

CITING FOREIGN AND INTERNATIONAL LAW TO INTERPRET THE CONSTITUTION: WHAT'S THE POINT?

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Some years ago, I was lecturing in Brazil and Argentina on constitutional issues, and I spoke one day to a group of Brazilian judges on criminal procedure and due process rights in the United States. When I was finished, up stood one very frustrated Brazilian judge who complained that when prisoners come into his court, they demand their “Miranda rights.”

I had several reactions to the judge’s revelation. First of all, I could understand his frustration that a foreign system was injecting its law into his courtroom. As a prosecutor, I remember that even some state judges didn’t like lawyers interjecting federal law into their courtroom—as if it were “foreign” law. With judges from other countries, there must be a special sense of resentment at the claimed superiority—sometimes—of United States law. My other reaction was, in a way, a sense of pride of the influence of American law. Actually, this was not so much evidence of the influence of American law as it was of the power of American media, film, and television. I realized that prisoners in Brazil, and probably all over the world, know just as much about the U.S. Constitution as the typical American student. That is, what they know about the U.S. Constitution they have learned from “cop” shows and movies which address the issues of criminal procedure—from arrest through trial.

There is much more to the U.S. Constitution, of course, than just what’s portrayed on television and in the movies. Nevertheless, in this age of globalization, the message of the media shapes the worldwide understanding of U.S. legal culture. We live in a world, which has become much more wired than it was when I gave those lectures years ago in Brazil. Back then, you had only radio, television and film, all of which offer only one-way communication. Now, with the Internet, communication is much more interactive.

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So now one might ask: why shouldn't Americans listen to what others around the world have to say on issues that affect them, just as well as they do us? Indeed, Americans are more insulated than people in many other countries. It is often embarrassing when traveling abroad to have people ask, what do people in the United States think about us? The truth of the matter is that people in the United States rarely think about those outside of the United States. What most Americans know about other countries comes from watching television news reports—usually tragedies about events such as bombings in Israel or Iraq.

Many people outside the United States know more about U.S. politics than most Americans do. What the U.S. does affects them much more than what their countries do affects the U.S. When you watch news abroad, what you often see is what we would call local U.S. news. Of course, what you hear is not the same kind of commentary. But maybe that's the point. If people of other nations know a great deal about the U.S., why not listen to their views? Shouldn't we have a two-way communication, instead of just those of us in the United States expressing views on matters affecting political power, culture, law, etc.? This seems to be the question some members of the U.S. Supreme Court are asking themselves.

Although a constitutional originalist, I am also, however, a comparativist. I appreciate the importance of understanding international and foreign law. Indeed, to be an originalist, I believe, requires some understanding about international and foreign law. International law, known at the founding as the "law of nations," is background for much in our Constitution.¹ Federalism derives from ancient treaty arrangements; in other words, federalism is drawn from what we would call international relations. In discussing federalism, for example in *The Federalist Papers*, the Framers demonstrated their knowledge of the ancient federations of Greece and Rome, as well as those of Switzerland and the Netherlands.² Those who drafted the Constitution viewed them as undesirable models and deliberately chose not to follow any of them!³ Madison,

¹ U.S. CONST. art. I, § 8, cl. 10.

² THE FEDERALIST NO. 6, at 22–23 (Alexander Hamilton) (Terence Ball ed., 2003) (discussing historical events of Rome, Athens, Sparta, and Holland); THE FEDERALIST NO. 4, at 15 (John Jay) (Terence Ball ed., 2003) (referencing the federations of Greece and other countries); see also *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997).

³ THE FEDERALIST NO. 9, at 35 (Alexander Hamilton) (Terence Ball ed., 2003). Hamilton wrote:

in particular, studied them and concluded that these federations were defective as governments.⁴ The Framers, as well as those who opposed the Constitution, also studied a Frenchman named Montesquieu, who made profound observations about separation of powers and federalism.⁵ Both the Federalists and the Anti-Federalists agreed on the principle of separation of powers as articulated by Montesquieu, although they disagreed about what he meant.⁶ *The Federalist*, drawing on Montesquieu's endorsement of a "confederate republic," created the innovation of a federal government, as distinguished from a confederacy.⁷

