Hon. Michael Chertoff:

Secretary, United States Department of Homeland Security

Ron Cass: I promised Leonard Leo and Gene Meyer and Dean Reuter that I would give a serious introduction for the Secretary, although when he heard I was introducing him, he did raise the threat level to Orange. Secretary Chertoff proves that a very smart Jewish boy can grow up to be a successful lawyer. He overcame a number of obstacles in his career. It got off to a very shaky start. He attended Harvard College and then Harvard Law School. He then clerked for Justice Brennan. So, you can see, this was really going badly at the beginning.

But the Secretary was able to turn it around. He had a very successful private practice at Latham and Watkins, and then a career in public service. He was a U.S. attorney and special counsel to the Senate Whitewater Committee, endearing him to one particular senator. He was the Assistant Attorney General of the United States for the Criminal Division, and then he was appointed as a circuit judge to the United States Court of Appeals for the Third Circuit, thereby covering not only the Virgin Islands but also Trenton, Camden, and Newark.

When the President was looking for someone to take over the Department of Homeland Security he turned, as he had on other occasions, to Michael Chertoff, putting him in charge of terrorism, nuclear threats, immigration, border control. (No one mentioned hurricanes at the time when you were appointed, I think.) I recall vividly the pictures of the Secretary when he was appointed. He had a full head of dark hair. He was confirmed by 98 to nothing. Senator Clinton has asked for a recount, but I think he has done a spectacular job. I'm delighted that he is here with us.

Please welcome Secretary Michael Chertoff.

Secretary Chertoff: Ron, thank you very much. I don't usually address lawyers groups anymore. One of the benefits of my current position is that it's the first I've had since I graduated from law school in which I do not act in the capacity of a lawyer. And I'll tell you, it's wonderful. Every time there's a problem, I say, go ask the lawyers about that.

But I am delighted to speak to this group because I think the premise of the Federalist Society is that ideas matter in the world of the law and that our views on the role of the courts and our philosophy of law actually have real-world impact on the way we organize our lives and conduct our daily affairs. When I was in law school, the Society had not yet been formed. We were still in the full flush of the Warren Court years, back when the phrase "judicial activism" was seen as a term of admiration. Those of you are younger may find it a little hard to imagine an environment in which only very few of us were willing to talk about things like judicial restraint and to suggest that judges couldn't solve every single problem—to be facing, really, a majority that looked at us like we were demented.

Actually, one of those who was a year behind me but I think probably had a very similar experience was John Roberts, now the Chief Justice. They were very few people, frankly, who in my era were in a position to argue seriously for what Chief Justice Roberts has, I think, very accurately described as judicial modesty. Now, first, let me tell you what I think the phrase "judicial modesty" means. It means things like deferring to the political branches that represent the will of the people. It means cautiousness in the use of judicial remedies and humble recognition of the fact that sometimes there are unintended consequences. It means mindfulness of the limits of judicial competence.

You know, judges are, by and large, pretty smart. When I was a judge, my colleagues were pretty smart. But they don't necessarily understand everything. And a kind of modesty about and understanding of your own competence is, to me, a significant element of the proper behavior of a judge. A critical element of judicial modesty is rigorous observance of the self-limiting elements of jurisdiction. You have to be particularly careful about policing yourself to make sure you don't overstep boundaries because judges, after all, are generally giving last word about jurisdiction.

So what I think is really fascinating is that, by forming the Federalist Society, the visionaries who created the organization established a forum in which these ideas of judicial modesty could be openly discussed in a collegial environment. Essentially, they

created a counterweight to the prevailing academic orthodoxy of the '60s and '70s, and that was a very positive thing. Of course some people have taken up the idea that really the Federalist Society is like the modern day Da Vinci conspiracy, a secret society that controls all of the legal jobs and legal decision-making in the administration. We know that is nonsense. But what the Society did was create a forum in which one could challenge ideas that had previously been accepted as the conventional wisdom.

