Book Review

Stephen Breyer, *The Court and the World : American Law and the New Global Realities.* New York : Alfred A. Knopf, 2015.

Reviewed by **Herb Somers**, *Reference/Foreign & International Law Librarian*

On June 23, 2016, United Kingdom voters took to the polls to vote on a referendum to determine whether the UK should remain a member of the European Union. By the early hours of the next morning when the results were finalized, it was determined that the UK had narrowly voted for leaving the Union. This result roiled international financial markets, with all major exchanges suffering precipitous losses. Amid dire warnings of an impending global economic collapse by pundits, the British pound quickly reached a new 30-year low against the U.S. dollar while U.S. stocks lost roughly $800 billion in market value.

"Brexit" offers just one illustration of how closely the United States' legal and economic fortunes are intertwined with the legal regimes of hundreds of international organizations that are scarcely known or understood by the vast majority of Americans. Justice Stephen Breyer examines the many ways U.S. courts must take into account this quickly evolving international legal order in his book *The Court and the World: American Law and the New Global Realities.* While past works by Supreme Court justices have primarily taken an insular look at U.S constitutional law, Breyer looks beyond our shores to the foreign and international legal systems that American courts are now increasingly called upon to interpret and synthesize into American law. Breyer posits that American courts are now members of a "multinational judicial enterprise" that requires courts throughout the world to establish a meaningful legal dialogue among a multitude of diverse legal systems. He views this work as essential to ensuring well-reasoned decisions by American courts and also bolstering the rule of law throughout the world.

Cicero: "When the cannons roar, the law falls silent." Here, *The Young Cicero Reading.* Fresco, c. 1464. Wallace Collection, London.

In the first four chapters, Breyer examines the timely constitutional issues surrounding the President's power to respond to foreign security threats. He begins by quoting Cicero, who wrote that "[w]hen the cannons roar, the law falls silent." Cicero's words serve as an apt metaphor for the strong deference the Court accorded early presidents when they responded to threats against our nation. Abraham Lincoln famously suspended the writ of habeas corpus at the outbreak of the Civil War, allowing for the arbitrary arrest and detention of thousands of individuals. Presidential prerogatives were again left unbridled during the First World War, which saw the Wilson administration detain large numbers of individuals critical of that war.

> [Breyer] begins by quoting Cicero, who wrote that "[w]hen the cannons roar, the law falls silent."

The Court followed suit during the Second World War, granting the President considerable leeway in executing his war powers, which prompted challenges in such cases as *Curtiss-Wright**[1]* and *Ex parte Quirin**[2]*. This deferential practice culminated in the Court's *Korematsu**[3]*decision which approved the detainment of thousands of Japanese-Americans during the war. He also takes the reader through the development of the "political question" doctrine which was used frequently by the Court to quickly dispose of such cases without reaching the constitutional issues.

Justice Breyer then examines the Supreme Court's post-Second World War jurisprudence and describes how that previously unfettered Presidential power gradually was walked back by the Court. The *Steel Seizure Case* illustrates the dawning of the Court's more critical constitutional analysis of the limits of Presidential power in times of crisis[4]. As most law students know, the case is noted for Justice Jackson's concurrence dividing Presidential action into three categories depending on the presence or absence of Congressional authority. Justice Jackson concluded that President Truman's seizure of steel mills to prevent a strike during the Korean war fell into the third category which states that "when the President acts in ways that are incompatible with the express will of Congress, his powers are at their lowest and he may "rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter…."[5]. In the *Steel Seizure Case*, Jackson argued that Congress has enacted "statutory policies inconsistent with the seizure here."[6]

> Breyer states that the Steel Seizure case is notable as the first instance where the Court set real limits on presidential prerogative in security affairs during a time of war.

Four other justices concurred that the seizure fell beyond the President's powers, with members reaching the same result on different grounds. Breyer states that the *Steel Seizure* case is notable as the first instance where the Court set real limits on presidential prerogative in security affairs during a time of war.

The war against terrorism brought renewed scrutiny to the limits of executive power in times of conflict. Breyer analyzes a line of four cases decided between the years 2004 and 2008 stemming from the detention of enemy combatants at Guantanamo following 9/11. *Rasul**[7]* and *Hamdi,**[8]* both decided in 2004, concerned a federal court's competence to rule on the lawfulness of detaining enemy combatants at Guantanamo. In *Rasul*, the Court rejected the President's claim that the *habeas corpus* statute at issue imposed a geographic limitation on the court's ability to hear the case. *Hamdi* concerned whether the President, during times of war, could detain an American citizen as an "enemy combatant." While the Court agreed with the government that the President could indeed detain an American citizen as an enemy combatant, the majority again rejected the Executive's argument that a Court cannot review individual detention decisions, with Justice O'Connor stating that the executive cannot "erode" the "fundamental…right to notice and an opportunity to be heard."[9]

The third case, *Hamdan*[10], decided in 2006, concerned another Guantanamo detainee and the use of a special military commission created by executive order used to try the defendant.

