

The Wednesday luncheon session of The American Law Institute convened in the State Room of The Mayflower, Washington, D.C., and was called to order at 1:10 p.m. by President Michael Traynor.

**President Traynor:** We are going to begin a little early because our speaker has very kindly offered to answer questions at the end, so we want to allow a little time for that.

Harold Hongju Koh, Dean of the Yale Law School and a member of the Institute, is an internationally acclaimed scholar, teacher, lawyer, and writer.

Upon becoming dean, his title almost immediately gave rise to two public statements, which I will leave you to place on a spectrum of human errors that make life so wonderfully imperfect: First, National Public Radio introduced him on a program as the “incoming Dean of Harvard Law School,” (*laughter*) and then one commentator about that said, “No doubt, this produced much consternation in New Haven and Cambridge, Mass. But as far as the real world is concerned, it appears it’s half-a-dozen of one, six of the other.” (*Laughter*)

After graduating from Harvard *summa cum laude*; from Magdalen College, Oxford, as a Marshall Scholar, in Philosophy, Politics, and Economics, with First-Class Honours; and from Harvard Law School, where he was the Developments Editor of the *Harvard Law Review*, he served as a law clerk to Judge Wilkey on the D.C. Circuit Court of Appeals and then to Justice Blackmun of the Supreme Court. Before coming to Yale, he practiced with Covington & Burling in Washington, D.C.; at the Office of Legal Counsel at the U.S. Department of Justice from 1983 to 1985; and as an Assistant Secretary of State for Democracy, Human Rights and Labor from 1998 to 2001.

In a recent radio interview, Dean Koh referred to his parents, born in South Korea, who came to this country more than 50 years ago for the education and the freedom. He also said that “Once an Asian dictator told us to stop imposing our Western values on his people,” claiming, “‘We Asians don’t feel the same way as Americans do about human rights.’ I pointed to my own face and told him he was wrong.”

With his deep understanding of international law, human rights, and constitutional law, as well as his first-hand experience in the Office of Legal Counsel, he was well-positioned to evaluate the now-repudiated torture opinion from that office. Mincing no words, he said it was “perhaps the

most clearly erroneous legal opinion I have ever read.” (*Applause*) He said it was undermining “the very underpinnings of individual criminal responsibility” that “were set forth in the landmark judgments at Nuremberg,” was “a stain upon our law and our national reputation,” and offered “a definition of torture so narrow that it would have exculpated Saddam Hussein” and was a “stunning failure of lawyerly craft.”

We are fortunate in this country to have such a forthright, courageous, and informed citizen, educator, lawyer, and writer. Author of many books and articles, Dean Koh has also testified in Congress; served as counsel or amicus curiae in many human-rights cases; given numerous named lectures and commencement addresses; and received many honors, awards, and honorary doctorates.

In a recent article entitled, “The Globalization of Freedom,” he said, quote: “[T]he most striking change in the law since I graduated from law school more than two decades ago is the rise of a body of law that is genuinely transnational—neither fish nor fowl, in the sense that it is neither traditionally domestic nor traditionally international.” As a salient example, he mentioned the ALI/ UNIDROIT Principles of Transnational Civil Procedure.

In a recent welcoming speech to new Yale law students, Dean Koh mentioned that “When you come to my office, as I hope all of you do, you will see in Chinese characters on my wall,” this phrase: “Theory without practice is as lifeless as practice without theory is thoughtless.”

Dean Koh, in The American Law Institute, which happily combines both, we are delighted to welcome you here today. (*Applause*)

**Dean Harold Hongju Koh:** Thank you very much. It is great to be here at the ALI, and a special honor to follow Justice O’Connor to the podium.

I should say that some of my most formative experiences as a lawyer happened at the ALI. When I first came to Washington, it was during the 1980s, the time of the drafting of the Restatement Third of the Foreign Relations Law of the United States. To this audience, let me say that that Restatement, which I have studied very closely over the years, nearly broke up my engagement, before I married my wife now of 22 years.

What happened was that there was an afternoon session to discuss part of the Restatement, and I decided to ask my then-fiancée, who is a lawyer, to go there on a date. (*Laughter*) That tells you what a fun guy I am. (*Laughter*) My future wife said to me, “Do you think that I will understand what’s going on in this discussion of the Restatement?” And I said, “Well, you’re a

lawyer, I'm a lawyer; of course you will." We arrived in the middle of a discussion about § 712 of the Restatement, which is about the standard of compensation for the taking of property. Andy Lowenfeld, the Associate Reporter, began his expansive remarks by saying, "Many of you have questioned the use of the word 'ordinarily' in § 712; some have proposed that instead we use the words 'absent extraordinary circumstances.' It is upon this issue that I would like to devote the balance of the afternoon's remarks." (*Laughter*) I sat captivated by the discussion, but at the close, when I turned to my wife, she said, "Either the engagement is over or I will no longer attend any more ALI functions with you." (*Laughter*) Although of course, today, she sends her very best regards. (*Laughter*)

The Annual Meeting of The American Law Institute is always an occasion for evaluating the state of the law and human rights in our country and to take stock of where we are. What I would like to suggest in these remarks, which are entitled, "On Law and Globalization," is that, in the last five years, the world of law has almost literally turned upside down. What has turned it upside down? The global war on terror.

