

The Court in the World

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Let me start by saying that I am not an expert on international law, and I am not an expert on the law of other countries. But I have spent a certain amount of time working as a judge in our courts, and I will speak from my point of view as a justice on our Supreme Court. I want to explain to people how the work has changed in what some call—it is not a very happy word, but it is all right—transnational law, meaning law of other countries, international law; why that has become part of my life; and how.

Why look to the world?

When we first went off to see courts in Europe, which our court does from time to time—we hear other people and we talk to them—I came back and I thought it was pretty interesting. I was speaking at a university and I said that we had learned a lot of useful things. A professor from Finland asked me to name one thing. I thought for a minute or two and I did come up with something. Well, that would not be so hard to answer today. The number of cases requiring us to take foreign considerations into account has increased substantially. In this piece, I want to tell you what it is like to weigh these foreign considerations and identify a few of the questions that we as justices must answer.

Part of my motive for doing this is that there is a tremendous political issue, one that was best illustrated when, a few years ago, I sat on a panel with a Republican congressman from Virginia. At some point, the congressman strongly criticized the practice of referring to other countries' courts. I said,

¹⁶ This chapter was adapted from the 2014 inaugural Justice Stephen Breyer Lecture on International Law, given on April 3, 2014 at the Brookings Institution in Washington, DC.

“I guess that’s aimed at me,” and he replied that it was. I then explained that foreign court decisions do not normally bind us in the United States. But they have similar problems, they have constitutions that are more and more like ours, and they are trying to protect liberty and democracy. If someone with a job like mine has a problem like mine and a constitution like mine, why wouldn’t I read what his judgment says? I don’t have to follow it, but why not read it? I might learn something.

The congressman agreed that I should read the foreign opinion but felt I should not refer to it in my opinion. I acknowledged his point, although I disagreed, but not knowing when to quit, I said, “Well, look, many of these countries have courts that are newer than ours and they don’t have the same degree of prestige that we do. They refer to our cases, and we sometimes refer to theirs. Then they can go to their legislators and have one more argument for saying, ‘What we do is important, please pay us our salaries this year.’ It helps to provide support for the rule of law.” The congressman thought that was fine but he added that we justices should instead send the foreign court a letter of support, but still not refer to their decisions in our opinion.

I realized that I was not going to win the debate until I figured out what the people who are thinking about this politically are actually concerned about. And those are some of the people to whom I address my most recent book.¹⁷ They see a world that has changed a lot and that concerns them. Indeed, our docket has changed a lot. They think we have something uniquely American. Well, that is not a surprising thought. One can go back and see how Madison described our Constitution and our federal government. He said, “The Constitution is a charter of power granted by liberty,” not, as in Europe, “a charter of liberty...granted by power.”¹⁸ Madison was thinking that the basic condition of Americans is freedom and Americans grant to the federal government a power to do something. If the power is not granted,

¹⁷ Stephen Breyer, *The Court and the World: American Law and the New Global Realities* (New York: Alfred A. Knopf, 2015).

¹⁸ James H. Read, *Power versus Liberty: Madison, Hamilton, Wilson, and Jefferson* (Charlottesville: University of Virginia Press, 2000), 29 (quoting James Madison writing in the *National Gazette* in 1792).

the government cannot do it. That was different than Europe, where Louis XIV controlled the power even if he granted liberty. Whether or not the end result was the same, the starting places were different, and that is often reflected today in the law.

So those who view these matters politically have a point. I see that many Americans are worried. But whether or not we refer to questions that come up abroad or answers that foreign courts give, and what the law is like in some other places, has nothing to do with what they are worried about. It is the world that has changed and our docket that has changed. If we want to preserve our American values, we better learn something about what is going on elsewhere because that affects directly what we do at the Supreme Court. In a word, understanding and referring to what is happening abroad is often the best way to preserve our American values.