Attorney Lambdin P. Milligan, convicted by a military tribunal during the Civil War on charges of conspiracy, appealed to the U.S. Supreme Court, which found in his favor: “Martial rule can never exist where the courts are open and in the proper and unobstructed exercise of their jurisdiction” (*Ex Parte Milligan* (1866)).

The Court, harking back to the post-civil war case *Ex parte Milligan**[11]*, held the use of such a commission was unlawful since the power to “institute tribunals for the trial and punishment of offenses” in time of war was in the hands of Congress, not the President acting without Congressional authority.[12] The final case, *Boumediene v. Bush**[13]*, considered whether an enemy combatant was still entitled to obtain a writ of *habeas corpus* even when Congress had repealed the statute at issue in *Rasul*, substituting a prohibition against obtaining such a writ. Again, the Court found the statute unconstitutional, grounding its decision on the importance of the writ as a fundamental right against arbitrary imprisonment.

Taken together, the Guantanamo cases see the Court more willing than ever to walk through the brambles to determine the constitutionality of executive decision-making in a time of crisis. They show the court striking a delicate balance between protecting individual liberty and providing the President the latitude to make important security decisions in times of crisis. Breyer sees the court moving decidedly away from an attitude of extreme deference to the chief executive to one of greater scrutiny. He states that the “inability of courts to predict accurately the nature of future risks, either to security or to civil liberties, argue strongly that judges should proceed case by case.”[14] Thus, the Court cannot abdicate its constitutional review power, and must proceed with the hard work of scrutinizing executive decisions implicating national security that threaten to curtail important constitutional protections. Breyer also sees these cases becoming far more technical and specialized, requiring the judiciary to develop the subject expertise to weigh complicated security and intelligence matters astutely in the future.

> The Alien Tort Statute (ATS) was enacted in 1789, yet it languished unused for nearly two hundred years until it was repurposed by inventive human rights lawyers as a tool for bringing human rights violators to justice in U.S. courts.

Breyer examines the intricate interplay between domestic and international law in "Opening the Courthouse Doors: The Alien Tort Statute and Human Rights" through scrutiny of a formerly obscure statute that provides an avenue for foreign litigants to bring suits for human rights violations in federal courts. The law in question, the Alien Tort Statute (ATS)[15] was enacted in 1789, yet it languished unused for nearly two hundred years until it was repurposed by inventive human rights lawyers as a tool for bringing human rights violators to justice in U.S. courts. The text of the law consists of only thirty-three words: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”[16] Originally enacted to protect foreign officials from assault and provide foreign individuals redress for universally unlawful acts such as piracy and privateering, lower federal courts began allowing its use to remedy grievous violations of human

rights in American courts. The 1980 Second Circuit landmark decision in *Filartiga v. Peña-Irala**[17]*** reinvigorated its use. A suit brought by Dolly Filartiga in U.S. courts for the murder of her brother in Paraguay sought $10 million in damages based on the Alien Tort Statute. The lower court dismissed her claim, stating that international law did not govern the treatment of a country's treatment of its citizens. On appeal, the Second Circuit overruled the trial court, stating that the universal condemnation of torture among nations of the world violated international law and was thus judicable in U.S. courts.

The Court's decision opened the floodgates of ATS cases in U.S. courts as numerous litigants attempted to bring actors responsible for other forms of egregious abuse such as slavery, genocide, and crimes against humanity to justice. Later courts also held that the statute could be applied against individuals who, while not directly responsible for human rights violations, were found to have aided and abetted these misdeeds. Inventive lawyers would soon use these decisions to bring suits against corporations operating in nations where human rights abuses were rife. Breyer sees this surge of litigation as being problematic in four ways. First, it raises questions of legitimacy. In applying the "law of nations" to these cases, are the views of foreign courts and legal scholars truly reflective of American legal traditions? Second, issues of capacity arise: are American courts the proper institutions to determine whether a violation of international law has occurred? Third, there are questions of interference. Do such suits interfere with our relations with other nations? Finally, Breyer identifies issues of universality, questioning whether American judges applying the statute are competent to create a system that easily allows other nations to follow our lead.

> When examining the question of what torts the statute encompassed, the Court pointed to a limited set of actions identified in Blackstone's Commentaries...

Outside the E. Barrett Prettyman United States Courthouse (Washington, DC): Sir William Blackstone, in bronze, by sculptor Paul Wayland Bartlett (1920).

