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PARTICIPANTS:

Welcome and Moderator

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President,
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Featured Speaker

JUSTICE STEPHEN G.BREYER
Associate Justice,
U.S. Supreme Court

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P R O C E E D I N G S

MR. TALBOTT: Good morning everybody. And thank you particularly on such a beautiful day, when you have multiple reasons to be outside to be inside, for a very special event. I'm Strobe Talbott, and I want to welcome all of you to a kind of three and one pleasure.

We are here today to celebrate the creation of a newly endowed chair at The Brookings Institution. We're here to thank and to honor the donor of that chair. And we're here to engage in a discussion with one of the leading jurists of our time.

In its 92 years, Brookings has had an outstanding Board of Trustees. It's very well represented here this morning in fact. Bill Coleman, Don McHenry, Herb Kaplan all here to represent our board, which has had, in a leadership position for over a quarter of a century Ezra Zilkha.

Now, since Ezra is part of the governance of this institution, it's particularly appropriate that the chair bearing his name would be in our Governance Studies Program.

GS, as we call it here at Brookings, is the original program of this institution, going back to its founding in 1916. And its mission very simply described, is to study, to attend to, and to work of improving the health of the American democratic system.

It's also appropriate that the inaugural holder of the Ezra Zilkha chair should be Bill Galston.

Bill is one of this nations foremost political theorists, he like many at Brookings has had government service. No less in the White House. He is also someone of great academic distinction. He has as many of you know, I think been a professor of Public Policy at University of Maryland, where he directed the Institute for Philosophy and Public Policy.

Bill is the author of eight books, over 100 articles in political theory, and on American government and politics.

We're thinking a lot about legacy, in many contexts. And I want to highlight what I think is going to a lasting legacy of Pietro Nivola's tenure at the Vice-President and Director of Governance Studies. Because it was Pietro who brought Bill Galston to Brookings two and a half years ago.

Next week the directorship of the Governance Studies program will pass to Darrell West, who is also with us here today.

And working closely with Pietro and Darrell and the other outstanding scholars in Governance Studies Program, Bill Galston in his new capacity as the holder of the Zilkha Chair is going to continue to build on what he already accomplished as a real thought leader. On political and institutional reform in this country, ways of reducing the polarization of

our politics, ways of improving the federal budget process, and developing a true 21st Century version of the American social contract.

Now in thinking about how properly to launch the Zilkha Chair, we wanted to find a way of spotlighting the personal and intellectual values, the dedication to public service, the respect for civility and public discourse that Ezra and Bill and the rest of us here at Brookings revere. And there is no better way then to do that, then to ask Justice Stephen Breyer to lead us in a discussion.

Justice Breyer has been on the Supreme Court for 14 years. His association with Brookings goes back 20 years earlier. Back in 1974 he published his first book with Brookings. It has the stirring title *Energy Regulation by the Federal Power Commission*.

Now, I've known Justice Breyer for a long time, he has virtually no vices except for perhaps one, which is excessive modesty. And last night over a lovely dinner, he modestly said, "You know that book is not only no longer in print, it's number four million and something on the Amazon list." I couldn't believe that, so I went home last night. I went on Amazon, and I've got good news for you: 2,232,877.

Justice Breyer has graced a number of our events here. He has spoken to our Board of Trustees. He used this podium back in 2005 to launch another book, that I think is even better on Amazon, and that's

Active Liberty: Interpreting our Democratic Constitution, and a year later he was part of our annual Raymond Aron Lecture.

And I might add that we're particularly glad that Ambassador Vemo [phonetic] could be here today. But the panel that Justice Breyer took part in conducted about an hours conversation on how to compare the judiciaries in constitutions of the United States and Europe. And that sort of sets the scene in some ways for at least –- I'm sure some of the themes he'll touch on this morning.

He's going to speak to us on international governance, and American law. So you see yet again, the word "governance" is the theme of the day, as well it should be.

So Justice Breyer over to you.

(Applause)

JUSTICE BREYER: Thank you. I'm going to watch the time. So you know the little boy who says to his father in church when he sees the minister taking off his watch and putting it there and says, "What does that mean daddy?" and his father says, "nothing, nothing at all."

But I'll go on. But I'm very glad to be here thank you Strobe, and I'm glad it's only two million, six hundred and so that's an improvement.

And I'm going to talk about governance, international

governance, from what I call the worm's-eye view, which is that of a lawyer or a judge, because we see individual cases, and controversies, and find it difficult to develop large theories. I'm glad to talk about that subject, because it's both governance and also Ezra Zilkha has done this marvelous thing in producing this chair.

And his life is international. He's lived in many different countries and he understands the world of commerce. The world of commerce is now international. He understands human rights and those problems. That is international.

And so let's look at it in the most global perspective. That's how we normally look at things. We say: What is it from the most global perspective? What does it mean for me?

And from that point of view: What does it mean for a judge? And I can tell you that the emotional experiences to what this means. Between Sandra and I, Sandra O'Connor and I on 9/11 we were supposed to be in India. And we were. We had just arrived. And on that very day we saw on television the events occurring here in the United States. And of course there was tremendous sympathy, and we continued what we were doing, which was speaking to judges and lawyers.

But what became evident to us at that time, is that the relevant division in the world, is really not between people from different

countries, or even different continents. The relevant distinction is the distinction between people who are committed to a rule of law and approaching things through reason, and cooperation and those who are not. And we'd like to think we're all on the first side.

And if we're going to be on the first side, we're in the process of building institutions. But what institutions? And that's where I think maybe I can shed a little light from my own narrow prospective.

Because as soon as people start to talk to me about "Well, how do these foreign things" -- usually they say it in a hostile tone. How do these foreign things affect your job as a judge? And sometimes they say, well isn't it an American Constitution? I mean why are you looking at things that happen abroad? And various remarks like that.

