# THE FEDERALIST SOCIETY
# 2003 NATIONAL LAWYERS CONVENTION

## SHOWCASE PANEL I:

## CUSTOMARY INTERNATIONAL LAW: THE NEXT FONT OF JUDICIAL ACTIVISM?

With Opening Remarks by
the **Honorable Theodore B. Olson**

Thursday, November 13, 2003

Panelists:

**PROFESSOR CURTIS BRADLEY**, University of Virginia School of Law

**PROFESSOR LORI FISLER DAMROSCH**, Columbia Law School

**HON. FRANK H. EASTERBROOK**, U.S. Court of Appeals, Seventh Circuit

**HON. JACK L. GOLDSMITH, III**, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice

**PROFESSOR MATTIAS KUMM**, New York University School of Law

**HON. EDWIN D. WILLIAMSON**, Sullivan & Cromwell and Former Legal Adviser, U.S. Department of Justice, moderator

MR. LEO: Good morning. My name is Leonard Leo. I am Executive Vice President of the Federalist Society. On behalf of the directors, officers, and staff of the Society, it is my privilege to welcome all of you to our 21st Annual National Lawyers Convention.

Those of you were with us last year helped to mark a very exciting celebration of the organization's 20th anniversary. In organizing this year's convention, we were therefore especially mindful of continuing our longstanding tradition of presenting thought-provoking, balanced debates about timely legal questions. The theme for this year's plenary sessions is international law and American sovereignty.

Focusing our attention on the impact of international law on American sovereign interests was not a difficult choice, so many of the events that have been making the front pages of the newspapers since we gathered last year touch on this area: the War in Iraq; the War on Terror that commenced with those horrific events of September 11; intense

debates about the role of the United Nations; and the Supreme Court's grand use of international law, most recently underscored in *Lawrence v. Texas*, to name just a few examples. The recent experience, though, provided me with an even deeper appreciation for the subject we'll be tackling over these next three days.

Last week, I had the privilege of dining with the Belgian Ambassador to the United States, and we spent much time talking about America's far more intense concern about sovereignty, at least in comparison with the European community. That conversation forced me to reflect on why our nation historically has cared deeply about sovereignty. The answer, I think, is so remarkably obvious and simple that it can easily be forgotten as we delve deeply into issues of international affairs. It is because there is a way of life here within our borders that is very well worth protecting and building upon.

Judge Learned Hand recognized this simple fact when he delivered his famous Spirit of Liberty at an "I am an American" Day celebration in 1944. He began, "We have gathered here to affirm a faith, a faith in a common purpose, a common conviction, a common devotion. Some of us have chosen America as the land of our adoption; the rest have come from those who did the same. For this reason, we have some right to consider ourselves a picked group, a group of those who had the courage to break from the past and brave the dangers and the loneliness of a strange land. What was the object that nerved us, or those that went before us, to this choice? We sought liberty—freedom from oppression; freedom from want; freedom to be ourselves."

President Ronald Reagan echoed a similar note in June 1982 in an address to the British Parliament. Calling up the words of Sir Winston Churchill, President Reagan said, "Let us ask ourselves, what kind of people do we think we are? And let us answer, free people, worthy of freedom and determined not only to remain so but to help others gain their freedom as well."

We have with us this morning a man who shares this vision. Theodore Olson, Solicitor General of the United States. These sentiments were imbued in his November 16, 2001 address to this Convention, the first Barbara K. Olson Memorial Lecture, where he said, "Implementation of our lofty ideals has never been without error, but the course of our history has been constant, if occasionally erratic, progress, from the articulation of those lofty ideals to the extension of their reality to all our people—those who were born here and those from hundreds of diverse cultures who flock to the American soil because of those principles and the opportunities they promise."

And then, speaking of his late wife Barbara, who was among the many murdered on September 11 and a very good friend of this organization, he continued, "Barbara was Barbara because America, unlike any place in the world, gave her the space, freedom, oxygen, encouragement, and inspiration to be whatever she wanted to be. Is there any other place on earth where someone could do all these things in 45 years?"

General Olson, in so many ways, you have been a source of wisdom, understanding, and inspiration for many of us who have occupied the halls of Federalist Society meetings these past two decades. There is no better man to serve the American people, and we could not have a truer and more steadfast friend of this organization for these past 20 years.

Please join me in warmly welcoming Solicitor General Theodore Olson.

HON. OLSON: Thank you. I've been before more hostile groups. It's a very special privilege for me to participate in welcoming you to the Federalist Society's 2003 National Lawyers Convention. I fully appreciate that my appearance here today essentially dooms my chances to be confirmed to any office by the United States Senate. But the very discernible margin by which I was approved by the Senate sent a rather unmistakable message on that score, anyway. It isn't as if the handwriting was on the wall. It was more like the handwriting was engraved on my chest and other parts of my anatomy. Besides, I don't think I would want to go through another experience like the last time; I felt like one of those goats they use for playing polo in Afghanistan.

It is appropriate at this point in the Convention to pause for a moment to reflect on the first Federalist Society Lawyers Convention in 1987, 17 years ago. I had the privilege of serving on the Convention Committee for that event, although I'm not sure that I did anything. But they do that sometimes, put you on these lists. But the real organizers of that seminal conference did a remarkable job for such a fledgling organization. Four hundred lawyers from all over the country pre-registered, and over 1,000 people actually showed up to attend. This year, by contrast, over 1,000, I'm told, pre-registered. I have no idea how many lawyers will show up this time, but if the turnout is remotely comparable to 1987, the Federalist Society may have to consider drastic measure to cut attendance, like perhaps bringing in Barbra Streisand's husband to do a Ronald Reagan imitation at the dinner. That ought to cut down attendance, and I understand he might be available.

The keynote speaker for that 1987 convention was Attorney General Edwin Meese. Thirty individuals participated in nine panel presentations or gave speeches. This year, by contrast, there are 28 separate panels and speeches, and a remarkable 120 speakers. The 1987 program included then-Vice President George H. W. Bush and at least seven distinguished speakers who have turned out to be recidivists—that is to say, they're speakers again this year—including Appeals Court Judges Robert Bork, Frank Easterbrook, Stephen Williams, and Alex Kasinski. And it may be no coincidence, it occurs to me, that none of them has been confirmed by the Senate to any higher office since 1987.

To give you an idea of how well the Federalist Society has done since 1987, there were 90 student chapters then; there are 170 now. There were only four lawyers' chapters in 1987; there are 60 now. And the Society itself, in 1987, had a staff of two, and 4,000 members. It has over 33,000 members now, and a staff of 15. That's pretty remarkable.

Just for the fun of it, I looked at what some of our 2003 speakers were doing in 1987 and what they have done in the interim. United States Attorney General John Ashcroft will speak on Saturday morning on the PATRIOT Act. He has a lot to say, and I urge you not to miss that presentation. In 1987, General Ashcroft was Governor of Missouri. He next served as United States Senator for two terms before becoming Attorney General in another one of those genteel confirmation rituals for which the United States Senate is becoming so universally respected and loved.

Assistant Attorney General for Civil Rights Alex Acosta, who's a speaker this time, was then a student at Harvard, not yet an attorney.

Education Department General Counsel Brian Jones was a college student at Georgetown, not even a law student.

Bill Pryor had just been graduated from Tulane University School of Law in 1987. Today, he is not only Attorney General of Alabama and a speaker at this

Convention, but one of the most recent additions to the rapidly growing Distinguished Filibuster Victim Club as a nominee for a spot on the 11th Circuit.

And in 1987, Ken Starr was a judge on the United States Court of Appeals for the District of Columbia Circuit, followed by four years as Solicitor General of the United States. As everyone knows, Ken then allowed himself to be appointed independent counsel to investigate then President William Jefferson Clinton, a position from which Ken learned what it must be like to perform oral surgery on an adult male grizzly bear without the benefit of anesthesia. To illustrate how tough politics can be these days, Ken Starr was even attacked for things like going to church on Sunday and the crime of singing hymns while jogging.

You get the idea. The Society's speakers this week have come a long way since 1987. Each have had enormously successful careers and have many things in common, but most of all they are all participants, not spectators. They are not afraid to express their opinions, and they are not afraid of a fight.

You are about to embark upon just about the most intellectually rich programs ever assembled at any legal gathering. I don't know how any other organization could or ever had matched what you've got before you today. I certainly have never seen such a stunning and varied array of the most talented and provocative legal minds in American political life from all points on the political spectrum, from Viet Dinh, Doug Ginsberg, Edith Jones, Charles Krauthamer, and J. Harvey Wilkinson, to Patricia Wald, Jerome Sestack, John Payton, Andrew Stern, and Howard Berman—brilliant, successful, intellectual people who have opinions, express them with passion and persuasiveness, and who have not only endured but survived and triumphed in many of the nation's most important and far-reaching legal and political battles. Your program features 15 federal judges, at least, by my count, including 12 federal appeals court judges from six separate circuits, leading professors from over 20 law schools, over 20 administration officials representing law, diplomacy, education, and finance, including at least 10 top current or former Justice Department officials, prominent journalists, a score of the nation's finest private practitioners, and leaders of America's leading think-tanks and advocacy organizations.

The subjects of the discussions and speeches at this convention are at the core of the most vital issues facing our legal institutions and government today. The theme of this year's convention and the overarching subject of several of the programs, including the one that's about to begin, is international law and American sovereignty, subjects that could not be more important in today's world of diplomatic, military, and economic tension and strife, and against the backdrop of an unprecedented international war against terrorist acts directed against civilians, schools, hospitals, and institutions such as the Red Cross and the United Nations, in every corner of the globe.