If the age of globalization began in November 1989, with the collapse of one structure, the Berlin Wall, the nature of the age of globalization profoundly changed with the collapse of a second structure, the Twin Towers, on September 11, 2001. Between those two years we moved literally out of the light and into the shadows of the age of globalization.

During the first phase, from 1989 to 2001, everyone marveled at the possibilities of globalization—global communications, global markets, the ability to send e-mail anywhere in the world, to travel anywhere on a moment's notice. Then suddenly, on September 11th, we realized with horror that all these tools of globalization could be turned against us, that e-mail could be used for sending viruses, the very planes that could fly us around the world could be used to crash into our most precious buildings, that global commercial transactions could be used to finance terrorist operations. All of a sudden, many people starting asking what I like to call "the Tina Turner question": "What's law got to do with it? What's law but a sweet old-fashioned notion? We're at war!" is what they said.

In the next five years, I would suggest, the U.S. vision of international and domestic law was effectively turned upside down. This raises two questions, which I hope will form the thrust of my discussion today. First, how did the world of law, international and domestic, turn upside

down? Second, what can and should we as lawyers, judges, law professors, and law schools do to turn it right side up again?

Let me suggest that, in May 2001, five years ago, there was an international vision that guided our foreign policy which could be simplified into four elements. First, that we conduct a foreign policy based on diplomacy backed by force, but only as a last resort. Second, that our human-rights policy was based on universalism and the tenets of Franklin Delano Roosevelt's famous 1941 "Four Freedoms" speech, where he spoke of securing a world marked by freedom of speech, freedom of religion, freedom from want, and freedom from fear. Third, that we believed in promoting democracy worldwide through a Kantian vision of democracies cooperating with one another by building democracy from the bottom up, supporting the legitimate aspirations of peoples everywhere. And fourth and finally, that our diplomatic approach would be based on what could be called "strategic multilateralism and tactical unilateralism."

When I was asked, at the end of 2000, to brief the new Secretary of State, Colin Powell, on the core of our democracy policy, I told him it was a policy of using global cooperation among global democracies to solve global problems. There are simply too many problems that extend beyond our borders, that cannot be solved by one country acting alone, be it AIDS, SARS, avian flu, environmental degradation, the greenhouse effect, transnational crime, trafficking, or, I told him, terrorism. For each kind of threat, the solution must be to use cooperation among global democracies to solve global problems.

Where are we five years later? This vision has been turned upside down. We see a policy of using force first, accepting the notion that preemptive strikes and wars of choice are permissible as a matter of international law. Second, we have increasingly adopted a human-rights policy that rejects universalism and treats one freedom—freedom from fear—as superior to all the others. One former member of the current Administration told me during a debate: "We think there's only one freedom that now counts: Freedom from fear." Third, we have come to accept that democracy can be promoted from the top down, through occupations, if necessary, of countries such as Afghanistan or Iraq, and fourth, we have shifted to a diplomatic approach based on strategic unilateralism, with multilateralism used only as a tactical method, expressing antipathy to international law and indifference to the policy of solving global problems through global cooperation among global democracies.

Significantly, this inversion of our vision of international affairs has been accompanied by a turning upside down of our constitutional vision. It is important to acknowledge this: our constitutional vision facilitates our foreign-policy vision. As a matter of constitutional law, in May 2001, again there were basically four premises that were widely accepted: First, that executive power operates within a framework of checks and balances, resting on a vision from the *Steel Seizure* case [Youngstown Co. v. Sawyer, 343 U.S. 579 (1952)] of shared power, a simple notion that checks and balances don't stop at the water's edge. To thrive in a global world, we must have an energetic executive checked by an energetic Congress and overseen by a searching judicial branch. A second premise was that there are no law-free zones, practices, courts, or persons. Third, we accept no infringement on our civil liberties without a clear statement by our elected representatives. Fourth and finally, that—except for a few political rights, such as the right to vote or serve on a jury—aliens are treated largely the same with respect to economic and social matters. And so my parents, who were permanent-resident aliens, were treated virtually the same as citizens with respect to most social and economic rights.

Five years later, again, this vision has turned upside down. Now the Administration asserts a constitutional theory of unfettered executive power, based on extraordinarily broad interpretation of Article II of the Commander-in-Chief power and a case called *United States v. Curtiss-Wright* [299 U.S. 304 (1936)]. When I was in the Justice Department we called this “the Curtiss-Wright so I'm right cite.” (*Laughter*) If the President is the sole organ of our nation in foreign affairs, he can do anything under his constitutional authority.

What does this mean, in real terms? We now have law-free zones, let's call them Guantánamo or Diego Garcia. We have law-free practices, let's call one of them “extraordinary rendition.” We have law-free courts, let's call them “military commissions.” And we have law-free persons, let's call them “enemy combatants,” who can be detained indefinitely on executive say-so, largely free from judicial oversight.