And indeed cases come to our court, where those questions are relevant. What law do we look to? What law will we use in deciding a case? That arises probably, but not always in the United States of America.

Now what I would like to do in the next 15 minutes is distinguish for you three kinds of circumstance. Because, I'm not the Professor of Governance and the Professor of Governance may be helped by a distinction between three kinds of circumstance. And then you may be interested in working out those circumstances, and then later reporting

your results, thoughts etcetera. Which of course my secret motive is, I believe that will help me in my job as a Justice, and it may help others as well.

So what are the three kinds of cases, that I've seen arising in the last five or 10 years with greater and greater frequency. That I think are quite relevant to law as it develops as a system for governing people, both in the United States and outside the United States. I can label the three.

I'll label the first one: That which is extremely exciting and has very little relevance. I'll label the second one: That which has great relevance and is totally not exciting. And I will label the third one: I don't know. It's somewhere in the middle. It's very hard to understand, but I suspect it's incredibly important. Those are useful categories.

Let's go to the first: That which is extraordinarily exciting. Shows up in the newspapers and in congressional debates. Has led 30 members of Congress to introduce a bill that would forbid the judges from ever referring a decision in a foreign court in their opinions. What is that exciting issue?

Well, I think it arose because sometimes in my cases, in other cases, in constitutional cases. Cases we're deciding for example, whether the death penalty as applied to someone under the age of 18, is a

cruel and unusual punishment.

Or, a case involving the rights of homosexuals in Texas. In cases like that and in many others the majority of opinions have referred to decisions of foreign courts. Now that produces a negative reaction. What kind of reaction? I was at a meeting somewhat like this.

You know there are meetings where judges and members of Congress, and Ambassadors and other's get together and we talk about different things. Usually: Why are our institutions so far apart? And why don't they understand each other? Usually the answer emerges after about five minutes as various people of the audience begin to leave, and -- but in any case.

At one of those meetings I was with a member of Congress, and he began to say, it's so terrible, that the members of the Supreme Court, refer to decisions of courts in other countries. And I said, Well, I guess that's aimed at me. He said, possibly. And I said, Well, I'd like to tell you why. Why do we put that in our cases.

It's because I've discovered over the course of time particularly since the end of World War II there are more and more courts, in more and more countries, that people have entrusted with the job of interpreting documents like the Constitution that protect basic rights. And this is a bet on their part. They are betting that by giving courts authority to

do that, and judges the authority to interpret words like that. It will help make those rights real. No sure thing by the way. But they think it might help.

So I say, if they have a document somewhat like ours, and I say they are judges sort of like me, human beings, contrary to popular belief. But they have a job like mine. They're interpreting a document like mine. Problems are more and more the same across the world. Why don't I read what they say? It doesn't bind me, how can it hurt? I might learn something? To which he said, fine read it, just don't refer to it in your opinion. I thought I should have quit earlier, but none –- I couldn't resist. I said, no, no it's more than that. It's more than that.

There are many countries, which used to be behind the Iron Curtain for example. And now they're not. And now they want to have democratic governments and be protected of human rights. And they have courts just beginning, and they refer to our cases quite often. Why not refer to theirs? I mean if their legislatures are giving them hard times, they can say, see the Supreme Court of the United States, which is a well-established court, refers to our opinion, and that might help them a little bit. To which he said, fine. He said, write them a letter just don't put in your opinion. I realized I was getting nowhere. I thought well what is going on? Now this is just my own subjective view.

But what I think is going on is this. Because it's pretty hard to see, why people would object to our reading the decisions of judges elsewhere. I mean, we meet the judges elsewhere. We talk. We talk about common problems.

Actually it's now reached the stage, which is quite different from 10 years ago. Or when the judges of the European Court come here as they do, or the Supreme Court of India. Or I'm somewhere else and I'm speaking to them. And we go and discuss something, it is no longer a discussion in which I used to call it my day of camp. You know; I did this today; I did that today. And the other one did the other today. That is usually not too productive.

Rather it is a discussion a specific item of common interest. How in fact are you dealing with federalism in the EU? What are you doing to help that woman in Naples who hates Brussels? And when we learn what you're doing to help that woman in Naples, who hates Brussels, maybe we'll understand a little better how to deal with some of our own federalism problems, because, well, though we have no one in Naples, Europe, we have someone in Naples, Florida. And there might be people there that hate Washington, just the same way the people in Naples, Italy hate Brussels. I mean that's the nature of the discussion. I'm saying it shorthand.

And my suspicion is that there isn't really too much objection to that. But what there is objection to, are the two cases where this got a lot of publicity. One concerned the death penalty, and the other concerned the rights of homosexuals.

So my wife, who's a psychologist told me there's a phenomenon called displacement. And in psychology displacement means you're pretty angry at A, so you blame B.

And what I think, though I can't prove it, is those who don't like the result on the substance of those two cases, think that foreign law had something to do with it. And I think it had nothing to do with it. I think that those two cases would have come out the same way, foreign law or no foreign law.

But that I think in large part has what kindled this very spectacular fireworks of a political debate. To which I say, more and more judges from foreign countries will talk to each other. More and more we will see nations across the world putting a degree of confidence in judges to try to enforce basic precepts of democracy and human rights. Indeed in July, in France we may discover their Constitution amended, which changes their Constitutional court into a court that is much more like our own here in the United States.

So the trend is not going the other way, and as long as that's

so, and as long as people meet with each other, and talk about common issues, you will see a kind of discussion, a common discussion, that does produce a degree of learning; if not consensus.

But it is an American Constitution. There is no doubt about that. And what we learn from other people, whether it's a treatise, whether it's a law professor's article or whether it's a discussion in an International forum does not bind us.

But anyway, that's one subject, which is an example. I've gone through it, of what's happening often. It does happen and it is gradually I think knitting law across the world at a Constitutional level, more and more together. Maybe that's what people don't like.

