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A Collision of Authority: The U.S. Constitution and Universal Jurisdiction

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**A COLLISION OF AUTHORITY:
THE U.S. CONSTITUTION AND UNIVERSAL
JURISDICTION**

Remarks by

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INTRODUCTION

Parker Clote, Symposium Chair, 2009-10: Good Afternoon. Thank you all for coming. I think we are about ready to start. Again thanks everyone for coming to the Volume Nine Symposium – A Collision of Authority: The U.S. Constitution and Universal Jurisdiction. I would like to thank our distinguished panel for coming, some of whom have come a long way, and I would like to thank Dean Kristine Henderson for her help, and Professor Jack Preis for being our moderator, and also my ad hoc committee. You all did great work. Unfortunately, our fourth panelist Dr. Anthony Arend is unable to be here today due to an illness in the family. We wish him well. As for our panelists: Erwin Chemerinsky is the Dean of UC Irving. He is the inaugural Dean. He spent most of his time at Duke Law and USC. His list of publications

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is as voluminous as it is distinguished, and I think he has helped more than one of us through a Con Law exam. Professor Mary Ellen O'Connell is here from Notre Dame Law. She is an authority in the international community, in international law, and in the law of war. She also graduated from Northwestern undergrad, and spent time in the London School of Economics and Cambridge, and she earned her J.D. from Columbia. She is a member of the American Society of International Law, the German Society of International Law, and the Council of Foreign Relations. Our last panelist is professor Jeremy Rabkin. He is a professor of law at George Mason University, and he spent over twenty years at Cornell as a political science professor. We are very honored to have them all here today, and I hope that you enjoy the presentation.

Professor Jack Preis, University of Richmond School of Law: Welcome, I'm Jack Preis. I'm going to very briefly set the stage. The issue today really has many facets, and I'll start it with something very simple. Really the centerpiece is courts. The governments create courts, and the governments tell these courts what to do.

So the government in Germany might create a court system in Germany, and they might say if there are a bunch of slip and falls on the streets of Munich, we want you to resolve these disputes, very simple right? That is the type of judicial power we are very familiar with. What if we change the facts a little bit, and Germany says to its' court, "We want you to resolve disputes where the defendant is not a German, where the plaintiff or the victim is not a German, where the events did not occur in Germany, and where neither the defendant nor the victim is any longer near Germany." That starts to sound a little bit different. The German's power to resolve that type of dispute, if it exists at all, and that's one of the issues we'll be talking about today, if that power exists at all, it would be a power that derives from a doctrine known as universal jurisdiction.

Under this doctrine, courts of a particular sovereign are empowered to resolve what are commonly called "crimes against humanity" in their own domestic courts. You might think of it this way: crimes against humanity under this doctrine can be tried anywhere humanity resides, and humanity resides everywhere there is a country in a sense, right? So every country is competent to resolve this type of dispute. A quick example could be, what if Germany decides to prosecute Eric Holder for mistreatment of Iraqis that occurred on a CIA base in Turkey? Nothing has to do with Germany except the court itself. What do we think of that?

So today we are going to talk about these issues, and there are a couple different facets that arise which our panelists will have a variety of things to say. One issue that might come up is just power it-

self. Where does this German court actually get the power to declare for all the world what Eric Holder should and should not do? Another issue is the nature of the wrongs that can be addressed through courts exerting international jurisdiction. What if Germany's view of torture is out of step with the rest of the world's view? What if Eric Holder's view on torture is out of step with the rest of the world? A third view might be instrumental – is a court, particularly a court in Germany, far removed from the dispute itself, the right place to resolve difficult issues of international politics? Are the restrictions of the judicial system fit, and maybe even further, might it be that local governments can always resolve their own problems? Is the American government competent to resolve problems with Eric Holder? Maybe so. So why do we need Germany? Well, that's all I'll say as a way to set the stage because we have some people who have studied this in much more detail than I have, and we are happy to have them. The way this will work is they will speak for approximately ten to twenty minutes each depending on the points they'd like to make. We'll probably have to return here and there for some responses, but we look forward to hearing your questions as well. Thank you very much. Professor O'Connell, please begin.

O'CONNELL COMMENTARY

Professor Mary O'Connell: Well, it's a great pleasure to be here back on your beautiful campus where my niece, Libby Gragg is a senior. And it's also very satisfying to be a part of another important discussion on these issues. And I'm really grateful to Parker Clote that he has organized this event, and I am looking forward to participating in it with all of you.

Despite the provocative title of our panel today, "Collision of Authority: The US Constitution and Universal Jurisdiction," I'm going to try to persuade you that the fundamental issue here is not very controversial, and that it is in fact quite straightforward. We have a very good set of rules to determine when courts should decide which legal issues, the kind of legal issues that Professor Preis just mentioned. The law spells this out, and if we follow the law, we really do avoid some of the very egregious controversies that have arisen since 9/11. So let me make some preliminary remarks to show you, to at least begin this attempt to show you, that there is straightforward law governing conflicts of jurisdiction, governing when courts should take jurisdiction in which kinds of cases and which courts. So for example, we of course are dealing with these kinds of overlapping jurisdictional questions all the time. In the United States we have a federal system so there are overlapping jurisdictional questions, controversies, or collisions of authority between our local governments, our local courts, municipal courts, state courts, federal courts, and then of course also

we live in a global world in which many of us are travelling, doing business, serving in the armed forces outside of the United States and that is when other courts come in to play.

But international law has a way for sorting out these overlapping jurisdictional issues, for helping us understand both international law and our own domestic law, for sorting out these kinds of conflicts, and I think it's really rather straight forward. So I'll give a very common example before I go into the cases that I think are of the greatest interest to us today, the post 9/11 cases, as they are now known, and maybe this will make the rest of the discussion a little easier. So let's say that we have an Indiana farmer where I'm from, South Bend, Indiana, and he is selling corn to a French manufacturer of biofuels. So this is an international contract for the sale of goods. In this kind of case, if the parties come to a dispute, the law governing that dispute, governing the contract, will either be the law of the place of the greatest contact to the contract. International law allows any of these three choices of law to sort out which law should govern this contract. We have to use international law to sort out conflicts or potential conflicts of legal authority or legal jurisdiction to sort out these conflicts of legal authority or legal jurisdiction because we have persons of more than one country involved here, the U.S. and France in my little hypothetical. If the French party decides to sue in the United States under the contract, which of course international law would allow, a second set of U.S. rules governing our court system that come into play, and in particular, U.S. Constitutional rules or civil procedure rules about the authority of our courts to take jurisdiction in such a dispute, and they have to look to such issues as whether there are sufficient ties to the U.S. court to hear cases of that kind or *forum non conveniens* issues etc.

On 9/11, attacks were carried out in this country by non-Americans resulting in the deaths of 3000 people and of course considerable destruction of property. Within days of those attacks, the United Nations Security Council found that the attacks had triggered the U.S.'s legal right under the United Nations charter to act in self-defense. By October 7, 2001, the U.S. and the United Kingdom had determined that Afghanistan was responsible under international law, and in particular under the International Rules of State Responsibility for violations of international law, that Afghanistan was responsible for the 9/11 attacks because of the close ties between Afghanistan's then government under Mullah Omar and his Taliban colleagues and the actual 9/11 perpetrators, members of Al-Qaida. The United States and the United Kingdom then acted on their right of self-defense and attacked Afghanistan. When they did so, and upon engagement by Afghan forces, international law made clear- makes clear- that the general peacetime law prevailing in Afghanistan, the law governing

acts of violence, like criminal law, was moved out of the legal system and the international law of armed conflict then became the prevailing law in the conflict zone.

The international law of armed conflict is found in a variety of treaties, many of which we know very well, the famous Hague Conventions, the Geneva Conventions, but it is also found in important rules of customary international law and principles, general principles of international law, such as the necessity to use force, and the requirement that any attack be proportional. This law pertaining to armed conflict permits certain privileges to the regular members of the armed forces. These privileges do not apply in peacetime. The most important of these privileges apply only in wartime, only during an armed conflict, and only to regular armed forces: of the right to kill without warning, to detain without trial, and to seize property or to destroy property if it is related to enemy's military efforts. These are extraordinary privileges that international law makes clear only apply in a war zone and even then, these privileges are limited within the context of very important and serious protections on all persons in the conflict zone. International law of armed conflict applies territorially, it applies to places where armed conflict is going on. In all other places, the regular prevailing peacetime criminal law applies to acts of violence, or just in general, peacetime civil rights and criminal/civil law applies. This is a basic and core conflict or choice of law rules that we find in international law very important to our discussion today.

