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## John Paul Stevens, Human Rights Judge

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## PANEL I: CRIMINAL JUSTICE

### JOHN PAUL STEVENS, HUMAN RIGHTS JUDGE

*Diane Marie Amann\**

A cherished moment of my service as a law clerk to the Honorable John Paul Stevens occurred halfway through the 1988 Term, amid the Courtroom's marble and mahogany majesty. Early in the week, an advocate had addressed a robed inquisitor as "Judge," and so provoked a withering reminder that members of this high bench were "Justices." At that instant no one said a word. But the scene repeated itself days later. This time Stevens—who had expressed unease at the first exchange as soon as he returned to chambers—spoke up: "Excuse me, but if I am not mistaken, Article III refers to us as judges."<sup>1</sup>

I treasure this moment not because it exposes Stevens's knowledge of the Constitution—his legal acumen is beyond dispute—but rather because of what it says about Stevens as a person. Humility, not haughtiness, has marked his career on the Court. The unwarranted rebukes of nervous advocates stirred his sympathy, yet did not erase his respect for his peers. Accordingly, Stevens chose pointed understatement as a means to ease the

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\* Professor of Law, University of California, Davis, School of Law (Martin Luther King, Jr. Hall); law clerk to U.S. Supreme Court Justice John Paul Stevens, 1988-1989. A version of this Article was presented at a symposium on "The Jurisprudence of Justice Stevens," Sept. 30, 2005, at Fordham University School of Law in New York. For guidance on this and other endeavors over the years, I thank my co-clerks Abner S. Greene, Lewis J. Liman, and Randolph D. Moss. Thanks as well to Nellie A. Pitts for help and encouragement; to Stuart Banner, Mary L. Dudziak, Eugene R. Fidell, and Carlton F.W. Larson for comments on this project as it developed; and to Robert Abiri, Anagha Dandekar Clifford, NaTasha Ralston, Ryan Walters, and the staff at the Library of Congress's Manuscript Division for research assistance. This article is dedicated to the Honorable John Paul Stevens, whose imprint on my life and contributions to the life of the Nation are inexpressible.

1. He was, of course, not mistaken. See U.S. Const. art. III, § 1 (authorizing Congress to establish courts, then stating that "[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office"). This telling is based not on argument transcripts, but rather on my memory of events I witnessed. See Tony Mauro, *Advocate Left Flak Jacket Back in Texas*, Legal Times, Jan. 23, 1989, at 13 (giving a contemporary account of the second exchange, in oral argument for *Barnard v. Thorstenn*, 489 U.S. 546 (1989)); Stuart Taylor, Jr., *The Last Moderate*, Am. Law., June 1990, at 48 (reporting on both exchanges); see also Christopher L. Eisgruber, *John Paul Stevens and the Manners of Judging*, 1992/1993 Ann. Surv. Am. L., at xxx (relating a secondhand version of the story).

distress of the former without unduly bruising the pride of the latter.<sup>2</sup> The moment illuminates why the title of this Article names Stevens “Judge.” It also sheds some light on why I call him a “human rights judge.” So, too, do other stories that reflect Stevens’s fondness for self-effacement: For example, he is said often to recount that on arrival in Washington he listed his occupation as “Justice” on a form and so provoked the reply, “OK, last week, I had a guy who said ‘Peace.’”<sup>3</sup> There is also the story that Stevens does not tell but that his clerks do, of the time that Stevens walked into a Court reception and at once relieved a law clerk of the task another Justice had assigned her—serving coffee to that Justice and the other men in the room.<sup>4</sup> Still, showing that Stevens is humane does not alone establish that he is a “human rights” jurist; more explanation of that descriptor is in order.

Much noted in recent years has been the Court’s renewed willingness to consult foreign norms and practices in the course of interpreting the law of the United States. Various Justices have looked beyond U.S. borders to construe treaty provisions, as might be expected,<sup>5</sup> but also to bring harmony to the field of copyright,<sup>6</sup> to serve the needs of industry,<sup>7</sup> and to confirm the scope of the constraints that the Constitution places on state action.<sup>8</sup> Such references have triggered a range of reactions: from many international lawyers, kudos and advice on how to improve the quality of consultation;

2. Stevens reprised this choice each time that he ended a dissent by affirming esteem for his colleagues. Even as he wrote in one of his most wrenching opinions that the Court’s judgment regarding the 2000 Presidential election had destroyed “the Nation’s confidence in the judge as an impartial guardian of the rule of law,” Stevens concluded with his signature sentence, “I respectfully dissent.” *Bush v. Gore*, 531 U.S. 98, 129 (2000) (Stevens, J., dissenting). The adverb was absent in opinions by fellow dissenters, as it often is in other Justices’ dissents.

3. Cliff Sloan, *In Praise of John Paul Stevens*, MSNBC.com, May 6, 2005, <http://www.msnbc.msn.com/id/7748622/site/newsweek/1098/>.

4. See Eisgruber, *supra* note 1, at xxx.

5. See, e.g., *Olympic Airways v. Husain*, 540 U.S. 644 (2004) (illustrating debate among Justices about the significance of judgments from England and Wales on interpretation of terms in the Warsaw Convention regulating air travel); see also Antonin Scalia, *Keynote Address: Foreign Legal Authority in the Federal Courts*, 98 Am. Soc’y Int’l L. Proc. 305, 305 (2004) (stating that “[w]hen federal courts interpret a treaty to which the United States is a party, they should give considerable respect to the interpretation of the same treaty by the courts of other signatories”).

6. *Eldred v. Ashcroft*, 537 U.S. 186, 196 (2003) (construing a term in a U.S. statute to correspond with that term’s meaning in the European Union).

7. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (supporting a law school’s use of affirmative action to attain a diverse student body, in part because “major American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints” (citing briefs of amici 3M Corp. and General Motors Corp.)).

8. See *Roper v. Simmons*, 543 U.S. 551, 575 (2005) (finding in foreign sources “confirmation” of the existence within the United States of a consensus against executing juveniles) (discussed *infra* text accompanying notes 12, 56-57, 171, 182, 184-85); *Washington v. Glucksberg*, 521 U.S. 702, 718 n.16 (1997) (sustaining state’s law against assisted suicide after discussing legal prohibitions in Australia, Britain, Canada, Colombia, and New Zealand).

from some members of Congress, jurisdiction-limiting legislation and calls for impeachment.<sup>9</sup>

Asked to name the Justices at the forefront of the revived use of external norms, Court watchers on both sides of the debate well might omit mention of Stevens. While other Justices paid visits to their counterparts abroad and made speeches in favor of joining an international judicial conversation,<sup>10</sup> Stevens seemed silent. In fact, however, Stevens played an essential role. It was in dissent from a 1988 Stevens opinion discussing foreign law that Justice Antonin Scalia first sketched the critique that brought the Court's tradition of consulting external practice to a halt.<sup>11</sup> Stevens wrote the opinion that resumed the practice after a thirteen-year hiatus, and he figured in two subsequent decisions that entrenched it.<sup>12</sup> Finally, he spoke out against attacks on consultation, both in a separate opinion and in a speech to Midwestern jurists.<sup>13</sup> Stevens's role in these cases was in keeping with a longstanding willingness to consider global context—not in every case, but when the particular circumstances so warrant.

This Article investigates the nature and reasons for this. First it discusses certain “Stevensean” jurisprudence—if I may coin a term that honors the Justice's favorite bard<sup>14</sup>—specifically, jurisprudence that considers

9. In support of the practice, see, for example, Anne-Marie Slaughter, *A New World Order* 102 (2004) (seeing “cross-fertilization of legal cultures” through judicial interactions as essential “to build a world under law”). In opposition, see, for example, H.R. J. Res. 97, 109th Cong. (1st Sess. 2005) (objecting, in a draft resolution expressly triggered by *Lawrence v. Texas*, 539 U.S. 558 (2003), to judicial consultation of foreign law unless consistent with “original meaning of the Constitution of the United States”); Tom Curry, *A flap over foreign matter at the Supreme Court: House members protest use of non-U.S. rulings in big cases*, MSNBC.com, Mar. 11, 2004, <http://msnbc.msn.com/id/4506232> (reporting the statement of U.S. Rep. Tom Feeney (R-Fla.) that, should such a resolution pass, judges who disregarded it would invite the “ultimate remedy, which would be impeachment”).

10. See Robert Badinter & Stephen Breyer, *Judges in Contemporary Democracy: An International Conversation* (2004); Ruth Bader Ginsburg, *Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication*, 22 *Yale L. & Pol'y Rev.* 329, 330 (2004) (stressing “the value I place on comparative dialogue”); Sandra Day O'Connor, *Federalism of Free Nations*, 28 *N.Y.U. J. Int'l L. & Pol.* 35, 41 (1996) (“Just as our domestic laws develop through a free exchange of ideas among state and federal courts, so too should international law evolve through a dialogue between national courts and transnational tribunals and through the interdependent effect of their judgments.”); cf. Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's Passion for Foreign Law Could Change the Supreme Court*, *The New Yorker*, Sept. 12, 2005, at 42 (giving an account of Kennedy's support for consultation, based on interviews given in summer 2005).

11. See *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Thompson v. Oklahoma*, 487 U.S. 815, 859 (1988) (Scalia, J., dissenting); discussion *infra* text accompanying notes 20-29, 171, 184-86.

12. See *Roper v. Simmons*, 543 U.S. 551 (2005); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Atkins v. Virginia*, 536 U.S. 304 (2002); discussion *infra* text accompanying notes 51-57, 171, 182, 185-86.

13. See *infra* text accompanying notes 57-59.

14. See John Paul Stevens, *The Shakespeare Canon of Statutory Construction*, 140 *U. Pa. L. Rev.* 1373 (1992); Who wrote Shakespeare? The Moot Court Debate on the Authorship of Shakespeare's Works, <http://www.shakespeare-oxford.com/mootcour.htm> (last visited Jan. 19, 2006) (depicting Stevens and two colleagues, Justices William J.

international context in determining the degree to which the U.S. Constitution constrains criminal law enforcement. The discussion shows that Stevens has pursued a path of selective receptivity to consulting foreign sources and to applying the Constitution in matters with overseas implications; however, he has offered scant explanation of why he is receptive or what circumstances cause him to consider foreign context. In search of answers to those questions, this Article looks to a period of Stevens's life that as yet has received little attention; that is, the mid-twentieth century, during which he came of age as a man and as a lawyer.

Scholars have found in World War II and its aftermath clues to doctrinal shifts that led the Court to do right by civil rights and rights of the accused; specifically, to enforce against both federal and state governments the Constitution's guarantees that all will receive equal protection of the laws and that none will be deprived of liberty without due process of law.<sup>15</sup> Stevens lived that era, as a naval officer, as a law student, as a law clerk to Supreme Court Justice Wiley B. Rutledge, and as a lawyer. It seems elementary that the formation of Stevens the young man in an era of great global change would have had an effect on the thinking of Stevens the Justice.

This discussion of Stevens at mid-century relies primarily on examination of the Rutledge Papers on file at the Library of Congress and on a brief phone conversation with Stevens.<sup>16</sup> No historian will be surprised to learn that this limited research has not resolved unequivocally why the Justice has proved receptive to consideration of international context. But the research did contribute some pieces to that puzzle. It revealed, for example, that an incident during the young naval officer's service as a codebreaker planted concerns about capital punishment, a salient issue throughout the career of the Justice.<sup>17</sup> Cases that worked their way through the Rutledge chambers counseled vigilance—particularly in time of global conflict—against executive encroachments on judges' duty to protect the rights of detained or convicted persons.<sup>18</sup> In one case, law

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Brennan and Harry A. Blackmun, presiding at the Sept. 25, 1987, debate described in David Lloyd Kreeger, *In Re Shakespeare: The Authorship of Shakespeare on Trial*, 37 *Am. U. L. Rev.* 609 (1988)).

15. The Constitution states, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1; *see also id.* amend. V (using identical language, and requiring the federal government to afford due process to "any person"); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (finding in the Fifth Amendment's Due Process Clause a duty on the part of the federal government to afford equal protection). For scholarship regarding the effect of global developments on mid-century U.S. jurisprudence, *see infra* text accompanying notes 87, 161, 179, 194, 196.

16. Wiley Rutledge Papers, Manuscript Division, Library of Congress, Washington, D.C. [hereinafter *Rutledge Papers*]; Telephone Interview with Justice John Paul Stevens (June 22, 2005) [hereinafter *JPS Interview*]. In citations to correspondence throughout this article, Stevens is designated "JPS"; Rutledge, "WBR."

17. *See infra* text accompanying notes 68-78.

18. *See infra* text accompanying notes 118-35; *cf.* Norman Dorsen, *John Paul Stevens*, 1992/1993 *Ann. Surv. Am. L.*, at xxvi (acknowledging the "risk" of "highlight[ing] any one

clerk Stevens advised—fully six years before the decision in *Brown v. Board of Education*—that segregation be ruled unconstitutional.<sup>19</sup>

These incidents afford tentative answers to the question of the Justice's selective receptivity to foreign context. Stevens's experiences offered the real-time lesson that much of what is considered external law—in particular, norms enforced within regional and international human rights systems—is not really external at all. To a great extent it is the progeny of American legal traditions of fundamental rights and due process, and it is to that extent alone that Stevens has looked to such sources. These norms are, moreover, the product of a time in which the United States endeavored to lead the world by example. During World War II, Stevens himself shouldered a bit of the burden that attended U.S. leadership. The Navy officer's awareness of that burden may help to explain some of the Justice's views—not only why he has paid some heed to foreign judges in the course of constitutional interpretation, for example, but also why he has accorded to foreigners abroad some of the protections of that Constitution. In short, it is not some fascination with the foreign that explains Stevens's receptivity. It is, rather, his enduring quest to uphold American values, at home and abroad.

## I. STEVENSEAN JURISPRUDENCE AND FOREIGN CONTEXT

Examination of selected matters that reached the Court in the last two decades reveals the contours of Justice Stevens's jurisprudence in cases with transnational import.

### A. Consultation and Constitutional Interpretation

Early in the 1987 Term, Justices heard argument in *Thompson v. Oklahoma*, a matter from America's heartland not only because of its place of origin, but also because its facts involved the bloodthirst and brutality that are tragically familiar in capital cases.<sup>20</sup> Ordinarily there would have been no claim that capital punishment—permitted within bounds set out eleven years earlier in an opinion by Justices Potter Stewart, Lewis E. Powell, and John Paul Stevens<sup>21</sup>—was excessive. But this was no ordinary case. Petitioner, fifteen years old at the time of the murder, sought a ruling

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influence on what a justice writes," yet "suggest[ing] that John Paul Stevens was shaped in large part by his clerkship with Justice Wiley Rutledge").

19. See *infra* text accompanying notes 114-17; see also *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896), to hold that maintenance of separate but equal facilities is inherently unequal, so that racial segregation of public schools violates the Equal Protection Clause of the Fourteenth Amendment).

20. *Thompson v. Oklahoma*, 487 U.S. 815, 819-21 (1988) (plurality opinion) (Stevens, J.) (describing the facts in the case argued Nov. 9, 1987); *id.* at 859-63 (Scalia, J., dissenting) (same); cf. *Koon v. United States*, 518 U.S. 81, 94-96 (1996) (explaining the concept of "heartland" as descriptive of a typical criminal case).

