Ginsburg: Does Scalia Think Like Roger Taney?

by Edward Spannaus

Associate Supreme Court Justice Ruth Bader Ginsburg carried on the public dispute within the U.S. Supreme Court—and pointedly censured Associate Justice Antonin Scalia—in a speech delivered April 1 to the American Society on International Law, in Washington, D.C. Increasingly, Supreme Court Justices, including Scalia, are speaking publicly outside of the court, on their policy differences, especially in regard to the heated debate over the recognition of international law and court decisions from other countries.

This flared up in the court's 2002 decision which held that the execution of a mentally retarded offender was unconstitutional, and in the decision last month, which declared the juvenile death penalty unconstitutional. In both rulings, the court's majority—over Scalia's scornful dissents—cited the near-universal condemnation of these practices.

Ruth Bader Ginsburg

In her speech, Ginsburg harked back to the Declaration of Independence's "decent respect for the opinions of mankind," to the Framers of the U.S. Constitution who incorporated the Law of Nations into U.S. law, and to statements by early Chief Justices John Jay and John Marshall. From there, she observed that, "There are generations-old and still persistent discordant views on recourse to the opinions of mankind," citing an at-that-point-unnamed mid-19th Century U.S. Chief Justice who had expressed opposition to taking such considerations into account. Ginsburg then quoted this 19th Century Chief Justice saying: "No one, we presume, supposes that any change in public opinion or feeling in the civilized nations of Europe, or in this country, should induce the U.S. Supreme Court to give the words of the Constitution a more liberal construction than they were intended to bear when the instrument was framed and adopted."

"Those words were penned in 1857," Ginsburg continued. "They appear in Chief Justice Roger Taney's opinion for a divided court in *Dred Scott v. Sanford,* an opinion that invoked the majestic Due Process Clause to uphold one human's right to hold another in bondage. . . ."

From there, Ginsburg pointed out that there still remains, today, among some jurists, "considerable skepticism on the propriety of looking beyond our nation's borders, particularly on matters touching fundamental human rights," and some "downright opposition," at which point Ginsburg cited Scalia's dissenting opinion in the juvenile death-penalty case, which declared that the court should 'cease putting forth foreigners' views as part of the reasoned basis of its decisions.' "

Justice Ginsburg is someone who obviously chooses her words very carefully, and therefore, despite her reported personal friendship with Scalia—whose self-professed "originalism" and "textualism" sounds identical to Taney—the significance of her juxtaposition is hard to miss.[1]

The 'H' Word

Justice Ginsburg also touched on another highly disputed issue, the question of the scope of Executive power, in citing the 1952 Steel Seizure case—which the U.S. Supreme Court cited in its rulings against the Bush Administration in the enemy combatant cases last June. The "torture memos" coming out of the Justice Department and the White House in 2002-03, had asserted that the President could use his Executive authority to override treaties and U.S. law in time of war.

Antonin Scalia

Ginsburg cited the fact that Justice Robert Jackson (earlier the chief prosecutor for the United States at Nuremberg), had "pointed to features of the Weimar constitution in Germany that allowed Adolf Hitler to assume dictatorial powers." Jackson drew from this, she said, "support for the conclusion that, without more specific Congressional authorization, the U.S. President could not seize private property, even in aid of a war effort."

This is what Jackson wrote, in his concurring opinion in the *Youngstown Steel* case:

"Germany, after the First World War, framed the Weimar Constitution, designed to secure her liberties in the Western tradition. However, the President of the Republic, without concurrence of the Reichstag, was empowered temporarily to suspend any or all individual rights if public safety and order were seriously disturbed or endangered. This proved a temptation to every government, whatever its shade of opinion, and in 13 years suspension of rights was invoked on more than 250 occasions. Finally, Hitler persuaded President Von

1. See Lyndon H. LaRouche, Jr, "Scalia and the Intent of Law," *EIR,* Jan. 1, 2001.

Hindenburg to suspend all such rights, and they were never restored."