The international armed conflict in Afghanistan ended in June 2002. When Hamid Karzai took over the Afghan government and then changed the relationship with the United States and the United Kingdom. He then requested that these two countries and others, now members of ISAF, come to Afghanistan and assist him in bringing stability and order to that country. It became a non-international armed conflict within Afghanistan and to non-international armed conflict international law also has a set of rules that contains the three core privileges that we just talked about but somewhat less, a lesser group of protections. Still, the law of both kinds of armed conflict is quite extensive and quite similar. So far so good with respect to sorting out conflicts of legal authority between situations of war and situations of peace.

But then a strange thing happened, a novel and unexpected thing in our country. In November 2001, the President issued an executive order called Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-citizens in the War Against Terrorism, and this document asserted a right to try persons before military commissions, who, as a member of Al-Qaida or anyone, this is a quote from the order, who has engaged in, aided or abetted, conspired to commit acts of international terrorism.

Now, military commissions may be applied and may be used to persons detained in the hostilities of an armed conflict but not outside of an armed conflict. The order, however, made its choice of law, its determination to use a particular part of the law of armed conflict, the right to try persons before military commissions, based not on location, not on the standard rule of choice of law and international law, but on the identity of certain persons. This is not supported by international law. It was an error by us to make this kind of choice. It erroneously applied a law of armed conflict rule to persons not necessarily engaged in an armed conflict. But something even more insupportable in law was to follow. In February 2002, the White House received a memo from the Office of Legal Counsel making another choice of law based again not on who persons are and not where they are. This memo asserted that the law of armed conflict privileges applied everywhere in the world, but the Geneva Convention protections did not apply to all persons perceived to be part of this international armed conflict, and that was the Taliban and Al-Qaida were not to be protected by the Geneva Convention protections prevailing during armed conflict. And then, of course, by August 2002, the Office of Legal Counsel had written yet another infamous memo, this one justifying forms of harsh interrogation as not violative of the rules governing interrogation, rule in peacetime law – the convention against torture, and wartime law – the Geneva Conventions.

As I've already explained, the law of armed conflict applies where armed conflict occurs. It has territorial application to all persons in the combat zone, or zone of hostilities, privileges, and for fighters and protections to all persons in the armed conflict zone. Outside the armed conflict zone, peacetime criminal law applies to the acts of violence – criminal law that must in turn comply with international human rights law. The law leaves no person out of its protection.

I believe Dean Erwin Chemerinsky will discuss U.S. criminal law, applicable to persons suspected of carrying out violent acts of terrorism. I'll continue my remarks by further explaining why the law of armed conflict properly applies only in Afghanistan, Iraq, and later in Iraq and Somalia. But, that outside of these war zones, because it is only there that the law of armed conflict or that the choice of law would apply, the U.S. was in error to try to apply and take the privileges, and certainly made an error to not apply the protections of the rule of armed conflict.

All of this turns on the fact that there is an armed conflict in Afghanistan and later in Iraq and Somalia. International law, of course, it is expected that international law will define what an armed conflict is, since this is such an important distinction and makes the difference in terms of applying – making a choice of law between law of peace and law of war. International law in fact does have a definition

of armed conflict. An armed conflict cannot be constructed to suit a particular purpose. Armed conflict is determined today by facts of fighting, not mere declarations, as it appeared before the adoption of the UN Charter. The International Law Association, a leading scholarly organization of international lawyers, tasked a committee on the use of force in 2005 to report on the evidence within international law of the definition of armed conflict. The committee, in its initial report given in 2008, said this: "Looking to element treaties, in particular international humanitarian law treaties, rules of customary international law, general principles of international law, judicial decisions, and the writings of scholars, the committee has found that all armed conflicts, whether international or non-international, have at least two minimum characteristics: the existence of organized armed groups engaged in fighting on a certain amount of intensity. These situations are more than internal disturbances/tensions such as rise in isolated and sporadic acts of violence, like terrorist acts. The single one-off terrorist act is not, under international law, an armed conflict, and the law of armed conflict, whether privileges or protections, does not apply."

Within an armed conflict, as I suggested, the law of armed conflict must be followed. It not only gives privileges, but it demands that certain protections be afforded to all persons in the territory of the armed conflict. Violation of certain fundamental protections in the law of armed conflict leads to an obligation on all states under principles of universal jurisdiction to take action to investigate and prosecute. This was the international choice of law rule as to the enforcement of the fundamental law of armed conflict, especially violations in the form of grave breaches.

Let me just read for you some of the grave breaches listed in the third Geneva Convention, by way of example. Grave breaches include: "willful killing, torture, or inhuman treatment, including biological experiments; willfully causing great suffering, or the serious injury to body or health." If any permutation of these violations occurs, every state in the world is obligated under international law to investigate and prosecute. Again, and I'll quote from the Geneva Conventions, "all states shall be under the obligation to search for persons alleged to have committed or to have ordered to be committed such grave breaches and shall bring such persons, regardless of their nationality, to its own courts, and may also, if it prefers, in accordance with the provisions of its own legislation, hand such persons over for trial to another high-contracting party to the Geneva Conventions, provided such high-contracting party has made out a prima facie case."

All states in the world today are parties to the Geneva Conventions – all 192 sovereign states. So every state in the world has the obligation to investigate and prosecute grave breaches of these Con-

ventions. Spain, today, is carrying out such a prosecution against ten United States officials, including the drafter – the primary drafter – of three memos that I mentioned, John Yoo, but also our Secretary of Defense Donald Rumsfeld. This prosecution is going forward as an enforcement of the Geneva Convention because of torture that was alleged to have been carried out at Guantanamo Bay against persons who I've not yet asserted were or were not a part of an armed conflict in Afghanistan. They may also have protections under the Convention against torture, which has similar universal jurisdiction enforcement provisions. But Spain, in carrying out this prosecution's investigation, and potential prosecution, is not acting in conflict with any other law. Under international choice of law, that is the proper procedure for enforcing the law of armed conflict. So I do not see any collision in this particular case of universal jurisdiction or the exercise of universal jurisdiction. There should be no collision with the United States Constitution, because if you properly apply choice of law provisions, they lead to a choice of law of armed conflict, including its provisions for enforcement of universal jurisdiction. That's the proper law. It's not the U.S. Constitution in these cases, and so that should not lead to a conflict.

By the same analysis, persons suspected of violent acts or plots, such as Abdulmutallab, who alleged to have tried to carry out a terrorist act on an airplane flying from the Netherlands to Detroit on Christmas Day. He carried out his action outside of an armed conflict. He was not a participant in hostilities. So he is only properly tried before a regular civilian criminal court, and not before a military commission.

In conclusion, there's no true collision of authority at stake, as I suggest to you in these cases. If you do not see a clash between the U.S. constitution and the conflicting principles of otherwise applicable jurisdictional or legal authorities, it is a matter of good faith choice of law made consistently within the overarching paradigm of the rule of law.

CHEMERINSKY COMMENTARY

Dean Erwin Chemerinsky: It is really an honor and a pleasure to be with you. I was delighted to see the invitation from Parker Clote, and I've known Parker Clote longer than he or I would like to admit. His parents, Paul and Jackie, are dear friends of mine, very important in my life, and made the trip from Houston here for the symposium.

The question I pose at the outset is why are we talking about universal jurisdiction in February of 2010? The answer, of course, is that individuals at the highest levels of American government violated American international law and have not been held accountable in American courts. The fact of the matter is: are there tribunals else-

where in the world where they can be held accountable? I think to talk about this, we've got to place the events since September 11th in historical context. I believe that since September 11th, some of the worst aspects of American history have been repeated. Throughout American history, whenever there's been a crisis, especially a foreign-based crisis, the response has been repression. The concept I've come to realize is that we weren't any safer.

