunals. The Court said that what was set up in that case was not sufficient to meet constitutional standards and that the

rules of courts martial had to be the baseline rather than the more limited rights that had been given. Four members of the Court said that Article III of the Geneva Conventions applied, which requires that criminal sentences be issued by a regularly constituted court affording all the judicial guarantees recognized as indispensable by civilized people. Now, since that case there has been legislation passed by Congress only a couple of weeks ago trying to deal with the problems that the Court identified in Hamdan.

Other nations in the Western world have also had to grapple with some of these issues. In Great Britain, the Parliament passed an anti-terrorism crime and security act, and that act permitted indefinite detention of non-British terrorist suspects without the need to charge or try them with anything. That was challenged in the British courts, and when it went to the House of Lords, the law lords, in an 8 to 1 decision, the law lords found that the detention policy violated Great Britain's commitment to the European Convention on Human Rights. Lord Nickolls of Birkenhead writing for the law lords, said “indefinite detention without charge or trial is an anathema in any country which observes the rule of law.” Britain, then -- the Parliament -- replaced Part 4 of the Act with new legislation to try to comply with that decision, and it no longer allows people to be detained in prison indefinitely, but it does permit imposing conditions resembling house arrest. I don't think that's been tested.

Australia, another ally of the West, also passed an anti-terrorism act, and the Australia High Court also considered the question of indefinite

detention under Australia's act. It arose in the question of two men who had applied for political asylum in Australia and had been denied political asylum and Australia wanted to hold them indefinitely. The High Court in Australia upheld that scheme and said the men had no right to enter in the first place and under those circumstances could be held indefinitely.

There was a dissent there by a Justice Kirby, and he had a lot to say about that decision, which I will not read to you.

Another nation's court addressed a similar question that arose in connection with extradition proceedings. The German court struck down the act that had been passed by the German legislative body and said that it was invalid.

That kind of sums up where we are in terms of litigation since September 11th, and I don't know if there are any complete conclusions to be drawn, but it seems to clear to me that these issues put each of our nations in the dilemma of having the different branches of government checking each other and trying to determine the extent to which terrorism is a sufficient threat that it limits our protection of civil liberties in the interim. I would say that our Supreme Court has done pretty well so far. I don't know what the future holds. All I can say is that there are plenty of conflicts out there, plenty of business for each branch of our government. Justice Breyer is needed.

(Laughter)

JUSTICE O'CONNOR: He's going to have to stay and help solve some of these things.

I think I've exhausted my ten minutes.

MR. TALBOTT: No, no, you've put your ten minutes to terrific use, Justice O'Connor, and you have certainly teed up Justice Breyer, who I'm sure will have something to say on a number of the issues that have come to the fore.

But, perhaps, Justice Breyer, you will include in your comments an elaboration on what you have said very publicly in an extraordinary discussion, a very civil debate between you and Justice Scalia on the subject that Justice O'Connor framed for us here at the end, and that is the extent to which it is appropriate and useful for foreign law to be referred to in some fashion when we grapple with these issues here in the United States. As I think everybody in the room knows, Justice Scalia's position -- and I think that I'm paraphrasing him accurately -- is that we have to protect against allowing the sort of covert smuggling of foreign values into our Constitution. Justice O'Connor referred to the Hamdan case, which is one of several where foreign law was referred to. We are a community of common values. We face a common threat, and how do you see this as relating to the issue at hand, Justice Breyer.

JUSTICE BREYER: First, I'm going to let you down somewhat, because I will not say anything that can be taken as a comment on any case coming before the Court or on any recent legislation. If you think I have subtly or not subtly given some indication of what I think about these issues, you're wrong. I will give no indication of what I think about them.

MR. TALBOTT: That's not a let-down. I think we'd be --

JUSTICE BREYER: All right, a personal word: For years I have enjoyed coming to Brookings. I find it fascinating. Indeed, when I started coming here I frequently attended seminars—which were very useful to me—involving trucking routes, airline deregulation, and regulation of the field price of natural gas. Now, you can imagine how interesting the people here are when they can get me to come back again and again to hear them speak about those subjects.

(Laughter)

MR. TALBOTT: And we published your first book.

JUSTICE BREYER: Correct. You did. That book is currently ranked at number 8,764,321 on the Amazon.com bestseller list.

(Laughter)

JUSTICE BREYER: And that list only goes up to 3 million!

