

**The Federalist Society for Law
and Public Policy**

presents

**THE FRAMERS' UNDERSTANDING OF
ORIGINALISM AND INTERNATIONAL LAW**

2005 National Lawyer's Convention

November 11, 2005

PANELISTS:

Professor David M. Golove, New York University of Law

Hon. Diarmuid F. O'Scannlain, United States Circuit Judge, United States Court of Appeals for the Ninth Circuit

Hon. William H. Taft IV, Fried Frank Harris Shriver & Jacobson, and Former Legal Advisor to the Secretary of State

Professor John C. Yoo, University of California, Berkeley, Boalt Hall School of Law and Former Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice

Hon. Ronald A. Cass, President, Cass & Associates, PC and Dean Emeritus, Boston University School of Law (moderator)

MR. CASS: That's not the sign to stop eating. That's just a sign that we're about to get started with the program. There are some seats down front. As in law school, you're probably safest sitting up front. We expect those sitting here to be prepared already, so we'll be calling on those of you standing in the back. I'm Ron Cass. I'm chair of the Federalist Society International Law and National Security practice group, so I'm responsible for telling you what alert level we're on today. I think after Karl Rove's speech, I think we're on low alert level.

Any time someone has what seems like a good idea, people are really

willing to line up behind it, although there are often questions about what is, in fact, a good idea. We're talking this morning about the Framers' original understanding of international law, and there are a number of topics that are wound together in this. There is international law, the Law of Nations, the common law of all people, and there's also foreign law. And at the beginning, we had attention to both. There was particularly attention to maritime law under the heading of international law, and there was the incorporation of foreign law in our own law of what we did, because we inherited a great deal from Britain, but the Framers also studied the law of Rome and France and Scotland.

We have, in today's world, a renewed sense of curiosity about the role both sources of law should play. We have international treaties that increasingly incorporate and rely on norms of international law, such as NAFTA, which in some provisions expressly invokes international law themes. And we have some judges on federal courts invoking foreign law. Famously, Justice Breyer invoked the law of one of the leading nations, Zimbabwe, in trying to figure out what we should be doing, what the right and moral thing to do was, in America under our Constitution.¹ Both of these have become somewhat controversial, and our panel today is going to straighten out any and every question you have on sources of law, both foreign and domestic, and both ancient and modern.

In order of appearance today, we have the Honorable Diarmuid O'Scannlain, who is known not only as one of the best and brightest federal judges, but one of the least pronounceable federal judges. Diarmuid is one of the judges on the Ninth Circuit, but we like him anyway. He was a tax lawyer, the Deputy State Attorney General for Oregon, and a public utility commissioner, the director of the Oregon Department of Environmental Quality. He was appointed by Ronald Reagan to the Ninth Circuit in 1986. He has sat on more than 6,000 cases and, as I understand from one of his clerks, written more than 9,000 opinions of those cases.

Professor David Golove is a scholar on constitutional law and history. He has published well-known articles on the historical foundations of the treaty power, the relationship of international courts to constitutional process, and presidential authority over military and international affairs. He teaches constitutional law and international law at New York University. He's the Hiller Family Foundation Professor of Law, and also directs the JD/LL.M Program in international law at NYU.

Professor John Yoo of Berkeley is also a leading scholar on the relationship of international law and war powers to constitutional commands. He's the author of the book, *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11*,² newly published. He'll be autograph-

¹ See *Knight v. Florida*, 528 U.S. 990, 996 (Breyer, J., dissenting).

² See JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (Univ. of Chicago Press 2005).

ing copies after the session, for anyone who's willing to buy one. I understand that this is not the typical academic book. I've written a number of books, and they're academic books; they're books that, once you put them down, you just can't pick them up again. But John assures me that his book isn't one of them. Actually, one of my books was bought by someone outside the family; we're still trying to track that down. In addition to his scholarly title, John is former General Counsel to the Senate Judiciary Committee and the former Deputy Assistant Attorney General of the Office of Legal Counsel. He's the winner of the Federalist Society's Paul M. Bator Award for excellence in legal scholarship, a good friend, and an excellent academic.

Will Taft is counsel these days at Fried Frank Shriver Harris and Jacobson. He's the former General Counsel of the Department of Defense. He is the Former Deputy Secretary of Defense, the former Acting Secretary of Defense, former General Counsel of the Department of Health, Education and Welfare. He has a lot of former titles. I was reading through them, and it took me 2 1/2 days to get through them. Most recently, he was a Legal Adviser to the Department of State, someone who is an expert on the topics we're talking about today. Will says he has promised us nothing about what he'll say, and he expects fully to deliver on that promise.

With that, let me turn the program over to Judge O'Scannlain.

Diarmuid.

JUDGE O'SCANNLAIN: Thank you very much, Ron. As the only judge on the panel, let me make the obligatory disclaimer up front that, while my perspective is certainly informed by my 19 years of service on the Ninth Circuit dealing with international and foreign law, including twice in the *Sosa* case,³ I speak of course only for myself and not for my court.

The Founders rather clearly believed that the Law of Nations was a body of customary law regulating mutual intercourse among sovereign nations. Article 1, Section 8 of the Constitution gave Congress the power to "define and punish Piracies and Felonies committed on the high seas, and Offenses against the Law of Nations."⁴ In 1789, the very first Congress passed the Alien Tort Claims Act, sometimes called the Alien Torts Statute, which permitted non-citizens to sue in federal court for torts committed against the Law of Nations, or a treaty to which the United States is a party.⁵ And yet, even though the Act incorporated the Law of Nations, neither the Framers nor the first Congress felt that the Law of Nations irrevocably

³ See *Alvarez-Machain v. United States*, 331 F.3d 604 (2003), *vacated*, *Sosa v. Alvarez-Machain*, 543 U.S. 692 (2004).

⁴ U.S. CONST. art. I § 8, cl. 10.

⁵ Judiciary Act of 1789, ch. 20, §9(b), 1 Stat. 73, 76-77.

bound the United States. Instead, they felt that the Law of Nations imposed constraints “in point of moral obligation.”⁶ In their view, the United States had the power to depart from aspects of the Law of Nations, provided that it was willing to face the international consequences.⁷

With that said, I’m going to leave to my colleagues the development of the Founders’ understanding of international law. My task is to focus on another facet of the debate present at the founding: specifically, their generation’s concern about the use of foreign legal sources by American judges. By foreign legal sources or foreign law, I do not mean the Law of Nations. American judges quite appropriately apply the Law of Nations when construing treaties and determining the content of customary international law. Instead, I will be dealing with the Founders’ views regarding American judges’ use of foreign nations’ domestic law in interpreting the Constitution and laws of the United States.

