

authorization as we move into the third century of the Constitution and a new era of collective security.

REMARKS BY HAROLD HONGJU KOH*

In this, the bicentennial of the Bill of Rights, it is worth talking not just about what our Constitution constitutes (i.e., our structure of government) but also about what it protects (i.e., the rights of individuals to be free from governmental interference and to be free to pursue self-fulfillment). After the equal protection and due process revolutions of the 1950s and the 1960s—exemplified by the Supreme Court's decisions in *Brown v. Board of Education* on the equal protection side, *Miranda v. Arizona* in criminal due process, and *Goldberg v. Kelly* in civil due process—in the 1980s and 1990s, American constitutional law refocused its attention upon issues of structure. This reorientation was exemplified by the line of Burger and Rehnquist Court cases starting with *Buckley v. Valeo* (about the constitutionality of the Federal Election Commission), running through *Northern Pipeline*, *INS v. Chadha*, *Bowsher v. Synar*, *Morrison v. Olson*, and, most recently, the *Mistretta* case (upholding the constitutionality of the sentencing guidelines).

Similarly, in American foreign affairs law, the 1950s and 1960s signaled the high watermark for rights with the Warren Court's decisions in *Reid v. Covert*, *Kent v. Dulles*, and *U.S. v. Robel*, before structural issues seized center stage in the foreign affairs context as well. So just as *Roe v. Wade* marked a kind of last major gasp for rights in the domestic realm before the Burger Court, the *Pentagon Papers* case, decided by an unholy alliance of First Amendment absolutists and executive supremacists, marked a last gasp for rights in foreign affairs before issues of structure took control of the Burger Court's foreign affairs docket as well—starting with *Goldwater v. Carter*,¹ which involved treaty termination; *Dames & Moore v. Regan*,² involving foreign claims settlement; *INS v. Chadha*, the legislative veto case; and culminating only a few months ago in Judge Harold Greene's decision in *Dellums v. Bush*, which holds (among other things) that the President does require the approval of Congress before he goes to war.

While we think about cases like *Chadha* and *Dellums* as being about structure and not rights, they illustrate that the dichotomy between structure and rights in foreign affairs is a false one.³ For as much as *Chadha* involved the battle over an institutional tool, namely the legislative veto, at base, that case concerned the *right* of an alien not to be deported unconstitutionally. Similarly, I think we miss much of the import of the *Dellums v. Bush* ruling if we see it as merely a case that said that Congress must approve a decision to go to war (although holding in that case, that the underlying issue was not ripe). What Judge Greene was implicitly acknowledging was not simply the prerogatives of Congress, but also that the soldiers who were being sent to that war would have had a *right* not to fight in an unconstitutional, unauthorized war. If President Bush had not subsequently sought congressional authorization, then tens, if not hundreds, of soldiers would have invoked that right across the country, citing Judge Greene's decision as reason why they should not have to fight and die in an unauthorized, unconstitutional

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¹ 18 ILM 1488 (1979).

² 20 ILM 897 (1981).

³ The Supreme Court recently made a similar point in *Dennis v. Higgins*, III S.Ct. 865 (1991).

war. I cannot help but think that the grim prospect of litigating scores of such cases might have influenced our President to ask Congress for authorization, without which it would have been unthinkable for him to proceed.

The right of soldiers not to fight was not the only individual right at stake in the Iraq-Kuwait war. In war, truth may be the first casualty. But we have learned from *Korematsu* that rights follow close thereafter. In just the few short weeks that the war raged, we heard about denial of press access to the conflict and to photograph bodies that were being returned to the Dover Air Force Base. We heard Fifth Amendment claims of uncompensated takings from American companies. We heard about violations of the equal protection rights of women to participate in combat or of Arab-Americans to be free from discrimination at home. What is most striking is that none of these claims was sustained on the merits, although neither the Constitution nor the Bill of Rights contains a "foreign affairs exception."

Even a quick rundown of Bill of Rights cases in foreign affairs demonstrates that this recent history was no aberration. This leads me to my central message: that a lesser standard of protection for constitutional rights is being applied when foreign affairs are at stake, whether we are talking about here or abroad and whether we are talking about citizens or aliens.

