

**September 28, 2008**  
**When Judges Make Foreign Policy**  
**By NOAH FELDMAN**

Every generation gets the Constitution that it deserves. As the central preoccupations of an era make their way into the legal system, the Supreme Court eventually weighs in, and nine lawyers in robes become oracles of our national identity. The 1930s had the Great Depression and the Supreme Court's "switch in time" from mandating a laissez-faire economy to allowing New Deal regulation. The 1950s had the rise of the civil rights movement and *Brown v. Board of Education*. The 1970s had the struggle for personal autonomy and *Roe v. Wade*. Over the last two centuries, the court's decisions, ranging from the dreadful to the inspiring, have always reflected and shaped who "we the people" think we are.

During the boom years of the 1990s, globalization emerged as the most significant development in our national life. With Nafta and the Internet and big-box stores selling cheap goods from China, the line between national and international began to blur. In the seven years since 9/11, the question of how we relate to the world beyond our borders — and how we should — has become inescapable. The Supreme Court, as ever, is beginning to offer its own answers. As the United States tries to balance the benefits of multilateral alliances with the demands of unilateral self-protection, the court has started to address the legal counterparts of such existential matters. It is becoming increasingly clear that the defining constitutional problem for the present generation will be the nature of the relationship of the United States to what is somewhat optimistically called the international order.

This problem has many dimensions. It includes mundane practical questions, like what force the United States should give to the law of the sea. It includes more symbolic questions, like whether high-ranking American officials can be held accountable for crimes against international law. And it includes questions of momentous consequence, like whether international law should be treated as law in the United States; what rights, if any, noncitizens have to come before American courts or tribunals; whether the protections of the Geneva Conventions apply to people that the U.S.

government accuses of being terrorists; and whether the U.S. Supreme Court should consider the decisions of foreign or international tribunals when it interprets the Constitution.

In recent years, two prominent schools of thought have emerged to answer these questions. One view, closely associated with the Bush administration, begins with the observation that law, in the age of modern liberal democracy, derives its legitimacy from being enacted by elected representatives of the people. From this standpoint, the Constitution is seen as facing inward, toward the Americans who made it, toward their rights and their security. For the most part, that is, the rights the Constitution provides are for citizens and provided only within the borders of the country. By these lights, any interpretation of the Constitution that restricts the nation's security or sovereignty — for example, by extending constitutional rights to noncitizens encountered on battlefields overseas — is misguided and even dangerous. In the words of the conservative legal scholars Eric Posner and Jack Goldsmith (who is himself a former member of the Bush administration), the Constitution “was designed to create a more perfect domestic order, and its foreign relations mechanisms were crafted to enhance U.S. welfare.”

A competing view, championed mostly by liberals, defines the rule of law differently: law is conceived not as a quintessentially national phenomenon but rather as a global ideal. The liberal position readily concedes that the Constitution specifies the law for the United States but stresses that a fuller, more complete conception of law demands that American law be pictured alongside international law and other (legitimate) national constitutions. The U.S. Constitution, on this cosmopolitan view, faces outward. It is a paradigm of the rule of law: rights similar to those it confers on Americans should protect all people everywhere, so that no one falls outside the reach of some legitimate legal order. What is most important about our Constitution, liberals stress, is not that it provides rights for us but that its vision of freedom ought to apply universally.

The Supreme Court, whose new term begins Oct. 6, has become a battleground for these two worldviews. In the last term, which ended in June, the justices gave expression to both visions. In two cases in particular — one high-profile, the other largely overlooked

— the justices divided into roughly two blocs, representing the “inward” and “outward” looking conceptions of the Constitution, with Justice Anthony Kennedy voting with liberals in one case and conservatives in the other. The Supreme Court is on the verge of several retirements; how the justices will address critical issues of American foreign policy in the future hangs very much in the balance.

This may seem like an odd way of thinking about international affairs. In the coming presidential election, every voter understands that there is a choice to be made between the foreign-policy visions of John McCain and Barack Obama. What is less obvious, but no less important, is that Supreme Court appointments have become a de facto part of American foreign policy. The court, like the State Department and the Pentagon, now makes decisions in cases that directly change and shape our relationship with the world. And as the justices decide these cases, they are doing as much as anyone to shape America’s fortunes in an age of global terror and economic turmoil.