The story can start in the earliest days of the republic, when in 1798, Congress passed the Alien and Sedition Act, that made it a crime to falsely criticize the government or government acts. Individuals were convicted under this law for speech tamer than what Jay Leno or David Letterman say on a daily basis. Thomas Jefferson ran for president in 1800, in part on a platform to get the Alien and Sedition Act repealed. This led to pardons for those who were convicted under it. A century and a half later, the Supreme Court said that the Alien and Sedition Act was declared unconstitutional in recorded history. However nice that metaphor is, it doesn't obscure the reality that people went to prison just for criticizing the president. During the Civil War, Abraham Lincoln suspended the writ of habeas corpus even though the president has no authority to do this. Hundreds, maybe thousands, of individuals went to prison simply for criticizing the way the north was waging the Civil War. Historians show us these imprisonments violated the Constitution and did nothing to help the north in its effort to win the war.

During World War I, Congress passed two statutes in 1917 and 1918 that made it a federal crime to criticize the war. Those who study First Amendment law have undoubtedly read the case of *Schenk v. United States*, where a man was sentenced to ten years in prison just for circulating a leaflet that said the draft was unconstitutional as involuntary servitude. There wasn't a shred of evidence that this leaflet interfered with the war effort, and yet the Supreme Court upheld the conviction of the sentence.

During World War II, 110,000 Japanese Americans aliens and citizens, and 70,000 were United States citizens, were uprooted from their homes and placed in what president Roosevelt called concentration camps. Not one Japanese American was ever indicted or convicted of espionage against this country. The deprivation of liberty was enormous.

One more example before getting to contemporary events, the McCarthy era, it was truly the age of suspicion when merely being accused of being a communist was enough for people to lose their jobs and sometimes their liberty. The leading Supreme Court case during the era was *United States v. Dennis* - four people were sentenced to twenty years in prison for the crime of conspiracy to advocate the overthrow of the United States government. What did they do? Organized

to teach the works of Marx, Lenin, and Engles. They weren't plotting the overthrow of the government; they weren't even convicted of advocating the overthrow of the government. Their crime was conspiracy to advocate the overthrow of the government, and the Supreme Court upheld their convictions and sentences, with Chief Justice Fred Vincent saying, "when the evil is as grave as the overthrow of the government, there doesn't have to be any proof that the speech increases the likelihood."

Sadly I believe that since September 11th we've repeated this, engaged in repression that hasn't made the country any safer. I'd like to make three points this afternoon. First, I want to argue that the government since September 11th has claimed the authority to act unconstrained by any law. Second, I want to argue that this is wrong, that all individuals who were detained must be held and treated according to the constitution and international law. Then finally and most briefly, I want to argue that in this context universal jurisdiction is appropriate. Where there is clear law then tribunals can exist to try those who are accused of violating that law. As to the first of the points I want to make, I think there are two key premises that what has gone on since September 11th that explain why we are talking about universal jurisdiction. First, the government has claimed the authority to detain and treat certain individuals unconstrained by the Constitution or international law, and second, they claim that no court has the authority to review these actions. Both of these premises should be familiar to us. As to the former, starting soon after September 11th, the Bush administration claimed that it could detain individuals as enemy combatants without either the Constitution or international law applying. Now international law does not create the concept of enemy combatant. In international law there is the notion of a lawful combatant, somebody who is fighting for a nation in a war because there are certain things that a person can do in a war including using deadly force that would otherwise be a crime. But there's not a separate category of individuals that are unlawful combatants excluded from protection by the Constitution or international law.

Nonetheless, from the earliest days after September 11th, the Bush administration claimed that it could detain people and treat them without either the Constitution or international law applying. These examples should be familiar to you. There is the example of Jose Padilla, apprehended in Chicago at an airport in May of 2002. His alleged crime was to plot to build and detonate a dirty bomb in the U.S. The Bush administration claimed that he could be held as an enemy combatant and did not need to be indicted tried or convicted.

Think of how stunning this is as a claim of power. It's no less than an authority to suspend the Fourth Amendment, which generally requires a warrant before someone is arrested. The Fifth Amendment,

which requires a grand jury indictment before someone is held. And the Sixth Amendment, which requires conviction by a jury before somebody is imprisoned. The Bush administration took the position that since Padilla was an enemy combatant, international law and the Geneva Courts did not apply to him either. There is the example of Ali Al-Marri, a graduate student at Bradley University in Peoria, Illinois. He too was apprehended in 2002. The government once more said that he could be held indefinitely as an enemy combatant and neither the protections of the Constitution nor international law applied. There is Yaser Hamdi, an American citizen apprehended on the battlefield in Afghanistan, brought to Guantanamo. There it was discovered that he was an American citizen and he was brought then to the United States. Once more, the government took the position that he could be held indefinitely as an enemy combatant, that neither the Constitution nor international law provided any protection. There are the Guantanamo detainees, over 700 individuals have been held in Guantanamo since January 2002.

I have been representing a Guantanamo detainee since July of 2002, a man by the name of Salim Gherebi. I can tell you in all candor, without revealing any classified information, that I have no idea why Gherebi is in Guantanamo. He may be a very dangerous man who deserves to be held, or he may be there by mistake. Many were brought to Guantanamo by mistake. The United States paid warlords in Afghanistan to name those with ties to Al-Qaida. Some warlords named rivals to get them out of the way. Some just gave names to collect bounties. Gherebi has never had any meaningful hearing; there has been no trial. There is no way to know whether he should be detained. The Bush administration consistently took the position from the time the first detainees were brought to Guantanamo that they could be held as enemy combatants and neither the Constitution nor international law applied.

And then there were those who were taken to rendition camps. We don't know how many. In Jane Mayer's stunning book *The Dark Side*, she suggests the sum would be hundreds of thousands. What's more, the government has taken the position that no law, not the Constitution nor international law, applies to detainees. In fact the Bush administration has taken the position that its treatment of these detainees is unconstrained by law. The so called "torture memos" by Jay Bybee and John Yoo are so important because they claim that the President unilaterally could ignore both treaties and statutes that proscribed torture, that the President could apply his own definition of torture that allowed extreme interrogation and allow things that have been regarded as torture for decades.

So that's one reason we are talking about universal jurisdiction, because we have a government that has claimed for almost a dec-

ade that it could hold people unconstrained by any law. The other reason we are talking about it is we have a government that has claimed that its action are not reviewable in any court. In each of the cases that I mentioned, the position of the Bush administration was that no court has the authority to review the detention and treatment. That was the position of the government in the Padilla case. In fact, at the oral argument of the Padilla case there was a stunning exchange between Justice Ginsburg and Paul Clement, then the Deputy Solicitor General. Justice Ginsburg said, "Is it your position that Jose Padilla could be held for the rest of his life without any form of due process?" And Mr. Clement's response was "The only due process that Padilla is entitled to is to respond to the questions put to him by his interrogators." Justice Ginsburg responded saying, and also said in the companion case, *Rasul v. Bush*, about the Guantanamo case, "Are you saying that even if those in Guantanamo were tortured, there would still be no forum where they could have recourse?" And the response that was given, was that of course that the United States military would never engage in torture. What a coincidence, that night were the first reports on the national news of what occurred at Abu Ghraib. We will never know if that influenced what the Supreme Court said.

The Supreme Court in the Hamdi case said that while he could be held as an enemy combatant, he had to be given due process. The Supreme Court, in *Rasul v. Bush* and *Boumediene v. Bush*, held that those in Guantanamo had access to federal habeas corpus. It is unclear what remedies federal courts can give; that is an issue pending right now before the Supreme Court. It is also unclear whether or not habeas corpus will extend to those detained in rendition camps, and that is now pending in D.C. courts. It is unclear what remedies will be available, for example, even the Obama administration is urging a broad state secrets doctrine that would preclude any civil suits for abuses.

