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Toward a Geopolitics of the History of International Law in the Supreme Court – Remarks by Lori F. Damrosch

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history becomes possible because Sloss, Ramsey, and Dodge have produced this valuable book.

REMARKS BY LORI F. DAMROSCH*

I am pleased to have been one of the contributors to the forthcoming volume that provides the occasion for the present panel.[1] David Sloss and his co-editors, William Dodge and Michael Ramsey, deserve congratulations for coming up with a concept for a much-needed research project, for assembling a group of scholars from different disciplines, for organizing an authors' conference that was a model of collaborative interaction, and for exemplary editing of the papers. The volume examines an astounding number of cases involving international law at the Supreme Court and should become an indispensable reference for lawyers, scholars, and judges. The contributors who are law professors examine these cases from the point of view of international law, U.S. constitutional law, legal history, and the comparative law of foreign relations. Those who specialize in history (who in some instances are also experts in international or constitutional law, and in other instances bring an outsider's perspective) have located the developments under consideration in the broad sweep of U.S. history and world history. As an example, John Fabian Witt challenged the authors participating in the conference to take a broader frame than what he called "insider doctrinal history," by standing outside doctrinal categories and looking at the social context in which law is embedded: under this approach, writing a history of law would be a "necessarily subversive act."

In opening the proofs of the volume, I was gratified to note the dedication "to the memory of Louis Henkin (1917–2010), who pioneered the modern field of U.S. foreign affairs law." In that spirit, and bearing in mind the recent work of co-panelist Mary Dudziak on perceptions of Supreme Court decisions rendered in wartime,[2] I will briefly diverge from my prepared remarks to draw attention to correspondence between the young Louis Henkin and Judge Learned Hand during World War II, which mentions one of the cases Professor Dudziak has addressed in her scholarship. Henkin clerked for Hand in the 1940–1941 term and was expecting to proceed to clerk for Justice Felix Frankfurter, but he was drafted in June of 1941 and sent to boot camp and then to North Africa, Sicily, Italy, France, and Germany. Judge Hand corresponded with his former law clerks who were serving in the U.S. armed forces in the war, and much of that correspondence is preserved in the Hand archive at Harvard Law School. In addition to extracts quoted in Gerald Gunther's biography of Hand,[3] I have drawn on several unpublished letters for a forthcoming tribute to Henkin in the *American Journal of International Law*.[4] I will quote from a different letter here, which mentions one of the Jehovah's Witnesses cases that Professor Dudziak discusses in her article:

> The Supreme Court Reporter gets through occasionally—and I thumb through it, stopping only rarely. Much of it has become foreign, legal clichés and words of daily use are strangers to me. I read the Civil Liberty cases—and with all the opinions, dissents,

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[1] Lori F. Damrosch, Medellin *and* Sanchez-Llamas: *Treaties from John Jay to John Roberts, in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE (David L. Sloss, Michael D. Ramsey & William S. Dodge eds., 2011).

[2] Mary L. Dudziak, *Law, War, and the History of Time*, 98 CALIF. L. REV. 1669 (2010).

[3] GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 535–38, 552, 682, 762 n.133 (1994).

[4] Lori Fisler Damrosch, *Louis Henkin (1917–2010)*, 105 AM. J. INT'L L. 287 (2011).

> concurrences and cross-concurrences I'm lost—but I was glad to see the Flag Salute Case go, even a little surprised that FF [Felix Frankfurter] didn't go for the Witnesses. Those door knocking cases leave me confused—What do you think of them, sir? . . . Somehow, it seems there's a new realignment on the Court, not quite congealed, which puts FF on a "conservative" minority of three or four. That doesn't really surprise me since—assuming the labels to mean something, and have nothing derogatory about them—we never thought him a great "liberal," any more than we used to think Holmes. But some people I know are going to have great ideological conflict—because they have made an ideology of Justice Frankfurter, and—to my mind—an ideology whose nature they mistake.[5]

Professor Dudziak writes that after Pearl Harbor, Justice Frankfurter said to his law clerk, "Everything has changed, and I am going to war."[6] The justice did not actually go to war, but his prospective law clerk, the 26-year-old Louis Henkin, did; and we know that the war changed him.

Professor Dudziak's article asks us to consider how the onset of war changes our reckoning of time. Does a new era begin when war begins? Is there a clear demarcation between times of war and times of peace ("normal" time)? Scholars of the Supreme Court have reflected on whether cases are decided differently if they arise in wartime, as contrasted to ordinary (non-war) time. In constitutional law, it is often said that restrictions on civil liberties are more likely to be sustained in wartime than in peacetime. But Professor Dudziak problematizes any bright-line division between war and non-war. The "shadow of war" may already have begun affecting the Supreme Court before the United States entered World War II, as evidenced by the decision in the first flag salute case, *Minersville School District v. Gobitis*,[7] where the Court ruled against the Jehovah's witnesses just as German troops were rolling into France in June of 1940. Frankfurter wrote the majority opinion, which some Supreme Court law clerks disparagingly called "Felix's Fall of France Opinion." A second case raising similar issues, *West Virginia State Board of Education v. Barnette*[8]—the very case that Henkin talks about in his letter to Judge Hand—was decided in 1943, after the United States had entered the war. There the Court reversed itself, taking a more deferential approach to civil liberties than in the earlier case, with Justice Robert Jackson writing for the majority and Frankfurter in dissent.