As you discuss these issues, the United States Supreme Court has embarked on its October 2003 term, which will touch upon some of those same issues. For example, the applicability of the Foreign Sovereign Immunities Act, to property expropriated from Jewish citizens in Austria during and immediately after the Second World War. Whether American courts have authority to order and supervise domestic discovery in connection with an antitrust complaint before the Directorate General for Competition of the European Commission, when no proceeding is pending before that Commission, and where that foreign jurisdiction does not permit that discovery. At least, that's the way the

question is presented in the case. And finally, whether U.S. courts have jurisdiction to consider challenges to the detention by the United States of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Naval Base in Cuba.

The Guantanamo cases serve to remind us that issues of separation of powers and the allocation of government power, the core of the Federalist Society agenda, are among the most important issues facing our courts and our political institutions today. On one level, the Guantanamo cases involve what appears to be a narrow jurisdictional question, whether U.S. courts can exercise habeas corpus jurisdiction over enemy combatants held at the Guantanamo Naval Base, where the United States contends it is not a sovereign. But the issues raised by this litigation ultimately extend much further to combatants held in other foreign locations, such as military bases in Europe, the Middle East, or Asia, or on U.S. vessels, or by allies of United States.

Other issues being raised in pending or anticipated terrorism, including how much authority the commander-in-chief possesses to detain enemy terrorists on U.S. soil; what rights these detainees have to criminal trials and the right to consult with counsel, what rights depend upon the captured combatant is a citizen, a lawful resident alien, an unlawful alien captured on U.S. soil, or a terrorist captured in Iraq or Afghanistan or elsewhere. Whether the courts or the executive decides these issues in the first instances; and what rights the American public or the press have to access to information about enemy combatants—how they were captured, where and why they were being held, and the conditions of their detention.

Beyond these questions are important issues of the executive's ability to wage a war against an enemy who recognizes no sovereign, whose combatants fight in no uniform, and who recognizes no limits or restrictions on how or against whom violence will be inflicted. Ancillary to those questions are a host of issues concerning what legal tools the executive has at his disposal to conduct intelligence against foreign powers, including terrorists and their allies, both within our borders and those seeking to enter this nation. Many of these issues will be discussed by the panelists and speakers over the next 2-1/2 days.

At the same time, the age-old battles between the executive, the judiciary, and Congress continue to rage over the roles and responsibilities of each. For example, a federal court has ordered the Vice President to submit to discovery at the instance of private party litigants concerning meetings and deliberations of the President's National Energy Policy Development Group, known affectionately to intimates as the NEPDG. I avoid that because it's very hard to say.

This group, consisting exclusively of administration officials under the direction of the Vice President helped develop the Bush Administration's energy policy and legislative proposals. Interest groups claim the right to know the identity of non-government persons the NEPDG talked to, and other details of the policy development process. The administration claims that neither the Federal Advisory Committee Act nor any other law requires the administration to disclose, in a suit of this nature, how it develops policy proposals, or from whom it gets its ideas, and that the judiciary has no authority to order discovery in this process.

A petition for certiorari has been filed, styled *Chaney v. United States District Court*, and the Court will presumably decide in December whether to hear that case. The

principles are far broader than the specific facts of the case. In this era of a judiciary that seems to be everywhere, when and where can the Executive Branch draw the line against judicial supervision of the performance of its core executive constitutional role?

Other issues raised by two pending cert. petitions, and I gather you're going to hear more about this, involve the incident a few years ago involving the torture and murder by members of a drug cartel of a DEA agent in Mexico, and the apprehension in Mexico of a Mexican doctor who allegedly administered drugs to the DEA agent so that his life could be prolonged during the torture process.

The doctor claimed that he was unlawfully captured and transported to the United States by Mexican nationals working with the United States government. The Supreme Court earlier held that his arrest was not in violation of America's extradition treaty with Mexico and allowed the criminal prosecution of the Mexican doctor to go forward in the Central District of California. At the end of the government's case, however, a district judge in California granted a motion of acquittal.

The doctor then returned to Mexico and promptly filed suit for damages against the United States under the Federal Tort Claims Act, and his Mexican captors under the Alien Tort Statute. By a six-to-five vote, the Ninth Circuit held that law enforcement officials have no authority to enforce federal statutes outside the United States, and therefore allowed the FTCA claims to proceed in the face of an express statutory exclusion of claims arising in a foreign country. It also upheld damage claims under the Alien Tort statute against the Mexican nationals who captured the doctor and transferred him to the United States, based upon what the court held to be an obligatory rule of international law prohibiting arbitrary arrests.

The government has filed a cert. petition in a case against the United States and supported the cert. petition of the Mexican nationals. These cases raise exceedingly important questions of the authority of the courts to supervise and regulate the conduct of law enforcement officials abroad, and to impose liability on foreign nationals who assist United States officials engaged in law enforcement or other acts deemed vital to the protection of the United States or its citizens. These issues are of immense importance in the struggle to defend our citizens from international terrorists. The court is expected to decide in the next few weeks whether to take these two cases.

Finally, I would be remiss if I did not mention the dramatic two-year-long battle over the President's appointment power and the Senate's advice and consent function concerning the federal judiciary. This drama continues to unfold as we speak, as the Senate is now about halfway through a 30-hour filibuster session. Seven times in the past two years, the Senate agreed to deny a vote on the confirmation of Miguel Estrada to an appointment to the United States Court of Appeals for the D.C. Circuit. I use these words advisedly. I did not say a minority of Senators denied Miguel Estrada a vote; I said that the full Senate allowed a minority of Senators to do so. Although Mr. Estrada has decided to withdraw from this process, three more of President Bush's appointees to federal appeals courts have been denied a confirmation vote for appeals court positions despite majority support, and two more appeals court nominees are expected to face the same fate today or tomorrow.

The Senators voting to block the confirmation votes, and their supporters, including the *New York Times*, say that it is not only right but a noble and heroic act for them to deny a vote to individuals they regard as out of the mainstream conservatives and

that the Senate has approved the vast majority of President Bush's judicial nominees. Setting aside a moment the merits of the qualifications of these individuals, the overriding issue, it seems to me, is the process by which a confirmation vote is precluded with respect to a judicial nominee who is nominated by the President and who has the support for confirmation by a majority of the Senate. This is not a defeat of a confirmation. It is a collective refusal of the entire body to act on a confirmation.

Of course, the Senate has the theoretical power to refuse to vote on any matter, if its members decide that no vote shall be taken unless 60 or 70 or 80 or even 100 senators agree to proceed with the vote. And that—make no mistake about it—is what the Senate has done. Nothing in the Constitution prohibits the Senate from changing its rules by a majority vote. So, when it allows 40 senators to block a vote on a presidential appointment, it is not the action alone of just 40 senators; it is the action of the United States Senate. And if it can decide internally to allow 40 senators to block a vote, it can decide to allow 20 or 10 or one senator to do so. The Senate may stay in session as many nights as it wants, but as long as it maintains and enforces a 40-vote veto, the entire Senate has empowered any 40 of its members to block a confirmation. Only the Senate can enforce such a rule, and only the Senate can change it.

The rule does not mean that all judicial appointments will be blocked. Those who inspire no serious opposition will continue to be confirmed, but from this point forward, candidates like Bob Bork, Nino Scalia, Clarence Thomas, Miguel Estrada, Bill Pryor, Carolyn Cool, Janice Brown, Patricia Owen, Charles Pickering, will stand no chance of confirmation. And of course the same will be true when a Democrat holds the presidency and there are 40 or more Republican senators willing to exercise the same minority veto authority to block some of the best and brightest of the more liberal wing of the American legal community.

And as we learned with Miguel Estrada, it is not only those who get involved in politics or speak out and write about controversial subjects who will be blocked, but those who are simply perceived to be too liberal or too conservative to suit the taste of a powerful, persuasive minority of the Senate. They will not be confirmed.

As you can see, you have before you no shortage of hot, important, controversial issues to discuss and an ample supply of bright, quick-witted—don't let me down now—articulate, courageous, and outspoken—outspoken, I know you'll be—experts on all sides of the issues to discuss them with you. None of these speakers is easily intimidated, or they wouldn't have been invited to be a part of this Convention. And, none is likely to pull any punches, or they wouldn't have been willing to jump into this seething intellectual cauldron.

I doubt that any of you would be here for this Convention if you didn't care about your country, its institutions and values, and want to participate in making this nation a better, safer, freer and more energetic society. You have come to the right place. I know you will enjoy yourselves.

Ladies and Gentlemen, start your engines.

## FEDERALIST SOCIETY
## SHOWCASE PANEL I: CUSTOMARY INTERNATIONAL LAW
## THE NEXT FONT OF JUDICIAL ACTIVISM?

HON. WILLIAMSON: This is our first panel of the Convention, and I don't think we'll disappoint Ted and his expectations. With the issue being international law and American sovereignty, there's probably no better place to start than the question of customary international law.

We have a very distinguished panel, people who've written extensively in this area. Again, they're all outspoken, and consistent with Federalist Society traditions, you will hear both sides of the issue. We will start with Jack Goldsmith, who is now the Assistant Attorney General in the Office of Legal Counsel. The biographies of our speakers are in your programs.

Jack will be followed by Lori Damrosch. I do have to mention in Lori's resume that she has had three jobs, and two of them are in the two places where I've had my two, that is Sullivan & Cromwell and the State Department in the Legal Advisors office. She is now at Columbia Law School. Jack and Lori will talk about what customary international law is, how do you find it, and I hope they'll talk about how you change it.