As you know, in several recent high-profile decisions, our Supreme Court has broken sharply with tradition by invoking foreign practice and precedent to support a controversial holding. In *Atkins v. Virginia*,⁸ Justice Stevens referred to the fact that the execution of the mentally retarded is overwhelmingly condemned by the world community to bolster the conclusion that such practice violates the Eighth Amendment of the United States Constitution.⁹

Then, in *Lawrence v. Texas*,¹⁰ Justice Kennedy supported the Court’s holding that a statute making it illegal for persons of the same sex to engage in certain sexual conduct violated the Due Process Clause, by observing that many other countries have accepted the right to sexual freedom, and by specifically citing to a decision of the European Court of Human Rights.¹¹

Most recently, in *Roper v. Simmons*,¹² Justice Kennedy’s opinion for the Court drew in part upon worldwide legal opinion, arguing that “the United States now stands alone in a world that has turned its face against

⁶ *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 272 (1976) (Iredell, J.).

⁷ *Alvarez-Machain*, 331 F.3d at 649 (O’Scannlain, J., dissenting). One of the handful of founding-era cases involving the Alien Tort Claims Act recognized the power of the federal government to depart from the law of nations. *Bolchos v. Darrel*, 3 F. Cas. 810, 811 (D.S.C. 1795) (No. 1,607) (“It is certain that the law of nations would adjudge neutral property, thus circumstanced, to be restored to its neutral owner; but the . . . treaty with France alters that law . . .”).

⁸ 536 U.S. 304 (2002).

⁹ *Id.* at 317.

¹⁰ 539 U.S. 558 (2003).

¹¹ *Id.* at 573 (citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981) ¶ 52). For further discussion of the use of comparative constitutional analysis in *Lawrence*, see Roger P. Alford, *Federal Courts, International Tribunals, and the Continuum of Deference: A Postscript on Lawrence v. Texas*, 44 VA. J. INT’L L. 913, 915 (2004) (“For the first time in history, a majority of the Supreme Court has relied on an international tribunal decision to interpret individual liberties embodied in the U.S. Constitution.”).

¹² 534 U.S. 551 (2005).

the juvenile death penalty.”¹³ He went on to defend the use of foreign precedent against his critics, writing that “[i]t does not lessen our fidelity to the Constitution or to our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our heritage of freedom.”¹⁴

These recent examples of comparative constitutionalism in the Supreme Court’s jurisprudence have drawn harsh responses from adherents to the traditional view that American courts should place exclusive reliance upon domestic sources of law. In 2003, a resolution was introduced in the United States House of Representatives condemning the *Atkins* and *Lawrence* decisions, and, as its title states,

... expressing disapproval of the consideration by Justices of the Supreme Court of the United States of foreign laws and public opinion in their decisions, urging the end of this practice immediately to avoid setting a dangerous precedent, and urging all Justices to base their opinions solely on the merits under the Constitution of the United States.¹⁵

And, seven United States Senators introduced a bill known as the Constitution Restoration Act, which provides that, “[i]n interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional law and common law.”¹⁶

Now, I suggest that the introduction of these legislative measures resoundingly echoes the founding generation’s belief that the unique social, economic, and political realities of American life require a distinctly American jurisprudence. As you know, the earliest settlers in this country made a conscious decision to abandon certain aspects of English law. In the words of one scholar, there was among the early colonists “a very clear perception of their destiny to work out a new legal system, to established rules dictated by their special polity, or by the conditions of primitive and simple life in which they found themselves.”¹⁷

Many members of the founding generation were influenced by Montesquieu’s theory, set forth in 1748 in the *Spirit of the Laws*, that the content of a legal system ought to bear a close relation to the country’s political, social, economic, religious, and geophysical environment. To quote Montesquieu, “[Laws] should be adapted in such a manner to the people for

¹³ *Id.* at 575 (“[T]he United States is the only country in the world that continues to give official sanction to the juvenile death penalty.”).

¹⁴ *Id.* at 575–77.

¹⁵ H.R. Res. 468, 108th Cong. at 1 (2003).

¹⁶ S. 2323, 108th Cong. (2004).

¹⁷ PAUL SAMUEL REINSCH, ENGLISH COMMON LAW IN THE EARLY AMERICAN COLONIES 57 (Leonard W. Levy ed., Da Capo Press 1970) (1899).

whom they are made, as to render it very unlikely for those of one nation to be proper for another.”¹⁸ Montesquieu’s work was widely circulated and highly influential during the founding era, and the ideas formulated in the *Spirit of the Laws* helped speed the development of a legal system that was tailored to the realities of American life and shorn of foreign elements.

Thomas Jefferson, for one, was a firm proponent of this movement. He read Montesquieu and shared his conception that the tenor of a legal system must coincide with the nation’s social and cultural persuasion. At the time of the American Revolution, Jefferson helped to introduce over 100 bills designed to bring Virginia’s laws into alignment with the values of the American Revolution. In the words of one such bill, these reforms were necessary because many of Virginia’s laws were “founded on principles heterogeneous to the Republican spirit . . . [and], having taken their origin while our ancestors remained in Britain, are not so well adapted to our present circumstance of time and place.”¹⁹

Notable reforms proposed by Jefferson included the abolition of *prima genitor*. This practice of awarding an intestate parent’s estate exclusively to the eldest son was disfavored by Americans because it perpetuated an aristocratic class with vast land holdings. Other reforms proposed by Jefferson included the establishment of religious freedom and the institution of a system of humane criminal sanctions wherein capital punishment was to be reserved for murder and treason only.

James Madison was instrumental in securing the enactment of many of Jefferson’s proposals. Madison’s sympathy for the notion that our fledgling republic needed to develop a legal system that was not unduly reliant upon foreign law is evidenced in the *Federalist Papers*. In Number 42, Madison wrote that “neither the common, nor the statute law of [England], or of any other nation, ought to be a standard for the proceedings of this, unless previously made its own by legislative adoption.”²⁰ Madison went on to assert that English law would be an illegitimate guide for the United States to follow.²¹

A different approach to mitigating the influence of foreign law was adopted by the States of New Jersey, Kentucky, and Pennsylvania, which enacted statutes forbidding the citation of English precedent in their courts. New Hampshire had a court rule to similar effect. The spirit of these early 19th-century provisions was very similar to that of the Constitution Restoration Act introduced last year, which would preclude federal courts from

¹⁸ BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 6 (David Wallace Carrers ed., Univ. Cal. Press 1977 (1748)).

¹⁹ THOMAS JEFFERSON, *Bill for the Revision of the Laws (Oct. 15, 1776)*, reprinted in 1 *THE PAPERS OF THOMAS JEFFERSON* 562, 562 (Julian P. Boyd ed., 1950).

