

Foreword:
**The Nation of Laws and
the Law of Nations**

By Christopher J. Borgen

Since its inception, the American Society of International Law (ASIL) has encouraged a discussion concerning America and its relation to international law. This volume collects selected speeches from the history of that dialogue, bringing together major addresses by Justices of the Supreme Court from Annual Meetings of the ASIL. Although this view is relatively narrow, it is nonetheless informative as to the experiences and issues that played a part in shaping the perceptions of international law in the American judiciary.

This collection attempts to give a sense of the substance and evolution of the ongoing encounter between the “Nation of Laws” and the “Law of Nations,” as seen by judges from the highest U.S. court. The views of the Justices are framed by their experiences and by the concerns of the day. Each speech evokes a particular point in American history—the inter-War period, the turning of the tide of the Second World War, the dawn of the Cold War, and so on—yet we can consider whether this series of points actually implies a particular trajectory to how the views of the American judiciary have evolved.

An oft-repeated analysis of the history of international law in U.S. courts is that judges from the eighteenth and nineteenth centuries tended to see international law and U.S. law as part of a single integrated system, where more recent judges view international law and U.S. law as two distinct systems. While this may be accurate as a matter of describing

judicial attitudes, it does little to explain why this attitudinal shift took place. Although the speeches collected here do not provide a final answer, they do give us a place to start our inquiry and they suggest some possibilities as to why this shift occurred. The reasons may have less to do with changing perceptions of law itself than with considerations of America's place in a globalizing, interdependent, world.

Looking at the speeches thematically, one can group them into four periods. The first group, including the addresses from Chief Justices Taft and Hughes and Justice Owen Roberts, span from the inter-War years into World War II. Their comments were often concerned with the role that law may play in the resolution of disputes among states. There follows a triptych of speeches by Justice Jackson between 1945 and 1952. Justice Jackson also mentioned the peaceful resolution of disputes but, framed by his experiences in Nuremberg, he began to look towards questions of individual liability and culpability and the relationship between international law and the individual. There then follows a long gap, until Justice Blackmun addresses the Annual Meeting in 1994. His speech, as well as Justice O'Connor's in 2002, shift from law's role in war and peace to the Supreme Court's practice in interpreting and applying international law. And, most recently, Justices Breyer, Scalia, and Ginsburg in three successive years have a conversation on the citation of foreign law in American legal opinions.

Each of these speeches was a product of its times and responded primarily to the concerns of the day. Nonetheless, it is perhaps telling how the dominant issues shifted over the course of the century and how, in broad lines, these speeches sketch how America's perception of international law has changed.

Consider the three early speeches. In the shadow of the “Great War” and on the road to the Second World War, law was portrayed as a means to make peace among nations less fragile and more durable. These addresses span from the immediate aftermath of World War I to the point when the tide is turning in favor of the Allies in World War II. As David Bederman summarized in his review of the century of scholarship in the *American Journal of International Law*: “[t]he interwar period (1922 – 1939) features the economic paradox of the 1920’s boom and the following Great Depression, and America’s political disengagement from the international community culminating in repeated rejections of involvement in such international institutions as the Permanent Court of International Justice (PCIJ) and general isolationism.”¹ The speeches of this period run from optimism to gritty determination and back again.

The first address of this period, given by Chief Justice Taft in 1922, has a tone befitting the Roaring Twenties. About as lighthearted as a speech on international law can get, Taft characterized the Supreme Court as an international tribunal—and also mentioned his hope for a similar such tribunal on a global scale. He said that:

¹ David Bederman, *Appraising a Century of Scholarship in the American Journal of International Law*, 100 AM. J. INT’L L. 1, 5 (2006).

