1991

# Plenary Session: The U.S. Constitution in its Third Century: Foreign Affairs – Remarks by Lori Fisler Damrosch

Lori Fisler Damrosch
*Columbia Law School*, damrosch@law.columbia.edu

REMARKS BY LORI FISLER DAMROSCH*

Our Moderator has asked us to look ahead into the Constitution's third century and anticipate the emerging issues. I believe the changes in the field that I have selected, international organizations and institutions, are likely to be dramatic, perhaps more so than the more incremental changes in the areas being addressed by my copanelists. With all respect to our Moderator, I would like to take note of the rather modest treatment given to international organizations in the leading work on foreign affairs and the Constitution published by Louis Henkin in 1972. I hope he will forgive me if I suggest that his chapter on international organizations, which is already rather short, boils down to the following three propositions. First, international organizations are not doing anything very ambitious yet. Second, the United States can veto or otherwise block most decisions of international organizations. Third, in any event, the United States remains constitutionally free to disregard obligations imposed through international organizations, although we would have to accept the consequences of violating international law.

I suggest that these three propositions will not suffice for U.S. constitutional law in the third century. Lest you think I exaggerate the gap between the propositions asserted by Professor Henkin only two decades ago and the international structures that are already far advanced, let me take up the three propositions in turn. First, Professor Henkin tells us, "Constitutional obstacles even worth discussing arise only when an international organization begins to acquire attributes of government and to impinge directly on the lives and activities of the inhabitants of the United States or on state governments." Then after suggesting what some of the issues might be—improper delegation, denial of rights to individuals, and so on—he goes on to say: "No international organization to which the United States is now a party seriously stirs any of these issues." Even at the time he was writing, international organizations had already assumed some quasi-governmental functions, and more are being added with each passing year. We can expect the trend to accelerate with vigor in the coming century.

Second, concerning the veto or other blocking actions, Professor Henkin introduces this concept in a section dealing with a very timely topic for 1991, i.e., whether the UN Security Council could direct the United States to go to war. One complete answer, he says, is that the United States has a veto. As for the constitutional objection that only Congress can commit the United States to go to war, his brief footnote disposes of the problem as follows: "In fact, the UN Charter does not commit the United States to go to war unless the Security Council orders it and the United States could prevent such an order by its veto." The Persian Gulf crisis has focused sharp attention on the interface between Security Council action and national constitutional law. I cannot do justice here to the issues opened up in the *Journal*'s recent Agora pieces on the matter in the January 1991 issue. I will have a few words to say about this toward the end of my presentation, but I will now turn to the veto question.

In a future crisis in which the President might favor the use of force and Congress would do what it usually does, namely nothing, the least likely scenario would be that the President defers to congressional sensitivities by vetoing a Security Council resolution calling on the United States to carry out the policy that the President supports. Apart from the Security Council veto, I am sure Professor Henkin had in mind the possibility that in some international organizations the United States

*Columbia University School of Law.

(perhaps together with other like-minded countries) could exercise a blocking vote under systems where a country's voting rights are proportional to its economic power, or that the United States could "opt out" of an unwanted decision under systems designed so that states cannot be bound without their consent. At the time he wrote, the United States probably was largely able to shield itself from the imposition of unwanted obligations, but this is no longer the case in all international organizations. It probably should not be and it certainly will not be in the third century of the Constitution.

Now let us examine Professor Henkin's third proposition. He asserts, "As with any other international obligation, the United States has the ultimate decision as to whether it will or will not comply." The notion that the United States could violate international law as an answer to potential constitutional objections is proffered half a dozen times in a slim chapter of a dozen pages. In the intervening years, however, he has written quite eloquently in criticism of the cases, beginning in the Constitution's first century and continuing throughout the second, in which the Supreme Court declared that the United States remains constitutionally free to violate international law. To my mind there is a world of difference between the rare instance when the United States might be required by the Constitution to refrain from undertaking or carrying out an international obligation, and, on the other hand, the vaguer notion that the United States remains constitutionally free to breach international obligations merely because of transitory policy differences between U.S. decision makers and an international organization.

There is little mystery about why Professor Henkin should have endorsed these three propositions for the purpose of contending that international organizations raise no particular constitutional difficulties for the United States. Obviously, he wished to make it seem easy for the United States to participate as fully as possible in as many international organizations as possible. These three propositions are comforting to those who prefer that the United States relinquish as little as possible of its sovereignty and cling as much as possible to our traditional ways of doing things. The problem is that Professor Henkin, along with most of us in this room, is not only a committed constitutionalist but also a committed internationalist. Thus, in the last paragraphs of his chapter, he gives us a hint of how he might approach the difficult questions if they were ever to arise. I am going to quote once more, and this will be the last of the quotes: "The Framers did not presume to anticipate what the interests of the United States require today, and surely they did not presume to prevent it. They did insist on a few basic safeguards—respect for the political process, the integrity of national institutions, the rights of the individual. . . . [C]reative legal imagination can find ways and suggest means to bring such novel arrangements largely within a dynamic, flexible, hospitable Constitution."