Now, of course, nobody who does not already believe that proposition is going to accept it by just hearing it announced, so I want to give a few examples of the types of very serious questions that we face where it is helpful and sometimes necessary to know something about what is happening somewhere else in the world. 20 years ago there were typically two or three cases out of a docket of 80 that raised such questions. The number today is closer to 10 or 15. That is a very high percentage of our cases. I am speaking of cases where we have to know what is going on in another place outside our borders or where knowing that is extremely helpful. Let me describe five kinds of cases of that sort.

The first problem: Civil liberties versus security

Consider a classic problem that has been around for at least 200 years: the conflict between civil liberties (traditionally defined) and security. The Constitution gives to the Congress and the president of the United States the duty as well as the power to worry about our security. It does not give that duty primarily to judges, but it does give to courts, as they have evolved, responsibility to see that the constitutional guarantees of basic individual liberty are not infringed upon.

What happens when civil liberties and security conflict? Let us go back into history. There have been some sorry examples from history that frame the approaches we can take to this question. I shall describe some of them, leading up to the current state of the art.

Look back to the Civil War. Secretary of State William H. Seward told his colleague, the British ambassador, “I can touch a bell on my right hand and order the imprisonment of a citizen of Ohio; I can touch a bell again and order the imprisonment of a citizen of New York; and no power on earth, except that of the President, can release them. Can the Queen of England do as much?”¹⁹ One could argue that during the Civil War this was a necessity. But was it?

Cases expressly raising that kind of conflict between civil liberties and security did not come to the Supreme Court until after the Civil War was over. The government argued one of four possible positions on this issue. First, the government argued the position taken by Cicero about 2,000 years ago. Cicero said, “When the guns roar, the laws fall silent.” Now, he did not say exactly that because there were no guns at that time, but he said something like it.²⁰ And that is what the attorney general then argued to the Supreme Court: The military and no one else has the power to arrest people in Indiana, including a civilian man named Milligan, whom the attorney general accused of leading a conspiracy.²¹ The court unanimously held that, if the civilian courts were open, which they were in Indiana, an American citizen could not be tried in the military courts. So the court rejected position one, the position that the courts have no role to play in times of war, but it did not do so until the war was over.

The political question doctrine

A second position was dogma for many years, but in my view, it does not now squarely address the conflict between civil liberties and security. There

¹⁹ William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime*, 2nd ed. (New York: Vintage Books, 2001), 49.

²⁰ Cicero wrote, “*Silent enim leges inter arma.*”

²¹ See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

is something called the “political question” doctrine. It has many forms, but greatly simplified, it cautions judges to avoid involving themselves in cases raising too much of a political question. It is difficult to define a political question, but I had a little experience in a case involving a statute passed in Congress that said that if an American citizen who was born in Jerusalem applied for a passport, the passport office had to print on the passport both the city of Jerusalem and the state of Israel.²² Previously, the passport listed only the city. The president refused to follow Congress’ directive. The person applying for the passport then sued, contending that the statute required the passport to include the state, Israel. The president responded that such a decision was his, not Congress’, to make, as the political status of Jerusalem was a foreign policy matter that implicated the president’s power to recognize states. I thought the court should not get involved in a matter as political as the status of Israel and Palestine. I spelled out my view in a dissenting opinion.²³ How many of the other justices agreed? None (except Justice Sotomayor, who agreed in part).²⁴ What happened to the political question doctrine? Few doctrines ever completely disappear, but one should not conclude that today’s court will avoid security/civil liberties conflicts by labelling them “political questions.”

The president always wins

The third approach to addressing the challenge of reconciling civil liberties with security is to say that the Supreme Court will review what the president does in a security matter where civil liberties are involved, but that nonetheless the president always wins. That is close to what the Supreme Court said in *Curtiss-Wright*, where the court determined that Congress can delegate to the president the power to define a particular crime.²⁵ President Franklin Roosevelt issued a proclamation criminalizing the sale of weapons from the United States to countries fighting in the Chaco territory, a parcel of land between Paraguay and Bolivia. Paraguay and Bolivia went to war for control over the Chaco in the early 20th century, and the U.S. government prosecut-

²² See *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012).