But I want to add another personal point. Being here, at the Raymond Aron lecture, means something special to me. I was a student at Stanford in the late '50s and then at Oxford from '59 to '61. And back then, when I was the age of most of the people in this room, Raymond Aron was a very important figure in the world. Whenever we wanted to know what was happening in France and in Europe, we muddled our way through *le Monde*. And in *le Monde* we read about Raymond Aron and Maurice Duverger; we read about Edith Piaf and Thelonious Monk; and many others. Those names probably spurred my interest in France, which has been personally and professionally rewarding over

the years.

It was interesting to listen to Robert Badinter and then to Sandra O'Connor, because they offered examples of what I will talk about. You would like me to talk about terrorism, but I can say very little about that. You also asked about the use of foreign laws and foreign experience, and that I can say a little bit more about.

There's a debate about whether we should or should not refer in our cases to foreign law or foreign court decisions. In what respects is this debate important and in what respects is it not? There are two categories of cases, (a) and (b). (A) is the category of very exciting constitutional cases, such as homosexual rights and the death penalty. The foreign-law debate definitely does come up in these cases. Reference to foreign law in these cases is highly controversial. I'll come back to category (a).

I want to begin, however, with category (b), which includes the many, many cases where we refer to foreign court decisions without the slightest bit of controversy. Examples include antitrust cases, discovery issues, tort cases. There are quite a few such cases, maybe dozens in the last ten years. There was, for example, the case of *Republic of Austria v. Altmann*. Maria Altmann sued the Austrian Gallery to retrieve six Klimt paintings that she said had been seized by the Nazis during World War II. The Gallery asserted a defense of sovereign immunity. I knew very little about sovereign immunity. The American statute that allows the defense uses this phrase, "sovereign immunity," which is used

across the world. But I wanted to learn, what is this defense really about? I found the answer in an opinion of a Court of Appeals in Paris in the fabulous case of *Ex-King Farouk of Egypt v. Christian Dior*. King Farouk didn't pay his bill for “frocks and coats.” Christian Dior sued him. King Farouk asserted in defense a claim of "sovereign immunity." In that defense, the King in effect asserts, "I need not pay because I was King when I ordered the dresses." The court held to the contrary. It wrote, "You were king. You are not king now. Hence you must pay." Having read this opinion, I began to understand sovereign immunity. The defense focuses upon the status of the defendant at the time of the suit, not at the time the conduct took place. My point here is that my having read and referred to King Farouk’s case raised no political or other controversy whatsoever. That case was different from the cases in category (a). Keep that difference in your mind.

Now I will return to the legal framework for considering matters such as terrorism. I find it interesting to hear Robert Badinter discuss the basic principles that the French maintain in combating terrorism, in part because much of what he says is as true in America as in France. What do I mean by that? Well, the American position denies the validity of a famous remark by Cicero: "Inter arma leges silent." "When the cannons roar the laws fall silent." Cicero meant that in time of war the laws fall silent. But the American legal system follows the opposite principle. In time of war, as in time of peace, the Constitution applies.

The relevant question is not whether but *how* the Constitution

applies in wartime. There are many phrases in the Constitution that directly invite flexibility. The Fourth Amendment does not prohibit all searches; it prohibits *unreasonable* searches. What's an unreasonable search? We answer that question with an eye toward our civil liberties' traditions. Our legal traditions make clear that in peacetime, if a policeman sees a woman being dragged into an apartment house, the policeman does not have to stop and procure a warrant; he can simply enter the apartment house and rescue her. In peacetime as well as in wartime, our civil liberties tradition provides for flexibility. The principle against warrantless searches bends. But when? Under what circumstances? My answer is the same as Senator Badinter's: when it is necessary that it do so.

That brings us to what are typically the more difficult issues for judges. What about the particular factual issue before a court? The judge may have to decide whether it is, or is not, necessary for the principle to bend in the particular case? How can the court know? We are judges, after all. We are not security experts. We understand that security experts know more about these kinds of questions; they have more security-related experience than we do. And the President who appoints the security experts is democratically elected. Congress is elected. We are not. But we have sworn to uphold the principles of the Constitution. So the question before us often is: what do we do, in this case, under these circumstances, given, say, the security experts' support for the Government? Justice O'Connor has spoken about a balance. In striking that balance, we cannot abandon our civil liberties traditions. But what is necessary in

such cases, and who decides? That's the bread and butter issue in many of these cases.