Well, I supposed it's a question of what the law is. Rather than the fact, that knowledge is spread. That they might either favor or oppose. So, I say that's very spectacular, but maybe it's not quite as important or exciting really as the spectacular nature suggests.

But the second area, is totally boring and extremely important. There what I refer to in our court are not the one or two cases that have to do with gay rights or the death penalty, but the many cases that ever more deal with what I call the substance of the law of other countries.

If I go back two or three years, where I actually made a list. I

found out of the 80 cases that we heard during the year, there were nine that raised serious questions of either international law, or the law of some other nation. Now three concerned Guantanamo, so put them to the side, those are special.

But six concerned subjects like the following: A plaintiff who was in Ecuador who's a vitamin distributor, wants to sue a defendant who's in Holland. The defendant says the plaintiff, says part of an international vitamin conspiracy that had an American member, therefore he would like to bring his case to the vitamin manufactures in New York. Why? One reason, vitamins were too expensive. He was too weak. He couldn't travel to Europe. Another reason, we have travel damages, and he'd rather like the travel damage suit. But the question is can he bring his case in New York.

Now to know the answer to that case it is essential that we know how that anti-trust law of Europe law works. And the EU filed a brief. So did France, so did Japan, so did Canada, so did Germany and to understand that case, we had to read those briefs and they weren't briefs that just said, the Nation of Germany is against. To the contrary, they were briefs that explained the law in considerable detail carefully and helpfully.

Case: Plaintiff, a company from Los Angeles, defendant, another company from Los Angeles. A sues B to try to get information that

B has that A would like. B says it's our information, why should we give it to you? A says so we can give it to the Cartel Authority in Brussels. Can they get it? The Cartel Authority filed a brief saying we don't want it. Still a difficult issue to interpret the statute. Again, we have to understand the law of several places, and we understand it only if we're told by the lawyers in the briefs.

Mrs. Altmann: Mrs. Altmann sues to get back the six Klimt paintings. The six Klimt paintings that she said the Nazi's took from her Uncle, before World War II. And they ended up in the museum in Vienna, and were they hers or were they the museums?

The museum asserted a defense of sovereign immunity. She had sued in Los Angeles, can the museum claim Sovereign Immunity or not? They used to be, but weren't completely anymore an arm of the state, of Austrian State. And now they're more commercial. But they weren't before. And so where do we look? Before do we look now? How do we find the answer to how to interpret sovereign immunity?

I found a very good analysis in a case of a French Appeals Court. It's called Christian Dior against ex-King Farouk. The ex-King –- he didn't pay for his wife's dresses. Christian Dior sued him. He said sovereign immunity. I'm the king. The court says no, no, no, you are ex-King. You were king; you are not king. Pay.

Now, in that a little more complicated than that in reality, but nonetheless. I find the clue to an answer, to the questions of the Klimt painting. In a case that was a European case, luckily pointed out to us by the lawyers.

Or the trucks that wanted to come in from Mexico, under NAFTA. To be met with a claim that environmental law keeps them out. To be countered with a claim that the President of The United States wants that set aside.

Or the Warsaw Convention, governing airline treaties or a statute passed in the 1700's. The late 1700's called the Alien Tort Statute, saying you can recover from anybody all over the world who hurts you. Anyone can, anyone whether you're American or not, if that's in violation of International Law.

Oh, what were they talking about then? Pirates. They were talking about pirates. It was a statute aimed at piracy. So now we have to decide who are today's pirates. What is the equivalent? And that is not an easy question. Which we answered: In about three or four hundred well chosen pages.

But the –- you begin to see the point and look at the number of cases. Serious cases, and how can I find that French case. I cannot find it, unless someone points it out. And who points it out? The lawyers. And

the lawyers can't find it, unless they learn where, how and why. To look for those cases, that aren't just American cases.

And where are they going to learn that? Ultimately in the law schools. And do the law schools teach it? Sometimes. Why will they teach it? Because the firms are international, and the firms have clients that do business all over the world. And they will be helpful to the firm if they can make the right arguments in court, or before an arbitrator.

That is what I see happening, and we see that turning up. We see the countries of Europe saying how will we find a uniform commercial law? How will we get everyone together?

And then sometimes Americans point out, you know we have an institution called the Uniform Commissioners on –- you know the Uniform Law Commissioners. And they're not private, and they're not public and they travel all over the country trying to sell Uniform Codes to the Legislatures. Maybe you want to try an institution like that, or maybe they'll have an institution that we might wan to try.

But that is where I see the heart and soul of what is going on, as if you want a metaphor that I've been looking for that I learned in high school, in the 11th grade when I had to take Latin from Mr. McCarthy. Never understanding a word of it. But he did used to point out at the beginning of *The Aneneid*, I think Aeneas is up –- lands on this coast. And

they are all shipwrecked, and he then sees all the people in Carthage working. Then he calls them –- they're like bees, and they're building things. And what are they building? Nobody ever learns exactly what they're building.

But they're out there working together, and sometimes I think of these lawyers across the world and the judges to a degree, as like those bees. They're all out there building something. And you can't stop them, because their clients want and need the information, and there's no way to get it, without learning something about the law of other countries, and then inevitably trying to put things together in a rational, sensible way.

That's the nature of the human mind. To impose a structure on this mess whether it is law or whether it is something else. But that's what we do. And we're doing it, and who brings it all together? Not me. I can just report that I'm part and you're part of an enterprise that's putting that kind of thing together, and that's changing the nature of law.

Whether people argue about it in Congress, or don't. It is a fact that is continuing. And it's done at a level of people who are professional people. Not politicians, not people who are elected. But it's happening, it's going on and there's no way to stop it, which is fine. Now what's the third, which I said is that which is so incomprehensible I can't even understand it?

All right the third, which I think, is possible or capable of study. And it came up, what earlier this year. Now it is not exactly about the law of France, or the law of Germany or the law of the United States. It is about the institutions that are being built in this sort of middle area.

