

THE BROOKINGS INSTITUTION

THE COURT AND THE WORLD:
AMERICAN LAW AND THE NEW GLOBAL REALITIES
A CONVERSATION WITH JUSTICE STEPHEN BREYER

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Introduction:

STROBE TALBOTT
President
The Brookings Institution

Panel:

MODERATOR: BENJAMIN WITTES
Senior Fellow, Governance Studies
Co-Founder and Editor-in-Chief, Lawfare
The Brookings Institution

JUSTICE STEPHEN BREYER
Associate Justice
United States Supreme Court

DAHLIA LITHWICK
Contributing Editor, *Newsweek*
Senior Editor, *Slate*

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P R O C E E D I N G S

MR. TALBOTT: Good afternoon, everybody. I'm Strobe Talbott. It's my pleasure to welcome all of you here this afternoon. Thank you for braving the elements. I think it would require a little bravery tomorrow afternoon around this time, so we timed this event, I think, perfectly.

And particular welcome to Justice Breyer and to Joanna Breyer. They are both friends of this institution, friends of many of us here. Justice Breyer's connection with The Brookings Institution goes back a ways. I suspect that most of you noticed when you came into the front entrance of the building that there are some banners celebrating our 100th birthday here at Brookings. This is also the 40th anniversary of the publication of Justice Breyer's first book, which came out under the imprimatur of The Brookings Institution Press.

Later this year, by the way, The Brookings Institution Press will be publishing his dissent in the death penalty case. That'll be in the fall.

We also have an annual lecture series here in his honor and in his name, and the next one of those will be during the course of the spring. And the subject is always the theme of international law and its importance to the world and, of course, to the United States.

Today, we are going to hear from him and the two panelists, Dahlia Lithwick and my colleague from the Governance Studies program, Ben Wittes, here on a related question, which is the degree to which and the reasons for United States law taking account of the laws of other countries. This is the topic of his new book, *The Court and the World*, which has been widely and prominently and enthusiastically reviewed in recent months.

So, with that, I'm going to turn the proceedings over to the panel. And

there will be plenty of chance for you to interact with Justice Breyer and be part of this conversation. So, with that, Ben, maybe you'll just open it up.

MR. WITTES: All right. Well, thanks very much for coming out on this cold day. I will dispense with introductions because we really are dealing with two people who don't really require an introduction to a Brookings audience.

And we're going to structure this just as a conversation. Dahlia and I will ask questions for the first half roughly and then we will go to questions from the audience. Please make sure your phones are silenced and as you have questions and want to get in on the conversation, signal me and, I will say this again before the time comes, wait for a microphone to actually come around before you start talking.

So, Justice Breyer, let's start with just a little bit of an overview of the project that you undertook in this book. Why did you want to write a book about the Court situated not in American law, but in the world as a legal and non-legal venue? And what's the overarching theme that holds the project together?

JUSTICE BREYER: Well, I wrote it so I could speak at Brookings. (Laughter) The first book, by the way, you still can get. It's at Amazon. It's called *Regulation Energy by the Federal Power Commission*, which I wrote with Paul MacAvoy. It only costs a penny. (Laughter) Pretty good. If you have one of those free postage things, it's just a penny.

Now, the second book, which I think I also spoke of here, it was a better book, I think. It was called *Regulation and Its Reform*. And I perhaps said this here, but the *Los Angeles Times* reviewer said: In *Alice in Wonderland*, Alice emerges from the pool of tears of the dormouse who begins to read from *The History of England*, Hume's *History of England*. "Why are you reading that?," says Alice. And the dormouse says, "Because this is the driest thing I know." That was before Breyer wrote this book.

(Laughter)

So, in any case, I thought I would try to do better. The theme of this is to show people something. What is it I want to show?

I want to show I feel I and maybe some others and maybe lots of ordinary people who aren't specialists when they hear words like "interdependence," "the globe is shrinking," a slight cliché, "globalization," they are like Fabrice del Dongo, the hero of *The Charterhouse of Parma*, who is wandering around in the battlefield of Waterloo. Bullets are flying, the fog of war is everywhere, Napoleon's riding back and forth, and he thinks to himself something really important is happening here. I just wish I had any idea at all what it was. (Laughter)

And that's sort of what we think about, or some of us think about globalization. I mean, how does it affect us? So I want to be absolutely concrete and say, here, I'm giving you a report from the front.

I've seen considerable change in this respect in the 20 years that I've been on the Court, a little longer. And I want you to see that change not in terms of generalizations, but in terms of specific kinds of problems, which I would have said would have risen maybe once in a term and now maybe 15, 20 percent of the cases where you have to know what's going on abroad in order to decide the case. That's not necessarily picking up somebody else's legal opinion written in Lichtenstein or something and putting it in ours. That's not the exact -- sometimes, yes, but not generally.

It is knowing how other people suffer from and deal with similar kinds of problems. So I picked five or six. And I want people to see how our Court has changed because of this and that it has nothing to do with individuals. It has to do with change in the nature of the world.

And I want, by the way, I'd also like people to see more about how our

Court decides decisions because there's no way you could read about these decisions without understanding better how we actually go about approaching decisions and why we do what we do.

And the last point I think I'd like people to get out of this and I hope some of them do is that we do have a kind of choice in the world. The problems are global -- security, environment, health, commerce -- and call for cooperative solutions. And if we cannot do this through law, there are going to be other ways of doing it and those other ways are a lot worse, and we see them every day on the television.

So I think there's an important general message and I think there's an important learning experience. And I think there's a more specific learning experience if you can get out of it how the world has changed even in respect to our institution.

MR. WITTES: So, Dahlia, jump in as you have questions, and I'm going to put out two. So one is when people read your name in connection with the title, *The Court and the World*, a lot of people will immediately jump to your long-running debate with Justice Scalia about whether and under what circumstances it is appropriate to use foreign law sources as authorities in American judicial opinions. This book is actually about a much broader subject than that. And I would like you to sort of walk us through what the connection between that debate and this larger project is and then talk a little bit about the four areas that you've identified as kind of ground zero in this conversation in your report from the front.

JUSTICE BREYER: All right, let's take the first. It is true in most of the reviews in the United States have said what you just said, but they don't even notice what the book's actually -- well, I don't want to (inaudible).

It's very dangerous to read a review of your book. Paul Bator told me that years ago. He said you read a review of a book you want and either it's sort of rude

or it's complimentary. And if it's rude, you think uhh. And you think why did I read it? And if it's complimentary, where it says it was good, you think but do they know how really good it is? (Laughter) So there's no payoff in reading reviews, but it is true.

Now, there were a couple written in Europe, one in a magazine called *Europe* and one in *The Economist*, in the online version, that did get the point, which you just said. This is not about a debate with Justice Scalia. There is a connection. What is the connection?

The connection is that there is a political debate, I think, more than a legal debate about whether the Court should, in its opinions, refer to decisions of foreign courts. I learned that when Congressman Goodlatte and I were at some kind of seminar and he was going on about how we shouldn't do that. And I said I guess that's aimed at me. He said yes. (Laughter) I said, well, let me tell you why I do it.

People in public life are usually pretty good at debating, so don't be quite as self-confident as I was at the moment. I said, well, I'll tell you why I do that. I do that often because there are many, many more courts in the world today in countries that have a constitution like ours, they have independent judiciaries, they have problems like ours. So if a person with a job like mine has a problem like mine with a document like mine and rights, why don't I read it? I don't have to follow it. It doesn't bind me. Good argument.