²⁰ *THE FEDERALIST* NO. 42, at 217 (James Madison) (George W. Carey & James McClellan eds., 2001).

²¹ *Id.*

2008]

Originalism and International Law

313

relying upon foreign law when interpreting the Constitution.²² As a result of these statutes, lawyers in the young republic found it necessary to seek guidance from the country's own nascent collection of case law, rather than from the vast store of more readily available English decisions.

I hope that this overview has succeeded in demonstrating that the Founders would not have approved of the citation of foreign practice and precedent happening in American courts today. While the founding generation desired the United States to engage with the world community, and even explicitly incorporated aspects of the Law of Nations into American law, they believed that, on the domestic front, it was crucial to forge a uniquely American jurisprudence. They accordingly felt that American jurists should place no reliance upon foreign legal authorities when interpreting the Constitution and laws of our own country.

I'm grateful for this opportunity to share perspectives with you, and I look forward to the question-and-answer session.

Thank you.

PROFESSOR GOLOVE: I want to thank you all for inviting me to address you today, and for the honor of being on this distinguished panel.

The topic today is rather broadly formulated—the understanding of the Framers and the founding generation of international law—and I'm going to make my remarks rather general in nature, in accordance with the topic at hand.

So, very broadly, I think it's uncontroversial to observe that the revolutionary and founding generations both held the Law of Nations in very high regard, and it was very influential upon their thinking in general, and it served as an important source and guidance in many of the major political actions that they took during the Revolutionary period, and then the founding.

Now, speaking in particular about the revolutionary generation before I get to the founding, it's uncontroversial that the great writers of the Law of Nations, Vattel, Grotius, Pufendorf and others, many others, along with the great writers of the Natural Law tradition, Locke among them, were highly influential with the revolutionary generation and provided much of the inspiration for the Revolution itself. They were part of the Enlightenment rationalist tradition in which the American Revolution was born.

Now, more specifically, the Law of Nations played a very vital role in

²² See generally Constitution Restoration Act of 2004, H.R. 3799, 108th Cong. § 201 (2004) ("In interpreting and applying the Constitution of the United States, a court of the United States may not rely upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than the constitutional law and English common law.").

shaping the development of the conflict between the colonists and Great Britain. The colonists turned to the Law of Nations for developing ideas about an imperial constitution and imperial constitutional arrangements with the British Empire that might be acceptable to the colonists. But when those ideas failed—that is, when the British refused to accept them—they then moved, after the Declaration of Independence, to adopt the Confederation. Now, again, the Confederation itself was rooted in the teachings of the great writers and the Law of Nations. The term itself, “confederation,” and the related terms, “federation” and “federal,” were all terms that were borrowed very self-consciously by the revolutionaries who created the Articles of Confederation from the Law of Nations.

During the critical period—the so-called critical period after the creation of the federation and before the founding—the Law of Nations played a very a vital role in U.S. policy. The federal government or the Confederation government was as assiduous as it could be in trying to strictly uphold, on behalf of the United States, the Law of Nations in the conduct of the Revolutionary War and in its relations with other powers, and they bitterly criticized the British for its unwillingness to recognize the Law of Nations applying to the revolutionary struggle.

Now, it’s true that the weakness of the Confederation structure and the centrifugal forces that it unleashed made it extremely difficult for the Confederation officials—for the federal officials—to actually ensure that, at the state level, there would be compliance with the Law of Nations and with the treaties of the United States. And, in fact, it was the failure of local officials to be able to carry out international obligations of the United States that was one of the principal impetuses to the Philadelphia Convention, and, ultimately, to the Constitution.

It’s worth noting that the opposition, if it were opposition in the sense, to the Law of Nations, at least to complying with the treaties of the United States and the Law of Nations, was not a principled opposition to the Law of Nations. It was rather a caving-in by localist politicians in the states to the intense pressure that they felt from popular pressure for taking reprisals against the loyalists in the wake of the revolutionary struggle. So it was not principled—the arguments that were brought didn’t actually attack the Law of Nations—they were rather sophisticated claims of interpretations of the Law of Nations, and led to nearly disastrous consequences for the nation.

Now, let me turn to the founding generation. The founding generation also held the Law of Nations in equally high regard. The reverences for the Law of Nations that are expressed by the leading Founders repeatedly in their writings are legion. Major figures in the American Revolution and founding who wrote about the Law of Nations, including Hamilton, Madison, Wilson, Jay, Iridell, St. George Tucker, Marshall, and many others, wrote paeans to the Law of Nations, which were a commonplace throughout the entire founding period. There was almost a total absence of dissent-

ing views on this question.

I'm going to touch on some of the reflections of this reverence or high regard that the Founders had for the Law of Nations in the founding period. Let me begin with the Declaration of Independence. Even the Declaration of Independence—earlier, obviously, than the founding—Jefferson's famous invocation of the importance of appealing to or showing a decent respect to the opinions of mankind is well known. Less well known, but highly relevant—and especially in light of Judge O'Scannlain's remarks—I think it's worth quoting Madison. In view of the general debate that the judge was referring to the over use of foreign precedents and international precedents in U.S. courts, and over the so-called global test that was much discussed during the last presidential election, and in view of the current foreign policy crises we face, let me read from Madison in Federalist Number 63. He says,

An attention to the judgment of other nations, is important to every government, for two reasons: the one is, that, independently of the merits of any particular plan or measure, it is desirable, on various accounts, that it should appear to other nations as the offspring of a wise and honorable policy: the second is, that in doubtful cases, particularly where the national councils may be warped by some strong passion, or momentary interest, the presumed or known opinion of the impartial world, may be the best guide that can be followed. What has not America lost by her want of character with foreign nations? And how many errors and follies would she not have avoided, if the justice and propriety of her measures had, in every instance, been previously tried by the light in which they would probably appear to the unbiased part of mankind.²³

Another reflection of the Framers' regard for the Law of Nations appears as the pervasive view—really the unanimous view—that the Law of Nations was much like other law, like common law. It was law in that sense. It was binding on the United States. It was obligatory for the United States to follow international law, and to a rather remarkable extent, that it was enforceable as law in the courts of the United States.

Another point I want to make very briefly is that, during the Revolutionary war, during the critical period—throughout the entire founding period and much beyond—there was a very great importance attached by the founding generation to U.S. compliance with the Law of Nations. And there was also an equal insistence on compliance by other countries and vindication of U.S. rights under the Law of Nations, particularly with regard to the British. In fact, this was a matter of principle, and it was the *causas belli* which led to the War of 1812.

Now, let me turn to the role of the Law of Nations in respect to the Constitution itself. The Law of Nations is pervasively related to the American Constitution. Of course, there is again the idea of Federalism, which was borrowed from the Law of Nations. In this respect, one of the great

²³ THE FEDERALIST NO. 63 (James Madison), *supra* note 20, at 325.

geniuses of the founding generation of the Framers was their transformation of the idea of federalism into a new and unique form of government.