Third, we increasingly hear the claim that the executive can infringe on civil liberties without clear legislative statements, relying on things like the Authorization for the Use of Military Force resolution of September 2001, which did not, in my view, authorize anything close to the acts—secret NSA surveillance, indefinite detentions, torture—for which it is being invoked now. And a fourth consequence, sharp and growing distinctions between citizens and aliens with respect

to political, civil, social, and economic rights, distinctions that are so strong and frightening that people are taking to the streets in the thousands to march in protest.

The latest twist, in the last six months, is the notion that executive action creates its own legality, that somehow, executive action constitutes a law unto itself. Mike Traynor suggested this with regard to the torture debate, where the notion was, if the President orders it, it must be legal. Or, as we now see with regard to NSA [National Security Agency] spying and data mining, what the Attorney General first said when asked by Senator Feingold, “Could the President violate the law?” He responded, “It is not our policy to violate the law.” But when asked, “Well, did you violate the law?” he said, “If the President ordered it, it is lawful.”

The latest variation, reflected in recent stories in *The Boston Globe* and *The Washington Post*, is the extensive use of presidential signing statements to suggest that laws like the McCain amendment, which restricts the use of torture and cruel, inhuman, and degrading treatment by any U.S. official anywhere, should be construed consistent with the President’s theory of constitutional power.

It does not take long before we are reminded of Richard Nixon’s famous quote, “when the president does it that means that it is not illegal.” [Interview with David Frost, May 19, 1977] But perhaps the more accurate quote is by Henry Kissinger, who said, “The illegal we do immediately. The unconstitutional takes a little longer.” [*The New York Times*, October 28, 1973] (*Laughter*)

On reflection, there is more truth to Secretary Kissinger’s remark than you might think. Why does the unconstitutional take a little longer? Because even the most expansive theory of presidential power should not carry the day unless the checks and balances against such overreaching prove ineffective. So where are the checks and balances? Congress could be a check and balance, but its recent fecklessness has been obvious and painful. Under the executive theory of presidential signing statements, even that Congressional limitation of executive action that does occur can be turned into a form of authorization through presidential interpretation.

There have also been important checks *within* the executive branch, striking responses by career Justice Department officials resisting what they believed to be departures from longstanding legal practice, by Judge Advocate General’s officers and retired generals, an extraordinarily loyal and patriotic group now speaking up to protest the undermining of the Geneva Conventions. But even so, recently when the Office of Professional Responsibility of the Justice Department began to look into the NSA matter, the NSA blocked that investigation on the grounds that clearance would

not be given by one branch of the executive branch to another, an unprecedented event. The former head of that office, Mike Shaheen, commented in the press that it was one of the most shocking things he had seen in his 13 years of working on these issues.

State and local governments could be a check, but those of you familiar with the *Crosby* case [*Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000)], involving federal preemption of Massachusetts legislation regulating purchasing from Burma, know that if state legislatures act in this area, their views can be considered to be preempted by the acts of the federal government.

The media has been a tremendous check on executive overreaching. The Abu Ghraib story, for example, kept the torture issue alive simply because the press refused to let it go. And concerned citizens have stood up for their own rights. For example, the librarians of America publicized and forced changes in particular provisions of the Patriot Act that would have allowed the Government to search library records. My point: there have been checks on executive overreaching, but unfortunately, not powerful or effective ones.

This raises the question to which I want to devote the balance of my time. What about the courts? What about lawyers? What about law schools? And, I ask, what about our most distinguished group of lawyers and jurists, this gathering, The American Law Institute?

Let me offer one measure of the changes that have occurred since I was a young lawyer in Washington interested in the draft Restatement Third of Foreign Relations Law. When two of my colleagues who are here today—David Levi, now a distinguished California federal judge and Frank Holleman, now a distinguished South Carolina practitioner—and I were clerking at the Supreme Court, we had maybe one or two cases that raised international issues. But today, nearly a quarter of the docket could be viewed as having an important transnational dimension. In just the last three terms, there have been 22 Supreme Court cases raising transnational issues: four involving issues arising out of 9/11, an Alien Tort Claims Act case, cases under the Foreign Sovereign Immunities Act, extraterritoriality cases, immigration cases, the North American Free Trade Agreement, cases involving statutory interpretation of federal criminal statutes, two well-publicized cases about the death penalty [*Roper v. Simmons*, 543 U.S. 551 (2005) and *Torres v. Mullin*, 540 U.S. 1035 (2003)] and three cases about the Vienna Convention on Consular Relations—*Medellin v. Dretke*, 544 U.S. 660 (2005), *Bustillo v. Johnson*, 126 S. Ct. 621 (2005) (granting cert.), and *Sanchez-Llamas v. Oregon*, 126 S. Ct. 621 (2005) (granting cert.)—as well as

other cases involving treaty interpretation, the Warsaw Convention, a recent decision reviewing the Tenth Circuit's ruling on the UN Convention on Psychotropic Substances, the first opinion written by the new Chief Justice [*Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 126 S. Ct. 1211 (2006)], and transnational discovery—*Intel Corp. v. Advanced Micro Devices, Inc.* [542 U.S. 241 (2004)].

