

THE FUTURE OF LOU HENKIN'S HUMAN RIGHTS MOVEMENT

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It is a wonderful honor to be here today, to speak in praise of my hero, the great Lou Henkin. You will notice that in describing Lou I use two vastly overused words, “great” and “hero,” but I use both terms advisedly. As the late John Hart Ely used to say, you don’t need many heroes if you choose carefully. And along with my father, and the late Harry Blackmun, Lou Henkin has been my hero for nearly 30 years.

I first met Lou twenty-two years ago in the company of Benno Schmidt, who was then the Dean of this great law school. I was looking for a teaching job; during my interview, as a recruiting stratagem, Benno took me to Lou’s office. By coincidence, at that moment Lou opened the door, looking exactly as he does today—and we shook hands. Benno turned to me with a huge grin on his face, put his hand on my shoulder, and said, “Harold, I can remember the first time that *I* met Lou Henkin.”

At that moment, I felt that I was in the presence of greatness. Now the word “greatness” is vastly overused. It is hard to tell the difference between greatness and mere excellence, but you know it when you see it. It is the difference between a baseball player like Jackie Robinson, for example, and someone, like say, Alex Rodriguez, or the difference between Trump Tower and the Great Wall of China.

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When someone is truly great, that means you will not see their like again, for three or four generations. And by that measure, Lou Henkin is one of the very few certifiably great people I have met. That is why I would go anywhere, and do anything, to honor the great Lou Henkin.

Although we did not meet in person until 1984, it was actually years earlier that Lou first began to shape my moral and intellectual universe. As a law student, I remember reading *Foreign Affairs and the Constitution*¹ and seeing a new vista opening from Lou's amazingly clear analysis. I felt like I had been given a map, with Lou as my cartographer, charting out a new intellectual terrain—the law of U.S. foreign policy—which has engrossed me ever since. As a graduate student studying international relations, I read his great book *How Nations Behave* and I paused over a sentence sometimes called “the sentence that launched a thousand articles”: “It is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all the time.”² In my case, that book pushed me to an inquiry into why nations obey international law that will occupy me for the rest of my life.

The first time I saw Lou in the flesh was not at Columbia but at the Mayflower Hotel in Washington, D.C. He was running a meeting of the *Third Restatement of the Foreign Relations Law of the United States*³ for which, as you know, he was the chief reporter. The scene was reminiscent of Daniel in the lion's den. Lou was standing in a room of about this size, with hundreds of lawyers present, none of them billing less than 500 dollars an hour; they were ferociously criticizing the wording of Section 712 of the Restatement—the expropriation provision, which was hotly at issue in a number of ongoing arbitrations.⁴ And after one particularly savage criticism, Lou turned to the speaker and said to him something I will never forget: “That may be what they pay you to advocate, but that is not the law, and I'm not going to say it.” Sound familiar?

1. Louis Henkin, *Foreign Affairs and the United States Constitution* (2d ed. Oxford Univ. Press. 1996) (1972).

2. Louis Henkin, *How Nations Behave* 47 (2d ed. 1979) (1968).

3. Restatement (Third) of Foreign Relations Law of the United States (1987).

4. *Id.* § 712 (setting forth the responsibility of a state under customary international law for injury to property and other economic interests of private persons who are foreign nationals).

That was the moment I realized that what makes Lou Henkin a genuine hero is not just his brilliance and his scholarly achievement, but his absolute integrity and incorruptibility. If Lou says it, it must be right, not just because there is no one smarter, but because there is no one more honest. During the five decades that he has graced first Penn, then Columbia Law Schools, his biggest impact has been the structure of international human rights law that he has put in place. There is no person on this planet who has not found shelter or affirmation in his ideas. In the years I have been lucky enough to work in these fields, there is no important issue on which he has not spoken or taken a stand. Even as he has supposedly been retired these past few years, he has simply used the time he has freed up to play an even more active role as teacher, mentor, and example to yet another generation of law students.

What makes this all more amazing is that Lou is not one of those people who loves human rights but hates human beings. The number of people worldwide who have been touched by his clarity of thought is matched only by those who have been blessed by his personal kindness. And when I think of Lou, I picture him walking with his dear friend, Justice Harry Blackmun, wearing matching cardigan sweaters, through the meadows of Aspen, talking with passion about everything from the death penalty to the right to privacy. I think of him as a man of achievement who reached out to the underdog, to the unnoticed, and to the unknown. Why else was it, when I was a young minority professor in the first year of my teaching, that the first person who ever invited me to speak on a scholarly panel was the great Lou Henkin? And why was it, that when his name was put forward for election as the first U.S. delegate to the Human Rights Committee of the International Covenant on Civil and Political Rights, he was elected by acclamation? It was not just because of his towering academic reputation, but because so many of the African delegates could remember human kindnesses that Lou had paid to them while they lived here as students in New York City.