Foreign domestic law is also interesting in many ways. When you look abroad at modern codes, you learn that codes exist within the context of very different constitutional systems. Most American lawyers know only the common law system which exists in the United States and which is similar to that of England, Canada, and Australia.⁸ The civil law reigns in most of the rest of the world, where legislative codes dominate.⁹ Rooted in the Roman civil law, these codes are creations of nation-states formed at the beginning of the nineteenth century.¹⁰ The French and German codes primarily have influenced codification throughout the world.¹¹

What are the fundamental differences between common law and

It is impossible to read the history of the petty Republics of Greece and Italy, without feeling sensations of horror and disgust at the distractions with which they were continually agitated, and at the rapid succession of revolutions, by which they were kept in a state of perpetual vibration, between the extremes of tyranny and anarchy.

Id.; see also *Printz*, 521 U.S. at 921 n.11.

⁴ See THE FEDERALIST NO. 43, at 211–12 (James Madison) (Terence Ball ed., 2003) (discussing how the confederate republics of Germany, Holland, and Switzerland were "less adapted to a federal coalition" that could provide protection to every state).

⁵ See THE FEDERALIST NO. 47, at 235 (James Madison) (Terence Ball ed., 2003).

⁶ See *id.* at 236 (stating that Montesquieu's ideas on the separation of power allowed the separate departments to exert partial control over each other); *cf.* CENTINEL, THE ANTIFEDERALIST NO. 47, available at <http://www.thisnation.com/library/antifederalist/47.html> (last visited Mar. 8, 2006) (stating that Montesquieu's ideas called for complete separation of power).

⁷ See THE FEDERALIST NO. 9, *supra* note 3, at 38–39 (discussing the definition of a confederate republic and the distinction between a confederacy and consolidation of states); see also THE FEDERALIST NO. 4, *supra* note 2, at 15–16 (discussing the problems associated with independent confederacies).

⁸ See University of Ottawa, World Legal Systems, <http://www.droitcivil.uottawa.ca/world-legal-systems/eng-monde.htm> (last visited Mar. 8, 2006); Wayne R. Barnes, *Contemplating a Civil Law Paradigm for a Future International Commercial Code*, 65 LA. L. REV. 677, 684 (2005).

⁹ Barnes, *supra* note 8, at 684, 717.

¹⁰ *Id.* at 699–700, 705, 708, 712.

¹¹ *Id.* at 712–13.

civil law countries? Why do other countries write codes? Historically, legislative codes have been a means to limit judges in their discretion, consistent with a constitution based on legislative supremacy.¹² Codification is supposed to be a complete expression of law.¹³ As such, codes are to be applied with little or no creativity from judges.¹⁴ If so, how is it that the European Court of Justice has become a very “creative” court? In my view, the European Court of Justice blends some elements of both the common law and civil law approaches.

American lawyers and legal academics have for years preached abroad that what other countries really need are more powerful judges. The European Treaties have created a court where the judges are independent of, and operate from a superior position to, the countries that chose them to be judges. They interpret treaties that lack the integration found in a code. Convinced that it is for the court to mold Europe, judges of the European Court of Justice have engaged in a common law style of judging. These code-trained lawyers, however, lack the common law appreciation for the importance of procedure. A civilian legal education differs significantly from a common law education in the U.S. The civilian approach is deductive, working from general principles. Procedure is simply not an important part of the academic education of most European lawyers.

Before borrowing from other legal systems, one needs an understanding of the foreign legal context. Remember that Lafayette took his experience in our Revolution, with his rhetoric of rights, back to France.¹⁵ But France produced a very different type of revolution based on an abstract concept of rights not grounded in history and procedure. The seed taken from America and planted in French soil gave rise to a very different form of liberty.

Cross-pollination is not necessarily a bad thing. Indeed, at the founding, the U.S. borrowed not only from England but also from the continental Europe. But I suggest that the more you learn about other countries and their constitutional and legal systems, you will realize how different they are. It is not by accident that the United States is not a third world country. The difference between

¹² Daniel A. Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 292–94 (1989).

¹³ *Id.* at 291.

¹⁴ *Id.* at 284.