I'm not going to say that the philosophy of judicial modesty or similar conservative philosophies now dominate the legal landscape; far from it. Many people still believe, whether in academia or on the courts or practicing law, that the purpose of the courts is to pursue a vision of social justice as conceived by legal thinkers and judges. But now, in large part because of the work that the Society and others have done, the claim for judicial modesty is sufficiently well-established that everybody understands, even the critics, that it must be addressed. Judges and lawyers that take an activist approach realize that they have to respond to this critique. Conservatism and judicial modesty have now become forces to be reckoned within the intellectual discourse of the law here in the United States. In short, you've leveled the playing field, and that has been a very good thing.

Your work is not done, however. I'm going to ask you to confront a new challenge, and that is the rise of an increasingly activist, left-wing, and even elitist, philosophy of law flourishing not in the United States but in foreign courts and in various international courts and bodies. For decades, the judges, the lawyers, and the academics who provide the intellectual firepower in the development of international law and transnational law have increasingly advocated a broad vision of legal activism that exceeds even the kind of legal activism we saw in the academy here in the '60s.

So now you're scratching your head and you're asking yourself, why does the Secretary of Homeland Security care about this? Well, in my domain much of what I do actually intertwines with what happens overseas, and what happens in the world of international law and transnational law increasingly has an impact on my ability to do my job and the ability of the people who work in my department to do their jobs.

I'll give you a recent example. Some of you may have followed in the press that there was a difference of opinion between the European Union and the United States about the use of something called passenger name record data, which is basic information that you get when you buy a ticket or work through a travel agent as part of the process of planning your trip to the United States. There's great value to us in having access to that information as part of the process of determining who we are going to allow in to the United States. That, of course, is a fundamental core power of any sovereign. You get to decide who you're going to admit and who you're going to reject. It turns out that this very modest amount of information, like your address and your credit card and your telephone number, helps us determine whether people seeking to come into the country have connections to terrorists that, at a minimum, suggest we ought to put them into secondary inspection before we grant them admission. This strikes me as an eminently reasonable power, and I can tell you that it is a critical tool in protecting this country.

But privacy advocates, particularly in the European Parliament, believe that because that information is collected in Europe, among other places, they should determine how we use that information. This led to a very substantial debate. Fortunately, we resolved it with an agreement which addresses the principal concerns we have. Still, it focused my attention on how much my ability to do my job leading a department that protects the American people depends upon constraints that others want to put on us under their conception of either international or transnational law. So I've come to see in a very dramatic way that this has a real-world impact on how we protect ourselves.

Of course, it turns out that this is not a new issue. If you go back to 1986, there was a case in the International Court of Justice called *Nicaragua v. the United States*, involving a challenge to the United States policy of supporting the Contras. The ICJ was confronted by a jurisdictional argument that the United States raised. The argument was that, based on the various treaties we and other countries had agreed to, the court didn't really have jurisdiction over the matter because all the relevant parties were not participating. But the court brushed

that jurisdictional argument aside and ruled against the United States on the ground that even if the treaties did not permit the issue to be addressed in that particular forum, there was customary law that allowed the court to act even though the treaties would have forbidden action in that case. That's a fairly significant and dramatic decision, at least in my view.

In 1998, the International Court of Justice again confronted the United States in *Breard v. Gilmore*. That case involved a Paraguayan who had not been given access to his consul—(I think frankly because no one knew he was Paraguayan). He worked his way up and down the state system in Virginia after he was convicted and sentenced to death and literally at the 11th hour of his execution Paraguay went into the International Court of Justice and argued to have a court order imposed that the United States not complete the sentence imposed by a duly constituted Virginia state court.

Ultimately, the case went up to the U.S. Supreme Court, and the court ruled that because the plaintiff, Briard, had not exhausted or raised these issues at any point in the state court proceedings, he had waived his rights. There was a procedural bar under a 1986 federal statute that basically said that you have to raise your claims in accordance with state law for you to waive them. Therefore, the execution went ahead. But international lawyers in the international courts were outraged that we gave greater weight to a federal statute that came after the treaty in question, rather than deferring to an international court.

