FEDERALISM OF FREE NATIONS

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At the end of World War II, Justice Robert Jackson took leave from the Court on which I now sit to serve as America's chief prosecutor at the war crimes trials in Nuremberg. He opened the case with these words: "That four great Nations, flushed with victory and stung by injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason."[1] I think it evident that the International Military Tribunal at Nuremberg, reflecting an unprecedented level of multilateral cooperation and restraint, was a watershed in promoting the rule of law among nations. The principled success of the Nuremberg tribunal fostered confidence in a post-War regime of international dispute resolution predicated not on Power, but on Reason; on Right, not Might.

This timely conference finds the international community in the midst of another seachange in how we resolve conflicts among nations and disputes that transcend national borders. New international institutions are proliferating faster than at any time since the years immediately after World War II. We have witnessed the establishment of several new multilateral development banks since 1989, three environmental bodies since the United Nations' Earth Summit in 1992, and new multinational bodies that will come into being under the North American Free Trade Agreement and the Uruguay Round of GATT.[2] Each of these new institutions incorporates a panel or tribunal to resolve disputes that inevitably will arise among the signatory states and their citizens. And direct descendants of the Nuremberg tribunal can be found in Yugoslavia and

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* Associate Justice, Supreme Court of the United States. Remarks given at the New York University School of Law Conference on "The Reception by National Courts of Decisions of International Tribunals," New York, February 17, 1995.

1. ROBERT H. JACKSON, THE CASE AGAINST THE NAZI WAR CRIMINALS 3 (1946).

2. Marianne Lavelle, *A World Bank Panel Breaks Legal Ground*, NAT'L L.J., Dec. 19, 1994, at A1.

Rwanda,[3] with the international community employing the rule of law to prosecute and punish those responsible for the inhuman atrocities recently witnessed in those regions.

As these international tribunals gain strength both in numbers and in authority, their relationship with the domestic courts of member nations will be of critical importance. There are notable differences among the different countries represented here. My comments will touch on how the Supreme Court of the United States deals with questions touching on international law.

In order to assess the role of the Supreme Court of the United States in the international order, I think one must first appreciate the role of the Court within our national government. Since *Marbury v. Madison*, of course, the judicial branch has served a vital role in our constitutional structure. Unlike high courts in many nations, the Supreme Court of the United States and lower courts have not only the authority, but the duty, to invalidate legislative and executive actions that violate the constitutional rights of our citizens and the constitutional prerogatives of the States.

But our power of judicial review, however comprehensive, is not absolute. Perhaps the most notable exception is in the area of foreign relations, where we have repeatedly recognized the autonomy of the political branches to formulate policy according to their best judgment of the nation's interests. The reason for this deference rests in the recognition that, among the Constitution's three separate branches of government, it is Congress and the President who are best equipped to coordinate a uniform and effective foreign policy. Judicial review of these delicate decisions threatens the coherence and unity with which such policies must be communicated and effected. When Justice Jackson returned to the Court after his service at Nuremberg, he explained the limits of our authority and competence in this area. He wrote in a 1948 case that,

> [s]uch decisions are wholly confided by our Constitution to the political branches of the government, Executive and Legislative. They are delicate, complex,

3. *See* Statute of the International Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess., Res. & Dec., U.N. Doc. S/INF/49 (1993); Statute of the International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., Res. & Dec., U.N. Doc. S/INF/50 (1994).

> and involve large elements of prophecy . . . . They are decisions of a kind for which the Judiciary has neither the aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.[4]

This recognition of the Court's limited authority over foreign policy decisions finds expression in the so-called political question doctrine. The doctrine rests on the premise that, over a set of questions, typically involving issues affecting international relations, the structure of the U.S. Constitution as well as prudential considerations deny the judiciary its traditional role of conflict resolution. As the Court observed in *Baker v. Carr*;[5] "Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature, but many such questions uniquely demand single-voiced statement of the Government's views."[6]

Our reticence to enter into the arena of international law at times extends also to the actions of foreign sovereigns, through operation of the Act of State Doctrine. As we said in an early case,

> The principle that the conduct of one independent government cannot be successfully questioned in the courts of another . . . rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign State to be reexamined by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.'[7]

Justice Harlan once explained in *Banco National de Cuba v. Sabbatino*,[8] that the act of state doctrine "arises out of the basic relationships between the branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of de-

4. Chicago & Southern Airlines v. Waterman Steamship Co., 333 U.S. 103, 111 (1948).

5. 369 U.S. 186 (1962).

6. *Id.* at 211.

7. Oetjen v. Central Leather Co., 246 U. S. 297, 303-04 (1918).

8. 376 U.S. 398 (1964).

cisions in the area of international relations."[9] The act of state doctrine, therefore, could be characterized simply as an application of the political question doctrine to actions of foreign governments. Both reflect a recognition that under our constitutional system of government, foreign policy is best left to the judgment of the political branches, without undue interference from the courts.

