BINGHAM CENTRE FOR THE RULE OF LAW

60th Anniversary Marshall Alumni Lecture

Stephen Breyer

Associate Justice

Supreme Court of the United States

8 April 2015

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Sixty-eight years ago, speaking at Harvard just after the terrible winter of 1947, General George Marshall pointed out that Europe "must have substantial additional help or face economic, social, and political deterioration of a very grave character." He added that "the United States should do whatever it is able to do to assist in the return of normal economic health in the world." Thus, the Marshall Plan was born. The Plan involved not just an economic transfer, but a call for international cooperation. It was intended to assure political stability and peace.

Six years later Great Britain established the Marshall Scholarships. Those scholarships were both a tribute to George Marshall and a thank you for America's Marshall aid. The tribute was well deserved. And Marshall himself understood the practical value of the thank you. He wrote to the first group of twelve Marshall Scholars that "a close accord between our two countries is essential to the good of mankind in the turbulent world of today and that is not possible without an intimate understanding of each other. These scholarships point the way to the confirmation and growth of the understanding which found its necessity in the terrible struggle of the war years."

Along with more than 1400 other Americans, I have benefited from that tribute, that generous gesture of goodwill from Great Britain to the United States. And, like those others, I should like in return to say thank you for the Marshall Scholarship. It made an enormous difference to my life.

…

[W]e young Americans learn[ed] in Britain. We learned by making friends. We learned from travel during vacations. We learned what we were formally taught-- philosophy, politics, and economics in my case. We learned, beneath those dreaming English spires, about a commitment to clear critical thought and seriousness of purpose. We learned about traditions of human liberty that run back, at least, to the Great Charter signed at Runnymede. We learned about public service, and about democratic government.

Richard Neustadt told me years later that President Kennedy and Prime

Minister MacMillan, meeting in Bermuda about the Sky Bolt missile, were talking informally after their business meeting. MacMillan described his plans for the next budget. Kennedy, aware of his own struggles with Congress, asked, "But what will Parliament do?" "Parliament?," said MacMillan. "But we have a majority, so they will just pass whatever the cabinet recommends." "You recommend it; they pass it?" said Kennedy. "My God, anyone could run a country like that."

Not quite. But we found that Britain, without a written Constitution, had internalized the underlying principles of democratic government – a rule of law, protection of individual freedom, participation in the public life of a community--giving them life by embodying them in the community's shared expectations of proper public behavior. We found that those underlying principles, and those shared expectations, resonated with our own experiences growing up across the Atlantic.

Indeed, we found that, while much was different about Britain, much too felt familiar. There was a certain idealism at that time, a sense of common history, shared values, and shared objectives.

Others might have found those things elsewhere. But in my own case they appeared at a particular place, in England, at a particular time, among the teachers, fellow students and friends I made there. That explains in part how touched I felt when, after 9/11, the Prime Minister of Great Britain appeared before our Congress, and members of all three Branches of our Government stood and applauded. And it helps explain why George Marshall's words still resonate with me: "A close accord between our two countries is essential . . . in the turbulent world of today."

These words resonate for another reason. Sixty years after the Marshall Scholarships were created, we live in a world that is no less turbulent than it was in George Marshall's time. The interdependent world of today is characterized by, among other things, a fragile international economy, growing economic divisions between North and South, increased environmental risks, insecurity, and in some places, anarchy, fanaticism, and terrorism. If there is any hope of solving such complex problems, which belong to no one nation, the effort will have to be a collective one.

I am going to talk about a small portion of that collective effort – a portion that has to do with law and ultimately the rule of law. I am fully aware that judges cannot solve these problems. But still they have a role to play. That role arises out of the ever more international nature of the cases on all of our dockets. Those cases require us to understand foreign practices including legal practices as well as events that take place beyond our borders. I shall describe some of the past and present cases before the United States Supreme Court. I do so because I want you to see both how the law in the United States as well as the nature of our

cases has changed, increasingly requiring us to consider the international effects of our decisions and how our law interacts with, and may be influenced by, legal practices abroad.