I know that [James Brown Scott]² regards the institution of which I have now the honor—undeserved honor—of being the head, as exhibit A in international law. If I may judge of the volumes of our decisions that he has put upon the poor students of international law, I should think that our court would be regarded with a great deal of concern by those who are to study the subject. He draws much from our opinions, as evidence of what can be done in the world, if you will only have a Supreme Court of the world. We do administer international law, and we have every little while an example of the foresight—I hope it may be called—of our ancestors in making provisions for such an international tribunal within the Constitution. The Articles of Confederation first gave us the idea, and it was followed in the Constitution.³

The promise of international dispute resolution—and the role of the U.S. in defining such a mechanism—would be a motif in addresses ranging from Justice Owen Roberts’s world federalism to Justice Jackson’s discussions of Nuremberg.

Taft went on to discuss instances of the states of the United States resolving disputes that they had with each other before the Supreme Court. While this may not be the first example that comes to mind for a modern audience when they think of the Supreme Court and international law, it was the central image of Taft’s

² James Brown Scott, first editor-in-chief of the *AMERICAN JOURNAL OF INTERNATIONAL LAW*. See note b to the Address of Chief Justice William Taft. See also Bederman, *supra* note 1, at 2.

³ Address by Chief Justice William Howard Taft *infra* p. 3.

speech. Then, looking outwards from the United States, he concluded:

Now we have a court in the League of Nations. It is a great institution. It is an institution that I doubt not will make much for the benefit of the world... It is established on broad principles... That court is an American invention and it derives its strength from American tradition, and I sincerely hope that we are working towards it.⁴

This hopeful tone is in sharp contrast to the rejection of the League of Nations by the U.S. in 1920. Internationalist aspirations in the U.S. then refocused onto the Permanent Court of International Justice (PCIJ). As a state did not have to be a member of the League in order to join the PCIJ, international dispute resolution still seemed quite possible. Grander designs of international organization seemed unlikely, however, given the disinterest—if not hostility—of many in the U.S. towards the broader project. This was reflected by a shift in scholarship to a discussion and critique of the different proposals for the U.S. to fully join the PCIJ, “creat[ing] a sophisticated literature on the advantages, and drawbacks, of international adjudicatory mechanisms.”⁵

It is in light of the rejection of the League but the ongoing debate over U.S. involvement in the PCIJ, that

⁴ In 1922 the Permanent Court of International Justice (PCIJ) was in the infancy of its short life. The U.S. was involved with the construction of the Court and the ASIL’s John Bassett Moore was the first U.S. judge on the Court.

⁵ Bederman, *supra* note 1, at 12.

one must read the remarks of Chief Justice Charles Evans Hughes from 1931. The address was at a gala celebration marking the ASIL's Twenty-Fifth Anniversary that included twenty-six heads of diplomatic missions and members of the press.⁶ Although the immediate cause of the speech was a celebration, there was little cause for rejoicing—the Great Depression had begun and the PCIJ's protocols were mired in the Senate—and a substantial portion of the Annual Meeting was devoted to discussing the future (or lack thereof) of the PCIJ.⁷ Hughes's tone echoed his time. Looking backward as much as he was looking forward, he said that “the great interrogation as we face the uncertainties of the future is—Which will be triumphant, lust of power, an imperious chauvinism, class consciousness, or a dominating sense of justice which rides in the whirlwind and directs the storm?”⁸

Attempts at codifying international law, such as the League of Nations Codification Conference of 1930, had been inconclusive at best. The League itself was in jeopardy. And so, he explained, “[i]nstead of attempting to record the progress of international law, I should prefer to dwell on the progress of international lawyers.”⁹ International law was no longer a specific thing to be built, “an impossible ideal in the certainty of law.”¹⁰ To the contrary, “[i]f we consider the content of international law, as a body of rules which states feel

⁶ FREDERIC L. KIRGIS, *THE AMERICAN SOCIETY OF INTERNATIONAL LAW'S FIRST CENTURY* 137 (2006).

⁷ *Id.* at 136.

⁸ Address by Chief Justice Charles Evans Hughes *infra* p. 11.