And how could it be otherwise when you're married to Alice Hartman Henkin, a woman and lawyer whose lifelong commitments to justice and society match your own? And if you want to know what love is, you ought to watch the two of them walking through the meadows at Wye Plantation, arm in arm, talking about international human rights. Lou and Alice are lovers and partners, who when the sun sets to start the Sabbath, close their books, read the Torah, and

remind themselves that in the end, the greatest truths in life lie in love, not in the musings of fallible human beings.

Your Dean has invited me today not just to praise Lou Henkin, but to appraise the future of his most famous offspring—the international human rights movement.

Let me suggest that, in the time that Lou has inhabited this field, international human rights law has gone through four modern phases: (1) in the early years, an era of “universalization” of human rights norms; (2) in the second phase, an era of “institutionalization,” in which human rights institutions were created: governmental, intergovernmental, and nongovernmental; (3) a third era of “operationalization,” starting roughly with the Helsinki Accords in 1976, whereby a human rights compliance process became operationalized and the institutions and the norms began to work together to produce results; and (4) the era in which we now live, the age of “globalization.” The first period of this current era—running from the fall of the Berlin wall to the fall of the Twin Towers—was a period of global optimism, where we saw that globalization could be a tool for the transformation of the economy, rights, and global governance. But then five years ago, with the dawn of the War on Terror, we commenced an era of global pessimism that stays with us until today.

The question we should be asking ourselves is: on what does the future of the human rights movement depend? Critical to that inquiry has been the role of the United States in human rights. We know Lou’s famous statement, “in the cathedral of human rights, the United States is more like a flying buttress than a pillar—choosing to stand outside the international structure supporting the international human rights system, but without being willing to subject its own conduct to the scrutiny of that system.”⁵ As of September 11, 2001, the U.S. human rights policy had been very much defined by Lou’s own thinking: (1) a policy of diplomacy backed by force only as last resort; (2) a human rights policy based on universalism and what Franklin Roosevelt called the “four freedoms”: freedom of speech, freedom of religion, freedom from want, and freedom from fear; (3) a democracy-promotion policy

5. Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 St. Louis U. L.J. 293, 308 (2002) (attributing the statement to Louis Henkin).

dedicated to building democracy from the bottom up; and (4) a diplomatic approach based on strategic multilateralism and tactical unilateralism.⁶ The core prescription was simple: that to solve global problems, we needed to foster global cooperation among global democracies.

Five years later, where are we? Each of these tenets has been turned upside down, against the better thinking of many people, exemplified by Lou. We now see a policy that too often embraces force first, involving preemptive strikes in wars of choice; a human rights policy that rejects universalism and trumpets freedom from fear as the overriding value; a democracy-promotion policy that attempts to build democracy from the top down in dangerous places like Afghanistan and Iraq; and a diplomatic approach that all too often relies on strategic unilateralism and tactical multilateralism, with accompanying antipathy to international law and indifference to the concept of global cooperation.

Significantly, Lou Henkin's original foreign policy vision was both made possible and cabined by his approach to Foreign Affairs and the Constitution, a four-part vision that, as of September 2001, was still widely shared: first, the constitutional vision of shared powers, based on the *Steel Seizure* case's⁷ premise that checks and balances don't stop at the water's edge; second, the idea that our Constitution recognizes no law-free zones, law-free persons, law-free courts, or law-free practices; third, the idea that the government should not infringe upon civil liberties without a clear legislative statement; and fourth, a presumption that there should be relatively modest distinctions between citizens and aliens, particularly with respect to social and economic rights.

Where are we now, five years later? Again, the world has been turned upside down. A constitutional theory is being urged based not on the *Steel Seizure* case, but on extreme unfettered executive power, invoking dicta from *United States v. Curtiss-Wright Export Corporation*,⁸ what we used to call the "*Curtiss-Wright* so I'm

6. President Franklin Delano Roosevelt, Annual Message to Congress: The Four Freedoms (Jan. 6, 1941), available at <http://www.fdrlibrary.marist.edu/od4freed.html>.

7. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

8. In *United States v. Curtiss-Wright Export Corp.*, Justice Sutherland states:

[W]e are here dealing not alone with an authority vested in the

right” cite. We now see law-free zones (e.g., Guantánamo); law-free practices (e.g., extraordinary rendition); law-free courts—we call them “military commissions”; and law-free persons, whom we call “enemy combatants.” All of these practices the Government claims are exempt from judicial oversight. The Executive branch now infringes upon civil liberties, based not on clear congressional statements, but on vague legislative mandates. And we now see sharp and growing distinctions between aliens and citizens that have led millions of people to march in the streets.

The latest twist in this dramatic flip-flop has been the executive branch’s surprising claim that it is a law unto itself in the areas of torture, NSA spying, data-mining, and most recently, presidential signing statements. What all this brings to mind is Richard Nixon’s statement, “when the President does it, that means that it is not illegal.”⁹ Or, as Henry Kissinger put it: “The illegal we do immediately. The unconstitutional takes a little longer.”¹⁰

On reflection, Kissinger’s quip carries a sad ring of truth: unconstitutional action does take a little longer, because unconstitutionality cannot succeed unless the checks and balances fail. That brings us to an important moment last summer: the Supreme Court’s decision in *Hamdan v. Rumsfeld*.¹¹ By a five to three vote, the Justices struck down the Bush Administration’s system of military commissions. The holding of the case was straightforward: the President’s 2001 military commission order was authorized by neither the commander-in-chief power nor the Authorization for Use of Military Force (AUMF) Resolution; moreover, the military commissions violated the Uniform Code of Military Justice (UCMJ) as well as Common Article 3 of the Geneva

President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.

299 U.S. 304, 319–20 (1936).

9. *Excerpts from Interview with Nixon About Domestic Effects of Indochina War*, N.Y. Times, May 20, 1977, at A16.

10. DuPre Jones, *The Sayings of Secretary Henry*, N.Y. Times Mag., Oct. 28, 1973 at 95.

11. *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006).

Conventions.¹²

Since *Hamdan*, some have claimed that the case is merely about a lack of legislative authority or a defective system of military commissions. Lou Henkin does not believe that and neither should you. *Hamdan* is much bigger than military commissions; it is the most important decision on executive power since the *Steel Seizure* case, because it tells us how Congress, the President, and the courts should work together in a constitutional system to fight a war against terrorists. As Justice Felix Frankfurter said in *Guaranty Trust Company v. York*, *Hamdan* is not so much an important case as it specifies a “way of looking at law,” directing that we conduct the war on terror in a manner consistent with core norms of constitutional and human rights law.¹³ What *Hamdan* teaches is that when the President responds to a war on terror, he cannot go it alone, citing unspecified inherent constitutional authority or vague statutory blank checks. Instead, he must act within the scope of existing statutes and ratified treaties.

Fairly read, *Hamdan* should take us “back to the future,” to help set the world of public law right by restoring the four core constitutional and international principles that Lou Henkin taught us. First, all eight of the Justices, including the dissenters, relied not on *Curtiss-Wright*, but operated within the *Steel Seizure* framework, invoking Henkin’s vision of shared constitutional power. Second, the majority rejected human rights exceptionalism, denying the Government’s claim that Hamdan was a person outside the law held in an extra-legal zone—Guantánamo—where he could be subject to the jurisdiction of a non-court. Instead, the Court treated as binding a universal treaty obligation, Common Article 3 of the Geneva Conventions.¹⁴ Notice the Court’s recognition that Common Article 3 is not about POW status, but about minimal standards of humane treatment, that every nation, including ours, is obliged to give its detainees. Common Article 3 is not about “them” and who they are; it is about us and who we are. The White House and some members of

12. *Id.* at 2754–58.

13. *Guaranty Trust Co. v. York*, 326 U.S. 99, 101 (1945).

14. *Hamdan*, 126 S.Ct. at 2796 (“Common Article 3, then, is applicable here and, as indicated above, requires that Hamdan be tried by a ‘regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.’”); see Geneva Convention Relative to the Treatment of Prisoners of War art. 3, opened for signature Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

Congress have complained that the terrorists have not signed Common Article 3 or the Geneva Conventions;¹⁵ but in the same way, the whales have not signed the Whaling Convention! The issue is not whether they have signed those agreements or not, but whether the United States as a state party is obeying its minimal obligation to provide humane treatment.