### **What Conservatives Understand About International Law**

The debate between inward-looking conservatives and outward-looking liberals has recently taken a turn toward the shrill. Liberal lawyers do not simply accuse their conservative counterparts of denigrating the rule of law; they accuse them of violating it themselves. Calling last spring for the firing of the tenured Berkeley professor John Yoo, an architect of the Bush administration’s legal strategy in the war on terror, Marjorie Cohn, the president of the National Lawyers’ Guild, declared that “Yoo’s complicity in establishing the policy that led to the torture of prisoners constitutes a war crime under the U.S. War Crimes Act.”

The conservatives’ arguments are no less heated: not only, they contend, do liberals paint a naïvely romantic picture of the world — one in which the United Nations and its agencies and courts would make law for Americans — but liberals are also endangering American lives. Dissenting this past June from the Supreme Court decision giving those held at Guantánamo Bay a right to challenge their detention, Justice Antonin Scalia wrote that the majority’s ruling “will almost certainly cause more Americans to be killed.”

These sorts of accusations are overstated and unhelpful. Neither the liberal nor the conservative view corresponds to the stereotype assigned to it by its opponents. Notwithstanding their limitations, both views express values that are deeply grounded in the American constitutional tradition and in the rule of law. Each is necessary to help us make sense of the Constitution's role in an increasingly complex global world.

Consider first the conservative vision, which is sometimes called "sovereigntist" because it emphasizes the power and prerogative of the United States to act as if it is responsible to no one but itself. The Bush administration, through its characteristic combination of boldness, historical ambition and operational incompetence, has given sovereignty a bad name, much as it has for unilateralism. But the constitutional principle here is actually one that most liberals also fully embrace: namely, the principle of democracy.

International law, as even its staunchest defenders must acknowledge, often fails to accord with democratic principle. Such law is not passed by a democratically elected Congress and signed by a democratically elected president. It is true that the U.S. Constitution says that international treaties signed by the president and approved by the Senate shall be the supreme law of the land, thereby conferring some democratic legitimacy on treaties. But a great deal of international law derives not from treaties signed by consenting nations but rather from the vague category of international custom, which over time can harden into binding law. For hundreds of years, until more formal treaties were adopted, custom was the main way international law was created, giving rise to the laws of war, for instance, and condemning terrorism and torture. Even today, the existence of a treaty among only a select group of nations can be invoked in international forums as evidence of an established custom — and nonparticipating countries can come to be bound by treaties that they themselves never signed.

To conservatives, such international "law" is anathema. Even in cases in which explicit treaties among nations do exist, conservatives worry. Such treaties, after all, are increasingly interpreted by nondemocratic institutions like tribunals of the World Trade Organization or the United Nations' International Court of Justice. Two hundred years ago, treaties tended to be simple agreements between two parties, with each reserving the right to

interpret (and, if necessary, enforce) the treaty's terms for itself. Today, though, many of the most important treaties — those governing trade, the environment and other crucial matters — involve a large number of nations that agree as a condition of the treaty to be bound by the decisions of an international body. To sign on to such a treaty, conservatives point out, confers future lawmaking authority on some unelected and thus undemocratic body.

According to the sovereigntists, the United States, faced with such undemocratic regimes, should feel free to reject any undesirable verdict of a body like the International Court of Justice and embrace a policy more in line with U.S. interests — much in the way that Israel responded to the I.C.J.'s condemnation of the path of its security barrier on the West Bank. In a world where Libya can lead an international human rights commission, no international institution is free from the distortions that arise when all countries are treated as equals. Even within the distinguished higher echelons of the United Nations or European Union, there is a risk that bureaucrats may pursue policies that reflect the values and priorities of their own technocratic classes. The worst-case scenario, from the perspective of the conservatives, is one in which enemies of the United States engage in “lawfare,” opportunistically charging the country with violations of international law to impede it from rightfully ensuring its safety.

Another key sovereigntist principle is the right of the United States, when acting abroad, to protect itself, whether fighting wars or preventing terrorist attacks. Historically, the court has given the president, as commander in chief, great latitude to act abroad as he sees fit. In situations in which Congress has explicitly authorized the president's action, the court has recognized the prerogative as almost absolute. For instance, when the United States acquired Puerto Rico, Guam and the Philippines in the Spanish–American War, the Supreme Court allowed Congress and the president to govern those territories without extending constitutional rights to the residents. Similarly, after World War II, when Germans held by the United States in occupied Germany pending war-crimes charges petitioned for judicial review, the Supreme Court turned them away.