21. *Gregg v. Georgia*, 428 U.S. 153, 158-207 (1976). On *Gregg* and consequent decisions, see generally James S. Liebman & Lawrence C. Marshall, *Less is Better: Justice Stevens and the Narrowed Death Penalty*, 74 *Fordham L. Rev.* 1607, 1619-48 (2006).

that his execution would amount to unconstitutionally cruel and unusual punishment.<sup>22</sup> Months later, on the last day of the Term, petitioner prevailed. Stevens's opinion for the plurality restated that, to interpret the Eighth Amendment, the Court looked to "the 'evolving standards of decency that mark the progress of a maturing society,'" as determined from both "the work product of state legislatures and sentencing juries" and "the reasons why a civilized society may accept or reject the death penalty in certain types of cases."<sup>23</sup> Having shown a state legislative consensus against the penalty under review, Stevens cited foreign practice and multilateral treaties and wrote that to conclude "that it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense" was "consistent with the views" of "other nations that share our Anglo-American heritage" and of "the leading members of the Western European community."<sup>24</sup>

Stevens's reference to external norms was both in keeping with prior decisions and supported by a Library of Congress survey.<sup>25</sup> It provoked protest nevertheless. Justice Antonin Scalia's dissent for three members of the Court argued that to rely on an account of "civilized standards of decency in other countries is totally inappropriate as a means of establishing the fundamental beliefs of this Nation."<sup>26</sup> A domestic consensus in favor of execution ought to control "even if that position contradicts the uniform view of the rest of the world," Scalia insisted, adding, "We must never forget that it is a Constitution for the United States of America that we are expounding."<sup>27</sup> A year later, a majority of the Court agreed: World opinion was dismissed in the first footnote of a judgment holding that the Constitution permitted the death penalty for children over

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22. *Thompson*, 487 U.S. at 818-19 & n.1 (plurality opinion) (Stevens, J.); see U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

23. *Thompson*, 487 U.S. at 821-22 (plurality opinion) (Stevens, J.) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion) (Warren, C.J.)). Three Justices agreed with Stevens that application of this formula compelled a categorical ban. *Id.* at 821 (reporting joinder by Brennan, Marshall, and Blackmun, JJ.). Justice Sandra Day O'Connor concurred in the judgment on a narrower ground. *Id.* at 848-59 (O'Connor, J., concurring).

24. *Id.* at 830, 831 n.34 (plurality opinion) (Stevens, J.) (citing *inter alia* Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention]; International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), Annex, U.N. GAOR Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 68, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]).

25. *Thompson*, 487 U.S. at 830 n.31 (plurality opinion) (Stevens, J.) (stating that in *Trop* and other Eighth Amendment decisions, the Court had "recognized the relevance of the views of the international community"); *id.* at 830-33 & n.34 (discussing external norms and practice, based on information in a survey and *amicus* brief).

26. *Id.* at 868 n.4 (Scalia, J., joined by Rehnquist, C.J. and White, J., dissenting) (citations omitted).

27. *Id.* (invoking, without citation, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (Marshall, C.J.) (writing that "we must never forget that it is a *constitution* we are expounding"))).

fifteen, and was not discussed at all in a same-day judgment permitting execution of mentally retarded persons.<sup>28</sup> Scalia assured an academic audience that, with these decisions, consultation of foreign law had been “retired.”<sup>29</sup>

### B. Law Enforcement at Home and Abroad

The Court did not retreat from all consideration of foreign concerns. To the contrary, transnational expansion of U.S. law enforcement compelled the Court repeatedly to ask to what extent the Constitution applies overseas. Most Justices answered, “Not much.” The Court held in *United States v. Verdugo-Urquidez* that introduction of evidence which U.S. agents had obtained in a warrantless search of a noncitizen defendant’s home in Mexico would not transgress the ban on unreasonable searches and seizures;<sup>30</sup> in *United States v. Alvarez-Machain* that due process did not forbid the United States from arranging to kidnap a defendant abroad in order to hale him into court on charges of murdering a federal agent;<sup>31</sup> and in *United States v. Balsys* that, notwithstanding the privilege against self-incrimination, a court could compel testimony in a U.S. immigration proceeding even though it might be used against the witness in a foreign prosecution.<sup>32</sup>

As is his wont, Stevens filed a separate opinion in each case;<sup>33</sup> in so doing, he evinced a contextual approach to the question of the Constitution’s extraterritorial reach. Stevens rejected the statement in *Verdugo-Urquidez* that the noncitizen before the bar was not “among those ‘people’ who are entitled to the protection of the Bill of Rights,” yet held against him on the ground that “American magistrates have no power” under the Constitution to issue warrants applicable outside of the United

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28. *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) (Scalia, J.) (criticizing dissenters’ discussion of other countries’ rejection of the juvenile death penalty); *Perry v. Lynaugh*, 492 U.S. 302 (1989) (omitting mention of foreign context in reviewing a death sentence imposed despite evidence that the petitioner suffered from mental retardation).

29. Antonin Scalia, *Commentary*, 40 *St. Louis U. L.J.* 1119, 1121 (1996). For further discussion of consultation in this period, see generally Diane Marie Amann, *International Law and Rehnquist-Era Reversals*, 94 *Geo. L.J.* (forthcoming 2006).

30. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (interpreting U.S. Const. amend. IV).

31. *United States v. Alvarez-Machain*, 504 U.S. 655 (1992).

32. *United States v. Balsys*, 524 U.S. 666 (1998) (interpreting U.S. Const. amend. V) (“No person . . . shall be compelled in any criminal case to be a witness against himself.”).

33. Stevens’s readiness to write separately reflects the value he places on transparency in judicial decision making—a value reinforced by his 1969 experience investigating corruption in the Illinois judiciary, an incident that might have been uncovered earlier if a state Justice had not declined to publish a draft dissent. John Paul Stevens, *Foreword to Kenneth A. Manaster, Illinois Justice*, at xii (2001) (“If there is disagreement within an appellate court about how a case should be resolved, I firmly believe that the law will best be served by an open disclosure of that fact, not only to the litigants and other lawyers, but to the public as well.”).



States.<sup>34</sup> Stevens concurred in *Balsys* as well. He reasoned that “[t]he primary office” of the Self-Incrimination Clause “is to afford protection to persons whose liberty has been placed in jeopardy in an American tribunal,” and compulsion of testimony subject only to use abroad “will not have any adverse impact on the fairness of American criminal trials.”<sup>35</sup>

For Stevens the kidnapping for trial of Dr. Humberto Alvarez-Machain did compromise American justice, and he dissented with vigor. Stevens’s article-by-article analysis of the U.S.-Mexico extradition treaty—read in light of the U.N. Charter and other international law designed to prevent one country’s “violation of the territorial integrity” of another—undercut the majority’s conclusion that the treaty contained no implicit ban on forcible abduction.<sup>36</sup> Stevens further refuted the premise that the case was controlled by a century-old holding that due process had not been violated by the exercise of criminal jurisdiction over a defendant whom a bounty hunter kidnapped overseas. The issue at bar was not private conduct, Stevens stressed, but rather action by a government that had no lawful authority so to act.<sup>37</sup> Though it was understandable that U.S. agents would have wanted to avenge the death of their comrade, “it is precisely at such moments that we should remember and be guided by our duty ‘to render judgment evenly and dispassionately according to law,’” Stevens wrote.<sup>38</sup> Mindful that what the United States does “in a case of this kind sets an example that other tribunals in other countries are sure to emulate,” Stevens concluded with a call to caution that Thomas Paine had sounded 200 years earlier: “He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself.”<sup>39</sup>

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34. *Verdugo-Urquidez*, 494 U.S. at 279 (Stevens, J., concurring in the judgment) (taking issue with *id.* at 265 (Rehnquist, C.J.)); cf. Diane Marie Amann, *Guantanamo*, 42 Colum. J. Transnat’l L. 263, 292-99 (2004) (analyzing the precedential weight of Rehnquist’s statement respecting the applicability of the Fourth Amendment to noncitizens).

35. *Balsys*, 524 U.S. at 700 (Stevens, J., concurring). Conversely, Stevens added that he did “not believe our Bill of Rights was intended to have any effect on the conduct of foreign proceedings.” *Id.* at 701.

36. See *Alvarez-Machain*, 504 U.S. at 670-81 (Stevens, J., joined by Blackmun and O’Connor, JJ., dissenting) (citing U.N. Charter; Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3 [hereinafter OAS Charter]; 1 Oppenheim’s International Law 295 & n.1 (8th ed. 1955) (setting forth customary international law)).

37. *Id.* at 682 (Stevens, J., dissenting) (arguing that reliance on *Ker v. Illinois*, 119 U.S. 436 (1886), “fails to differentiate between the conduct of private citizens, which does not violate any treaty obligation, and conduct expressly authorized by the Executive Branch of the Government, which unquestionably constitutes a flagrant violation of international law, and in my opinion, also constitutes a breach of our treaty obligations”).

38. *Id.* at 687 (Stevens, J., dissenting) (quoting *United States v. United Mine Workers*, 330 U.S. 258, 342 (1947) (Rutledge, J., dissenting)).

39. *Id.* at 688 (quoting 2 The Complete Writings of Thomas Paine 588 (Philip S. Foner ed., 1945)); see also *id.* (approving of 1991 South African decision that relied on *Ker* and other U.S. precedents in the course of dismissing the prosecution of a defendant whom governmental agents had abducted in a foreign country). On remand, the defendant stood

### C. Constitutional Border Crossings

The terrorist attacks of September 11, 2001, etched into high relief the challenge of securing liberty while fighting an enemy. The U.S. executive soon chose to subject persons—many noncitizens plus a couple of Americans whom it unilaterally designated “enemy combatants”—to indefinite, incommunicado detention and interrogation at sites in the United States, at the U.S. military base at Guantánamo, and elsewhere throughout the world. At the end of its 2003 Term, the Court established in *Rasul v. Bush* that aliens held offshore were entitled to petition U.S. courts, and in *Hamdi v. Rumsfeld* that courts must undertake meaningful review of the lawfulness of detention.<sup>40</sup> Justices offered disparate rationales in the ten separate opinions filed in *Rasul*, *Hamdi*, and a companion case, *Rumsfeld v. Padilla*;<sup>41</sup> in each, Stevens made his own viewpoint clear.

Stevens’s opinion for five members of the Court in *Rasul*—brought by two Australians and twelve Kuwaitis held at Guantánamo—grounded decision in the tradition of habeas corpus, “a writ antecedent to statute, . . . throwing its root deep into the genius of our common law” well before the framers enshrined it in the Constitution of 1789.<sup>42</sup> Stevens discussed mid-twentieth century opinions that confirmed the writ’s core purpose of putting a stop to executive detention without judicial review, and he noted that the Court had heard habeas petitions in times of war, even, in the case of Japan’s General Tomoyuki Yamashita, petitions from noncitizens in U.S. custody overseas.<sup>43</sup> A 1950 precedent did not preclude relief, Stevens wrote, because it hinged on the 1948 statutory interpretation in *Ahrens v. Clark*, since overruled.<sup>44</sup> Stevens thus applied the statute to detainees at the

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trial and was acquitted of all charges. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 698-99 (2004) (finding, in respondent’s civil suit, no basis for relief under U.S. law).

40. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); see also Amann, *supra* note 34, at 266-85 (discussing the development of the executive detention policy and domestic and extranational litigation predating Supreme Court review).

41. 542 U.S. 426 (2004); see Diane Marie Amann, *Abu Ghraib*, 153 U. Pa. L. Rev. 2085, 2096-98, 2126-31 (2005) (analyzing the Court’s detention trilogy).

42. *Rasul*, 542 U.S. at 473-74 (Stevens, J., joined by O’Connor, Souter, Ginsburg, and Breyer, JJ.) (quoting *Williams v. Kaiser*, 323 U.S. 471, 484 n.2 (1945)) (citing U.S. Const. art. I, § 9, cl. 2 (“The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”)) (alteration in original).

43. *Id.* at 474 (quoting *inter alia* *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring in the result) (“The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial.”); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 218-19 (1953) (Jackson, J., dissenting) (stating that “[e]xecutive imprisonment has been considered oppressive and lawless” since the time of Magna Carta of 1215, and that the English judiciary “developed the writ of habeas corpus” to keep individual rights free from “executive restraint”)); see also *Rasul*, 542 U.S. at 475 (citing *inter alia* *In re Yamashita*, 327 U.S. 1 (1946)).

44. *Rasul*, 542 U.S. at 475-79 (discussing the interrelation of *Johnson v. Eisentrager*, 339 U.S. 763 (1950), and *Ahrens v. Clark*, 335 U.S. 188 (1948), the latter overruled by *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973)); cf. *id.* at 485-88 (Kennedy, J., concurring in the judgment) (arguing that *Eisentrager* applied, but interpreting it to conclude that Guantánamo petitions should go forward).

Guantánamo base, over which the United States “exercises ‘complete jurisdiction and control,’” notwithstanding its location in Cuba.<sup>45</sup> Turning from habeas to detainees’ civil suits, he wrote that no case law “categorically excludes aliens detained in military custody outside the United States from the privilege of litigation in U.S. courts.”<sup>46</sup>

Although the Court had confined *Rasul* to the question of jurisdiction, Stevens’s opinion indicated that, if proved, allegations that innocent noncitizens were enduring at Guantánamo prolonged executive detention without charges or access to lawyers “unquestionably” would establish violations of U.S. laws.<sup>47</sup> His position with respect to the two citizens held in the United States was even more adamant. In *Hamdi*, Stevens joined a dissent in which Scalia contended that, even in times of emergency, unless Congress suspends the writ of habeas corpus, the executive may not detain an American suspected of making war against the United States except according to the constraints of the criminal justice system.<sup>48</sup> Joined by three Justices, Stevens condemned the majority in *Padilla* for interposing a procedural obstacle to avoid “our duty” to consider the “questions of profound importance to the Nation” that the case posed.<sup>49</sup> In a passage that echoed his earlier evocation of Thomas Paine, Stevens expressed concern lest the Court’s refusal to examine petitioner’s detention condone executive interrogations reminiscent of the Star Chamber: “[I]f this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.”<sup>50</sup>

Stevens’s position in the detention trilogy rested almost exclusively on the domestic law of habeas corpus and due process. Yet in other decisions from the same period, Stevens was influential in reviving the consultation of foreign norms and practice to aid determination of the meaning of “due process” and other open-textured constitutional terms.

Breakthrough came in 2002, when the Court in *Atkins v. Virginia* overruled thirteen-year-old precedent to hold that the execution of mentally retarded offenders is unconstitutionally cruel and unusual.<sup>51</sup> Stevens’s

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45. *Id.* at 480 (quoting Lease of Lands for Coaling and Naval Stations, U.S.-Cuba, Feb. 23, 1903, T.S. No. 418).

46. *Id.* at 484 (citation and internal quotation omitted).

47. *Id.* at 483 n.15; see also Amann, *supra* note 34, at 281 (quoting the single question on which the Court granted certiorari).

48. *Hamdi v. Rumsfeld*, 542 U.S. 507, 554-79 (2004) (Scalia, J., joined by Stevens, J.) (interpreting U.S. Const. art. I, § 9, cl. 2, quoted *supra* note 42).

49. *Rumsfeld v. Padilla*, 542 U.S. 426, 455 (2004) (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ., dissenting).

50. *Id.* at 465. Compare *id.* with *United States v. Alvarez-Machain*, 504 U.S. 655, 688 (1992) (quoting 2 *The Complete Writings of Thomas Paine*, *supra* note 39).