The Law of Nations provided, much like the common law as to other parts of the Constitution, the background set of principles against which they would be necessary to understand what the Framers were doing, particularly with regard to foreign affairs powers. What is the treaty power, for example? Or, what is a treaty? Well, the answer lies in the knowledge and understanding of what the Law of Nations provides, and this is a pervasive feature of all foreign affairs provisions.

The Constitution also included many provisions which were designed to encourage and facilitate U.S. compliance with the Law of Nations, and it's probably true that at least most of the Founders, or the majority of the Founders, felt that, *in extremis*, Congress should have the power to violate the Law of Nations, but Congress only. And they incorporated a number of mechanisms into the Constitution, the purpose of which was to ensure that compliance would be the rule.

Now, let me just specify—I have very little time, so I'll just specify—the major mechanisms that they developed. One is that they gave federal courts jurisdiction over all those kinds of cases they can imagine which would raise questions of the Law of Nations. It's not that they didn't expect the state courts to apply the Law of Nations; on the contrary, they did expect the courts to apply the Law of Nations. But they were concerned about the problem of uniformity in the interpretation of the Law of Nations and treaties. And they also wanted to give Congress at least the option to make sure that it would be an exclusive federal matter; that is, the interpretation of the Law of Nations.

Of course, the Founders made it difficult to enter into treaties; but, once treaties were entered into, they adopted an innovative—and at the time, unique—provision which made the treaty, upon ratification *ipso facto* at least in most cases, the supreme law of the land under the Supremacy Clause. Now, this, from the very beginning of our history, gave rise to the self-executing treaty doctrine, that treaties—at least in many contexts—can be enforced by courts directly as law, and also to the idea that treaties are binding on the executive branch, given its duty faithfully to execute the law.

Finally—and this is the point that I want to emphasize today—the Framers provided that the President would be bound in exercising his foreign affairs powers, his constitutional foreign affairs powers, to observe the Law of Nations. And in particular, when the President was acting and commander-in-chief, he would be bound to observe the international laws of war.

Now, maybe I can state that a little differently and a little more affirmatively. The Framers understood the commander-in-chief power itself to be power subject to other separation of powers constraints and the Bill of

Rights, but the power to exercise the belligerent rights of the United States under the laws of war. This was an extremely broad grant of authority to the President, but it was not an unlimited grant of authority. One limitation was precisely rooted in the very conception of the power itself, which was the power that the President could exercise the belligerent rights of the United States, but he couldn't go beyond the belligerent rights of the United States. He couldn't violate what they would have called, and did call, the rules of civilized warfare.

Now, let me read to you from Madison—this is pervasive understanding of the time of the founding—from one of his famous *Helvidius* letters in 1793. Madison says, “[T]he executive is bound faithfully to execute the laws of neutrality,”—that’s part of the laws of war—“whilst those laws continue unaltered by the competent authority”²⁴ That is, by Congress. “It is bound to the faithful execution of these as of all other laws internal and external,” that is, internal, meaning municipal law or congressional statutes; and external, meaning the Law of Nations.²⁵ “It is bound to the faithful execution of these, as of all other laws internal and external, by the nature of its trust and the sanction of its oath”²⁶

But it wasn't only Madison. It was Hamilton and his *Pacificas* letters. It was many, many other leading members of the founding generation who expressed his view on a variety of occasions. It was, in fact, taken from the British constitutional practice. It was in the mid-18th century, when Lord Mansfield, patently most famously, in a very famous memorial he wrote on the Silesian loans to the Prussian king, where he established and elaborated the principle that the king could not order violations of the laws of war—the crown had no such power—and that the British courts would not give effect to orders which violated the Law of Nations. It was an article of faith among the founding generation, a basic Republican limitation on the scope of executive power. It appears in Marshall Court decisions repeatedly, and it appears in opinions offered by executive branch officials during the early Republic, as well as members of Congress in debates over the quasi war with France in the 1790s, and then again in the lead-up to the War of 1812.

I'm going to close there with the following observation. There's a real dilemma for those who hold too strongly to two views, and I assume that there may be people who fit that description that are members of this Society. On the one hand is a deep skepticism about international law, perhaps even hostility to international law; and, on the other hand, a deep respect for the founding, and for original meanings and original intentions. This is a real dilemma, and, I would urge you, when you hear the siren call of

²⁴ JAMES MADISON, “*Helvidius*” Number 2, reprinted in 15 THE PAPERS OF JAMES MADISON 80, 86 (Thomas A. Mason et al., eds., 1985).

²⁵ *Id.*

²⁶ *Id.*

people who want to tell you that it ain't so, that you listen to the siren calls with a degree of skepticism and give those claims a degree of scrutiny that is sufficient to really convince yourself honestly that the views they're expressing reflect the understanding of the Founders.

Thank you very much.

PROFESSOR YOO: I'd like to thank the Federalist Society for once again—as it does on an annual basis—saving me from the jurisdiction of the People's Republic of Berkeley and allowing me to come to a slightly more conservative place, the city of Washington, D.C. Also—no offense, Judge—I'm also very happy to be outside the jurisdiction of the Ninth Circuit for a few days. Although, as you all know, Congress is studying the proposition of splitting the Ninth Circuit, and I think the real answer is that we should split the state of California and have a section in the center called Schwarzeneggerland, where people can move if they want to escape the city of Berkeley, or at least Los Angeles, rather than splitting the Ninth Circuit.

I also would like to thank Ron. I am trying to plug this book; *The Powers of War and Peace* is the title.²⁷ I don't think I'm signing any copies. This is actually a draft. It seems to be the habit that drafts of mine get out before the final versions. But I think the final version is now out and I encourage you to purchase it. Buy it on Amazon and if you don't like it, you can return it. It doesn't hurt the sales figures.

Let me make a few comments about international law; and I think David and I see things, probably not surprisingly, very differently, although I do welcome him into the camp of originalists. I think it's a very odd thing, actually, if you look at international law as a field. Most people who might think of themselves as liberal academics usually worship at the altar of Madison and Hamilton and the framing, and I think it's great that we have chosen to fight on common ground.

Many things David said I think fairly represent the majority view in the academy today, those views being that international law is federal law and is binding on the United States through the Supremacy Clause; the idea that the President, in particular, cannot violate international law—there are some people who go farther and say that the President cannot terminate treaties on his own authority, that he needs congressional permission. All of these positions, like many things in the academy, have the virtue of being utterly inconsistent with practice and the beliefs of numerous Presidents and Congress over the years. Just the treaty termination question—more than half the treaties we've ever terminated have been terminated by the President alone. As you know, we're fighting in the federal courts now the

²⁷ See YOO, *supra* note 2.