By emphasizing the plenary authority of the political branches to conduct affairs of the state, I do not mean to suggest that in the United States such conduct is wholly beyond the requirements of law. In some of the oldest statements from the Court, we have observed that the laws of the United States incorporate fundamental principles of the law of nations. Those who are familiar with our domestic law no doubt know the traditional canon that our courts ordinarily will not construe a statute to conflict with constitutional principles. Instead, we often try to read a law so as not to call into question its constitutional validity. Less well known than the canon is its origins. This cardinal principle has its roots in *Murray v. The Charming Betsy*.[10] In that case, decided in 1804, Chief Justice Marshall wrote not about the violation of constitutional rights, but rather of international obligations. He stated: "[A]n Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[11] In this early exposition of interpretive principles that would define our jurisprudence, we thus acknowledged that the law of nations is an integral part of that jurisprudence. We repeated this basic principle in the famous case of *The Paquete Habana*,[12] where the opinion stated unequivocally that,

> [i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction . . . . For this purpose, where there is no treaty and no controlling executive

9. *Id.* at 423.

10. 6 U.S. (2 Cranch) 64 (1804); Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council, 485 U.S. 568 (1988).

11. Murray v. The Charming Betsy, 6 U.S. (2 Cranch) at 118; Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council, 485 U.S. at 575 (citing Murray v. The Charming Betsy).

12. 175 U.S. 677 (1900).

> or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.[13]

Our membership in the family of civilized nations demands no less than this reciprocal recognition of rights and responsibilities—an obligation that the Supreme Court of the United States has on occasion acknowledged and observed.

Some may wonder how this professed respect for the law of nations comports with the Court's abstention from issues touching on international relations. A skeptical observer perhaps would argue that the Court merely pays lip service to the rule of international law, while at the same time shirks its responsibility to uphold those principles. In fact, our precedents demonstrate an attempt to strike a balance between the requirements of international law with a respect for the judgment of the political branches in matters of foreign policy. It is obviously a delicate balance, and one that continues to be refined in the cases that require us to apply these doctrines.

Our deference to the primary authority of the political branches, of course, yields most readily when the political branches themselves seek our assistance and invoke the judicial power in the course of conducting foreign affairs. In a characteristically thoughtful and lucid opinion for the Second Circuit, Judge Learned Hand in the famous *Bernstein* case[14] held that the act of state doctrine applied to bar suits seeking redress for Nazi Germany's expropriation of American assets, *unless* "our own Executive, which is the authority to which we must look for the final word in such matters, has declared that the [act of state doctrine] does not apply."[15] After the Secretary of State issued letters containing such declarations, the court of appeals reversed its earlier judgment and directed the district court to proceed and adjudicate the claims. It is this same recognition of the primacy of the Executive in the conduct of foreign affairs that led a plurality of the Supreme Court, in *First National City Bank*,[16] to hold the act of state doctrine inapplicable where the President has so advised the

13. *Id.* at 700.

14. Berstein v. Van Heyghen Freres Societe Anonyme, 163 F.2d 246, (2d Cir.), *cert. denied*, 332 U.S. 772 (1947).

15. *Id.* at 249.

16. First National City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972).

Court. Precisely because the Executive is charged with the primary responsibility to conduct foreign affairs, the Court should not abstain from performing its traditional adjudicatory function when the Executive has assured us that doing so would be consistent with American foreign policy.

How does the recent trend toward the proliferation of multilateral and international tribunals fit in this doctrinal framework? By enacting legislation creating or consenting to the creation of such tribunals, the political branches in our country have obviously judged that they further America's foreign interests. To the extent that these new tribunals necessitate the involvement of the federal judiciary, Congress and the President are in effect seeking judicial involvement in these matters. I think the creation of these tribunals are, if you will, only a more systematic variant of the *Bernstein* letters to the judiciary. By negotiating and approving treaties and agreements which create transnational tribunals and prescribe their relationship with our domestic courts, the political branches of our government are asking the judiciary to not abstain from its usual adjudicatory function. They are ascribing a role for the courts in these specified areas of international relations, a role that is limited by the terms of the authorizing laws and treaties.

The precise boundaries of that role, and the attendant relationship between national courts and international tribunals, are issues that we have gathered here to examine, and I trust that the our discussions will be fruitful in that regard. I would like to start by offering an observation that is based on a somewhat imperfect, but in my view helpful, analogy to the relationship between state and federal judiciary in the dual court system that we have here in the United States.

Having served as a state court judge before taking my seat on the Supreme Court, I have spent considerable time on the Supreme Court explaining the virtues of federalism as applied to the judiciary. The basic feature of this notion of federalism is a judicial comity borne of dialogue and trust. I think the great advantage of our federal system is that it permits state and federal courts to talk with each other—to engage in healthy debate on questions over which there is conflict or to forge consensus on issues of mutual interest. In the same light, I think that both federal and state courts are part of one dual system, and we federal judges must trust our state counterparts to do their best in carrying out their duties under the

Constitution, which they, like we, have taken an oath to uphold.