¹⁵ Louis Henkin, *Revolutions and Constitutions*, 49 LA. L. REV. 1023, 1024 (1989).

the U.S. and many third world countries is not that Americans are more brilliant, because we are all immigrants after all. Why is it that immigrants who succeed in the United States could not have done just as well back in their native countries? Simply put, it is that many countries have ineffective constitutional systems, which stifle opportunity.

Throughout Latin America, drafters of constitutions thought they were copying the U.S. Constitution.¹⁶ In reality, they did not understand the difference between a constitution and a statute. They wrote constitutions as if they were civil codes, attempting to place an American-style constitution atop a civilian legal system. They did not, and still do not, understand the importance of procedure in constitutional systems. They did not understand the U.S. version of federalism even when some thought they had modeled it.

My exposure to foreign lawyers and law professors has been quite enriching. Comparison of constitutions is very instructive about our own Constitution. In my view, an originalist understanding is not at all insular. Quite the opposite. An originalist approach to the Constitution improves one's understanding of the international arena, and vice versa. There is no dichotomy between being an originalist and being an internationalist. But interest in comparative constitutionalism as an intellectual inquiry does not necessarily lead to support for judicial citation of international and foreign sources of law as part of interpreting the U.S. Constitution.

In many ways, I agree with Dean Susan Karamanian that the controversy over the citation of international and foreign law is "a tempest in the teapot."¹⁷ In one sense, the controversy is simply an aspect of the debate between originalists and living constitutionalists. On the other hand, there is something else happening here. To explain the point, I want to distinguish between and discuss the "purpose" and the "effect" of citing international and foreign law. The word "purpose," in a legal context, has at least two meanings. It is a word often used ambiguously, sometimes meaning *motive* and sometimes *intent directed at a certain end*. Regarding motives, Professor Kersch has

¹⁶ Albert P. Blaustein, *The U.S. Constitution: America's Most Important Export*, ISSUES OF DEMOCRACY (Mar. 2004), <http://usinfo.state.gov/journals/itdhr/0304/ijde/blaustein.htm>.

¹⁷ Susan L. Karamanian, *Resuscitating the Great Writ: The International Court of Justice and the U.S. Death Penalty*, 69 ALB. L. REV. 745 (2006).

described what the motives might be for citations to foreign law, in particular for Justice Breyer.¹⁸

In the debate last January between Justices Breyer and Scalia at American University, Justice Scalia responded to Justice Breyer by saying that when you have no other authority for what you're doing, you cite a foreign authority because a judge has to have an authority.¹⁹ Justice Scalia's explanation identified both a motive and an end intended by the judge citing foreign law. I agree with Justice Scalia's position, but I leave it to my colleague, Professor John McGinnis, who will elaborate points similar to those made by Justice Scalia.²⁰ Rather, I wish to pursue the issue in terms of purpose (in both its meanings) and effects.

I come back to the motivations mentioned by Professor Kersch,²¹ which I believe are largely driving the urge to cite foreign law. I do agree with observations by other panelists that justices who cite foreign law may have varying views about their impact on foreign judges. Justices likely think about foreign judges differently, depending on whether they serve on courts in developing countries or on courts in more developed countries. Some justices may be attempting to encourage judges in developing countries. As to judges on European courts, however, some Supreme Court justices may be thinking that if they do not cite foreign judges, those judges in turn might stop citing them. In other words, justices may have multiple motives. But who can really analyze motives?

Rather, let's compare motive with the other meaning of "purpose," as an intent directed at a certain end. Regardless of a justice's motive, every opinion is intended to persuade an audience. As every effective litigator, speaker, or writer knows, a speaker's or writer's language is tailored to the audience he or she hopes to persuade. But that does not mean, for example, that two speakers addressing the same audience are actually focused on the whole audience. Thus, in criminal jury trials, the prosecutor argues to all the jurors

¹⁸ Ken I. Kersch, *The Supreme Court and International Relations Theory*, 69 ALB. L. REV. 771 (2006).

¹⁹ Justices Antonin Scalia & Stephen Breyer, *Constitutional Relevance of Foreign Court Decisions* (Jan. 13, 2005) (Discussion at the American University Washington College of Law), <http://www.wcl.american.edu> (search "Breyer Scalia transcript"; then scroll down to Jan. 14, 2005).

²⁰ See generally John O. McGinnis, *Contemporary Foreign International Law in Constitutional Construction*, 69 ALB. L. REV. 801 (2006) (dismissing foreign courts as appropriate sources of authority).