They'll be followed by Curt Bradley, who is currently in the Virginia Law School faculty but will become the Counselor for International Law in the Office of the Legal Advisor at the State Department at the beginning of the year. He'll be followed by Matthias Cumm, who is an associate professor of law at NYU Law School. Curt and Matthias will discuss the question of where customary international law fits into the U.S. legal system.

And then, there's the final cleanup hitter. We'll be hearing from Frank Easterbrook on his views on the subject of customary international law.

Jack.

HON. GOLDSMITH: Thank you. We've got a very short period of time, so I'm going to be very general and very quick. The topic of the panel is Customary International Law: A New Font for Judicial Activism? I suspect that most of you are international lawyers. Perhaps you can take a little bit of time just to talk about that and talk about the ways in which it has become a font of activism, and then talk about the answer to the question. The short answer to the question is that it has been the font of activism for about 25 years. That's the bad news. The good news is that there are indications that the courts are starting to figure this out and to deny the ability to interpret customary international law expansively.

So, the dictionary definition of customary international law—many of you may know about treaties. These are agreements that states enter into explicitly. There's another form of international law called customary international law that has the same status, in terms of its bindingness, as treaties. And the general definition or the standard definition of customary international law has two parts. One, customary international law is a consistent practice of states, but the first part has to be a state practice, a consistent practice of states; and the second part is that this practice has to be followed by states from a sense of legal obligation.

Now, customary international law is not mentioned anywhere in the Constitution. Article 3, of course, mentions treaties as a basis for federal jurisdiction and the supremacy clause mentions treaties as a potential for supreme federal law. Article 1 does mention the law of nations, which is the words for customary international law at the time

of the founding, and it gives Congress the power to define and punish offenses against the law of nations.

For most of the country's history, courts did apply this thing called customary international law. They did so in the same sense that they applied pre-Erie general common law. They sometimes used customary principles as a basis for a rule of decision, but it was not a basis for federal jurisdiction and it did not implicate the supremacy clause. It was a rather benign force in the judicial process.

This all changed quite radically in 1980 in a case called *Filartiga*, which has been called *Brown v. Board of Education* of human rights litigation by the new Dean of Yale Law School, and it was that. This is a case in which, to make a long story short, someone who was tortured in Paraguay sued her torturer in the United States. And the *Filartiga* court said that that case could be brought here, and they recognized a civil cause of action for torture.

Now, *Filartiga* did three important things, changed the law in three dramatic directions. First, it read the Alien Tort Statute from the 1789 Judiciary Act to establish jurisdiction over this kind of case. There's an entire panel devoted to that question. I think we'll touch on it a little bit here. There's an entire panel devoted to that issue either today or tomorrow.

The second thing *Filartiga* did was, for the first time, it held that this thing called customary international law was part of federal law. That means that it provides a basis for Article 3 jurisdiction and it can be part of the supremacy clause binding on the states, or at least it can be binding on the states via the supremacy clause, and maybe even binds the Executive Branch, some people thing.

And the third radical thing *Filartiga* did was it changed the way that we identify customary international law. Prior to *Filartiga*, courts engaged in the practice of actually trying to discover what the practices of states were. They looked to actual practices to see if states have really been following a particular custom. And they also inquired as to whether this custom really was viewed by the states as binding on them. That was not a determinant process, but at least it was a limited process more of discovery than creation.

*Filartiga* changed this. And the reason it changed it had everything to do with the type of case it was. It was a human rights case involving torture. If you think about it for a moment, in 1980, there was no consistent practice of states not torturing people from a sense of legal obligation. The fact is that in many states in 1980 tortured people. So, the standard view of customary international law would not have permitted courts to determine that torture was prohibited by custom because the state practice permitted torture. It wasn't obvious at the time, but it radically changed the way that we discover customary international law, and it did so in a context in which it was saying this is federal law.

It basically looked at four sources to discern customary international law. The United Nations General Assembly Resolutions—that's the first point. Second were treaties, and it's of note that every treaty that the court relied on in 1980 to say this is a customary international norm against torture was a treaty that the United States had not ratified, so unratified treaties count. Third were pronouncements of international bodies in conferences, of which there are many and various sorts, and which they often end with aspirational pronouncements about the way the world should be. And the court said this

was a source of customary international law. And finally, and in my view most insidiously, the writings of scholars were viewed as a source of international law.

Now, it's true in the 19th century, the writings of scholars were viewed as a source of international law, but in the 19th century, they were viewed as a source of customary international law because scholars actually used to sit down and collect the practices of nations and put them in large, thick books, so you could go and look at what the practice of nations were, and it was more of a factual inquiry. And in that sense, it makes sense that you would look to the writings of scholars to discern what custom is. That is not what the writings of scholars are like today. The writings of scholars today in the international law area are not characterized by what I would call the discovery of customs, but they're characterized, frankly, by overt, normative analysis.

Those are the four sources of custom that the *Filartiga* case relied on. It's obvious why none of these sources by themselves—unratified treaties; general assembly resolutions; pronouncements of international bodies; and the writings of scholars—is anything close to a real source of law. They certainly—these are not sources that we would say reflect the values of, and that are accountable to, U.S. lawmaking processes.

And finally, these sources were literally, in terms of the custom that they were producing, were literally without principled limit. The treaties themselves were quite vague, and you could basically find just about anything you wanted in these various sources to support just about whatever conclusion you wanted to reach.

Well, in the last 25 years, courts have been discerning custom in this way. And they've been going along their happy way without much resistance. It's important to understand why there hasn't been much resistance. The reason there hasn't been much resistance is because for the first 20 or so years, these were all human rights cases involving an alien plaintiff suing an alien defendant. And in almost all these cases, the defendant never showed up. They were all default judgments. There was no other side of the argument effectively being presented about why this didn't make sense as customary international law.

This is starting to change. It's starting to change precisely because the cases are now being brought not against non-U.S. citizens who don't show up to adjudicate the case, but rather against the United States government, against the states—their prison practices, their death penalties and the like are said to be violative of custom. The Guantanamo detainees are said to violate customary international law. And finally, U.S. corporations are being sued. Now, these are all three defendants that have fine lawyers, and there's been much more rigorous contestation of this method of identifying customary international law, and I'm happy to report, and I'll close here, by simply summarizing—I'm happy to report that in the last year, there have been three very important cases, two of them in the Second Circuit, where *Filartiga*, the case I began with, began, that have effectively reversed or repudiated the method of customary international law identification that I just described, which came out of *Filartiga*.

The best representation of this is the Flores case in the Second Circuit. Judge Cobranos wrote a terrific and very insightful decision. I'll just tick off what he concluded about the various sources that were relied on in the Filartiga case. He basically said that a treaty is proof of custom only if there's only overwhelming ratification of the treaty plus uniform and consistent action in accordance with its principles. And he basically suggested that if the United States hadn't ratified or hadn't made the treaty self-executing,

it couldn't be a source of custom. He said, correctly, that general assembly resolutions are not a source of customary international law. He said that multilateral declarations are invariably political statements that are not a proper source of customary international law. He said that the decisions of international bodies are not primary evidence of international law. And he basically said that scholars, or course, cannot be a source of customary international law.

So, the trend lines have been bad for the last quarter century. I think these three cases in the last year have been good. I'll just close with two quotations from law professors who've been fighting about these issues. David Beaderman, a professor at Emory, wrote that for human rights lawyers, "The rediscovery of the Alien Tort Statute in 1980 was much like finding the Holy Grail." It was everything they'd been looking for, and it gave them all-encompassing power to go forward.

To which, Michael Collins of Tulane responded in an article in the *Virginia Journal of International Law*, "Why not? Like many other legal archeological discoveries, the Alien Tort Statute is almost too good to be true. By incorporating an unwritten and ever-evolving law of nations, often developed outside our domestic political processes, and with a prominent role played by academics, the Alien Tort Statute is uniquely configured to take on the meaning that the sincerest human rights advocates wish it to possess, and as supreme federal law no less."

In the last year, courts have started to cut back on this nonsense, and I'm hopeful that those trends will continue.

PROFESSOR DAMROSCH: I'm designated to speak in favor of customary international law, so I think I need to begin by paraphrasing Ted Olson, who said that he's been before more hostile audiences. And I guess I've been before some hostile and some friendly audiences, and I don't know where on the spectrum the individuals out here are. But I hope that I can show that you needn't be hostile to customary international law. I want to make that case in some of the terms that are familiar to the Federalist Society, even though they may not be my own way of thinking about things.

The first of those terms is originalism. I think it's quite clear from the founding generation that the United States would comply with international law, including customary international law, and that all three branches would participate in ensuring compliance. Second, I think it's very clear that the main areas of customary international law that were known to the framers are just as important to the United States today. And among those, we can single out diplomatic; maritime law, including high seas freedoms and control of coastal water; piracy; and the laws of war, including the rights and obligations of belligerents and neutrals.

Now, let's just begin with originalism. I'm not an originalist; I have to confess that, so this is like talking a foreign language to me. But, for those of you committed to originalist methodologies, there is ample evidence that the framers expected that the United States would comply with international law, and that all three branches would participate in ensuring compliance. I think we can find this from Article 1, Section 8, clause 10, the Congressional power to define and punish offenses against the law of nations; in Article 2 from the executive power clause and the take-care clause, that the executive shall take care that the laws be faithfully executed. We can find it from the attention in Article 3's specification of the judicial power to include suits that would

implicate the foreign relations interests of the United States, and we can find it from the supremacy clause of Article 6 that makes the Constitution laws and treaties of the United States the supreme law of the land. And it explicitly establishes there's supremacy over state law.

Now, Blackstone, whose writings were well-known to the framers and were quite influential to our constitutional debates, said that the law of nations in its full extent is part of the law of England, and that law of nations was part of the law that was received into the U.S. legal system.