He said, yeah, read it. He said just don't refer to it in your opinion.
(Laughter)

So I said, well, look, I said, but there are a lot of countries in Eastern Europe that are just trying to establish these courts, they're newly established courts. They help produce protections of democracy, human rights. And sometimes they need a little recognition so they can go to their legislatures or publics and say, look, we're

recognized. We don't -- old court, the United States Supreme Court, they understand what we do. We recognize what they do, they recognize what we do. I said that helps a little bit.

He said fine. He said write them a letter. (Laughter)

What's driving him? Well, this is what I think the connection is. I think the reason, this is just my own view, that it's become so salient an issue is because the issue has arisen primarily in cases involving the death penalty and gay rights. And I say those are special, particularly the death penalty, because it says in the Constitution when we're considering that, it has a prohibition against cruel and unusual punishment. Unusual in the United States? Unusual in the world? Thomas Jefferson and Madison and Hamilton did not say. So there's an argument about that.

You start arguing about the death penalty and you will discover emotions rise. I think this might be a spillover there.

But regardless, I think there's something deeper because, no, many, many, many, many other cases nobody, not Justice Scalia, not anyone on the Court, denies you have to look, you should look to foreign opinions when you're trying to interpret a treaty, for example. And there are many other cases, such as cases involving the scope or reach of even mundane subjects -- anti-trust law, securities law -- where of course you have to look to what other people do. Nobody denies that.

But what's moving the congressman and why is this so salient politically? My own opinion, because people are concerned that the more we consult with courts from abroad or institutions from abroad or look to abroad it will partly be the same old group of slightly left wing people consulting with each other or, more importantly, what will happen is a watering down of our American values. I say, ah, that's what's worrying you, a watering down of our American values.

Well, that's a good point. I don't deny that problem. But the reason I write this, in part, to show you what's going on is that I hope by the time you read it, and I hope you do, you will come to the conclusion, which is mine, that the best way to preserve our American values is to know what's going on abroad and participate. Because the major problems are international in scope and major solutions have to, in part at least, be international in scope. And if we do not participate and learn, the world will go on without us and we will have less influence than we would otherwise.

So working out the relationships of law and taking into account what goes on elsewhere is part of an effort to preserve what we've come to cherish, which is our own values. And see if you don't agree with me. Maybe he will, but that's a major motive and that's what I see the connection is.

MS. LITHWICK: Can I follow up? Because I had exactly the same reflexive response to the book reviews, which is that they were trying to mash it into the smaller argument about citing foreign law. And I think you deal with it in three pages and say exactly what you just said, we should cite foreign law because it's there.

But I think that the other thing that the book reviews were a little bit misleading about, Justice Breyer, is the extent to which this is a normative book. And by that I mean this is not you saying we should be enmeshed in a conversation with the world and our Court needs to be global and bigger in scope because it seems to me that this is a purely descriptive book. What you're saying is we are, this is the status quo, and that it's not, as you say, because of the nature of the cases we take. It's the nature of the world we live in that we are deeply, deeply engage in this. And so to the extent that there's a normative part of the book, I feel as though what you're trying to say is given that this is the world we live in, here's how we're going to do it. Is that fair?

JUSTICE BREYER: That's what I think, exactly right, and we have the

normative part, but that is how I do things. If I think -- probably it's partly style, partly just -- but I think that a position that I'm taking in the Court is completely correct. Sometimes I think it's only partly correct, but regardless, I think it's right, really right, and the others are wrong. I'm not going to say how right I am because nobody will believe that. The way I think you persuade somebody is you say but don't you see it's this and this and this? And if I'm going to be really mean, my own style is to try to write it in a way that a child of two would have to agree.

See, I'm just telling you the facts. That used to be the program. Not all of us are old enough to remember that, but what was it? It was Sergeant Joe Friday.

SPEAKER: *Dragnet*.

JUSTICE BREYER: *Dragnet*, that was it. He'd say just the facts, just the facts, ma'am. And that is what I've tried to do.

For example, look, protecting civil liberties in time of war is not a new problem, but I would like to show you where we are, and to do that I have to go back and do some history. I mean, Cicero 2,000 years or so ago, he said or basically I translated it as when the cannons roar, the laws fall silent. Then somebody pointed out the Romans didn't have cannons. (Laughter) So I said, okay, my point's still the same. He's saying when in time of war, the laws fall silent.

That was pretty much how American courts acted for a very long time. Abraham Lincoln, after all, his Secretary of State Seward had a bell on his desk and he called in the British ambassador. He said I push this bell, I can have anyone I want in New York State thrown into prison. I push it twice, anyone I want in Indiana. He said tell me, does the queen of England have such power?

Of course, you can understand Lincoln. He was up against a big problem. But the courts said -- I'm wrong. The courts did say something after the war

was over, with a couple of exceptions, which didn't get too far. After the war was over. Tens of thousands of people imprisoned who weren't combatants.

Go to World War I and you'll see Woodrow Wilson doing about the same thing with free speech, with all kinds of things.

Go to World War II, you will see 70,000 American citizens of Japanese origin taken from their homes in California and put into camps. For what reason? No good reason. By the time that case came up to the Supreme Court in 1944, (inaudible; audio drop?) differently from 1942, where people were genuinely worried about invasions of San Francisco. Nobody was. Nobody was worried about an invasion from Japan.

And when the Justice Department lawyers looked back into the rationale for supporting the removal -- by the way, J. Edgar Hoover being the leading opponent, Earl Warren being one of the leading supporters. He later said it was one of the worst things he ever did, but he supported it. For what reasons, what evidence? They looked at this and they said there was no evidence. None.

I mean, General DeWitt said, well, there are 743 signals that were sent offshore to Japanese submarines. Burling and Ennis in 1944 in the Department of Justice called in the FCC and said let's look at that. They came back two weeks later with a pile like this and said not one. What were those 743 instances? Well, they were all things like buck privates working the machinery they didn't know how to work. Not one. So those two lawyers said we're not signing the brief.

And then they worked out a compromise in the brief, a footnote that nobody could understand, but which really said we don't believe the Defense Department. And what's his name, Herbert J. Wechsler, was the one who worked out a compromise, that compromise, and got them to sign the brief.

So you could say, well, the Supreme Court gets the *Korematsu* case.

That was the case. I once met Korematsu. He was a great guy. He was very feisty. He was a friend of our next-door neighbor in Cambridge whose father had been Ernie Besig, the ACLU lawyer in San Francisco. He used to play poker with my father. And the ACLU wouldn't support him in that case at the beginning. He represents Korematsu.

Korematsu says, but I'm going to win, I'm an American. There's no evidence. What?

He lost. He lost 6 to 3. So for a while I thought, well, they didn't understand the footnote. Then I read the transcript. What's his name, who is -- a well-known lawyer here who was representing the Japanese-American Defense League, he pointed out that footnote and said read it. Six to three and the six, Black, Douglas, Frankfurter, the people who were on the -- they decided *Brown v. Board*. The others were Murphy dissented, good, and Jackson and Roberts. Very interesting.

And why? Well, I had thought the reason must be this: it must be, because this is generally viewed as one of the worst cases in the U.S. reports, it must be that the justices in the majority thought, well, somebody has to run this war. Roosevelt or us. And they said we can't, I guess Roosevelt has to. Okay, we'll uphold it.

Now, I thought I'd made that up, you know, that it seemed like the best inference. And two weeks ago, I met a historian who said he'd gotten ahold of Black's notes from the conference and that is exactly what Black said.

MS. LITHWICK: Wow.

JUSTICE BREYER: It's not in the book because I didn't know it, but it was a logical inference. You see?