Why is this significant? Because the United States has always operated within the realm of transnational law since its inception. The Declaration of Independence recognized that, in an interdependent world, we must pay “decent respect to the opinions of mankind,” simply because we were a small country trying to gain credibility with the rest of the world.

If you look at the constitution of Timor-Leste, East Timor, the newest country in the world, it reads like the young America, speaking about the desire of the Timorese to comply with international law as a way of gaining international standing. Most of our common law came from a foreign country, England.

Chief Justice John Marshall was one of the early pioneers of transnationalism. He said that courts must ascertain and declare what the law is, not just in *Marbury* [v. Madison, 5 U.S. (1 Cranch) 137 (1803)] but in a number of international cases. By 1900, the Supreme Court could hold unanimously in *The Paquete Habana* case [175 U.S. 677 (1900)] that international law is part of our law. This transnationalist tradition, I believe, continues as a core judicial tradition of our country. Chief Justice Marshall was Secretary of State before he was Chief Justice. John Jay was the first Secretary of Foreign Affairs and Washington's special envoy to England, where he negotiated the Jay Treaty. Justice Horace Gray wrote *The Paquete Habana* case and Melville Fuller and Chief Justice (and former President) William Howard Taft were founders of the American Society of International Law. During the Warren Court, the leading transnationalists were Justice Brennan, who wrote, among other opinions, *Trop v. Dulles* [356 U.S. 86 (1958)], Justice Douglas, who traveled to more countries in the world than perhaps any other member of the Court, and Justice Byron White, who wrote the famous dissent in *Sabbatino* [*Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964)], urging national courts to apply rules of international law. In the Burger Court, my late boss, Justice Blackmun, stated what I believe to be a transnationalist credo: that U.S. courts must look beyond national interests to “mutual interests of all nations in a smoothly functioning international legal regime” to “consider if there is a course that furthers, rather than impedes, the development of an ordered international system.” [*Société Nationale Industrielle*

*Aérospatiale v. U.S. Dist. Court for Southern Dist. of Iowa*, 482 U.S. 522, 555, 566 (1987)  
(Blackmun, J., concurring)]

Now think about this. In the 1950s, if state courts were directed to consider what was good for a good national system, you would talk about the federal courts and the federal system, and that's what Professors Hart and Wechsler did. In this day and age, I would argue, the parallel question is whether U.S. courts should consider what is good for an international system. Compare § 403 of the Restatement [Restatement Third, The Foreign Relations Law of the United States], which talks about the extraterritorial extension of national jurisdiction. In determining whether the assertion of extraterritorial jurisdiction is reasonable, one of the factors mentioned is "the importance of the regulation to the international, political, legal, or economic system," and another is "the extent to which the regulation is consistent with the traditions of the international system." This provision, originally drafted by Andy Lowenfeld based on his pathbreaking Hague lectures, again suggests that courts applying the foreign relations law of the United States ought to take the needs of the international system into account.

Why do I mention this? Because as time has gone on, the courts that we have and the judges on them have started to fall into two identifiable camps: which I call "transnationalists" and "nationalists." The transnationalists tend to see the U.S. as interdependent with other countries; the nationalists focus instead on our autonomy. The transnationalists see international and national law as intermeshed; nationalists see a strict divide between domestic and foreign law. Transnationalists believe that courts have an important role to play, by applying rules such as those in the Restatement of Foreign Relations Law to particular cases, in bringing transnational law home; while nationalists believe that "internationalization" of foreign and international law into U.S. law can be done only by the political branches. Transnationalists tend to believe, like Justice Blackmun, that we should develop a global legal system; nationalists are focused on the development of the national legal system. And transnationalists tend to see comity and the courts as significant constraints on executive power, while nationalists tend to press for strong deference to executive power.

Significantly, the Rehnquist Court whose era just ended was a court that was divided between transnationalists and nationalists. Clearly in the nationalist camp were: Chief Justice Rehnquist, Justice Thomas, and Justice Scalia; on the transnationalist side, the group included: Justices Breyer, Souter, Stevens, and Ginsburg; in the middle: Justices Kennedy and O'Connor,

who over time came to lean toward transnationalism, as you heard again in the remarks of Justice O'Connor earlier today.

Since 1995, Justice O'Connor cast decisive votes in 148 of 193 of the five-four decisions of the Rehnquist Court. She authored key opinions in numerous international cases. Take, for example, her separate opinion in *Roper v. Simmons* [543 U.S. 551 (2005)] about the execution of juveniles. She became increasingly vocal in support of transnationalism through her work for the American Society of International Law and the ABA CEELI [Central European and Eurasian Law Initiative], and she cast key votes in *Lawrence v. Texas* [539 U.S. 558 (2003)] about decriminalization of same-sex sodomy, the *Hamdi* case [*Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)] about due-process rights for enemy combatants, *Rasul* [*Rasul v. Bush*, 542 U.S. 466 (2004)], regarding access to habeas corpus for aliens detained on Guantánamo, and *Alvarez-Machain* [*Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)], regarding rights of aliens to sue under the Alien Tort Claims Act, all based upon an emerging transnational philosophy.