²³ See *id.* at 1437-1441 (Breyer, J., dissenting).

²⁴ See *id.* at 1431-1437 (Sotomayor, J., concurring in part and concurring in the judgment).

²⁵ See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

ed people for selling arms to the belligerents. The defendant argued that the president could not make up criminal laws as he goes along; Congress has to do it in writing, and Congress cannot delegate to the president the power to define crimes. The court rejected the argument, holding that Congress could delegate their power to the president. And it was the anti-New Deal court that did so—a court hostile to delegation of power to the president. But that court held that, in this instance, Congress could make the delegation. Why? Because the president is in charge of foreign affairs; Congress is not.

Later on, during World War II, the U.S. government forced 70,000 United States citizens of Japanese origin to move to internment camps, where they were held against their will. The Supreme Court held that was consistent with the Constitution.²⁶ The majority included liberal justices such as Hugo Black, William O. Douglas, and Felix Frankfurter. Why did they do that? They reasoned that it was 1944, when we were still in the midst of fighting, and somebody must run the war. By the time they decided the suit, there was no danger from the Japanese invasion. But they thought that either Roosevelt runs the war or the court runs it, and because the court cannot, the president must be free to manage the war as he wishes. The court would not overturn the president on a security matter. There was much criticism of that case. I agree that it was a terrible decision.

Limits on presidential power

The fourth approach is illustrated by two cases, one of which was the *Steel Seizure* case, decided during the Korean War.²⁷ President Truman seized a steel mill. Why did he seize it? Because he did not want a strike. Well, why not let the employees strike and instead try to stop the strike once it started? The president was nervous about doing that, afraid that he could not stop the strike after it began. So he decided to seize the mill and give the workers the pay raise they wanted, hoping they would stay at work. The government, indeed, the whole cabinet, warned the Supreme Court justices that, if the president were blocked from seizing the mill, we might lose many soldiers

²⁶ See *Korematsu v. United States*, 323 U.S. 214 (1944).

²⁷ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

fighting the Korean War. Winning the war was critically important, but the court nonetheless struck down the seizure.

In his *Steel Seizure* opinion, Justice Robert H. Jackson explained that the president may have had the power to seize the mill had Congress passed a law agreeing with him, and he may have had that power had he acted in the face of congressional silence.²⁸ But he did not have the power to act where Congress had forbidden him to act. The court held that Congress had forbidden him to act here. I have one problem with Jackson's argument: In my view, Congress had not forbidden the president to seize the mill. Rather, I think something else was going on in the court. I think the court was telling the president not to go too far in exercising unilateral power.

Finally, we heard four cases arising out of the detentions at Guantanamo Bay.²⁹ The theme of those cases, every one of which was decided in favor of the detainee and against the president, was captured by Justice Sandra Day O'Connor when she wrote: The Constitution does not write the president a blank check.³⁰

If you compare Jackson and O'Connor's approach to the other three approaches, you might be glad the court has taken such a stance. But the court has been criticized both for interfering in security matters and for the opposite, for not going farther. Should it have refrained from interfering at all as it did in *Korematsu*, the Japanese internment case? And why does it not go farther? Because it does not know all the answers. The biggest problem is that nine human beings constitute the court, not nine computers. They are not experts on security or foreign relations, but they do know that the president and Congress sometimes go too far, and that is what Justice O'Connor wrote.

We now live in a world where security problems are international. We also live in a world where not every country has the same system for dealing with

²⁸ See *id.* 634-655 (Jackson, J., concurring).

²⁹ See *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Boumediene v. Bush*, 553 U.S. 723 (2008).