And so, now what happens? I mean, we have that case on the books. During the Korean War, we have steel seizure. And steel seizure, Jackson gets up and says, no, the President has gone too far. And that's the majority. The majority say he's

gone too far. Why? Maybe they're reacting against *Korematsu*. Maybe they're saying we think Roosevelt just goes too far and we can take that out against Truman. He's less popular. (Laughter) I don't know, but that's what they said.

Then you look to the Guantanamo cases and the Guantanamo cases say four cases, four detainees, every one of them wins. The President loses. Congress passes a law saying those detainees who are enemy combatants and an enemy combatant, nobody -- well, some deny it, but not many -- can be held an enemy combatant during a time of shooting war when you are in the shooting war. And those were the detainees at that time. At least they can hold them.

But Congress passed a law saying they can't get to court. No, that's struck down. And the key, since they want each of those cases, and they weren't popular people -- I mean, bin Laden's chauffeur is not a popular person in the United States -- Sandra O'Connor writes even in time of war the Constitution does not write to the President a blank check to run over civil liberties, traditional civil liberties. I signed that. It's easy to sign that. It only becomes hard when you ask the obvious next question: Very well, what kind of check does it write?

And there we are. And it's a long windup for a very short pitch. So that long windup you've heard and the very short pitch is simply that's where we are now. What kind of check? You want to say no check for our criticisms? Many criticize those Guantanamo opinions, some saying we interfered with the President. To those I say you want -- what do you want? You want *Korematsu*? Is that what you want back, no review of any kind?

Then the civil liberties side says, well, why didn't you write a little bit more explaining what they can and cannot do? Why are you so elliptical? Why is it so narrow? To which I say why didn't we write more? I know why I didn't. Because I don't

know the answer, that's why. Because I don't know the answer more. And so there we are.

Now, how do you want to solve the next case that's coming up? And isn't it a good idea that maybe we know something about national security because we start getting out there pronouncing on what the right balance is between the national security and the civil liberties? And maybe it's even a good idea, since we're not the only ones to face this problem, that we learn something about how other countries are facing the problems, too, and how it works out there. In other words, a little bit of empirical experience may help get better decisions unless you want to withdraw entirely, in which case there lies *Korematsu* or in which case you -- or if you want just arbitrary decisions. And then what happens to the security of the country? All right, you see? I'm drawing a problem.

MR. WITTES: So I want to put you a little bit on the relationship between the first section of the book, which deals with these national security and civil liberties balance matters, and the subsequent sections of the book, which deal with, respectively, treaty interpretation and U.S. statutory interpretation in interaction with the rest of the world.

So the broad thesis that we can't avoid as a descriptive matter that we are engaged with the rest of the legal world is, I think, overpowering in the second two sections, that, you know, yeah, when you're interpreting treaties, other countries' practices, interpretations of those treaties' institutions really, really matters. And you make a really powerful case that our statutory interpretations are pervasively affected now in certain areas by looking overseas and inevitably so.

But the read the first third of the book and I said wait a minute. You can tell this story and we conventionally have told this story without reference to the broad

thesis of this book. We've told it as a separation of powers story. The President gets too strong, the Court has reined him back. The Court has gotten more aggressive about doing so as the imperial presidency has become more imperial.

And so my question is why should we think about this first section as part of this story? It doesn't involve foreign law or legal institutions. It doesn't involve -- it involves a much older struggle. The only foreign document really that we end up talking about in these cases is a 100-year-old lease of a plot of land in Cuba. And so my question is, is this first section really an example of the thesis or is it a graft of a larger -- of a different debate, that is the debate of how powerful the President should be in wartime, onto a sort of globalization discussion?

JUSTICE BREYER: Very good question which my publisher asked the editor when I sent him the manuscript. (Laughter) And my response is what I told him and what I hope is there.

The last part I talk about what Israel does, I talk about what Britain does and what some other countries do. But what I'd like to appear, of course, it is an old debate and it's an old, in a sense, unresolved debate. And the key to that debate is really Jackson, who says in the steel seizure case if you want to find out what the Founders thought about this presidential power, the scope of it, the limitations upon it -- and he means, I think, precedent as well -- you'll discover there are very few indications, that it's like Joseph trying to interpret the dreams of the pharaoh.

So you're not starting out where you're going to resolve this thing by precedent, by what Hamilton said or somebody else said. It's just not going to happen. So I want to show the nature of the problem. And I wanted to go into in some depth the steel seizure case. And the reason I wanted to do that was I wanted people not to view it in those abstract terms of presidential power versus the Court. I wanted them to see

what the problem was from the point of view of the President and I wanted them to see what the problem was from the point of view of the judges.

And you catch a sentence here where in conference somebody says or in the oral argument to Jackson that you were attorney general and you said the President had all these kinds of powers. Now you're saying he doesn't. He says that was then and this is now. I was attorney general and now I'm on the Court. You see? And it's rather different.

When you get into that, I think and I hope people would come away with the sense of the importance of knowing the practicalities of the situation, a sense of knowing what is possible to do and what likely consequences there are, which you will never know for certain. You may get a glimmer. And that's why I say us knowing something about what the national security problem is and today that problem is international, I say knowing something about what other countries do and that's because maybe you can see from that some things that you might do or might not do or might modify and do.

In other words, I'm leaving it up to the reader to make that connection. I'll bring him up to speed and then I'll say, now, look, here's today's problem, which is an international one. And, you know, he's going to have to start thinking.

So I think, all right, what do we do about this? How do we do it? How do we get the information? Where does it come from? Let's discuss that and let's figure out how the Court might do it better than worse.

Once you're read that, it's actually in a sense easier and a sense harder. You're absolutely ready for instances where you can plunge into the middle of it, where we're looking at what goes on abroad all the time and it's obvious that you have to.

I mean, that's *Kirtsaeng*, you know, this is in the commerce area. But

Supap Kirtsaeng, he's a Thai student, he's up in Cornell. He discovers his textbooks, identical textbooks -- identical -- in English, sold in Bangkok for a much lower price. So he writes to his parents and says send me a few. They sent a lot more than a few. He began to sell them. The publisher got annoyed, brought a lawsuit. Can they do it, yes or no? It depends on like six technical words in a very technical copyright statute. Nobody knows what they mean. They're pretty obscure.

I go into my office, I find a stack of briefs like this. From where? All over the place. Lawyers in Asia, lawyers in Europe, governments of different countries. I said in this technical case, why are there all these briefs?

And I begin to get an answer as I read along because one of them tells us copyright today is not simply a question of books or even books, films, and music. Buy an automobile, software, copyrighted. Go into any store you want, you will see labels on products, copyrighted. And it says the answer to this case we think, these are retailers saying this, is going to affect \$3.2 trillion worth of commerce. All right? And to get that answer right I think you have to know what's going on elsewhere, i.e., how other countries handle copyright, et cetera.

Or an anti-trust case, you know, where a vitamin distributor in Ecuador wants to sue a member of a cartel, a manufacturer (inaudible; audio drop) Holland. Brings the lawsuit in New York. Why New York? Well, maybe he had no vitamins, so he was so weak he couldn't get to Holland. (Laughter) Possible. The other possibility is called treble damages and attorney's fees.

Does he have the right to do it under the statute? I don't think that you can answer that question properly without knowing how the European cartel authority works and what interpretations will and what interpretations will not interfere with their efforts to obtain common objectives, and they filed briefs telling us those things. Good.

That's today's world and it's right. And it's where a legal term called comity, which used to mean don't unnecessarily interfere with others, now I think more and more means try to get the laws of other nations in similar areas to work harmoniously with ours and ours to work harmoniously with them. And there are a lot of cases -- securities, anti-trust, copyright, others -- where you have to work that out.