It is my purpose in the remainder of my time to sketch out some approaches to the questions that Professor Henkin left for another day. I do not wish to suggest that anything in the Constitution prohibits U.S. participation in the full range of international organizations, those that are already functioning as well as those that can be conceived in the third century. But I do believe that we should be candid about the kinds of constitutional arguments that we use to justify U.S. participation. Rather than arguing that international organizations will not require us to change any of our traditions, we should identify the ways that wholehearted participation would or might require change, and then elaborate a constitutional theory that will explain why these changes are justifiable. I will not spend any of my limited time on spurious constitutional issues like states' rights. Mr. Justice

Holmes told us in 1920 that there were no limitations on the treaty power deriving from rights reserved to the states, and what he said about the Migratory Bird Treaty Act could equally well be said about a migratory bird treaty organization. I will also forego two areas that would merit careful attention. The first is the problem of the recurrent tension between congressional power of the purse and the U.S. obligation to pay assessments to international organizations, including the United Nations. I am going to duck this question because I am afraid that if I were to propose an "off-the-shelf, stand-alone enterprise," under which we proponents of international organizations would attempt to generate funds for our pet cause outside the regular appropriation cycle, Harold Koh (our resident expert on the Iran-contra scandal) might have to use his time to debate this fascinating possibility.

A second area that I will not address, although the issues are well worth consideration, concerns individual rights. Just as an illustration of the issues under this heading, I might mention on-site inspection under arms control treaties, especially the proposals for verification of a chemical weapons treaty. I am confident that the potential Fourth Amendment issues are manageable, but I do not have time to elaborate that argument here. I am also not going to discuss things like U.S. participation in an international criminal court. There has been much written about this, so let me move on to the two areas that I do want to examine. The first is regulation or law making and the second is security.

First, regulation. What I envision is that the United States will have to accept the authority of international institutions to establish rules of law binding on the United States, even though the United States resists the rule in question and the U.S. government cannot control the outcome. To some extent, international organizations are carrying out this function already. So far, it is a limited sphere. I suggest it will increase. The Reagan administration's arguments against the UN Convention on the Law of the Sea included some arguments that were framed in constitutional or quasi-constitutional terms addressed to features along these lines. I cannot in my remarks rebut those arguments in a particular case, but rather I proffer them as an illustration of issues that repeatedly will arise as international organizations acquire responsibility for complex systems of regulation.

I start with the proposition that congressional power over foreign commerce, and over foreign affairs generally, is plenary. The issue is whether Congress may exercise its plenary authority by ceding to an international regulatory institution the power to decide on rules that the United States might not be able to prevent or change. More than half a century ago when New Deal legislation was under constitutional attack, it was believed that there were constitutional limits on the extent to which Congress could delegate its own powers to the President or to regulatory agencies. Constitutional lawyers debate even today whether the so-called "delegation doctrine" has any contemporary validity. I am inclined to doubt that it does. It seems to me an outmoded relic, but even if I am right and the Congress may delegate unfettered rule-making discretion to the President or to domestic agencies, it will require a considerable leap in constitutional argumentation to justify the trend that seems to me inevitable over the coming century.

Domestically, we accept the idea that regulatory agencies can get away with broad freedom of action, because we know that if they mess things up too badly, Congress will step in and try to set things right. The nice constitutional arguments about whether Congress can delegate regulatory authority to private associations or other private persons also presuppose that Congress has ultimate power to lay down the law in case of abuse of the authority delegated. What we will need for

the third century is something like the moment when our Supreme Court realized in the late 1930s that the Constitution should not impede the implementation of the New Deal legislation that the country so badly needed. The time will come in the coming century when the United States will have to accept that the congressional function of regulating foreign commerce is fulfilled, not infringed or abdicated, when Congress consents to law making by international organizations, even when we do not like the outcome in a given instance.

Finally, I turn to the field of security. Mr. Chairman, I am going to move from teasing you to making an all-out attack on another of the senior figures in the Society, our beloved Editor in Chief, Thomas Franck. I wish to devote the remainder of my time to explaining why his recent piece in the *Journal* profoundly misunderstands the relationship between the U.S. Constitution and the UN Charter.