51. *Atkins v. Virginia*, 536 U.S. 304 (2002) (overruling *Penry v. Lynaugh*, 492 U.S. 302 (1989)). In the interim, Stevens had cited foreign jurisprudence in support of his position that whether the law permitted execution of someone who had served a prolonged time on death row was a question of sufficient “importance and novelty . . . to warrant review.” *Lackey v. Texas*, 514 U.S. 1045, 1045 (1995) (Stevens, J., memorandum respecting denial of certiorari) (discussing two Privy Council judgments). To date, the Court never has granted certiorari on that question.

opinion for the Court focused on domestic indicators of standards of decency; that is, on a state legislative trend against such executions, on the scarcity of such executions, and on an “independent” judgment that such executions do not “measurably advance the deterrent or the retributive purpose of the death penalty.”<sup>52</sup> In a footnote citing an amicus brief from the European Union, Stevens added: “Moreover, within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved.”<sup>53</sup> Dissenters objected to the majority’s return to consultation,<sup>54</sup> but to no avail. In 2003, a five-member majority discussed decisions of the European Court of Human Rights in the course of holding that due process bars criminal prosecution of same-sex sodomy,<sup>55</sup> and in 2005 the same majority discussed the International Covenant on Civil and Political Rights, other human rights treaties, and foreign practice as it overruled precedent to hold that the Eighth Amendment prohibits execution of anyone younger than eighteen at the time of his or her crime.<sup>56</sup>

Each of the latter two decisions was written by Justice Anthony M. Kennedy, presumably pursuant to an assignment from Stevens. When Kennedy drew fire for his use of foreign law, Stevens came to his aid. Stevens’s short concurrence in the 2005 case welcomed the majority’s “reaffirmation” of the “evolving standards of decency” principle, and asserted that if Alexander Hamilton were alive, he would join Kennedy’s opinion, as did Stevens, “without hesitation.”<sup>57</sup> In a speech before the Seventh Circuit Judicial Conference soon after, Stevens criticized “a mass mailing suggesting that I should be impeached” on account of that joinder:

It does seem to me, however, that there is a vast difference between, on the one hand, considering the thoughtful views of other scholars and judges—whether they be Americans or foreigners and whether they be state judges, federal judges or judges sitting in other countries—before making up our own minds, and, on the other hand, treating international

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52. *Atkins*, 536 U.S. at 313-27 (Stevens, J. joined by O’Connor, Kennedy, Souter, Ginsburg, and Breyer, JJ.).

53. *Id.* at 316-17 n.21 (citing Brief for European Union as Amicus Curiae Supporting Petitioner at 4, *id.* (No. 00-8452)).

54. *Id.* at 322-25 (Rehnquist, C.J., joined by Scalia and Thomas, JJ., dissenting); *id.* at 347-48 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting).

55. *Lawrence v. Texas*, 539 U.S. 558, 572-77 (2003) (Kennedy, J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.) (outlining the 1981 judgment of the European Court of Human Rights in *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. 52 (1981), and observing that, since then, that court and “[o]ther nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct”).

56. *Roper v. Simmons*, 543 U.S. 551, 576-78 (2005) (Kennedy, J., joined by Stevens, Souter, Ginsburg, and Breyer, JJ.) (citing *inter alia* U.N. Convention on the Rights of the Child art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3; American Convention, *supra* note 24, art. 4(5); ICCPR, *supra* note 24, art. 6(5); Criminal Justice Act, 11 & 12 Geo. 6, c. 58 (U.K.)). See generally Amann, *supra* note 29 (detailing consultation in this period).

57. *Simmons*, 543 U.S. at 587 (Stevens, J., joined by Ginsburg, J., concurring).

opinion as controlling our interpretation of our own law. We should not be impeached for the former; we are not guilty of the latter.<sup>58</sup>

Stevens added, “Our system is the role model for the world.”<sup>59</sup> It was a declaration based squarely on the Justice’s own life experience.

## II. A PORTRAIT OF THE JUSTICE AS A YOUNG MAN

Born April 20, 1920, into the family that built the Chicago hotel now known as the Hilton, young John Stevens met the international celebrities of the Roaring Twenties: Amelia Earhart scolded him for being out late on a school night, and Charles Lindbergh, just back from his landmark solo flight to Paris, gave the boy a dove.<sup>60</sup> A South Side Cubs fan, Stevens sat in the stands at Wrigley Field as slugger Babe Ruth, with two strikes against him, pointed to center field and hit a home run to put the Yankees ahead in Game Three of the 1932 World Series.<sup>61</sup> Several years later, Stevens listened as two of his University of Chicago professors, Mortimer Adler and Robert Hutchins, debated whether the United States should come to the aid of England in its fight against Nazi Germany.<sup>62</sup> The Phi Beta Kappa graduate had just begun master’s degree studies in English literature when a dean encouraged him to take a correspondence course in military encoding and decoding.<sup>63</sup>

### A. World War II Codebreaker

On completion of the codes course, Stevens received a commission as an officer in the U.S. Navy. He took his physical at Great Lakes Naval Base on December 6, 1941. Hours later, of course, Japanese kamikazes bombed Pearl Harbor.<sup>64</sup> The surprise assault on the Pacific fleet propelled the

58. John Paul Stevens, *Justice Stevens Remarks, Seventh Circuit Judicial Conference Dinner 2, 8* (May 23, 2005) (on file with author).

59. *Id.* at 8-9 (quoting U.S. District Judge Joan Lefkow, who had spoken just before him).

60. *John Paul Stevens, Associate Justice, Supreme Court of the United States, Biographical Data*, 1992/1993 Ann. Surv. Am. L., at lv [hereinafter *Biographical Data*] (listing birthdate); Glen Elsasser, *Say . . . Who Was That Bridge Life Master, Anyway?*, Chi. Trib., Nov. 26, 1998, at 1. Stevens, who later became a private pilot, provided a glimpse of that raucous era in *Granholt v. Heald*, 125 S. Ct. 1885, 1909 (2005) (Stevens, J., dissenting) (describing his “understanding (and recollection) of the historical context” of the amendment that ended Prohibition, a time when “millions of Americans” did not consider “alcohol . . . an ordinary article of commerce,” but rather “condemned the use of the ‘demon rum’”).

61. See Eric Enders, 1903-2004: 100 Years of the World Series 79 (2005) (describing the game); Elsasser, *supra* note 60 (mentioning Stevens’s attendance); Oyez, *Justice John Paul Stevens’ Chambers*, <http://www.oyez.org/oyez/tour/stevenschamber-from-introduction> (last visited Feb. 28, 2006) (depicting framed print of Ruth’s feat and scorecard from that game, both displayed in the Justice’s chambers). Long afterward, Stevens threw the first pitch at the same ballpark. See photo accompanying Tom Curry, *Justice Stevens is key to high court’s future*, MSNBC.com, Sept. 21, 2005, <http://www.msnbc.msn.com/id/9408518/>.

62. John Paul Stevens, *Learning on the Job*, 74 Fordham L. Rev. 1561, 1561 (2006).

63. See Manaster, *supra* note 33, at 38; *Biographical Data*, *supra* note 60, at lv.

64. JPS Interview, *supra* note 16; see Manaster, *supra* note 33, at 38 (“Eventually Stevens couldn’t resist joking that his enlistment apparently had precipitated the war.”).

United States into the world war already raging for years in Asia, Europe, and Africa. Thus that date of infamy, as President Franklin D. Roosevelt famously called it,<sup>65</sup> had been preceded by many others. The full extent of the Holocaust that claimed millions of persons—Jews, Poles, Slavs, Gypsies, homosexuals, and others against whom Hitler had railed—would not be revealed until after the war's end.<sup>66</sup> Nonetheless, by 1941, everyone knew of the Nazis' conquests of continental Europe and consequent impressment of the conquered into forced labor, of the 1935 Nuremberg law that oppressed persons it defined as Jews, and of the 1937-1938 Rape of Nanking, during which many thousands of Chinese suffered sexual assault and other brutality at the hands of Japanese invaders.<sup>67</sup>

"I went to Pearl in December 1942," Stevens recalled much later, "and stayed there almost until the end of the war."<sup>68</sup> He was a codebreaker, a member of a global team of "unlikely warriors"<sup>69</sup> whose labors have been described in heroic terms:

[H]ollow-eyed, unshaven cryptologists or photo reconnaissance analysts deep in a basement or windowless room, surrounded by the clack of IBM sorters and tabulator machines or the stench of darkroom chemicals—it was men (and women) of this sort who were the intelligence aces of World War II. Far from the fighting fronts, in Pearl Harbor, Melbourne, New Delhi, and Washington, small groups of seldom-seen, overburdened, relentlessly driven men and women labored over the greatest intelligence feat of the war: the recovery, decryption, and analysis of coded messages.<sup>70</sup>

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65. See Pearl Harbor—FDR's Day of Infamy Speech, <http://www.umkc.edu/lib/spec-col/ww2/PearlHarbor/fdr-speech.htm> (last visited Jan. 14, 2006) (including photos, an audio clip, and a typescript facsimile of his Dec. 8, 1941, speech to Congress in which Roosevelt named the attack "a date which will live in infamy").

66. See Telford Taylor, *The Anatomy of the Nuremberg Trials* 21-24, 103 (1992) (reviewing the persecution of Jews, Gypsies, Slavs, and Poles); Diane Marie Amann, *Group Mentality, Expressivism, and Genocide*, 2 Int'l Crim. L. Rev. 93, 96-97 (2002) (summarizing a description of atrocities in Raphaël Lemkin, *Axis Rule in Occupied Europe* (1944), and Lemkin's linkage of those crimes to Adolf Hitler, *Mein Kampf* (Reynal & Hitchcock ed., 1939)); Arthur L. Berney, *Revisiting a Conference Commemorating the Nuremberg Trials: A Commentary from a Nuremberg Prosecutor*, 17 B.C. Third World L.J. 275, 275 (1997) (discussing the persecution of homosexuals, Gypsies, and others); see also Taylor, *supra*, at 26 (admitting that the author, though an Army officer, "did not become aware of the Holocaust until my exposure to the relevant documents and witnesses at Nuremberg," and citing a "comparable avowal" in George Ball, *The Past Has Another Pattern* 63 (1982)).

67. See, e.g., Iris Chang, *The Rape of Nanking: The Forgotten Holocaust of World War II* (1998) (describing atrocities in Nanjing, China); Taylor, *supra* note 66, at 21, 340, 457, 560 (discussing the Nuremberg laws and later, similar measures in occupied countries); *id.* at 24 (referring to reports "[i]n the wake of the Nazi conquests of 1940 and 1941" of "the roundup of millions of men and women from all the occupied countries for forced labor on German farms and in German mines and factories").

68. JPS Interview, *supra* note 16; see also Manaster, *supra* note 33, at 38.

69. Donald A. Davis, *Lightning Strike: The Secret Mission to Kill Admiral Yamamoto and Avenge Pearl Harbor* 91 (2005).

70. Ronald H. Spector, *Eagle Against the Sun* 445 (1985), *quoted in* Carroll V. Glines, *Attack on Yamamoto* 13-14 (1991) (stating further that "almost all of the messages flashed between the top Japanese naval units and their leaders after Pearl Harbor were intercepted

Stevens was awarded a Bronze Star for his service. “I did a lot of work breaking a particular cipher,” he explained. “It involved call signals. It was very technical.”<sup>71</sup>

One event days before Stevens’s twenty-third birthday would stay with him for the rest of his life. The architect of the Pearl Harbor attack was Admiral Isoroku Yamamoto, who had learned English from a missionary and become a Babe Ruth fan while studying at Harvard in the 1920s.<sup>72</sup> On April 14, 1943, Americans discovered that Yamamoto was about to travel to the front. Unbeknownst to the Japanese, Stevens explained in an interview more than sixty years later, “We had broken the code.”<sup>73</sup> On Roosevelt’s orders, U.S. pilots downed Yamamoto’s plane over a Solomon Islands jungle on April 18, Easter Sunday.<sup>74</sup> “I was on duty on the day they brought the plane down,” Stevens said, “The message was, ‘We bagged one eagle and two sparrows,’ indicating success in the mission.” The kill buoyed the spirits of many, who knew that getting Yamamoto would, as Stevens put it, “have a tremendous strategic advantage.”

But the incident troubled the young officer. “I remember thinking that the planners must have engaged in a lot of deliberation before deciding to go along with the plan,” Stevens said. “I have read a number of books on it since and discovered that was not the case. They were concerned that targeting him would reveal that they had broken the code.” Accounts of the killing indicate that U.S. Admiral Chester A. Nimitz and others—in communications laced with foxhunting terms<sup>75</sup>—debated only the tactical benefits and costs.<sup>76</sup> “But they had no humanitarian concerns at all of the

and read by the U.S. Navy’s outstanding codebreakers,” and calling “[t]heir work, unheralded and still mostly classified, . . . the secret weapon that could be said to have won the war in the Pacific”).

71. JPS Interview, *supra* note 16. Roosevelt established the Bronze Star Medal for award to a service member who “on or after December 7, 1941, distinguishes, or has distinguished, himself by heroic or meritorious achievement or service, not involving participation in aerial flight, in connection with military or naval operations against an enemy of the United States.” Exec. Order No. 9419, 9 Fed. Reg. 1495 (Feb. 8, 1944).

72. See Davis, *supra* note 69, at 36-39.

73. All Stevens quotes respecting the Yamamoto incident are from JPS Interview, *supra* note 16; see Hiroyuki Agawa, *The Reluctant Admiral: Yamamoto and the Imperial Navy* 370-74 (John Bester trans., 1979) (indicating that the Japanese did not suspect codes had been broken until after the strike against Yamamoto); Davis, *supra* note 69, at 91-93 (discussing breaking of Japanese code); Glines, *supra* note 70, at 20-25 (same).

74. See Agawa, *supra* note 73, at 344-68 (providing an account of the killing of Yamamoto); Davis, *supra* note 69, at 257-302 (describing the U.S. mission); Glines, *supra* note 70, at 57-111, 149-50 (giving U.S. and Japanese accounts of events, relating Roosevelt’s authorization, and noting that the date was Easter).

75. See Glines, *supra* note 70, at 6-8 (writing that Admiral William F. Halsey, Commander, South Pacific, sent subordinates a wire that ended “COMMENT: TALLEYHO X LET’S GET THE BASTARD X,” and that later Nimitz wired Halsey, “BEST OF LUCK AND HAPPY HUNTING”).

76. See Agawa, *supra* note 73, at 370 (“What Nimitz feared in reality was that the operation would reveal to the Japanese the truth about American code-breaking activities.”); Davis, *supra* note 69, at 228-29, 289-90 (discussing concerns around which the debate over whether to target Yamamoto centered); Glines, *supra* note 70, at 4-5 (recounting a

kind that troubled me,” Stevens said. That fact “kind of surprised me,” he continued, particularly given that Yamamoto “had spent time in the United States and had friendships among high-ranking American officers.”<sup>77</sup>

Appearing before the Chicago Bar Association decades later, Stevens alluded to the event without naming the target. The Justice told his audience that the experience had sown doubts in his mind about another instance in which the state takes the life of a named individual; that is, capital punishment. Recalling that talk, Stevens affirmed that the Yamamoto incident led him to conclude that “[t]he targeting of a particular individual with the intent to kill him was a lot different than killing a soldier in battle and dealing with a statistic. . . . In my mind, there is a difference between statistics and sitting on a jury and deciding whether to kill a single person.”<sup>78</sup>

### B. *Postwar Law Student*

In 1945, Stevens enrolled at his father’s alma mater, Northwestern University School of Law, on the G.I. Bill.<sup>79</sup> Two years later, he graduated magna cum laude, having set the school record for highest grade point average.<sup>80</sup>

Stevens’s law studies took place at a time of monumental postwar reconstruction and realignment. A month after the attack on Pearl Harbor, the United States and its European allies had taken a first step toward an international organization, a global security regime designed to deter nation-states’ abuses of force.<sup>81</sup> As Stevens readied to enter law school, fifty countries adopted the Charter of that United Nations organization at a conference in San Francisco.<sup>82</sup> Then, on October 6, 1945, Allied prosecutors lodged with the newly established International Military

conversation in which Nimitz and an aide, mulling whether “to try to get” Yamamoto, spoke only of tactical considerations).