³⁰ See *Hamdi*, 542 U.S. at 536 (Opinion of O'Connor, J.) (“[A] state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.”).

those problems. Maybe we can learn something from one another. Japan decided to put a foreign policy expert on its Supreme Court. England decided that it would not allow certain people suspected of terrorism to talk to a lawyer who has access to security information. Israel fears the suspect might say to his lawyer, “Tell my mother I’m fine,” which actually means, “Blow up the café.” Anyone who thinks that is just a made up problem should put themselves in the position of the Supreme Court of Israel, where they face problems like that. In Israel, they have developed a system in which the government argues *ex parte* to a judge that lawyer-client communication is dangerous.³¹ If the judge agrees, the government can hold the suspect *incommunicado*. The government has to come back a few days later and explain why that is still necessary. Each time the government returns, it bears a heavier burden to prove its case. I am not advocating any of those systems. I am simply trying to show that we are not alone with these problems—and that we can sometimes learn from others what to do or what not to do.

Problem two: Enforcing human rights around the world

We live in a world where human rights are increasingly an international issue. The whole world is against torturers and genocide. But here, in a sense, the United States is out in front because it has a statute called the Alien Tort Statute (ATS), which provides that any person who is harmed or injured by a violation of international norms or international law can recover damages in an American court.³² Our courts have held that, if a victim of torture in Paraguay can find his torturer in the United States, he can sue him and recover damages in New York, even though the victim himself is Paraguayan.³³

Why is the ATS on the books? It was passed in the 1790s to deal with pirates. At that time, if someone found a pirate, he could hang him. If the pirate had any

³¹ See Brief of Amici Curiae Specialists in Israeli Military Law and Constitutional Law in Support of Petitioners at 23-25, *Boumediene v. Bush*, 553 U.S. 723 (2008) (Nos. 96-1195, 06-1196).

³² 28 U.S.C. § 1350; *see also* *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (interpreting the ATS).

³³ *See* *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

money, he could confiscate it first. Then, any of the pirate's victims could sue and recover the money. The question for us is, how does the ATS apply in a modern context and who are today's pirates? We might interpret the statute to mean that, if a prosecutor proves any kind of serious violation of international law, the plaintiff can recover. Of course, if we take that tack, other nations can do so, too. By that token, if former Secretary of State Henry Kissinger, who was sought for questioning in Spain relating to human rights abuses, were to go abroad, he could be detained.³⁴ And what about Israel, unpopular regimes, and so on? We must figure out how to interpret the statute so that different jurisdictions can apply it without interfering with each other. That is not an easy thing to do. The heart of the problem is that there is no supreme court of the world. Our legal systems must operate accordingly, independently developing systems that avoid conflict.

The word that helps solve the problem is a technical legal word: comity. Its meaning is captured by something Senator Ted Kennedy used to say to me and Ken Feinberg when we worked for him and came up against something we wanted to negotiate with other senators. He would say, "Work it out." We would ask how, and he would laugh and respond, "That's your problem." That is a slightly exaggerated version of the challenge judges face today.

To return to the ATS, it certainly applies to torture and genocide, but how it applies beyond that, and to what extent, is less certain and must be worked out. The comity problem is not limited to the human rights arena. Consider the following example: Does U.S. law allow a company based in Ecuador to sue a Dutch company in New York for antitrust damages? We had such a case.³⁵ To answer that question, we had to know how antitrust law worked in Europe. The European Union filed briefs telling us how. So did France, Germany, Japan, and many other countries. To solve that kind of technical, jurisdictional, statutory problem in the United States, we need know how the relevant world works elsewhere, and adjust accordingly. That is comity.

³⁴ Al Goodman, "Spanish judge seeks Kissinger," CNN, April 18, 2002, <http://edition.cnn.com/2002/WORLD/europe/04/18/spain.kissinger/>.

³⁵ See *F. Hoffmann-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155 (2004).