And treaties? We're three times interpreting treaties having to do with abduction of children. That's a tough, tough job for a family judge who is a state court judge, who has one of the toughest, toughest jobs in the system. Eddie Ginsburg, who had that in Cambridge, used to say -- he'd tell me that he tells the people in front of him when they're fighting, solve it yourselves because if you can, you'll do whatever -- you'll do a lot better than what I have to do. Tough job.

You know who knows least about it? Federal judges, Supreme Court least of all.

So why are we trying to solve a case, words that are obscure and difficult and ambiguous, where on one side are groups of people who are absolutely determined to prevent abduction and on the other side groups of people who are absolutely determined to fight spousal abuse, which often leads to abduction? Why are we doing this? The answer is because it's in a treaty.

And why is it in a treaty? Because today marriage is more and more a question (inaudible; audio drop) crosses frontiers, crosses boundary lines. And there we are. That's the world. And there are ways we might be able to do better or less well, et cetera, some of which are discussed.

All right. Is that beginning to answer your question?

MS. LITHWICK: I want to ask you about something that's not in your book and you can just say it's the next book, Dahlia, and then Ben will ask a question.

But I think that you talk about speech a little bit when you talk toward the end of the book about proportionality, but I've always thought of you as someone who thinks really, really hard about sort of the intersection of free speech and globalization and terrorism. And I remember in 2010, when you were worried about Koran burning and you said to George Stephanopoulos, oh, you know, maybe the whole world is starting to look like a crowded theater. And a lot of speech purists like myself said, oh, my god, no, the whole world can't be a crowded theater. But people die in Pakistan when we burn Korans here and I think that was your point.

And I think your point has been, and in this sense I think you've been a little bit out ahead of some of your colleagues, thinking about how we're going to reinterpret the way we think about speech when ISIS is throwing up instructional videos that everybody can get access to. And this is something, in some ways, we're now having this conversation this month. You know, Eric Posner, people who are very serious thinkers are saying we need to revisit how we protect speech because there is no longer a crowded theater. It's the whole world.

I don't know if that inflects on how you think about the intersection of the law in the world. I don't know if it's something that you feel that you can comment on. But that's the chapter of this book that I feel like you thought very hard about and perhaps have not put into words here?

JUSTICE BREYER: I do say some things about it and I've said more about it in opinions. And the one place that I shouldn't have said anything about it was with George Stephanopoulos. (Laughter) It really proves don't try to show how clever you are. It does not work. I mean, I thought he did ask that question about the man who was burning the Koran at the time and I thought, oh, I have such a good answer. I'm going to say, well, of course, people have freedom of speech, don't they? But you can't

yell fire in a crowded theater, can you? And I thought that's perfect because nobody knows what that means. (Laughter) And I sort of answered the question, no, no. The blogs picked that up and half of them think, oh, he hates free speech and the other half think he wants to burn everything up or I don't know what. But it was not a good question to answer publicly. It just wasn't. It's too complicated and it is too close to the hearts of many Americans, as it should be.

So there are problems that I've raised. And the question, if I say there's a big difference within the Court sometimes, I suppose I'm more on the -- some people are more on the side of what I consider to be turning it into absolute rule. There's this rule, then there's a sub-rule, and then there's the other rule over there. I don't think that works. Probably, in many cases, I'm more with Frankfurter on this probably, that there's a lot of balancing that has to go on. No matter whether you pretend it's a rule or not a rule, you're actually doing a lot of balancing, and that's what I put into this book.

Now, I can only add, because you'd like me to add something more than that, is since cases like this may well come up, the way the Court works best, in my own opinion, and Tocqueville said this or something like it, is people in the country have a way of dealing with new problems. The first thing, Tocqueville says -- like, say, privacy and the Internet and all these difficult kinds of problems that change the notion of traditional privacy -- the first thing they do, says Tocqueville, is they start to shout at each other. Now, he doesn't -- he calls it the clamor, but really he means it's okay. Maybe it's not always polite and it should be, but they start talking about it from every point of view.

And you get talk at universities, you get it in the newspapers, you get it in magazines, you get it in trade associations, the police associations have a view, civil libertarians have a view. And they start talking and debating, and then they might try passing laws and perhaps in the form of administrative rulings, perhaps in hearings in

local legislatures or in Congress. And out of those might come administrative rulings that you change because you see they didn't work very well and they'll start moving around. And eventually, people will write laws and maybe change them and so forth. But when there's been discussion and when there has been debate, and when that has eventuated in a law, and then it comes to the Court, for us to say is what you've decided within the boundaries -- and they're often very broad boundaries -- of the document, with this document that sets frontiers beyond which you cannot go, I think we do a better job of answering the question.

When you unleash us at the beginning and we have to decide it on (inaudible; audio drop), you see. I think we do a less good job. That's not always true, but I prefer approaching a problem when other people have thought about it first, and then I can see more easily what the sides are. And as I say, you don't always have the luxury of doing that, but where you can do it, it is, I think, likely to lead to a better solution.

MR. WITTES: We're going to start taking audience questions. As you signal me, I will direct the microphone your way.

While we do that, I just want to pose one more question myself. You know, as the audience can see, this is a much larger discussion than the narrow should we cite foreign law debate. My question is which parts of the descriptive thesis that you've outlined are matters of common ground between you and your colleagues and which parts are actually disputed? I'm not looking for, you know, who thinks what, but, I mean, how much of what you've laid out in this book would other members of the Court say, yeah, that's right, that's the new world we face? We pose different answers to those questions, but, yes, Justice Breyer has accurately described the problem that the Court faces in the world.

And to what extent would they say, no, on this point there really is no in

the context of the world? There's just U.S. statutory law, there's just the Constitution, and, you know, he's imagining an interconnected web that doesn't, in fact, or should not, in fact, affect the way we do our jobs.

JUSTICE BREYER: Well, I suspect I could get the greatest unanimity on treaties because everyone's written that you have to look to other countries to interpret a treaty. And on the questions that we were discussing about business, like the securities and anti-trust, well, Justice Scalia wrote the opinions and he usually takes the other view. And I just joined on to what he was saying and maybe added a few things. There wasn't much disagreement about that.

He might disagree as to the overall importance of it. I don't know, I'm not sure. I've never had that discussion with him.

I'd say where you're likely to get the most disagreement is on the civil liberties versus security on the ground that, well, we're not going to learn much from abroad. And I can't prove that we will. That's why I say I leave -- you know, it's not booting the question down the road. I'm trying deliberately to provoke conversation.

The way we solve things in the legal profession has traditionally been the judges say something, the professors all say why it's wrong. It's good, that's their job. They can compare it with other things that have been said in the past and they can say this would work better, this would work better. And the lawyers reading what the professors write and leading the opinions can take what's useful for the case and we will get back in front of us in different form the thought of quite a few people on this kind of issue.

And it's at least that kind of discussion that I think is important here. And since I'm out there in the world that's doing it at the Court, I thought perhaps it would help to provoke that kind of discussion by writing this book.

MR. WITTES: So I will say that, you know, when you flip the mirror around, your point in other countries is utterly uncontroversial. So I was also in a frontline situation with respect to this recently. I was in Israel and wrote an article comparing U.S. versus Israeli military attitudes toward proportionality and targeting. And I almost immediately after publishing the article got a call from the IDF legal staff asking me to come talk about this exact disparity because the question is what could you learn from, you know, American practice in this area? And there was simply no conversation about whether it was appropriate to look at that question or how valuable it would be.