An example of this, before the Bush administration, was a man by the name of Khaled El-Masri. El-Masri was stopped at the German border, he was stopped based on mistaken identity. He was simply confused with another individual with the same name. Nonetheless he was taken to a rendition camp where he was brutally tortured. According to Jane Mayer's book, a high official at Langley had the suspicion that he was somebody with Al-Qaida ties, and as he did not reveal any useful information, the extreme interrogation of torture escalated. Once it was discovered he was there by mistake, he was dumped on the streets of Albania. He brought a lawsuit for recourse in federal courts. Ultimately the Court of Appeals held that the because of the state secrets doctrine, he could not get any recourse. The Obama administration has considered continuing the position of the Bush ad-

ministration using the state secrets doctrine to block any judicial review.

So these two premises: one, that individuals who are detained and treated where no law applied, and that no court would have the opportunity to review, got us talking about universal jurisdiction. Going along with them, I think, is the choice of the Obama administration not to investigate or prosecute those in the Bush administration responsible for violations of the law. Entirely for political reasons, the Obama administration has said that even if those in the top-level of the Bush administration had violated the law it would be better not to have a truth commission, better not to have an investigation, better not to have prosecutions.

This explains then, why we're talking about universal jurisdiction. Well, the second point I want to make I hope is the most obvious. All who are detained must be done so in accord with the Constitution and international law. There is no authority of any government to act unconstrained by any law. No. I can give you a pragmatic reason for this. I've given so many speeches since September 11th. What I've always been surprised to see is that individuals in the audience mostly in agreement with my position are those who have served in the military or with loved ones in the military. What I've heard from them over and over again is, "How can the United States expects foreign governments to follow international law in treating American prisoners if the United States doesn't follow international law in treating foreign prisoners?" There's also a principle that's involved here. It's the principle of the rule of law – that when the government deprives individuals of liberty, it has to follow the law. The rule of law requires that there be predictable legal standards and that they be enforceable. And those standards exist. The standards are following the United States Constitution. Now the reach of the United States Constitution is uncertain.

We know the Constitution applies to anyone who is apprehended in the United States. There's no doubt the Constitution applies to Jose Padillo or Ali Al-Marri who were apprehended for actions in the United States. I think it applies clearly to any who are detained in the United States. That would include then Yaser Hamdi or anyone brought to the United States. I think by implication, the Supreme Court in *Hasul* and *Boumediene* were saying that Guantanamo, since it's under American sovereignty, is also covered by the Constitution. Does the Constitution apply to rendition camps? That we don't know. But even there, there's law to be applied. Professor O'Connell put it out. There are the Geneva Courts, there are the covenants of individual liberties and civil rights. And my position is that anytime any government is detaining individuals, treating individuals, it has to comply

with the law. There is no black hole where individuals can be held and treated unconstrained by the law.

Well this then brings me to the third and final point I'm going to make. To me this explains why universal jurisdiction is appropriate. It is appropriate for tribunals throughout the world to try those who violate their national standards. Now it might seem that this is a radical proposition, but it's been part of American law, at least with regard to civil liabilities, since the earliest days of the republic. One of the very first statutes that Congress adopted was the Alien Tort Statute. The Alien Tort Statute creates civil liability in American courts for those who violate the law of nations. Just a few years ago, in *Sosa v. Alvarez-Machain*, the Supreme Court reaffirmed that individuals can be sued in the United States for human rights violations, even if they occur elsewhere. And there have been lawsuits brought under the Alien Tort Statute, successful ones, for human rights violations that occurred throughout the world.

This is universal jurisdiction. Tribunals have been created that exercise universal jurisdiction. To give you an example - the Nuremberg Tribunal that existed after World War II. What authority did the United States and other notorious nations have to try German war criminals? Their defense was that they were just following the law of their country and the United States took the position and, nations throughout the world, that there is a law of nations and that tribunals can be created to enforce that law of nations. That is what the principle of universal jurisdiction is about.

So is it appropriate for Donald Rumsfeld to hold you and others for violating international law? Yes, now whether they can get personal jurisdiction over these individuals is a different matter. But in terms of subject matter jurisdiction, universal jurisdiction exists. I conclude with two quotes from the late Supreme Court justices. One is from the late Justice Robert Jackson who said, "The Constitution is not a suicide pact." Of course he is right. But before we give up constitutional rights, is it really necessary to do so for national security? The Constitution has been able to be complied with for 200 years. The point of my examples from the beginning is when we deviated from it in the name of national security, did we really make the country any safer? The other quote comes from the late Justice Lewis Brandeis, he said, "The greatest threat to liberty will come from a proclaimed act for beneficial purposes." He said people know to resist the tyranny of despots. He said the insidious threat to freedom will come from well meaning people with zeal, with a little understanding of what the Constitution is about. If Lewis Brandeis ever knew John Ashcroft, or Alberto Gonzales, or John Yoo, or Dick Cheney, it couldn't have been better words for them.

RABKIN COMMENTARY

Professor Jeremy Rabkin: I have a different view or two. And I guess I should say, when I was invited to come here, I was told they really wanted John Bolton, but he wasn't available, you're his understudy. I said, "Oh, thank you." To be the understudy of John Bolton is very flattering, and I will try to live up to that distinguished honor.

What you just heard Professor Chermersky say was we have been doing this since 1789. We've been doing this since 1789 because we've always had this view if you commit a terrible crime you should be punished. And it's not punished by American authorities, you should be punished by international authorities. That was always our view.

I want you to just stop and think. He gave you his version of American history: terrible depression through the first world war - some people were put in jail. Alien-sedition Acts - some people were put in jail. Here's my version of American History: for the first hundred years we had millions of people in awful bondage in slavery. The first twenty years after the Constitution went into affect we were participating in the international slave trade at a time when everyone else in the world thought, "oh that's really awful." We did a lot of bad stuff in the Civil War, as probably some people from the South remember, and let's just skip to more recent times. He's concerned about, "some people were prosecuted for their speeches." We killed about 600,000 German civilians by bombing their cities in the second world war, and then as you recall we dropped two atomic bombs on Japan. Now if it were true that universal jurisdiction was "always part of world heritage law," you have to ask how come General Sherman, how come General Grant weren't afraid to travel the world? How come southern officials who were involved in the slave trade weren't afraid to travel the world? How come President Truman and people in his administration weren't afraid to travel the world? And of course the real answer is this is a doctrine that is made up which never previously existed. We did not think in 1789 we could try anyone or that anyone could try us. This is a very, very recent creation.

Don't be misled by their focusing on John Yoo. That's, I mean I'm sorry, but this is a fetish. I guess law professors are upset about it, and I'm a law professor. But the truth is, right now, President Obama is ordering air strikes on people who are not combatants in Pakistan and in Yemen. If it's true that there is international law, and it is absolutely clear because Professor O'Connell and the Red Cross have said so, so it's absolutely clear, you are either engaged in a recognized international conflict, which means an international conflict in a particular place where there's armies fighting, or else you are entitled to civilian trials, or otherwise it's a black hole. Obama is doing some-

thing much worse than anything John Yoo did. What Obama is doing is killing civilians in Yemen and Pakistan without any warning, let alone a trial. Let's all take a deep breath and focus on that. We aren't talking about John Yoo; we are talking about Barack Obama. And, we are probably talking about Eric Holder and people in the Justice Department who told him, "Yeah, that's okay." We're for sure talking about people in the Defense Department who not only said its okay, but salute it, and did it. So we're not talking about the Bush people, we're talking about Obama, we're talking about now. What's happening in the world? Well, some people criticize, some people raise questions. I haven't heard anyone say there should be universal jurisdiction trials of Obama and his cabinet in Europe. And why not? I think the real reason is because none of this is serious, we're just kidding, and it's all just stunts. Let me start with, oh let me just say one other thing on this rebuttal - we were talking about how terrible it was that people who were being held - combatant people who weren't really combatants were being held in Guantanamo, and wasn't that terrible?