77. See Davis, *supra* note 69, at 228, 289-90 (stating that a U.S. intelligence officer had gone to a “duck-netting party” as Yamamoto’s guest, and also “played bridge and watched kabuki” with him); Glines, *supra* note 70, at 4-5 (referring to Yamamoto’s hosting of a 1937 duck hunt at the emperor’s game preserve).

78. JPS Interview, *supra* note 16. Stevens’s talk appears to have been reported only in a bar newsletter, which I read at the time but did not keep.

79. Manaster, *supra* note 33, at 38 (“G.I. Bill mostly paid his way”); John Paul Stevens, *Introductory Comment*, 75 Nw. U. L. Rev. 977, 977 (1981) (stating that his father studied law at Northwestern in 1906).

80. See George W. Gekas, U.S. House of Representatives, Tribute to U.S. Supreme Court Associate Justice John Paul Stevens, *reprinted in* 142 Cong. Rec. E1450 (daily ed. Aug. 1, 1996).

81. See Declaration by the United Nations, Jan. 1, 1942, available at <http://www.yale.edu/lawweb/avalon/decade/decade03.htm> (containing the pledge of twenty-six “United Nations” to fight the Axis Powers in order “to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands”); Taylor, *supra* note 66, at 26 n.‡ (stating that by this declaration “[t]he United Nations alliance was formally established”).

82. See, e.g., Mary Ann Glendon, *A World Made New* 3-20 (2001) (tracing developments leading to the approval of the U.N. Charter).



Tribunal an indictment charging twenty-four Nazi leaders with crimes against peace, war crimes, and crimes against humanity.<sup>83</sup> Trial soon began in what proved to be the first of many war crimes proceedings in Europe and in Asia.<sup>84</sup> But the alliance frayed even as the joint trials proceeded. In the spring of Stevens's first year of law school, former British Prime Minister Winston Churchill declared that "an iron curtain has descended across the Continent," dividing Europe into democratic and Communist halves.<sup>85</sup> A year later, President Harry S. Truman proclaimed that the United States would "support free peoples who are resisting attempted subjugation," and Secretary of State George C. Marshall announced a comprehensive plan "to assist in the return of normal economic health in the world, without which there can be no political stability and no assured peace."<sup>86</sup> The waging abroad of a Cold War made imperative, to borrow a trope from Professor Mary L. Dudziak, enforcement at home of individual rights and racial equality.<sup>87</sup>

These developments were reflected in the pages of Northwestern's law review, of which Stevens was a co-editor-in-chief. During his tenure, the

83. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 (authorizing tribunal); Taylor, *supra* note 66, at 78-149 (detailing the drafting and contents of the first indictment).

84. See Opening Statement of Justice Jackson (Nov. 21, 1945), in *Int'l Military Tribunal, 2 Trial of the Major War Criminals Before the International Military Tribunal* 99-155 (1948) [hereinafter Jackson Opening]; see also *United States v. Goering*, 6 F.R.D. 69 (1946) (Int'l Mil. Tribunal, 1946) (setting forth the judgment of the International Military Trib., delivered Sept. 30-Oct. 1, 1946). Trials continued in Europe for a number of years thereafter. See *Germany (Territory Under Allied Occupation: U.S. Zone), Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 (1949-53)*; Taylor, *supra* note 66, at 640. There were trials in Asia as well, before special U.S. military commissions operating pursuant to congressional enactment, and before an international tribunal operating pursuant to the Charter of the International Military Tribunal for the Far East at Tokyo, *Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo*, April 26, 1946, T.I.A.S. No. 1589, 4 Bevans 20. See Richard H. Minear, *Victors' Justice: The Tokyo War Crimes Trial* (1971).

85. Winston S. Churchill, *The Sinews of Peace*, Speech Delivered at Westminster College, Fulton, Mo. (Mar. 5, 1946), in *VII Winston S. Churchill: His Complete Speeches 1897-1963*, at 7285, 7290 (Robert Rhodes James ed., 1974).

86. Harry S. Truman, President, Address Before a Joint Session of Congress (Mar. 12, 1947), available at <http://www.yale.edu/lawweb/avalon/trudoc.htm>; see also Text of the Marshall Plan Speech (June 4, 1947), available at George C. Marshall Foundation, The Marshall Plan, [http://www.marshallfoundation.org/marshall\\_plan\\_speech\\_harvard.html](http://www.marshallfoundation.org/marshall_plan_speech_harvard.html) (State Department handout).

87. Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 *Stan. L. Rev.* 61 (1988) [hereinafter Dudziak, *Desegregation*] (demonstrating the relation between changes in the racial policy and the changing global status of the United States); see also Mary L. Dudziak, *Cold War Civil Rights: Race and the Image of American Democracy* 252 (2000) (writing that "[w]hile it provided leverage for social change, the Cold War imperative was never static," but rather benefited from and helped to generate "international interest" in "the narrative of race in America"). See generally Margaret Raymond, *Rejecting Totalitarianism: Translating the Guarantees of Constitutional Criminal Procedure*, 76 *N.C. L. Rev.* 1193 (1998); Richard Primus, Note, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 *Yale L.J.* 423 (1996).

review published not only an article on impediments to post-conviction relief for Illinois prisoners denied their right to a fair trial, but also three lectures on postwar challenges, each delivered by a statesman working to promote international peace and democracy.<sup>88</sup> Among them was Adlai E. Stevenson, an Illinoisan who had served as special assistant to the Secretary of the Navy, as press liaison at the San Francisco Conference establishing the United Nations, and as senior advisor to the U.S. delegation at the first meeting of the U.N. General Assembly.<sup>89</sup>

The Northwestern faculty decided to sponsor Stevens and his counterpart for clerkships with Chief Justice Fred M. Vinson and Justice Wiley B. Rutledge. "It was in the *Law Review* office," Stevens later wrote, that the two top editors "flipped a coin to determine which vacancy each would seek."<sup>90</sup> The results of that toss led Northwestern Professor W. Willard Wirtz to recommend Stevens to Rutledge in a letter whose terms well exceeded glowing. "Let me simply say that I consider Stevens to be one of the two most outstanding students whom I have ever worked with," Wirtz wrote his longtime colleague and friend, adding, "I know that this must sound like exaggerated praise, and yet it is literally true."<sup>91</sup> Wirtz continued,

Stevens has the quickest, and at the same time best balanced, mind I have ever seen at work in a classroom. . . . The man is just as solid as he is brilliant. Beyond all this he has a personality which makes it a pure delight to work with him. I suppose that he is undoubtedly the most admired, and at the same time, the best liked man in school.<sup>92</sup>

Wirtz concluded with the "hope that your plans will work out so that you can take advantage of Steven's abilities and that he may, at the same time, enjoy what I should consider the finest single opportunity that any man could possibly have."<sup>93</sup> Rutledge extended the opportunity. Stevens

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88. See Stevens, *supra* note 79, at 977 (stating that he was co-editor for issues two and three of Volume 42 of what was then called the *Illinois Law Review*, in which appeared Philip C. Jessup, *The International Court of Justice and Legal Matters*, 42 Ill. L. Rev. 273 (1947); Joseph E. Johnson, *The Security Council in the United Nations*, 42 Ill. L. Rev. 192 (1947); Adlai E. Stevenson, *Some Post-War Reflections*, 42 Ill. L. Rev. 292 (1947)); Comment, *Collateral Relief from Convictions in Violation of Due Process in Illinois*, 42 Ill. L. Rev. 329 (1947).

89. Stevenson, *supra* note 88, at n.\*; see John Bartlow Martin, Adlai Stevenson of Illinois 184-223, 234-54, 271-72 (1976) (discussing this service).

90. Stevens, *supra* note 79, at 977.

91. Rutledge Papers, *supra* note 16, Box 46 (Letter from W. Willard Wirtz to WBR 1 (May 23, 1947)); see also John M. Ferren, Salt of the Earth, Conscience of the Court: The Story of Justice Wiley Rutledge 103, 111-12 (2004) (describing the relationship that began in the mid-1930s when Rutledge, Dean of the University of Iowa College of Law, persuaded an at-first-reluctant Wirtz to join his faculty).

92. Rutledge Papers, *supra* note 16, Box 46 (Letter from W. Willard Wirtz to WBR 1-2 (May 23, 1947)).

93. *Id.* (Letter from W. Willard Wirtz to WBR 2 (May 23, 1947) (misspelling of Stevens's name in original)).

finished his J.D. in Northwestern's 1947 summer session, then moved to Washington to begin his clerkship.<sup>94</sup>

### C. Cold War Law Clerk

Wiley Blount Rutledge, Jr., had moved to Washington eight years earlier, having resigned as law dean at the University of Iowa to become a federal appellate judge.<sup>95</sup> Roosevelt remarked that his nominee brought with him "'a lot of geography'": A preacher's son born in Kentucky, Rutledge had studied and taught high school in several central and western states before earning his law degree from the University of Colorado.<sup>96</sup> He joined Colorado's faculty after a brief stint in private practice; later, he served as law professor and dean at Washington University in St. Louis as well as at Iowa.<sup>97</sup>

Rutledge was known for his humility, for his genuine liking of people from all walks of life.<sup>98</sup> "For the times," his biographer has written, "he was unusually sensitive to the aspirations of women, of Jews, and . . . of African Americans."<sup>99</sup> He was an avid internationalist. In a speech supporting the United Nations as a means to replace "rule of force" with "rule of law," Rutledge gave the words of the Constitution a global reach as he urged his audience not to

let pass, in timidity and division, the chance to establish justice, to form a more perfect and embracing union, to insure both domestic and international tranquility, to provide for the common defense of mankind, and to secure the blessings of Liberty not only for ourselves and our Posterity but to all the generations of the earth.<sup>100</sup>

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94. In accepting Rutledge's offer of employment, Stevens proposed starting immediately after he finished classes. *Id.* Box 42 (Letter from JPS to WBR (July 14, 1947)). A note handwritten on this letter indicates that, in replying, Rutledge told Stevens to "take a week of vacation" before starting. Stevens complied, and so began his clerkship on September 22. *Id.* (Letter from JPS to WBR (July 24, 1947)).

95. See Ferren, *supra* note 91, at 100-30, 166-70 (writing of Rutledge's 1939 appointment to the U.S. Court of Appeals for the District of Columbia Circuit).

96. *Id.* at 219 (quoting Roosevelt); see also *id.* at 13-48 (describing Rutledge's upbringing in the home of a Southern Baptist minister and the educational path that led Rutledge to Colorado).

97. See *id.* at 51-130 (describing Rutledge's faculty years).

98. See *id.* at 112, 178-83, 418. Stevens has written that Rutledge "was annoyed that law clerks recently discharged from military service found it difficult to remain seated" when he entered, and that he "liked to travel by day coach because he enjoyed the conversation of his fellow passengers." John Paul Stevens, *Mr. Justice Rutledge*, in *Mr. Justice 177, 179* (Allison Dunham & Philip B. Kurland eds., 1956).

99. Ferren, *supra* note 91, at 418 (stating that Rutledge's wife "helped along" his sympathy for African-Americans); see *id.* at 115-19 (relating Rutledge's measured resistance to discrimination while a law dean); *id.* at 384-90 (describing Justice Rutledge's actions respecting race discrimination and the status of women).

100. Rutledge Papers, *supra* note 16, Box 201 (Wiley B. Rutledge, *The Alternative*, at 1-2 (Mar. 30, 1946)). Compare *id.* with U.S. Const. pmbl. Rutledge was addressing an international group formed at the time of the San Francisco Conference to "promote friendship and understanding between lawyers of the United Nations and between the

In private and public life Rutledge had fought against child labor and for assistance of counsel, and he had spoken out in defense of civil liberties in time of war.<sup>101</sup> Yet within months of joining the Supreme Court, Rutledge lent his support to a wartime measure seen today as an unwarranted suppression of liberty. He voted in 1943 to affirm the conviction of Gordon Hirabayashi, an American who had defied curfew orders issued during the internment of more than a hundred thousand residents of Japanese heritage—and he did so despite apparent concern that invidious discrimination underlay those orders.<sup>102</sup> That vote then compelled Rutledge to join five Justices in affirming the conviction of Fred Korematsu on the ground that “[p]ressing public necessity” justified treating persons of Japanese descent differently from all other Americans.<sup>103</sup>

By 1946 Rutledge had less patience for executive curtailments of fundamental rights. In a landmark opinion, he broke from the majority’s affirmance of a military commission verdict holding General Yamashita criminally responsible for atrocities that Japanese troops had committed during the battle for the Philippines.<sup>104</sup> Rutledge relied on the then-applicable Geneva Convention and on domestic law.<sup>105</sup> Contending “that

nations themselves.” Rutledge Papers, *supra* note 16, Box 44 (Invitation to WBR from Organizing Committee of the United Nations League of Lawyers); *cf.* Ferren, *supra* note 91, at 189, 392-402 (discussing other internationalist speeches by Rutledge); *id.* at 68 (tracing Rutledge’s “strong internationalism, unusual in the Midwest,” to his days in St. Louis).

101. *See* Ferren, *supra* note 91, at 73-79, 263 (describing Rutledge’s work against child labor); *id.* at 187-89 (recounting Rutledge’s wartime speeches); *id.* at 419 (discussing his impact on defense rights).

102. *See id.* at 242-46 (describing Rutledge’s role in *Hirabayashi v. United States*, 320 U.S. 81 (1943)). Rutledge “seemed tempted” to join a draft dissent in which Justice Frank Murphy stressed “that [d]istinctions based on color and ancestry are utterly inconsistent with our traditions and ideals,” and identified “a melancholy resemblance” between “the treatment of Japanese-Americans” by the United States and “the treatment accorded to members of the Jewish race in Germany and other parts of Europe.” *Id.* at 244 (quoting Murphy). In the end, however, Rutledge filed a brief opinion concurring with the majority’s affirmance, and Murphy transformed the draft from a dissent into his own separate concurrence. *Id.* at 244-46; *see also Hirabayashi*, 320 U.S. at 109-14 (Murphy, J., concurring); *id.* at 114 (Rutledge, J., concurring); Fowler V. Harper, Justice Rutledge and The Bright Constellation 175-76 (1965). On internment *see*, for example, Peter Irons, *Justice at War* (1983).

103. *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (affirming the conviction notwithstanding dissents by Justices Murphy, Robert H. Jackson, and Owen J. Roberts); *see also* Ferren, *supra* note 91, at 246-59 (discussing the litigation of *Korematsu* and analyzing Rutledge’s reasons for joining the majority); Harper, *supra* note 102, at 176-78 (same).

