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Justice Breyer's Remarks at the 2015 Jorde Symposium September 24, 2015

Stephen Breyer*

This book—what's it about? Why did I write it? When I hear the words “interdependent,” “globalization,” “a shrinking world,” I think they range between clichés on the one hand and buzzwords on the other—but they aren't quite concrete. I thought it might be helpful to write very concretely about what these words mean in terms of the life of a Supreme Court justice. What have they meant at the Court? When I look back and compare twenty years ago to today, I think we have many more cases where those words concretely make a big difference.

I've listed four or five categories of cases and discussed them in an effort to try to focus on what problems they raise now. I can give you a few examples. One of them that is of interest to people is a traditional problem that goes back thousands of years: we have security needs. In our context, the Constitution delegates the security authority almost entirely to the President and to the Congress, not to the judges. Well, what happens when security conflicts with civil liberties, because the Constitution delegates significant power in that area to judges? What are judges supposed to do when they conflict?

If we go back two thousand years, we can find a phrase that governed what most judges did for many, many centuries. It comes from Cicero, who said, “When the cannons roar, the laws fall silent.” I used to translate it that way until somebody pointed out to me, “You know, the Romans didn't have cannons.” That was a little awkward. So then I thought I would say, “In time of war, no law.” No courts, anyway. Stay out of it.

If you look at American history, you get the idea that that was the rule that was followed for quite a long time. We can understand it sometimes. Lincoln, during the Civil War, put tens of thousands of people in prison. He said, well,

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perhaps it's necessary. Secretary Seward called in the British ambassador one day and said, "I can push this bell and have anyone I want in New York thrown into prison. I can push it twice and have anyone in Ohio put in prison. Tell me: does the Queen of England have such power?" Now, the Court did get involved, but only after the war was over. It tried at the very beginning, but got nowhere until after the war was over.

If we jump forward very quickly in our history course and look at World War I, it wasn't very different. We had Learned Hand dissenting sometimes, and Holmes and Brandeis sometimes writing great dissents. But basically, all kinds of written materials were censored and lots of people were put in prison. The courts did virtually nothing. And that continued through the Great War of the Chaco, which no one knows about. It was between Bolivia, I think, and Paraguay, over some oil that didn't exist. The Curtiss-Wright Corporation was sending them arms. President Roosevelt wanted this to stop, and so he got Congress to pass a law saying that the president can basically make anything he wants a crime in this area. The Court let him do that. Why? Foreign affairs, security.

Or, jump to World War II and we have *Korematsu*, where seventy thousand Americans of Japanese origin—American citizens—were taken from their homes. Right here. They were sent from their homes to Tanforan in Northern California and Santa Anita in Southern California, and from there to camps, which were really prison camps. And they spent the war there. For what reason?

By 1944, the *Korematsu* case got to the Court. By 1944, everyone knew there was no longer any reason to keep seventy thousand Japanese in camps. No reason. And anyone who looked into it would have learned pretty quickly that there was never any reason. Never. That's what J. Edgar Hoover told President Roosevelt: don't do it. And one of the big advocates for it was Earl Warren. He said it was the worst thing he ever did, or certainly one of the worst. But in any case, there they were in prison, and the Supreme Court wrote an opinion that said, "Stay there."

I thought a lot about that case, which is generally recognized as one of the worst cases that the Court has written. I thought: why did they do it? The people who wrote the opinion—Black and Douglas and Frankfurter—were civil libertarians. They were the ones behind *Brown*. I mean, why did they do it? The only explanation that I've come up with is, well, they were thinking: somebody has to run this war. Roosevelt or us? We can't. And therefore, Roosevelt will.

After a while, by the time of the Korean War, a somewhat different Court—although not totally different—began to think that this is not such a great idea, Cicero's idea. They held, almost for the first time, that the President, even at the time of the Korean War, could not seize the steel mills because he

wanted to avert a strike that might have threatened lives of American soldiers in Korea. They held that he couldn't do it.

You'll read about that case, undoubtedly. It's always taught because they had a tripartite categorization of presidential action. I didn't read it for that purpose. I read it to try to figure out what was moving Justice Jackson. I think what was moving him—it's just my guess—is what he had seen, and what the Court had seen happening in Europe. The Court had seen what had happened when you give one person too much power. They didn't say anything rude about Truman or about Roosevelt, but sometimes I think that they are deciding this case against Roosevelt. And Truman is their ultimate objective. That's because he's there now, and less popular.