As our country moves toward a more international regime of dispute resolution, this federalist ideal of healthy dialogue and mutual trust may possibly be adapted to describe the proper relationship between domestic courts and transnational tribunals. It is a relationship which might be described as "the federalism of free nations," to use a phrase of the philosopher Immanuel Kant.[17] Just as our domestic laws develop through a free exchange of ideas among state and federal courts, so too should international law evolve through a dialogue between national courts and transnational tribunals and through the interdependent effect of their judgments. This dialogue has been rather one-sided with respect to the opinions of the Supreme Court of the United States. The flow of ideas from our Court to other tribunals around the world is well-chronicled, but we have not seen fit to reciprocate in kind. I think this will change, as we are asked to define our role within the international regime. The Supreme Court of the United States observed in *The Paquete Habana* that, in order to discern the rule of law among nations, we resort "to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat."[18] As our domestic courts are increasingly asked to resolve disputes that involve questions of foreign and international law about which we have no special competence, I think there is great potential for our Court to learn from the experience and logic of foreign courts and international tribunals—just as we have offered these courts some helpful approaches from our own legal traditions.

The other essential element of our federalist tradition is mutual trust and respect. Through the development of abstention doctrines, federal courts have refrained from exercising their authority in certain cases so as not to disrupt proceedings in state courts or to intrude in the processes of state governments. And our precedents, especially in the area of

17. IMMANUEL KANT, THE ETERNAL PEACE, *reprinted in* THE PHILOSOPHY OF KANT: KANT'S MORAL AND POLITICAL WRITINGS 441 (Carl J. Friedrich ed., 1949).

18. 175 U.S. at 700.

habeas corpus, reflect a healthy respect for the opinions of state courts and recognize the need to protect the finality of their judgments. By the same token, I think it is fair to expect that international tribunals, in discharging their functions, should be mindful of their effect on domestic courts and should heed our prerogatives as a sovereign nation. The trust and respect, of course, is mutual. Just as state courts are expected to follow the dictates of the Constitution and federal statutes, I think domestic courts should faithfully recognize the obligations imposed by international law. The Supremacy Clause of the United States Constitution gives legal force to foreign treaties, and our status as a free nation demands faithful compliance with the law of free nations.

The analogy to the relationship between state and federal courts, I must admit, is not close. The state and federal judiciaries are two halves of a national system; both exist as indispensable components of one Union. International institutions, by contrast, are at best a loose confederation of sovereign states. And the relationship between state and federal courts are an integral component of the federal structure of the United States Constitution. By contrast, the role of international tribunals and their influence on the operation of domestic courts are governed by the foreign policy judgments of the President and Congress made through the governing international treaties and agreements. I do not think, however, that these differences change the fundamental lessons of dialogue and mutual respect that we have learned from our federalist tradition, lessons that we could put to good use in defining the relationship between national courts and the various international tribunals.

My observations, of course, do not provide answers but only suggest a starting point. There are many important substantive issues to be addressed by the courts in a judicial fashion. For instance, the vesting of certain adjudicatory authority in international tribunals presents a very significant constitutional question in the United States. Article III of our Constitution reserves to federal courts the power to decide cases and controversies, and the U.S. Congress may not delegate to another tribunal "the essential attributes of judicial power."[19]

19. Commodity Futures Trading Commission v. Schor, 478 U.S. 833, 851 (1986).

Whether our Congress has done so with respect to tribunals created by different treaties and agreements is a critical question, but one that could only be answered in specific cases. In addition, our courts will have to interpret specific provisions of the different treaties and authorizing statutes to determine what effect to give to the judgment of various international tribunals. These questions are related, and what effect international tribunals have on domestic courts may inform the analysis as to whether Congress acted constitutionally in creating the international panels and vesting them with substantive adjudicatory authority. At a more practical level, the success of multinational tribunals in resolving disputes depends critically on their ability to transcend parochial interests and render legitimate judgments. It still remains to be seen whether these newly created tribunals will rise to the challenge and attain their legitimate status in the international regime.

These are all very difficult issues which remain to be addressed as the United States and other nations participate in this era of global cooperation. Fortunately, the history of our Supreme Court has given us at least a foundation upon which to build. The principles of limited judicial power teach us to defer to the policy judgment of the political branches, especially in the conduct of foreign affairs. At the same time, our Court, consistent with our constitutional ideals, has recognized the dictates of international law and observed the comity accorded to the opinions of foreign courts. I hope that this balanced tradition will serve our Court well as it is asked to define the role of domestic courts in the international legal regime.

Three Terms ago, one of my opinions for the Court began with this simple sentence: "This is a case about federalism."[20] Perhaps some day one will open with: "This is a case about the federalism of free nations."

20. Coleman v. Thompson, 501 U.S. 722, 726 (1991).