104. *Compare In re Yamashita*, 327 U.S. 1 (1946), with *id.* at 41-81 (Rutledge, J., dissenting). Murphy was the only other dissenter, *id.* at 26-41; Jackson did not take part in the decision, *id.* at 26; *see also* Ferren, *supra* note 91, at 301-23 (discussing the case); Patricia M. Wald, *Rules of Evidence of the Yugoslav War Tribunal*, 21 *Quinnipiac L. Rev.* 761, 770 (2003) (stating the desire “that current international law tribunals not devolve into the kind of *Yamashita* trial the famous dissenters, Justices Murphy and Rutledge (and probably history as well), condemned”).

105. *See Yamashita*, 327 U.S. at 56-57, 61-81 (Rutledge, J., dissenting) (citing *inter alia* U.S. Const. amend. V; Articles of War, 10 U.S.C. §§ 1471-1593 (1916); Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, T.S. No. 846).

the Constitution follows the flag,”<sup>106</sup> he decried the overseas proceedings as contrary to the United States’s “great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents.”<sup>107</sup>

Rutledge was no more comfortable with the international war crimes tribunals that the United States had helped to establish at Nuremberg and Tokyo. Today, Nuremberg—and the opening statement of Justice Robert H. Jackson, who took leave from the Court to serve as Chief U.S. Prosecutor at the first trial<sup>108</sup>—is viewed as a wellspring of international criminal justice.<sup>109</sup> But many of Jackson’s brethren believed, as Justice William O. Douglas later put it, “that the Nuremberg Trials were unconstitutional by American standards”;<sup>110</sup> indeed, Chief Justice Harlan Fiske Stone labeled the process a “high-grade lynching party.”<sup>111</sup> Rutledge, too, expressed opposition, telling a friend that the war crimes trials were “perversions of the legal process” that had “done more to destroy any conception of democracy among the German and other

106. *Id.* at 47 (Rutledge, J., dissenting).

107. *Id.* at 41-42 (Rutledge, J., dissenting). A week later, Rutledge and Murphy reiterated their opposition by dissenting from a military commission’s capital conviction of the Japanese general in command during the Bataan Death March. *Compare In re Homma*, 327 U.S. 759 (1946) (denying motions for review in one unsigned paragraph), *with id.* at 759-61 (Murphy, J., dissenting) (likening the petition to that in *Yamashita*) and *id.* at 761-63 (Rutledge, J., dissenting) (same). *See generally* Harper, *supra* note 102, at 180-95 (providing background and critique of both cases); David L. Herman, *A Dish Best Not Served at All: How Foreign Military War Crimes Suspects Lack Protection Under United States and International Law*, 172 *Mil. L. Rev.* 40 (2002) (same).

108. Jackson Opening, *supra* note 84, at 99-155. References to Jackson’s address may be found in, for example, Barayagwiza v. Prosecutor, Case No. ICTR-97-19-AR72, Appeals Chamber Decision on Prosecutor’s Request for Review or Reconsideration (Mar. 31, 2000) (Declaration of Judge Nieto-Navia), *reprinted in* 39 *I.L.M.* 1181, 1196 (2000); Antonio Cassese, *The ICTY: A Living and Vital Reality*, 2 *J. Int’l Crim. Just.* 585, 587 (2004); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *Yale L.J.* 2537, 2556 n.75, 2590 (1991). Jackson returned to the Court in summer 1946. Taylor, *supra* note 66, at 547-48, 570.

109. *See, e.g.*, Taylor, *supra* note 66, at 634-41 (assessing the legacy of Nuremberg); Diane Marie Amann, *Harmonic Convergence? Constitutional Criminal Procedure in an International Context*, 75 *Ind. L.J.* 809, 818-20 (2000) (situating Nuremberg within the history of movements toward international norms of criminal process); Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 *Cal. L. Rev.* 75, 91-92 (2005) (describing Nuremberg as the source for “[t]he modern conception of the international criminal trial as a transitional justice tool”).

110. William O. Douglas, *The Court Years 1939-1975*, at 28 (1980) (emphasis omitted) (attributing this view to Chief Justice Stone and Justices Murphy and Hugo Black as well as himself); *accord* Taylor, *supra* note 66, at 418-21 (describing enmity between Jackson and Black while the former was in Nuremberg).

111. Alpheus Thomas Mason, *Harlan Fiske Stone: Pillar of the Law* 716 (1956) (quoting Stone); *cf. Homma*, 327 U.S. at 760-61 (Murphy, J., dissenting) (stating that Justice Rutledge, in his dissent, “agrees” with Justice’s Murphy’s view that, after Nuremberg, “[a] procession of judicial lynchings without due process of law may now follow.”).

European peoples than almost any course we could have pursued.”<sup>112</sup> Rutledge was still talking about those trials when John Paul Stevens arrived in 1947 to assist him in his fifth full Term on the Court.<sup>113</sup>

Many matters on which Stevens worked included the claim that a government practice deviated from American values—a charge that could carry global consequence for a United States still adjusting to its new status as one of the world’s two superpowers. Three such cases deserve particular mention.

In one, Ada Sipuel Hurst, an African American “concededly qualified,” sought to force compliance with the Court’s order that Oklahoma provide her a legal education “in conformity with the equal protection clause of the Fourteenth Amendment.”<sup>114</sup> The Cold War politics of race surfaced in the case, one of a series argued by lawyer Thurgood Marshall: A letter in Rutledge’s file warned “that some well known Communists are quite active here in Oklahoma on behalf of Miss Sipuel’s case.”<sup>115</sup> The file also contains a typescript clerk’s memorandum, signed “jps,” which advised taking judicial notice that “the doctrine of segregation is itself a violation of the Constitutional requirement,” and concluded that “if there is any chance of granting any relief, I would do so.”<sup>116</sup> Rutledge filed a lone dissent from

112. Ferren, *supra* note 91, at 400 (quoting a letter by Rutledge).

113. Asked about the Nuremberg trials, Stevens later recalled, I remember Justice Rutledge talking about them. He was very very troubled by the *ex post facto* aspects of them. He also had serious misgivings about Jackson’s participation. He said that he felt it was inconsistent with his views before the war, though I am not sure what he was referring to.

JPS Interview, *supra* note 16; *see also* Ferren, *supra* note 91, at 221-22 (stating that Rutledge took his seat on Feb. 15, 1943, midway through the Court’s 1942 Term).

114. Sipuel v. Bd. of Regents of the Univ. of Okla., 332 U.S. 631, 632-33 (1948) (per curiam) (citing Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938)), *quoted in* Fisher v. Hurst, 333 U.S. 147, 148 (1948) (per curiam) (stating facts leading to the same petitioner’s mandamus action).

115. Rutledge Papers, *supra* note 16, Box 157 (Letter from Phil Higgins to WBR (Nov. 22, 1947)); *see also* John Paul Stevens, Address to the American Bar Association Thurgood Marshall Awards Dinner Honoring Abner Mikva (Aug. 6, 2005), *available at* [http://www.supremecourtus.gov/publicinfo/speeches/sp\\_08-06-05.html](http://www.supremecourtus.gov/publicinfo/speeches/sp_08-06-05.html) (recalling Marshall’s argument in *Sipuel*). *See generally* Richard Kluger, Simple Justice (1976) (detailing Marshall’s role in litigation against school segregation).

116. Rutledge Papers, *supra* note 16, Box 157 (jps, *Fisher v. Justices of Okla. S.Ct. et al.*, at 2, 3). The critical portion of this memorandum stated in full:

Petitioner stresses the time element emphasized in this Court’s mandate, and asks that the Court take judicial notice of that fact that it is impossible to set up an equal law school in the few days before the beginning of the new term at Okla Univ.

I would shift the emphasis slightly. The mandate of this Court directs the state to provide her with a legal education ‘in conformity with the equal protection clause.’ I would think it possible to take judicial notice of the fact that (a) a law school for one student cannot be equal, even if you accept the equal but separate doctrine, and (b) the doctrine of segregation is itself a violation of the Constitutional requirement. Then in order to comply with the mandate of this Court, the state must admit her to Oklahoma Univ.

*Id.* at 2 (abbreviations and spacing in original).

the denial of mandamus, though on a ground less bold than that advanced in the memorandum.<sup>117</sup>

A memorandum by Stevens likewise played a key role in *Marino v. Ragen*, involving an Italian immigrant serving a life sentence for murder.<sup>118</sup> At the time of his arrest, petitioner, eighteen, had been in the United States for two years. He spoke no English. The record indicated that he had pleaded guilty without the benefit of defense counsel; at parts of the proceedings the arresting officer acted as interpreter. It had taken twenty-two years for a state judge to hear the petition for post-conviction relief—and then to reject it without explaining whether denial was on the merits or because petitioner had failed to choose the proper remedial path.<sup>119</sup> The state confessed error before the Court, and most Justices agreed simply to dispose of the case by vacating and remanding per curiam. But Rutledge was not content to let Illinois—the source of roughly half the Court's prisoner petitions<sup>120</sup>—so easily off the hook. Writing in his own hand that the case posed “the question of the course this Court should follow in the future concerning the disposition of similar petitions,” Rutledge then adopted much of clerk Stevens's typescript draft for his concurrence, which Justices Douglas and Frank Murphy joined.<sup>121</sup> The concurrence incorporated Stevens's statement “that the Illinois procedural labyrinth is made up entirely of blind alleys, each of which is useful only as a means of convincing the federal courts that the state road which the petitioner has taken was the wrong one.”<sup>122</sup> Stating that prisoners “are required to ride the Illinois merry-go-round of habeas corpus, coram nobis, and writ of error,” the concurrence, like the typescript draft, concluded that, even if the state had not confessed error, federal review would have been warranted.<sup>123</sup> Rutledge soon wrote the law dean at the University of Chicago: “I had been waiting for the *Marino* chance for some time. It was of course questionable whether a blast of that sort might not do more harm than good, but we concluded that things could not be much worse and that the blowout

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117. *Fisher*, 333 U.S. at 151 (Rutledge, J., dissenting) (arguing that state courts had not complied with the Court's mandate in *Sipuel*, 332 U.S. at 631 (per curiam)).

118. *Marino v. Ragen*, 332 U.S. 561, 561-62 (1947).

119. *Id.* at 561-63; *id.* at 565 (Rutledge, J., concurring).

120. *Id.* at 563 (citing statistics for the previous three Terms).

121. Rutledge Papers, *supra* note 16, Box 158 (*Marino v. Ragen*, Rutledge's handwritten draft, 1st page). Compare *id.* with *Marino*, 332 U.S. at 563 (Rutledge, J., joined by Douglas and Murphy, JJ., concurring).

122. *Marino*, 332 U.S. at 567 (Rutledge, J., concurring). Compare *id.* with Rutledge Papers, *supra* note 16, Box 158 (*Marino v. Ragen*, typescript inserted into Rutledge's handwritten draft, at 3 (Dec. 12, 1947)). Stevens, of course, had served as editor of a law review volume that published an article on the subject. See *supra* text accompanying note 88 (mentioning Comment, *supra* note 88, cited in *Marino*, 332 U.S. at 569 n.11 (Rutledge, J., concurring)).

123. Compare *Marino*, 332 U.S. at 570 (Rutledge, J., concurring), with Rutledge Papers, *supra* note 16, Box 158 (*Marino v. Ragen*, typescript inserted into Rutledge's handwritten draft, at 4 (Dec. 12, 1947)).

might help.”<sup>124</sup> The concurrence attracted media coverage and correspondence from grateful prisoners.<sup>125</sup> Another letter included a reminder of the brooding Cold War: A Chicagoan commended the *Marino* concurrence, then urged Rutledge to continue to “uph[o]ld the right of free expression . . . particularly since the present ‘Red’-baiting often takes the form of trying to deny freedom of expression to our citizens. . . . We want no communism here; but we likewise do not want fascism brought in behind the smoke-screen of a ‘red’ scare.”<sup>126</sup>

Tension between individual rights and national security was overt in *Ahrens v. Clark*, brought by more than a hundred German-born U.S. residents whom the Attorney General unilaterally had declared dangerous during the war against Nazi Germany.<sup>127</sup> From a detention center on Ellis Island, they argued that the executive’s power to deport alien enemies had ended with the war; because the Court already had refused two similar challenges, clerk Stevens called the petition “apparently unmeritorious.”<sup>128</sup> But this time review was granted. In a pre-argument memorandum, Stevens stated that the executive would have power to deport, but only if the judiciary first had exercised its own power to scrutinize the asserted justification for deportation.<sup>129</sup> The majority never reached that question. It affirmed the ruling below that courts in the District of Columbia, where the petition had been filed, had no jurisdiction to review the lawfulness of detention in New York.<sup>130</sup> Rutledge prepared a dissent that Justices Hugo Black and Frank Murphy would join.<sup>131</sup> “For the first time this Court puts a narrow and rigid territorial limitation upon issuance of the writ” of habeas

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124. Rutledge Papers, *supra* note 16, Box 158 (Letter from WBR to Wilber G. Katz (Jan. 19, 1948)).

125. *See Illinois Cases Show Workings of ‘Merry-Go-Round’ of Courts; Prisoners Assert Rights Were Denied*, St. Louis Post-Dispatch, June 18, 1948, at 2A. This article and the inmates’ letters are contained in Rutledge Papers, *supra* note 16, Box 158.

126. Rutledge Papers, *supra* note 16, Box 158 (Letter from Edward G. Punkay to WBR (Dec. 29, 1947)); *see Ferren*, *supra* note 91, at 260-71 (discussing Rutledge’s First Amendment jurisprudence). Notably, adjacent to the article cited *supra* note 125 was another that evinced Cold War tensions. *See Rutledge Papers*, *supra* note 16, Box 158 (containing *Showdown Due with Russians, Publisher Says*, St. Louis Post-Dispatch, June 18, 1948, at 2A).

127. *Ahrens v. Clark*, 335 U.S. 188, 189 (1948).

128. Rutledge Papers, *supra* note 16, Box 156 (Supplemental Memo, AHRENS \* No. 446). Though this typescript is unsigned, other documents in this file make it clear that Stevens worked on the case. They include the primary certiorari memorandum, which sets forth arguments restated in this supplement. *See Id.* (jps, *Ahrens et al v. Clark*).

129. Rutledge Papers, *supra* note 16, Box 156 (jps, Bench Memo, *Ahrens v. Clark*). The memo stated, “I should think that even an alien enemy ought to be entitled to a fair hearing on the question whether he is in fact dangerous.” *Id.* (jps, Bench Memo, *Ahrens v. Clark*, at 5)

130. *Ahrens*, 335 U.S. at 189-93.

131. Only Rutledge and Black favored reversal at the post-argument conference. *See* Rutledge’s handwritten notes on back of first three pages of Rutledge Papers, *supra* note 16, Box 156 (jps, Bench Memo, *Ahrens v. Clark*). Box 156 contains the note to Rutledge by which Murphy switched his vote after the draft dissent circulated: “I voted the other way but I now believe you are right + that your opinion is a fine job.”



corpus, and thus “attenuates the personal security of every citizen,” Rutledge wrote in his own hand.<sup>132</sup> He then set forth his interpretation of the relevant statute, interweaving his own words with those from a typescript draft dissent by Stevens. Rutledge incorporated Stevens’s observation that the majority’s decision would foreclose review for “petitioners detained by the military authorities in Germany and Japan”—some held “pursuant to sentences imposed by military tribunals for alleged offenses,” some “confined for indefinite periods without charge and without trial.”<sup>133</sup> Even as he wrote that “the full ramifications of the decision are difficult to foresee,” Rutledge excerpted three possibilities from Stevens’s draft: There might be no relief “where persons are wrongfully detained in places unknown,” perhaps in military custody or, like Hirabayashi, on account of a “mass evacuation,” or “even from wilful misconduct by arbitrary executive officials overreaching their constitutional or statutory authority.”<sup>134</sup> The concurrence, like the draft, concluded: “These dangers may seem unreal in the United States. But the experience of less fortunate countries should serve as a warning against the unwarranted curtailment of the jurisdiction of our courts to protect the liberty of the individual by means of the writ of *habeas corpus*.”<sup>135</sup>

#### D. *Young Mr. Stevens*

It is a testament to the strength of their relationship that in the one year before Rutledge’s death at age fifty-five,<sup>136</sup> Stevens penned a number of long letters to his former boss, and Rutledge responded. Notably, each letter addressed Rutledge not as “Justice,” but “Judge.”