In any case, the Court said no. "Let's look to the precedent"—that's the famous line. Look to the precedent. Look to what the Founders thought. Jackson wrote, "Would you ask what the Founders thought about the presidential power in these circumstances?" He said it was just like asking Joseph to interpret the dreams of Pharaoh.

Now we come to Guantanamo, where we have four cases, each brought by a detainee. Not popular, the detainees. One of them was Bin Laden's driver. He's not the most popular person in the United States. They all are suing the Secretary of Defense, the Department of Defense, the President—powerful people. The issues tended to be whether they could get into court. At one instance, Congress passed a statute that said, "No. No habeas corpus." The Court held that was unconstitutional, so the detainees got into court. Some have been released. Some are still there. But the victory, legally, was for the detainee.

And the theme, if I try to characterize it—I don't know if others would agree—is Sandra O'Connor's statement in one of these cases that the Constitution does not write a blank check to the president to do what he wants about civil liberties. Not even in wartime, or a time of national security emergency or threat. Now, I signed right on it. That was a good statement. It says, "We're not going back to *Korematsu*." Cicero is gone, we thought—a long time gone. Good-bye. Back to Rome, even if they don't have cannons.

But now, as I've given you enough time to think about it, the thought may have crossed your mind: If the Constitution does not write a blank check, what kind of a check does it write? Hmm. Look through Justice O'Connor's opinion to see what it says about that. Nothing. I'll be honest with you: virtually nothing. Why doesn't it say something? Because we don't know. That's why. Because in fact there are many different situations, so beware of going too fast too quickly. You'd end up going too far, too fast. Beware of that.

Now, we have not a solution, but we have a problem. The problem is one that—at least in my view—could extend quite a long time, with all kinds of threats that come from all kinds of different places in the world. It's an inglorious question. How do we answer this kind of question without knowing

something about the security problems? How do we answer this kind of question without knowing something of what's going on with respect to security beyond our borders? Isn't it likely to be helpful in answering these kinds of questions to know something about how other countries with similar problems deal with security and civil liberties? Not because the other countries are right—they may or may not be—but because knowledge of different methods of addressing similar problems might help us reach a correct solution. If there is no blank check, this might help us to fill it in a little better.

I want to give you a totally different example. Let's try commerce, that's pretty obvious. Commerce is international. We have in front of us at the Court a man from Thailand, Supap Kirtsraeng, a student at Cornell. He gets to Cornell on a scholarship and he discovers that the books in Thailand—the very same books—are much cheaper. He writes home and asks his family to send him some. And they send him a few copies. Actually, they send him quite a few more than a few copies. And he thought it'd be a very nice idea to sell them to others, which he did, and he began to make a nice profit. The publishing company thought that was a bad idea and brought a lawsuit.

Now, whether he can do that or whether it's stopped or permitted by something called the first-sale doctrine, that is a really technical copyright question, really technical. It's there in the statute. I mean it is. I promise. Technical. I get the briefs in my office and there are briefs from lawyers all over the world—from Asia, from Europe, businesses all over the place. I could not figure out why in this case, there were so many briefs from so many different people until I read a brief that said, "You realize, I hope, that copyright today is not just a question, not just a question of books or film or music." We were told by one brief that this case would affect \$3 trillion worth of commerce. Even today, that's a lot of money. And that's why all those briefs were there. There is no way, in my opinion—you can make up your own mind reading the opinions—but, in my opinion, there is no way to resolve that case satisfactorily without knowing something about the copyright laws of other countries and what the publishers are trying to do. That's going to take us well beyond our shores.

Or take an antitrust case. A man from Ecuador. The plaintiff sues the defendant, who is Dutch. What does the defendant do? He is a distributor in Ecuador of vitamins produced by a cartel, one member of which is Dutch. They're mostly European, but there is an American—and he sues in New York. Now, why did he sue in New York? Maybe because this cartel raised all the prices and he could not afford to get to Europe. It's possible. Another possible reason: treble damages. Treble damages and attorney's fees. Can he sue or not? We have to interpret, again, some words that are pretty obscure. We were given briefs by the European Union authority and enforcers all over the world, who were trying to enforce slightly different but basically similar anti-cartel and anti-price fixing laws. There is no way to resolve the correct interpretation of

this American statute without knowing how the other laws work so that we can reach an interpretation that allows those different enforcers to work together harmoniously and doesn't create chaos.