We know that one of things the first Congress did in the first judiciary act of 1789 was to make explicit provision for suits by aliens for torts in violation of the law of nations, and that's the very statute that was invigorated in 1980 in the *Filartiga* case that Jack Goldsmith has criticized…

(Audio break)

… Goldsmith that international law textbooks identify the two elements, first the general practice of states, which must be widespread, representative, and consistent, and second, that this practice must be followed out of a sense of legal obligation.

Now, historically, customary international law covered and continues to cover domains of international relations that remain strategically and practically very important to the United States. The essential attributes of external sovereignty are all derivative of the core notions of statehood established by customary international law. The power to control our borders the power to exclude those who are not part of the polity—the Supreme Court looked to customary international law to allocate these powers to the national level of government in the late 19th and early 20th centuries. The law of the sea, including freedoms on the high seas and the rights of coastal states to control areas close to their own borders; the law of diplomatic relations, including the immunities of foreign emissaries in U.S. territory and U.S. diplomats abroad, as well as the obligations of diplomatic and consular officers in the states that receive them. There's a long history of U.S. courts dealing with such questions, and giving effect to international obligations of the United States to protect these immunities.

We need customary international law in all these areas. We benefit from the existence and enforcement of customary international law. Customary international law, including judicially enforceable customary international law, is very much in U.S. interests, as much so in the 21st as in the 18th century.

Now, let me take the example of the law of the sea. We'll note here that maritime law is specifically noted in Article 3, Section 2 of the Constitution, as falling within the federal judicial power. Now, for most of the rest of the world, the law of the sea is now treaty law. The United States is one of those few states that is not a party to the U.N. Convention on the law of the sea. So, for the United States, the relevant law is customary international law. Now, who was it who told us that the law of the sea is customary international law? It was President Ronald Reagan, who issued a proclamation in 1983 claiming for the United States certain benefits under customary international law and insisting that we would hold other states to their obligations under that same body of law. His statement said, in part, that the United States has long been a leader in developing the customary law of the sea, and that the United States will recognize the rights of other

states in the waters off their coasts, so long as the rights and freedoms of the United States and others under international law are recognized by such coastal states.

It is that very customary international law that we rely on when we claim rights of passage through international straits, or the rights of submarines to navigate without surfacing, or innocent passage through other states' territorial waters—all of those are critical to our national security, and we rely on customary international law for those.

Now, there's a customary law of diplomatic immunity, and of other state officials. This was recognized in the 18th century. Indeed, some of the leading cases from the founding generation deal with what we would call diplomatic law. Today, much, but not all, of this body of law is codified by treaty. But where there is no relevant treaty, as in the examples of heads of state or government or foreign ministers or other high-level officials who visit the U.S. on official business, then U.S. courts quite properly recognize such immunities as a matter of customary law and give effect to them by dismissing cases brought against such immune foreign officials.

Now, at the international level, the International Court of Justice has confirmed the existence of such immunities in a 2002 case, the arrest warrant case, *Congo v. Belgium*, which applied a rule under customary international law that a sitting foreign minister is immune from legal process. There should be no doubt of the U.S. interest in applying such a rule in our own courts, thereby giving effect to customary international law, if a suit should be initiated against a sitting foreign minister of a foreign state in our courts. You can be sure that our government would invoke such a customary international law immunity, if a case were brought against one of our officials in a third country court. And unless we apply a customary international law in our courts, how can we expect foreign courts to do so.

Now, let me move forward to the 20th and the 21st centuries and explain our need for customary international law and judicial enforcement of customary international law. I would like to stress here the influence of U.S. constitutional concepts on much of 20th and 21st century customary international law, including the protection of private property. Major 20th century efforts to ensure that the customary international law and the payment of just compensation upon the expropriation of private property for public purpose would maintain an international odd minimum standard roughly comparable to the U.S. Fifth Amendment takings clause. Far from judicial activism, the courts showed self-restraint in this area, and Congress actually instructed the courts to apply a customary international law rule.

There are differences between the old and the new customary international law. Do those differences matter? It is true that the domain of customary international law has expanded to include topics that were not part of the field of customary international law in the framers' day. Human rights law is the main area of this expansion.

A strong argument can be made that because of the worldwide human rights movement in which the United States has played a leadership role, the Iron Curtain fell and the infusion of U.S. values into the mainstream of international humanitarian law, for example, through the efforts of Max Kapelman, who chaired U.S. delegations at some of the key East-West meetings, has led to legally binding and enforceable customary international law behind the former Iron Curtain.

Now, I have a module on juvenile death penalty, which I want to talk about, but you're going to tell me I'm out of time to talk about the death penalty.

HON. WILLIAMSON: No, why don't you go ahead.

PROFESSOR DAMROSCH: Okay. I do want to say a few words on the juvenile death penalty because this has been one of the areas where the dispute between those who favor application of customary international law in U.S. courts and those who oppose it has been most sharply joined.

Every country in the world except the United States and Somalia has accepted a treaty obligation that establishes a minimum age of 18; that is to say, the minimum age at which the crime was committed for the application of the death penalty. This is the Convention on the Rights of the Child. And as I say, every country in the world except the United States and Somalia are parties. Now, I agree with Jack Goldsmith that the mere existence of an unratified treaty is not enough to establish customary international law. Many of the aspects of the Convention on the Rights of the Child are not customary international law. The question is, what is the pattern of practice?

Here, we would look to the factual record of the actual behavior of states. That factual record shows that virtually all states have refrained from applying the death penalty to persons who committed their crimes below the age of 18. Virtually all have set such a minimum age in their national constitutions or laws, and virtually all have followed, out of a sense of legal obligation, the consistent practice of refraining from applying the death penalty. This applies, by the way, to the U.S. federal statutory minimum age, which is 18, as well as the state laws of every state that has recently reformed its death penalty laws, including my own state of New York.

The only states actually to have executed juveniles in the last decade are Iran, Nigeria, Pakistan, Saudi Arabia, and if you go back far enough, you can get Democratic Republic of the Congo in that list, as well. Of the states of the United States in the last 10 years, the only states that have executed juveniles are Texas, Virginia, Oklahoma, and if you go back to 1993, one each from Georgia and Missouri.

Now, if I lived in one of the states that still insisted upon a right to execute persons who had committed their crimes below the age of 18, I would wonder whether I would want to be in the company of Iran, Nigeria, Pakistan, and Saudi Arabia. I would wonder about joining the consensus of the rest of the world. I would want to know when's the last time my elected representatives deliberated on and fixed a minimum age. And I suspect that the answer would be that the elected representatives simply never considered the question, or at least not recently.

If a rule of customary international law does exist, as I believe it does, then the federal courts could and should enforce it against non-compliant states. The United States has the sovereign prerogative to enforce international law, and it has the sovereign prerogative to violate international law, but the latter prerogative can only be exercised by the federal government, not by the states.

PROFESSOR BRADLEY: The issue I'll be addressing in my short amount of time is the issue of the domestic legal status of the type of law you've been hearing about -- that is, customary international law. And in particular, I'm going to challenge the claim that's been made by a number of courts since the Filartiga case that Jack Goldsmith mentioned, the claim that this body of law has the status automatically of federal law within the U.S.

legal system. By federal law, I mean that it would preempt automatically any inconsistent state law, such as death penalty laws, as Lori Damrosch just mentioned, and also provide a basis for bringing cases into the federal courts under federal question jurisdiction, possibly also judicially binding the executive branch.

A number of courts have said since Filartiga that customary international law has the status of federal law. They've done so in the human rights litigation in particular. I think they are wrong—and to make a prediction, I think the Supreme Court, when and if it addresses the issue, is likely to determine that they are wrong—so I'll try to persuade you of that in a very brief amount of time.

The place to begin this question and questions like it is really with the constitutional text. To go back to a point that Lori Damrosch made, the founders were certainly quite aware when they wrote the Constitution and ratified it that there were two major sources of international law. There were treaties and there were also the body of law called the law of nations, part of which we call customary international law.

Given that understanding, the text of the Constitution on this is quite striking. That is, we see abundant references to treaties. For example, in the most relevant clause to this issue, the supremacy clause lists three types of law that shall have federal supreme law status: the Constitution itself; the laws of the United States; and treaties. And that is the end of the list. The Constitution also talks about treaties in giving jurisdiction to the federal courts. In neither the supremacy clause nor in Article 3, the provision for the federal courts, is there any reference to this body of law, well known to the founders, known as the law of nations.

Indeed, as Jack Goldsmith noted, the only place in the text of the Constitution do we see a reference to this important body of law is in Article 1. That is a grant of power to the legislature, to Congress, to codify the law of nations as part of their power to define and punish offenses. The Constitution, of course, also tells us how treaties are made. That is, through a process that involves both presidential action and a super-majoritarian requirement in the Senate, again making no mention of the other body of international law, the law of nations.

So, what one could easily read just from the initial survey of the text is that treaties could be, if they go through the right process, part of the supreme law of the United States. And indeed, that is what the supremacy clause says. But the way in which the law of nations, a more diffuse, evolving body of law, the way in which that body of law can become part of the U.S. legal system is through congressional action in the define and punish clause.

Congress, of course, has invoked that clause in a few select instances. But in all of the areas of controversies, some of which the last two speakers touched upon, we do not have congressional action, nor do we in any relevant way have treaties being enforced as the Constitution specifies. Now, advocates for broad status for the law of nations or for customary international law in the U.S. legal system often try to point to the clause in the supremacy clause that refers to the law of the United States. The claim that has often been made is that that clause should be read as implicitly incorporating the body of the law of nations.