Soon after returning to Chicago, Stevens wrote of his interest in helping “Adlai Stephenson”; the diplomat who had once published in Northwestern’s law journal was a candidate in the 1948 Illinois gubernatorial election.<sup>137</sup> Stevens apologized for begging off a post at Yale Law School in favor of the practice. He wrote that he was “particularly

132. Compare *Ahrens*, 335 U.S. at 194 (Rutledge, J., dissenting), with Rutledge Papers, *supra* note 16, Box 156 (*Ahrens v. Clark*, Rutledge’s handwritten draft, 1st page).

133. Compare *Ahrens*, 335 U.S. at 208-09 (Rutledge, J., dissenting) (citing cases), with Rutledge Papers, *supra* note 16, Box 156 (Draft dissent, *Ahrens v. Clark*, at 4 (Stevens’s typescript inserted into Rutledge’s handwritten draft, at 15)).

134. Compare *Ahrens*, 335 U.S. at 195, 210 (Rutledge, J., dissenting), with Rutledge Papers, *supra* note 16, Box 156 (Draft dissent, *Ahrens v. Clark*, at 5 (Stevens’s typescript inserted into Rutledge’s handwritten draft, at 15)).

135. Compare *Ahrens*, 335 U.S. at 210 (Rutledge, J., dissenting) (citing *Hirabayashi*), with Rutledge Papers, *supra* note 16, Box 156 (Draft dissent, *Ahrens v. Clark*, at 5 (Stevens’s typescript inserted into Rutledge’s handwritten draft, at 15)). For other accounts of Stevens’s role in *Ahrens*, see Joseph T. Thai, *The Law Clerk Who Wrote Rasul v. Bush: John Paul Stevens’ Influence from World War II to the War on Terror*, 92 Va. L. Rev. (forthcoming 2006); Charles Lane, *Stevens Brings a Historical Perspective to Detainees’ Case*, Wash. Post, May 3, 2004, at A19.

136. See Ferren, *supra* note 91, at 416 (stating that Rutledge died on Sept. 10, 1949, two weeks after suffering a stroke while driving his wife to a church potluck).

137. Rutledge Papers, *supra* note 16, Box 42 (Letter from JPS to WBR (Sept. 4, 1948)).

favorably impressed” by the Poppenhusen firm, noting that “contrary to the practice of most of the successful outfits in Chicago, there are several Jews in the organization.”<sup>138</sup> But at twenty-five lawyers the firm “is a little larger than I would like,”<sup>139</sup> Stevens added.

The Justice wrote quickly to reassure his former clerk about Yale.<sup>140</sup> “Please don’t misunderstand me about the whole business. I became fully convinced that you had the makings of a fine teacher and of course I am always glad to see men of that type enter that branch of the profession,” Rutledge wrote, adding that he did not start his legal career as a teacher, either. “Whether a man starts one way or the other and whether he shifts are largely matters of personal inclination and taste,” he continued, then concluded with a reference to Stevens’s interest in Stevenson, “I am glad you have in mind so definitely something more than sticking to the routines of practice and I shall be glad particularly to learn about the character and details of your political activities during the coming campaign.”

After a few months at Poppenhusen Stevens was restless, and predicted that soon he would leave either to take a job in the administration of Stevenson, by then governor, or “to hang out a shingle with one or two other fellows of about my age.”<sup>141</sup> Eventually he turned down a state offer; he explained that it was in the finance department, and besides, it came while he was trying his first case.<sup>142</sup> “I could no more have quit my job in the midst of the trial,” Stevens wrote, “than I could have quit a championship (assuming I were a championship player) tennis match with the score tied. . . . I had a swell time trying to win.”<sup>143</sup> On another matter, Stevens expressed disappointment at the Court’s refusal to hear an Illinois prisoner petition on which he had worked, then hastened to report that the state legislature “finally” had put an end to the post-conviction labyrinth that Rutledge had condemned in *Marino*.<sup>144</sup>

138. *Id.* (adding that “[t]hey will pay me \$350, which I think is a fair starting salary”). The firm then called Poppenhusen, Johnston, Thompson and Raymond is now known as Jenner & Block. *See Biographical Data, supra* note 60, at lv; Taylor, *supra* note 1, at 48.

139. Rutledge Papers, *supra* note 16, Box 42 (Letter from JPS to WBR (Sept. 4, 1948)).

140. All quotations in this paragraph are from *id.* (carbon copy of Letter from WBR to JPS (Sept. 17, 1948)). *Cf.* Rutledge Papers, *supra* note 16, Box 42 (Letter from Wesley A. Sturges, Dean of Yale Law School, to WBR (July 7, 1948) (inquiring about Stevens and containing a handwritten note of reply, “J.S. O.K.—no reservations”). Not long after this exchange, Stevens began an eight-year stint teaching antitrust law as an adjunct professor. *Biographical Data, supra* note 60, at lv (stating that he lectured at Northwestern from 1950 to 1954 and at the University of Chicago from 1955 to 1958).

141. Rutledge Papers, *supra* note 16, Box 42 (Letter from JPS to WBR 1-2 (Jan. 22, 1949)).

142. *Id.* (Letter from JPS to WBR 2 (July 11, 1949)).

143. *Id.* (Letter from JPS to WBR 2-3 (July 11, 1949)).

144. “I should have thought,” Stevens wrote, “that the series of outrages which we described to you there would have collected four votes even though the Fourth Amendment has been reduced to a ‘pale and frayed carbon copy of the original.’” Rutledge Papers, *supra* note 16, Box 42 (Letter from JPS to WBR 6-7 (July 11, 1949) (quoting, without citation, a two-week-old passage in *Wolf v. Colorado*, 338 U.S. 25, 48 (1949) (Rutledge, J., dissenting))); *see also* Ferren, *supra* note 91, at 372 (attributing the legislature’s action to pressure from the full Court, which eventually joined Rutledge in voicing objections to

Stevens related that in recent weeks, "I have been quite deeply troubled by the Hiss trial."<sup>145</sup> Alger Hiss, born sixteen years earlier than Stevens, was a onetime law clerk to Justice Oliver Wendell Holmes, Jr.<sup>146</sup> As a State Department officer for a decade beginning in 1936, Hiss had accompanied Roosevelt to the Yalta Conference and, along with Stevenson, had helped organize the San Francisco Conference.<sup>147</sup> Soon after Hiss left government service, the House Committee on Un-American Activities began investigating a charge that Hiss had passed state secrets to a Communist agent; eventually Hiss was indicted on charges that, in denying the accusation, he had perjured himself.<sup>148</sup> The case stirred debate among many in the United States and abroad.<sup>149</sup> Stevens was no exception. Writing Rutledge three days after the jury hung in what would come to be known as the first Hiss trial,<sup>150</sup> Stevens reported, "Through the early stages of the trial, and through most of Hiss' testimony, I had not the slightest doubt of his innocence and was indignant at the persecution." And yet, "I find it almost impossible to believe his defense," Stevens continued. The government's evidence was "not enough to convince me 'beyond a reasonable doubt,'" Stevens wrote, but then allowed that "as a mere spectator one tends to apply a weight of the evidence test." "Shake[n]" by the jury's vote, Stevens "wonder[ed] how many of the eight voters for conviction were substantially influenced by the distorted accounts in the press," and found "most shocking" reports that the Federal Bureau of Investigation was investigating the four who voted to acquit. The letter's detail and emotion demonstrate that, even as he immersed himself in what

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Illinois' procedures, and from the state bar association); *supra* text accompanying notes 118-26 (discussing *Marino*).

145. Rutledge Papers, *supra* note 16, Box 42 (Letter from JPS to WBR 3 (July 11, 1949)). All quotations of Stevens in this paragraph are contained in this letter.

146. The Earl Jowitt, *The Strange Case of Alger Hiss* 59-60 (1953).

147. *Id.* at 62-63; *see also* Alistair Cooke, *A Generation on Trial: U.S.A. vs. Alger Hiss* 7-8 (1952) (referring to both roles and further stating that the extent of Hiss's influence at Yalta was overblown by his opponents yet "curiously abetted" by his defense counsel); Martin, *supra* note 89, at 405-07 (discussing the controversy stirred by the deposition that then-Governor Stevenson gave under court order in the Hiss case, and noting that Supreme Court Justices Felix Frankfurter and Stanley Reed also were character witnesses for Hiss).

148. Among those who analyzed these events were the accused and his accuser. *See* Whittaker Chambers, *Witness* (1952); Alger Hiss, *In the Court of Public Opinion* (1957). Other contemporary accounts included Cooke, *supra* note 147 (report by a British journalist then writing for the *Guardian* of Manchester, England), and Jowitt, *supra* note 146 (analysis of legal proceedings by a jurist who had served as Britain's Attorney General, Solicitor General, and Lord Chancellor).

149. *See* Cooke, *supra* note 147, at 9-11 (reporting on "motives that impelled people to take one side or the other, or even to take no side at all," and noting that although "[m]any Democrats and old New Dealers" sympathized with Hiss, so too did "many conservative Easterners, Democrats and Republicans, of gentle upbringing or social pretension who felt as a threat from below what the common man might sense as an imposition from above").

150. *See id.* at 274-76 (relating reports of an eight-to-four jury deadlock); *id.* at 355 (stating in the chronology that the first trial lasted from May 31 to July 8, 1949). A second trial ended in a conviction, and on March 22, 1950, Hiss began serving a five-year term in federal prison. *See id.* at 330-39, 356.

would become a successful private practice,<sup>151</sup> Stevens remained engaged in the public issues of the day.<sup>152</sup>

### III. JUSTICE ENGAGED

Engagement with the world and America's place in it persisted after Stevens filled the seat vacated by Justice Douglas in 1975.<sup>153</sup> Among the books Stevens read during the Court's 2004 summer break was the report of the commission established to investigate what led to the terrorism of September 11, 2001, and what to do to prevent new attacks.<sup>154</sup> The other two were just-published biographies: Ron Chernow's study of Alexander Hamilton and John M. Ferren's study of Wiley Rutledge.<sup>155</sup> To find a synergy among these choices one need only reconsider Stevens's role in recent cases of transnational moment.

#### A. *Stevens, Rutledge, and the Duty of the Judge*

In a speech Stevens himself pointed out that an opinion portrayed in the Rutledge biography—the 1948 dissent in *Ahrens*—“significantly influenced an important case decided less than three months ago.”<sup>156</sup> He was referring to *Rasul*, the 2004 decision in which four Justices joined Stevens in rejecting the executive's post-September 11 effort to hold noncitizens whom it had labeled enemies at sites where U.S. courts could examine neither the asserted justification for nor the alleged conditions of detention.<sup>157</sup> Stevens stressed *Ahrens*'s effect on interpretation of the federal habeas statute.<sup>158</sup> But the influence of the case was more

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151. In 1952, Stevens helped to establish the Chicago firm of Rothschild, Stevens, Barry and Myers, where he tried antitrust cases for plaintiffs and defendants until his appointment in 1970 to the U.S. Court of Appeals for the Seventh Circuit. *Biographical Data*, *supra* note 60, at lv; Taylor, *supra* note 1, at 48.

152. Whether Hiss was in fact a Soviet spy remains a point of contention to this day. Compare David Lowenthal, *Did Allen Weinstein Get the Alger Hiss Story Wrong?*, History News Network, May 2, 2005, <http://hnn.us/articles/11579.html> (refuting documents released in the 1990s that purported to establish Hiss's involvement in espionage), with G. Edward White, *The Reinstatement of Alger Hiss's Law License*, 8 Green Bag 2d 383, 390 (2005) (asserting that Hiss spied for the Soviets from the 1930s until 1946).

153. See Leonard Orland, *John Paul Stevens*, in *V The Justices of the United States Supreme Court 1690, 1691* (Leon Friedman & Fred L. Israel eds., 1997) (describing the circumstances that led President Gerald R. Ford to select Stevens). Douglas's chief rival in 1939 had been Rutledge. Roosevelt named Rutledge instead to the Court of Appeals, where he served until he joined the Supreme Court in 1943. See Ferren, *supra* note 91, at 151-221.

154. John Paul Stevens, *What I Did This Summer*, CBA Record, Oct. 2004, at 34; see The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks upon the United States (authorized ed. 2004).

155. Stevens, *supra* note 154, at 34-35; see Ron Chernow, *Alexander Hamilton* (2004); Ferren, *supra* note 91.

156. Stevens, *supra* note 154, at 35; see also Ferren, *supra* note 91, at 372-73, 412-13. On the circumstances of Rutledge's dissent described in this paragraph, see *supra* text accompanying notes 127-35.

157. *Rasul v. Bush*, 542 U.S. 466, 470-85 (2004) (Stevens, J., joined by O'Connor, Souter, Ginsburg, and Breyer, JJ.); see *supra* text accompanying notes 40-47.

158. See Stevens, *supra* note 154, at 35.

fundamental. As a law clerk, Stevens had advised Rutledge that the executive held the power to expel petitioners in *Ahrens* provided they first received due judicial scrutiny. For Rutledge the thwarting of that proviso was the heart of the matter. Although the case had been brought by German-born residents, Rutledge saw the issue as nothing less than “the personal security of every citizen” to be free from wrongful deprivation of liberty at the hands of “jailers” acting “in defiance of federal judicial power.”<sup>159</sup> Stevens’s own draft dissent embodied that sensibility; indeed, it gave examples of deprivations that might follow from the Court’s refusal to consider the petition.

One of those examples expressly cited the 1943 case in which Rutledge had gone along with the majority in endorsing executive orders to confine American citizens and residents of Japanese descent.<sup>160</sup> That the Justice incorporated into his dissent his clerk’s negative reference to *Hirabayashi* speaks volumes about how Rutledge’s views had shifted in five years. In that half decade the United States had succeeded in its campaign with Britain, France, and the Soviet Union against Axis aggression. It had launched reconstruction initiatives that ranged from establishing an international organization to regulate the waging of war, to international investment in war-torn economies, to international trials of deposed leaders on war crimes charges. And it had begun to examine its own responsibility for deprivations of the liberty and equality that its Constitution promised—an introspection fostered both by postwar revulsion at totalitarian excess and Cold War desire to give the lie to Communists’ anti-U.S. propaganda.<sup>161</sup> Rutledge long had advocated preservation of liberty against executive encroachments; as Terms passed he put the strength of his votes behind those words. Thus Rutledge’s dissent in *Ahrens*, with its warning that in limiting judges’ power to check executive action the United States invited abuses like those suffered by “less fortunate countries,”<sup>162</sup> flowed logically from his dissent two years earlier in *Yamashita*. At base of Rutledge’s opposition to the process by which the Japanese general had been sentenced to death lay a conviction that when the United States ventures abroad with its power—its “flag”—it remains obliged to treat

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159. *Ahrens v. Clark*, 335 U.S. 188, 194, 195 (1948) (Rutledge, J., dissenting). Stevens quoted these passages at length in a 1956 essay on his mentor. See Stevens, *supra* note 98, at 180.