So, I mean, I do think when you approach the civil liberties wartime question from the point of view of do other countries think our law is worth looking at, there's no doubt that the answer to that question is yes.

JUSTICE BREYER: Now, but wait, because let's take what I think is likely to be -- it's just a guess, if you were to go 5, 10 years into the future, would be one of the most important constitutional questions. And that stems from the fact that Professor Cassese had his students go out and look across the world how many international organizations are there, international organizations like little bureaucracies, created by treaty or by executive agreement or by something else. They used to all just be treaties, saying you do this, I do that. Ah-ha-ha, that's not what they are now. Some of them set up the United Nations, other set up some other bureaucracy.

And how many do you think there are that set up some bureaucracy that can, in fact, make rules, that rules in practice bind citizens of more than one nation? Now, that sometimes comes as a surprise. How many think there are more than 100? More than 500? More than 1,000? More than 2,000?

All right. There are more than 2,000 and we belong to several hundred. I mean, it isn't just the U.N. It's also let's try the International Bluefin Whale Commission

or what about the International Olive Oil Council? I like that one. And they're all over the place. All over the place. International Civil Aviation Authority, oh, it doesn't bind us. It doesn't? Try flying and violating one of its rules. They're all over the place.

And we have in Bern meetings of bankers to set all kinds of rules in the United States to which meetings attend members of the SEC staff. Now, they can come back and they can say, oh, we're now promulgating this proposed rule for your comment. But wait a minute. They really decided that in Bern. And who was present in Bern? The bankers. The public? No. Regulators? Yeah.

And there are rules and laws all over the place. Who probably makes the rules that affect your daily life the most? The SEC or ICANN? ICANN is the organization, headquarters in Los Angeles, some kind of corporation that makes all the rules for the Internet. Hmm, hmm, hmm.

And what is the status of those rules? And how does the public (inaudible) input? And how do you, in fact, square the delegation of authority that's being given to these entities with an Article 1 that says the legislative power of the United States shall be in a Congress of the United States, not the Bluefin Oil -- whatever? You see?

Similar problem to what arose at the time of the '30s, when we had the creation of agencies. What were those? Were they in the Constitution? Well, if we can't resolve that problem, and it may come up in many different forms, but if the answer is you can't do it, how do we solve the world's problems? And cooperation is a necessity. And if the answer is do as much as you want, what happens to Article 1 and the constitutional delegation of authority?

I mean, there may be ways of working this out. It may be fine. I just sort of reacted to your saying that they don't have these problems in Europe. They don't?

They don't? They just had the problem before the Constitutional Court of Germany about the extent to which the EU treaty signed by Germany was valid in light of a Constitution that has certain reserve powers to the states, the Lander. And they've had that same question in Italy and they've had that same question in Austria. And every court has decided it the same way, namely that the government could not give all the powers away to the EU. They're always something they can't give. Now, they've always decided in the case in front of them that it was all right to give those powers. But nonetheless, one after another.

And you say France, oh, no problem. No problem? France just has a state of urgency where it derogated from the Strasbourg Convention. Ah, let's imagine why they might have done that. Perhaps they did not have this great respect for the laws of other nations that you might expect or not expect. But nonetheless, that's what they did.

And so the problem of how you reconcile -- and I didn't notice in any of the English decisions anyone mentioning how Israel dealt with the problem. The Israelis are different because they have Avram Baruch (phonetic) who said everything in the world is always relevant. (Laughter)

But it's not a problem, I don't think, that is unique to us, the problem of how, for example, we're going to reconcile the security needs and civil liberties is something not only a lot of people have, but in respect to which a lot of different nations have not yet worked out the system or systems through which they are going to resolve these tensions and difficulties.

MR. WITTES: So we're going to go to questions from the audience. I have a few things to say in advance. Please, again, first wait for the microphone.

Second, please tell us who you are and what organizations you're from,

if that's relevant.

And number three, you know, Justice Breyer's a very, very gentlemanly man. I am not. There's always somebody in the audience who thinks they're going to get him to say how he's going to vote in the blank case that's big this year. Don't try it. You're not going to fool anybody and I will cut you off with a shocking lack of due process. (Laughter)

So, sir?

MR. LOCKE: Steve Locke (phonetic) and I work and study here in the city. Thanks a lot, Ben, I appreciate it. I actually did think about trying to trip up Justice Breyer, but.

MR. WITTES: See? It's always worth the warning.

MR. LOCKE: Justice Breyer, I'll make them three quick ones. You were recently in France. Could you give us your sense of the greater crackdown on civil liberties, to an extent pushed out by that legislature? That's the first question.

The second is, what influence has Justice Goldberg and Senator Kennedy had on your work in the Court?

And the third is *Bush v. Gore* is on page 280 for anyone who's interested. I covered that as a young news producer. I wondered do you hear the protests outside on either side of the cases that you're on? And thanks.

JUSTICE BREYER: As to the first, what's going on in France, I don't know more than you if you read the newspapers there. I haven't been there for a while. I know they're having these kinds of problems, but I don't have anything specific to comment about it that I haven't already.

In respect to the -- which was the second?

MR. LOCKE: Justice Goldberg.

JUSTICE BREYER: Oh, yes, I would say Justice Goldberg is very practical. We love Justice Goldberg. I mean, he had two clerks at that time. He was wonderful, just great. He used to take us to lunch. Of course, all the clerks loved that, the boss takes you to lunch.

But he was happiest, I would say, at the Labor Department. He was an activist. He liked to get things done. He was the Labor Secretary for a few hours before he set up a Minimum Wage Committee, an End Discrimination Committee, a do-this committee, and a do-that committee. And he really couldn't do that at the Court.

He liked the Court, it was fine. It was fine. But this was Goldberg. He's sitting in his office -- or at home one night and he sees on television there's a terrible snowstorm and they need medicine somewhere at a hospital, which they couldn't get. And he said I know what I'm going to do. I know the general who runs Fort Meade or whatever it was. And he calls him on the phone and he says, General, I have a great idea for you. And that's Kennedy, too, "for you." Why don't you take one of your machines and get the medicine there? You'll be on television, you'll save the people, it'll be fabulous. And he did. (Laughter)

Kennedy, sort of like that in a way, the way you compromise. I wrote on a cup, my law clerks gave it to me, the six things I learned from Kennedy. First, of course, is the best is the enemy of the good. Absolutely. Never try for the best. The good is good enough.

And the second thing, which I thought was -- the way you compromise? What a good idea you have. (Laughter) You sit there and listen until you hear that person who's totally against you say something, oh, I can get that one. What a good idea you have. And then when it comes time because it went through, you push that person out in front of the television cameras so that his constituency, he did a good thing. And

he'll come back and try to help in the future. Great. And I learned from him so many things. I mean, so many things.

Credit? Don't try to get all the credit, please. I mean, he's not averse to getting credit, no politician could be, but credit, don't worry about it. It's a weapon. Use it to get your end.

Now, if the thing succeeds, there will be plenty of credit to go around. If it doesn't succeed, who wants the credit? (Laughter) See?

And I loved working there. I loved working for Arthur Goldberg. I loved working for Ted Kennedy. I mean, that was another thing that Kennedy had and Goldberg, too, to a degree, but Kennedy really had it. You know, we're out there to help. Help who? Help him. Help yourselves and help people who need help. And do it with a little bit of lightness of tone. Don't take yourself too seriously.

When I would come in in the morning, I'd just love to go in there because it's going to be interesting and fun and we may get something accomplished.

MR. WITTES: Ma'am?