⁹ *Id.*

¹⁰ *Id.* at 14.

themselves under obligation to observe, we may be disappointed in both the extent and the rate of development.”¹¹ But if we focus on the work—the process—therein we may find renewed hope. Describing the increased study of international law in law schools, the production of scholarship, and other aspects of the work of international lawyers, Hughes explained:

All this activity holds the greatest promise. It will yield results in lawyers, if not in law. And I believe that out of this earnest study and comparison of opinions, and, in particular, out of the serious endeavor to understand intimately and correctly the conditions to be dealt with, the bases of national policies and the grounds of national fears, we may look for the gradual development of that enlightened conscience in international affairs from which the concepts of the international law of the future will proceed.¹²

So international law was less a perfect structure than the hard work of developing enlightenment. And this work was made all the harder as the U.S. Senate ultimately refused to give consent to the Protocols of the PCIJ.

When a member of the Supreme Court would again address the ASIL, the world would be at war, so it is understandable that the speech would be focused on the great questions of war and peace. In his 1943 address, Justice Owen Roberts returned to a discussion of grand

¹¹ *Id.* at 11.

¹² *Id.* at 13.

designs, as did much of the Annual Meeting that year,¹³ focusing in particular on the peaceful resolution of disputes between states. Justice Roberts was not only interested in an international court, but rather building “supra-national government” including a legislature and an executive. He believed international law was weak due to structural deficiencies:

Treaties, league covenants, and agreements which may be repudiated at the wish or whim of any nation party to them leaves the adherents to the compact little or no power to compel reculant signatories to comply with their undertakings. And a world court whose jurisdiction can only be invoked by willing nations is helpless to prevent such violation of plighted faith.¹⁴

The weakness of law could be overcome with organization, institutionalization, and supranationality—a world federalism:

Given adherence to the fundamental propositions I have stated, I have enough confidence in the intelligence of mankind to believe that a convention of delegates from the nations can overcome the difficulties presented, as the Constitutional Convention of 1787 overcame those confronting it.¹⁵

Ultimately,

¹³ KIRGIS, *supra* note 6 at 167.

¹⁴ Address by Associate Justice Owen J. Roberts *infra* p. 22.

¹⁵ *Id.* at 23.

Our obligation then is to arouse and enliven public sentiment in this country in support of an integration of our own and other nations in a world organization having the purpose and the power to adjust the relations of the peoples of the earth in accordance with the dictates of justice, and to promote and, if necessary, enforce the peaceful composition of all differences and disputes which may occur.¹⁶

Justice Roberts was reacting to a specific instance in time. The United States was embroiled in the most sweeping conflict in its history and one in which the nation and a large part of the world are united against a common enemy. He was not the only leader who believed that, as the tide of war turned and victory and peace seemed possible, a new method of international cooperation was at hand. And, while world federalism was not in store, the United Nations was.

These early addresses were by Justices who had also been prominent politicians on the national stage. Although some of their aspirations—Justice Roberts’s dream of a rational world government, Chief Justice Taft’s hopes for the PCIJ—ran headlong against the harsher realities of the world, they nonetheless showed how perceptions of international law were entwined with an optimistic view of America’s place on the world stage. Justice Hughes, it should be noted, seemed to have seen international law itself as still more promise than reality, a promise that could only be realized through incremental steps rather than grand designs. In all of these cases, though, the Justices were looking outwards asking how international law could reorder

¹⁶ *Id.* at 26.

international politics, and what would be America's role in ordering international law.

These early addresses cast America as a rising power and as an architect of a new international legal system, whatever its eventual form may be. Design and construction may be hard work, as Hughes emphasized, but all three of these Justices viewed this construction as a challenge facing the U.S.: the Nation of Laws building the Law of Nations.