The 9/11 cases of 2004 perhaps illustrated this best. In the *Hamdi* case, only Justice Thomas voted with the Government. In *Rasul*, the Guantánamo habeas case, you see a straight split between the transnationalists and the nationalists. In the *Padilla* case [*Rumsfeld v. Padilla*, 542 U.S. 426 (2004)], which went back to South Carolina on a jurisdictional issue, four of the dissenters, the hard-core transnationalists, would have argued that the President had no authority to detain Padilla indefinitely.

What drove these decisions? The dog which did not bark seems to be the scandal at Abu Ghraib, which cast doubt on the Government's arguments that its officials could be trusted to supervise a system of long-term detention of enemy combatants without any form of judicial oversight.

What has happened since? It is not rocket science. The U.S. Government has adopted a simple philosophy: go forth in the Fourth. (*Laughter*) If the U.S. Government litigates war-on-terror cases in the Fourth Circuit, they have shown a likelihood of winning. After *Padilla*, wherever the Government chooses to detain people will be the place in which their habeas petitions must be heard. If the Government holds the detainees in military brigs in South Carolina, those cases will inevitably be heard in the Fourth Circuit, a court that is traditionally deferential to the Government's national-security claims. But even there the Administration has recently encountered difficulties, both in the *Padilla* district-court ruling rejecting the U.S. Government's authority and

then in a striking Fourth Circuit opinion criticizing the Government by Judge Michael Luttig before he left the bench. In the case of *Moussaoui*, the so-called “20th hijacker,” prosecutorial misconduct was exposed, and then the jury at the penalty phase sentenced the defendant to life, not the death penalty that the Government had requested [*United States v. Moussaoui*, 382 F.3d 453 (4th Cir. 2004)].

And then earlier this term, in *Hamdan*, a Supreme Court case in which the Chief Justice has recused himself, the military-commissions case, the early reading at the oral argument was that five Justices—again, the transnationalist five, including Justice Kennedy—were extremely skeptical of the Government’s position. I submitted an amicus brief in that case for a group of former diplomats, arguing that use of military commissions to dispense ad hoc justice has undermined our foreign-policy interest in the rule of law. Ironically, a system of military commissions designed to punish terrorists has now become a major impediment to our own ability effectively to fight this war.

Now you might well ask, where does the new Chief Justice stand? Looking to history, as a law clerk to Chief Justice Rehnquist, a leading nationalist, Chief Justice Roberts worked on the leading recent decision supporting expansive executive power in foreign affairs, *Dames & Moore* [*Dames & Moore v. Regan*, 453 U.S. 654 (1981)]. As a White House and Justice Department lawyer, he generally favored deference to executive power in foreign affairs. He joined the D.C. Circuit majority in the military-commissions case, *Hamdan* [*Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir.), cert. granted, 126 S. Ct. 622 (2005)]. He has questioned the reach of federal legislative authority, the famous case of the arroyo toad [*Rancho Viejo, LLC v. Norton*, 334 F.3d 1158 (D.C. Cir. 2003)]. And so he seems likely to step into Chief Justice Rehnquist’s shoes in the years ahead. But since the transnationalists have recently held a six to three majority, it seems unlikely that Chief Justice Roberts’s ascension alone will overturn the six to three transnationalist majority.

This then raises the question: what about Justice Sam Alito, a graduate of Yale Law School with a distinguished career as a Government lawyer. His opinions on the Third Circuit over the past 15 years indicate that he has referred to “international law” in only four cases, and “foreign law” in zero cases, although he has authored a number of opinions regarding immigration and transnational drug-smuggling. At his confirmation hearings, however, he was extremely skeptical of the application of these bodies of law to U.S. law.

And so you have the emerging Roberts Court, four transnationalists, four nationalists, and now the swing Justice is clearly Justice Kennedy. He is the author of key transnationalist opinions in *Lawrence*; in *Roper*, the juvenile death-penalty case; and *Rasul* on Guantánamo. He has also become increasingly vocal at the American Society of International Law and the ABA's rule-of-law initiatives in China, Eastern Europe, and Turkey. He wrote an opinion favoring denial of certiorari in the recent *Padilla* case and he led the hostile questioning of the U.S. Government in the *Hamdan* case.

Given all of this, what can we say about law and globalization and the role of the Supreme Court as a check on executive overreaching? First, this struggle between the transnationalist and nationalist judges will very likely determine how our courts orient themselves toward this issue going forward. It is a debate that is gaining tremendous public visibility. Take the recent debate between the leading transnationalist, Justice Breyer, and the leading nationalist, Justice Scalia, at the American University. Second, this issue crosses political lines. Four of the transnationalist justices—Stevens, Souter, O'Connor, and Kennedy—were Republican appointees. And it is the next appointment that will likely be pivotal. The irony of the most recent confirmation hearings is that they have turned largely on “yesterday's issues”—federalism, abortion, religion, affirmative action—with almost no questioning of the nominees about the issues that these Justices will really shape, particularly issues concerning law and globalism and law and technology in a global era, e.g., the *Grokster* case [*Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005)].