²¹ See *supra* note 18 and accompanying text.

because he or she must persuade all of them. The defense attorney might actually address only the one who appears to be a possible holdout for acquittal.

Members of the Supreme Court also are not necessarily addressing the same, single audience in any particular case. Presumably, justices of the Supreme Court are explaining the reasons for their opinion generally to the American people, more particularly to lawyers, and still more specifically to those knowledgeable in the particular subject, e.g. tax law. On matters of international significance, so-called conservative justices may not worry about persuading foreign audiences, but that does not mean they are isolationists who are unaware of the foreign audiences. Those interested in foreign law and international law include not only Justices Breyer, Ginsburg, Kennedy, and O'Connor, but also Justice Scalia and the late Chief Justice. Justice Scalia travels and teaches abroad as much, probably more, than anybody else on the Court. The late Chief Justice also taught abroad.

One of the late Chief Justice's first trips to teach abroad was to our summer law school in the south of France.²² When he arrived, a prominent faculty member from the host university, a teacher on comparative constitutional law, quickly attached himself to the Chief Justice. Even though the French professor probably was on the liberal side of things, he was absolutely thrilled to befriend the Chief Justice. He entertained and established a good relationship with the Chief Justice. The next term, in *Raines v. Byrd*, the Chief Justice's opinion cited his new foreign friend.²³ That was a nice gesture. What was his motive? Well, friendship. After that, the French law professor's star undoubtedly rose. He must have shown that footnote to all of his colleagues. In this, the French law professor would have been acting like law professors in the United States. American law professors cite their friends in footnotes if it fits. What's the motive? Is it the quality of the cited article? Friendship with the author? Hope of being cited in return? Or a mix of these motives? Such are the human variables that motivate different people.

The late Chief Justice made a gesture not long ago to those abroad that I don't think many people even know about. You, of

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²³ *Raines v. Byrd*, 521 U.S. 811, 828 (1997) (citing to Louis Favoreu).

course, remember the Guantanamo case, *Rasul*.²⁴ Did you know that those arguments were broadcast over radio? Not many people outside of law schools know that; the Supreme Court rarely allows such broadcasts. And when else did the Court broadcast an argument? It did so in *Bush v. Gore*.²⁵ Why? In *Bush v. Gore*, the whole American people was really interested. How many Americans were that interested in the case of foreign detainees in Guantanamo? Most of the interest was in Europe and elsewhere. Apart from lawyers, there was not much demand in the United States—certainly nothing like the interest that there was for *Bush v. Gore*. I suggest to you that what the Chief Justice had in mind was for the rest of the world to see that the case of the detainees was being fairly addressed in Court proceedings that were transparent. Yet, even though the Chief Justice seems to have had an attitude of concern for those outside this country, he nevertheless dissented in the case.²⁶ In other words, he demonstrated that there are ways to show respect for a foreign audience without following their views. There are some people who think that, in speaking to an audience, somehow you must tell them what they want to hear. The Chief Justice, along with other dissenters, did not do that. The action of the Chief Justice, however, showed that despite what those abroad may believe, the process in the United States has a transparency unlike that of many other countries.

But I turn now to Justices Breyer and Ginsburg. As I said, Professor Kersch's quotes from Justice Breyer suggest his possible motives.²⁷ I want to focus to the second meaning of "purpose"—not motive, but intent. What does a justice intend to achieve by citing foreign or international law? Professor Kersch suggested a rather aggressive, possible agenda on the part of Justice Breyer.²⁸ He quoted Justice Breyer in an interview with George Stephanopoulos

²⁴ *Rasul v. Bush*, 542 U.S. 466 (2004). In *Rasul*, the Court held that a U.S. District Court has jurisdiction under the federal habeas statute to hear challenges from aliens held at Guantanamo Bay. *Id.* at 484.

²⁵ *Bush v. Gore*, 531 U.S. 98 (2000). In *Bush v. Gore*, the Court held that manual recounts ordered by Florida Supreme Court did not satisfy the Equal Protection Clause's requirement of non-arbitrary treatment of voters to secure fundamental right to vote for President of the United States. *Id.* at 103.