Justice Hughes's incrementalism was, in a manner, further developed in three speeches by Justice Jackson. In Jackson's speeches, there were no grand designs for the abolition of war through law. Rather, Jackson brought a keen pragmatism into the dialogue in a series of reflections on the uses and the limits of international law based on his experiences relating to the Nuremberg prosecutions. The three major addresses by Justice Jackson to the ASIL come together as a snapshot of America and international law at mid-century. America was emerging from the Second World War with a new-found strength. International law still held great promise—and seemed more urgent than ever—and yet its pre-war institutions were in tatters, or worse. Jackson, a consummate political insider, did not spend his time talking about building global governments: he focused on what would need to happen for the United States and the new institutions of international law to survive in this new era.

Justice Jackson opened his 1945 address with a curveball, telling the leadership of the ASIL: “Few groups are likely to assemble today that would better know the shortcomings of international law than this group which I am privileged to address.”¹⁷ But, he

¹⁷ Address by Associate Justice Robert H. Jackson (1945) *infra* p. 27.

continued, it was precisely the people who knew of international law's weaknesses who could most appreciate its strengths and its promise. And it was at that moment in April, 1945, when there was a yearning for law as opposed to brute force, that there was an opportunity to build international legal institutions that could stand the tests of time and of politics. He considered the construction of a successor to the PCIJ and the eventual trial of war criminals. But, after discussing these institutional matters, he set out a warning for the United States, the young superpower. Law, he explained, is not "a policy weapon." He said:

It is futile to think, as extreme nationalists do, that we can have an international law that is always working on our side. And it is futile to think that we can have international courts that will always render the decisions we want to promote our interests. We cannot successfully cooperate with the rest of the world in establishing a reign of law unless we are prepared to have that law sometimes operate against what would be our national advantage.¹⁸

This marked a pivot in the relationship of law and power in the twentieth century. Up to this point, America had been a rising power but it had essentially taken (or rejected) the rules that had been made by the established European powers. Justice Jackson seemed to understand that from this point on, the United States would have a primary role in making the systemic rules and it would have to overcome the imperial temptation to

¹⁸ *Id.* at 40.

ignore the very legal institutions that it was in the process of building. In order to strengthen the system, the United States would have to be willing to lose arguments.

Similar pragmatic insights ran throughout his speeches from 1949 and 1952. Ranging from tart comments on the codification of international law (“...codification has never yet come out of people’s imaginations; it has come out of their experiences. Codification, therefore, is one of the last ways law develops.”) to observations on the difficulty of building a legal mechanism to try war criminals when your partners, the Soviets, have little respect for the rule of law. Nonetheless, he saw signs of hope in the great number of substantive legal doctrines common to the legal systems of the world “as to what is right and fair between man and man.”¹⁹

Justice Jackson’s genius was in seeing the importance of the individual to international law. Like Hughes, Jackson recognized that personal interactions are the key to building the structures of international law. But Jackson also understood the growing importance of the individual as a subject of international law. His third address, from 1952, considered the construction of international criminal law. He placed Nuremberg not as the end of a war, but as the beginning of a process of construction. And the issues he spotted are startling for their prescience: “[i]f the United Nations Organization were to put international criminal law in statutory form, it certainly must define criminal aggression,” he posited.²⁰ With always a skeptical eye on grand schemes of international legislation, Jackson saw an analogy in

¹⁹ *Id.* at 54.

²⁰ *Id.* at 64.

the construction of international criminal law to the body of international law as a whole:

While I suppose there is little prospect that an international criminal court will be established in the immediate future, its consideration focuses attention upon problems of jurisdiction, composition and procedure which, I assure you, are among the most troublesome in actual practice in this field. I think that systems of law differ more deeply and stubbornly in methods of trial than in substantive principles. Yet, historians have pointed out that the common law developed procedurally before it did substantively and that a law of rights and liabilities began to develop only when there was a system for adjudicating rights and liabilities. It is not far-fetched to compare the present state of international society to a primitive society which had controversies to be decided long before it had legislatures to frame codes. Whenever courts begin to function on either civil or criminal issues, they develop a body of decisional jurisprudence. We are prone to forget that law is older than legislation.²¹

Justice Jackson's three addresses bridged the aspirations of earlier commentators for grand constructions with the pragmatic concerns of the more recent Justices. He moved the dialogue from being only about states to being about state power and individual rights and responsibilities. While Chief Justice Hughes discussed the role of the individual in building international law, it was still a law focused on states.