We have an important tool that helps us decide such matters properly, namely the lawyers. Lawyers ask questions, and they will ask the Government, why must we deviate from the civil liberties norm in this instance? The Government will answer. It will have to do more than speak generally; it will have to explain why, in this particular case, this particular deviation is needed. The lawyers then can ask, why didn't you deviate differently, i.e., create a smaller deviation from the civil liberties norm? And, again, the Government will answer. Must these proceedings be conducted in public? Normally, yes. But when necessary, a judge can look at materials *in camera*. The judge will evaluate the materials before him, the questions and answers, giving due weight to both sides. The judge will then determine if the deviation from the norm really is justified, if it really is necessary. All of this gives you a picture of the kinds of questions and answers that we judges hope will allow us never to make that *Korematsu* mistake again. And we also hope these questions and answers will allow us never to make the opposite mistake of following the traditions too rigidly, later discovering that this time a deviation really was necessary to prevent some terrible catastrophe.

With that background, I return to the first question. Why is it that there is so much controversy about relying on foreign law in category (a), those constitutional cases, while in category (b), antitrust and tort cases and so on, references to foreign law spark no controversy at all? My explanation is that what

people worry about in those areas of tremendous controversy -- such as homosexual rights and the death penalty -- is that we are smuggling foreign values into our American Constitution. But in the second category, no one fears that we are smuggling anything into anything. In these more quotidian contexts, everyone understands why we look at foreign experiences: to see how people whose approach to the law is similar to ours have handled the same problems that are now before us. Sovereign immunity, for example, is the same throughout the world. The way a French court considers it in relation to King Farouk provides guidance for how we should consider it in relation to the Austrian Gallery. And so I pose this question: are we not doing the same thing in the first category also? Are we not similarly learning from foreign experiences?

After all, are there so many differences between a French judge and an American judge? We come from roughly similar traditions. We both value civil liberties. We both worry about intruding on our civil liberties traditions, and we both understand the need to rely on flexibility in those traditions to promote national security. You heard Senator Badinter enunciate this same basic principle. Now I ask you: Is the principle he espoused so very different from the principle we follow in America?

There are many similarities between us — similar documents, similar protections, similar principles, and similar human beings called judges. So can we not learn something from their response to a similar problem? We will never be bound by their practices. Of course, their response will never control

ours. But can we not learn from seeing what has been tried, adopted, or rejected in France, or Britain, or Australia? This applies not only to what has been done in their judicial communities, but also in their intelligence communities, in their security communities, and in all of their responses to terrorism and other challenges. Can we not learn something about what is necessary and what is not necessary, about what works and what does not work? Can we not learn at least enough to ask those intelligent questions that we hope will protect us both from a return to *Korematsu* and from entering the fabled suicide pact?

Having phrased this lengthy question, I will now answer it: yes.

(Laughter)

SENATOR BADINTER: Très bien.

MR. TALBOTT: Terrific.

Well, I think to maximize the half an hour or so that we have left we should open the floor to all of you. I would ask anybody who wants to put a question one of the panelists to very briefly identify yourself. Colleagues are here with microphones, and premium on succinctness of questions so we can hear as much as possible from our three guests.

Right there perhaps.

MR. KOBER: I'm Stanley Kober with the Cato Institute. Years ago I acquired a book called *The New German Constitution* published around 1922 on the Weimar Constitution, and the passage in the book I found quite striking said, "Weimar, unlike the American Constitution, has no concept of

inalienable rights," and it seemed to me that foreshadowed what happened in Weimar ten years later.

On this question with regard to international, when the Cold War ended I was struck to read in the Soviet literature no country can say that it is immune to international legal standards, the Helsinki final act. We, the Soviets, made a mistake. This helped end the cold war. And I've always wondered about this with regard to the Ninth Amendment. The Bill of Rights was formulated -- now, they recognized it would not be exhausting. Given that this standard of international rights helped end the cold war, why is it so unusual to look at international standards in terms of the Ninth Amendment?

JUSTICE BREYER: The Ninth Amendment is very interesting. It says, "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." Years ago, I was a law clerk to Justice Goldberg when the Court decided *Griswold v. Connecticut*. Justice Goldberg wrote a concurring opinion in that case. He wrote that the Ninth Amendment means what it says. It is a rule of construction in the Constitution that means that the fact that certain rights are listed does not mean that there are no others. The Framers said in the Ninth Amendment, don't read the list contained in the Bill of Rights' first eight amendments to mean there are no others. Where are those other rights located? In many instances in the Court's history, it has recognized other rights in the Fourteenth Amendment's concept of liberty. The Fourteenth Amendment says that no person shall be deprived of

liberty without due process of law. Well, what is the content of that liberty?