²⁶ *Rasul*, 542 U.S. at 488 (Scalia, J., dissenting). Chief Justice Rehnquist joined Justice Scalia's dissent.

²⁷ Kersch, *supra* note 18.

²⁸ *Id.*

at the end of the term in 2003.²⁹ In that interview, Justice Breyer pondered “the challenge” of “how [the U.S. Constitution] fits into the governing documents of other nations.”³⁰

How the U.S. Constitution fits within the other governments of the world probes more than motive. Of course, you cannot quarrel with the motive—stated by Justices Ginsburg and Breyer—to learn more about other countries. Who could quarrel with that? That’s an academic exercise that, at a minimum, reflects intellectual curiosity. But the suggestion that nothing more is involved in the citation of foreign and international law is simply false. Opposition to citing foreign court precedents does not mean that an individual is not intellectually curious. You can be intellectually curious about foreign law without citing foreign courts.

Justice Ginsburg is even more aggressive and clear about what is going on. In fact, while Justice Breyer has taken center stage, Justice Ginsburg has demonstrated she actually has committed to a clear agenda. Indeed, she has proclaimed her purpose (in the sense of intent) to move the Court toward the globalization of human rights. In an article which was given as speeches at Hawaii and Idaho, she starts first by saying we should have a dynamic constitutionalism, which is another name for living constitutionalism.³¹ More importantly, she expresses her longing for the day when there will be the globalization of human rights and the extra-territorial application of U.S. fundamental rights.³² At the time in 2003–2004, before the *Rasul* decision, the consequences of her position may not have seemed as far-reaching as they are.

So, what effects might follow from the intentions expressed by these two justices? Justice Breyer has said he simply acts as a problem solver. In reality, behind all problem solving lies some set of principles as the basis for solving problems, unless in fact, one has not considered the broader consequences of what one is doing. Whether you do or do not consider them, certain consequences

²⁹ *Id.*

³⁰ Interview by George Stephanopoulos with United States Supreme Court Justices Sandra Day O’Connor & Stephen Breyer, on THIS WEEK WITH GEORGE STEPHANOPOULOS (July 6, 2003) (transcript on file with author).

³¹ Justice Ruth Bader Ginsburg, Comments at the University of Hawaii Law Review Symposium, in 26 U. HAW. L. REV. 335, 335–36 (2004); Ruth Bader Ginsburg, Sherman J. Bellwood Lecture, Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication, in 40 IDAHO L. REV. 1, 5, 9–10 (2003) [hereinafter Ginsburg, *Beyond Our Borders*].

³² Ginsburg, *Beyond Our Borders*, *supra* note 31, at 5.

follow both for constitutional and international law from the movement to cite foreign and international law.

The citation of foreign and international law certainly affects both federalism and separation of powers. In this symposium, much of the discussion has been about controversial cases—*Lawrence*,³³ *Grutter*,³⁴ and *Roper*³⁵—sodomy, affirmative action, and the death penalty. Each of these cases changes the law of a state. Treaties that have been ratified by the Senate and made executory within the U.S. override state law under the supremacy clause.³⁶ But a treaty that has not been ratified or not made executory lacks that status. In *Roper*, one of the four sources cited was the American Convention on Human Rights.³⁷ That treaty is not “supreme law” in the United States. It would be interesting if it were. For the American Convention on Human Rights also recognizes the rights of the unborn from the moment of conception.³⁸ That provision is certainly not binding within the U.S. And I doubt Justice Kennedy will be citing that same treaty when the abortion issue comes back to the U.S. Supreme Court.

Justices can be selective when they want to be. But it is not just a matter like “selective incorporation” of the Bill of Rights through the Fourteenth Amendment. The intrusion of foreign and international law is affecting constitutional structure. If you look at the *Printz* case—the Brady gun case—where Congress required local law enforcement, under an unfunded mandate, to do background checks on gun applicants, you see the Court holding that this federal responsibility could not be forced upon the states.³⁹ Justice Breyer and Justice Scalia disagree over the question of whether this country should follow the federal approach taken by the European Union. Justice Breyer observes that the European Union issues directives to the states, *i.e.*, the central power tells

³³ *Lawrence v. Texas*, 539 U.S. 558, 573, 576–77 (2003) (citing the European Court of Human Rights that had declared laws proscribing consensual homosexual conduct invalid under the European Convention on Human Rights).