Of course, it has not only been the United States that has felt the vigor of what I would call this very activist kind of international adjudication. In 2004, the International Court of Justice waded into a thicket, probably one of the most difficult in the area of international relations: that is, Israel and its activities in the West Bank of the Jordan River. In a case entitled *Legal Consequences of Construction of a Wall in the Occupied Palestinian Territory*, the ICJ issued a very broad advisory opinion concluding that the construction of a wall specifically designed to keep suicide bombers out of Israel, where they were blowing up people on a regular basis, violated international law; that it had to be dismantled, and that reparations had to be made.

Part of the reasoning was that Israel could not use the threat of terrorist attacks emanating from the Palestinian territories to justify the wall because the attacks were not attributed to a state. In other words, using what I would consider a very hyper-technical reading, the court was relatively dismissive of what most of us would regard as a very compelling fundamental attribute of state sovereignty—the right to protect your citizens from being killed by people coming in from outside. I think this sequence of decisions shows an increasing tendency to look to rather generally described and often ambiguous "universal norms" to trump domestic prerogatives that are very much at the core of what it means to live up to your responsibility as a sovereign state.

Now who is interpreting these laws? To the extent that this country is party to a treaty, if it's been ratified by the Senate and we have consented to it, it's fair that we live up to the letter of the agreement. But often, the letter of the agreement is not what controls. It is, in fact, what we have not agreed to that people seek to impose upon us. This begins with the judges and justices of various international courts, not appointed by or ratified by our legal or political process. What they say is customary international law is often the opinion of international law experts. That basically means professors. I'm sure it's an academic fantasy to imagine a world in which the writings of professors actually define the content of the law, rather than what Congress passes or has agreed upon. That's typically not, at least in my experience, the way we make law in this country, but it is quite seriously the view taken by some; that international law can be discovered in the writings of academics and others who are "experts," often self-styled experts.

I think Congress itself has recognized that this tendency to have a very expansive and activist view of customary international law requires that we be very cautious about how we address the issue. Several times, for example, Senate has expressly put reservations into its approval of treaties to make sure that the treaties are interpreted and applied domestically in a limited fashion or, even more importantly, in a way that's consistent with our own fundamental constitutional requirements. Yet, again, the experts and sometimes the far-end adjudicators simply view those limitations as minor impediments in their insistence that we accept the full measure of

the treaty as ratified by others, even as ratified not by anyone but instead having its source in that vague and fertile turf of "customary international law."

Of course, when one looks to the sources of this international law, one can hardly fail to note, for example, the composition of UN organs such as the Human Rights Committee, which often takes its view of international law from countries like Cuba and Zimbabwe—not notable upholders of the rule of law in their own countries. This is troublesome, when we consider the increasing tendency of the UN and similar bodies to enter into the domestic arena with aggressive views of international law that would require us, for example, to second-guess the PATRIOT Act or to accord illegal immigrants in the United States equal rights with those who are here legally.

Perhaps even more urgently, we see in the current arena the impact of international and transnational law on our struggle to defeat an enemy that wants to bring war to our shores, and successfully did so on 9/11. I've talked about the passenger name record issue we had with Europe, in which some in the European Parliament argued that the fact that the information was derived from Europeans coming to the U.S. meant that we should be forced in the United States to let Europe supervise and set the terms of how we make use of that information. A press report I saw today suggested a similar measure by some European privacy advocates to limit the way in which financial information that we gather can be used in our country because at some point that information may have passed through European hands. It seems clear that how we deal with this issue of international law is increasingly impacting how we defend ourselves and how we conduct our domestic affairs.