2008]

Originalism and International Law

319

idea of whether customary international law itself can be binding on the United States and actually become federal law.

I want to address a few of those issues mostly through the lens of treaty termination, and, in particular, the neutrality proclamation. But, before I do that, I think it's fair to admit that international law was important during the drafting of the Constitution. Certainly there are phrases in the Constitution, like the power to declare war and the power to define violations of the Law of Nations, which explicitly refer to international law. It is also true that the Framers were very worried about states violating international law. That had led to the disputes with Great Britain at the time. And it's true that the United States had often made appeals to international law in its diplomatic relations, which is not surprising because, if you think about it, in the late 18th century, the United States was a militarily weak country, and it was commonly using international law to try to convince the British not to do yet another bad thing to the United States.

On the other hand, it's useful to think of what the Constitution actually did—let's start with the text and structure. What did the Constitution actually do to prevent these problems? It doesn't actually say anywhere in the document that international law is part of federal law. The Supremacy Clause doesn't mention international law as one of the binding forms of supreme federal law. What the Constitution did, I think, quite simply, is it centralized control over international law and foreign affairs in the national government and left it up to the national government to decide whether to violate international law or not. So, a lot of quotes you read from the framing about how great international law is and how it shouldn't be violated are usually the Framers criticizing the states in their practices, which led to the crisis with Great Britain.

The other thing is, think about how the Supremacy Clause and federal lawmaking work. If you look at the Supremacy Clause, if you look at how laws are made in this country, they all involve some kind of process that goes through the House or the Senate, and the President, or both or various accommodations of such. Why would it be that the Framers would have created a way for a body of law to be directly incorporated into American law without any review, or being passed on in any way by the political branches of government, unlike statutes, treaties, and constitutional amendments? All those forms of law either involve the President, or the Senate, or both—actually they do involve the President and the Senate. Why would it have been that international law would have been exempted somehow from this process for making all other forms of federal law?

The one thing to turn to would be treaties, because I think it would be the case that, if we could agree that presidents can violate treaties or terminate treaties on their own authority, which seemed to be a much harder form of international law, then, certainly, I think it would logically be the case that the President would have those same powers with regard to inter-

national law, customary international law, which are never actually expressed in any kind of written document.

Take a look at the treaty power. The first major treaty controversy that arose in our country was over the neutrality of the United States in the Napoleonic wars. In 1778, the United States signed a treaty of alliance with France, which committed us to defending French territory in the Caribbean, and actually committed the United States to letting the French use the United States as a territory or a base to conduct naval operations against anybody that it was at war with. 1793 was the beginning of the war between France and Great Britain. France declared war on Great Britain and Holland, and the United States government was thrown into turmoil because we weren't sure whether our mutual defense obligations with France required us, or would require us, to enter into the war against Great Britain—something nobody in the government wanted to do.

On that occasion, President Washington held a Cabinet meeting. This was actually a day when they had Cabinet meetings that actually decided things, sort of like an appellate court—except for the Ninth Circuit, of course. They sat in a room together and talked about the neutrality proclamation, and we have the documents of what Washington asked them and what people's responses were. And the interesting thing is that nobody in that room, for one, ever thought that the President had to consult with Congress in deciding what policy to pursue in violating, suspending, terminating, or acting inconsistently with the treaty with France. This was quite interesting, because this was a treaty that wasn't even made by a president; it was made in 1778 before the Constitution.

If there was a belief at the time that the President needed cooperation of the other branch of government to violate international law, you would've thought that he would have wanted to consult Congress on the interpretation of the French treaties. Instead, everybody in the Cabinet—and this included Jefferson and Hamilton—seemed to agree that this was a presidential decision; this was not some kind of joint presidential-Congressional decision.

The other thing they argued about was international law. Hamilton argued immediately for a suspension or termination of the treaties because the regime in France had changed, and, he argued, we had made the treaty with the king of France, and now there's this rabble or mob in charge of France; we don't have a treaty with them, so we're out of it. We don't need to obey this treaty. Jefferson made an argument based primarily on international law that said that we are not allowed to break treaties just because there's been a change in government. At the same time, however, Jefferson never argued, Hamilton never claimed he argued, and Washington never thought it was an argument, that, if he decided to terminate the treaties, that, even if it were illegal under international law—if Jefferson was right that this somehow would prevent the President from reaching that

decision and acting upon it under our constitutional system—if you go back and look at the records, I think it's quite clear everyone assumed that President Washington could have terminated our treaties with France if he had wanted to. Instead, what he did was he issued a neutrality proclamation, which said that the United States would remain neutral in the conflict, and no U.S. territory could be used to help in attacking either the French or the British, which itself was quite inconsistent with the text of the Treaty of Alliance with France.

The passage that David quoted from Helvidius comes from James Madison. He was quite critical of the neutrality proclamation. I think it's the judgment of most historians that the Helvidius argument was quite unsuccessful. Madison himself didn't really want to make it. It's very interesting Jefferson was so irritated because, he said, Hamilton was out there writing too much in the newspapers—he has his famous quote. He says Hamilton is such a busy body; he's like a host of people all by himself. So he wrote a letter to Madison and he said, well, I'm not going to write this, but, Madison, you, please write some papers responding to Hamilton's defense in the neutrality proclamation. You have a clear idea of who was the judge and who was the clerk here.

So, Madison went out and he wrote these Helvidius papers. His basic argument was that the neutrality proclamation was illegal and unconstitutional because, by declaring peace, President Washington had deprived Congress the ability to declare war, which I think many people today agree is a complete *non sequitur*. Congress could have declared war, if it wanted to, regardless of the neutrality proclamation. And I think, because of that, historically people have thought the Helvidius arguments and papers are quite unconvincing.

The other thing I will note is that I don't think Madison was quite consistent himself during his career. In the Virginia ratifying convention, which is the convention where the commander-in-chief powers were extensively debated, Patrick Henry—those of you who have ever looked at this, remember, Patrick Henry was the fellow who said “give me liberty or give me death,” and then a lot of people tried to give him the latter—Patrick Henry claimed, making exactly the claim that people make today, that the commander-in-chief power was so large and great it would lead to a Democratic tyranny by the President as the head of the military.

Madison, of course, said that you should have faith in Congress; Congress will have the funding power to cut off any misadventures by the President. But there was no claim in the Virginia convention, where the Constitution only passed 188 to 180—just a four-vote difference—that it was going to be international law that was going to bind the commander-in-chief.

So, putting the framing aside, just let me end by asking whether it would make sense as a matter of policy today for us to read the Constitu-

tion to bind the President or bind the United States through international law. Why would it make sense for us to adopt this reading of the federal lawmaking system that would bring in this body of law without having to go through the process of statutes or treaties, rather than what I think the Framers thought, which would've been sort of a political process check under international law?