Since I have been a Member of the Court, the number of cases concerning foreign or international matters has grown exponentially. Twenty years ago, returning from a meeting with judicial colleagues in Europe, I was speaking enthusiastically about the usefulness of what I had learned, when a professor asked me to give a few concrete examples applied to our current cases. I was hard pressed to answer. But today I would have no difficulty. Of the 70 or so cases on our docket annually, somewhere between 10% and 20% are likely to require us to look abroad. They concern commerce, human rights, security, treaty interpretations, and other issues.

Consider three cases that the Court has decided in the past couple of Terms. In the 2012 Term, we heard about a student from Thailand, studying in the United States. The student asked friends and family to buy textbooks in Thailand, where the English-language Asian editions were considerably cheaper than the editions sold in the United States. When the student received the books in the United States, he sold them at a profit. Did America's copyright statute allow this or forbid it? We were told that the answer to this technical question could affect more than a trillion dollars' worth of international commerce. For today commerce in books, films, music, designs, software, and other products with copyrighted labels is global.

Somewhat more recently, we heard a case concerning the relation of treaties to Congress's power to legislate. Can a treaty give Congress legislative power that, under our Constitution, Congress would otherwise lack? To put the legislative question more broadly: There are now approximately 2000 international organizations (with staffs that total more than 250,000) that possess the power to make rules that as a practical matter bind more than one nation. To what extent can Congress delegate legislative power to such an organization? If Congress is totally free to delegate, what happens to our Constitution, which grants Congress, not necessarily other bodies, legislative power? But, if the power to delegate is significantly restricted, how do we solve, through cooperative international efforts, the global problems of our time? European courts, such as the German constitutional court, have faced this kind of questions directly in respect to the European Union.

A third case concerned the government's power to overhear private telephone or email conversations that may pertain to matters of security, say terrorism or espionage. The Constitution gives Congress and the President the authority to protect American security. But it gives the judiciary considerable responsibility to protect fundamental rights. What is the Court to do when national security interests and basic individual rights conflict? The British judiciary

has faced similar challenges.

This small sample of cases gives you a flavor of the international matters that our Court faces currently. We must consider facts about foreign actors, foreign nations, and international relations. We must decide how American law applies to people and to events abroad. We must interpret our Constitution in the context of modern, international security threats. And we must undertake each of these tasks with an awareness of the fact that other courts around the world face the same questions—and that those courts can learn from each other, or at least must endeavor to make decisions that can coexist in our increasingly interconnected world.

This last case raises a key question. How does the Court balance national security interests and basic individual rights? The Court would answer this question in different ways in different times. Those answers illustrate the changing scope of the Court's power and responsibilities over time, and why increasingly it needs to consider facts, circumstances, and law that comes from abroad.

As a matter of history our Court has not always been willing to intervene in matters of national security and foreign affairs. Indeed, we can distinguish among four different approaches that our Court has taken. For many decades, the Court's attitude reflected Cicero's dictum: "in times of war the laws fall silent." At the beginning of our Civil War, for example, President Lincoln suspended the writ of habeas corpus. President Lincoln's suspension of the writ in effect allowed his military to arrest civilians arbitrarily, without court review. And on May 25, 1861, Union soldiers in Baltimore, Maryland arrested John Merryman, a ringleader in anti-Northern riots. Merryman immediately asked a nearby federal court to issue a writ of habeas corpus. Despite Lincoln's action to suspend habeas corpus, the judge issued the writ. Under the Constitution, the judge explained, Congress can suspend the writ of habeas corpus in time of insurrection, but the President cannot.

Rather than release Merryman, the President defended his actions in Congress, asking, "Are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?" His Secretary of State echoed his sentiment, telling a British minister:

> 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 so much?

Indeed, over the course of the Civil War the President and his generals imprisoned about 13,000 civilians, often holding them without trial.

President Lincoln's view is not unique. President Roosevelt's Attorney General, Francis Biddle, once said during World War II that "[t]he Constitution has not greatly bothered any wartime President." During war, the executive and legislative branches typically believe that the foreign threat, not the preservation of civil liberties, is the pressing problem. And for decades the judiciary basically agreed. It would often call a matter of war or foreign affairs a "political question" not suited for judicial decision, and it would refuse to intervene. Cicero would have applauded.

But the courts have sometimes heard cases questioning the President's national security powers, even as applied to wars. Still, in doing so the Court often took a second approach. It would give great deference to the President, using a standard that comes close to saying, "The President always wins." The Court followed this approach just before and during World War II.