Because what I understood Professor O'Connell to say was there are only two categories: you are a privileged combatant in which case you can hold people - because it's a real war, and you are privileged to be a combatant in a real war, and if you're captured in a real war you can hold them; or else there has to be ordinary due process. There is no in between, that would be a black hole, and that would be a war crime or, in any way, a crime against humanity, or any way against international law to do the "in between." Well, if that's really the doctrine, and if people who say, "Yes, it's OK to do the in between," are international criminals who, if not tried here, can be tried elsewhere, we should start with Justice O'Connor, she's still alive. And she's out there. She's not in office, so she won't have official immunity. Let's get her, because she authorized this. She said, "Yes." You can hold people in Guantanamo. It doesn't matter where they came from, it's not just people that were captured in a war zone, not just combatants. You can hold them there if they are dangerous. And if they are right, if that's against international law, let's have the (Germans? Journalists?) go after Justice O'Connor. Good luck.

I want to start by saying - I mean what I wanted to say - I think if we want to talk about collision. I guess my fellow panelists were saying, "Well there is no collision because good people in America are for universal justice, and the world is for universal justice, and the constitution is for universal justice, so it's all universal and it's all just, and there is no collision." I disagree with that. And I want to start by saying I think there is question whether the Constitution does authorize universal jurisdiction. There is this clause, of course, in Article I, Section 8, Clause 10: "The powers of Congress include the powers to

define and punish piracies and felonies committed on high seas, and offenses against the law of nations.” If you stop and think about this, which almost no one does, it’s interesting that they break out those things separately. Why don’t they just say offenses against the law of nations? Why piracy, and other offenses on the high seas? Why isn’t that all included in the law of nations? A really excellent article by a scholar at Northwestern, Eugene Kontorovich, who used to be my colleague at George Mason University – great article if you are really interested in this – and he digs out that, actually if you go back to the founders, they thought of these as separate categories, and what they were really thinking about was piracies committed against Americans, offenses on the high seas committed by Americans, and offenses against the law of nations committed in the United States. Each one of these separate items had a different jurisdictional basis.

There was actually a big debate in 1800 in the House of Representatives involving the sailors who had been involved in a mutiny on a British ship. They were British sailors who killed their British officers. Some of them came into the United States, and President Adams extradited them back to Britain for trial. This was criticized, and people said, “Why are we giving in to Britain? They won’t get justice there. We should have our own trial.” Somebody got up in the House of Representatives and said, “We couldn’t possibly have jurisdiction over a crime committed on a British ship by British nationals on the high seas.” He said, “That clause in the Constitution which enables Congress to define and punish piracies and felonies on the high seas can never be construed to make to the government a grant of power which the people making it do themselves possess. The people of the United States have no jurisdiction over offenses committed onboard foreign ships against a foreign nation. Of consequence, in framing a government for themselves they cannot have passed this jurisdiction to that government.”

In other words, the meaning of this clause couldn’t possibly refer to “you can just try anyone for anything without any jurisdictional connection to the United States.” The person who gave this speech was John Marshall, Congressman from Virginia. President Adams said, “That is a terrific speech; you should be Secretary of State.” And after that he said, “Come to think of it, you should be Chief Justice of the Supreme Court.” And his decisions for the Supreme Court are consistent with this in regard to piracy. He said, “We don’t have jurisdiction over even acts of piracy if committed by non-Americans against non-Americans out on the high seas. Universal jurisdiction is not something that the United States can exercise.”

Nobody has yet found a case in which the United States did exercise this in the nineteenth century, or anytime in the twentieth century until, really, it starts with this case - *Filartiga v. Pena-Irala*

in 1980, in which some international lawyers persuaded the Second Circuit that, “Oh yes, we could have jurisdiction under this 1789 statute which doesn’t mean what you used to think it meant.” If it really meant universal jurisdiction, anyone can file suit against anyone else in American courts. We should have loads of cases because that would be so much fun to do. A lot of people would like to have done that. No one before 1980 thought this, and the Supreme Court has subsequently told us, “Well no, not really. Actually kind of . . . no.”

So, I think it is a real question whether we are authorized to do this by the Constitution, whether Congress is. The one important deception is if whether it were by treaty, then I think that Congress could assert jurisdiction, but it wouldn’t be universal jurisdiction. We would have jurisdiction in those situations in which other countries, signatories to the treaty, had agreed to it, and I think that it could cover certain international tribunals. I think in the case of Nuremberg, our actual justification was you surrendered unconditionally to us, we are now in charge – the four occupying powers. It was delegated authority, it wasn’t universal jurisdiction. I believe the reason why Marshall and other people, to begin with, thought this cannot be right – it cannot be this free floating, just put anyone on trial for anything if you want to. I believe they have this understanding that the logic of that would undermine our own Constitution at home.

Let me just quickly, I don’t have time to argue this through, but let me just pose this to you. A few things in the United States Constitution – Congress has the power to declare war and to make rules for the government in regulation of the armed forces. If I understood Professor McConnell’s argument it is that when you act in a way that violates international standards, other countries can prosecute you if you don’t prosecute the people who did it. So suppose Congress declares a war that other countries think is improper under international law. Suppose we authorize our troops to do things that other countries think are improper. It seems to me the logic of universal jurisdiction is that the other countries can then put our defense officials on trial, maybe our members of Congress on trial, and where that goes is that we don’t get to decide for ourselves. And these provisions in the Constitution that vest this power in Congress become nullified. The President has the power under the Constitution, Article 2, to pardon offenses against the United States. Well, if other countries don’t have to respect the pardon or the amnesty that the president may give, has the power to give, then it turns out that he doesn’t really have an effective pardon power because people still have to be afraid that, “Oh, I am going to be prosecuted in Germany or somewhere else.” So the pardon power which was supposed to be a way for us to settle some claims, it doesn’t settle them anymore, we always have to be worried about Spain, France, Germany, one of those other countries. The Con-

stitution is the supreme law of the land, according to Article 6, that means it overrides everything else. Well, how can it if adhering to our constitutional norms we can be prosecuted in other countries?

A point which I do really want to emphasize – we shouldn't think of this as just the favorite provisions of my colleagues here. There are a lot of things that other countries think that are international law or should be international law. Professor McConnell mentioned customary international law. Customary international law is very, very loose. A lot of people think customary international law can be determined by UN resolutions, where we have now had I think four UN resolutions saying basically if you insult Islam you have violated human rights, and you should be prosecuted. A lot of countries have a view of free speech which is free speech needs to be constrained if some people are offended. It is ultimately the international covenant of civil and political rights that you have no right to advocate for war or engage in hate speech. A lot of countries think that allowing this in America is wrong, or they are moving towards that view. So I think you can easily extrapolate, not very far down the road, other countries saying that we are all suppressing this, so you should be doing the same. I hope Professor Chemerinsky will be on my side then and say, "Oh wait, actually America is entitled to have its own view and we shouldn't allow foreigners to prosecute Americans for living under the American Constitution."

But I believe the logic of what he said leads in the other direction, which is if you don't adhere to the international standard then other countries have the right to prosecute Americans for not living up to what these other countries think is the proper international standard. I want to say in conclusion I think if you think this through, it is not only potentially at odds, there is collision, potentially, with the American Constitution, but I think the whole idea of constitutionalism. Because the logic of this is not limited to actual treaties but to interpretation of treaties, the Geneva Convention citation that you have there – gee there should have been lots and lots of prosecutions under that if it were understood by other countries the way it was presented. Nobody has had such prosecution happen. I don't think it was understood that way. I don't believe the United States would have agreed to that in 1949 if they understood what they were saying was, "Oh yeah, and if you think there is any question about how we fought our most recent war go ahead and prosecute Americans." I don't believe that that's what it means. But if you are saying other countries interpretations of treaties, and even worse, other countries interpretations of evolving standards of practice, decency, custom, whatever you want to call it, if you think those things lay the basis for prosecution, then there is not just potential collision with our own Constitution, but with the idea of constitutionalism.

The history of the world, if I could give my history. This is somewhat broader. People used to think there should be a universal authority - a papacy, a caliphate, because they know what justice is in the way that God wants it to be. And the other alternative there was there are many gods, and every city has its own god and therefore should be ruled by someone in contact with the particular god of the city to say what is just and unjust. In the history of the world we are constantly getting sort of theological, theocratic, interpretations, with people claiming the authority to enforce them. What I think is most crucial about modern constitutional government and how we have come to understand it is this is a way in which a people constitutes itself and says these are the rules by which we agree to be governed.