So just ask yourself the questions about the use of force. You know, under international law today—conventional international law—it's a violation of international law for a country to use force, except in its self-defense or when it's authorized by the Security Council. And I think it's worthwhile to ask whether that's actually yielded good results for the United States or the international system. So, two cases in point. First, a case where the UN's power was upheld was in the case of Rwanda, where the United States and other countries did not receive Security Council resolutions to go to Rwanda, and the lesser nations never sent any real troops to try to stop what was happening in Rwanda, and you saw a genocide of almost a million people there.

Also ask yourself the question about Kosovo, where the United States and its allies invaded, attacked another sovereign nation, Serbia, without UN Security Council permission. I think many people honestly would have to admit that our intervention in Kosovo was illegal under international law. But was that not, in fact, better for the United States and its allies, and, if you want to call it, global welfare that the United States did not feel itself bound by the UN Security Council in that case.

So, it's always fine and great, obviously, if the United States can act consistent with international law; but the question is whether the United States should be bound in all cases to have to obey international law, even when it would be better for our country, or for the international system, for the United States to act contrary to it. I think our Framers, in their wisdom, left that question up to the President, primarily, or the President and Congress acting together; but they certainly didn't try to answer that question through the Supremacy Clause or trying to bind our nation into international law without the check of the political process.

Thanks.

HON. MR. TAFT: Well, let me say I am very grateful to the Federalist Society for the invitation to be with you today. I've heard that some of your invitees recently have been eager to put some distance between themselves and the Society. Not me. For a person who has been just a normal conservative Republican for 60 years—which is to say, since before my mother came out of the ether—an invitation to be on a panel here is obviously pure gold. Harriet Miers should've been so lucky. And, in my case, I'm very grateful, and I will be sure to put it on my résumé, that I have been with you now not just once, but twice, in any case, should a sen-

ator should make an inquiry about this. It's a great pleasure for me to be here, not only for that career move purpose, but also to be enlightened by my fellow panelists on a subject in which I have to say they have the advantage of me in terms of scholarship and expertise.

Just very briefly, then, since we've taken a lot of time and they've covered a lot of ground, I'll give you my few points that have occurred to me as I have looked over the subject that was assigned to us in this panel. My impression is, essentially, and I think it's agreed here, that the Framers were very committed to compliance with international law, at least at the state-to-state level, the obligations taken by nations.

One of the objectives of the Declaration of Independence was to take advantage of the status of a state on the international plane; particularly the right—and it's in the last part of it—the right to contract alliances. But, there was a real focus on what states were, by right, entitled to do; and the Framers well understood that obtaining these rights also entailed assuming some responsibilities and duties; and I think there is every reason to believe and to know that they were very much committed to establishing the United States as a nation. A part of that was to take its place in the international scheme—to have those rights, and to insist on them—but also to insist on the duties of other states to respect their rights, and to undertake to respect those rights and those duties themselves.

This appears, as I say, in the Declaration of Independence. It's also very evident, it's in John Jay's famous grand jury charge in Richmond, where he talked of the Law of Nations, "by which nations are bound to regulate"—*bound*, he says—"to regulate their conduct towards each other."²⁸ And it's also there in the early court cases. You see it in *The Charming Betsy*,²⁹ which circumscribes the role of other laws to make them conform where possible, unless absolutely directly contrary, to international law and customary law and the Law of Nations. You see it in *Guyot v. Hilton*³⁰ and a number of other cases. It's well-established, and I don't think there's any disagreement on the panel about that.

The more difficult question has always been how far the Law of Nations has been imported into domestic law, and what the Framers' conception about that was. And, to the extent that it may have been imported into domestic law, how did that happen? My sense of where the Framers were—and I hesitate to put it this way—but, in some respects, it seems the Framers got it wrong as to what the Constitution meant, or has come to mean; certainly, because my impression is that most of the Framers felt that international law, the Law of Nations, had come in more effectively into domestic law than in fact has been the case, or, in fact, I would say, has been desirable.

²⁸ Jay, charge to Grand Jury, Henfield's Case, 11 Fed. Case No. 6360.

²⁹ *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

³⁰ *Hilton v. Guyot*, 159 U.S. 113 (1895).

They got this idea, I think, from Blackstone—who, in the middle of the 18th century, was the authority with whom they were all familiar—who said that the Law of Nations was part of the law of the land of Great Britain. There's no ambiguity there. You find it also in the Attorney General's opinions—Attorney General Randolph; Attorney General Lee—both said very simply that the Law of Nations was the law of the land. And, in fact, I think Attorney General Randolph—and, this would've been in 1792 or 1793—said that it was the law of the land; even though “not specifically adopted by the Constitution or any municipal act”;³¹ so, he was importing it. At least, that was what he thought, perhaps not thinking deeply—obviously not with the advantage of all of the scholarship that we now have—but it's there. This was certainly his impression.

I think Washington's neutrality proclamation, and Hamilton's defense of it to which John Yoo has referred, also relied to a degree and an aspect to which he did refer, on importing customary international law into domestic law in a rather dramatic fashion, where Washington actually attempted to bring in the law and make violations of the Law of Nations criminal just by saying so in his proclamation. It's clear now that this is not possible. That's been established, and I think rightly so.

Madison, as John said, was stimulated by Jefferson to respond to Hamilton's defense of the proclamation. And, in this aspect, I think Madison was correct, and he's been borne out later: namely, that, in making something a criminal act by the statement that something was a violation of the Law of Nations, that in fact you do need an enactment of legislation by Congress; and Madison did make that point. I think it was a good point, and it has stood up. He said that basically that the Congress had to act under Article 1, its authority to define the offense against the Law of Nations; and, of course Congress did do so, I think just a year later. So, it wasn't a disagreement of policy, but it was a disagreement as to what was necessary and how you would bring the Law of Nations properly into domestic law.

So, in any case, it seems to me fair to say—and this is clear—that the Framers were not really of one mind on the extent to which the Law of Nations would become the law of the land. There was some idea that it certainly had become so, or could be made so, but there was no agreement on either that point or, if it did, where it did. Was it going to be a part of federal common law? Was it going to be just a rule of decision for courts? Was it going to be part of state common law? Or, none of these—would you actually need the legislation, which Article 1 authorizes Congress to take? I don't think, as I say, that there was complete agreement on that point; and that, of course, enables us to continue to discuss it as we do, and to seek for more enlightenment.

Thank you.

³¹ 1 Op. Att'y Gen. 26, 27 (1792) (Randolph).