This argument is incorrect, I think, both historically and as a matter of just a simple reading of the text. So, first, historical evidence, which a number of historians and law professors have looked at quite closely, clearly indicates what one would think

anyway from reading the clause itself, which is that "laws of the United States" refers to laws enacted by the federal legislature—that is, from Congress. And of course, that is why treaties are mentioned separately. "Laws of the United States" is not a reference to international law.

But the textual points even stronger than that—the clause is actually not "laws of the United States;" it's "laws of the United States made in pursuance of the Constitution." I find it difficult to see how anyone could argue that the body of customary practices evolving over time in the international community is made pursuant to the U.S. Constitution, which is the requirement of the supremacy clause.

In a further effort to advance this argument that the law of nations is automatically part of the laws of the United States, some people have pointed to cases, particularly cases from the 1800s and early 1900s decided by the U.S. Supreme Court, in which the Supreme Court has in fact stated basically the following. Customary international law, or the law of nations, is "part of our law," or "part of the law of the land." And there are statements like that in these old Supreme Court decisions. It is clear from the context of those decisions, from admiralty cases and the like, that what the court meant by those statements is that the law of nations is part of the background common law rule that courts in this period could draw upon when they otherwise had jurisdiction over the case, and when there was no domestic law to the contrary. And indeed, some of the cases said exactly that.

A number of historians and others have studied this particular issue as well, and it is almost now uncontested that the historical evidence suggests that the Supreme Court and other courts were not treating the law of nations as supreme federal law. They were treating it as part of the background common law. That is the only way in which the courts were, in effect, borrowing from Blackstone, the reference that Lori Damrosch made. So, there are serious technical and, I think, dispositive textual arguments as to why the law of nations was not intended to be part of the supreme federal law, unless incorporated into our legal system by the political branches of our government.

In addition to just a reading of the text, though, I think it's important to point out there are serious political process objections to the claim that this evolutionary customary body of law automatically is part of our federal law materials that automatically preempt the state and perhaps have other effects on the federal courts and the executive branch. In particular, I think there are two sets of problems. One, one could put under the heading of Federalism related problems. Under the Constitution, the federal government is given broad power to preempt state law. To do so, however, it must go through difficult processes, either through the legislative process, which typically involves majority support in both houses of Congress and presidential signature, or through the treaty process, which in many ways is even more difficult—both presidential participation and two-thirds of the Senate.

The states and their citizens have substantial representation and voice in both of those processes, and they in effect have no voice, by contrast, in this process of customary international law formation. Nor do they have formal representation in the federal courts that have been asked to directly incorporate this material into the U.S. legal system.

And the second set of process concerns separation of powers. When the courts act on their own to convert customary international law into U.S. federal law, they are

bypassing both Congress and the U.S. treaty makers, the two entities charged, as I've mentioned, with incorporating international law into our system.

As a final separation of powers problem, most of the customary international law that has in fact been incorporated by the federal courts has been in the area of international human rights law, as has been mentioned. Much of this law is reflected today in multilateral human rights treaties. And yet, if you look at the practice of the Senate and the president with respect to those treaties, you find a consistent decision not to bring those materials into the U.S. legal system, either by not ratifying the treaties at all or by consistently attaching limiting conditions to specify that the treaty shall not be self-executed within the U.S. legal system. In my view, it undermines the Senate's and President's role in the treaty process for courts to simply allow litigants to re-label their human rights claims as customary international law, and thereby bypass the restrictions imposed by the Senate and President.

In sum, the proposition that customary international law has the status of federal law is inconsistent, in my view, with the text of the Constitution and its assignment of responsibilities to Congress and the treaty makers, and it's inconsistent with the legal process related both to American Federalism and separation of legal powers.

Thank you.

PROFESSOR CUMM: It's a pleasure for me to be here. And having first been educated in Europe before coming to the United States, and now teaching at NYU, what I will try to do here is not to duplicate any of the arguments that have been put forward with regard to the status of customary international law as a matter of domestic law, but instead bring a somewhat historical and imperative perspective to the subject.

Now, to begin with, one of the things that is striking about the contemporary debates about the status of customary international law in the law of the United States is the absence of two opposing radical positions. One radical position would be to claim that international law generally, but certainly customary international law, isn't really law properly so-called and shouldn't be subject of any judicial enforcement by federal courts in the first place.

The arguments in support of that position I won't put forward now because this is not part of the debate that we are currently having. But it's important to keep in mind that for over a century, in the 19th century and even in the early, right up to the mid-20th century, claims and arguments relating to the status of international law generally, but certainly customary international law, as law at least for the purposes of domestic enforcement have characterized a significant part of the debate, and that position today has been—is off the table primarily because practice, as it has evolved, and arguments, as they have been put forward, have suggested that this is a problematic position to take.

There is an opposite position, just as radical, which isn't part of the debate either, and it's the following. It suggests that anything that is international law, in virtue of being international law, trumps any national law to the country, even national constitutional law. The idea is that the world is constituted by a vertically integrated legal system, at the top of which is international law. Now, that isn't a model that informs much of practice in liberal democracies all over the world today either.

Instead, the debates have centered about how to design doctrines to appropriately manage the interface between national law on the one hand and international law on the

other. With regard to customary international law in the United States context, the specific problems, one of which we've already address, are two. On the one hand there's the question whether customary international law is a kind of federal common law and, as such, preempts state law.

Now, that would have significant practical implications. Amongst other things, it would mean that in the case of the juvenile death penalty, for example—and this is an easy case as far as ascertaining that there is a rule of customary international law that prohibits the juvenile death penalty, and there are no problems related to sources, at least in this particular case either. It's a slam-dunk simple case. So, if we accept that there is such a rule of customary international law and it has the status of federal common law, it would mean that the juvenile death penalty, to the extent that it exists as a criminal law on the state level, would have to be declared as incompatible with federal common law. So, that's one issue we've heard the two sides of the debate already.

But there's a second issue that I want to lay out on the table, at least, and which increasingly informs at least the sense some justices' tendencies here in the United States, and that is to use customary international law, or foreign law more generally, as an aid to interpret the national Constitution. So, particularly with regard to the fundamental rights provisions, which are very abstract and indeterminate, as we all know, the question is whether or not you can draw customary international law—I will just focus on that for the moment—as an argument that has some weight, that has a role to play in the mix of arguments that determines how to appropriately interpret the Constitution.

With regard to the juvenile death penalty, for example, to take that up again, the question is whether the fact that there is a rule of customary international law, which prohibits the juvenile death penalty is an argument to interpret the Eighth Amendment prohibiting cruel and unusual punishment in such a way as to ensure the conformity of national constitutional practice with international law. That's the issue.

Now, the issue raises a whole host of deep jurisprudential issues that I won't have time to go into now, but I'll just put on the table three arguments, since I was asked here to speak in favor of customary international law—three arguments in favor of giving some weight, of making customary international law arguments part of the mix as far as the canons of arguments available to constitutional lawyers and constitutional adjudication concerns.

What are these arguments? Well, I'll focus on three. The first is the following, and it's generally recognized in the United States with regard to the interpretation of statutes. And it's generally recognized in most, if not all, liberal democracies with regard to constitutional interpretation, as well. It's the following argument: If in doubt, a federal court should interpret national law in such a way as to preclude the triggering of international liability. So, you would want federal courts to ensure that unless there's something to the contrary, they know something to the contrary, what they are doing will not trigger the international liability of their country. But of course, that's not an argument, once you know that the political branches of your country don't care very much in that particular case and prefer a different outcome.

So, what other arguments are there? Well, one of them refers to the value of the international rule of law, the idea that there is some value—now, this value doesn't trump everything else—but there's some value attached, and some way to be given, to attempt to establish and to further nurture an international environment in which states generally,

also through the use of national judiciaries, ensure that states abide by and enforce international law. Now, if there is some value there, if that is a value of some significance, then the idea of furthering the international rule of law provides an argument to give some weight to customary international law when interpreting the national Constitutions.

Another point. Once we've solved problems relating to the identification of customary international law—let's imagine we're very strict with regard to the standards that we apply in order to determine whether, in fact, there is a rule of customary international law. If we use such an approach, a strict approach to the identification of customary international law, then it is very likely, or it's at least something to put on the table, that result wise, it would probably help and illuminate and enlighten the national constitutional tradition. That is at least an argument I've heard in various constitutional jurisdictions outside of the United States. It could enlighten the national constitutional tradition to at least see the arguments and see the positions that international law provides out on the table, as part of the mix of considerations that are relevant.

So, the idea is that all things considered, the practice will be one that is likely to provide better results once we include what international law has to offer and what customary international law has to offer as part of the mix to be considered in constitutional interpretation.

And the third argument is pragmatic and certainly not legal technical in any sense, but I think it's of importance. It's the following. It's connected to the idea of the unique role and the great success of the United States with regard to its position in the world to day. Many countries look to the United States—many constitutional courts, many legal actors in the world, look to the United States look to constitutional practice in the United States, to see what it is, to get an example, to at least engage with how one could think about constitutional rights, adjudication, what the appropriate role of the judiciary is, etc.

If the American federal court set an example here and engaged—not necessarily always followed, but engaged—international law seriously, engaged in a practice of reasoning in this respect, in some sense that could help. Now, I don't want to over-emphasize this. It's just one point in a wide mix of factors. But it's one way in which other courts in other countries where democracies are likely to be less entrenched, more unstable, to help them do the right thing and enforce international law, even against these perhaps recalcitrant reactionary and undemocratic executives some of the time, to some extent. So, it's the model, the exemplary function, that is at least an aspect that needs to be taken into account in this respect.

Thank you.