What are they? I mean there's NAFTA, there's WTO and if you get out one of the books and look for all those initials. You can find two or three pages filled with different initials. Initials of organizations that have some kind of standing to make law. Which law in some way or another affects the United States as well as a lot of other nations.

Now there are people who tried put all those together. And when you put them together, you see page after page, of institutions that have been given through various treaties all kinds of functions. Not just to legislate, but also to ejudicated cases. The WTO does that, with varying effects.

Now why do I think we should wake up to that on the Supreme Court, or maybe in Congress? Because we had a case, well I'll tell you what the facts are. And the facts will really mislead you as to the importance of the case. At least what I think it is.

We had a case and I need five minutes to explain it, because it's so complicated, and then you can forget it.

It had to do with the death penalty. And that is what threw

everyone off. Because the death penalty is a very emotional issue.

All right, we entered into a treaty called the Vienna Convention. Many years ago, and in that treaty we promised that we would tell any alien person, who's arrested by a policeman. Mr. Alien person, you have the right to call your Nations Council. We promised we'd tell them that. State policemen who would do it the FBI would do it.

The problem was most of them didn't do it. So there were quite a few Mexican nationals arrested in Texas and nearby. Who were charged and convicted of murder over time. And they were never told, that they had a right to call their Council.

So one day, some of the lawyers woke up to this, and they brought proceedings and said but my client was never told. Well, now what happens? Well they said we need a new trial. Made a difference. The prosecutors would say it didn't make any difference what so ever. There was loads of evidence. It wouldn't have mattered. And Texas by in large would not give them any new proceedings.

Mexico went to the International Court of Justice. We had promised in an optional protocol to accept the ICJ's interpretation of that treaty. The ICJ then interpreted the treated.

And the ICJ said here is what we think the treaty means. We think it means that Texas must give Mr. Medellin, who was one of the

people a new hearing. A new hearing to see whether the failure to give him the right to call his counsel made a difference. Is that complicated enough? It's actually a lot more complicated. I've simplified it.

But, they said Texas –- no they said United States vie in a manner of your choice. You provide a new judicial hearing on the question of harm. Whether this was harmless, or not.

So the President of the United States, said to Texas go give him a new hearing. Now, Texas being Texas -- and we had a case on it too. We'd sent it back to Texas for a new hearing, but we didn't say give a new hearing. We just said we're sure they'll do the right thing. So whatever that is, they decide. They say no, we won't. All right they won't.

Now we have to answer the question. Do they have to give them a new hearing? Do they have to? And what we ended up deciding six to three was they did not have to. I was in the three.

But why do I think that that's so important? Because the issue in that case, though it might seem specifically to be about a new hearing to see whether an old hearing was harmful or harmless, because of the failure to tell a person their right. It might seem to be about that.

But, the broader issue in that case is, wait we signed the treaty. And we signed the treaty saying the ICJ could interpret the treaty. And the ICJ interpreted the treaty in a way give them a new hearing. So,

why don't we have to do it?

The issue in the case is whether what the ICJ says, when it interprets the treaty automatically becomes the law of the United States. Not everybody agreed that we'd have to do it. Texas would have to do it. We'd have to tell them to do it.

If Congress had subsequently passed a statute saying it's the law of the United States. But Congress never subsequently passed a statute. Congress just ratified the treaty and forgot about it.

Now why is that important? Because when I looked it up, I found 40 other treaties that seemed to say about the same thing.

I brought a list of some of them. Copyright Convention, Convention on Road Traffic, International Civil Aviation, International Circulation of Education Materials. I'm just reading it random. Paten Cooperation, Vienna Convention on Diplomatic Relations, Protection of Interdustrial Property, various friendship treaties and commerce with a whole bunch of countries. Anyway you can read them if you have nothing better to do.

And I have about five or six pages of them. And I have about five or six pages too, of other cases in which our court -– that's what I rested my argument on. Had said that treaties of certain kinds are self-executing. Now that's a hard question. Whether a treaty automatically

becomes law of the United States or not?

When I went through those cases, I thought John Marshall found the answer about 200 years ago. He said those treaties that address themselves to the political branches of the government, are not self-executing. Those treaties that address themselves to Judicial Branches are self-executing.

What's an example of the former? Take your troops out of Nicaragua 1925. What's an example of the latter? An alien can inherit property in Ohio, on the same terms that a resident of Ohio can inherit property in Albania. Something like that you see very minor, minor but important commercially. Important in a lot of ways.

Now that's why I've had this long, long discussion of this particular case. Because what it resonates in my mind, is we are building institutions all over the world. Those with three initials or four initials: WTO and 42 others.

And their treaties that I've given you a little flavor of. And those treaties have within them, and the institutions have within them. Ways of resolving disputes under law.

Now if we want those ways of resolving disputes under law to be meaningful, we better say to the nations local institutions, such as the courts of whatever country. I name no names. Wake up! You have a

problem. You have to decide these cases in a ways under your own laws and constitutions that will enable the kind of cooperation, we're trying to get.

We're trying to get through the way we write our treaties, and through the way we create dispute solving mechanisms within the treaties own framework. It almost puts you to sleep when you say it. But if you can't do it, it's going to be hard to develop international dispute resolving mechanisms in areas of commerce trade, copyright patents, and a host of others. Let alone human rights.

Because there are –- I don't know how many countries 120 countries, and I found that we're not the only one that has this problem with self-executing versus not self-executing. And when I looked up about six different countries, I found they did it in six different ways. And I thought if I were writing a multi-lateral treaty, that it was going to apply to 60 different treaties through sixty different countries, I'd have to be familiar with all 60 different ways. Or I wouldn't be able to write the right words in the treaty that would get this job done.

Okay? There we are. I hope for the Professor of Governance I have set an agenda. The first part was funny and not too important. The second part is pretty important but at least understandable. And the third part is totally incomprehensible, but certainly requires more work. Thank

you.