MS. BOVAT: Sharyn Bovat, Voice of a Moderate. I know that you've got a lot of cases that you could hear. Now, we won't talk about one that could be fast tracked, but when you have to decide what cases, do you just sit around and say, okay, we have to do a gay rights case, we've got to do a civil rights case? When you make those decisions, not some that are like super speedy that have to be expedited, but just that process, can you just give some insight to regular people?

JUSTICE BREYER: Sure, a very good question.

MR. WITTES: And can I just add to that question? How does that relate to -- given that your docket is discretionary, you could choose to have more or fewer cases that situate the Court in the world or define these parameters. To what extent is

that a legitimate consideration, that, you know, hey, we want through the aggregate docket to do more work in this situating the Court in the world area or we want to stick our head in the sand and do as little as possible? I mean, is there a connection between --

JUSTICE BREYER: No. (Laughter)

MS. LITHWICK: Okay.

JUSTICE BREYER: You'll see. The answer to your question, it's a very good question, I get asked that a lot. I'll come back to you. But the two questions I get the most, first yours because people generally who aren't connected with the Court and so forth, what they think is we sit around and we say, oh, what fun it would be to decide -- you know, they have a perverted sense of what's fun, but they think that's what we're doing. (Laughter) And the other is, isn't it all really politics? Aren't you a JV politician, junior varsity?

And as to the first question which you've asked, Taft, who was President of the United States and then Chief Justice of the Supreme Court, gave the best answer. He said we are not here to correct errors. Everyone who has his case here, and there are probably about 8,000 a year that ask us to hear their case, everyone has already had a trial, an appeal, and maybe two or three appeals. There's no need for a fourth appeal. And why would you get it right? You know, there are just too many. They're good judges, they'll get it right. Well, then why are we here?

He said the reason that you're here, first and foremost, is to create a uniform federal law. Unlike other federal courts, we don't take state laws. Most laws in this country are made in states, 95 percent. Family, business, crime, almost everything. We're about this, made in Congress. Congress may get you to think that it's the most important. Sometimes it is, sometimes it isn't. But anyway, we're only dealing with them.

And suppose the lower court judges have come to different conclusions

as to the meaning or application of the same words, whether it's in the federal tax statute or whether it's in the Constitution? Different interpretations, do they need us? Yes, the law isn't uniform.

Now suppose they've come to all the same conclusion. Do they need us? Why? They're good judges. No need.

So the primary criteria is just what I've told you. And that's why I can go through 150 a week, you see, reading the memos the law clerks have written and I can see what's the issue in this case. Is there a division on it? Not are they right or wrong.

Now, that's not 100 percent of the story because if a lower court judge holds a statute of Congress unconstitutional, we'll probably take it. And if it's some major thing that the country needs a uniform answer to quickly, we'll probably take it. But what I just told you at the beginning is about 95 percent, and those criteria are pretty much followed. It isn't sitting there, I'm not sitting there thinking, oh, this one will be a good one for that. No.

So you get the idea. It's much more mechanical than people think. After I go through my memos, 150 of them, whatever they are, and everybody else does the same, on Friday we're in our conference by ourselves, any one of us can put any one on for discussion. And maybe there'll be 10 or 12 and we'll go around the table and we'll say briefly, it starts with the Chief and then it goes to Justice Scalia and Kennedy and Thomas and Ginsburg and me and Alito and Sotomayor and Kagan. And the Chief usually says, well, I'm going to vote not to take this because or I'm going to vote to take this because, and people will add their two cents' worth pretty quickly. If there are four votes, it's taken. If not, it's not. If no one listed it, denied.

And if I hear something I didn't hear before, I can always say hold it next week. And if I wanted it held next week, I go back, look it up, and write a memo. And if I

really feel strongly, I write a dissent from the denial of cert (phonetic) and I circulate it. And you only see, if you see them, you only see the ones that have failed because I'm trying to convince my colleagues and sometimes they do. And so I think that system works pretty well.

By the way, if we make a mistake and we deny a case we should have taken, what will happen? Trick question? What? It'll come up again. You see? It'll come up again. And if it doesn't come up again, I guess the country didn't need us. You see? Does that give you a rough outline? And that is pretty much how it works.

MS. BOVAT: It's not as (inaudible; audio drop). (Laughter)

JUSTICE BREYER: Well, I don't see it that way because I have enough to worry about. Now, does Ben's factors sometimes enter into my mind? Well, it's conceivable in some marginal way where it's a close case. That's why I talk in terms of probably and never say never, et cetera.

MS. LITHWICK: Can I just ask one quick, quick question because it's bugging me? And that is just there's such an anxiety throughout this book, Justice Breyer, about the knowledge gap. And you've just talked about getting stacks and stacks of amicus briefs from foreign countries. I wonder, that's where you get your knowledge from, right?

JUSTICE BREYER: Yes, yes.

MS. LITHWICK: And do all of your colleagues have that same sense that that's where we're going to learn this stuff, it's going to come from the briefs, or is there a growing sense that we better Google this because there's a lot of knowledge?

JUSTICE BREYER: Well, sometimes you can Google things. It depends on what they are. I mean, there are a lot of public things you can Google. I wouldn't try to Google some special argument that somebody doesn't have, but I want to

know something that's a general fact I might.

One of the best things in a patent case is one of the lawyers got the idea of doing a diagram of invention that moved. And he did it with the approval of the other lawyer, but they put it onto Google. And we called it up and I looked at it, ah. So there are a lot of ways now you get information in front of the judge.

The best thing typically, and it's long been true in the area of security, is that the lawyers have a trial or a hearing before the judge and they have two great questions they always ask. If there's an infringement on traditional civil liberties, the lawyer will ask why? Why? Why are you doing it? What's the need? And now a big area there is going to be supposedly the government says we can't tell you. Well, can you tell the judge? Well, do you have to tell us? Well, how do we resolve that? There's a big area, you can see. But the question "why" is a very important question.

And the second question that they'll ask is why not? In other words, if you had to do it, why couldn't you do it this less restrictive way? And the reason I -- well, anyway, and again, you run into the same information problems. And will that be sufficient or will we need more? And in a lot of areas, traditionally, when the government would file a brief saying this is the impact on foreign affairs, that's the end of it. Harder to say today whether that should be the end of it. Just listen to it, give it weight, to what extent, where, when, why, et cetera. It's filled -- I think it's filled with difficulty and I think that's what I want to communicate.

MR. WITTES: Yes?

MR. INGLE: Hi, Jordan Ingle (phonetic), natural born citizen. (Laughter) I was trying to think of what areas of law that we could learn the least of from internationally, where we're the most distinct. Can you address either whatever answer comes to your mind on that or the Second Amendment, which was one of my guesses?

JUSTICE BREYER: Well, no, my first reaction, of course, probably because of the cases we heard this week is the law as it is related to American Indians. I'm not sure we have learned too much from other countries and it's a very complicated area of law. Maybe we have -- as I say that, I'm not certain -- on the questions of sovereignty of the reservations and so forth. But we've had questions in that area about Indian Reservations and so forth. A tough one.

And if you say, well, how did we -- look, Abraham Lincoln, we've already learned things from other countries. Where did Abraham Lincoln learn his law? In the cabin, right? In front of the fireplace, right? What was he reading?

MS. LITHWICK: Blackstone.

JUSTICE BREYER: Blackstone. Well done. And who did Blackstone quote all the time? That's harder. Not Cicero. That's harder. Who did he quote all the time? What? Lord Coke. Lord Coke, how made the commercial law of England. And my professor, Ben Kaplan, said that the reason Anglo American judges enjoy a degree of prestige in their countries is really because Lord Coke figured out how to create a set of commercial rules that made England the richest country in the world for many years. And where did Lord Coke get his information, at least some of it? The edicts of Colbert from France.