²¹ *Id.* at 69.

Justice Jackson argued that international law would increasingly need to account for the acts of individuals. His singular experiences at Nuremberg had affected his views of international law such that he could see the work of the tribunal as a microcosm for the challenges of building international law in general, not just international criminal law.

After Justice Jackson's speeches, no sitting Justice of the Supreme Court made a major address to the ASIL Annual Meeting until the 1990's. In other words, the dialogue between the ASIL and the highest court was almost silent during the whole length of the Cold War. It is unlikely that there is one specific reason for this hiatus, although one can see that the focus of the ASIL was changing. In 1952, the same year of Justice Jackson's final major speech at the ASIL Annual Meeting, the *American Journal of International Law* published Myres McDougal's essay *Law and Power*, marking the arrival of a "new, policy-oriented international jurisprudence."²² This new jurisprudence, which would be known as the New Haven School, was less focused on the work of judges and more so on the interplay of law as part of the broader policy-making process.²³ With the U.S. embroiled in a long conflict with the Soviet Union, a conflict that could not be

²² Bederman, *supra* note 1, at 41; *see also* Myres S. McDougal, *Law and Power*, 46 AM. J. INT'L L. 102 (1952).

²³ Regarding the New Haven School, *see* Harold D. Lasswell & Myres S. McDougal, *JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY* (1992); Myres S. McDougal & W. Michael Reisman, *INTERNATIONAL LAW ESSAYS* (1981); Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1 (1959); *see also* Oran R. Young, *International Law and Social Science: The Contributions of Myres S. McDougal*, 66 AM. J. INT'L L. 60 (1972).

resolved by a ruling from an international tribunal, the interest in the peaceful settlement of disputes waned somewhat and there was an increased interest in the relationship of law to foreign policy-making. This was not so much a turning-away from judges and courts—always of major interest to the international legal establishment—but rather a turn towards those most directly involved with the foreign policy process.

Consider the list of featured speakers at the Annual Meetings during the Cold War.²⁴ Current or past Secretaries of State spoke at the Annual Meetings of 1956, 1965, 1970, and 1975 (among others). Other Cabinet-level officials or Ambassadors to the UN spoke at the 1967, 1976, 1984 and 1989 Annual Meetings. A partial list of speeches by Senators would include the meetings of 1954, 1955, 1957, 1959 and 1985. And these lists do not include the major speeches at Annual Meetings from the likes of Robert Bowie, George Ball, Averell Harriman, John McCloy or various Legal Advisers of the Department of State.

How America's passage through the Cold War affected its view of international law is a topic well beyond the scope of this brief foreword. What is clear, though, is that when Justice Blackmun and Justice O'Connor renewed the discussion between the ASIL and the judiciary, the dialogue had a profoundly different tone. Gone were the designs of building international institutions, let alone world federalism. Also gone was the tendency to analogize how the international system

²⁴ The list in the text is drawn from a review the AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS from the 1950's to the 1990's. See also KIRGIS, *supra* note 6, at 245-51 (the 1950's); 298-99 (the 1960's); 349-51 (the late 1960's and early 1970's); 388-89 (1984); 423-426 (the late 1980's).

should look based on American history. Instead, the speeches of Justices Blackmun and O'Connor and then those of Justices Breyer, Scalia, and Ginsburg focused on what they know best, the hard work of judging claims before a court.

Justice Blackmun's opening line could have been a topic sentence for all five of these addresses: "I am here tonight to speak about the Supreme Court, the law of nations and the place in American jurisprudence for what the Drafters of the Declaration of Independence termed 'a decent respect to the opinions of mankind.'"²⁵ In his review of cases that the Court had recently heard, Blackmun catalogued some of the main issues that would animate arguments concerning international law in U.S. courts in the coming years. He discussed methods of treaty interpretation, disputes over when the U.S. actually has jurisdiction over an alien, and the role of foreign opinions when assessing topics such as the constitutionality of the death penalty.