This vision of universal jurisdiction which just sort of flows along, which just evolves and has new interpretations of new practices is really at odds with a fundamental understanding that we have in the modern world of what a constitutional government is. Constitutional government is, in the first place, what you want to know is who is authorized to make law. We know what it is here – it's the House the Senate, the President. We have this little debate about reconciliation and the filibuster, but we know for sure that it is the House, the Senate, and the President. Obama cannot say, "You know what, the Senate is just too much trouble. I won in the House – that is good enough." We have a constitution that spells this out. We have nothing like this for the evolving standards to be applied by the courts invoking universal jurisdiction, and so I think we, and we know who gets to vote for the House and the Senate. We have rules about this, and some of these rules are in the Constitution, the most important ones are – this is how we constitute ourselves. Who gets to hand down decisions invoking universal jurisdiction? Which countries? Is it only democracies? What about the tyrannies? What about the anti-American countries? What about the really nasty hostile countries - does their authority count just as much? It's supposed to be universal.

We have really no way of knowing where this is going or what it is really about, so I think potentially it is really a very serious collision, and I think it is very important for us to be clear, however much you hate John Yoo, call him names, write articles, denounce him, if you want you can say that he will never be hired at your law school. If you want, you can even say that the Justice Department was wrong. By the way the Justice Department cleared him, so we are saying now that the Justice Department is not fit to decide whether John Yoo committed a crime, we need a court in Germany. Don't do that, that is a very dangerous thing, let us decide for ourselves what our standards should be, and who should be punished. It's really the worst thing you can do. I think it is a betrayal not only of this country but of the idea of constitutional government, and I firmly do believe that it is a betrayal

of any possibility of international order, countries living together in peace if you let loose this very new thing which has no real foundation to it, and very little practice behind it. Yeah, if we don't like something you did our courts can just go after you even if you have no connection to our country, it is a really terrible mistake – and we shouldn't let it loose. Thank you.

DISCUSSION

Preis: We've heard three great presentations from our guests. And I am sure each of them will have something to say to the other two, so we can take this in any order you'd like, who'd ever like to begin.

O'Connell: I am not sure I followed everything Professor Rabkin was putting forth, but I do feel very strongly about a number of his points, and I want to just respond to a few of the most important. I heard Professor Rabkin say again and again something about Americans shouldn't be prosecuted abroad. Americans are prosecuted abroad regularly. If they are living in another country in France, in Chad, in Costa Rica and they violate the law of that country they will be prosecuted. It is simply a myth that, and I am not sure exactly what Professor Rabkin had in mind, that Americans are somehow only subject to U.S. national courts. That is not the way the world works, and we have as a world agreed that we held several very important principles in common, and that these are the rules of the road for our coexistence as an international community, and these rules, the most important rules, we agree should be prosecuted, should be enforced and if one, if the state that is the most natural state to do it, usually the state of nationality doesn't. Others will. These are the agreements we've made. We don't live up to our agreements very well, but I think it is our obligation, especially as lawyers, to constantly work to make sure we do uphold our highest principles that we have committed to in our treaties and in our most important rules of customary international law. We decided at Nuremburg, it was this country that decided that crimes of genocide, war crimes, violations of the 1929 Geneva Convention for the protection of prisoners, and crimes against humanity, fundamental human rights crimes, should not go unpunished.

And we, not out of the blue, but working on a model that had already been developed in the Treaty of Versailles, for trying the Kaiser in the first world war, we created a court that would hold persons, on behalf of the whole international community, for these important crimes. That was 1946 that the judgment in the international military tribunal came down. The Geneva Conventions that we honor today, and we are a party too, that govern our armed forces in the field were adopted in 1949, three years after Nuremburg. So, Professor Rabkin, we knew very well what we were doing in Stockholm at the Geneva

Convention negotiations, and in the final negotiations. We sent some of our most brilliant military officers to negotiate for us at those Geneva Conventions.

These are the documents that they wanted, and these are the documents that we train our armed forces in over the years that, under which, we have modified our uniformed code of military justice to comply with so we are at the international standard, that we have tried persons such as Lieutenant Calley, where we did fulfill our obligations, and then in the Gulf War, we fought in a model way. My husband was a United States Army interrogator in the Gulf War, and he was also the Geneva Convention's trainer for his division, and he is not a lawyer, but he has always told me that it was the fact that he and his men knew what the rules were that made them feel that they were fighting in a righteous way and in a righteous conflict, and in which we did not have the cases of Post Traumatic Stress Disorder. Our soldiers then knew the rules and they knew they were fighting in compliance with them. When we captured persons, we didn't know if they were combatants subject to detention or not, or might have been civilians, we held hearings under Article Five of the Third Geneva Conventions. We held almost 1500 such hearings. We did it by the book. We kept prisoners according to the Geneva Conventions standards, and we won that war after 100 hours of fighting. Many persons in the Iraqi armed forces surrendered to the United States armed forces because they knew they would be well treated. We are still in Afghanistan, eight years after 9/11, nine years, going on nine years. I suggest to you if we had made the same care and concern about how we were fighting that conflict, we would be in far better shape today.

But the other thing that I do have to say, in agreement with Professor Rabkin, is that I never said the Obama administration has somehow turned the page and has brought us to a new day in which we are in compliance, in which we are supporting the rule of law in the world, in particular the Geneva Conventions and the important human rights treaties, especially the convention against torture. Very sadly, I believe the Obama administration is taking very bad advice and following along on the Bush administration's path that is not helping our country, that is not helping our world. I have written a number of articles in which I have argued that the use of drones in Pakistan today, being run by the CIA, not by our armed forces, who have no right to use military force even in an armed conflict, and there is not an armed conflict in much of Pakistan in which we are using drones. And we do not have a right to do it, and I believe it is as serious a violation of the Geneva Conventions and the law of armed conflict as many of the violations that occurred during the Obama administration. So, I do take umbrage with Professor Rabkin that he

would suggest that this is a political position rather than an objective and important legal position that I put forward.

Rabkin: I totally agree with your first point. Of course Americans, when they commit a crime in another country are subject to the jurisdiction of that country. No one is disputing that. I didn't think that had anything to do with universal jurisdiction. Every country has jurisdiction in its own territory. I also concede that when somebody makes a decision in the United States that has an effect in another country, victims in the other country might have some claim to jurisdiction. That's going to be difficult, and we hope that they will be really cautious and careful about that, but what makes universal jurisdiction so dangerous is it's inviting 200 countries in the world to say, "Ah yeah, come to think of it, we have a view on this too." And I do not think it is true that there is any history of that. If there were history of that, the world would have been much more chaotic than it was.

I want to say briefly what you said about, "This is something new because in the Vietnam War we prosecuted Lieutenant Calley." Well yes we did, and then President Nixon pardoned him. He committed a monstrous crime, right? This is a guy who burned this village and killed a lot of people – I think about 100 people – women and children – a really ugly, horrible crime. President Nixon pardoned him, I think after one year.

O'Connell: Commuted his sentence. Didn't pardon him. Commuted his sentence.

Rabkin: Commuted his sentence, eh!

O'Connell: He shortened it from life in prison.

Rabkin: To?

O'Connell: To house arrest; he did serve some time.

Rabkin: Not very much! I think there were a lot of things that we did in Vietnam which were very questionable and a lot of the world thought that in fact it was a terribly unjust war and the Americans were behaving very badly. We didn't see any prosecutions of Americans at that time. If Vietnam wanted to assert jurisdiction, that would be something else, but we didn't see France, Germany, the Netherlands, Spain doing it. I have absolutely no doubt that your husband behaved extremely honorably. I'm in favor of the Geneva Conventions. I'm in favor of conforming to the right standards of interrogation. I didn't mean to mock any of that. I do say though that there are reasonable questions of interpretation, and it is not reasonable to have

third parties that have nothing to do with it come in and say, “No, the American interpretation is wrong, or the American practice is wrong. And, therefore, we’re going to prosecute.”