Third, the Justices rejected the idea that you could hold someone in violation of their rights without a clear legislative statement. As Justice Breyer said in his concurrence, the AUMF should not be read as a “blank check” to endorse without limit any manner of executive action.¹⁶ And fourth and finally, the Justices held that even alleged enemy aliens have certain rights in a process of detention and trial in which they face likely punishment. The claim that we are in a “war on terror” does not bring us outside the law. The Court flatly rejected the Government’s attempted dichotomy between law and war by requiring consistent application of the law of war to Hamdan’s case. As the Court put it: “regardless of the nature of the rights conferred on Hamdan, they are, as the Government does not dispute, part of the law of war. And compliance with the law of war is the condition upon which the authority set forth in Article 21 [of the UCMJ] is granted.”¹⁷

Read carefully, the underlying theory of *Hamdan* also rejects: the President’s supposed freedom to authorize torture and cruel

15. See, e.g., White House Memorandum, Humane Treatment of Taliban and al Qaeda Detainees (Feb. 7, 2002), available at http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf (“[N]one of the provisions of Geneva apply to our conflict with al Qaeda . . . [because] al Qaeda is not a High Contracting Party to Geneva.”); see also *Nomination of Alberto Gonzales to be Attorney General: Hearing Before the Senate Comm. on the Judiciary*, 109th Cong. (2005) (statement of Sen. John Cornyn) (defending the proposition that the Geneva Convention does not apply to al Qaeda because it is not a signatory), available at http://judiciary.senate.gov/member_statement.cfm?id=1345&wit_id=3740; see also *Nomination of Alberto Gonzales: Senate Hearing*, 109th Cong. (2005) (floor statement by Sen. Orrin Hatch) (restating the argument that only signing parties are covered by the Geneva Convention), available at http://hatch.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=1277&IsTextOnly=1.

16. Hamdan, 126 S.Ct. at 2799 (Breyer, J., concurring) (“The Court’s conclusion ultimately rests upon a single ground: Congress has not issued the Executive a ‘blank check.’”).

17. *Id.* at 2794 (majority opinion) (internal citations omitted).

punishment in the face of the McCain Amendment;¹⁸ the President's supposed freedom to engage in broad NSA wiretapping without a Foreign Intelligence Surveillance Act (FISA) warrant or amendment;¹⁹ and the notion that, even with legislative approval from this Congress, the President can authorize military commissions whose procedures are inconsistent with the UCMJ and the Geneva Conventions.

In sum, *Hamdan* provides the basis for taking us back to the future. Followed correctly, it reaffirms the core elements of Lou Henkin's constitutional view: a foreign affairs power based on *Steel Seizure's* vision; a return to human rights universalism, which rejects law-free zones, persons, and courts; denial that civil liberties may be infringed without a clear legislative statement; and refusal to accept the treatment of aliens as second-class persons devoid of rights.

In *Hamdan*, the Supreme Court reaffirmed the spirit of the *Steel Seizure* case for the 21st Century. *Hamdan* marked a major step toward reestablishing what Justice Jackson termed in his *Youngstown* concurrence the "equilibrium established by our constitutional system."²⁰

The decision confirms that constitutional checks and balances do not stop at the water's edge. *Hamdan* instructs that our constitutional democracy must fight even a War on Terror through balanced institutional participation: led by an energetic executive, but guided by an engaged Congress and overseen by a judicial branch that enforces enacted law. The Court's ruling recognizes that the best way to develop a sustained democratic response to external crisis is through interbranch dialogue, and not executive unilateralism. As Justice Breyer put it:

[w]here, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so. The Constitution places its faith in those democratic means.

18. Detainee Treatment Act of 2005, Pub. L. No. 109-148 §§ 1001–1006 et seq., 119 Stat. 2679, 2739 (to be codified at 42 U.S.C. § 2000dd) (prohibiting torture and cruel, inhuman, and degrading treatment of individuals under custody or control of the U.S. government).

19. For elaboration, see Koh, *supra* note 1 at 2365-67.

20. 343 U.S. at 638 (Jackson, J., concurring).