To prove my point, let me just walk through the ten amendments. We have already talked about the limits placed on First Amendment press access in the Persian Gulf case. A similar case in Grenada, *Flynt v. Weinberger*, was declared moot. The free press clause suffered additional body blows in the *Snepp* case and from the government's successful effort to get an injunction against *Progressive* magazine to enjoin publication of an article about building a nuclear device. Our preferred First Amendment right to free speech was denied to aliens outside the United States in *Kleindienst v. Mandel* and was effectively narrowed by the Supreme Court decision in *Haig v. Agee*, which permitted a content-based revocation of a passport on the ground that the restriction inhibited only action, not speech. In a case called *Boos v. Barry*, the Supreme Court recently proved more protective of free speech, but it nevertheless sustained a statute which substantially impaired the right to free assembly outside a foreign embassy. Appellate courts have recently dismissed on standing and political question grounds establishment clause challenges to sending ambassadors to the Vatican. In *Goldman v. Weinberger*, the U.S. Air Force was allowed to prohibit an American soldier from wearing a yarmulke, notwithstanding the First Amendment's free exercise clause.

So much for the First Amendment. I will skip over the Second and Third Amendments, which have been infrequently invoked, to the Fourth. Just last term, the Court in *U.S. v. Verdugo-Urquidez*⁴ declined to apply the Fourth Amendment's warrant clause to the search of a nonresident alien's foreign property, even though the alien was in the United States at the time of the search and was being held for a U.S. trial. The subtext of Justice Rehnquist's opinion in that case was that the Court's real concern was to deny Fourth Amendment protections to General Manuel Noriega, the general whom it took an army to arrest. If we turn to the Fifth Amendment due process clause, we see a similar cutback on the right to international travel in *Haig v. Agee* and *Regan v. Wald*.⁵ We see restrictions placed on the Fifth Amendment takings clause in *Sperry v. U.S.* and *Langenegger v. U.S.* Despite application of Sixth Amendment jury trial right to U.S. citizens

⁴29 ILM 441 (1990).

⁵23 ILM 792 (1984).

in *Reid v. Covert*, and even to aliens abroad in a very bizarre case called *U.S. v. Tiede*⁶ (the subject of Herbert Stern's famous book *Judgment in Berlin*), that right has not been invoked or sustained recently. Finally, even though the Eighth Amendment is worded in the passive voice, and thus could apply to aliens overseas, I have yet to find a case in which it has been invoked by an alien who suffered cruel and unusual punishment at the hands of the U.S. government overseas, although in theory it could have been invoked in the Second Circuit's *Toscanino* case (where U.S. agents tortured an Italian in Uruguay).

What is the point of this *tour d'horizon*? As we emerge into the third century of the Bill of Rights, we must ask: Why is respect for constitutional rights in foreign affairs declining, even though the Cold War has ended and our President trumpets a "New World Order under law"? This question has recently been addressed by two very thoughtful commentators—the first, Professor Gerald Neuman, in an article entitled "Whose Constitution?" in the January 1991 *Yale Law Journal*; and the second, by our Moderator, Louis Henkin, in chapter four of his *Cooley Lectures*.⁷ Both Neuman and Henkin blame the declining respect for constitutional rights in foreign affairs on the poverty of judicial theory. Professor Henkin's particular target is balancing. He believes that courts have balanced individual rights against the public interest in national security and foreign affairs cases, consistently denigrating individual rights while exalting the public interest and treating claims of national security as compelling.

Professor Neuman also criticizes this balancing approach, but he goes on to attack two other approaches that have been frequently applied by the courts. The first he calls the "social contract" theory, a highly formalistic theory that essentially views the protection of the Bill of Rights as being limited to a very small class of rights holders with membership in that community being specified separately by the words of each amendment. This approach was applied by Chief Justice Rehnquist in the *Verdugo* case where, writing for four justices, he denied an alien defendant Fourth Amendment protection because that amendment says the right of "the people" to be free from unreasonable searches and seizures shall not be infringed. The Chief Justice concluded that the alien defendant, who had been brought forcibly into this country, did not have sufficient connection with the U.S. to be part of "the people" that the Fourth Amendment was designed to protect. Under this formalistic reading, however, nonresident aliens might arguably have constitutional rights under the First Amendment religion clauses (which do not mention "the people," saying only that "Congress shall make no law"), the Fifth Amendment (which says "any person"), the Sixth Amendment (which says "the accused") or the Eighth Amendment (which speaks in the passive voice). The problem with the social contract approach is not only that it is excessively literal and very grudging of constitutional protection, but also that it encourages the Court to engage in what my colleague, Ruth Wedgwood, has called "a second era of selective incorporation," in which judges choose to apply particular constitutional clauses extraterritorially by scouring textual nuances for evidence that the Framers intended to include or not include particular individuals in the community of rights holders. This approach freezes the text of the Constitution in a sort of "Borkian originalism"; also, it is not even predictable—Chief Justice Rehnquist made clear that he did not limit the phrase "the people" to mean just citizens. Presumably, he would include as part of "the people" permanent resident

⁶19 ILM 179 (1980).