Conservatives argue, not implausibly, that these historic decisions did not undermine the rule of law: they embodied it. The Supreme

Court's judgments derived, after all, from the Constitution itself and its own democratic pedigree. One central reason that the people of the United States formed the Constitution was in order to provide for the common defense. The Constitution does protect rights, according to this view — but they are the rights of citizens, not the rights of mankind in general or of foreigners who have never even set foot in the United States.

### **What Liberals Understand About International Law**

From the liberal perspective, the vision espoused by the conservatives is crabbed and parochial. Of course the Constitution demands democracy and gives rights to American citizens. But, say the progressives, that does not explain why over the last two centuries the Constitution has become the very model of what a system of government under law looks like. The key to the Constitution's global appeal, according to the liberal view, is that the document stands for the universal principle that state power over individuals may only ever be exercised through law — no matter what government is acting, and no matter where on earth.

This outward-looking, "internationalist" conception of the Constitution respects the sovereignty of the United States and that of other countries — provided they deliver a just legal order to their citizens. But liberals point out that even a constitutional state that guarantees rights for its own citizens will not protect people in many places and times, often when rights are most sorely needed. In wartime, for instance, almost no nation will have an interest in protecting the rights of foreign enemies that it encounters. On the open seas, no domestic law applies. And for reasons of sheer practicality, no country's laws regulate all its potential relations with all other states. To cover situations like these, where domestic law runs out of rope, is the task of international law. Such law seeks to ensure rights for all, not by replacing the domestic law of independent nations but by holding it to standards of universal justice and by supplementing it where it is incomplete or inadequate.

From this perspective, international law is necessary to ensure that the rule of law will actually obtain in situations where individual states do not provide it. This is why, for liberals, it is essential that the United States comply with its international obligations. The

framers of the Constitution were certainly eager to demonstrate such compliance. When they made treaties the law of the land, they were saying — according to an interpretation of Chief Justice John Marshall's that dates back to 1829 — that the moment the Senate ratifies a treaty, it automatically becomes the supreme law of the land, binding in every court in the nation.

Deepening their historical argument, the liberals also point out that from the earliest days of the United States, the nation's courts applied customary international law, regularly deciding who owned ships captured on the high seas according to immemorial practice that was not found in any treaty. What is more, the framers' reliance on international law and custom went to the very heart of their constitutional endeavor: what, otherwise, did the framers mean when they spoke in the Constitution about the declaration of war, or about letters of marque and reprisal, or about judicial authority over ambassadors?

In practice, the internationalist camp argues for the prudent use of international legal materials in constitutional decision-making — not only for purposes of rhetoric and persuasion but also to provide rules and principles to help actually decide cases. For example, liberals argue that if the United States adopts laws designed to comply with the Geneva Conventions, the government is obligated to follow the treaty to the letter should the government invoke the authority to detain prisoners that the treaty confers. Likewise, when the United States has undertaken to comply with the decisions of international tribunals, those tribunals' rulings must be treated as law, just as the treaties themselves are.

Liberals concede that the framers showed respect for international law, in part, because their country was new and revolutionary, and they sought legitimacy in the community of nations. But the liberal view stresses that the tradition of respect continued even once the nation was well established, and that it was kept alive by successive generations for different but always compelling reasons. The United States helped found the United Nations after World War II, for instance, at what was then the nation's moment of greatest global power. Franklin Delano Roosevelt's idea, shared by liberals then and now, was that the international rule of law was good not just in principle but also in practice. As a country governed by law, we were asserting the superiority of our system to others governed by

dictatorship. Moreover, since the United States was a permanent member of the Security Council, any compromises to our national sovereignty were more than outweighed by the tremendous benefits of having a legitimate international legal order through which, as a superpower, it could assert its will.

As liberals see it, being a leading exponent of the rule of law internationally strengthens America's ability to pressure or bully other countries to respect the rights of their own citizens. In this way, oddly enough, the liberal view is consonant with certain aspirations of the Bush administration. In Afghanistan, Iraq and beyond, President Bush has tried to export liberal constitutionalism, including both elections and basic rights. His "freedom agenda" is, in fact, a direct descendant of liberal internationalism, a policy associated with Woodrow Wilson and his plans to make the world safe for democracy through the work of international institutions.

The Bush administration, of course, distrusts international organizations that continue in the tradition of the League of Nations, which Wilson helped to found (though he could not persuade his own country to join it). But Bush's notion that America's democratic Constitution should be an inspiration for the world is identifiably Wilsonian — as is the zeal to spread the good word, voluntarily when possible but by force if necessary. If the greatest tragedy of the Bush presidency is the enormous human cost of America's ham-handed efforts to accomplish this worthy goal, a second, related tragedy is that the spreading of constitutional democracy is rarely talked about anymore as a liberal goal at all.