Problem three: Interpreting treaties

How do we interpret treaties? Let us take, for example, the Vienna Convention on Consular Relations, which the United States signed and ratified, but which does not state whether it automatically becomes domestic law in the United States.³⁶ The Vienna Convention requires government authorities to inform arrestees who are citizens of a foreign country (like Mexico, in this case) that they have a right to see their nation's consul. Government officials in Texas arrested a Mexican national, but did not inform him of his right to contact his consul, presumably because they did not know they were required to do so. The defendant was convicted and sentenced to death. He then brought his case to the International Court of Justice (ICJ) in The Hague because another provision of the Vienna Convention gave the ICJ the last word on such questions. The ICJ decided that a court in the United States had to hold a hearing to determine if the defendant was prejudiced by the fact he was not informed of his rights under the Vienna Convention.³⁷ President George W. Bush wrote a letter to Texas directing the state to give the defendant such a hearing. Texas refused.

The question came to us at the Supreme Court—is the Vienna Convention, a treaty, automatically effective as part of U.S. domestic law?³⁸ We split on it. I thought it was, but the majority thought it was not. What interests me here is not the result of the case but how we reasoned through it. I asked my law clerks to look up every case like this one since 1790, and they found quite a few.³⁹ In one case, Chief Justice John Marshall said to read the provision of the treaty. If it seems to address judges—i.e., it is fairly technical—then it automatically becomes domestic law.⁴⁰ On the other hand, if it seems political—e.g., it is about stopping a war, bringing back the troops, or having a military base—then it is addressed to the political branches and is not automatically domestic law. That is an oversimplification of Marshall's rule,

³⁶ Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 261.

³⁷ See *Avena and Other Mexican Nationals (Mexico v. United States)*, 2004 I.C.J. 12 (Mar. 31).

³⁸ See *Medellin v. Texas*, 552 U.S. 491 (2008).

³⁹ See *id.* at 568-569 (Breyer, J., dissenting).

⁴⁰ See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314-315 (1829).

but I thought it was a good one, and I said so in my dissent in the Vienna Convention case.

Soon thereafter, I described the case at a meeting. A former foreign minister of the Netherlands responded, “That’s our rule.” It would have helped had a treatise or law review article called that fact to my attention. Given the result in the case, it may be up to our treaty negotiators to say in treaties whether the treaties’ provisions should take effect as domestic law. Regardless, I suspect that treaty negotiators and legislators are not always on the same page. They will have to be if the promises we make in our treaties are to take effect as domestic law.

Problem four: Reconciling new international organizations with our constitutional system

A fourth problem has not directly faced us yet, but it is likely to do so. Treaties today often do not provide clear directives to each signatory party. Rather, they create an international organization, like the World Trade Organization or the World Health Organization, create a bureaucratic structure, and empower the administrators or international civil servants to write rules that will bind the nation. Are those rules effective as domestic law? I have just discussed a case in which the House of Representatives did not pass a law embodying the treaty’s provisions but the Senate did ratify the treaty. Suppose Congress does pass a law giving the international organization the power to write rules that automatically bind Americans as a matter of domestic law. On the one hand, if we say that Congress cannot do that, how are we going to come together and help solve complex global problems like the environment, commerce, and others that Strobe Talbott has identified?⁴¹ On the other hand, if Congress can delegate total power to make laws to international civil servants, what happens to Article I of the Constitution, the article giving Congress, not international administrators, the power to legislate?

⁴¹ Strobe Talbott, *The Great Experiment: The Story of Ancient Empires, Modern States, and the Quest for a Global Nation* (New York: Simon and Schuster, 2008).

The problem is rather like the problem the Supreme Court faced during the New Deal—what was the constitutional status of administrative agencies? In great administrative law opinions like *Crowell v. Benson*, the court, for the first time, came to grips with a very difficult new entity.⁴² It had to figure out a way to integrate that entity into the constitutional system we have, and it did so. We may well have to do the same in the case of international agencies.