Given these concerns, it was inevitable that the Supreme Court would accept an ATS case to define categorically the statute's scope and reach. That opportunity arrived in 2004 in *Sosa v. Alvarez-Machain*.[18]This case concerned the Mexico kidnapping of Doctor Alvarez-Machain, who was later brought to the U.S. by DEA agents to be tried for murder and torture. After an acquittal, Alvarez-Machain brought suit against one of his abductors under the ATS in a U.S. court. The Supreme Court agreed to hear the case to determine if the kidnapping was indeed a violation of the "law of nations." Breyer suggests that the Court took the middle ground in this case by rejecting two extreme readings of the statute proposed by the litigants. The defendant argued that the statute was merely jurisdictional in nature, and its use depended upon a legislature creating a tort for a violation of the law of nations, which did not exist either at the state or federal level. Secondly, the defendant rejected the plaintiff's argument that the law provided an open-ended "authority for a new cause of action for torts" with no limits on the scope of the claims. When examining the question of what torts the statute encompassed, the Court pointed to a limited set of actions identified in Blackstone's *Commentaries*, namely violation of safe conducts, offenses against ambassadors, and piracy.[19] As to other torts that might fall within the ambit of the statute, the Court stated that they must represent "a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[20]

Using this test, the Court then found that the ATS did not recognize a claim for the "arbitrary arrest" at issue in *Alvarez-Machain*. While the Court did not entirely foreclose avenues for bringing suit under the ATS, it greatly reduced the number of violations under laws of nations that potentially could be actionable.

The *Alvarez-Machain* decision, although limiting, did little to staunch the flow of ATS cases brought in federal courts, and the Court again was called to clarify the scope of the case. In 2012, the Court heard *Kiobel v. Royal Dutch Petroleum Company**[21]**,* which involved a suit brought under the ATS alleging murder, torture, and rape in Nigeria by Nigerian military and police forces acting on behalf of the Shell Petroleum Development Company. Litigants were asked to address the question of "[w]hether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States."[22] The Court declined to extend the statute to actions outside the U.S., holding that a presumption against extraterritoriality attached to the statute. This presumption was meant to assist courts in avoiding conflicts between U.S. and foreign law as well as protecting the Court from interfering in the foreign affairs powers of the executive and legislative branch. The Court did leave one narrow avenue of escape for future litigants by leaving unanswered the question of whether aliens might sue American defendants who violated the "law of nations."[23] The decision also left a glimmer of hope for potential litigants by stating that even though the actions took place outside the U.S., a claim might still be actionable: "where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."[24] The Court left open the question of what would "touch and concern the territory of the U.S." and what "sufficient force" entails. Ultimately, Breyer believes that Congress is the proper institution to provide the solutions to the questions left unanswered by the Court. The statute has not been amended for over two hundred years, and he sees this as an opportune moment for Congress to provide guidance to the Court on the proper scope and application of the ATS. In the absence of Congressional action, Breyer acknowledges that courts will need to continue to be well-versed in foreign and international law as well as international relations in the field of human rights in order to apply the statute judiciously in future cases.

> Ultimately, Breyer believes that Congress is the proper institution to provide the solutions to the questions left unanswered by the Court.

Other chapters of *The Court and the World* address topics such as the foreign reach of American statutes, treaty interpretation, and the use of arbitration in international investment disputes, a burgeoning area of international practice. A later chapter on the treaty power examines how the Court interprets and incorporates decisions of international tribunals relevant to the cases it considers. Examples are mined from criminal procedure cases that implicate the Vienna Convention on Consular Relations (VCCR) where foreign defendants were not provided with their right under the treaty to have their country's consulate notified of their arrest. The Court in those cases chose to

give effect to a "procedural default" rule precluding consideration of the VCCR violation despite a decision by the International Court of Justice (ICJ) that the defendant should be given relief. While the Court gave the ICJ decision "respectful consideration," it was not obliged to follow its decision. These decisions implicate the non-"self-executing" nature of U.S. treaties that precludes them from being binding as a matter of U.S. law while simultaneously binding the U.S. at the international level. Breyer argues that the level of deference to be accorded the decisions of international tribunals will continue to be a pressing issue as the United States participates in other organizations with dispute resolution bodies that interpret treaties to which it is a party.

The late Justice Antonin Scalia: Foreign law can "never, never be relevant to the meaning of the U.S. Constitution."