### **The Court's Liberal Victory**

Each constitutional worldview — the one conservative and inward-looking, the other liberal and outward-focused — has found exponents on the current Supreme Court. This past spring, in two cases before the court, each side won an important victory. The larger battle, however, was widely overlooked. The liberal victory was widely publicized, but its full implications were not often noted. As for the conservative win, its very existence went almost entirely unnoticed.

The liberal victory, in the case of *Boumediene v. Bush*, took place against the backdrop of the detentions of suspected terrorists at Guantánamo Bay, Cuba. The detainees were being held there because the Bush administration's lawyers were confident that, under the Supreme Court's precedent, the detainees would not enjoy constitutional rights. Like the Germans denied review after World War II, the detainees were noncitizens who were neither arrested nor held in the United States. Guantánamo was leased from Cuba under a 1903 treaty, so it was not in the United States, and yet there was no tradition of applying Cuban law there.

In light of these circumstances, the Bush administration seemed to believe it could treat Guantánamo as a law-free zone. Unlike Iraq, which the administration conceded was a war zone in which the Geneva Conventions applied, Guantánamo was initially considered legally off the grid. It is often said by liberal critics that Bush's anti-terror policies ignored the Constitution and international law. But this is a misleading oversimplification. What the choice of Guantánamo demonstrates, rather, is the profoundly legalistic way in which those policies were designed. Using the law itself, the lawyers in the Bush administration set out to make Guantánamo into a legal vacuum.

The court's decision in *Boumediene* repudiated that attempt. The majority, led by Justice Kennedy, announced that for constitutional purposes, Guantánamo Bay was part of the United States: the detainees there enjoyed the same rights as if they had been held in Washington. The *Boumediene* decision was chiefly the accomplishment of Justice John Paul Stevens, who has made overturning the Bush detention policies into the legacy-defining task of his distinguished career. In key opinions issued in 2004 and 2006, Stevens chipped away at the special status asserted for Guantánamo, each time referring the matter of judicial review for the detainees back to Congress. But Congress repeatedly approved the administration's proposals to deny access to the courts. To win the fight even against Congress, Stevens needed Kennedy to provide the fifth vote and hold that denying the Guantánamo detainees their day in court actually violated the Constitution.

The opinion that Kennedy wrote for the court's majority in *Boumediene* announced squarely that the Constitution applied to the detainees being held in Guantánamo. Kennedy insisted that he

was not overruling the precedent of the German detainees who were denied review. Unlike the situation with the Germans after World War II, he argued, the Guantánamo detainees had not received a hearing; the Guantánamo naval base was entirely under U.S. control; and granting hearings was not so impractical that it would fundamentally disrupt the operation of the prison. In effect, however, Kennedy's opinion rejected what the Bush administration claimed to be the rule that noncitizens held outside the United States were not entitled to constitutional protection.

Having refused to overturn *Roe v. Wade* in the 1990s and having championed gay rights in recent years, Kennedy may now be depicted as an unlikely liberal hero — the latest in a line of Republican appointees (one of whom is John Paul Stevens) who gradually evolved into staunch exponents of liberal rights. The key to Kennedy's reasoning in the Guantánamo case was his expansive conception of the rule of law. In the central paragraph of the decision, Kennedy explained his underlying logic: if Congress and the president had the power to take control of a territory and then determine that U.S. law does not apply there, "it would be possible for the political branches to govern without legal constraint," he wrote. Government without courts, Kennedy suggested, was not constitutional government at all. "Our basic charter," he went on, "cannot be contracted away like this."

What seemed to most offend Kennedy about Guantánamo, then, was precisely the effort by the executive branch, with the approval of Congress, to make Guantánamo into a place beyond the reach of any law. By insisting on its own authority, the court was striking a blow for law itself. In this way, the court embraced the ideal of the outward-looking Constitution: a document that protects the rights not only of citizens within the United States but also of noncitizens outside its formal borders. This Constitution, by extension, stands for the ideal of legal justice being made available to all persons — no matter where they might be.

Holding that the Constitution did indeed follow the flag to Guantánamo was an act with tremendous international resonance. It can even be read as an attempt to hold the Bush administration to its own rhetoric about democracy. The rule of law, after all, is not solely an American ideal but one that is broadly shared globally. To

insist that some law covers all people wherever they may be found underscores the universality that law aims to create.