⁷L. Henkin, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* (1990).

aliens, but what about aliens on student visas, undocumented aliens, or the like? Do they have a sufficient connection to be part of “the people”? From *Verdugo* alone, the answer simply is not clear.

Some judges have applied a third approach that goes too far in the opposite direction, which Neuman calls “universalism.” This approach would give constitutional rights to anybody anywhere as long as they are being affected by the U.S. government. The sources of this theory are partly natural law and partly a notion that the U.S. government was created with certain inherent constitutional limitations that it cannot exceed. This was essentially the view taken by Justice Black in *Reid v. Covert*. Under this view, *Verdugo* would have been wrongly decided, not because the alien has certain “rights,” but because the U.S. government has no constitutional power to engage in unreasonable searches and seizures. Thus, this approach focuses less on the rights-holding quality of the victim than upon the limits to the constitutional power of the government actor. The problem with this approach is that, first of all, it is circular. Secondly, it burdens our government with the problem of providing for the general welfare not only for the people of the United States but for the entire world that we affect with our law. Given our preeminent geopolitical situation, one which the Framers did not foresee, this is a kind of “imperial overstretch” which even Paul Kennedy did not anticipate.

Given these defects in these three theoretical approaches—balancing, social contract, and universalism—is there another viable approach? Justice Blackmun’s dissent and, to a certain extent, Justice Brennan’s dissent in *Verdugo* suggest another idea, “mutuality”—by which I mean a principle of mutuality of rights and obligations. The idea is that the alien Verdugo should be accorded Fourth Amendment rights, not because everyone in the universe has such rights and not because he participates in some hypothetical social contract, but *because* he is subject to American power or sovereignty. He is in American governmental custody and thus, according to Brennan, he is one of the governed. Under this theory, a foreign national would have rights against the U.S. government because the U.S. government purports to exercise its sovereign authority against him or her.

In the early days of the American Republic the U.S. government exercised its power primarily territorially, but also in some cases extraterritorially against its own nationals. As we all know now, it continues to exercise power extraterritorially, based on the “effects” doctrine, passive personality, universality, etc. As the United States continues to extend its global reach, the argument will be made that people who are subject to U.S. power should also gain the benefit of the Bill of Rights to prevent abuse of that power. It seems to me that this mutuality approach makes good sense. If we are looking for a reason for the decline in respect for the Bill of Rights in foreign affairs in recent times, it is partly because this approach has not been tried; either a balancing approach or a social contract approach has been applied instead. These other approaches have been applied to deny constitutional rights even to aliens who are completely within our jurisdiction and totally subject to American governmental power (for example, the undocumented Mariel Boat Cubans).

Similarly, courts have erroneously applied a balancing approach to privilege unsubstantiated claims of a compelling governmental interest in secrecy, speed, or efficiency of governmental action over the rights even of U.S. citizens living in the United States. For an example, we need look no further than the *Korematsu* case, which credited claims of military necessity over the rights of Americans in the United States during wartime. It seems to me that that case was an egregious mistake. The balancing approach gives too much weight to claims of military

and governmental necessity without looking behind them. However, to say that I disagree with this approach is not to deny that these governmental interests exist. It merely means that they should not be trumps that overwhelm rights. To the contrary, the very point of our Bill of Rights is that constitutional rights should trump governmental interests and overcome even statutes enacted through the normal political process. It is because we take these rights seriously, because we have a liberal Bill of Rights that is designed to create a private space in which we can operate, that individuals can flourish here free from the tyranny of the majority.