Our Court today simply does the same.²¹

In the fall of 2006, Congress hastily enacted “quick-fix” military commissions legislation to reverse *Hamdan*’s holding, in the process attempting to strip away the detainees’ right to habeas corpus.²² But by trying to undo the Court’s ruling, Congress unwisely placed us on the wrong side of our Constitution, international law, and history, creating the likelihood that the new Military Commissions Act may also soon be struck down by the Supreme Court.²³ At the same time, the Democratic-controlled Congress elected in November 2006 has introduced a number of bills seeking to revise or repeal the Military Commissions Act to bring it into compliance with both the UCMJ and Common Article 3 of the Geneva Conventions, to give detainees the “full and fair” trials they were originally promised in March of 2001.²⁴

In short, if Congress finally understands what *Hamdan* stands for, and reads it as an invitation to go back to the future, it may mark an occasion for a fresh start with regard to these issues. But we ought not forget that the war on terror is only one of the human rights problems that we face in an age of globalization. We all know the laundry list of other problems that we face: North Korea; the Iraq war; Hezbollah; Iran; global warming; AIDS; avian flu; problems of democracy in such places as Russia, Thailand, Nigeria, Zimbabwe, and the Mideast; and the relationships between the United States and international bodies in a time of transition at the United Nations.

21. *Hamdan*, 126 S. Ct. at 2799.

22. See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

23. In April 2007, the Supreme Court denied one effort to expedite review of the legality of the Military Commissions Act of 2006, with three Justices dissenting. See *Boumediene v. Bush*, 127 S.Ct. 1478 (2007). However, on June 29, 2007, the Supreme Court vacated its previous denial of certiorari and agreed to hear an appeal from a D.C. Circuit decision upholding the Act. See *Boumediene v. Bush*, 127 S.Ct. 3078 (2007).

24. See, e.g., Jeff Zeleny, *Democrats Hope to Expand Rights at Guantánamo*, N.Y. Times, June 6, 2007 (describing legislation). For an analysis of the legislative prerequisites of a full and fair trial process for Guantánamo detainees, see Testimony of Harold Hongju Koh before the Senate Committee on the Judiciary regarding *Hamdan v. Rumsfeld*: Establishing a Constitutional Process, July 11, 2006 at 11-16, available at http://www.law.yale.edu/documents/pdf/Deans_Office/KOH_Hamdan_TESTIMO_NY.pdf.

What Lou taught us is that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.”²⁵ But how to bring the United States back into compliance with its international obligations in a way that allows us to address these human rights challenges? We need a broader strategy: whereby the executive branch uses diplomacy and compliance with international law to promote global cooperation; the legislature maintains our compliance with our international obligations; the courts continue to pay “a decent respect to the opinions of mankind”;²⁶ and civil society—including human rights groups and universities like this one—monitor our government leaders and hold them accountable for human rights misconduct in places like Abu Ghraib and the treatment of ghost detainees.

In each of these areas, the foundational work was done by—you guessed it—the great Lou Henkin: writing on foreign affairs in *Foreign Affairs and the Constitution*;²⁷ compliance with international law in *How Nations Behave*;²⁸ human rights universalism in *The Rights of Man Today*;²⁹ transnational law in *The Restatement [Third] of Foreign Relations Law*;³⁰ and the rights of aliens and refugees in *The Constitution and United States Sovereignty: A Century of “Chinese Exclusion” and Its Progeny*.³¹

The simple lesson that Lou Henkin taught us is that protecting human rights law is far too important a task to leave to governments. It is a challenge for all us who are twenty-first century citizens and lawyers. So if I ask: On what does the future of Lou Henkin’s human rights movement depend? The answer is: it depends

25. Henkin, *supra* note 2, at 47.

26. *Cf.* The Declaration of Independence para. 1-2 (U.S. 1776) (“When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and of Nature’s God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation Let Facts be submitted to a candid world.”).

27. Henkin, *supra* note 1.

28. Henkin, *supra* note 2.

29. Louis Henkin, *The Rights of Man Today* (1978).

30. Restatement (Third) of Foreign Relations Law of the United States (1987).

31. Louis Henkin, *The Constitution and United States Sovereignty: A Century of “Chinese Exclusion” and Its Progeny*, 100 Harv. L. Rev. 853, 853–86 (1987).

on whether we have the wisdom to follow the teachings of Lou Henkin.

In his dedication to *How Nations Behave*, Lou described his father in the words of the Psalms. He called his father a man “Who All His Days Loved Law, Sought Peace and Pursued It.”³² Today let me describe my hero the same way, as our greatest international lawyer, a simple man “Who All His Days Loved Law, Sought Peace and Pursued It.”

32. Henkin, *supra* note 2, at v.