And I even began to find at one point, I found somebody who knew that Colbert took a certain amount of his material from the Arab scholars in Grenada. I thought that would be pretty good if I could pin that one down, but in any case.

MR. WITTES: Please.

SPEAKER: Hi. My name is Anna, a naturalized citizen. I was wondering, you talked about looking at decisions of other courts. And common law is a tradition that's delineated in this country by a Constitution. So does the practice of

looking at decisions of other courts kind of erode the principle of a nationalized tradition of common law? And do you see that eroding in the future and giving way to a different type of law?

JUSTICE BREYER: Well, that's I think what some people are worried about and I don't think it has to erode. After all, we've had a system for many, many years where people have looked to the laws of many different states when they work out commercial law. And even without the United States Supreme Court, in areas of state commercial law they look to each other's laws. And they were able to create a Uniform Commercial Code, partly with the aid of the uniform code commissioners. There are many ways of trying to create a uniform law where that's necessary and part of it involves looking to each other. And we wouldn't say that the Uniform Commercial Code is some unfortunate development. I think we'd say it's a very fortunate development. And to what extent that it changed the law of Utah, I don't really know. But, I mean, there are many ways of looking to these things and I'm not suggesting one entirely.

And what I want to show, and I stop there, is that I don't think engaging in this activity is going to undermine basic American values. I think by and large it will help preserve them. And most of all, it will be the perhaps one practical way to increase the likelihood that the great problems are improved in their solution through a rule of law itself, which is the Fifth Amendment, the Fourteenth Amendment, that then which there is no more basic part of American law.

MR. WITTES: But you go one step further in the book, sometimes subtextually and sometimes quite explicitly, which is that you argue that given a statutory regime that could reasonably be interpreted in way X or way Y, there is something desirable about choosing a statutory interpretation that makes the international system not work worse or work better, that tends to harmonize American law with other countries'

law and tends to respect other countries' sovereignty over matters that -- you know, I guess that sounds all correct to me. And yet, I can imagine the argument in response that says, wait a minute, when did it become a canon of statutory interpretation to make other countries' laws work better? And I'm interested in how you respond to the idea that it really isn't the job of the American legal system to improve the global functioning of law elsewhere.

JUSTICE BREYER: Well, the examples I give --

MR. WITTES: Which are really startling examples, by the way. I mean, I think --

JUSTICE BREYER: Well, I didn't want to give examples that prove the contrary. (Laughter) No, that isn't quite true because I think maybe I have given one that does. But you can't just pick your friends. But the anti-trust, right, securities, copyright --

MR. WITTES: And ATS, the Alien Tort Statute.

JUSTICE BREYER: That's the one that's more controversial. You say when did it happen that instead of just trying, as in *Timberlane*, interesting enough, an old anti-trust case that used to be -- if there are any anti-trust -- I don't know if there are any anti-trust lawyers here. It was a small group of administrative lawyers. I used to belong to that group. I used to say we're a small group, but we love it. (Laughter) But the fact is that we have a very strong anti-trust policy. We certainly always had when I was teaching it and before and worked in the department. It's a very important part of American law. And to allow this anti-trust principle of, say, preventing agreements in restraint of trade to develop further in a world of commerce that is international, I don't argue it, I assume it, it's very much in our interest. And similarly, anti-fraud laws in the securities area that take into account the fact that Australia has a slightly different system aimed at the same thing, to prevent its shareholders -- to get those to work in common is

to me a way of strengthening our own law in an international world and works better.

So I think your question when did this all change? Ah, I don't know, but not too long ago because you can find cases where the only meaning attached to the word "comity" is the meaning of don't step on somebody else's toes where it doesn't have this idea of harmonization. And it's used few and far between. So I'm saying look what's happened. Look what's happened. And I'm saying probably that will work out for the better for us because we work in cooperation in trying to get these policies accomplished through many different enforcement agencies. That's good. That's fine. That's part of what law itself is about if you see law itself, as I do, as simply one human mechanism designed to help people who live together in societies function more effectively, productively, and fairly. That's Hart and Sacks and I never went further.

MS. LITHWICK: But talk about ATS now because that --

JUSTICE BREYER: ATS is more controversial. ATS is the Alien Tort Statute.

MR. WITTES: For those who don't know.

JUSTICE BREYER: Yes, Dolly Filartiga. Dolly Filartiga from Paraguay shows up in New York in the 1970s, where she finds a man from Paraguay, who in Paraguay tortured her brother to death. And she also finds a statute that had hardly been used for 180 years, the Alien Tort Statute, which says that an alien can sue in a Federal District Court for damages in tort for a violation of the law of nations.

Well, what's that about? Probably that was, in part, about pirates. I mean, you found a pirate, you hanged him. It didn't matter where he came from. And if when you're hanging him upside down, coins fall out, give them to his victims.

And so how do we apply this statute now? Who are today's pirates? And the Court said she can bring her suit for torture. And she went back, even though

she didn't collect the money because he was broke, but she still went back and she said to Paraguay, I came to the United States trying to look that torturer in the eye and I came away with so much more.

Well, other people began to follow that statute and there were a lot of them. And now the courts begin to have to answer these questions. Who are today's pirates? And what happens if the country involved doesn't want you to get their pirates? For example, South Africa, who said we don't want judges in New York to start giving damages against companies doing business here. We have our own method of dealing with apartheid. It's called truth and reconciliation, so stay out of it. And to what extent does the judge give weight to that?

And how do we have a rule of decision that will, in fact, be a rule that could be used in other countries even if they don't, but maybe the International Criminal Court's looking for rules? And you don't want a rule that everybody trying it differently is going to get all mixed up and it'll happen, as we always think, that everybody in other countries is going to go put Henry Kissinger in jail or something. I mean, that's not the way it's supposed to work out.

And there is no Supreme Court of the world in order to interpret this, so judges in our Court or other American courts in applying this are going to have to think about how to universalize the interpretation or principle that they're using. Now here some people think we just shouldn't get into that business. Forget it, goodbye Dolly Filartiga. But that isn't what the Court said. Well, maybe it came close.

And there are other people who think you can work out ways of doing this. And there is where there is a disagreement.

MR. WITTES: Here in the front. No, no, sorry, not that far front. I meant the front of the people with their hands raised.

MR. GAGLIANO: Justice Breyer, is there anything that came out of the Obama healthcare -- I'm Lou Gagliano. I'm a healthcare consultant. Is there anything that came out of the Obamacare federal case that would prevent the federal government from taking more responsibilities, particularly relative to directing patients to where they should get procedures done?

JUSTICE BREYER: Don't know. The truthful answer is I don't know.

MR. WITTES: That's a little beyond the scope of today's discussion.

Right in back of --

MR. SHAPIRO: Ilya Shapiro from the Cato Institute. And, Justice Breyer, I'm wondering what you think the advent of populism of both the left and the right, both in America and abroad, has on the story you're talking about with globalization and the law. Is it that it's irrelevant because this is a discussion within and between elites, at least until President Trump or Sanders start appointing judges? Or is there some infiltration in that regard?

JUSTICE BREYER: It's a discussion about judges and law. And so what is the relevance to this discussion about judges and law? Well, I thought the best comment for at least the last few years, until I got shown it wrong, Paul Freund years ago, a great expert on the Supreme Court, and really talking about the New Deal Supreme Court and the changes that they made, he said the Court does not shift with the wind. It does not change with the weather. But the climate, the long-run climate, hmm, that may have an impact.