DEAN CASS: Well, now that we have dealt with importing international and foreign law into U.S. law, we can deal with exporting some of the control over the panel to the audience. Now we are open for your questions. I know this is a very shy group, so we'll let you volunteer before we began calling on members of the audience.

Let me encourage people to line up behind the microphones. Let me ask you to get in line there.

We'll start with the first gentleman at the microphone.

AUDIENCE PARTICIPANT: My name is Ben Davis. I teach at the University of Toledo Law School. My question is along these lines. First, going back to originalism: I have great ambivalence about originalism, simply because I have an ancestor from 1787, who was born in Africa and who was enslaved in 1800, and two of the people who owned her and her family were presidents of the United States; so, I go way back with an issue on the ideas of the people at the time.

But, with regard to the discussions that you have here, my question is, isn't it just a dance between *de jure* and *de facto* here, where you could have Mr. Golove's point of view of *de jure* and there would be an obligation, but that *de facto* when the President of the United States, under the commander-in-chief powers, otherwise violates some kind of international law obligation, there is no sanction against him in our system; so you can reconcile both Mr. Golove that Mr. Yoo by that.

Now, if there were enforcement mechanisms that would constrain the President of the United States or the people who work for him—for example, for conspiracy to commit torture—in courts of the United States, that might resolve the issue in terms of the limits there would be on the President. But, barring enforcement mechanisms either at the state or federal level, aren't we just left with a *de jure* obligation, but a *de facto* non-application with non-enforcement, which would reconcile both?

DEAN CASS: Let's see if the panelists can reconcile their views with that question.

PROFESSOR GOLOVE: Yes, I think it's a good point. I don't think our views can be reconciled, even through that method. I think they're irreconcilable. I think John and I are, in some sense, inhabiting different worlds, and to a very disturbing degree to me. But I'm going to put that aside for the moment.

Yes, this is a *de jure* world I'm describing. But, mind you, this is a feature of public law in general. That is, it's not unique to the Law of Na-

tions that, when a governmental official in a capacity to take action may, in fact, violate the Law of Nations and there is no reliable procedure to correct the violation to vindicate the rights that have been violated, that is a feature of the Law of Nations. It's also a feature of all constitutional law.

Courts are sometimes available. The question is why it is the courts are complied with. After all, courts don't have an army to use against the political branches. The public law in general has this feature, and it means that, sometimes, for example, presidents violate constitutional law and nothing is done about it because they have impunity in a sense; because there's not a political process which would necessarily vindicate their rights. That doesn't change the *de jure* status of the constitutional rights that are in issue, any more than it changes the constitutional obligations of the President to comply with the Law of Nations.

JUDGE O'SCANNLAIN: I would just like to add that I think there is at least one situation in which international law or the Law of Nations is part of American law, and that is in the Alien Torts Statute; because we have to determine whether an alien who invokes that statute has rights which arise out of the violation of the Law of Nations, and that's what was going on in the *Alvarez-Machain v. Sosa*³² case; and, to that extent, it would seem to be that it would have to be a recognition that international law is American law to that extent. And, a great deal of what we were doing in those cases was trying to identify, based on everything from Pufendorf and Grotius and others, what is the norm to which the United States is committed.

DEAN CASS: John, do you want one more crack at this before we take the next question?

PROFESSOR YOO: You know, I agree with David that we inhabit different worlds. It's probably safer for both of us. But let me just ask—in response to your question, I think what you just suggested—Congress passing a criminal statute is perfectly appropriate. I mean, Congress can also incorporate norms of international law into domestic law both through the Alien Torts Statute or Criminal Acts, and it has the power. Article 1, Section 8 says that Congress has the power to define and punish violations of the Law of Nations. It also seems to imply that, if Congress doesn't do it, why should that actually exist, then, as a legal prohibition as directly to federal law without congressional action?

Let me give you examples, then, of whether we really want to test the idea that *de jure* or *de facto* international law should constrain the Presi-

³² *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004).

2008]

Originalism and International Law

327

dent. Many people in international law believe that the use of nuclear weapons against cities is a violation—a massive violation—of human rights. Almost half of the Court of International Justice issued an opinion suggesting that. Would that mean that the President was constitutionally prohibited from considering the use of nuclear weapons without any congressional action?

Again, take the example of Kosovo. Kosovo was illegal under international law. Does that mean that, under our Constitution, it was illegal for the President to order the use of force in Kosovo? Put aside the fact that the war was also a violation of the War Powers Resolution.³³ But is that—without congressional action one way or another—is it unconstitutional for the President to launch our forces into Kosovo?

DEAN CASS: Let me take the next question.

AUDIENCE PARTICIPANT: Judge O'Scannlain, forgive me if I don't have this exactly right. The Restoration of Constitution Act that you referred to—where is the authority of Congress to do that? I'm asking because I don't know. And assuming they have the authority, is it truly binding on the Supreme Court and the other courts? And even if it is binding, are they likely to just ignore it anyway?

JUDGE O'SCANNLAIN: Well, first of all, it's not an act; it's a bill that was introduced. That would be the name of the act, if in fact it would pass. I am not aware of any significant probability that it's going to get anywhere, other than the fact that it was introduced. And I think, if anything, it's an expression of anxiety expressed in that form. That is to say that there are very obvious, as you suggest, separation of powers issues that would have to be resolved, if, in fact, it would ever be passed. My reference to it is only to suggest how topical all of this is and how concerned a very wide variety of Americans feel about this whole issue.

AUDIENCE PARTICIPANT: My question is kind of specific. It's to the whole panel, but I was curious about what the panel's opinion is on international efforts to affect individual liberties—specifically, the effects to try to change internationally—gun control efforts is specifically what I'm looking at—and efforts to possibly affect the Second Amendment within the country, and what the panel's opinion is on how that's going to be affected.

³³ 50 U.S.C. §§ 1541 *et seq.* (2006).

DEAN CASS: Do you have a weapon at the moment?

AUDIENCE PARTICIPANT: No, sir. Not right now. Not in D.C.

DEAN CASS: Then you can answer as you want.

(No response.)

DEAN CASS: No takers, huh? Obviously everyone agrees with the question.

HON. MR. TAFT: I think that's right. There is no basis on which foreign countries or peoples can enact statutes for the United States or amend our Constitution, as you've suggested. It can't happen.

PROFESSOR GOLOVE: I think it's uncontroversial that a treaty that is in violation of the Constitution—say, one of the provisions of the Bill of Rights—is an unconstitutional treaty and wouldn't be given effect in the United States.

DEAN CASS: Hopefully, you'll rest easy now.

AUDIENCE PARTICIPANT: My name is Briard. I'm a French Supreme Court attorney. I want to thank you, Judge, for quoting my compatriot, Charles Louis de Secondat, Baron de Montesquieu—this was the name, the complete name. The guy had a long name. And I want to thank also Professor Yoo for mentioning the 1778 treaty, which reminds us that our country was the very first in the world to recognize your independence.