What's the source of all this? Well, I think the source is something I said at the very beginning of this speech. It's the fact that the concept of judicial modesty—which has at least respect in this country, if not perhaps complete unanimous agreement—is pretty much absent in those areas where people develop and discuss international law. If you look at the cases I've talked about, it illustrates the point very well. A critical element of judicial modesty is deferring to the political and democratic branches, to those who govern with the consent of the people. Even when we talk about overriding those with the Constitution, it's because our Constitution is a document which reflects the consent of the people. But in the *Nicaragua* case, the ICJ precisely rejected consent by pushing to one side the carefully crafted treaty limitations about who should be present in the court before the court could rule, and then simply went ahead, invoking "customary law."

Recently, a leading practitioner in the area of international human rights law bluntly said that when the U.S. refuses to ratify a treaty, it doesn't matter because we are still bound by customary international law. In the *Breard* case, where the international community gave short shrift to Congress' mandate that we respect the procedural rules and regulations of the state courts (a critical element of federalism)—a specific act of Congress was viewed as an impediment to be brushed aside in the service of a more general and frankly vaguer set of international norms. What we see here is a vision of international law that, if taken aggressively, would literally strike at the heart of basic fundamental principles—separation of power, respect for the Senate's ability to ratify and reject treaties, respect for federalism and the importance of letting the state courts set their own rules to govern what they do.

Where is all this leading? I'm going to quote from the same international human rights lawyer who gives us his vision of where we're going with international law. He says in a recent book called *Lawless World*, "To claim that states are as sovereign today as they were 50 years ago is to ignore reality. The extent of interdependence caused by the avalanche of international laws means that states are constrained by international obligations over an increasingly wide range of actions, and the rules, once adopted, take on logic and a life of their own. They do not stay within the neat boundaries that states thought they were creating when they were negotiated." Now I'm quite sure that is meant to be a happy statement of the way we're operating now, but I actually view it as a chilling vision of where we could go, given the current developments in international and transnational law.

What can we do about it? Well, you know, traditionally, we have tended to act in a manner that I would call defensive. For example, after the *Nicaragua* case, the U.S. government withdrew jurisdiction. That ended the legal power of the International Court, such as it was, to compel a result. In some of the more extravagant assertions by some of the UN human rights organs, we simply

accepted the statement as a kind of hortatory request, and did not do anything further with it. Of course, those of you who follow the developments with the International Criminal Court know that we've sought to enter agreements with other countries to avoid the application of that court's rules against our own citizens when we haven't in fact ratified or agreed to that treaty.

But while these defensive means may be necessary, they are not, in my view, part of an efficient approach to the increasing challenge to our ability to conduct our domestic affairs. First of all, the fact is that, whether we like it or not, international law is increasingly entering our domestic domain. The Supreme Court has begun to bring it in through cases like *Hamdan* and *Alvarez Machain*—which allowed a very small opening, but still an opening, in the door under the Alien Tort Claims Act, to international human rights law being a source of direct causes of action here in the United States. Through various European and other domestic protection rules, there's an increasing effort to control use of information in our own country to determine who comes in from outside. And of course, international law is being used as a rhetorical weapon against us. We are constantly portrayed as being on the losing end and the negative end of international law developments.

In fairness, there are some positive things that a properly constructed and implemented international law can do, not only for the whole world but for us as well. Common standards and aviation and maritime security are a win-win for us and our allies. There is a positive dimension to international law that we can recapture, apart from those elements that seem to make it into a kind of activism on steroids.

The bottom line is this: the problem is not the idea of international law, but an international law that has been captured by a very activist, extremist legal philosophy. It doesn't have to be that way. So, my challenge to you is to take overseas the same kind of intellectual vigor and intellectual argument that you brought to academia in the '70s, which over time changed the playing field, so that there was a voice heard for judicial modesty. I'm confident that, while this is not going to happen in a week or a month or a year, if you take some of the ideas that you've developed into the legal-philosophical salons in Europe, you will eventually start to persuade them on the merits.