The last thing, you said that you were taking umbrage that I was suggesting that you were being partisan. No – I withdraw that. I am sorry. I didn’t mean to say that you were being partisan. What I did mean to say, and will say again is I think it is short-sighted for anyone to think that this approach to justice once it is unleashed can be limited to the people you happen to think are really bad, like John Yoo. Once it is unleashed in the world it could be applied to a lot of people, and although you think that President Obama is behaving badly, I personally think that what he is doing is very reasonable. I have a lot of respect for the armed forces, I don’t believe those JAG lawyers would be all so quiet if they thought that it was against international law. So I think that a lot of serious people, who are at least as serious as you and me, and probably more so because their careers really revolve around making these decisions, have told President Obama that this is a reasonable thing to do, and I don’t think that it should be second guessed, at least at the level of criminal law, by countries in Europe who will not do anything to help us actually fighting in Afghanistan.

Chemerinsky: I think that all three of us agree about the importance of constitutionalism and of enforcing the Constitution’s protections for individuals. I think we all agree about the importance of treaties and treaties being enforced. So, what we’re really talking about is: what is the best way to achieve this?

Now, when I was talking I made three points. One was that since September 11th the government has claimed the authority to detain and treat people unconstrained by the Constitution or international law. I think that it is so important to keep this in mind. It is the context for our discussion of universal jurisdiction, and if we’re going to talk about what is unprecedented – this really is unprecedented in American history. In the Vietnam War the United States created an accord with the Geneva courts, tribunals to determine whether or not individuals were Viet Cong or innocent civilians. Even though the Viet Cong were not following the protocols of war and the Geneva Accords, we held the tribunals that the Geneva Accords required. As Professor O’Connell said, we did this with regard to the Iraq War. To my knowledge, never before in American history had the United States claimed it could detain and treat people completely without regard to the Constitution or international law. To my knowledge, never before in American history had the United States government claimed the authority to torture individuals, unconstrained by federal law or international law. Going back to the time of George Washington, the

United States always prided itself on humane treatment of foreign prisoners, even when our enemy was not treating American prisoners in a humane fashion. The United States was a key party making sure the Geneva Accords were drafted and adopted.

The second point that I made was that all who are held, all who are treated, must be done so in accord with the Constitution and international law. Professor Rabkin talked about the importance of Constitutionalism, and I could not agree more. There should never be an instance where a government can hold individuals unconstrained by any law. That is inconsistent with the very notion of the rule of law.

So that brought me to my third point, the concept of universal jurisdiction. Now I realize that one way all of us on this panel have been at fault this afternoon is we've never defined what we mean by universal jurisdiction. And I realize that part of the problem, what may be generating unnecessary heat, is that we may not have the same definition of universal jurisdiction. I think universal jurisdiction is the authority of an accord to try individuals, civilly or criminally, for conduct that did not occur within its territorial jurisdiction. Now, we may have different definitions of universal jurisdiction, but I think that is what we are talking about here. And then there is really a descriptive and a normative question: descriptively, has universal jurisdiction ever existed? Have nations ever tried individuals for things that occurred outside the territorial jurisdiction? And the answer is it has gone on for centuries. I gave the example of the Alien Tort Statute; it was adopted in 1789. It says that federal courts have jurisdiction to hear civil suits against those who violate the Law of Nations. Now, we can certainly argue the extent to which it went on before 1980, we would disagree over that, but I don't think we can disagree that the United States Supreme Court, just a few years ago, in *Sosa v. Alvarez-Machain*, reaffirmed that federal courts have the authority to hear civil suits in actions that occurred outside of the United States, outside of our territorial jurisdiction, that violate the Law of Nations.

I'll give you one example: *Doe v. Unocal*. There was a lawsuit brought in federal district court in California against Unocal for using slave labor in Burma. The plaintiffs were individuals whose rights were violated outside the territorial United States. I can give you dozens of civil suits that were brought by individuals for human rights violations that occurred outside the United States. Descriptively, there's no doubt that there's this form of universal jurisdiction.

Both Professor O'Connell and I have mentioned the Nuremberg tribunals. There's no doubt that this occurred – they were trying individuals for things that were lawful under their country's law. And the United States, leading the way, said there are crimes against laws of nations. Now, so in this sense, universal jurisdiction has long existed. Now, Professor Rabkin says, but look at all the instances where uni-

versal jurisdiction wasn't exercised. And of course he's right, but the fact that it hasn't been used in many instances doesn't deny that, descriptively, it exists. Now there are many reasons it hasn't been used in the past. I briefly mentioned the concept of personal jurisdiction – I mean, the difficulty of personal jurisdiction is enormous because you can hold whatever kind of trial you want, but it's meaningless if you don't have the territorial authority to bring that person in. And nations often lack that. And the lack of territorial authority of personal jurisdiction is why you often don't see universal jurisdiction exercised. But the fact that it hasn't been used in many instances descriptively doesn't deny that it exists.

Also, power matters enormously. The reality is that those who win the war can then exercise universal jurisdiction; those who lose the war don't. Those who have power can exercise universal jurisdiction; those who don't haven't used it. I think of the trials that have occurred at the Hague, say, against Milosevic. That's an exercise of universal jurisdiction.

Now – so, descriptively, it exists. And that leaves us to talking about: normatively, should it exist? I think a lot of the arguments that are made against it are really strawpersons. For example, Professor Rabkin repeatedly wants to talk about – what are the amorphous standards that are used? I'm talking about the Constitution and treaties that exist. I'm not talking about some amorphous concept here. We ratified the Geneva Accords. We ratified treaties that prohibit torture. And the question is: if that law is violated, can there be prosecution?

Professor Rabkin wants to talk about the importance of constitutionalism. We agree – to me, that's what the rule of law is all about. And to the extent there are written legal standards, or for that matter, customary international law – and they're there in the form of our Constitution, treaties, or what the Supreme Court has referred to as the law of nations – then I think there can be prosecutions. But I'm going to agree with Professor Rabkin that there is a danger to universal jurisdiction. There's certainly the possibility that people could be prosecuted in a way that we don't like. Maybe it will be exercised against those for exercising free speech that we value. Now I take some comfort from Professor Rabkin's point that it hasn't been used this way. So the fact that it hasn't been used this way leads me to believe it's not likely to be used in that way. But there is that danger. But there's also a danger of not having universal jurisdiction. Because what happens when people violate their own laws, the laws of nations, and there's nowhere they're held accountable? Their country won't prosecute them – what happens then? Where would the German war criminals have been tried but for an assertion of universal jurisdiction? Where would Milosevic be tried but for an assertion of universal jurisdiction? And so in the end, as you think about this discussion,

what it really comes down to from a normative perspective: are the benefits that we gain by having the concept of universal jurisdiction, as a way of enforcing the rule of law, greater than the risks that there are that people might be tried for things that we don't want them tried for?

I take comfort in the very history that Professor Rabkin evokes and believes – that it's clear to me that, if we believe in the rule of law, there has to be someplace where there can be prosecutions. And I think that history gives us reason not to be too concerned about that.

Audience Member: My question is directed to the panel, but particularly to professor O'Connell. Is there some way that you can define either enemy combatant or armed conflict, in a way that affords proper balance to the individual liberties and to protection of security?

O'Connell: Well, I think the way international law has defined both combatant and armed conflict is respectful of security concerns. There had been a move in some years, in particular, by human rights advocates, to eventually restrict all military force to a rule of necessity, basically a law enforcement rule. That is not the rule in international law today. When a state is attacked significantly, as Kuwait was invaded by Iraq in 1990, international law does allow a right of self-defense and the use of an armed conflict military force of a significant level to liberate a state in that case. And those who are members of the regular armed forces are combatants, defined in the Geneva Conventions and in the additional protocols and in the paper I included in the materials just in case you'd like some more detail on this and some footnotes. It's called *Combatants in the Combat Zone*. But I think in America today we're still misled by this belief that we can accomplish great security through military force. Military force is suitable and appropriate, as I said before, I'm married to a soldier, so I do think that it's appropriate in some occasions. But I think that we have had a tendency, in part, due to our own history, and we're a country that was built under both the rule of law and in a revolutionary war, so we've had a great deal of confidence that we can accomplish a lot for our country through military force. But we're at a time now when we have to be more clever than that, when we have to use far more sophisticated and fine-tuned responses to the challenges to our country, of many kinds, in particular, security.