(Applause)

MR. TALBOTT: Justice Breyer, maybe to get the discussion started, I could just put one really basic elementary and maybe ignorant question to you.

And that is whether the document itself, the Constitution, includes anything that plays into this argument of whether it is appropriate and pertinent to consider or refer to foreign law in considering American cases?

And related to that, I know that the Declaration of Independence is a separate document, I don't know if it has any standing. But does the phrase there of a decent respect for the opinions of mankind ever come into play as you and your colleagues debate this issue?

JUSTICE BREYER: The second, yes people have used it. It's a rhetorical issue. I mean it makes it more for a rhetorical point, but purely legal point. The Constitution doesn't say, but early cases did.

John Marshall did very frequently refer to the law of nations or laws of other countries. If you look at Frankfurter he used to normally write in his opinions quite often, what courts did in other countries. So, it's not at all unusual to do that. And –- though if I go back 10, 20, 30 years. Bill Coleman's here, he was Frankfurter's law clerk. And probably

Frankfurter would make you look a lot of those things.

But the Anglo-American tradition was emphasized. I think today Anglo-American is not emphasized; it's there but not emphasized. So there's nothing that say you have to. And there's nothing that says; you can't.

In respect to the third problem; this problem –- the reason this question of Medellin was so difficult is there is a particular provision. The particular provision in – I'll read it exactly. It says Article Six says, this Constitution and laws of the United States made under the Constitution and all treaties made or which shall be made, shall be the supreme law of the land, and the judges in every state shall be bound thereby.

So my point was, well that's what it says. Why isn't Texas bound? I thought it was a good point. Convinced you others.

MR. TALBOTT: I'll throw it open to all of you. Mic up here please.

QUESTIONER: Curious, what was the majority's opinion on that point? What did they say in response?

JUSTICE BREYER: The majority didn't want to be –- my reading of that? That opens the question. It doesn't answer it. It means that we don't have the same kind of system they have in Britain because in Britain they do, I believe have to pass everything through Parliament.

But it's easier for them to do. I think: If they have a majority. Then it is for us to pass something through Congress.

So, no one thinks that for example the law: Take the gunboats out of Nicaragua. That, that binds the states automatically or the Federal Government. And so it must mean some questions are automatically binding, and others are not. Which ones?

That's why I go back to John Marshall. He said, "look to see if this is the kind of issue that you would expect Congress and the President to deal with, or the kind you'd expect judges to deal with." For example, is it commercial? Is it a matter of land law? Is it a matter of inheritance?

Is it a matter of ordinary criminal process? I would say judges. Is it a matter of high politics? War and peace? Armed Forces? I would say that's for the Political branches. And then there's more to it but that's what the difficulty is. And what the majority said is well for a variety of reasons this is the kind of issue that we think Congress, not the Judiciary should deal with. To which I had some excellent responses, but.

MR. TALBOTT: Yes, right there, lady right there.

QUESTIONER: How are governments going to sign treaties if they might be nullified later? Like how can you negotiate a treaty –- like should every country take into account the other countries may have a

different system of interpreting or enforcing a treaty later? Like, I know it's not your place, but I just want to know what you think.

JUSTICE BREYER: Well that's exactly the question I have. And that's why that was a large part of what I was concerned about, in looking at the case as I did. That of course you can do it, you know. If you say, in the treaty and provision X9 will be self-executing, i.e. it will take automatically, without any further legislative action.

That would be sufficient under what the court held for it to become self-executing, once the Senate ratified it.

But Britain isn't going to agree to that, nor is the Netherlands because they have their own rules. And so as I see it, the drafters are going to have to become familiar with the internal systems of many different countries. In order to figure out how to draft laws that are going to get them what they want. And quite often by the way, you'll have a drafting treaty, where the drafting nations don't really care. Or at least that isn't the main issue on their agenda. And then what do you do?

That's why I say this case called to my attention, a major intellectual and practical difficulty. That will face those who want to draft multi-lateral treaties with adjudicatory mechanisms built in. I think that's a very interesting and difficult question. That may have solutions. So really I'm suggesting it as part of your agenda.

QUESTIONER: Mr. Justice welcome back to Brookings. I remember we launched your book on risk assessments years ago, back here too. I think that was more spirited than the energy regulation.

I wonder if I can just broaden the subject a little bit, because yesterday I sat in on an interesting discussion here, where we launched a new legal center, and we had a book by Ben Witte as one of our colleagues who has written a new book on the law: *The Law of the War on Terror.*

And the court came in for a good bit of criticism and knocks for your recent decision, on the grounds roughly, I think the jest of it was that well you've rapped the knuckles of the Political branches. Told them that you know you've got to try harder, you still haven't got it fellows.

But you didn't lay out any guidance or rules which could give them the basis, for trying to come out with some way to have trials of the suspects at Guantanamo, and I think that even came up in some of the descents. But would you care to jump into that one a little?

JUSTICE BREYER: What rules do you suggest? You see as soon as you suggest some, I'm going to ask if there are people who have different idea of what the rules should be. And what do you think will happen? Yes, you will have let's see there may be 100, 200 people here, there'll be 400 different ideas.

And so I when I was –- I was asked a question like this the other day. They said, what message are you trying to send? What message was in that opinion? I said, message? There was no message. One side thought that the Congressional statute that said -– what it said there was you can't go to the courts except through a certain route. One side thought that was unconstitutional. The other side thought it was constitutional. I thought it was constitutional. The message we sent is that it was unconstitutional. And being less facetious I said we're not in the business of sending messages. We are in the business of deciding cases or controversies. And when we have a case in front of us, it raises a question. We will decide that question.