### **The Court's Conservative Victory**

From the conservative point of view, of course, Kennedy's decision did not follow from the basic principle of the rule of law. According to the four conservative dissenting justices, whose views closely tracked those of the Bush administration, the Constitution unquestionably binds the government. But according to their view, the Constitution also allows the president and Congress, acting together, to lease or even acquire territory and govern it without allowing recourse to the courts. Indeed, this view was precisely the one adopted by the Supreme Court after the Spanish–American War, when the United States was a rising imperial power. The dissenters in *Boumediene* actually agree with the liberals that law does apply to Guantánamo; they just maintain that the courts are not part of it.

The conservative cause may have lost in *Boumediene*. It prevailed, however, in a case decided last March that garnered little public attention— but that was, in its own way, just as important to defining our constitutional era. The case, *Medellín v. Texas*, grew from a conflict between the Supreme Court and the International Court of Justice over death–row inmates in the United States who were apparently never told they had the right to speak to the embassies of their home countries, a right guaranteed by a treaty called the Vienna Convention on Consular Relations. The international court declared that the violation tainted the inmates' convictions and insisted that they have their day in court to try to get them overturned.

The Supreme Court disagreed. In his initial trial and appeal, José Medellín, the man who brought the Supreme Court case, did not raise his right to speak to his embassy — presumably because, having never been informed of the right, he had no idea that it existed. Under the arcane rules for postconviction judicial review, a defendant ordinarily cannot ask the courts to consider legal arguments that were not raised when he was tried in the first place. And in its decision, the court upheld those rules: the violation of the treaty, it held, did not demand any special exception to the usual rules governing review. The fact that the United States had violated

its international-treaty obligation was of no use on death row. Medellín was executed by the State of Texas on Aug. 5.

What made this conflict between the Supreme Court and the International Court of Justice particularly stark was that the Bush administration had for once taken the side of international law. Before the Supreme Court issued its opinion, President Bush issued a memorandum advising state courts to follow the judgment of the International Court of Justice. With the ruling of the Supreme Court on one side, and that of the international court — endorsed by the president — on the other, just what did the Constitution require the state courts to do?

The United States signed three separate treaties stating that it undertook to obey the judgments of the International Court of Justice. But the Supreme Court bridled at the thought that the international court's decision might trump its own. This was not just instinctive turf-protection, though that concern no doubt played a part. Never before had an international body replaced the Supreme Court in telling lower courts in the United States that their own procedural rules were unacceptable. The natural order of things seemed to be turned on its head.

The Supreme Court held that the treaties obligating us to listen to the International Court of Justice were not binding law. Chief Justice John Roberts wrote that a careful reading of the text of the treaties revealed no intention to subject the United States to the judgments of the international court — not, that is, unless Congress passed a separate statute demanding such obedience.

This opinion upended the rules for applying treaties in the U.S. courts. In dissent, Justice Breyer painted a grim picture of the consequences. If treaties were not automatically binding law unless they said so, he wrote, the applicability of some 70 treaties involving economic cooperation, consular relations and navigation was now thrown into doubt. The rest of the world, he intimated, would be left wondering whether the United States intended to obey its treaty obligations or not — which is not a trivial concern when the world also suspects the United States of ignoring its obligations of humane treatment under the Geneva Conventions. To Breyer, the decision was a reversal of nearly 180 years of precedent and a

message to the world that the United States was prepared to play fast and loose with its international commitments.

When the justices rejected the death-row appeal, they were acting on the basis of familiar conservative concerns. The judges of the International Court of Justice were not appointed according to any constitutional procedure. To let the international body decide matters of law that would be binding for state courts seemed fundamentally undemocratic — an unjust usurpation of the judicial function. It would be absurd for the Constitution, as the core document of our democracy, to require such a result.

The old precedent regarding treaties was thus, according to the conservatives, truly obsolete. It made no sense to apply it in a globalized world where treaties are not just straightforward agreements between sovereign states; now, they often create irresponsible international tribunals to adjudicate their meaning. If the judgments of an international court were to be obligatory, a democratically legitimate body should say so explicitly — either the Senate that approved the treaty promising compliance or the whole Congress in a separate legal enactment.

By its own lights, the Supreme Court in the *Medellín* case was reading the Constitution to guarantee us control over our own destiny. That meant turning away from international law in a systematic and profound sense. The cost to the United States might be real, but the court considered it justified by the preservation of our democratic sovereignty.