What we've seen in the actual cases is that law enforcement, through international cooperation, is the most effective means of responding to terrorism in particular. In the last month, over fourteen high-ranking members of the Taliban have been arrested in Pakistan. That is a far more sure way of getting a stable Pakistan, one that doesn't foment and create persons who want to do serious harm to the

United States than attacking unlawfully, under international law, which is well known to Pakistanis and creating revenge and anger against the United States, which only fuels the cycle of revenge and creates a more insecure place. International law is very old law. It's even older than the United States Constitution. 1648 is when we tend to date modern international law. The rules on the use of force have grown up slowly over time, through great consensus, through trial and error, through great catastrophe, and doing better. And by now, if we would comply with, and I agree with Professor Rabkin that we have a poor record of really getting enforcement, and that's some place where I think we can do better, but these rules are wise rules that will guide our country to a better international community and a better future. If we had complied with the rules of international law, we would not have invaded Iraq, we would not have opened Guantanamo Bay, we would not have tortured persons. And all three of those have led to great insecurity for our country. So in my view and after almost thirty years of studying international law, especially the law of armed conflict, I would suggest to you that it's the best guide for creating both a world in which human rights will thrive, including our own human rights as Americans, and in which we will have greater security going forward in the future.

Audience Member: I have a question for Dean Chemerinsky, especially regarding your second point about how the Bush administration claimed that no law applied to these detainees and how universal jurisdiction needed to be invoked to make certain Bush officials accountable for their acts according to that stance. However, doesn't international law require a different outcome? Specifically that the United States courts take up these claims because local remedies must be exhausted. Local law has to apply before international law, so isn't it far too early to even consider evoking your universal jurisdiction for the Bush administration's claims because the United States courts still have to interpret the Constitution and in fact have granted these detainees due process rights and have kind of struck down the Bush administration's stance.

Chemerinsky: Your point, I think, is a simple one, that all individuals whose liberty is denied, all who are treated at the deprivation of liberty, must have the law applied, that the Constitution and international law have to apply to them. I completely agree that the preferable forum is a domestic forum. The question is: can there be an international forum? And as uncomfortable as it is, I don't see how if you'll accept the premise that our leaders violated treaties, international law, why they're any more immune from the forums that tried Milosevic, why they're any more immune than others who have violated international law. So yes, in terms of your question, but I don't

think that that denies what I'm saying, only to the extent that Spain wants to say that these individuals can be held accountable for violating international law, then I don't see how that's any different from instances where American courts under the Alien Tort statute have held individuals to be liable for acts that occurred outside their country. Now, when they say that the Alien Tort statute was wrong, that the Supreme Court was wrong in *Alvarez-Machain*, but that again confuses the descriptive and the normative.

Rabkin: Ok, so I'll use this opportunity to respond to what is I think a grotesque misrepresentation of what we're talking about. What Professor Chemerinsky is saying here is anytime American courts or any court takes jurisdiction over an incident which occurred outside of its territorial limits, well that's a precedent for universal jurisdiction. No it isn't. Not at all. I don't know anyone who seriously believes that. Of course there are some little, at the margins, claims of jurisdiction for things that happened outside your territory, but that's because there's some other nexus. It involves your citizens, either as the perpetrators or as the victims. That's the usual thing. What universal jurisdiction means is anyone. Universal means everyone. Anyone can assert jurisdiction over any incident that is satisfied by somebody's idea of whatever it is that is now in universal jurisdiction. Really bad human rights violations, whatever they are. Anyone, without any other nexus, just saying, "We in Germany believe in human rights (because we all know how much they believe in human rights) so we have the duty to go out there and prosecute Donald Rumsfeld."

Now that is not the Spanish case. The Spanish case is not universal jurisdiction at all. The Spanish case is: these are Spanish citizens who were injured in Guantanamo and we're standing up for them. I'm unhappy about that, but I don't think, woo that's terrible, that's a new precedent. That's a typical kind of conflict of laws, conflict of jurisdiction thing, and we have to negotiate with Spain about what to do there. That is going to happen in the world. The United States itself does that and has done that from the beginning. The piracy clause in the Constitution – surely, surely, nobody ever thought that it was involving things that happen in the United States. By definition it says in the Constitution "on the high seas," but that doesn't mean it's precedent for universal jurisdiction. What they were thinking of was either pirate attacks on American ships or Americans engaging in piracy. Well good then, we would have jurisdiction.

That is very different from saying that the whole world can jump in whenever it wants to. That is a really bad idea. Among other reasons it is a really bad idea, and not only because there are so many other countries and it is so hard to bargain simultaneously. It's a bad idea because it makes the issue completely abstract. You can't say, as

the Germans did, our paragons of human rights, we feel really bad that some people got killed in Afghanistan because we called in an air strike and it was a mistake. We feel really bad, a million Euros? Would a million Euros do it? Two million? I mean, they're trying to buy them off, which they probably will do. And that is not actually unreasonable. They're saying, "Oh, we're sorry but these things happen." If it's one country that is asserting jurisdiction, you could hope to deal with the actual litigants. Maybe not, but you have a better chance. If it's just a completely abstract claim based on just: this is wrong, and the world has an obligation to see that justice is done in the world. I don't think I'm caricaturing it. I think that is what Professor Chemerinsky is saying: "We need to have universal jurisdiction because we need to have this fall back to make sure that justice is done in the world." No we don't. This is preposterous.

I mean why even talk about some Americans did this and some Americans did that. How many people were killed in China? Fifty million? 100 million? I mean it's unbelievable what happened in China. How many people were killed by the Bolsheviks over seventy years of power in Russia? It's at least in the tens of millions. Nobody was prosecuted in Russia. Nobody in Europe was so worked up about Guantanamo and John Yoo. Has any of them said, "We've got to prosecute some of the worst Communist perpetrators in Russia."? Of course not. In China, do they say that someone has to be prosecuted? No, of course not. How is it that Europeans can go to sleep at night, knowing that monstrous crimes have gone unpunished? By the way has Spain ever prosecuted any of those responsible for Fascism? No. Germany? Did they really go through and comprehensively punish everyone? Ha, ha, ha. Don't be silly. So how is it that they can accept all these things? Well, they say the following, which is not unreasonable: "The world has to go forward and it is not always the best thing to ensure that everyone who deserves to be punished is punished."

If I could just give one last example which means a lot to me because I lived in Washington, and now I live in Virginia. President Lincoln said during the Civil War, "Those who have killed black troops during the Civil War, we will kill you. This is terrible. This is against the law of war." And what happened afterwards? We have an amnesty. No one was punished for that. People did terrible things but there was an amnesty. A decision was made, a political decision. It was more important to bring the country together. I believe this is the most generous interpretation of why people in Western Europe who were so high in their moral standards looked at Russia and China and said, "We're not telling you what to do." Move forward the best that you can. To say that that decision can never be made, there can never be an amnesty, there can never be a pardon unless you persuade 200

other countries and they relent and say it's ok to let John Yoo continue at Berkeley, this is not a recipe for a more peaceful world.

O'Connell: Just very briefly, I think they can find us. We are all on the World Wide Web. I just think in closing that the idea of a chaotic world out there, where Europeans are running after Americans in order to try them for all kinds of unfair reasons, while at the same time they are letting all kinds of Chinese tyrants and murderers go free. This is just a caricature, of course. We have very few of our most important treaties: the Geneva Conventions, the Convention Against Torture, and just a few other human rights treaties that provide for universal jurisdiction. And the fact that it's not being exercised more often, I think, is unfortunate. I do think that the United States should be encouraged to respect its own provisions of its treaties that it's committed to, and bring these prosecutions internally. That is the ideal. If we do not do it, and other countries that are equally committed to these very important, very few, very well-drafted, long-standing treaties, around which much of our law and much our understanding of how to be normative people in the world, moral individuals of moral countries, if we need encouragement to do the right thing here, that is why we are part of an international community. So, I don't want this sense that there is chaos running amuck. We have a system that we are committed to, that we have been committed to for a very long time, decades, this is new law since the second world war. I, for one, would like to see it better enforced, not let go because some people fear it will become a world of chaos. That's not what's happening now, and there's no real evidence that that is what will happen.