If you want a different area, try Dolly Filártiga, who came here in the 1970s from Paraguay. In New York, she sees the man from Paraguay who tortured her brother to death working for the dictator Alfredo Stroessner. She finds the Alien Tort Statute, passed nearly two hundred years ago, which says that an alien can bring a suit for a violation of the law of nations and recover damages. And she did. She won. She went back to Paraguay and said, "I came to the United States to look the torturer in the eye and I came away with so much more."

But that statute then began to grow in terms of use. More and more people found that they could fit their cases into that statute because there are human rights abuses throughout the world. And then the question began to arise more and more: How should it be interpreted? What happens if an interpretation creates interference with the laws of other countries? South Africa files a brief and says, "We are dealing with apartheid, its victims, and its perpetrators. We have truth and reconciliation, that's our method. And we do not want federal judges in New York or any other place in the United States interfering, one way or the other." How do we interpret the statute to take that into account? How do we interpret it so this law, which seems like a pretty good idea, works out uniformly or roughly uniformly and we don't keep getting in each other's way and causing infinite trouble in many parts of the world? That's the kind of question in front of us in the human rights area.

Or consider domestic relations. There is a system of domestic relations law in the United States. Indeed there is. They're called state judges and they know how to do their business. Suddenly we, federal judges at the Supreme Court, have in front of us three cases over the course of three years interpreting domestic relations treaties involving abduction. Why are we to decide something like that, we who know so little about it? The answer is because it's in a treaty. But why is it in a treaty? It's in a treaty because today more and more marriages cross international boundaries. That's why. The people who write those treaties better watch what we on the Court do. They should see if it's correct and amend the treaty if it isn't.

Treaties and executive agreements often set up little bureaucracies to work under treaties. These are large administrators, and they make rules that in practice bind more than one nation. How many such organizations would you think there are? How many think there are more than fifty? How many think there are more than one hundred? Five hundred? One thousand? Two thousand? It's more much more than two thousand. And we belong to several hundred of them.

You've heard of some, of course—the World Trade Organization and others—or perhaps you haven't. They are all over the place. What kinds of

rules are going to govern them in the future? I don't know. I do know that if Congress doesn't have any power to let other groups just like the ones I've been talking about set rules, how in heaven's name can we solve the problems that are facing us, such as the environment, security, health, or dozens of other things where the problem crosses more than one border? But if there are no limits to Congress's delegation power at all, what about fairness? What happens to Article I if all the power goes to the administrator of the International Olive Oil Commission? That, of course, was my object in the book. I wanted to go through area after area and simply flag these kinds of truly difficult questions.

What are my motives? My motives are—first of all and right on the surface—there are people who say that we really shouldn't refer to any cases of other countries. So, I want to say that that argument is much less relevant than you think. What I'm trying to show you—that person who's objecting—in this book is, that given the world as it is, the best way to preserve our American values is to participate. Take part. Find out what goes on elsewhere. Write your decisions in light of what goes on around the world, where that's relevant, and you will reach better solutions—solutions that help to preserve American values and work better for Americans and others.

My motive behind the motive, I think, is to say that's important for us to do because we're trying to prove something, or at least step towards proving something. And that is that we can help to ameliorate, if not totally resolve, the problems that will face all of you more than they will face me—because they're going to continue—and show that the rule of law or a rule produced through fair methods can in fact help with those problems.

The motive underlying the motive underlying the motive comes from when Sandra O'Connor and I went to India. When we went to India, we were there on the day of 9/11. Emotionally, we saw what was happening on the television. The Indians were wonderful. The judges there were very sympathetic. They figured out ways of continuing without having dinners and so forth, and of continuing our work. The lawyers were wonderfully helpful and the judges were as well. Everyone we met there was sympathetic.

I came away with an emotional reaction that the important differences in the world are really not between different geographic areas or races or religions or nationalities, but rather between those who believe that there's a basic way of living and resolving human problems in a rule of law and those who don't—those who think of more violent or other ways of solving problems. We know which side we're on. But it's important to prove, even to some of the others, that this rule of law and this system *can* help solve these problems. That it can help. That it isn't hopeless. I hope that people reading this will get some knowledge of how we on the Supreme Court are faced with problems thrown up by the world—very concrete ones—and how we are facing them. That will help with what we believe in: the rule of law. Thank you.