And what does all of this mean for me as a law dean and for American law schools? The simple answer: we need to talk about globalization. Although globalization is a much criticized word, we increasingly live in a world characterized by global connections, global interdependence, global information markets, global rights, and global governance. We need to teach law students to reflect on how to develop a process of humane globalization: globalization with a human face.

When we all attended law school in the 20th century, law was studied inside a “matrix,” divided into traditional dichotomies between domestic and international, public and private law. But, as we all now know, the matrix is a construct. (*Laughter*) It does not reflect reality. It is an intellectual construct that was placed on a body of law, and so we learned torts and contracts as domestic private law; we learned constitutional law as domestic public law; sometimes we would

talk about transnational commercial law, as private international law; and sometimes we would talk about nation-to-nation activity, which we call public international law.

But today virtually all of this law is transnational law. It is a hybrid. It crosses boundaries. It transcends these traditional dichotomies. We should not teach the matrix anymore. “Transnational law” can be defined as law that is “downloaded” from the international to the national system. Take, for example, the law merchant or the norm against genocide, both of which began as international-law concepts and have been downloaded from international into myriad systems of domestic law. Some bodies of law began in domestic systems, and then were uploaded into international law, and then downloaded again, like free trial guarantees and other civil and political rights. Finally, there are some bodies of law that are borrowed or transplanted from one system to the next, for example, the human-rights law against disappearance developed in Latin America and ultimately moved to the Middle East and Asia.

To illustrate, take commercial law. The law merchant, which many of you practice, first developed in the Mediterranean bazaars, was brought to English common law during the era of the British Empire, became part of U.S. general common law in the famous case of *Swift v. Tyson* [41 U.S. 1 (1842)], was codified by Karl Llewellyn in the U.C.C. [Uniform Commercial Code], and now, partly through the work of John Honnold, Ron Brand, and others, has been brought into the U.N. Convention for the International Sale of Goods. And so, in a few centuries, the law merchant has gone from transnational custom to domestic common law to domestic statutory law to international treaty law.

Or take another example, torture. The norm against torture started as a common-law prohibition, became an Eighth and Fifth Amendment prohibition embedded in our Constitution, was uploaded to international treaties such as the Convention Against Torture, migrated to other jurisdictions, for example, the European Convention on Human Rights, was downloaded into U.S. judicial practice by the jurisprudence of the Alien Tort Claims Act, particularly the case of *Filártiga v. Peña-Irala* [630 F.2d 876 (2d Cir. 1980)], and was recently *legislatively* downloaded by the McCain Amendment to the most recent Defense Authorization Act, with resistance now shown by the presidential signing statement to that law.

And we can see that, increasingly, the law of globalization is a subject that is pervasive: in the private-law area, with issues of uniform and customary practices of letter-of-credit finance, with regulatory rules in cyberspace that many of you deal with every day; in the public-law area,

through emerging issues of global public law such as international environmental law, anticorruption, and international human rights and refugee law. More and more of our law-school curriculum is now comprised of this body of transnational law.

None of this has escaped the ALI's notice. To give just a few examples of transnational-law projects conducted under ALI auspices, you have the Restatement Third of the Foreign Relations Law of the United States; the recent ALI/UNIDROIT Principles of Transnational Civil Procedure; the panel upcoming after lunch on Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes; Transnational Insolvency: Principles of Cooperation Among the NAFTA Countries; Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute; Principles of Trade Law: The World Trade Organization; and International Aspects of the United States Income Taxation.

What I would like to emphasize is that, increasingly, it is unclear whether a body of law is domestic or international. It is not clear, for example, whether the metric system is domestic or international. It is transnational. It is not clear whether the concept of "dot.com" is domestic or international. These are transnational concepts. And so it is with such other transnational concepts as "cruel, inhuman, or degrading treatment"; "civil society"; the concept of "the internally displaced"; or "transborder trafficking of human beings" all of which are increasingly transnational terms.

So what should we think of something like the Feeney Resolution, which tells judges not to look at foreign and international law in interpreting U.S. law? It is hard to know whether this is more nonsensical or more ahistorical. My presentation should tell you that U.S. judges have looked to international and foreign law from the beginning of the Republic, and that they will increasingly need to do so to construe terms such as "privacy," "equality," "letter of credit," and other legal terms that are not, and have never been, exclusively American concepts.

In the future, I believe that we will need to take the more practical approach championed by someone you all know, Ambassador Felix Rohatyn, who wrote in *The New York Times* that

[G]lobalization has made it not only "appropriate or useful" but vital to look at foreign laws. It is in our interest to be aware of their impact whether they concern antitrust, food safety or the death penalty. Contempt for the laws of our allies is a major factor in our increasing isolation in the world; . . . [Our courts] must show understanding, if not respect, for other peoples' beliefs and laws, and occasionally be willing to support reasonable changes. Our Constitution, itself, was an extension

of Enlightenment ideas that were incubated on the Continent. . . . Taking the views of 450 million Europeans into account is not a sign of weakness on our part, nor is it a commitment to change our views. It is simply recognition that the laws of our most important allies, our biggest foreign investors, foreign employers, foreign customers and trading partners are worthy of our attention.

That is the real world in which we now live, as opposed to the world in which some members of Congress seem to be living.