Justice Blackmun's enthusiasm for international law was tempered by his observation "that the present Supreme Court enforces *some* principles of international law and *some* of its obligations *some* of the time."²⁶ This may be due to judicial deference to the Executive or the comparative lack of diplomatic experience of modern Justices to those of earlier times. It echoed Chief Justice

²⁵ Address by Associate Justice Harry A. Blackmun *infra* p. 73. The role of international law in Justice Blackmun's decisions has been analyzed in Margaret E. McGuinness, *The Internationalism of Justice Harry Blackmun*, 70 MO. L. REV. 1289 (2005).

²⁶ Blackmun, *infra* at 82. Perhaps this was also a wink and a nod to Louis Henkin's famous construction that "[i]t is probably the case that *almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.*" LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 47 (2d ed.1979) (emphasis in original).

Hughes's contention that international law would progress as lawyers and judges are more involved in the process of international law. Hughes himself had been a judge on the PCIJ and the Permanent Court of Arbitration; Chief Justice Taft had been a commissioner in the Venezuela-British Guyana boundary dispute and, of course, had been President of the United States. Justice Jackson had been the chief prosecutor at Nuremberg. More recently, Justices of the Supreme Court have come from the ranks of academia, government service in domestic law and policy settings, and/or private practice. International experience prior to sitting on the bench has been relatively rare since the early twentieth century. Such differences in experience may have played a part in the different voices that were used. Justices Taft, Hughes, and Roberts had either been President or had been possible contenders for the Presidency. This, combined with the concerns leading up to and during the Second World War, would likely cause these Justices to look to international law particularly in its relation to "high politics" and diplomacy.

If anything, Justice O'Connor made this a central theme in her remarks. While she also addressed the main issues facing the Court, she described the ways in which U.S. judges are interacting with their counterparts around the globe. Whereas Justice Owen Roberts described the prospect of supranationality, Justice O'Connor explained the reality of "transjudicialism," the complex interplay of courts and tribunals across national lines. This globalization of judicial relations was why she considered that international law, properly understood, was no longer just about treaties but, borrowing from Philip Jessup, the regulation of activities across national boundaries.

Justice O'Connor's speech was the first post-September 11th speech by a Justice to the ASIL. It was also the first speech since the super-heated globalization of the late 1990's. If the speeches of the early Justices were animated by two world wars, then Justice O'Connor's may be seen as being informed by terrorism and globalization.

The final trio of speeches were primarily concerned with citation to foreign legal materials by U.S. courts. This issue had become hotly contested by commentators and in Congress. Justice Breyer's address from 2003 set the stage by providing a typology of the ways on which foreign legal materials are used by judges. He contrasted formalistic views of the law with the experience of recent decades, echoing Robert Jackson's observations:

Formally speaking, state law is state law, but practically speaking, much of that law is national, if not international, in scope. Analogous developments internationally, including the emergence of regional or specialized international legal bodies, tend similarly to produce cross-country results that resemble each other more and more, exhibiting common, if not universal, principles in a variety of legal areas.

These growing institutional and substantive similarities are important because to a degree they reflect a common aspiration—a near-universal desire for judicial institutions that, through guarantees of fair treatment, help to provide the security necessary for investment and, in turn, economic prosperity. Through their respect for basic human liberty, they thus may help to make that liberty a reality. The

force of this aspiration, I hope and believe, is virtually irresistible.²⁷

The following year, Justice Scalia addressed the use of foreign sources of law. Using interpretive canons as a starting point, and analogizing to the improper use of legislative history, Justice Scalia explained why foreign law is of very little use in construing U.S. statutes or the U.S. Constitution. Moreover, he argued, foreign legal materials are especially prone to misuse.