Perhaps one of the more politically contentious subjects the book addresses is the issue of Supreme Court justices citing foreign law in their decisions. Breyer's foremost opponent on this issue, his colleague on the Court, the late Justice Antonin Scalia, once emphatically stated that foreign law can "never, never be relevant to the meaning of the U.S. Constitution."[25] Critics of the citation of foreign law fear that by citing it, courts abandon meticulous legal analysis in favor of a simple "head count" of courts who fall on either side of a particular issue. They also suggest that the widespread citation of foreign decisions by American courts will, by a slow process of accretion, replace bedrock constitutional principles with foreign ones that have no foundation in the American legal traditions that underlie our Constitutional system. Breyer dismisses these arguments out of hand and claims they are beside the point. He contends that the process of globalization makes it even more essential that judges understand and take into account foreign legal practices. Breyer asserts that the "demands of the Court's work make impossible the sort of hermetically sealed legal system some might imagine America able to sustain, if indeed it ever existed."[26] The practice of citing foreign law is not driven by the "cosmopolitanism of some jurists that seek this kind of engagement but the nature of the world itself that demands it."[27]

> Breyer asserts that the "demands of the Court's work make impossible the sort of hermetically sealed legal system some might imagine America able to sustain, if indeed it ever existed."

He argues that reference to foreign law, while not legally dispositive for producing a particular decision, can assist courts in reaching better-reasoned judgments without the danger of inhibiting the Court's decisional autonomy. Breyer suggests that since the end of the Second World War, we have seen a proliferation of nations that have crafted legal systems with independent judiciaries in our nation's image and which share many of the bedrock constitutional principles we hold sacred. He argues that it would be ludicrous to simply ignore the decisions of these similarly-situated constitutional courts that have grappled with comparable legal problems. They can provide context and perspective to interpret American law, without any diminution of our historical legal traditions. The engagement of American courts in this universal legal dialogue has created, according to Breyer, "clusters" of "legally like-minded nations whose judges learn things from each other, either as a general matter or in particular areas of law such as security, commerce, or the environment."[28] Breyer sees opportunity in the Court's engagement in a global legal dialogue which provides the means to "promote adherence to and the adoption of those basic constitutional and legal values for which the court and the Constitution stand, and which we have bequeathed to others."[29] He contends that this global legal dialogue will continue with or without the United States' participation, and by adding our voice to the

conversation, we are more likely to advance those values throughout the world, rather than undermine them as critics have argued.

GW Law Dean Blake Morant, then President of the Association of American Law Schools, with U.S. Supreme Court Justice Stephen Breyer at the AALS annual meeting (2016).

The Court and the World offers a wide-ranging survey of the many challenges the American lawyer faces in an increasingly "intermestic" legal landscape. It remains unique among the writings of Supreme Court judges in that Breyer advocates that the judiciary acknowledge and interact with the larger international legal community. He believes American courts cannot function properly in a vacuum, and their engagement with international and foreign law will not diminish the sovereignty of America as some have argued, but rather, it will strengthen our prestige throughout the world and foster the rule of law. Lawyers not conversant in international legal practice will recognize in *The Court and the World* an instructive overview of the many areas of law where foreign and international intersect with domestic legal practice, while law students will find a useful roadmap for identifying and developing the skills needed to prosper in the legal practice of the future.B

JACOB Catalog Record: *The Court and the World*...(2015)

Footnotes

[1] United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)

[2] 317 U.S. 1 (1942)

[3] Korematsu v. United States, 323 U.S. 214 (1944).

[4] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)

[5] *Id.* at 637.

[6] *Id.* at 639.

[7] Rasul v. Bush, 542 U.S. 466 (2004)

[8] Hamdi v. Rumsfeld, 542 U.S. 507 (2004)

[9] *Id.* at 533.

[10] Hamdan v. Rumsfeld, 548 U.S. 557 (2006)

[11] 71 U.S. (4 Wall.) 2 (1866).

[12] *Hamdan,* 548 U.S. at 592 (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 140 (1866).

[13] 553 U.S. 723 (2008)

[14] Stephen Breyer, The Court and the World: American Law and the New Global Realities 84 (2015).

[15] 28 u.s.c. § 1350 (2012).

[16] *Id.*

[17] Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

[18] 542 U.S. 692 (2004).

[19] *Id.* at 720.

[20] I*d.* at 725.

[21] Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013)

[22] *Id.*

[23] *Id*. at 1668.

[24] *Id*. at 1669.

[25] Scalia Sears Supreme Court For Foreign Law References http://www.law360.com/articles/661690/scalia-sears-supreme-court-for-foreign-law-references [https://perma.cc/GDE2-6XCC]

[26] Steven Breyer, The Court and the World: American Law and the New Global Realities 246 (2015).

[27] *Id.* at 245.

[28] *Id.*

[29] *Id.* at 246.

Photo Credits

Cicero: Public Domain

Milligan: Public Domain

Blackstone: Courtesy of AgnosticPreachersKid

Scalia: Courtesy of Stephen Masker

Blake Morant/Stephen Breyer: Courtesy of The George Washington University Law School