DEAN CASS: We'll now entertain a motion to overturn the Neutrality Act.

AUDIENCE PARTICIPANT: On the issue we talk about, I would like to say three things. The first is that, to me, it is a very essential to make the difference between international law treaties and foreign domestic laws and foreign case law.

Second, I am the very first one to say that it is good to promote dialogue between judges, dialogue between nations, dialogue between lawyers and jurisdictions, and the mutual influence can exist. We have to face the same problems.

2008]

Originalism and International Law

329

But, third, if I had any advice to provide to American judges—and I have no competence to do that—but, I would say, stop being fascinated by the case law of Strasbourg. Stop—

(Applause.)

AUDIENCE PARTICIPANT: —I would say stop quoting the case law of Strasbourg. This case law—and I know I can speak freely—that case law is completely out of control. It is made by 45 judges, and, if you do that, you will be—especially in a country presiding by the jurisdictions—you will be in the same situation that we are today, which is a country where we gave up our very precious gift, which are sovereignty and independence.

Thank you.

(Applause.)

DEAN CASS: You can see why François Briard is the President of our chapter in France, and the only Frenchman Justice Scalia is willing to acknowledge in public.

AUDIENCE PARTICIPANT: Hello, my name is Jonathan Jacobs. I'm in my second year at Georgetown University, and I'm interested in whether anyone on the panel believes *The Charming Betsy* canon—which says that courts should interpret ambiguous statutes not to conflict with international law—whether anyone believes that still reflects Congress's intent these days.

DEAN CASS: Any takers on that? I've always liked cases with names like "the Charming Betsy." You just don't get those today.

PROFESSOR YOO: I think there's a very good article by Curt Bradley talking about *The Charming Betsy* Canon as actually enhancing Congress's powers, because it prevents the violation of international law unless Congress chooses to violate international law.³⁴ And, he tried to read it also as a way of protecting the President's prerogative, just to make sure that international law is not violated deliberately unless the political branches have actually chosen and decided to do it. And, so, if they do that, you want to have something clear from them that they intended to do that.

³⁴ See Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1998).

HON. MR. TAFT: Let me say, I think your question was whether the Congress believes this. I don't know whether they believe it; but, I think they are aware of the doctrine, and they act in knowledge of it, and the doctrine has vitality.

PROFESSOR GOLOVE: I think it would probably be hard to answer the question posed in the general way that you did. There's a lot of international law covering a huge variety of subjects and contexts, and the idea that Congress is of one mind about the entire subject of U.S. compliance with international law seems to me to be quite unlikely. I'm not expressing any expertise about what Congress thinks or doesn't; but, it seems that, to be pitched at that level of generality, it can't be right.

DEAN CASS: We have time for two more questions here.

AUDIENCE PARTICIPANT: My name is Frank Marine. I am a recently retired Department of Justice attorney. I want to try to cut through some of the abstractions, and have a hypothetical question for Mr. Taft and Professor Golove. Let's suppose that there's a foreign flag vessel on the high seas, and on that vessel there's Osama bin Laden. The foreign country adamantly refuses to give the United States consent to board the vessel, the Vice President advises the President to go on board, seize them, and we'll worry about the consequences later.

You two are legal advisers to the President. What would you advise the President?

HON. MR. TAFT: The current president?

AUDIENCE PARTICIPANT: Yes. Take any president you want.

PROFESSOR GOLOVE: You can speak to this question with great expertise. I'm only going to say that the panel today is—John suggested that I'm originalist because I was talking about original history, but I talked about original history because that was the subject of the panel, not because I'm originalist. But I don't think that anything I said, given my own methodological perspectives, answers the question that you have by reference to the founding.

But I do think that, if you want my view about it, I think there are emergency situations where the President has to have—when the President needs to act immediately, the President has to have authority to act immediately, but then he needs to go back and get congressional authorization.

2008]

Originalism and International Law

331

It's a change of policy.

JUDGE O'SCANNLAIN: But his boarding would be in violation of international law.

HON. MR. TAFT: I don't believe that it would be. I think that we have a right to act against Osama bin Laden wherever we find him. We're exercising our right of self-defense. It's endorsed by the Congress. It's endorsed by the UN Security Council. And we can go get him.

DEAN CASS: Good answer.

AUDIENCE PARTICIPANT: I wonder—well, the differences between our panelists, to what extent it's affected by—really, what is meant by the Law of Nations? Will: from your comments, I think I could reach a conclusion that the Law of Nations really only means those laws that govern the relations between nations, as opposed to Law of Nations meaning what today we use or call public and national law, or international humanitarian law, or human rights law, that great body of law that's generally referred to as “international law.” Is it clear what the Founders had in mind?

If that doesn't run us out of time, then I'll add my second question, which is: What did the Founders mean by “declaration of war,” the power to declare war, grant letters of market reprisal, and define rules of captures? Did they really mean that as a code word for the ability to use force, or did it have a more special meaning?

JUDGE O'SCANNLAIN: On the first point, I think the phrase, “Law of Nations,” as it was used in the late 18th century, meant customary international law as we understand it today. I think that's fairly well understood.

PROFESSOR GOLOVE: The content of customary international law at the time was different, but no less broad than it is today. In fact, in some ways, it was broader, because it included principles of conflicts of laws; the maritime law—including at that time maritime law insofar as it affected inland waters—it affected a whole variety of other subjects which were governed by the Law of Nations, the Law of Merchants, and so on. So, there were lots of state-to-state issues that were part of the Law of Nations.

PROFESSOR YOO: But, one point that is different, I think, is that

there was no concept then that international law would dictate how governments treat their citizens in terms of individual liberties. You don't have the kind of, I think, intrusive level of regulation. There are a lot of treaties now which regulate exactly the same things that we are accustomed to thinking about being regulated by domestic governments through statutes: human rights, environment, energy consumption, and you could go on and on.

I think it is fair to say that what international law was understood to do between the 18th century and today has changed; which is why I think Judge Bork wanted to read the Alien Torts Statute to only incorporate international law of the 18th century, because he didn't believe Congress anticipated or thought that this new international law of the 20th and 21st century was what the Framers intended when they wrote the Alien Torts Statute.

DEAN CASS: My friend François-Henri tells the story of a young woman who goes to confession and says to the priest, I can't help admiring myself day after day, looking at America, thinking how beautiful I am. Is that a sin? To which the priest replies: no, my child; it's not a sin, just a mistake. I think our panelists demonstrate that we have plenty of room for both in our consideration of foreign and international law. Please join me in thanking the panel for their contribution.

(Panel concluded.)