I think that's pretty good because over the long run, different judges are named. That doesn't mean the judges are all deciding things on the basis of politics because a judge is going to be named by a President who really does think that the law is what that President thinks. Well, let's not be too specific because if you think that the

President's going to appoint a person who is going to agree with him on everything, that President is in for a big disappointment. Teddy Roosevelt appointed Oliver Wendell Holmes. Within six months, I think, Holmes had decided to dissent in the *Northern Securities* case, a very important case politically, anti-trust, at that time. And Roosevelt said I could carve a judge with more backbone out of a banana. (Laughter)

But if you're talking about very general things, such as what law is about or what the Constitution is about or how these principles in the Constitution relate to life in America, what the country is about, and how these old perhaps long and durable principles apply to the world that's changing, a President may be luckier in getting somebody who has agreement with him on many of those basic jurisprudential points. And even there he might be mistaken.

But that's the kind of thing -- I mean, when I came to the Court, I thought since I'd been in federal court in Massachusetts, I'd had a lot of disagreements, and San Francisco isn't free of disagreements where I grew up. But I'd never seen disagreements like this, my god. And I thought for a while, you know, everybody should agree with me who's so right and so forth. But I soon thought that's not so, it's a big country. There are 320 million people just about and they think a lot of different things and it's not so terrible that you have people of different basic philosophies I'd say, which show up every so often. Not all that often; 20 percent are 5-4 and probably about half of those it's the usual suspects. But still, it's not so terrible in a big country, people with lots of different views, to have judges that have somewhat basic different basic jurisprudential approaches.

So there we are, which is to say it might sometimes have some effect, but not to accept over a long term.

MR. WITTES: Here.

MR. SULLIVAN: Justice Breyer, my name is Charles Sullivan and I'm

within the organization CURE. Many years ago, we were involved with the U.S. Sentencing Commission when you were -- and Judge Wilkins started out, and haven't talked to you since then really.

I chair or direct an international prison reform organization. And I also have read your book and there were three, I think, *Plessy v. Ferguson*, the *Dred Scott* decision, and the Japanese decision case that you've talked about were the three worst decisions the Supreme Court has made over the years. And I know you're not open to other nominations, but we're seeing in the prison reform movement the results of *Kansas v. Hendricks* or *Hendricks v. Kansas*, where have a civil commitment for people how have finished their criminal sentence.

We have a situation in Minnesota, where no one in 20 years has ever been release out of the 700 that are there civilly committed.

MR. WITTES: Okay, we need to bring this around to a question, please.

MR. SULLIVAN: Okay. The question I have is I don't think there was any international background to that case. It seemed like it was unique, that really no one knew what to do because a person who was convicted of a sex offense said that he would be a danger if he was released, so we've got to come up with something.

JUSTICE BREYER: Well, there are a lot of different areas. I mean, I'm sure that -- look, in every decision that's split, which is at least half of them, about half of them, there's somebody who thinks it's totally wrong. I mean, not everybody can be right and you just have a system where you follow the majority. And there are a lot of problems in the criminal justice system, I'm not going to disagree with you about that one.

And I've written some things years ago about the sentencing guidelines, which overall have made some improvements and I'm afraid perhaps fewer than I had hoped, and that's a long story. I think we're in the process of maybe seeing changes

being made. You would know better than I.

MR. WITTES: Are there other areas of the law where you think --

JUSTICE BREYER: I didn't think it had much to do with international, I agree with you.

MR. WITTES: -- I mean, where we should be looking to, you know, one of the questioner's comments is that, you know, the Court decided that case with no sense of what other countries do with long-term commitments.

JUSTICE BREYER: Well, I'm not arguing here. I'm trying to get examples here. And I think there'd be fewer than 20 percent, maybe fewer than 15 percent of the cases in a given year where it seems pretty clear that you need --

MR. WITTES: Need a sense of what other places are doing.

JUSTICE BREYER: Yes, you need a sense of what's going on elsewhere. And there might be many other cases where it would be helpful. I'm not saying that they're not. And the lawyers will probably point it out if they are, and sometimes they will be and sometimes they won't.

MR. WITTES: So we have time for one more question from the floor and then I'm going to ask Dahlia to pose the last question. The gentleman over way by the side whom I can't see.

SPEAKER: Thank you. My name is Joseph. I'm a student at SAIS across the street. To get the phrasing right, do you think that the federalism revolution of the Rehnquist Court era has now entered a phase where liberals should favor blue state federalism as the focus shifts from state sovereign immunity to other aspects of the commerce clause or enhancing state power to experiment with policy innovations serves to advance a progressive agenda in areas such as state labor, environmental, and health?

MR. WITTES: And I'm not sure what that --

JUSTICE BREYER: The only comment I could make is this is my own personal reading, I loved this years ago because I like irony to a certain degree, and this is irony in respect to liberals liking one constitutional kind of approach or provision and conservatives the others. And I happen to read in about the same period of time a book by a name called Ewald which is very, very interesting, the history of the Arney-McCarthy hearings. And he was a young lawyer attached to Fred Seton, who before he became Eisenhower's Secretary of the Interior was Secretary of the Army. And they moved all the files of the people whom McCarthy was trying to investigate over to the White House. Why? So that McCarthy couldn't subpoena them. And at that time all the liberals thought presidential privilege is the best thing we've ever heard of. (Laughter)

And I happened to be reading it at a time where Nixon was not going to give things to the committees over at the Senate on the same kind of grounds of presidential privilege. And surprise, surprise, the liberals seemed to think presidential privilege was the worst thing that they'd ever heard of in their life.

So it's always hard to line up exactly with a political philosophy how the legal principle is going to sort out and whether there'll be for more of it or less of it. And you're suggesting changes that they mean some shift in some political directions and I'm not going to say anything about it because I really don't know.

MR. WITTES: Dahlia, finish us up.

MS. LITHWICK: Well, I want to circle back to what I think was undergirding Ben's question to you when he was talking about going to Israel and having it sort of be a given that what America does is relevant to other courts because that flies a little bit in the face of what we hear, which is that we have this sort of influence in the world, that, you know, other courts cite us less often than they used to and that they're

more interested in South Africa and the Canadian constitution. So I know it's a part of your thesis that we want to be in this conversation, but is part of what animated the book the feeling that we are sliding out of an international conversation or is that overstating it? In other words, are you --

JUSTICE BREYER: No, it's not part of the book.

MS. LITHWICK: Okay.

JUSTICE BREYER: Israel's special because Avram Baruch thinks you should support all kinds of things that are relevant and that's how they've developed there. That isn't true necessarily in other countries. Whether we're cited more or cited less by some other country is up to them. It's not up to us.

MS. LITHWICK: And it doesn't worry you?

JUSTICE BREYER: That's not my job.

MS. LITHWICK: It doesn't worry you?

JUSTICE BREYER: My job is not to be popular. One thing you learn in my job is don't try to be popular. I mean, that's not the point. The satisfaction you're going to get out of it, maybe you'll be the only one who has that satisfaction. You try to get the thing decided correctly as best you can. And I think that knowing more in these areas, in certain areas, about what goes on will help me decide this case better as a matter of American law. And whether that has other things attached to it and people cite us more or cite us less, that's up to them. That's fine.

MS. LITHWICK: Outstanding.

MR. WITTES: I know it would make me popular to keep this going, but I'm not going to try to be popular. I'm going to fulfill my obligation to end this on time. Please join me in thanking both of our guests, Justice Breyer and Dahlia Lithwick.
(Applause)

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