As Professor Dudziak so cogently explains in her article, "time" has no essential dividing points but is the product of social life, and "wartime" is historically contingent. World War II does not clearly demarcate periods of "before," "during," and "after"—including for the reason that a legal state of war or emergency continued for many years after the factual cessation of hostilities. The inevitable fuzziness about periodizing World War II is replicated in the scholarship on law and war, as well as in the Supreme Court's recent Guantánamo cases, where uncertainty about whether a war on terror would ever have a definite ending point shaped the approach of the justices who joined the opinions in favor of granting relief to the petitioners.

"Periodization" questions are fundamental to the conception of the volume that Professor Sloss and his co-editors have organized, just as they are fundamental in the study of history in general, and of legal history in particular. As Professor Sloss has explained, the editors

[5] Letter from Louis Henkin to Learned Hand, Aug. 30, 1943, dispatched from Sicily (on file with author; quoted with permission of Henkin family).

[6] Dudziak, *supra* note 2, at 1673.

[7] 310 U.S. 586 (1940).

[8] 319 U.S. 624 (1943).

divided the treatment of the subject into five periods—(1) from the Founding to 1860; (2) from the Civil War to the end of the nineteenth century; (3) from the turn of the twentieth century through World War II; (4) from the end of World War II to the end of the twentieth century; and (5) the first decade of the new millennium. The editors justify their chosen periodization in the editors' introduction to the volume; it was also the subject of some debate at the conference where the draft chapters were discussed. Some authors took issue with the demarcation of the given time periods or called for further attention to the relationships between these periods of U.S. history and overlapping periods in Supreme Court history (often correlating to the leadership of particular chief justices) or in world history, as well as in relation to doctrinal developments in international law. For example, David Bederman, in his chapter on customary international law in the late nineteenth century, refers to "periodicity" as "that great bane of historiography," in the context of mapping the Supreme Court's doctrinal treatment of international law in relation to a general trend in the intellectual history of international law that was contemporaneously under way to shift its conceptual foundations from natural law to positive law.

My contribution to the volume focuses on the *Medellin* and *Sanchez-Llamas* cases—the first occasions for Chief Justice John Roberts to place his imprint on how the Supreme Court would approach questions of international law during his tenure as chief justice. As the subtitle of my chapter indicates—"Treaties from John Jay to John Roberts"—the implicit periodization of my essay corresponds to the periods in office of Chief Justice Roberts's predecessors, many of whom (in contrast to the present chief justice) had had extensive experience with international law through having served the United States in diplomatic capacity prior to becoming chief justice. The implicit theory of constitutional history in the essay is that the life experiences of chief justices *before* they reached the Supreme Court conditioned their attitudes toward international law and made it likely that those of them with experience in diplomacy, international arbitration, or adjudication, or combinations thereof, would attach more significance to compliance with international law than is the case for Chief Justice Roberts.

Among previous chief justices, several of them, including our first chief justice, John Jay, as well as John Marshall and Charles Evans Hughes, had been secretaries of state; William Howard Taft had been president. Jay had negotiated an arbitration treaty, commonly known as the Jay Treaty.[9] Chief Justice Morrison Waite had served as counsel in the *Alabama Claims* arbitration with Great Britain after the Civil War, which resulted in an award of $15,500,000 in favor of the United States. Taft, during his tenure as chief justice, arbitrated the *Tinoco Claims* dispute between Great Britain and Costa Rica. Hughes was serving as judge of the Permanent Court of International Justice when President Hoover offered him the nomination to the chief justiceship. Both Taft and Hughes were strong advocates of third-party dispute settlement through international arbitral or judicial tribunals, and urged the Senate to approve treaties that would enable the United States to participate fully in international dispute settlement mechanisms.

John Jay had provided the intellectual underpinning for establishing the supremacy of treaties over state law. In a report to the Continental Congress submitted in October 1786 when he was secretary for foreign affairs, Jay itemized numerous state laws interfering with performance of U.S. obligations under the 1783 Treaty of Peace with Great Britain. Jay's ideas laid the groundwork for the clause of Article VI of the 1787 Constitution that makes

[9] Treaty of Amity, Commerce, and Navigation, Nov. 19, 1794, 8 Stat. 116, TS 105.

treaties the supreme law of the land. Two of the five Federalist Papers drafted by Jay specifically addressed treaty compliance: in Federalist No. 3, Jay emphasized the "high importance to the peace of America that she observe the laws of nations" toward all treaty partners, and in Federalist No. 64, he justified the constitutional clause making treaties supreme law of the land, on the ground that no nation would want to make a bargain with the United States that this country would not fulfill.

Under Chief Justice Roberts, Chief Justice Jay's commitments are turned upside down. According to *Medellin*, treaty compliance is an optional political act rather than a constitutional duty, and state procedural rules are given priority over fulfillment of international obligations. While there is no way to know for sure how his predecessors would have decided such a case, there is reason to believe that they would not have given such short shrift to international law.