Let me conclude by asking whether substituting a theory of mutuality for a balancing approach will solve the problem of the decline of rights in foreign affairs. I would answer no, because the problem is not simply a theoretical one; it is also institutional. I have tried to argue in other work that there is a basic dysfunction in the way that our foreign affairs system currently operates. Each of the three branches has an incentive to behave in a way which makes the system as a whole work poorly. The Executive Branch has an incentive to act or to overreach; Congress has an incentive to defer; the courts have an incentive to duck the hard cases. This three-way pattern—executive initiative, congressional acquiescence and judicial tolerance—began with Justice Sutherland’s infamous dicta in *United States v. Curtiss-Wright Export Corp.*, calling the President the “sole organ of our nation in foreign affairs.” But the text of that opinion also makes clear that the President’s power “must be exercised in subordination to the applicable provisions of the Constitution,” language designed to ensure that the President’s power in foreign affairs would not trump the Bill of Rights. Moreover, only two years later, in 1938, the Court wrote the famous footnote 4 of *United States v. Carolene Products Co.*, which designated the federal judiciary as the institution charged by the Constitution with protecting rights against governmental overreaching. Decades later, in *Kent v. Dulles*, the Court created another tool to combat executive overreaching in statutory cases: the “clear statement” principle of statutory construction. Yet despite these tools, which were designed to help our judges protect our rights in foreign affairs cases, during the Vietnam era the courts increasingly abdicated that responsibility by applying doctrines like standing, ripeness, mootness, equitable discretion, or the political question doctrine. As my earlier review of Bill of Rights jurisprudence suggests, that pattern continues today.

I do not deny that there might be some cases in which courts might validly defer, even in rights cases, because of legitimate concerns about their competence or separation of powers. But we should recall that it is precisely *because* these judges have salary independence and life tenure that they have a duty to monitor and protect rights in foreign affairs. Instead, judges have absented themselves so systematically in recent years from the enforcement of rights that these rights have become systematically underenforced in foreign affairs cases. What makes this abdication more troubling is that the Supremacy Clause and Article I, section 10, of the Constitution remove the states as a meaningful check against federal executive overreaching, which makes judicial review in rights cases even more important in foreign than in domestic affairs cases.

In conclusion, I would blame the decline of rights in foreign affairs on two factors: a failure of constitutional theory and a failure of judicial institutions. Let me close by quoting an apt exchange from *Ramirez v. Weinberger*,⁸ a D.C. circuit

⁸23 ILM 1274 (1984).

case which enjoined U.S. military officials from interfering with a U.S. citizen's property in Honduras. It was written by a man I once clerked for, Judge Malcolm Wilkey, who was a good Republican and an advocate of judicial restraint. But in that case he ruled that, because of the rights being infringed, the government should be checked. Then-Judge Scalia wrote an angry dissent in which he asked what "special charter" authorizes judges to keep the executive in line in foreign affairs. Judge Wilkey answered, "the Judiciary does operate under a 'special charter' to help preserve the fundamental rights of this nation's citizens. That charter is commonly known as the United States Constitution."

REMARKS BY ADRIEN WING*

I have just returned from my first trip to South Africa. I arranged a delegation of thirty American lawyers and law professors and we participated in a conference in Cape Town called "Constitution-Making in South Africa." I told some of these 150 participants who were all members of a multiracial group called The National Association of Democratic Lawyers (NADL) that I was going to be a panelist here today at the American Society of International Law on the topic of aliens and immigrants.

I asked them in South Africa if the NADL or the African National Congress (ANC) Constitutional Committee, which was also involved in the conference, had given any thought to how they would treat aliens and immigrants in the new South Africa. After all, the ANC had just proposed a bill of rights, constitutional guidelines, and so forth. One of the lawyers, a man who is head of their constitutional committee and had spent twenty-eight years living in exile before returning home last year, told me that they had not really concretized their ideas on this subject yet. But it was his belief that a new South Africa would not exclude aliens and immigrants in the manner in which the United States had. He himself had been excluded at a certain point from the United States because they found he did not have a sufficient fear of persecution. Besides, he said, many of them knew what it was like to face discrimination in their own country. They had been welcomed in other countries as aliens or immigrants during their period of exile. So he told me they could not exclude others, particularly those people who are fleeing despotism, civil war, or economic hardship. I asked him what they were going to do if they were flooded with foreigners from all of the neighboring countries who were seeking a better way of life when so many of their own people have faced years of discrimination and do not have jobs. He did not have a ready answer to that, but he said there had to be a way. The new South Africa must be a role model in this regard for the rest of the Continent and the rest of the world.

Despite the many problems that South Africa is facing right now, I am more optimistic about the future of immigrants and aliens in South Africa than about their future here in the United States. I stand before you as a young person who, I hope, has thirty or forty more years of her career. I am quite pessimistic concerning that span of time about what is likely to happen in this regard in the third century of the U.S. Constitution. When I survey the current state of the case law and analyze the current economic and geopolitical situation in the world, I hold out little hope for positive change in the near future.

I am briefly going to summarize the roots of U.S. doctrine on immigrants and aliens, which should help us understand where it is right now and where it is likely

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