160. *Ahrens*, 335 U.S. at 210 (Rutledge, J., dissenting) (citing *Hirabayashi v. United States*, 320 U.S. 81 (1943)); see also *supra* note 135 (showing that Rutledge adopted the citation from Stevens’s draft dissent).

161. See Dudziak, *Desegregation*, *supra* note 87, at 101-02 (writing of the distress expressed by a presidential committee on civil rights regarding the degree to which the U.S. civil rights record was a matter of international concern); Primus, *supra* note 87, at 456 (contending that “much of postwar constitutional thought could be described as a quest for a legal formula that would solve the totalitarian problem”).

162. *Ahrens*, 335 U.S. at 210 (Rutledge, J., dissenting); see also *supra* note 135 (indicating that the passage incorporated Stevens’s draft dissent).

foreigners as well as citizens in accordance with due process and its other “great constitutional traditions.”<sup>163</sup>

There can be little doubt that the dissent in *Yamashita* took courage, for Rutledge’s case file brims with letters berating him for supporting a “Jap.”<sup>164</sup> Nor is there doubt of the lasting impression made on one former Navy officer, the law student who became Rutledge’s clerk a year and a half after the dissent issued. Justice Stevens featured *Yamashita* in his 2004 recap of Ferren’s biography.<sup>165</sup> That same year he cited the case in *Rasul*—tellingly, he did so in a positive sense, to show that the United States once had allowed greater judicial review than the executive wished to afford in the case at bar.<sup>166</sup> A decade earlier, Stevens subtly linked the trial by the United States of *Yamashita* in the Philippines to the U.S. kidnapping of Alvarez-Machain in Mexico for trial in the United States. In warning that repression of an enemy invites oppression of oneself, Stevens repeated verbatim, though he did not so cite it, Rutledge’s quotation in *Yamashita* of Thomas Paine.<sup>167</sup> And as long ago as a 1956 essay, Stevens restated a passage in *Yamashita* consistent with the desire to do right on civil rights: Rutledge, Stevens reminded, had insisted that as the United States and its allies entered ““a new era of law in the world, it becomes more important than ever before . . . to observe their greatest traditions of administering justice.””<sup>168</sup>

Within those traditions is judicial review of incarceration after sentencing, by way of direct appeal or habeas or some other procedure. On this matter too Stevens’s mid-century experiences—before, during, and after his service as a law clerk—played a role in his decision making as a Justice.<sup>169</sup> Stevens knew of the impenetrable maze of Illinois post-

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163. See *In re Yamashita*, 327 U.S. 1, 41-42, 47 (1946) (Rutledge, J., dissenting), quoted *in supra* text accompanying note 107.

164. See generally Rutledge Papers, *supra* note 16, Box 137. Notably, a number of the letters in praise of the dissent came from correspondents who had served in uniform during World War II. *Id.*; see also Ferren, *supra* note 91, at 321-22 (writing of the public response to the dissent).

165. See Stevens, *supra* note 154, at 34-35.

166. *Rasul v. Bush*, 542 U.S. 466, 474-75 (2004); see *supra* text accompanying note 43. Cf. Dorsen, *supra* note 18, at xxvi-xxvii (outlining the relation between Rutledge’s dissents in *Yamashita* and *Ahrens* and Stevens’s own jurisprudence, and stating well before September 11 that Rutledge’s example had given Stevens “courage”).

167. Compare *United States v. Alvarez-Machain*, 504 U.S. 655, 688 (1992) (Stevens, J., dissenting) (reference to Paine quoted *supra* text accompanying note 39), with *Yamashita*, 327 U.S. at 81 (Rutledge, J., dissenting) (setting forth the same quotation of Paine, drawn from the same source). Preceding this passage is Stevens’s explicit quotation of Rutledge’s dissent in *United States v. United Mine Workers*, 330 U.S. 258, 342 (1947), quoted *in supra* text accompanying note 38; see also *supra* text accompanying note 50 (noting an analogous sentence in *Rumsfeld v. Padilla*, 542 U.S. 426, 465 (2004) (Stevens, J., dissenting)).

168. Stevens, *supra* note 98, at 189 (quoting *In re Yamashita*, 327 U.S. at 43 (Rutledge, J., dissenting)).

169. On the circumstances surrounding *Marino v. Ragen*, 332 U.S. 561, 563-70 (1947) (Rutledge, J., concurring), as well as Stevens’s related experiences discussed in this paragraph, see *supra* text accompanying notes 118-26, 144. See also Stevens, *supra* note 98, at 190-91 (discussing *Marino*).

conviction remedies from his service as a law review editor; in working as a law clerk on *Marino* he tried firsthand to negotiate that labyrinth. The emphatic Rutledge concurrence to which Stevens contributed proved a catalyst for change, but only after Stevens as a lawyer had helped petition the Court for relief in yet another Illinois matter. These cases marked the beginning of Stevens's lifelong professional effort to assure that the state wields its power to punish with the fundamental fairness that the Constitution demands.<sup>170</sup> As evidenced in capital punishment cases like *Thompson* and *Atkins*, Justice Stevens has labored to narrow the substantive and procedural grounds for death eligibility, an approach that Professors James S. Liebman and Lawrence C. Marshall have given the apt label "less is better."<sup>171</sup> He has questioned publicly the death penalty's morality and risk of error.<sup>172</sup> And he has been "'awfully careful before he let a capital case go'"—phrasing first used to describe Justice Rutledge.<sup>173</sup>

One can push these parallels too far. Rutledge reportedly did not convey his thoughts about the propriety of the death penalty and, even if he had, his clerk surely could have disagreed.<sup>174</sup> Stevens has traced his personal views

170. See John Paul Stevens, *How a Mundane Assignment Affected My Re-Examination of Miranda*, CBA Record, Oct. 2000, at 34, 35-37 (discussing the difficulties that remained even after post-conviction reforms, and relating his own pro bono representation in *People v. La Frana*, 122 N.E.2d 583 (Ill. 1954), of a defendant whom police had "strung up over the door and beaten" and "held incommunicado and subjected to continuous questioning for several days" in order to extract a confession to murder); *Convention Notebook*, S.F. Chron., Aug. 11, 1992, at A4 (reporting Stevens's comment to an American Bar Association meeting that his own pro bono practice "convinced him that defendants in state criminal cases ought to continue to be able to appeal to the federal courts"); see also Orland, *supra* note 153, at 1701-09 (summarizing "Stevens on criminal procedure"); William D. Popkin, *A Common Law Lawyer on the Supreme Court: The Opinions of Justice Stevens*, 1989 Duke L.J. 1087, 1123-25 (discussing Stevens's concept of liberty in criminal justice matters and his view of prisoners "as a classic case of a vulnerable, discrete, and insular minority").

171. Liebman & Marshall, *supra* note 21, at 1675; see *supra* text accompanying notes 20-27, 51-54 (discussing, for example, *Roper v. Simmons*, 543 U.S. 551, 587 (2005) (Stevens, J., concurring); *Atkins v. Virginia*, 536 U.S. 304, 306-21 (2002) (Stevens, J.); *Thompson v. Oklahoma*, 487 U.S. 815, 819-48 (1988) (plurality opinion) (Stevens, J.)).

172. See Stevens, *supra* note 115 (stating that, given evidence of errors in death sentencing, "there must be serious flaws in our administration of criminal justice," and discussing certain "features of death penalty litigation that create special risks of unfairness"); see also Abdon M. Pallasch, *High court justice: U.S. would be better off without death penalty*, Chi. Sun-Times, May 12, 2004, at 12 (reporting that, even though he "still thinks the death penalty is constitutional," Stevens told the Seventh Circuit Bar Association that "'it's a very unfortunate part of our judicial system and I would feel much, much better if more states would really consider whether they think the benefits outweigh the very serious potential for injustice'").

173. Ferren, *supra* note 91, at 351 (quoting another former Rutledge law clerk); *id.* at 350-52 (discussing Rutledge's treatment of selected capital cases). For accounts of the Rutledge-Stevens connection in other contexts, see, for example, Allison Marston Danner & Adam Marcus Samaha, *Judicial Oversight in Two Dimensions: Charting Area and Intensity in the Decisions of Justice Stevens*, 74 Fordham L. Rev. 2051 (2006); Robert A. Schapiro, *Justice Stevens's Theory of Interactive Federalism*, 74 Fordham L. Rev. 2133 (2006).

174. See Ferren, *supra* note 91, at 350-51 ("The Court in Rutledge's time never considered the constitutionality of capital punishment as such, and Rutledge himself is not known to have expressed an opinion on that."); cf. Tony Mauro, *High Court '89: Highlights and High Jinks*, Legal Times, Dec. 18, 1989, at 8 (reporting Stevens's statement that his

about capital punishment to his involvement as a Navy codebreaker in the downing of Admiral Yamamoto's plane during World War II.<sup>175</sup> But while military service is formative, it does not set everyone on the same path. Civil War duty led Justice Holmes to esteem conflict and abhor human rights.<sup>176</sup> More recently, Justices who had served in uniform divided on whether the Constitution forbids criminal punishment for burning the American flag.<sup>177</sup> That superior officers expressed no qualms in 1943 about targeting Yamamoto suggests earlier sources for Stevens's "humanitarian" unease. Rutledge's diligence in capital cases may have nurtured seeds of doubt already present in his clerk's mind.<sup>178</sup>

A similar dynamic may have been at play in the *Sipuel* litigation. The case reached the Court amid calls for enforcement of civil rights, fueled on one hand by outrage at lynchings and beatings of African-American veterans just returned from the war, and on the other hand by a desire to dispel criticism abroad of racism at home.<sup>179</sup> Stevens has recalled watching from the law clerks' "cane chairs on the South side of the courtroom" the January 1948 day that an advocate—the future Justice Thurgood Marshall, with whom Stevens would serve on the Court—argued for *Sipuel*'s admission to law school: "Thurgood was respectful, forceful and persuasive—so persuasive that on the following Monday—only four days

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opinion in *Texas v. Johnson*, 491 U.S. 397 (1989) (Stevens, J., dissenting), in which Stevens argued that the First Amendment permits punishment for flag burning, "caused some debate within his chambers" because "[a]ll three of my law clerks disagreed with me violently").

175. On the Yamamoto incident discussed in this paragraph, see *supra* text accompanying notes 68-78.

176. Professor Albert W. Alschuler convincingly has linked Holmes's time in combat with Holmes's statement in 1916 that he did not "respect the rights of man . . . except those things a given crowd will fight for," and in 1920, "I think that the sacredness of human life is a purely municipal ideal of no validity outside the jurisdiction. I believe that force, mitigated so far as may be by good manners, is the *ultima ratio*." Albert W. Alschuler, *Law Without Values: The Life, Work, and Legacy of Justice Holmes* 26, 24 (2000) (quoting two letters by Holmes); see *id.* at 17-27, 46-50, 137 (elaborating on war as source of Holmes's views).

177. William J. Brennan and Anthony M. Kennedy, who were in the Army and the California Army National Guard respectively, were among the five Justices who maintained in *Texas v. Johnson*, 491 U.S. 397 (1989), that the First Amendment precluded punishment. Dissenters included three World War II veterans: Chief Justice William H. Rehnquist, who served in the Army Air Corps, and Justices Stevens and Byron R. White, both of whom were in the Navy. See generally V, VI *The Justices of the United States Supreme Court*, *supra* note 153.

178. In a 1996 speech, Stevens said that when nominated to the Court he did not himself know how he would vote on capital punishment. John Paul Stevens, *Opening Assembly Address, American Bar Association Annual Meeting, Orlando, Florida, August 3, 1996*, 12 *St. John's J. Legal Comment* 21, 25, 31 (1996) (adding that "[o]ur friends in Western Europe are unwilling to assume the risk of injustice associated with the execution of an innocent defendant," and though "the question was not raised at my confirmation hearings, before and after those hearings I have pondered, but never been able to explain, why our country must assume that appalling risk").

179. See Dudziak, *Desegregation*, *supra* note 87, at 77-93 (describing race-related violence and U.S. officials' concerns about unfavorable international press coverage). On the circumstances surrounding the case of *Ada Sipuel Hurst*, discussed in this paragraph, see *supra* text accompanying notes 114-17.



after the argument—the Court unanimously ruled in Sipuel’s favor.”<sup>180</sup> Clerk Stevens no doubt was jolted to receive, just weeks later, a mandamus action reporting that Oklahoma continued to resist giving Sipuel a legal education. Rutledge may have been poised to act against segregated education,<sup>181</sup> and that may have influenced Stevens’s memorandum advising the Justice to rule segregation unconstitutional. But the fact that this solution proved too bold for Rutledge, coupled with the urgent tone of Stevens’s search for “any chance of granting any relief,” point to a deep personal belief in the duty of judges to ensure that all persons benefit from the guarantees contained in the Constitution.

### B. *Foreign Context, Respectfully Considered*

Among the framers of that Constitution was Alexander Hamilton, whose biography Stevens read in 2004. There is serendipity in that timing. The next year, Scalia branded the decision forbidding execution of children “a mockery . . . of Hamilton’s expectation” that the judiciary would be “bound down by strict rules and precedents,” and thus prompted Stevens to reply, “[T]hat our understanding of the Constitution does change from time to time has been settled since John Marshall breathed life into its text. If great lawyers of his day—Alexander Hamilton, for example—were sitting with us today, I would expect them to join” the principal opinion.<sup>182</sup> Stevens had pressed for a ban on the juvenile death penalty seventeen years earlier in *Thompson*.<sup>183</sup> But he had come up one vote short of a majority, and his plurality opinion touched off more than a decade of struggle over the scope of the state’s power to impose capital punishment. In laying claim in 2005 to the legacy of Federalist forebears, Stevens underscored that the Court had come around both to the result he had urged in *Thompson* and, importantly, to the reasoning by which he had reached that result.<sup>184</sup>

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180. Stevens, *supra* note 115; see also John Paul Stevens, *Judicial Activism: Ensuring the Powers and Freedoms Conceived by the Framers for Today’s World*, CBA Record, Oct. 2002, at 25, 26 (citing the *Sipuel* litigation as an example of “judicial activism” with which “I now agree”).

181. Ferren quoted Louis Pollak, who succeeded Stevens as a Rutledge law clerk and is now a federal judge, “that Rutledge ‘would have moved’ on outlawing racial discrimination in the schools ‘if he’d had the chance’”; however, Pollak’s supposition was based in part on the instant opinion dissenting from denial of mandamus. See Ferren, *supra* note 91, at 387.

182. *Roper v. Simmons*, 543 U.S. 551, 607-08 (2005) (Scalia, J., dissenting) (quoting *The Federalist* No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961)); *id.* at 587 (Stevens, J., concurring).

183. *Thompson v. Oklahoma*, 487 U.S. 815, 818-48 (1988) (plurality opinion) (Stevens, J.); see *supra* text accompanying notes 20-29 (discussing *Thompson* and the consequent dispute over the use of external norms to determine whether the Constitution permits capital punishment in certain circumstances).