JUDGE EASTERBROOK: The topic of this panel, "Customary International Law: A New Font of Judicial Activism?" should cause everybody to do a double-take. Custom differs from law in kind and not just in degree. Unless there's a command behind the custom, it's not law. And if there is a command, we call it a statute or a treaty. Then there's the activism part of this title. Usually, this is just a shorthand for judges behaving badly, where the audience fills in its own definition of badly. In his new book, *Coercing Virtue*, Robert Bork treats it as a shorthand for judges behaving really badly. Judges occasionally behave really badly on all fronts. Customary international law is, alas, nothing new.

I'm skeptical of this new approach of defining activism. Judicial error is deplorable, as is judicial self-indulgence. Obi wan Kanobe would call it the Dark Side of Tenure. But I prefer to use the word "activism" to denote judicial usurpation, which is to say claiming for the judicial branch a power reposed in the political branches. From this perspective, judicial reliance on customary international law may be a new kind of activism for almost anything judges say about customary international law, which is to repeat something which is made up without the benefit of statute or treaty, entails a transfer of authority from the political branches of the government.

Our Constitution creates only two ways to bind persons to international law. Now, I use the word bind advisedly because there may be international law that is conclusive on the United States as a sovereign, without affecting its citizens and courts. This nation follows the dual approach to international law. In other words, the United States may have to answer to its partners in international circles for failing to keep promises, but the promises made to other nations are law within the United States only if implemented by statute or the rare self-executing treaty.

An example is the turmoil about the execution of some aliens who haven't been told about their right to seek consular officials. Some of our international partners and the International Court of Justice have taken the view that the United States is in default of its commitments. But United States courts have held that those treaties don't require the exclusion of evidence, so the remedy for errors by police must come in some other way.

Back to the main point. There are two ways to bind persons to international law. The first is the treaty clause that requires the consent of the president and two-thirds of the Senate. The second is Article 1, Section 8, clause 10, which says that Congress may define and punish piracies and felonies committed on the high seas and offenses against the law of nations. That requires a majority of each chamber plus the president's signature, or two-thirds of each chamber to override a veto.

There's no corresponding power in the judiciary to make any — (inaudible) — international law binding within the United States. Why empower Congress to define offenses of international law if judges just do so anyway in common law fashion? Now, this isn't to deny that Congress can't delegate a power to resolve private disputes under common law. After all, the antitrust laws are pretty open-ended. So is admiralty.

But it's quite something else for the judiciary to insist that the government itself is bound by customary, which is to say common, international law. It's not just activist, in my sense of self-aggrandizement, but contra-constitutional for judiciary to insist that states or the political branches of the national government conform to international law that does not meet the requirements of the treaty clause or the law of nations clause. I mean, think Erie, which held that general federal common law overriding state law is both non-existent and non-constitutional. And since customary international law is the set of things that don't meet the constitutional requirements, to enforce it against the president or the states has serious problems.

Now, some of you must be thinking, surely no court would tell the president that norms from outside statutes or treaties are legally binding. Everybody knows that it's the president who has the leading role in foreign affairs, subject only to grants to Congress, such as the power to declare war. So one might think, but if everybody knows this, the point seems to have escaped American judges.

The Alien Tort Act, which Jack Goldsmith discussed, gives U.S. courts "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." One might suppose, and distinguished judges, including Robert Bork, Roger Robb, and Raymond Randolph, have concluded that the law of nations referred to in that statute differs from modern customary international law and covers the set of offenses that nations universally respect. Diplomatic immunity and the laws against piracy on the high seas come to mind. But this is a minority view on the judiciary.

Ever since the Second Circuit's *Filartiga* decision in 1980, most federal courts have seen in this Delphic language an invitation to apply novel customary international law, to invent if need be, and even to override its limitations, such as the requirement that there be an actual custom or a ratified treaty to which the United States subscribes. Once you start relying on non-ratified treaties, the constitutional problem ought to be pretty clear.

I'll give you one example, a recent decision of the Ninth Circuit, holding that an alien is entitled to collect damages for a kidnapping said to violate customary international law, even though one defendant is the United States and the other acted for the United States. And, it is the official policy of the United States that kidnapping is valid under international law when the host nation refuses to deliver up criminals. If you doubt that proposition, let me remind you that we invaded Panama, in large measure to grab the drug deal Manuel Noriega, then ensconced as its president; that invaded Afghanistan and Iraq in order to lay hands on people who we deemed criminals, who those failed to render up.

Now, Justice Scalia tells me that judges shouldn't discuss Ninth Circuit decisions while petitions for certiorari are pending, so I will limit myself to stating the facts on the holding so you can judge for yourself whether a federal court would make an independent foreign policy and order the executive branch of the United States to follow that foreign policy.

The case I have in mind is Alvarez Machain, which Solicitor General Olson. The plaintiff, a Mexican national, was apprehended in Mexico at the behest of the United States and brought here for trial on drug and murder charges after corruption within Mexico thwarted his extradition. The Ninth Circuit dismissed the indictment on the ground that we had obtained the custody illegally. the Supreme Court of the United States reversed, holding that an invalid arrest does not prevent prosecution and that the diplomatic repercussions must be worked out through the State Department rather than the judiciary.

Alvarez Machain then turned the tables by suing both the persons who apprehended him and the United States, seeking money damages on the theory that by acting outside the extradition treaty with Mexico, the United States and its agents had violated customary international law. By a vote of six to five, the Ninth Circuit held earlier this year that he has a good claim. Notwithstanding the observations by Judge O'Scannlain, who wrote the principal dissent, that there can't really be a custom if the United States expressly rejects it as a matter of national policy, there were serious problems with separation of powers and sovereign immunity to boot. I won't discuss this case any further, but I do invite you to read it, plus Solicitor General Olson's petition for

certiorari as part of your intellectual inquiry into the question whether customary international law has become a new font of judicial activism.

Let me turn now to a second use of international custom as a tool of constitutional interpretation. "What?" many of you must be thinking. The Constitution was adopted in the late 18th century. How can modern international practices illuminate its meaning? Well, that's a good question—an unanswerable one, I believe, but twice in the last two terms, a majority of justices have done this. In *Atkins v. Virginia*, which posed the question of whether the Eighth Amendment permits capital punishment of retarded murderers, the majority opinion related that "the world community"—that's the court's phrase, not mine—"has overwhelmingly disapproved" of such executions. It did not explain why an opinion poll of United Nations diplomats has any bearing on the meaning of the constitutional text that James Madison drafted in 1791 or the power of Virginia to stake out its own position on that subject.

And in *Lawrence v. Texas*, which dealt with a challenge to the prohibition of consensual homosexual conduct, the court cited a decision of the European Court of Human Rights and the report of a British parliamentary committee, among other sources. Now, I'm inclined to think that these references are just window dressing. The justices would have reached the same decision in *Lawrence* if the Wolfendon Report in the United Kingdom had come to a different conclusion. In *Lawrence*, the reference to international custom was designed to refute the contention of former Chief Justice Berger that homosexuality has always and everywhere been condemned. It's hard to fault Justice Kennedy for giving an accurate internationalist response to an absurd internationalist argument in support prohibitions.

What really swayed the justices in *Lawrence* was John Stewart Mills on liberty. "Governments should not interfere with acts that do not harm third parties." That's an attractive moral principle. Just ask the Cato Institute. And you'll find me flocking with the libertarian wing of the Federalist Society. Still, it's no easier to term British moral philosophy of the 19th century into constitutional law than to treat the world court as a source of American constitutional law.

Have the justices forgotten that our Constitution lacks a judicial review clause? It's got a treaty clause. It's got a law of nations clause. It does not have a judicial review clause. The reason why judges are entitled to make constitutional decisions is that the Constitution is real law. That's *Marbury*'s central point. Having a written Constitution creates a hierarchy of legal rules, and when the Constitution clashes with ordinary law, the Constitution wins. That's an implication not only of the supremacy clause but also the amendment clause, which disables legislatures from changing the Constitution without a national consensus reflected in the approval of three-quarters of the states.

This means, however, that judges have the last word only when the Constitution is law. Appeals to substantive due process, the basis of Lawrence, are not appeals to law at all. Substantive due process and customary international law are alike in the sense that they aren't law. And when judges cannot implement rules of law, they have only one proper thing to do. They must shut up, which I will do right now.

Thank you very much.

HON. WILLIAMSON: Thank you very much. I want to allow the panelists, just very briefly—if any of you want to make a response to what any of your colleagues said. Jack.

HON. GOLDSMITH: Just a word about the juvenile death penalty, which has been raised by two of the speakers because I think it really raises in a very sharp and concrete fashion some of the issues of this entire conference on American sovereignty. Lori said correctly that the United States is one of two nations that has not ratified the Rights of the Child Convention that prohibits the juvenile death penalty. I disagree with Matthias that it's obvious that this is a rule of customary international law. You'd have to demonstrate that nations are not executing juveniles because they have a sense of legal obligation under international. If they do—assume that it is a rule of customary international law. It's also quite clear under standard doctrine that a state can opt out of a developing rule of customary international law by making clear that it doesn't consent to it. And the United States could not have been clearer in the last 20 years through various administrations in making this point clear. It's not just that we haven't ratified the Rights of the Child Convention; it's that we took reservations to the International Covenant on Civil and Political Rights, and we made various pronouncements in various international bodies that we do not feel ourselves bound by that norm.

Now, Lori knows this, but she thinks it doesn't matter. She thinks that because almost every country in the world thinks that this is a bad practice, that the United States must be bound by it. She thinks that judges should enforce that against states that have, through their democratic processes, decided that this is an appropriate punishment. That's the issue.