A case that illustrates this approach involved a war in the 1930s between Bolivia and Paraguay. The two nations were fighting over ownership of the "Chaco," a territory where they believed that they would find oil. Concerned about the war, President Roosevelt asked Congress for discretionary authority to impose an arms embargo and to make its violation a crime. And in 1934 Congress gave the President the authority he sought, allowing him to impose an embargo provided he believed the embargo "may contribute to the reestablishment of peace between those countries." President Roosevelt held just that belief, and so he imposed the embargo and made its violation a crime.

Despite the embargo, the Curtiss-Wright Corporation sold arms to Bolivia. So federal authorities indicted Curtiss-Wright. And a Supreme Court, which had recently struck down many laws for constitutional over-reach, upheld this one. Why? Because *foreign affairs are different*. The Constitution may grant Congress exclusive power to enact domestic laws, but it gives the President far greater power where war, treaties, and diplomatic relations are at issue. "In this vast external realm, with its important, complicated, delicate and manifold problems," the Court said, "the President alone has the power to speak or listen as a representative of the nation."

But the immense power described by the Court has its difficulties. Less than a decade later, during World War II, the President signed an order sending more than 70,000 American citizens of Japanese ancestry away from their homes on the West Coast to internment camps further inland. Unlike the British, who screened even enemy aliens on an individual basis (which is what America did in respect to Germans and Italians), Japanese citizens were simply moved en masse. One, Fred Korematsu, brought a case complaining; his case went to the Supreme Court; and in 1944, the Court, long after any invasion threat had passed, and made up of many of the liberal judges who later, in *Brown v Board of Education,* were to desegregate America, upheld the order.

The decision has been much condemned. I believe properly so. So why did the judges reach their conclusion? I suspect they may have thought, "Someone has to run the war; we cannot; Roosevelt can; so we must leave all these matters up to him." That, I have to add, was not the attitude of a British judge, Lord Atkin, who wrote in *Liveridge v Anderson*:

> In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which . . . we are now fighting, that the judges . . . stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is prohibited in law.

I think that many American judges came to agree with Lord Atkin, at least to the extent that he rejected the theory of unchecked power articulated in the Curtiss-Wright case. So we see that after World War II the Court took a different approach—a third approach. In a famous case involving President Truman's seizure of the steel mills during the Korean War, the Court held that the President had exceeded his constitutional powers. In 1951 the steel companies refused to meet the union's wage and benefit demands. The union threatened to strike. Mediation by government boards got nowhere. The President's cabinet told him that a strike would cripple our war effort. So the President seized the mills, so that the government could raise wages, appease the unions, and maintain steel production. The seizure was not without precedent. Presidents had previously seized companies before during times of emergency, for example, during World War II.

The companies brought a lawsuit, claiming the President lacked authority for the seizure. In reply, the President's lawyers told the trial court that in a time of emergency the Executive's power is essentially unlimited. The judge was not persuaded. He ruled against the President. And the case went to the Supreme Court.

The Court agreed with the trial judge. It held the President had violated the Constitution. The Court's decision might have surprised those aware of the earlier wartime precedents. But the Court remembered the Japanese internment cases and their unhappy results. Further, Justice Jackson's concurring opinion described the disastrous consequences that had followed when law in other nations law had given the executive unlimited emergency powers, as in Germany prior to World War II. He observed that "[n]o one, perhaps not even the President, knows the limits of the power he may seek to exert in this instance." And he, along with other members of the majority, held that the President exceeded his authority. He had gone too far.

But the Court's third approach, exemplified by the *Steel Seizure* case, did not establish a general rule describing how far is too far—and it did not consider limits where the Executive and Congress agree. The Court's fourth approach has been to consider where these limits lie. In 2004, 2006, and 2008 the Court decided four cases arising out of the detention of enemy combatants at Guantanamo Bay Naval Base in Cuba. The cases required the Court to balance competing constitutional interests, security needs, and civil liberties protections. The Court decided all four Guantanamo cases in favor of the prisoner-defendants and against the President.

The first Guantanamo case, *Rasul*, rejected the President's claim that the relevant habeas corpus statute imposed a geographical limitation preventing any federal judge from issuing a writ of habeas corpus to detainees held in Guantanamo Bay. The second, *Hamdi*, rejected the government's argument that courts could not review the process afforded to any individual enemy combatant. And the third, *Hamdan*, rejected the government's use of special military commissions created by executive order.