184. *Accord Simmons*, 543 U.S. at 587 (Stevens, J., concurring) (calling the Court’s “reaffirmation” of the evolving standards principle “[p]erhaps even more important than our specific holding”); Diane Marie Amann, “*Raise the Flag and Let it Talk*”: *On the Use of External Norms in Constitutional Decision Making*, 2 *J. Int’l Const. L.* 597, 598-605 (2004) (describing the progression of the Justices’ positions on consultation of foreign norms in the context of evolving standards and similar doctrines).

Stevens's opinions in *Thompson*, *Atkins*, and related cases stand as examples of the Justice's abiding conviction that constitutional protection cannot be confined by centuries-old practices that have no current resonance. Rather, the Constitution is to be enforced according to contemporary American values. To determine those values, moreover, it is entirely appropriate to take into account international norms embodied in treaty or custom, as well as foreign laws and practices, that shed light on the meaning of open-ended constitutional terms like "due process" or "cruel and unusual punishments." Stevens's views are by no means novel. In the 1930s, scholars debated the degree to which constitutional meaning adapts to what then-Dean Rutledge called "'modern needs'"; indeed, as Stevens observed, the concept of a living Constitution owes much to the lifework of Chief Justice Marshall.<sup>185</sup> Consultation of external norms likewise may be traced along a path that runs from Marshall and authors of *The Federalist* to Justices who now hold an evident interest in transnational aspects of domestic cases.<sup>186</sup>

On that path lies the mid-twentieth century, a period of great global change. Desire to deter catastrophic conflict and to avoid the abuses of force that had characterized just-vanquished regimes spurred adoption of new frameworks for collective security and international cooperation. The Charter of the United Nations followed fast upon the end of war in Europe in 1945, and was joined within years by a similar charter for the Americas,<sup>187</sup> by multilateral codifications of human rights,<sup>188</sup> and by one treaty against genocide and four designed to regulate the conduct of armed conflict.<sup>189</sup> Influential in the drafting of these instruments were Americans

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185. See *Simmons*, 543 U.S. at 587 (Stevens, J., concurring), quoted in *supra* text accompanying note 182; Ferren, *supra* note 91, at 125 (quoting a 1936 draft document, attributed to Rutledge, that supported Roosevelt's Court-packing plan as a means to dilute the power of anti-New Deal Justices).

186. See Amann, *supra* note 29 (marking this tradition). Stevens has dated the evolving standards approach to Eighth Amendment interpretation not simply to Chief Justice Earl Warren's statement in *Trop v. Dulles*, 356 U.S. 86, 101 (1958), but rather to a turn-of-the-century opinion in which the Court held that the term "'cruel and unusual punishments'" operated to invalidate a sentence, derived from Spanish law and imposed in the U.S.-held Philippines, to fifteen years of "hard, enchained labor" and the denial of certain civil rights. *Thompson*, 487 U.S. at 821 n.4 (plurality opinion) (Stevens, J.) (discussing *Weems v. United States*, 217 U.S. 349 (1910)).

187. U.N. Charter; OAS Charter, *supra* note 36; see also *supra* text accompanying notes 81-87 (discussing postwar legal developments).

188. American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, Ninth Int'l Conf. of Am. States, OEA/Ser. L./V/I.4, rev. (1965) (adopted Mar. 30-May 2, 1948); Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 102 Stat. 3045, 213 U.N.T.S. 221; Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg. U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR].

189. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Fourth

—Democrats like Adlai Stevenson and Eleanor Roosevelt and Republicans like Senator Arthur Vandenberg<sup>190</sup>—who understood that the United States had emerged from World War II with new global responsibilities. Cold War competition, moreover, reinforced a felt need for enforcement of constitutional rights, so that the United States truly might lead by example. Justice Rutledge, an internationalist whose jurisprudence would earn him description as a “champion of human rights,” vocally supported initiatives to extend worldwide the U.S. Constitution’s promises of justice, peace, and lasting liberty.<sup>191</sup> But like some of his brethren, Rutledge drew the line at Nuremberg: From their perspective, the trials before international military tribunals and special U.S. military commissions constituted unwelcome distortions of the American legal tradition.<sup>192</sup>

Aspects of Rutledge’s approach may be found in the jurisprudence of his former law clerk. Justice Stevens is aware of foreign context, as was Rutledge; furthermore, both have analyzed external norms, practice, and effects through the lens of American tradition. Stevens has resisted wholesale globalization of the U.S. Constitution. In *Verdugo-Urquidez*, he deemed U.S. judges powerless under the Fourth Amendment to regulate searches that U.S. agents conducted abroad, and in *Balsys* he contended that the Fifth Amendment interposes no obstacle to overseas use of testimony compelled in the United States for the reason that such use would not render unfair any American criminal prosecution.<sup>193</sup> Stevens’s decisions in the 2004 detention trilogy left unstated his position on the extent to which the Constitution shields certain persons detained in the U.S. campaign against terrorism. In *Hamdi*, Stevens joined Scalia to advocate considerable protection for one post-September 11 detainee; the opinion emphasized that the detainee was an American citizen.<sup>194</sup> International human rights law inclines toward full protection of all persons regardless of nationality.<sup>195</sup>

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Geneva Convention, *supra* note 24; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

190. See Glendon, *supra* note 82, at 5 (describing, in a book that details Eleanor Roosevelt’s role in drafting the UDHR, *supra* note 188, how President Roosevelt “courted” Arthur Vandenberg and other Republicans by naming them to represent the United States at the San Francisco Conference); *supra* text accompanying note 89 (discussing Stevenson’s role).

191. Ferren, *supra* note 91, at 421 (reprinting a 1949 editorial cartoon so describing Rutledge); see Rutledge, *supra* note 100, at 1-2 (espousing for the United Nations the goals contained in U.S. Const. pmbl.), *quoted in supra* text accompanying note 100.

192. See *supra* text accompanying notes 108-12 (setting out opposition by Rutledge and several others on the Court).

193. *United States v. Balsys*, 524 U.S. 666, 700 (1998) (Stevens, J., concurring); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 279 (1996) (Stevens, J., concurring in the judgment); see *supra* text accompanying notes 30, 32-35 (discussing these cases).

194. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 554-79 (2004) (Scalia, J., joined by Stevens, J., dissenting); see also Amann, *supra* note 41, at 2099 (discussing Hamdi’s subsequent release after he gave up U.S. citizenship).

195. See Amann, *supra* note 34, at 310 (setting forth international and national articulations of a “keystone of the fundamental rights tradition,” that “[n]o boundary” confines certain human rights); see also *id.* at 309-45 (analyzing post-September 11 detention policy and practice against the backdrop of human rights and humanitarian law).

But Stevens's majority opinion in *Rasul* made no clear pronouncement on the substantive rights to be accorded the non-American detainees to whom the Court extended "the privilege of litigation";<sup>196</sup> the Court will revisit that question in its 2005 Term.<sup>197</sup>

Justice Stevens has displayed not only an awareness of foreign context, but also a willingness to examine foreign judgments that partake of U.S. tradition and experience. Shared values may be found, of course, in any number of common law countries. Americans helped to draft Germany's Basic Law and, more recently, the constitutions of Eastern European states that gained independence with the breakup of the Soviet bloc.<sup>198</sup> Judgments of interest in these and other countries not infrequently are influenced by international human rights or humanitarian norms—norms contained in treaties that the United States helped negotiate. Law that may be called "foreign" or "external" often resonates with the juridical history and constitutive values of the United States, and is therefore alien neither to America's legal tradition nor to America's contemporary experience.<sup>199</sup>

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196. *Rasul v. Bush*, 542 U.S. 466, 484 (2004) (internal quotations omitted); see also *id.* at 483 n.15 (2004) (Stevens, J.) (quoting the statutory standard for issuance of a habeas writ and writing that if true, allegations that petitioners who "have engaged neither in combat nor in acts of terrorism against the United States" suffered protracted detention without charge "unquestionably describe 'custody in violation of the Constitution or laws or treaties of the United States.'"). What rights overseas detainees may enjoy remains the subject of litigation. See *El-Banna v. Bush*, 394 F. Supp. 2d 76 (D.D.C. 2005) (denying without prejudice a motion for preliminary injunction on the ground that Guantánamo detainees had shown no imminent threat to their health); *O.K. v. Bush*, 377 F. Supp. 2d 102 (D.D.C. 2005) (refusing to issue a preliminary injunction against inhumane treatment and transfer without notice); *In re Guantánamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005) (ruling that Fifth Amendment due process forbids arbitrary deprivation of detainees' liberty); *Khalid v. Bush*, 355 F. Supp. 2d 311 (D.D.C. 2005) (dismissing detainees' petitions in part on ground that nonresident aliens seized and held abroad had no rights cognizable in U.S. courts); see also *infra* note 197 and accompanying text.

197. See *Hamdan v. Rumsfeld*, 126 S. Ct. 622 (2005), *granting cert. to review* 415 F.3d 33 (D.C. Cir.) (rejecting a challenge to the validity of special military commissions established for the trial of a petitioner alleged to have been Osama bin Laden's personal driver, and other designated Guantánamo detainees). Also pending before the Court at this writing is a request to review recent rulings in the *Padilla* litigation. See *Padilla v. Hanft*, 423 F.3d 386, 397 (4th Cir. 2005), *rev'g* 389 F. Supp. 2d 678 (D.S.C.) (ruling in favor of a habeas petitioner on grounds similar to those advanced in the Scalia-Stevens dissent in *Hamdi*), *petition for cert. filed*, 74 U.S.L.W. 3275 (Oct. 25, 2005) (No. 05-533).

198. See, e.g., Vicki Jackson, *The Early Hours of the Post-World War II Model of Constitutional Federalism: The Warren Court and the World*, in Earl Warren and the Warren Court: Their Legacy in American and Foreign Law (Harry Scheiber ed., forthcoming 2006) (describing the drafting of Germany's charter as representative of a new, "global constitutionalism"); Wojciech Sadurski, *Postcommunist Charters of Rights in Europe and the U.S. Bill of Rights*, L. & Contemp. Probs., Spring 2002, at 223, 223-27 (explaining how the U.S. Bill of Rights "served as both a model and anti-model for the constitutionalization of citizens' rights in the new democracies emerging after the fall of communism").

199. See Amann, *supra* note 41, at 2134 n.179 (observing that modern international humanitarian law derives from codification of laws of war commissioned by President Abraham Lincoln and drafted by Francis Lieber); Amann, *supra* note 109, at 823-35 (demonstrating similarities between U.S. norms of constitutional criminal procedure and foreign and international counterparts); Amann, *supra* note 184, at 606 (explaining that

Such law provides evidence of how a civilized nation-state ought to behave<sup>200</sup>—to quote Stevens’s opinion in *Thompson*, of “civilized standards” to which a country that would present itself as global exemplar ought to be held accountable.<sup>201</sup> “Civilization,” though a bedrock term of the law of nations, now tends to be used advisedly in order to avoid any implied embrace of colonialist adventurism. But Stevens—the product of a university then steeped in the Adler-Hutchins project of immersing students in the Great Books of a Western world that stretched from Alexandria to Aspen<sup>202</sup>—has applied the term in an older and more positive sense. As Stevens wrote of it in *Alvarez-Machain*, “the civilized world” denotes an interdependent, transnational polity bounded by a “Rule of Law” that demands scrutiny of governmental incursions against individual dignity.<sup>203</sup> The dignitary interests at the core of Stevens’s view of the Bill of Rights are manifest as well in what are called international human rights.<sup>204</sup> Evidence of such commonality enhances Stevens’s attention to a foreign source, just as evidence of an absence of shared values will lead him to disregard it.

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“calling a cited norm ‘external,’ though a convenient rhetorical feint, is a misnomer”); cf. Ferren, *supra* note 91, at 56 (finding in “renowned Columbia University professor” Lieber, “a Prussian-born scholar who had become the nation’s first full-time law professor,” “some roots of the eventual judicial philosophy of Wiley Rutledge”).

200. Cf. Jackson, *supra* note 198 (attributing the Court’s postwar jurisprudence not only to a Cold War dynamic, but also to an acknowledgment of “a broader world of ‘civilized’ behavior, some of whose protections for criminal defendants apparently exceeded our own”).

201. *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988) (plurality opinion) (Stevens, J.); accord *Atkins v. Virginia*, 536 U.S. 304, 310 (2002) (opinion for the Court) (Stevens, J.) (reciting statements of dissenters below that in refusing to consider the effects of mental retardation on culpability, “[a] moral and civilized society diminishes itself”) (quoting *Atkins v. Commonwealth*, 534 S.E.2d 312, 325 (Va. 2000) (Koontz, J., dissenting)).

202. See Stevens, *supra* note 62, at 1561 (recalling the dispute between the famed University of Chicago professors “who taught the Great Books class”); John Paul Stevens, *The Third Branch of Liberty*, 41 U. Miami L. Rev. 277, 278-81 (1986) [hereinafter Stevens, *Liberty*] (setting out Adler’s taxonomy of liberty). See generally *Great Books of the Western World* (Robert M. Hutchins et al. eds., 1952) (fifty-four volume anthology of works by authors ranging from Aeschylus to Virginia Woolf).

203. “I suspect most courts throughout the civilized world,” Stevens wrote, “will be deeply disturbed by the ‘monstrous’ decision the Court announces today. For every nation that has an interest in preserving the Rule of Law is affected, directly, or indirectly, by a decision of this character.” *United States v. Alvarez-Machain*, 504 U.S. 655, 687-88 (1992) (Stevens, J., dissenting) (citing *The Apollon*, 22 U.S. (9 Wheat.) 362, 371 (1824) (Story, J.)); see *supra* text accompanying notes 31, 36-39 (discussing *Alvarez-Machain*).

204. Stevens, *Liberty*, *supra* note 202, at 284 (approving of the “simple proposition” that “a burden on the individual interest in equal respect and equal treatment may constitute an arbitrary deprivation of liberty without any inquiry into the procedures that accompanied the deprivation,” and adding that “[o]ne of the elements of liberty is the right to be respected as a human being”); see John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. Chi. L. Rev. 13, 37 (1992) (embracing the statement that “[t]hose who won our independence believed that the final end of the State was to make men free to develop their faculties”) (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)); see also Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 Stan. L. Rev. 1921, 1931-41 (2003) (analyzing the emergence of dignity as a legal concept in the last half of the twentieth century).

Examination of Stevensean jurisprudence, in short, exposes no automatic acceptance of foreign practice. It reveals instead a Justice constrained by his understanding of American constitutional values, yet receptive to judgments by colleagues whose thoughtfulness and commitment to fundamental rights merit his respectful consideration.

#### CONCLUSION

John Paul Stevens came of age in the middle of the twentieth century, at a time when the United States emerged as a world leader. As a Navy officer in World War II, Stevens learned firsthand some of the responsibility that came with that global status. His awareness of the role of the United States in the world was sustained throughout his law studies, his clerkship for Justice Wiley B. Rutledge, his years in the practice, and his service as an Article III judge. It is little surprise that Justice Stevens has extended some constitutional protections beyond U.S. borders, or that he has explained his willingness to consult the work of foreign jurists in these terms of mutual respect: “[I]f we expect them to listen to us, we should at least be willing to listen to what they have to say.”<sup>205</sup> Stevens’s mid-century experiences reinforced that much of what “they” have to say is not truly foreign, because the postwar human rights treaties or constitutions they interpret are progeny of America’s fundamental rights tradition. It is to the extent that foreign sources confirm American values of liberty and equality that the Justice has looked to such sources. And it is because human rights embrace those values that Stevens is, indeed, a human rights judge.

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205. Stevens, *supra* note 58, at 9.

*Notes & Observations*