We were not asked to decide to lay down some kind of groundwork, I don't know if we could have done it, or not done it. I would have had, myself considerable uncertainly as to what those rules ought to be. But that wasn't the question in the case. The question in the case was whether this part of the Congressional statute would forbid the prisoners at Guantanamo to go into a Federal Court and ask for a writ of *habeas corpus*. Was that consistent with the Constitution? That's the question we have, and that's the questions we answered.

Now you can have systems. The Massachusetts Supreme Judicial Court gives advisory opinions. You can have courts that do that.

Ours does not do that. And over time, I think that approach has probably shown its soundness. It's a big country with 300 million people. They have 600 million ideas.

In a question like terrorism, and security, and civil liberties; it's perhaps just as well to stick pretty closely to the issue that you know, because it's been fully briefed. And not go into a lot of other subjects, where our decision could cause far more trouble, than it's worth. That's what we do narrow. We did that and that was I think of all we're asked to do, and all we should have done.

MR. TALBOTT: Just one second Bill, wait for the mic.

BILL COLEMAN: Mr. Justice. On your *habeas corpus*; One when you really look at the vision of the Constitution, its not in the section of the Constitution dealing with Congress power. It's another section on the limit of Congress. There could be an argument, that the President has the right of *habeas corpus* and can also reject that, nothing to it.

As I understand it, long before the House of Commerce had some new *habeas corpus*, the King of England had something to do with it. And, therefore that concerns me.

Also, reading the history of the Civil War, when Mr. Lincoln wanted to revoke it and then Taney says he couldn't. And then he finally had it, Taney then insisted he was going to be the judge to try the case,

and for two years he never tried it.

JUSTICE BREYER: That was a major issue. What it says is the writ of *habeas corpus*. You probably know which article. I won't find it.

MR. COLEMAN: Nine.

JUSTICE BREYES: Thank you. The privilege of the writ of *habeas corpus* shall not be suspended. So it's passive voice. But it doesn't say who. Yes, it's in Article One.

It says unless when in cases of rebellion or invasion the public safety may require. Now does that mean Congress has to do it, or could the President do it? And that came up in the Civil War. It did not come up in our case because the President trying to do it.

But in the Civil War it came up and that's when Lincoln gave his famous speech, which I don't remember. But you will. Shall all the laws go but one go what: go down the drain. I don't think he said it that way.

So that, that one he meant should we not be able to have our law will be destroyed, our country will be destroyed. Just so I have to preserve this one law about *habeas corpus*. I'd rather do away with *habeas corpus*. Which he did suspend. And it's a question as to whether he acted lawfully in doing it. But that was not in our case.

QUESTIONER: Justice Breyer, you made the distinction of self-executing and non-self-executing. You also used the WTO as an

example, which is sort of a hybrid institution, because it was founded in Congressional-Executive agreements, as opposed to treaty. And then under the GATT, and then became a treaty.

Generally if I understand it correctly, the court has interpreted Congressional-Executive Agreements as pretty much the equivalent as treaties. But I wonder if you could comment on that? Particularly since we're looking at some very big –- we've had a challenge getting treaties passed because of the high bar of 67 votes. There are many people arguing for more Congressional-Executive Agreements. And I just wondered your thoughts on that? The binding nature of those as opposed the distinction of self-executing and not?

JUSTICE BREYER: I would have a sensible quote on that because I haven't had the issue in front of me. The – what I do see there –- actually I don't know if you've run into work of Professor Cassasi [phonetic] in Italy. He is a very great administrative law scholar. He spent the last 10 years trying to make lists of these institutions that are not the U.N., but like the WTO and like dozens of others, they have all kinds of powers, and the powers have been delegated through treaty.

And they in fact, also have certain ajudicatory and enforcement mechanisms. And they're aware of each other. I mean the EU for example, had a very interesting case, and the question was;

What's the relationship between the EU and the WTO? Not an easy question. Does the EU have to incorporate the WTO's decisions?

So what you look at which I've read in some of the articles he's written. And I'd be repeating what I said. That we see a world now populated by these constellations of these intermediate organizations. All of which have law making power, and all of –- many of which have ajudicatory power.

And which bear some but not a clear relationship one to the other. And what's interesting about the Medellin case, is I think for perhaps the first time, in this country anyway. The Supreme Court of the United States says, well we're part of this act too. And if we're going to be part of this act, as maybe the Constitution requires us to be, we better become educated about it. And we better understand what's going on through the world. That's just the commercial about the commercial.

QUESTIONER: I want to go back briefly to your three categories, of citation or study of foreign law. And if we take as a given your characterization of the first category as terribly controversial and utterly inconsequential --.

JUSTICE BREYER: Well, I overstated that.

QUESTIONER: It's interoperate the outcome or sort of the non-dispositive as to the outcome of the case, and yet has a huge impact

on the way we discuss case –- you know the categories, two and three, that is it sort of bring in to kind of disrepute and controversy. The study of law that is essential to those -– why isn't the right answer just as a prudential matter to decide those cases on other grounds? The category one cases on other grounds, and just sort of not to go there to the extent that they're not necessary to dispose of the case in front of you?

JUSTICE BREYER: Why do it? Why try to learn what abroad? And I think that the reason to try to learn what happens abroad, because what happens abroad is so interesting. I mean it's so important.

When we had a case involving campaign finance, I happen to know that the Strasburg Court had decided a very similar case, where Britain had limited the amount you can contribute to a Parliamentary Campaign, and there was an individual, who wanted to give a very small amount of money to a right to life candidate. And she was forbidden to do it. And the EU –- rather the Human Rights Court in Strasburg said Britain was wrong, and she should be permitted to do it.

Well, before I decided our case, I thought I wanted to read that. I wanted to see what their reasoning was. I ended up, I didn't agree with the reasoning. But I think it was useful to read it. And it's useful to read sometimes the Canadian decisions, and one of the most interesting one. Constitutions in South Africa.

Because South Africa, when they wrote their Constitution. Made a deliberate effort to canvas Constitutions throughout the world. And to try to pick bits and pieces of those that they thought were working well.