And what about law schools? I believe law schools are at a turning point of a kind we have not faced since the 19th century. In the 19th century, Yale Law School decided to stop teaching exclusively Connecticut law and to shift its focus to the study of national law. Under my deanship, Yale Law School—which, by the way, is not six to one, half dozen to the other with Harvard, I gently say (*laughter*)—we have made a similar decision: to educate our students about law and globalization.

This means that we teach them about three aspects of law and globalization. First, the law *of* globalization: globalization as a legal subject, a mixed international-domestic subject, like human rights and international business transactions. Second, we teach them about law *as* globalization. We understand the globalization of culture, the globalization of the economy—we need similarly to understand law as itself a phenomenon that is being globalized. Third, we teach them about the role that law plays in globalization, law *in* globalization. We teach the students that, as lawyers, they can promote a process of humane globalization or they can be the tools of a process of inhumane globalization, with our main goal being to train lawyers to recognize and act on global trends.

This means, I believe, that we should go back to the future, to an international vision based on the four original premises that guided us before September 11th, and to a constitutional vision based on shared power, a return to human-rights universalism, clear legislative statements before civil liberties are infringed, and equal dignity for citizens and aliens alike.

Let me close with this thought: that managing the role of law in an age of globalization is simply too important to be left to governments. It is something that all concerned lawyers, judges, law schools, and nongovernmental organizations have to do in the 21st century. There will be no organization more important in this activity than this one, The American Law Institute. The challenge of managing the role of humane globalization through law is very much in your hands.

Thank you very much. (*Applause*)

**President Traynor:** Thank you, Dean Koh. That was a marvelous bringing us back to our basic values and constitutional concepts of the rule of law, showing us what's gone wrong, and giving us a wonderful systematic framework of analysis within which to consider the various issues.

At lunch last year, we gave Dean Slaughter some Phillies tickets, and Dean Koh said, "Well, my son read the speech and said, 'You going to bring back the Phillies tickets?'" (*Laughter*) So, as we use the word "ordinarily," we also use the words "we'll consider that," and we will certainly consider that. (*Laughter*)

Let's have time for questions. We'll want to go to about a minute before 2:00, and then we will go immediately across the hall for international intellectual property. Dean Koh.

**Dean Koh:** The floor is open.

**Professor Christian Kirchner (Germany):** Thank you. My name is Christian Kirchner. I am a professor at Humboldt University in Berlin, Germany, and I deeply underwrite what you have said, Dean Koh. When I was studying at Harvard Law School, I had a course, International Protection of Human Rights, but times have changed here in the U.S., and many scholars in Europe—by that I mean continental Europe—are skeptical about the new developments here in the United States of America. In our sense, it is really essential to be on this transnational route, so my own law school has 64 cooperation treaties with law schools all over the world, and we stretch not only to America, but also now especially to East Asia and regions like that. I think this international cooperation is really necessary, and I am thankful to the ALI that it extends more and more its membership for scholars of other jurisdictions like Germany. Thank you. (*Applause*)

**Dean Koh:** I think the ALI has been very forward looking with regard to this. The ALI has, for example, used Foreign Advisers, going back to Restatement Third, Foreign Relations Law. I also note the very wise decision of Geoff Hazard and others to take the Transnational Rules of Civil Procedure and extend them not just to ALI members but to UNIDROIT members and then to vet those rules all around the globe. This dramatically expands the interest of foreign lawyers in the ALI's work, makes it seem less exclusively American, and I think makes the ALI a law institute for the world and not just for one powerful country in that world.

I should also mention that there is an important development in legal education; the ABA accreditation process will soon permit someone to graduate from law school in five semesters. If that is so, law students will have a sixth semester that could be used for lots of other purposes,

including, for example, spending a semester at Humboldt University or Beijing University or Tokyo University or Diego Portales University in Chile, or at any number of other law schools around the world. This presents a huge opportunity for American legal education, if American legal education is ready to seize upon it.

**Unidentified Speaker:** Dean Koh, globalization in the past has met the free flow of ideas, free flow of capital. Notably absent from your presentation—perhaps I missed it, but I didn't think I saw it—was the idea of the free flow of peoples across national borders. I wonder if you could address that issue in the context of globalization.

**Dean Koh:** Well, it was there, to the extent that I mentioned immigration and refugee law, as part of global public law. In European law courses, we teach about labor flows across borders, now clearly recognized in the European Union. In the refugee context, we are operating within a framework in which international regulation of the movement of peoples is still controlled by a 1951 Refugee Convention and a UN High Commissioner for Refugees, which does not yet have a formal mandate for dealing with internally displaced persons. We also have a system in which countries are increasingly granting reciprocal recognition of employment rights for the purpose of developing economic units that can compete on a global stage. So I do think that the whole issue of the free movement of peoples raises a huge issue.