### **Which Side Is Right?**

The *Boumediene* decision saw the Constitution as facing outward, expanding and promoting the rule of law throughout the world. The *Medellín* decision, by contrast, saw the Constitution as a domestic blueprint designed to preserve and protect the United States from foreign encroachment, even at some cost to the international rule of law.

Underscoring the tension between the two cases is the fact that nearly all the justices of the Supreme Court voted consistently across both of them. The four conservatives — Justices Antonin Scalia, Clarence Thomas, John Roberts and Samuel Alito —

dissented from the extension of habeas corpus rights to Guantánamo Bay in *Boumediene* and joined the majority opinion in *Medellín* that made it harder for treaties to become law. Meanwhile the court's liberals — Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg and Stephen Breyer — joined the majority in the Guantánamo case, and all but Stevens dissented in *Medellín*. (Though Stevens voted with the majority in that case, he did so seemingly only for tactical reasons; he wrote a separate, concurring opinion that did not embrace the logic of Roberts's majority opinion.)

The key vote in both cases was that of Kennedy. In both cases, he acted to uphold the prerogatives of the Supreme Court — against the president and Congress in the Guantánamo case, and against the international court in the *Medellín* decision. And Kennedy does argue that such judicial supremacy is crucial to the rule of law. But the other justices did not see the cases in those terms. To them, the cases were not primarily about the perennial issue of the division of powers between the different branches of government. To these eight justices, the cases were about what sort of Constitution we have: either outward-facing or inward-looking.

Who is right? It is tempting to conclude that the Constitution must look inward and outward simultaneously. But embracing contradiction is not the answer, either. Instead what we need to resolve the present difficulty is a subtle shift in perspective.

There is an important way in which neither of the predominant approaches to the Constitution and the international order can provide a fully satisfactory answer to the problem. Although they differ deeply about what the Constitution teaches, the two sides share a common image of what the Constitution is. Both imagine it to be a blueprint offering a coherent worldview that will allow us to reach the best results most of the time. According to this shared assumption, the way to find the real or the true Constitution is to identify the core values that the document and the precedents stand for, and to use these as principles to interpret the Constitution correctly.

There is nothing wrong with this picture of constitutional interpretation when it is applied to the vast majority of constitutional decisions, from the right to bear arms to the meaning

of equal protection of the laws. Deciding what deep principles emerge from our history can help resolve even problems unimagined by the framers, like those presented by abortion or claims to gay rights. Most of the time, constitutional interpretation proceeds in precisely this way — and so it should.

But when we are talking about the basic direction the country needs to face in order to achieve its goals in the modern world, deriving principles from history is often inadequate to dictate outcomes. The national and global situations in which we find ourselves are ever-changing. The ship of state must navigate in waters that correspond to no existing chart. The complexity of the world, coupled with the profound changes in the role the United States plays in it, is a very different thing from, say, our progressive recognition that African-Americans, women, gays and lesbians deserve the same equality and respect as everybody else.

For this reason, when the world has changed drastically, the Constitution has always had the flexibility to change along with it. The industrial economy, for example, was so much bigger and more complex than the economy of 1787 that the old constitutional order no longer worked. The New Deal ushered in systematic regulation and administrative agencies that had no real place in the three-branch system — but that we now accept as constitutional today. The original federal system limiting the power of the central government relative to the states also had to be reconfigured when the economy became truly national. The changed nature of the president's war powers offers yet another pragmatic example of flexibility and change. Modern wars demand rapid decision-making and overwhelming concentrations of force; in the light of these needs, we have largely abandoned the framers' model for war powers, which gave Congress much more authority than it is able to exercise today.

On each occasion that the Supreme Court has had to confront such drastically changed circumstances, it has adopted the approach of seeing constitutional government as an ongoing experiment. Justice Oliver Wendell Holmes Jr. wrote that our system of government is an experiment, "as all life is an experiment." Justice Robert Jackson, confronting the separation of powers — about which the Constitution is cryptic at best — admitted frankly that nothing in the document, the case law or the scholars' writings got him any

closer to an answer. Then he tried to come up with his own rules, designed to reflect political reality and the changed nature of the presidency.

Looking at today's problem through the lens of our great constitutional experiment, it emerges that there is no single, enduring answer to which way the Constitution should be oriented, inward or outward. The truth is that we have had an inward- and outward-looking Constitution by turns, depending on the needs of the country and of the world. Neither the text of the Constitution, nor the history of its interpretation, nor the deep values embedded in it justify one answer rather than the other. In the face of such ambiguity, the right question is not simply in what direction does our Constitution look, but where do we need the Constitution to look right now?