One just need recall how Senator Robert Byrd was recently castigated, in a speech attacking the unconstitutionality of the Frist-Cheney "nuclear option" to end extended debate in the Senate, when he, in similar fashion, identified the manner in which Hitler had used the cloak of legality and majority rule, to establish dictatorial rule.

Documentation

We reproduce here excerpts from remarks by Supreme Court Justice Ruth Bader Ginsburg to The American Society of International Law, delivered on April 1, 2005, in Washington, D.C.

In the value I place on comparative dialogue, on sharing with and learning from others, I am inspired by counsel that the founders of the United States gave us. The drafters and signers of the Declaration of Independence cared about the opinions of other people. They placed before the world the reason why the states joining together to become the United States of America were impelled to separate from Great Britain. The declarants stated their reasons out of "a decent respect to the opinions of mankind." To that end, they presented a long list of grievances, submitting the facts, the long train of the British crown's abuses, to the scrutiny of a candid world.

The Supreme Court early on expressed a complementary view. "The judicial power of the United States," the court said in 1816, "was intended to include cases in the correct adjudication of which foreign nations are deeply interested and in which the principles of the law and comity of nations often form an essential inquiry."

Far from exhibiting hostility to foreign countries' views and laws . . . the founding generation showed concern for how adjudication in our courts would affect other countries' regard for the United States. Even more so today, the United States is subject to the scrutiny of a candid world. What the United States does, for good or for ill, continues to be watched by the international community, in particular by organizations concerned with the advancement of the rule of law and respect for human dignity.

The new United States looked outward not only to earn the respect of other nations. In writing the Constitution, the framers looked to other systems and to thinkers from other lands for inspiration, and they understood that the new nation would be bound by the law of nations, today called international law.

Among powers granted the U.S. Congress, the framers enumerated in Article I the power to define and punish offenses against the law of nations. John Jay, one of the authors of the Federalist Papers and the first Chief Justice of the United States, wrote in 1793 that the United States, by taking a place among the nations of the Earth, had become amenable to the law of nations. And 11 years later, Chief Justice John Marshall cautioned that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. . . .

There are generations-old and still-persistent discordant views on recourse to the opinions of mankind.

A mid-19th Century U.S. Chief Justice expressed opposition to such recourse in an extreme statement. He wrote, "No one, we presume, supposes that any change in public opinion or feeling in the civilized nations of Europe, or in this country, should induce the U.S. Supreme Court to give the words of the Constitution a more liberal construction than they were intended to bear when the instrument was framed and adopted."

Those words were penned in 1857. They appear in Chief Justice Roger Taney's opinion for a divided court in *Dred Scott v. Sanford,* an opinion that invoked the majestic Due Process Clause to uphold one human's right to hold another in bondage. The *Dred Scott* decision declared that no descendant of Africans imported into the United States and sold as slaves could ever become a citizen of the United States. While the Civil War and the 13th, 14th, and 15th Amendments reversed that judgment, there remains among U.S. jurists considerable skepticism on the propriety of looking beyond our nation's borders, particularly on matters touching fundamental human rights. Some have expressed downright opposition.

Justice Scalia wrote this year in a dissenting opinion, joined by the Chief Justice and Justice Thomas, the court should "cease putting forth foreigners' views as part of the reasoned basis of its decisions. To invoke alien law when it agrees with one's own thinking and ignore it otherwise is not reasoned decision-making but sophistry."

The notion that it is improper to look beyond the borders of the United States in grappling with hard questions has a certain kinship to the views that the U.S. Constitution is a document essentially frozen in time as of the date of its ratification. I am not a partisan of that view. U.S. jurists honor the framers' intent to "create a more perfect union," I believe, if they read our Constitution as belonging not to the end of the 18th Century but to a global 21st Century. . . .

Recognizing that forecasts are risky, I nonetheless believe that we will continue to accord a decent respect to the opinions of humankind as a matter of comity and in a spirit of humility. Comity, because projects vital to our own well-being—combatting international terrorism is a prime example—require trust and cooperation of nations the world over. And humility, because in Justice O'Connor's words, other legal systems continue to innovate, to experiment, and to find new solutions to the new legal problems that arise each day, from which we can learn and benefit.