You asked whether something similar in the Weimar Constitution would have helped in World War II-era Germany. I don't know enough about Weimar to answer that question. But I do think the Framers meant what they said in that Ninth Amendment. They meant there could well be fundamental rights other than the ones listed in the Bill of Rights, and that's been borne out in the case law.

MR. TALBOTT: Jonathan? And I got to plug his book, so you're allowed to plug yours, John.

JONATHAN: Thank you. I have a question for Senator Badinter. I recently co-authored a Brookings book with Justin Vaisse, a French colleague, *Islam in France*, and we seem to be going through another cycle of confrontation between at least certain Muslim leaders and whole societies in which Muslims have become increasingly an important component of the population, and it reminds me somewhat of what we went through in the late '80s, early '90s. You could substitute Voltaire's "Mohammed" for Mozart's “Idomeneo”. You could substitute the first headscarf affair for the second, and the issues seem to be coming up again and again, and I'm curious what role you think courts have to play in France in terms of assuaging the fears of a minority that feels under siege and in mediating in this conflict and what, if anything, the United States can learn from the French experience of integrating Muslims.

SENATOR BADINTER: About the question of Muslim

integration, it's a most difficult problem, which is a way of not answering. Considering the history of France in terms of integration, of immigration, it has always been, up to the last I would say 20 years, a success. I, myself, was born from parents who were Russians and came -- my mother before the first world war and my father after the first world war, from the Soviet Union. The French system was clear. No community approached whatsoever. Only citizens. We do not care for the origins of people. Just we counsel them as citizens with the same rights. And it's printed and worded in the French constitution, Article II. So, the problem which then arose was always the second generation, and it took a generation so that they became like all the other French. This time it has failed and we're still looking at why.

What approach should be taken? It's not here that I shall enter into that discussion. Would you not believe into positive discrimination? We think that if you only mark the origin more than without taking it into consideration. Maybe we're wrong, maybe not. We think that on the reverse, there should be a more, I want to say, an eager conscience that those should be taken more into consideration than they are now. In other terms, leave to the people the opening of the French society, not to the state. Will that be enough? That's what we see.

Now, the remaining question -- and in my opinion it is tied up with a phenomenon which is worthwhile considering in all our civilization. The information, the sources of cultural formations have changed. There were national. There are no more national. The young Muslims in the Parisian suburbs

spend much time looking at al-Jazeera. That was impossible 25 years ago, for obvious reasons. You just had the French TV. The internet carries with it a permanent I would say preemption of prejudice which are not the ones as a culture of the place where it can sell the internet. What you find the internet now is propaganda, which didn't and couldn't exist before.

We have a very strong pattern of law, very strong, against all forms of discrimination, against all forms of racism, against all forms of anti-Semitism, against anything which calls for racist or discriminatory hate. But those, when it comes to internet, are very difficult to put in rigor, and that is a problem, see, about which we have to think. The question of formation and freedom of expression through the contemporary and modern media is different than the ones which prevailed at the time of the founders. Not to say that we must use censorship, etc., but I remember at an international conference we had in the OC about fighting against racism and anti-Semitism, we found out that while in Europe were laws which permitted us to go against the ones he meant, which is the broadcasting -- you know, the origins, the source. That couldn't be done in the United States because of the First Amendment, and therefore we found out that the largest part of the poisonous sites have settled peacefully in the United States. And we ask our American colleagues what will you do, because the souls -- poisoning of souls. Would you leave it open? And the question remains it's very difficult to touch, unless the Supreme Court makes a different interpretation of the First Amendment.

Just to say that in a global world one must always think global. And when you think of integration of Muslims in France, which has a specificity, you must think also of integration in the whole of Europe and outside of Europe.

My last -- will not go further is this. We have been opponents to community structure of a society. The British have done just the opposite. Same for the Dutch. The result is nonintegration in France; nonintegration in England, as we just saw it; nonintegration in Holland -- and in other places. So, we are still working on comparative basis, and I thoroughly, thoroughly support Justice Breyer points of view trying to find out in very close common societies what they do which works, what can we do which works, but no time for chauvinistic pride, and above all let's not be, my friends, provincial. This is one world, and the threats are the same versus all of the Western world, whatever the techniques they set up.

Sorry I was longer than you. Always beating me.