Problem five: Understanding the international stakes of our decisions

A copyright case illustrates the fifth problem. In *Kirtsaeng*, a Cornell University student from Thailand discovered that his textbooks were very expensive.⁴³ He remembered that the same textbook in English was on sale in Thailand at a much lower price. He had a great idea. He told his parents: “Send me one.” Then he had a better idea: “Send more and I’ll sell them to my friends.” Does that violate the copyright law? The answer can be found in something called the “first sale” doctrine, which is a technical doctrine written into the U.S. copyright statute. I discovered there were briefs filed in the case from all over the world. Why? It turns out that we could not answer the specific copyright question in the case without knowing something about copyright law in other places and how it all works together. And by the way, we learned from those briefs that \$3 trillion of international commerce was at stake. That is the world in which our American law now operates.

It is important how we answer the five questions I have raised—how do we negotiate conflicts between security and civil liberties, how do we write our treaties, how do we deal with new international administrative entities, how do we get all the information we need? Perhaps the public wants a more of an answer from the Supreme Court than simply saying, “Don’t go too far.” That is a judicial way of saying that we do not yet know the solutions, but the problems are clear and they are in front us.

⁴² 285 U.S. 22 (1932)

⁴³ *Kirtsaeng v. John Wiley & Sons, Inc.*, 133 S. Ct. 1351 (2013).

Judges as diplomats and weavers of a global rule of law

There is one other important change that has taken place in the last 20 years. I find that my role is more diplomatic. I am not a diplomat by definition, but judges from different countries do talk to each other. Recently, I talked with several judges in Ouagadougou in Burkina Faso. Whereas 20 years ago we would simply describe the nature of our jobs, we American judges and judges from other countries now have substantive conversations. When we visit the EU in Luxembourg or when the Supreme Court of India spends two days with us, we follow substantive agendas.

Those experiences form part of today's judicial experience. We are all helping to create or to sustain a rule of law. The rule of law simply is the opposite of the arbitrary. The arbitrary is that which is capricious, irrational, tyrannical, despotic, or autocratic. The rule of law is the opposite of that. Judges work on the rule of law together, even when they are not talking to one another. We are not political people. We are technicians. We are professionals helping to weave a legal web. Gradually, we make progress. We weave a cloth that, like Penelope's, unravels at night, But, unlike Penelope, we try to make progress.

The overall objective was well expressed in a passage from *The Plague* by Albert Camus. The story is about a plague coming to an Algerian city, Oran, but it is really about the Nazis coming to France. The people survive the plague, and at the end, Dr. Rieux, the hero, explains why he has told the story. He says that

the germ of the plague [that evil part of all mankind] never dies nor does it ever disappear. It simply goes into remission, perhaps for decades, but all the while lurking: in the furniture, in linen cupboards, in bedrooms, in cellars, in trunks, in handkerchiefs, in file folders, perhaps one day to reawaken its rats, and then, to the misfortune or for the education of mankind, to send them forth once again to die in some once-happy city.⁴⁴

⁴⁴ Albert Camus, *La Peste* (Paris: Les Éditions Gallimard, 1947), 312-313 (translated by the author).

That is why we judges are here. We cannot stop the rats, but more and more countries have seen that a rule of law administered in part through judges, lawyers, and others, is one weapon against the germs those rats would again send into our once-happy city. We are one arm in the war against that evil part of mankind, and we work on carrying out the task together.



Stephen Breyer, born in San Francisco in 1938, is a graduate of Stanford, Oxford, and Harvard Law School. He taught law for many years as a professor at Harvard Law School and at the Kennedy School of Government. He has also worked as a Supreme Court law clerk (for Justice Arthur Goldberg), a Justice Department lawyer (antitrust division), an assistant Watergate special prosecutor, and chief counsel of the Senate Judiciary Committee. In 1980 he was appointed to the United States Court of Appeals for the First Circuit by President Carter, becoming chief judge in 1990. In 1994 he was appointed a Supreme Court justice by President Clinton. He has written books and articles about administrative law, economic regulation, and, “Making Democracy Work: A Judge’s View,” a book about the Constitution. His most recent book is entitled “The Court and the World.” His wife, Joanna, was born in Great Britain and is a retired clinical psychologist. They have three children (Chloe, Nell, and Michael) and five grandchildren.