Justice Ginsburg's speech returned to the topic of foreign law and considered what it meant to have "a decent respect to the opinions of [human]kind." She explained:

while U.S. jurisprudence has evolved over the course of two centuries of constitutional adjudication, we are not so wise that we have nothing to learn from other democratic legal systems newer to judicial review for constitutionality. The point was well made by Second Circuit Judge, former Dean of Yale Law School, Guido Calabresi: "Wise parents," Judge Calabresi said in a 1995 concurring opinion, "do not hesitate to learn from their children."²⁸

Justice Ginsburg went on to frame the importance of learning in the midst of an increasingly complex world, debunking along the way misconceptions about how judges actually use foreign law—"comparative sideglances"—in their work. There is no specter of one-

²⁷ Address by Associate Justice Stephen G. Breyer *infra* p. 105.

²⁸ Address by Associate Justice Ruth Bader Ginsburg *infra* p. 129.

worldism here, only judges trying to glean insight from the experiences of others.

The discussion in these speeches (and to a lesser extent in Justice Blackmun's and Justice O'Connor's as well) are in contrast to those of Justices Taft, Hughes, and Roberts. The early speeches asked what America's experience could do for international law; more recent speeches ask what international law may do for (or to) the American experience.

The shift in emphasis is because the encounter of the American judiciary with international law over the course of this century has really been within the broader social context of America coming to terms with what we now call globalization. Justices Taft, Hughes, and Roberts were all talking about globalization, but using the terms of their time: the "end of isolationism," "supranationality," and so on. These speeches were in part defined by the First and Second World War, but they were also defined by America's entrance onto the world stage as a superpower. For these Justices, America was a rising military and economic superpower during a time when international economic relations were still relatively weak and slow and there was no other state that could muster anywhere near the economic strength of the U.S. Globalization was a one-way street: how America would affect the globe.

While the speeches from early in the twentieth century were framed by America as a singular power in the world, the more recent addresses are characterized by the effects of globalization. Although America may now be in a one-superpower world, the defining feature of this era for Americans is not so much that there is no other superpower but that globalization has increased in both breadth and intensity beyond anything any of us has previously experienced. And so for today's judges, globalization is not a dream or a potential but a day-to-

day reality, steeped with both promise and peril: international financial markets that never close; intellectual property zipping through cyberspace; discovery requests to and from foreign courts; terrorist plots devised in Afghanistan, developed in Germany, and executed in New York, Washington, and over Pennsylvania.

The era of globalization is one that has brought renewed focus on the work of judges, as well as the work of legislators, regulators, and members of civil society, particularly in how such groups coordinate across national borders.²⁹ It is thus of no surprise that judges would be once again featured at Annual Meetings. Globalization has affected the jobs of the Justices: today's Supreme Court Justices have meetings with counterparts from around the world, participate in international colloquia, and contribute to rule of law projects for democratizing nations. But it is no longer simply America helping the world; it is also the world making claims on America: to abide by our treaties, to respect international norms, to participate in a broader conversation that is taking place on what is good and just. While the Nation of Laws may have been a key architect of the Law of Nations, we are now coming to

²⁹ Examples of international legal scholarship focusing on the cross-border relations of sub-national actors as methods of generating law include Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER (2004); Developments in the Law: International Judicial Dialogue*, 114 HARV. L. REV. 2049 (2001); Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 U. RICH. L. REV. 99 (1994); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L. J. 487 (2005).

appreciate the ramifications of the system we have wrought. Globalization is a two-way street. While many judges from previous eras had considered how America may affect the world, this is the first generation of judges that is truly coming to terms with how the world may affect us.

In doing so, the current generation of judges and lawyers are doing the hard work described by Justices Hughes and Jackson. Whether they realize it or not, they are staking claims as to the proper balance between the international and the national. It is not a role which comes easy to a people that is used to being separated by oceans and time-zones from the rest of the world. But we are now finding that the world is a bit smaller—but more varied—than we had previously assumed. And in the day to day decisions of courts, we are learning to deal with it.

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