I get my revenge when he comes to Paris, because he's as brilliant as in Washington, but he speaks a little slower. (Inaudible)

(Laughter)

SENATOR BADINTER: Apart from that, I can tell you one thing. Whenever Justice Breyer comes to Paris, there's a full audience, and when he goes to the old heart of French culture, the Collège de France, founded in the early 15th century in the heart of Left Bank, it's deserted usually. When Justice Breyer comes, crowds -- and among the crowds I would say with high jealousy

was noticeable amount of young, beautiful women. Excuse me, dear, but you know.

(Laughter)

MR. TALBOTT: Right here, please.

(INAUDIBLE): Thank you. Dennis (inaudible) from Catholic University. I was wondering if Senator Badinter or any of the justices would care to comment on the difference in the traditions and structure of the American judiciary, particularly the Supreme Court, in comparison with the French constitutional tribunal and whether that makes any difference for the role of the courts in the larger polity, and particularly in the context of the war on terror of what's expected or appropriate for the courts to be doing.

JUSTICE O'CONNOR: Well, let me just offer one quick thing. In the French system, as in most EU countries, questions can be put to the High Constitutional Court about what about this piece of legislation, if we passed it would it be constitutional? We can't do that here. We have to have an actual case or controversy. So, that makes for very different dynamics. When the Supreme Court in our country gets a case, it's been an actual controversy at the lowest level, suit filed in a state or federal trial court, and it works its way up through the system eventually to our court. And in the civil law system the constitutional question goes directly to the High Court for resolution and it can be a hypothetical question. So, that's a very different dynamic.

MR. TALBOTT: Yes, sir. Right there.

MR. ADAMS: My name is Gilbert Adams. I'm a LLM candidate at George Washington University. I have a question for Justice Breyer.

Sir, you described some of the places in the Bill of Rights where the judge has to analyze by looking at words that are not specifically defined and has to ask questions, and a certain standard of necessity to limit rights has to be maintained. In cases where attempts were made to prevent these questions from being asked, such as restriction of jurisdiction of courts or restriction of habeas corpus, would you say this standard for showing necessity has to be particularly high?

JUSTICE BREYER: You're asking me to comment on the recent legislation limiting jurisdiction.

JUSTICE O'CONNOR: You can't --

JUSTICE BREYER: I'll turn that one over to my colleagues.

JUSTICE O'CONNOR: Sure, and let me just say one little thing here about that, and you can answer the question yourself. We don't have to. Let me find "habeas corpus" in Article I here. "The privilege of the writ of habeas corpus shall not be suspended," says our Constitution, "unless when in cases of rebellion or invasion the public safety may require it." Now, you can apply that test, can you not, and see what the answer is?

(Laughter)

SENATOR BADINTER: That's absolutely true.

JUSTICE BREYER: A great moment.

MR. TALBOTT: Yes, the lady right there.

(INAUDIBLE): Thank you, I'm a French-American law student at American University. I wanted to follow up on the question from the gentleman from Catholic University and to inquire more specifically about the fact that both here and in France there have been complaints here about judicial activism and in France about the *gouvernement des juges*, but as far as terrorism is concerned, the French have seemed more willing to defer to the judicial branch and to judges in particular, and I was wondering if you had any comments on why that was so, whether it was the ideology of the executive or whether there was something structural in the system that allowed judges to effectively have more of a role in these situations.

JUSTICE BREYER: That is very interesting. In the French system, the prosecutor is a judge, *le juge du parquet*. That person is trained as a *magistrat* or judge, and can exert a degree of control, after his training as a judge, over police investigations. I found an entertaining television program called *Police Judiciaire*, which helped explain some of these matters — in an exciting way.

As I understand it, in France, some people who participate in investigations and are involved in intelligence work are also part of the judiciary. In the U. S., the two branches are very separate. American prosecutors work in the Department of Justice, not in the judiciary. Prosecutors—not judges—work with the police and intelligence agencies. That separation between the two

branches probably makes a difference. On the one hand, it gives judges more independence. On the other hand, it makes judges more dependent on what others tell us about what steps are necessary and how the system is working. It would be interesting to see research on how that difference affects the two systems.