And let me just say that maybe the juvenile death penalty is not the best context for many people in which to think about the point Leonard Leo made, which is that this is really about whether we like our community and the way we decide things. It's not just the juvenile death penalty in which the United States differs from the rest of the world. It's property rights, it's the First Amendment, it's Federalism, it's separation of powers, and a whole host of other issues. And that's where this line of thought is taking us.

PROFESSOR DAMROSCH: I have two points to make in response to the positions of those on the panel. The first has to do with the role of scholars and the second has to do with unratified treaties. Our moderator, in sending an email message before this panel, gave us a little reading list and a few things he wanted us to comment on. And he asked us in particular to look at three cases, all of which savaged the role of scholars in the creation and application and advancement of international law. And I'm looking down the panel and I see that out moderator is the only member of this panel who has not been a law professor. So, what can I say?

I think there may be a small role for scholars. I do agree with the courts, and I think I agree with my colleagues on the panel, that academic is merely a subsidiary source, and it is most useful to the courts when it compiles and systematizes the relevant primary sources, that is to say the state practice. And I agree with the others on the panel that opinions about what the law should be are not the same thing as expositions of what state practice actually is. So, there's not too much difference about us on that point.

I think there's only one area where we differ, which is that I think that in general, federal judges are smart enough to tell the difference, whereas my colleagues think that the scholars should just shut up. I don't know why that is.

Now, I do think that there is some room for law professors to indicate to the courts, using whatever arguments and evidence they can muster, the general trajectory in which the law could be evolving, and law professors can point out what the long-range consequences would be of helping to move that trajectory along, and why it might be in the long-range interests of the United States to weigh in and to push things a bit farther in a favorable direction. Here, I agree with my colleague Professor Cumm that inter-judicial dialog, in the expectation that courts outside the United States may advance our constitutional values a little bit if they see that were are paying a little bit of attention to international jurisprudence. It's one of the affirmative contributions that the courts, and indeed the scholars helping the courts, can make.

Now, on unratified treaties, this has come up a couple of times, and there's an interesting case from the Second Circuit that is also on the reading list that our moderator gave us. It's not an alien tort case. It's *United States v. Yusef*, a terrorism prosecution. One of the interesting things in the *Yusef* case is that the court, there, actually used customary international law in interpretation of statute of the United States in considering what did Congress mean when it enacted an ambiguous statute, and could Congress in particular have meant to apply a kind of universal jurisdiction to reach a terrorist act that was committed or a conspiracy to commit a terrorist act that would have happened on a foreign aircraft flying between foreign ports without connections to the United States.

Now, one thing that's interesting about the *Yusef* case decided in April of this year by the Second Circuit is that the court actually thought that customary international law could be relevant to interpreting a U.S. statute. And I think that's actually a very constructive thing for the court to say. Now, I think they got it wrong on what customary international law actually is because the court looked at the wrong level of abstraction in trying to ascertain what aspects of terrorism are prohibited under international law; where is there consensus, where is there lack of consensus, and in particular, can politically motivated terrorism be considered to be the kind of crime that is sufficiently condemned with a sufficiently resounding unilateral consensus that it's covered by universal jurisdiction. The court said, oh, there's no consensus on political terrorism. And I think, there, if the court had listened to the law professors, the court could have identified the issue at the right level of abstraction and could have understood that this particular kind of terrorism is universally condemned.

Now, what I wanted to say on the unratified treaties, is that in the *Yusef* case, the court explicitly looked to an unratified treaty, namely the Vienna Convention on the law of treaties, the so-called treaty on treaties. It is not ratified by the United States, but the United States government has stated many times that it's an authoritative guide to the customary international law of treaties. And the *Yusef* court said, "Although the United States has not ratified the Vienna Convention, we look to it here as one source of guidance because the United States played a leading role in negotiating the Vienna Convention, and the U.S. Department of State long has taken the position that the Convention is the authoritative guide to current treaty law and practice."

Now, I think that that's a very valuable way in which a federal court has used an unratified, which the United States supports in its essential provisions as an authoritative guide to what customary international law is.

HON. WILLIAMSON: Any other comment from the panelists?

PROFESSOR BRADLEY: I'll just make a brief comment, Edward. Just as an observation, there are a bunch of different issues obviously connected up in the discussion that we've had. But to separate them out a little bit because you've seen some debate about some of them, but not all of them, there would be some discussion of whether there is such a thing as customary international law today. What does it mean? Does it have an important role? —some differing perspectives about that.

A different issue is, assuming there is such a body of law, and I myself think there is and that it does still play an important role—I agree with Lori about that—to what extent is it binding on the United States? Under what circumstances is it? So, for example, the juvenile death penalty, if there is such a norm, has the United States in effect opted out of that? I think they probably have, although people on this panel would disagree about that.

And then, probably still the most important issue I think is the issue about enforceability in the U.S. legal system. The enforcement mechanisms internationally, as you probably all know, are quite weak, which is one of the problems with international law. The enforcement mechanism in the U.S. legal systems are quite strong. And so, the ultimate issues I think of great significance is the precise status within the U.S. legal system. At least, I haven't heard significant arguments about why, given the constitutional structure and text and the important role played by the political branches in international law, why the federal courts themselves should be incorporating this material directly without any filtering or authorization from the parts of the government the Constitution seems to envision doing that work. And so, I think that's at least the most significant issue, from my perspective.

PROFESSOR CUMM: I just—well, I suppose—I do just want to—briefly, a technicality to Professor Goldsmith. Of course, there is a persistent objective rule, which precludes a rule of customary international law, which is generally supported by state practice and the opinion to be legally bound, which a state can opt out of if the state qualifies as a persistent objective. If the state is persistently objective.

With regard to the United States on the juvenile death penalty, unfortunately the first objections came up in 1990, and before that, the United States had already signed on to but never ratified the Inter-American Convention on Human Rights. So, at least you can see how there's an argument there about how, even though later on, since 1990 onward, certainly there has been a persistent objection to this particular rule that may simply have come too late.

But more importantly, there is one point that I agree with, with Judge Easterbrook, and it's the following. There is a deep connection between general questions that all of you are very aware of, of constitutional interpretation and an originalist approach, on the one hand, and the role of using customary international law or foreign—and those are two different things—in constitutional interpretation. I think it's true that it's somewhat difficult from the basis of an originalist methodological commitment to come to a conclusion that it is appropriate for the Supreme Court to use international law arguments in constitutional interpretation. So, I think the methodological debate about the proper role about general practical arguments and the focus on contemporary understandings, on the one hand, and the originalist camp, on the other, their dividing line

there is also the same dividing line. It's a theoretically connected dividing line, and it just breaks out once again with regard to these particular issues.

HON. WILLIAMSON: Judge Easterbrook.

JUDGE EASTERBROOK: I've been now accused of being a professor, which perhaps lies in my past and currently, you know, I do on the side. I'm not saying—I didn't want to disparage the work of legal academics. When I have a question of international law, I find the work of legal academics very useful, as, in fact, I find the work of the Ninth Circuit very useful on questions of domestic law. I look them up to see what they've done, and I do the opposite.

HON. WILLIAMSON: Before we open up for questions for the audience, I would like to make one comment myself. We've been citing the Rights of the Child Convention. And Lori knows me well enough to know I won't let this pass. I think that there's another aspect of the Rights of the Child Convention that's quite interesting, and that is that one of the substantive provisions of the Rights of the Child is that it states that every human is entitled to life, and in the preamble, it states that the rights provided in the Rights of the Child Convention start before birth. That, to me, translates into a pretty clear expression of a ban on abortion.

Now, I'll admit that the — (inaudible) —do attempt to make it clear that that is not what was intended, but it seems to me that the clear wording of the Convention is there. And then, I think if you survey what happens, what is the practice of states, I think you'll find an overwhelming practice of banning abortions. Now, pro-life crowd, don't get too excited because if, in fact, the right of choice is actually found in the Constitution, then we should not be supporting a convention that goes against what our Constitution provides.

With that little piece of legal trivia, let's see if anybody has any more intelligent questions.

AUDIENCE PARTICIPANT: Yes, this is John McGinnis of Northwestern University. My question is perhaps a somewhat naive one, which is, what is the role of customary international law in the modern world? I certainly understand why, in a world where there were high information costs, it was very hard for representative nations to travel and come together, you needed a process to discover what they might universally accept and regard as law. Of course, today, with planes to Geneva, the Internet, if nations want to come together and create a new rule of international law and then ratify it through their national processes, it's very easy to do. So, why should there be a structure for customary international law to mint new rules of customary international law, rather than relegate that to the multilateral treaty process?

HON. WILLIAMSON: Mattias, you want to take a crack at that?

PROFESSOR CUMM: Well, on the one hand, we can discuss this as a theoretical issue, but I think perhaps it's easier to simply point out that at this point, for a whole host of reasons, states still believe that it's an extremely useful tool as something to fall back

upon when, in the treaty negotiation process, they realize that the overall package is something they don't like, they don't want to sign on to, that doesn't mean that they don't want any rules to exist. They want some rules to exist, and their fallback option before which they negotiate, the set of rules recognized as customary international law.

The negotiations concerning the Vienna Convention of the Law of the Treaties, but also the Convention of the Law of the Seas are examples of where you see the function of customary international law influencing in what most people regard as a helpful and useful way the negotiation process for the multilateral treaty.

PROFESSOR DAMROSCH: I just wanted to add that a very large part of international lawmaking in the last four decades or so of the 20th century and continuing on now has been to codify into black-letter treaty law rules that originated in custom. And having a treaty there is advantageous because then somebody can pick up a book and read it, and it finds its way more easily into legal practice that way, so you don't have to rely so much on the works of scholars. So, a very large part of treaty-making is to stabilize and concretize rules that have evolved over decades, or in some cases centuries, of practice. The treaty process can also be used to change the law, as was done in the case of the Law of the Seas. The United States accepted part of it and didn't accept part of it. So, I think there's a place for both modes of lawmaking.