Now if you have courts making decisions like that. You can't do it comprehensively, I don't have time to do it comprehensively, I don't have time to sit there every evening, and read every law throughout the world. Of course I can't, but where they're brought into our attention – brought to our attention, I mean you can't not read it, if it's right there and the person is going to say something interesting.

In other words, summarize all that say the reason for reading it is, who know you might learn something. That doesn't mean you have to follow it.

QUESTIONER: Thanks very much for coming. Sorry for my simplistic question, but could you please explain how with the sixth amendment, the right to a speedy trial. Our government has incarcerated Hamdi and Padilla in South Carolina for a number of years. With no trial, no access to lawyers and so on. And they're American Citizens.

JUSTICE BREYER: That's a big question, that doesn't necessarily relate to the sixth amendment. I mean there are all kinds of amendments that people argue are not relevant.

And there is a question as to whether they're lawfully

incarcerated or not lawfully incarcerated. Prisoners of war can be lawfully incarcerated for a long period of time. Are they prisoners of war? Are they enemy combatants? What are the circumstances?

And luckily all those kinds of questions were the questions that I just gave such a good reason for not having to answer. That it would be a pity to go back on that reason now.

MR. TALBOTT: Yes, right there. Great.

QUESTIONER: Thank you. My understanding of Medellin was that the ICJ said the United States should give these persons, you know some sort of right Judicial review in a manner of the US choosing.

And the problem in Texas was, not that Texas refused to do it, but that the defendants had procedurally defaulted. And they no longer had appeal opportunities.

And frankly I thought that what the Department of Justice or the US Government did in the first Medellin decision was dishonest. And instructing Texas not withstanding the procedural default rules, to open the courts up, even though there was no statutory mechanism, to allow these appeals to proceed.

Could the United States have ordered a Federal Judge since they had also suffered procedural default on the federal level? Could the court have ordered a Federal Judge to hear a Habeas by one of these

defendants, even though he no longer had Habeas powers?

The second thing, which was more of a comment, I think what the United States should have done on this, was enact a change to the Habeas provision. To allow a reopening of –- or at least allow a second Habeas petition in unique circumstances.

And the President and the Executive Branch did not want to do that. So they just sort of kicked the can down the road, with this putting it on Texas. And I don't think that was particularly fair to Texas. But, would the court have entertained a Habeas without legislative basis for doing so?

JUSTICE BREYER: Well first I want to give you a special medal for being interested in Medellin.

Which is of course requires a certain dedication. And the specific answers I was over simplifying, when I gave it. Thank goodness. And the –- it involved the procedural default aspect too. And at least as I understood their order, they wanted another hearing period. And could we in fact had one in a Federal Court? Maybe. That was a possibility. That would have –- we didn't go into that. And whether we could have or not is sort of moot. It was something that occurred to some of the people, in the case that's true. But we didn't go into it.

MR. TALBOTT: Yes.

QUESTIONER: Thanks. I'm especially interested in Medellin

as well. So, I hope I get a medal. The Medellin case: getting back to that.

You mentioned in passing that it was about the death penalty, and that threw people off. Perhaps an alternative reading is that's precisely what it was about, and in fact you could read the entire history of the case to read as a commentary on the fact that the United States remains outside of the international regulation of the death penalty.

Mexico only acceded to the ICJ Optional Protocol of 2002 after it had become aware of this series of 52 cases around the United States where they had national on death rows because of state convictions.

So it brings me to a question about American exceptionalism, to the International Human Rights Regime or generally and the role of the court in kind of a mediation between what we think of as our Constitutional Jurist Prudence on Civil and Human Rights. And what is happening, not comparatively but internationally.

So bringing back to the 2004 Roper decision, which the court in passing mentioned that there has been an international abolition of the juvenile death penalty, and what that might say about universal minimums.

And I'm interested in your views on whether universal minimums, whether International Human Rights Treaties, to which the United States has either not exceeded, or has treated as non self-executing, to get back to technical questions. What role those have in Constitutional Jurist Prudence?

JUSTICE BREYER: People have referred to them –- judges in our court have referred to them as some kind of some kind of supporting, in a supporting role. That wasn't true of the Medellin case. The death penalty as the subject matter there I thought it was a distorting factor, distorting from the point I wanted to make.

I think it's very important in that particular case. It's quite right I think that the ICJ saw our system of the death penalty as different, and maybe they saw it as requiring special safeguards. And maybe that's what they were trying to do. But in the course of doing that as it worked out, we end up with a law that even if it weren't the death penalty.

If we're trying to interpret the Trademark Treaty, and we say that the ICJ has the final word for what this trademark means. And if the Joe Smith Company says I want to Trademark the shape of my bottle. I have a bottle that looks like a candy cane, and that's my trademark. And the other side says you can't trademark a candy cane, what will Santa Claus –- you know you see you get an argument there.

And the ICJ makes a decision, and what I guess is the same rule that says that the ICJ decision does not become law of the United States in the Medellin case. Says it does not become law in the United States in the trademark case, unless Congress acts. And if you think you can get Congress to act about a candy cane you are -– you still believe in Santa Claus.

You see that's the general governmental problem I'm pointing to. That doesn't undercut the importance of what you're saying. Because I think that probably this death penalty problem does explain quite a lot of what goes on in institutions like the ICJ as they see the United States. That's a possibility.

MR. TALBOTT: Up here. Second row, this gentleman right here.

QUESTIONER: When you're congressional friend chastised you for making reference in your opinion. Then mind that you read it. Did it occur to you that the First Amendment gave you some protection there?

JUSTICE BREYER: Well, I feel I can say what I want. But up to a point I can't talk about cases.

QUESTIONER: Would you think the First Amendment applies to anything a judge --.

JUSTICE BREYER: Oh you mean are they going to tell

judges what we can and cannot write in their opinions?