³⁴ *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring).

³⁵ *Roper v. Simmons*, 543 U.S. 551, 554 (2005) (acknowledging that the United States stands virtually alone in an international community that has abolished capital punishment for juvenile offenders).

³⁶ See U.S. CONST. art. VI, cl. 2; *Missouri v. Holland*, 252 U.S. 416, 434 (1920).

³⁷ *Roper*, 543 U.S. at 576.

³⁸ See American Convention on Human Rights, Nov. 22, 1969, art. 4(1), 1144 U.N.T.S. 146, available at <http://www.oas.org/juridico/english/Treaties/b-32.htm>.

³⁹ *Printz v. United States*, 521 U.S. 898, 902–04, 935 (1997).

states in general terms to carry out certain policies, but leaves it to the states to implement those directives.⁴⁰ In Justice Breyer's view, that approach is much more consistent with federalism.⁴¹ Justice Scalia retorts: "The fact is that our federalism is not Europe's."⁴²

I would go further than Justice Scalia. Not only is it not our system, but our system is a better system on this particular point in terms of what we value. Our system does not have European-style directives because our system was designed to enforce political accountability. When a central government tells a state what to do, and the state enacts the directive as state law, citizens look to state officials as being responsible for the law which was in reality forced on the state.

Maybe Europeans are not worried about accountability as much. The European Union is not a nation-state. Yet, the EU has more power in some ways than any nation-state, although it is not a state in international law. The EU is, if anything, a strange hybrid. It is more confederal than federal in the American understanding of those terms. Most importantly, confederalism is what we rejected. Europeans are free to adopt whatever system suits them. I am not about to tell them what system they should have. We have two different systems and to borrow from theirs is to change ours.

Looking to the European Union is instructive for distinguishing our federalism from theirs. I regularly consider European law when I teach Comparative Law every year in France. I tell the French students that I don't suggest that they should follow what we have done in the United States. I go so far as to say they should not do what we have done in the United States. We are different in our traditions. But if you are attempting to build a federal union, you will face the same problems we have. It is instructive to see how we have solved a particular problem of federalism. You have and will have the same kinds of problems. I ask students to think about how Europe should solve particular problems of federalism. So, yes, there is a purpose for comparison, but that does not imply using foreign law to re-interpret our Constitution. Europeans have often made the point that they have created a federal union different from that of the U.S. In the U.S., however, we already have our Constitution. Unlike Europeans, we are not in the process of

⁴⁰ *Id.* at 976 (Breyer, J., dissenting).

⁴¹ *See id.* at 976-78.

⁴² *Id.* at 921 n.11.

rewriting ours. In citing foreign and international law, some justices are apparently attempting to remake our Constitution.

In answer to George Stephanopoulos, Justice Breyer says he is attempting to figure out “how [the U.S. Constitution] fits into the governing documents of other nations?”⁴³ His statement suggests to me that he sees the U.S. system as becoming part of a global confederation of some kind. Is our Constitution to be subordinated to a larger world or regional federal constitution, the way the state constitutions are subordinated to the U.S. Constitution? Should we, in this country, subordinate our constitutional law to any other law? Must the federal courts follow what some international court says? These questions go to the essence of sovereignty.

Sovereignty is the critical issue. It figures in the Framers struggle in addressing both federalism and separation of powers. Separation of powers, as the Framers understood it, allows us to have a state that is powerful externally by being united as nation, but restrained internally by dividing sovereignty between the state and federal governments, and then dividing the three branches of the federal government in order to protect liberty. As Montesquieu said, there can be no liberty unless the executive, legislative, and judicial functions are separated.⁴⁴ That has been our prescription for preserving liberty within our borders. For two hundred years, however, until the *Rasul* case, the federal courts have lacked jurisdiction, except at the margins, over matters outside the United States.⁴⁵ In foreign and military affairs, our Constitution vests power primarily in the President in order to preserve our liberty.⁴⁶

In her speeches prior to *Rasul*, Justice Ginsburg said she looked forward to the day when the U.S. Bill of Rights would follow the executive wherever it acted in the world.⁴⁷ That of course would mean that federal court jurisdiction would follow the Executive wherever it acts in the world. The Justice recognized that that was not the law, but she predicted that it would soon be the law. In my response at one of her speeches, I said: “That suggests that

⁴³ Interview by George Stephanopoulos with United States Supreme Court Justices Sandra Day O'Connor & Stephen Breyer, on THIS WEEK WITH GEORGE STEPHANOPOULOS (July 6, 2003) (transcript on file with author).