PROFESSOR BRADLEY: I agree with the last two comments. As I said before, I think there is still a role and nations have recognized it in terms of having some background default rules and to fill in the gaps of treaty-making. Mattias has sort of mentioned that there may be collective action problems that prevent a text, but there may be a consensus about a lot of the rules nonetheless.

I would emphasize, though, one bit of caution, which is when an issue has been worked out in the treaty process and nations have come together on a text and reached agreement and imposed various kinds of limitations, for example, either individually or collectively, I do think it's dangerous at that point for courts, as I mentioned before, to allow, in effect, circumvention of that decisionmaking process by simply labeling change, to take the exact same rules and norms, call them customary international law and avoid some of the either individual or collective limitations that have been worked in. I do think some of that has been happening in the human rights area, so I wouldn't generalize from that, but I do think it's a problem there.

HON. WILLIAMSON: Also, it seems to me that the fact that you cannot get together and agree on this black-letter law means that it's not accepted practice. But, let's have one more question from my right.

AUDIENCE PARTICIPANT: Professor Cumm, you have indicated that you know of no one that's ready to take the radical position that international does indeed trump constitutional laws of nations. And no less a dangerous position as president of the International Criminal Court, who's supposedly a Yale-trained American lawyer, has advocated personally to me exactly that, and in defense of the International Criminal Court stepping in and treading all over the appellant process in the Mexican alien execution business.

Before it has the full opportunity to be heard through the American federal appellant procedure, he defended their body's right to step in ahead of the Supreme Court and the appellant process in the appropriate local circuit. So, I would venture to say that his colleagues on that particular bench are similarly inclined, and there's a lot more danger out there than you might suggest.

PROFESSOR CUMM: Well, ultimately, I'm not so sure how significant the danger would actually be if it were like that. But more importantly, I think actually, what's going on is that you'll find international law as making arguments about how to understand the constitutional provisions as they apply to the issue at hand. So, I wouldn't know of anyone who'd say I realize that there is a national constitutional provision which prevents you to give effect to this, but it doesn't matter. That's not the kind of argument you're likely to find.

The argument will always have to be couched—that's the general consensus—about understanding the constitutional provisions at issue. So, it's the national Constitution ultimately that is accepted in this whole debate as the supreme law of the land. That's not really in dispute.

AUDIENCE PARTICIPANT: Eric Hargin from the Chicago Chapter. I just have a question about what you think about the trend of using foreign sources in purely domestic cases, even granting the applicability of international law and international sources in interpreting law between the United States government and citizens of other countries. How do you get to the point of incorporating foreign sources as authorities, as was done in the *Atkins* and the *Lawrence* cases?

HON. WILLIAMSON: I thought we got some pretty clear answers on both sides of that question. Is there anything any of you want to add?

PROFESSOR DAMROSCH: As a scholar, can I give a reading list to my former student? The *American Journal of International Law* is going to have what we call an agora on exactly that question with a range of viewpoints presented. It'll be published in the January 2004 issue. I'm editor-in-chief of that journal, and the contributions will come from Professors Roger Alford, Michael Ramsey, Harold Coe, Gerald Newman, and Alex Alainakoff, with five different perspectives on the legitimacy or not of using foreign and international jurisprudence in U.S. constitutional interpretation. So, I would comment that to your attention.

AUDIENCE PARTICIPANT: Forgive me if this is a naive question, but it seems like there may have been an expansion in what we think of as customary international law, and I'm curious—at least the old things like law of war and diplomatic immunity, they all seem to have to do with intercourse among nations, or practices that have large spillover effects. And I'm curious why the juvenile death penalty fits into that. I don't see it having any effects—one country's practices having an effect on another, and so I'm curious as to why that even counts as international custom.

HON. WILLIAMSON: Go ahead, Mattias.

PROFESSOR CUMM: Well of course, if you abstract from the specific problem of the juvenile death penalty—it's easy always to pick out a specific detail and say why should that matter. But the general question is why should human rights generally matter as a concern of international lawyers, as opposed to establishing appropriate domestic systems that incorporate human rights appropriately. Well, the answer is why does that matter as a matter of international law is related to the answer this administration would give, why it matters to get Saddam Hussein out of Iraq and have some kind of democratic regime established in Iraq.

Domestic structures matter for the kinds of problems you're likely to encounter in a highly independent world, and terrorism is just one aspect of it, but there are other aspects related to fugitives, related to economic stability, related to prosperity, that suggest that how a state treats its citizens, and even perhaps how a state is internally structured is at least of some concern to the international community.

AUDIENCE PARTICIPANT: I'd like to pose sort of a stark, but not necessarily inconceivable, hypothetical because I think the juvenile death penalty thing is kind of a soft target for folks who want to push customary international law. Most Americans probably agree that minors should not be executed. But what if there was an emerging international but not American consensus for legalizing drugs. Is there some legal basis by which federal courts would have the authority to tell Congress that its war on drugs was no longer permissible?

PANELIST: No.

PROFESSOR DAMROSCH: No.

PANELIST: A little bit longer answer than that is that even the courts that have accepted this argument about customary international law having federal law status have almost uniformly rejected the argument that it can override Congress' legislation. There was one decision from the Southern District of New York fairly recently in an immigration context that seemed to suggest the opposite, but it's already been vacated by the Second Circuit. So, that does, at least right now under the case law, seem to be an area that is not particularly threatened.

Now, if there were state laws at issue, I think that would be a tougher case under the case law. But probably not, in terms of Congress.

AUDIENCE PARTICIPANT: I wanted to add quickly that your anecdote, Mr. Williamson, actually reminds us of this respect that international lawmakers pay to the American system because suggesting that children have rights before they're born, but that doesn't mean that we're essentially pro-life in this body law, is very similar to the statutes that require you to wear a seatbelt but prevent the failure to use one from being used to perhaps allay damages that you might suffer. And this is an inconsistency in American law that seems to be translated internationally.

My question is that we have, really, I think, a conundrum created by the Law of Treaties, or the Treaty of Treaties, which is that the Treaty of Treaties suggests when or

by what process other treaties will be effective. And I think it does illustrate this separation of powers problem and the subversion of the constitutional process that we could have a vague statement by the executive that that's kind of what we go by, when that very treaty specifies how all the other treaties would be ratified. And that's a danger I see, and that has led to people suggesting that treaties that are simply signed should be observed, even if they're not ratified by the Senate. I mean, would the proponents of customary international law support that kind of interpretation?

HON. WILLIAMSON: We've got about five minutes, and let me ask the three people who are still standing to ask their questions, and please make them very short and precise and questions, and we'll let the panelists clean up.

AUDIENCE PARTICIPANT: Yes. I wonder if you could address yourselves a little further to the question of domestication of treaties. The European Convention on Human Rights, for example, was adopted by Britain, and all that meant was that people could go to the court in Strasbourg and try to enforce these things. Until Britain said, well, you can also go to the four highest British courts --

HON. WILLIAMSON: I'm sorry. Let me just interrupt you. That is a great and a very interesting subject, but it is not directly on point here, and we've got about three minutes left, and I'm determined to get to you.

AUDIENCE PARTICIPANT: Thank you. What can we say that is state practice by nations? You know, the U.S. Supreme Court in the (inaudible) looked from the 16th century practice of England, France, and the Netherlands. Yet, today we quote U.N. Security Council resolutions, the U.N. Declaration on Human Rights—what is state practice that can be considered customary international law?

HON. WILLIAMSON: Let's hear the last question, and then we'll --

AUDIENCE PARTICIPANT: Yes. I was just a bit surprised to hear Professor Cumm cite the rationale of our present intervention in Iraq, that is a regime change as being—surely, that is the consensus of customary international law. Has that endorsed that rationale? I'm not aware of it. I thought we were kind of out there on that, so I just wanted —did you seriously mean that that was going to be a norm that could be cited as to why human rights laws --

PROFESSOR CUMM: It certainly shows that it's a concern for citizens that are not -- for other citizens, for people who are not just citizens of the state of Iraq.

HON. WILLIAMSON: Well, that was basically the legal justification for the Kosovo action, which was presented as a rather awkward thing—that the guaranteeing the U.N. charter of territorial integrity doesn't have a human rights exception to it.

PANELIST: I want to address this question --

HON. WILLIAMSON: Can I throw in another aspect of that to add to that. Also, what is the state practice, and what is this legal obligation, and what is that obligation?

JUDGE EASTERBROOK: Well, I'm not going to discuss the latter part. I want to address it only to point out one of the dangers. Since most of the things within the scope of customary international law are not characterized by unanimity, and since it's a canonical part of customary international law that unanimity be achieved, how do you turn the non-uniform practice into a uniform doctrine? That answer is by abstraction.

Again, to just refer to what the Ninth Circuit did in *Alvarez Machain*, is there a universal policy against taking people from foreign soil? The answer is no. The United States asserts a right to do it. How do you turn that into customary international law? Well, you say there is no right to do that when it's done arbitrarily. And therefore, the custom, the international custom is no arbitrary kidnapping. Well, is a particular kidnapping arbitrary? Well, the judges are now going to decide. By changing the level of generality, there's a big change in the allocation of authority to make the final decision because once you rephrase the rule as one saying no arbitrary governmental action, it's then possible to put almost any content into it. And that kind of playing with the level of generality in the underlying rule is, I think, one of the principal vices of reliance on the modern version of customary international law.

HON. WILLIAMSON: We're out of time. Thank you all.