Answering this requires the Supreme Court to think in terms not only of principle but also of policy: to weigh national and international interests; and to exercise fine judgment about how our Constitution functions and is perceived at home and abroad. The conservative and liberal approaches to legitimacy and the rule of law need to be supplemented with a healthy dose of real-world pragmatism. In effect, the fact that the Constitution affects our relations with the world requires the justices to have a foreign policy of their own.

On the surface, it seems as if such inevitably political judgments are not the proper province of the court. If assessments of the state of the world are called for, shouldn't the court defer to the decisions of the elected president and Congress? Aren't judgments about the direction of our country the exclusive preserve of the political branches?

Indeed, the Supreme Court does need to be limited to its proper role. But when it comes to our engagement with the world, that role involves taking a stand, not stepping aside. The reason for this is straightforward: the court is in charge of interpreting the Constitution, and the Constitution plays a major role in shaping our engagement with the rest of the world. The court therefore has no choice about whether to involve itself in the question of which direction the Constitution will face; it is now unavoidably involved.

Even choosing to defer to the other branches of government amounts to a substantive stand on the question.

That said, when the court exercises its own independent political judgment, it still does so in a distinctively legal way. For one thing, the court can act only through deciding the cases that happen to come before it, and the court is limited to using the facts and circumstances of those cases to shape a broader constitutional vision. The court also speaks in the idiom of law — which is to say, of regular rules that apply to everyone across the board. It cannot declare, for instance, that only this or that detainee has rights. It must hold that the same rights extend to every detainee who is similarly situated. This, too, is an effective constraint on the way the court exercises its policy judgment. Indeed, it is this very regularity that gives its decisions legitimacy as the product of judicial logic and reasoning.

### **Why We Need More Law, More Than Ever**

So what do we need the Constitution to do for us now? The answer, I think, is that the Constitution must be read to help us remember that while the war on terror continues, we are also still in the midst of a period of rapid globalization. An enduring lesson of the Bush years is the extreme difficulty and cost of doing things by ourselves. We need to build and rebuild alliances — and law has historically been one of our best tools for doing so. In our present precarious situation, it would be a terrible mistake to abandon our historic position of leadership in the global spread of the rule of law.

Our leadership matters for reasons both universal and national. Seen from the perspective of the world, the fragmentation of power after the cold war creates new dangers of disorder that need to be mitigated by the sense of regularity and predictability that only the rule of law can provide. Terrorists need to be deterred. Failed states need to be brought under the umbrella of international organizations so they can govern themselves. And economic interdependence demands coordination, so that the collapse of one does not become the collapse of all.

From a national perspective, our interest is less in the inherent value of advancing individual rights than in claiming that our allies

are obligated to help us by virtue of legal commitments they have made. The Bush administration's lawyers often insisted that law was a tool of the weak, and that therefore as a strong nation we had no need to engage it. But this notion of "lawfare" as a threat to the United States is based on a misunderstanding of the very essence of how law operates.

Law comes into being and is sustained not because the weak demand it but because it is a tool of the powerful — as it has been for the United States since World War II at least. The reason those with power prefer law to brute force is that it regularizes and legitimates the exercise of authority. It is easier and cheaper to get the compliance of weaker people or states by promising them rules and a fair hearing than by threatening them constantly with force. After all, if those wielding power really objected to the rule of law, they could abolish it, the way dictators and juntas have often done the world over.

On those occasions when the weak, using the machinery of courts, are able to vindicate their legal rights, the reason their demands are honored is generally that those who have the most influence in the system recognize it is in their own long-term interest to make the concession. Those who consider law a tool of the weak mistake these rare trade-offs for defeat, when — from the perspective of power — they are simply part of the cost of doing business. This is why, for example, the police and prosecutors embrace the Miranda warnings: they require that defendants be read their rights. But once the formality is satisfied, it is almost guaranteed that the defendants' statements will be admissible into evidence.

Applying the lesson that the world and the United States need law more than ever at this particular moment yields some specific conclusions. The executive branch certainly should be accorded considerable leeway in defending the nation from attacks by stateless groups like Al Qaeda. But it was an error of constitutional dimensions to choose Guantánamo as a global symbol of those efforts precisely because of the way it seemed to be outside the reach of our domestic Constitution, the law of any other country or international law itself.