⁴⁴ MONTESQUIEU, THE SPIRIT OF THE LAWS, available at <http://www.fordham.edu/halsall/mod/montesquieu-spirit.html> (last visited Mar. 8, 2006); see also THE FEDERALIST NO. 47, *supra* note 5, at 235–36 (quoting Montesquieu).

⁴⁵ *Rasul v. Bush*, 542 U.S. 466, 474–75 (2004).

⁴⁶ U.S. CONST. art. II, § 2, cl. 1.

⁴⁷ Ginsburg, *Beyond Our Borders*, *supra* note 31, at 7.

Eisentrager will be overruled.” At that point, *Rasul* was pending before the Court. The *Rasul* case involving Guantanamo prisoners did, in fact, distinguish—not overrule—*Eisentrager*.⁴⁸ It ruled on statutory grounds, not on constitutional grounds.⁴⁹ But for the first time, *Rasul* effectively extended federal court jurisdiction to review executive action outside U.S. territory.⁵⁰

Why does this particular extension of federal court jurisdiction matter? As previously mentioned, at the time the Constitution was drafted, the Framers were well aware of international law or the “law of nations.” It was not a law enforceable by any sovereign. Areas outside any sovereignty were said to lie within the “state of nature.”⁵¹ As a result, the Framers were very concerned that individual states not violate the law of nations and possibly precipitate a war.⁵² The Framers wanted the U.S. to adhere to the law of nations and thereby to gain respect in the world.⁵³ At the same time, they put the power to address the law of nations primarily in the hands of the Chief Executive and the Congress.⁵⁴ The federal courts were to prevent states from violating the law of nations, in properly presented cases, to the extent that the law of nations was recognized by the Congress and the President.⁵⁵ So the law of nations or international law has had a role in our law, but a role controlled by the text and structure of that Constitution. The role of the Supreme Court in matters of international law has until recently been limited and secondary to the political branches.

Justice Ginsburg made a remark that I think was very instructive. She said that Chief Justice Rehnquist had noted that the two greatest contributions of the U.S. Constitution were a strong executive and a strong court.⁵⁶ He noted—and she agreed—that the rest of the world has followed the U.S. example on strong

⁴⁸ *Johnson v. Eisentrager*, 839 U.S. 763, 778, 790–91 (1950) (holding that German military prisoners did not have a constitutional right to petition for a writ of habeas corpus because they were never in a territory where the United States had sovereign power).

⁴⁹ *Rasul v. Bush*, 542 U.S. 466, 483–84 (2004).

⁵⁰ *Id.* at 480–81.

⁵¹ See Harold L. Korn, *The Development of Judicial Jurisdiction in the United States: Part I*, 65 BROOK. L. REV. 935, 967 (1999).

⁵² Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 825 (1989).

⁵³ William R. Casto, *The First Congress's Understanding of Its Authority Over the Federal Courts' Jurisdiction*, 26 B.C. L. REV. 1101, 1111–14 (1985).

⁵⁴ Jay, *supra* note 52, at 829.

⁵⁵ *Id.* at 830–32.

⁵⁶ Ginsburg, *Beyond Our Borders*, *supra* note 31, at 4–5.

courts, but not on a strong executive.⁵⁷ Our system of separation of powers, which the Framers considered to be the principal protection for liberty, cannot be fully effective without both a strong executive and a strong court.

Justice Scalia says that lawyers love judges too much. What we lawyers have done is to export to the rest of the world the notion that they can have liberty as long as they have strong courts. The reality is that courts in many parts of the world are corrupt, both in nations on the right and on the left. Even those that are not corrupt are not what we would call independent. They are not appointed for lifetime; they do not have a salary that is undiminished; they are under political influence. So for us to follow the decisions of courts that are in many ways political, instead of following the text of our Constitution, certainly is not a prescription for liberty.

⁵⁷ *Id.*