SENATOR BADINTER: Our system does have all the advantages, but it's no time to make comparisons of the nature between the French system, where you have judges and prosecuting -- not judges but prosecuting attorney general coming from the same school and the changing functions during their careers. Permanent discussion in France. But if I may, like General DeGaulle used to ask himself questions, in sense that a question is a reason from -- there were no questions but he wanted to give the answer. I should ask you, Senator, *toi aussi* I was - I'll tell you bluntly. I was appalled by the laws which were passed. Appalled. I say it plainly. For a man of my age and European experience, the idea that a country like the United States, or England even more, could admit even the possibility of a limited detention without control by the judge was just -- I mean, impossible to believe. It's a form of nightmare you invented -- you, the Anglo Saxon, invented the habeas corpus far before all of us. We were still living in a barbaric age at that time in terms of guaranties of individual freedom. And suddenly we had the impression it was forgotten. Thrown away. And that you could have somebody arrested on charges) chosen by a foreigner, then not only foreigners, and that you could have strange places like Guantanamo where there's no rule of law because it doesn't belong to the

American system.

JUSTICE O'CONNOR: Oh, we held it does. The Supreme Court said it does.

SENATOR BADINTER: Yes, but I'm speaking of impression when --

JUSTICE O'CONNOR: Yes, all right.

SENATOR BADINTER: -- the law came, and I wonder how even the Congress could do that, and in England I was also amazed --

JUSTICE O'CONNOR: Is your Congress -- is your Parliament always perfect?

(Laughter)

SENATOR BADINTER: Sandra -- it's not that. I started by pointing out my horror because of what was brought by the English House of Common.

JUSTICE O'CONNOR: Right.

SENATOR BADINTER: The House of -- *la mere de toute la liberté* we say in France. When we turn to Westminster (inaudible) and what suddenly came out? And coming in as a young man after the darkest period of the war right here in '48, '49, it was a very, very different world. The rule of law, etc. And suddenly I had the impression that (inaudible). I was wondering how even culturally how could this happen, and this is the question I raise. Do you think, as I feel, that if Continental Europe is so tied up to freedom, it's because

they have been through, for so many centuries -- I say Continental, I don't cross the channel, I remain on the continent, because unlimited detention by order of the executive without knowing the motives is the Gulag.

JUSTICE O'CONNOR: Um-hmm, right.

SENATOR BADINTER: It's the Gulag. How can that happen? The idea that you can arrest somebody and transfer him abroad so that he is peacefully tortured so that you get information, this is proceedings which have been dealt with by the worse regime in the European continent of history not so long ago, and it remains so vivid and to us and the new generation so horrifying as a protest that that's why I mention what should never be touched by any government in any time in a democracy. Torture under any form, torture. Not slight torture or a low torture. This is not possible, because when you start with small you know where it ends up. *Et je crois* to see the terrible, precisely violations of these principles for so long in our continent that has made the new Europeans -- excuse me, it's almost Rumsfeld -- the new Europeans -- as a matter of fact, it doesn't exist. A new Europe -- new nations, all of them, are old. Yeah, that's what they are. It's old Europe altogether. But coming out from that bloody, horrible history, we know that when you start where it ends the Weimar story precisely. And this is a very, very, very terrible question. That's why I was so happy to read the magnificent and comparable language of the laws speaking about that, because nobody speaks laws and saying watch where you are going, and I was the author. There's a certain decision against Rumsfeld, which I read

with utter delight, my dear.

(Laughter)

JUSTICE O'CONNOR: "No blank check?"

SENATOR BADINTER: *Mais,* still, there have been laws passed and I fear for the future. I'll tell you bluntly I fear for the future. I told you what we have done in Algeria, and we still are disgraced in my eyes for that. It's not worth it. Believe me. It's not worth it. We stand for the principles for which we get more credit everywhere. That most terrible accusation that I have met during that Kofi Annan's word for the high-level panel is the accusation which constantly comes especially from the Muslims everywhere-- double standard civilization. Are you the rule of law for the others, the exception and the absence of legal guaranties? Never go into that direction. Its losses at the end are terrible.

MR. TALBOTT: You know, ladies and gentlemen --

SENATOR BADINTER: I'm extremely sad tonight.

MR. TALBOTT: You know, ladies and gentlemen, I know that there are others of you who have questions, but I think we should stop on this note for the following reason. Let the record show that the most provocative question of the evening was posed by one of the panelists to himself, and it elicited an answer of genuine eloquence, and Senator Badinter, we're very, very honored that you would be with us. In fact, as you know, judges in this country are addressed as "your Honor," and it's our honor, all of us in this room, to have been able to listen to the three of you and to participate a little bit with you in this

discussion. It's been of the highest quality and we're in your debt. So, please, all join me in thanking our --

JUSTICE O'CONNOR: Well done.

SENATOR BADINTER: And in the Chinese way, merci (phonetic) at the audience.