The Supreme Court therefore was right to reinsert Guantánamo in the legal grid — but not because this was definitively the best

reading of the constitutional materials, which were contradictory and indeterminate. What justifies the decision is the practical necessity and importance of reassuring the citizens of the United States and the world at large that the United States had not given up the role it assumed after World War II as the chief proponent of the rule of law worldwide. Not every Supreme Court decision has this monumental symbolic effect — but the *Boumediene* case was guaranteed to be seen as either a victory or a defeat for the very idea of law itself. In an ideal world, the Supreme Court would not have had to send this message, and it could have avoided the substantial expansion of its own power to which it was driven by the foolishness of the Bush administration.

The *Medellín* case is trickier. On one hand, globalization inevitably inserts us into an ever-widening array of treaty regimes, each with its own mechanism of adjudication. There is no turning back the clock to the simpler world of the framers. Joining the World Trade Organization, as we have, or the Kyoto Protocol, as we ultimately have not, does detract from the democratic legitimacy of the laws that govern us. This lesson can be easily learned from a glance at the European Union, where countries increasingly cede sovereign authority to the bureaucrats in Brussels. Under these circumstances, there is much to be said for requiring either the treaty ceding this authority to speak explicitly, or else for Congress to make this concession expressly, in full view of the public who elects it.

On the other hand, there is the problem of timing. Had the United States not invaded Iraq under a claim of international law that many other countries rejected, or had the Guantánamo disaster been avoided by the exercise of wiser judgment, it would be relatively easy to conclude that the Supreme Court was right to pull us back from too rapid an entrance into an international order that undercuts our sovereignty. But the treaty decision came at just the moment when the United States was trying to reassert its commitment to the rule of law internationally. The conservatives who carried the day did not care. For them, upholding international judgments that differ from our own courts' is inconsistent with our core constitutional values. The message sent, then, in the world and at home, is precisely the wrong one for this historical juncture, when the United States needs — at least for the moment — to convince the world that the project of international legality is one in which we believe.

## What the Election May Bring

There are going to be many more opportunities in the coming years for the court to take a position on the Constitution and the international order. Should John McCain become president, there is good reason to believe he would be more committed than President Bush to the international rule of law. Influenced by his experience of being tortured in Vietnam, McCain has sponsored legislation requiring that U.S. government personnel comply with the Geneva requirement of humane treatment of prisoners. Yet McCain has also snubbed Justice Kennedy, promising to nominate justices like Roberts and Alito in their ideological orientation; justices of this persuasion are likely to see the Constitution in largely inward-looking terms.

Meanwhile, Barack Obama, with his globalized upbringing and insistence on multilateralism, could be expected, as president, to nominate justices more sympathetic to an outward-looking Constitution. But if, as seems likely, the first retirees from the court are liberals, the best Obama could hope for would be to maintain the status quo — not to institutionalize a liberal majority for the future.

Whichever candidate is elected, once the Bush administration is out of office, the war on terror will almost certainly be waged differently, and the constitutional issues that arise will not be exactly the same as before. Guantánamo Bay will probably be closed, and the legal team that planned it will be long gone. But most of its detainees will still have to be tried, and their appeals will reach the Supreme Court once again. Of course we will still want to catch terrorists — especially before they act — and we will have to figure out what to do with them when we do. No matter who is president, the United States will still find itself deeply enmeshed in the affairs of Afghanistan, even if in the next few years there are substantial troop withdrawals from Iraq.

At the same time, the processes of globalization have not been turned back by the war on terror. The growing global financial crisis calls for more international regulation, not less. Conflicts between U.S. courts and international tribunals about the meaning of our international obligations are going to become more and more

common, just as they have become for members of the European Union. Next time, the Supreme Court may not be able to avoid conflict by asserting that the courts are not obligated to listen to the international body. When that happens, new doctrines and solutions are going to have to be developed.

In these all-important processes, as always in the history of the court, people are everything. Justices vary widely in temperament, ideology, intelligence and preparedness. The best justices can be really very impressive; the worst ones truly disastrous.

Charged with interpreting the Constitution and therefore shaping its contemporary orientation, the Supreme Court needs to be extraordinarily sensitive to the demands of history. When the court gets it wrong, the consequences can be serious. The Constitution we get will still be the one we deserve, but our deserts need not be good ones. The Constitution, let us not forget, gave us slavery and segregation. It gave us dysfunctional limitations on progressive legislation that was desperately needed in the years before the Great Depression. We like to think the Constitution is always leading us toward a more perfect union. But this has not always been the case, and as with any experiment, there is no guarantee that it will be in the future.

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