I don't think we should see the immigration debate that's currently raging in this country as simply a political discussion. It is raising the question fundamentally of what kind of regulatory approach we should have to the movement of people across borders to work. I am astonished to see that the solution now being proposed is sending 6000 national guardsmen to the U.S.-Mexico border. Is this seriously being put forward as a proposal for resolving this issue? Even Governor Arnold Schwarzenegger, who is himself a transnational commodity, (*laughter*) calls it a "Band-Aid." (*Laughter*) My hunch is that it would have taken more than 6000 guardsmen alone to stop *him* from crossing the border. (*Laughter*)

I think the point is clear. We do need some rethinking of the regulatory structure of migration at both the domestic and international levels. The U.S. as a leading country in that process has not yet enacted domestic legislation nor played its necessary role as a convening actor in a global legislative process to address this problem.

**President Michael S. Greco (Mass.):** Mike Greco, President of the American Bar Association.

I want to thank you first for serving on the task force I appointed in January that considered the Administration's domestic surveillance program, because you helped the ABA adopt a policy that I was informed last week, by Senators Specter and Kennedy, is helping to shape the debate in Congress on domestic surveillance.

I am in the process now of appointing another task force to look at the President's practice of issuing signing statements, and the ABA, by the time of our Annual Meeting in August, I hope will have a recommendation on that subject, and before you leave the room I'd like to talk with you. (*Laughter*)

But the real reason I stand is that, in your presentation—and I agree with everything you've said—you referred to the fact that Justice O'Connor and Justice Kennedy have been very active in the American Bar Association CEELI program. I want those in the room to know that CEELI was the first ABA rule-of-law initiative, but we have four now. We have one in Africa—I just came back from Kenya two weeks ago at the behest of that project—we have one in Latin America, we have one in Asia in which Justice Kennedy is very active, and CEELI.

Those projects are very consistent with what you have been telling us about today: lawyers, American judges, American lawyers in all those regions, especially in the former Soviet republics, and I have visited about eight of those to speak to them about the separation of powers, there is no question that the ABA is committed to the message that you have been delivering, and I am so pleased that the ALI is moving further and further along the path that you have been talking about.

But the most important thing I want this group to know is that the American Bar Association is continuing to speak out, not only on issues of domestic concern, whether it be surveillance, whether it be the treatment of Guantánamo detainees on torture, but also increasingly we are looking abroad, all over the world, in those four projects, to do the kind of extension of thought process that you have been describing here today, and I encourage everyone in this room, if you're not active in the American Bar Association in those rule-of-law programs, I urge you to take a look at it and to consider it, because those are hands-on practical ways that we can extend our reach and look to the lessons that we can learn abroad.

Let me close with this anecdote. I have had many highlights in my nine months in office, many of them, but the one that will stay with me a long time is the comment made by the new Chief Justice of the Republic of Georgia when I visited there. He had been in office for three days, and he began by saying to me, "Mr. Greco, I knew you were coming. I knew the President-Elect of

the American Bar Association was coming, and I have had requests to meet with other officials in the three days I have been in office, and I have respectfully declined so that my first official meeting would be with the incoming President of the American Bar Association, in gratitude for what American judges and lawyers have been doing since the Rose Revolution in helping us to create a democratic system of government and a free and independent and corrupt-free judiciary and legal profession.”

That says to me that, whether it be a former Soviet republic, whether it be Vietnam, which reached out for the help of the ABA, Thailand, all the countries I have gone to, they are looking to us, American judges and lawyers, for leadership, and we cannot let them down. Thank you.

*(Applause)*

**Dean Koh:** Well, I certainly share your concern with respect to signing statements. I think there are three issues. First, presidential signing statements function like line-item vetoes, and constitutionally we don't have a line-item veto. The President is supposed to take care that the laws as enacted be faithfully executed. So I do think the first issue is a very serious one.

Second, I do believe that the justices who have become transnationalists have benefited very much from traveling and engaging with foreign jurists. Chief Justice Margaret Marshall of the Massachusetts Supreme Court is certainly guided in her insights by her South African heritage. Justice O'Connor goes to Bahrain and sees the value of judicial independence. Justice Kennedy leads a mission to China and sees that there is a difference between a country in which the rule of law is mouthed and where the rule of law is actually actively pursued. They are all looking to the notion that the United States ought to be a beacon and not be viewed as creating a system of double standards.

The final point goes to what you have just said about the countries who are looking to us now, the countries who have gone through the so-called “color revolutions,” such as Ukraine, Georgia. They are in a similar situation to the central and eastern European countries of the '90s. They are looking to America to show that the rule of law has legs and that democracy does deliver. It is a very sad time when our Government, which is on the one hand supposed to be reaching out to win the favor of these newly emerging democracies, can't see the connection between what it is that they aspire to do and the message that we are actually sending to them. It is on this ground that I very much commend the ABA, under Mike Greco's leadership, and The American Law Institute.

I do not believe it is our job to simply bless the status quo. We stand for principles about what the rule of law ought to be. As a law dean, I think that law schools are not just professional schools. They are institutions of moral purpose. We must speak up for the rule of law when someone is threatening it, because if we don't, who will? (*Applause*)

**President Traynor:** Dean Koh, thank you for your talk. Your talk is so important and timely. We will have it published in the usual brochure, but as soon as we can get it up on our website, we are going to do that, if we can, with your help. Thanks.

Thank you very much. (*Applause*)