QUESTIONER: Right.

JUSTICE BREYER: Well, they haven't tried to do that yet have they?

QUESTIONER: Well, he gave it a little try there.

JUSTICE BREYER: I don't –- he didn't -- he was not trying to intimidate me, and I don't think I could have been intimidated in my own court -- .

MR. TALBOTT: Yes. Here it comes.

QUESTIONER: Thanks very much for speaking today. I have another quick question on Medellin and I'm very interested in what it is that Congress could or should do now to act. And there was a slight difference between your descent and Stevens' concurrence on what you think the options for Congress are? So I'm hoping you could spell that out for us a little bit. And on a related note: I found dicta on whether undertakes to comply is equivalent to shall comply to be very troubling, especially since that's such a commonly used phrase.

And I'm wondering if you could tell us, if you think there's also a need for any sort of Congressional action regarding interpretation of that phrase, if that's possible or if that would be necessary? Thanks.

JUSTICE BREYER: Well I don't –- well and I've thought

about this a little and I'm not an expert. I went through a lot of cases. I found 29 cases in the Supreme Court that had a lot going into this kind of issue. And you say well what is it about those cases that lead the court to say you don't need any statute?

And the thing that I found in my own view that they had in common, is that the subject matter was typically commercial or it maybe a procedural matters normally to be found in court. Sometimes extradition, property rights: Those kinds of subject matter.

And the second thing is that they all had in the provisions, operative language that courts could have worked with. They weren't just highly general phrases, they were rather specific phrases that a judge could have taken and applied.

And the third thing about them, is that in judges applying them there wouldn't have been some kind of Constitutional issue about whether the judge was usurping Congress' function or the President's function. Not even close.

And so I suppose Congress could write a statute if it wanted to. That listed the set of characteristics that seems to characterize the 29 instances where the court without any controversy, has found a provision self-executing. And Congress could say if it wished, in the future those treaty provisions that exhibit those characteristics will be self-executing, or

will go into effect automatically.

Now whether Congress would want to do that, whether that is the right approach, whether there is some other approach that would work better? I don't know. But that it seems to be the kind of thing that is well worth looking at.

MR. TALBOTT: Judge Katzman.

MR. KATZMAN: First of all I was the moderator of the exchange between Justice Breyer and --

JUSTICE BREYER: Yes you were.

MR. KATZMAN: And Justice Breyer cleared himself very well on behalf of all of us. My question is when you travel abroad, and talk to jurists, governmental officials. Is there a particular view or range of views that you hear about how American Law is perceived as it relates to international governments?

JUSTICE BREYER: I don't think so very much. It's –- I can't think of anything specific. I can't think of specific things. It's changed over 12 years. I remember when I first –- one of the first meeting we went to the EU and I was normally –- I'm normally enthusiastic about things sometimes more so than I should be.

And I went to a meeting at NYU and I said, you know I actually learned quite a lot at these meetings. It's very useful. And there was a professor there, a rather nice man, highly intelligent from Finland. And he said, really? Name one.

I was sort of stuck for a while. And I think now I wouldn't be. I wouldn't be. And that's a change not in me, I think it's a change over a decade or so, in the growth of these institutions.

MR. TALBOTT: Yes. A couple more. Right there.

QUESTIONER: Especially from those of us who are colleagues of Bill Galston, your presence here today means a lot to us. So thank you.

I think in the second portion of your categories, which you regarded as important but probably dull. You mentioned that globalization of law as professionals go about talking to each other and that judges do the same thing.

And some of my conservative friends would dispute the idea that this is boring. They're very exercised about it. And see it as a threat both to the sovereignty of the US Constitution and the accountability of American politicians to American voters. Do you see a conflict there now or potentially?

JUSTICE BREYER: Well not in the second category I'm

thinking of things, for example: you have the case, the case is a case involving the accident. The accident took place in an airplane, and the airplane had American passengers, and some passengers not from America. And the person who's injured brings a lawsuit.

It's governed by, the Warsaw Convention. The Warsaw Convention is an International Convention. You can't decide the case without referring to the Warsaw Convention. Just as you can't decide a case about the proper relationship between the anti-trust laws of the United States and the anti-trust laws of the EU without knowing something about both.

And it's very hard to think of how we live in this world, if that weren't so. And there's a broad range of things where just –- you have to get the knowledge or you can't practice law. And I don't know who your friends are there, but.

MR. TALBOTT: I think I will bring the discussion and it's been a superb discussion to a close. First by thanking all of you for being part of it. And as I said, at the outset. Particularly Ezra's fellow trustees including Vicki Sant. I apologize the swivel on my neck wasn't working sufficiently earlier Vicki. Delighted to have you with us too.

And picking up on Jonathan Rauch's grace note, that he struck before posing a question. We really want to thank you Justice

Breyer for honoring not just Ezra Zilkha and Bill Galston, but also helping us all to honor a little bit more of the role of the intellect in public life and not for the first time.

When I've had the chance to be part of a program like this, with you as the guest. I have the following thought that I'm going to express, as best I can. We're all properly addressing you as Justice Breyer, but I'm always reminded about how you are a Professor Breyer.

Which is to say, you are a superb teacher. And that is apparent in the way you give us insight into the way your mind is working while you speak. And I was struck when you were doing so today, at how you are kind of conducting a Socratic dialogue with yourself. You're posing questions so that we understand what you're saying, in the context of the questions that you're posing. And there's sort of intellectual transparency there.

And then also, the way in which you respond to the questions from the floor. I can't imagine you being truly stuck. By any questions, but I do see you pause quite often and really think about what somebody has said. Rather than going into some sort of automatic response.

And that is a lesson for all of us. Whatever line of work we're in, and this was yet again a reason for us to be very glad that you're a

friend to many of us personally here, and a friend to Brookings. So please all joining in thanking Professor Breyer.

(Applause)