The fourth case, *Boumediene*, was the most important. In *Rasul*, the Court had decided that federal statutes authorized prisoners at Guantanamo to bring petitions for habeas corpus in the federal courts. In reaction, Congress repealed those statutes and substituted a prohibition against such petitions. Thus, the Court had to decide whether the Constitution forbids Congress to close the courts to the Guantanamo detainees. The Court held that it did. In doing so, the Court stressed the importance of the writ, which forms what Blackstone called the "stable bulwark of our liberties." It protects us, in Alexander Hamilton's words, against "arbitrary imprisonments, the . . . most formidable instruments of tyranny."

The Guantanamo cases reflect a further shift away from Cicero and towards Lord Atkin. The words that aptly describe the cases appear in Justice O'Connor's opinion in *Hamdi*: The Constitution does not, even in matters of national security, write the President a "blank check."

But, we now must face the following question: What kind of a check does it write? The only answer to this question must be found through case-by-case review. In conducting that review the court will have to understand both the security side and the civil liberties side of the equation. To do so it will have to consider activities that take place abroad including the activities of foreign courts. That is because other courts and legislators, facing similar circumstances, may provide constructive examples that our Court may be able to put to good use. Britain, Israel, Spain and other nations have faced similar questions. I do not take a position in favor, or against, the solutions they found. But I do think it will prove useful to us to know what they are.

And that is my basic point. Whether we consider cases involving security

and civil liberties or international commerce, cases arising out of treaties, or statutes, or the Constitution, there is no going back. We often will have to consider relevant legal as well as factual circumstances arising beyond our shores.

You in Britain have long been aware of this fact. We are engaged in a common endeavor. We are facing common challenges. As the Court of which I am a Member becomes more and more willing to address issues, not only of international commerce, but also of national security and foreign affairs, it enters into that common enterprise, into a global conversation.

And perhaps the most important outcome of that global conversation is that we learn better ways to solve transnational problems through law. Any success in this regard helps to advance the rule of law itself. The rule of law is something more than an ideological commitment. Since King John at Runnymede we have considered it a *sine qua non* of social existence. Where it does not exist, we lack not only liberty but security as well.

At the time of 9/11, Justice Sandra Day O'Connor and I were in India, about to discuss the rule of law with Indian jurists. Our warm reception and the content of our meetings there made clear to us that the important divisions in the world are not geographical, racial, or religious but between those who believe in a rule of law and those who do not. Jurists across the world help to weave this fabric in their day-to-day work, persisting in their labors even if, in the manner of Penelope's handiwork, what is woven by day sometimes unravels during the night. Yet, we continue working, not as politicians, but as technicians, hopeful, but uncertain of success.

Our perseverance is important because, as we can recall, the rule of law is fragile, perhaps more so than we sometimes think. At the end of his book *The Plague,* the French writer Albert Camus offers a parable of the Nazi occupation of France. "[T]he germ of the plague," he writes, "never dies nor does it ever disappear. It waits patiently in our bedrooms, our cellars, our suitcases, our handkerchiefs, our file cabinets; and one day, perhaps, to the misfortune or for the education of men, the plague germ will re-emerge, re-awaken its rats and send them forth to die in a once happy city."

The rule of law is but one defense against the plague germ, but one that requires constant use to prevent the arrival of that unhappy day Camus describes. It is vital to our struggle to build a humane, democratic, and just society. The interdependence of today's world creates both opportunities and challenges with respect to that struggle. And it is above all the need to maintain a rule of law that should spur us on, jurists and citizens, at home and abroad, to grasp such opportunities and to understand such challenges and work at meeting them together.

That is where we started today. General George Marshall wrote in 1954 that "a close accord between our two countries is essential to the good of mankind in the turbulent world of today" and that such an accord "is not possible without an intimate understanding of each other." General Marshall could have written those words in 2015. The world today is turbulent, as nations of diverse citizenry and diverse beliefs attempt to navigate the complicated relationships between individual and nation, and between nation and world. In light of that turbulence, a close accord is essential—and an intimate understanding is the only way to achieve that accord. Sixty years on, the Marshall Scholarships still help to build that accord, to open our eyes to the common enterprise that our two nations pursue.

I thank you for mine.