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The Supreme Court in an Interdependent World

A considerable number of cases require the justices to examine the law and practices of other nations.

By

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When I joined the Supreme Court 21 years ago, we justices only occasionally had to look beyond our shores or beyond our nation's practices to decide cases. That is no longer true.

Today a considerable number of cases require us to examine the law and practices of other nations. Legal problems—human-rights violations, threats to national security, computer hacking, environmental degradation, corporate fraud, copyright infringement—surface beyond our borders and may become potential threats to us at home.

Meanwhile many Americans engage in international transactions and travel to lands where the customs and laws are different from our own. The legal questions that arise when something goes wrong in a consequential way with an American abroad, or a foreign national here, are among the most challenging that the court must decide.

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In my new book, "The Court and the World," I describe how global interdependence increasingly is changing the work of the Supreme Court. Here are a few examples of the issues that have come before us in recent years:

• In the mid-1970s Dolly Filártiga, a citizen of Paraguay, came to New York City. She soon found that Américo Norberto Peña-Irala, the policeman who had tortured and killed her brother some years ago in Paraguay, was living illegally in New York.

Ms. Filártiga also found an American law, the Alien Tort Statute of 1789, that seemed to open the doors of U.S. courts to a civil suit that she filed against Mr. Peña for her brother's wrongful death. She won the suit, although Mr. Peña was deported before she could recover any damages.

Since then, our courts have had to interpret that ancient statute with growing frequency. Eventually, the Supreme Court had to face an important question: Whom does the statute protect today? When Congress enacted the law, it may have intended to allow victims of 18th-century pirates an avenue for compensation. Who are today's

pirates? And how can we reconcile our interpretations of the statute with the need of other countries to rely upon their own methods for compensating human-rights victims (of, say, apartheid)?

• A few years ago a student from Thailand studying at Cornell asked his parents to buy English language textbooks in Thailand and send them to the U.S., where identical texts sold at a higher price. Does American copyright law allow him to do this? This sounds like a technical question, but the same issue can arise when you buy a gadget with a copyrighted label at the corner store, or when you buy a new car that includes copyrighted software. Does it matter if the car was made in America rather than Japan?

We were told that the implications of the case *Kirtsaeng v. Wiley* (2013) were enormous, perhaps affecting $3 trillion worth of world-wide commerce. (The student won.) • In the previous decade the court decided four cases that focused upon the rights of detainees at Guantanamo Bay. In respect to the curtailment of basic rights Justice O'Connor wrote (*Hamdi v. Rumsfeld* , 2004) that the Constitution does "not write a blank check for the President." I agreed. But what kind of "check" does the Constitution "write?" Can we know without understanding the nature of the foreign threats that face the nation?

• The court has had to interpret domestic-relations treaties that specify whether to send a child back to a father in a foreign country when the child was brought here by the mother. We have interpreted foreign-investment treaties setting ground rules for arbitration. We have interpreted treaties granting to foreign courts, such as the International Court of Justice, the authority to make decisions limiting the scope of state or federal criminal law. We have faced questions involving Congress's power to delegate to international bodies the authority to make rules that bind Americans. Hundreds of international institutions are already writing such rules.

The American public needs to understand what the "international" part of the Supreme Court's work actually means—and what it does not mean. In particular, the frequent presence of foreign-related issues in the court's cases has little or nothing to do with the current political debate about whether American courts, including the Supreme Court,

should refer in their opinions to decisions of foreign courts. Judicial references to foreign law and practices do not reflect the ideologies of justices—rather they reflect a world in which cross-boundary travel, marriage, commerce, crime, security needs and environmental impacts have become prevalent.

In the multipolar, mutually interdependent world, the best way to advance the values that the Founders set forth—democracy, human rights and widespread commerce—is to understand, to take account of, and sometimes to learn from, both legal and relevant nonlegal practices that take place beyond our shores.

Mr. Breyer is an associate justice of the U.S. Supreme Court and the author of "The Court and the World: American Law and the New Global Realities," out Sept. 15 from Knopf.