First, the framers of the UN Charter were well aware of the sensitivities of many member states, great and small powers alike, concerning their internal constitutional law governing the use of force. Accordingly, they devised a system that differentiated between nonmilitary means of enforcement, such as economic sanctions, and military means. Under the UN Charter, no organ has authority to compel any state, great or small, to participate in a military action unless it agrees to do so. The particular form is to enter into an agreement under Article 43 of the Charter pursuant to which a national military contingent would be made available to the Security Council at its call, but a state could agree through other means. I agree with Professor Franck that other mechanisms have functionally replaced Article 43, but this evolution in no way changes a basic point of the article, which is that states cannot be compelled to use military force unless one way or another they have agreed to do so. Such an agreement would have to be approved by the member states "in accordance with their respective constitutional processes." This phrase is used in Article 43, and I think that same concept is applicable no matter what mode of agreement might be in effect.

Second, the United States need not rely on the veto as protection against UN action, because the UN Charter simply does not and cannot be read to require any state to use military force unless it has agreed to do so, even in a so-called police or enforcement action. The Security Council may recommend or authorize force. In that event the United States would have to decide in accordance with its own constitutional processes whether to participate in UN-approved military action.

Third, the Senate in approving the UN Charter and the Congress in enacting the UN Participation Act understood that Congress could give advance consent to an agreement under Article 43 to allow the Security Council to use U.S. military forces. Once Congress approved an Article 43 agreement, the consent would be valid for the term of the agreement, and Congress would not need to approve a particular use of force falling within the terms of that agreement.

Fourth, Congress has the fundamental responsibility under our Constitution to decide on the basic policies governing uses of U.S. military force. Congress may exercise this responsibility through advance approval for certain categories of uses of force. Thus, Congress could decide to approve an Article 43 agreement, although it has not been asked to do so. Furthermore, Congress can decide to authorize the President to make U.S. troops available for a military action under the authority of a Security Council resolution. Congress may do so in the context of a particular case, as was done for the Persian Gulf conflict, or by describing a category of cases that could arise in the future. No such generalized authority has been granted by Congress yet, but it may wish to consider some such form of

authorization as we move into the third century of the Constitution and a new era of collective security.

### Remarks by Harold Hongju Koh*

In this, the bicentennial of the Bill of Rights, it is worth talking not just about what our Constitution constitutes (i.e., our structure of government) but also about what it protects (i.e., the rights of individuals to be free from governmental interference and to be free to pursue self-fulfillment). After the equal protection and due process revolutions of the 1950s and the 1960s—exemplified by the Supreme Court's decisions in *Brown v. Board of Education* on the equal protection side, *Miranda v. Arizona* in criminal due process, and *Goldberg v. Kelly* in civil due process—in the 1980s and 1990s, American constitutional law refocused its attention upon issues of structure. This reorientation was exemplified by the line of Burger and Rehnquist Court cases starting with *Buckley v. Valeo* (about the constitutionality of the Federal Election Commission), running through *Northern Pipeline, INS v. Chadha, Bowsher v. Synar, Morrison v. Olson*, and, most recently, the *Mistretta* case (upholding the constitutionality of the sentencing guidelines).

Similarly, in American foreign affairs law, the 1950s and 1960s signaled the high watermark for rights with the Warren Court's decisions in *Reid v. Covert, Kent v. Dulles*, and *U.S. v. Robel*, before structural issues seized center stage in the foreign affairs context as well. So just as *Roe v. Wade* marked a kind of last major gasp for rights in the domestic realm before the Burger Court, the *Pentagon Papers* case, decided by an unholy alliance of First Amendment absolutists and executive supremacists, marked a last gasp for rights in foreign affairs before issues of structure took control of the Burger Court's foreign affairs docket as well—starting with *Goldwater v. Carter*,[1] which involved treaty termination; *Dames & Moore v. Regan*,[2] involving foreign claims settlement; *INS v. Chadha*, the legislative veto case; and culminating only a few months ago in Judge Harold Greene's decision in *Dellums v. Bush*, which holds (among other things) that the President does require the approval of Congress before he goes to war.

While we think about cases like *Chadha* and *Dellums* as being about structure and not rights, they illustrate that the dichotomy between structure and rights in foreign affairs is a false one.[3] For as much as *Chadha* involved the battle over an institutional tool, namely the legislative veto, at base, that case concerned the *right* of an alien not to be deported unconstitutionally. Similarly, I think we miss much of the import of the *Dellums v. Bush* ruling if we see it as merely a case that said that Congress must approve a decision to go to war (although holding in that case, that the underlying issue was not ripe). What Judge Greene was implicitly acknowledging was not simply the prerogatives of Congress, but also that the soldiers who were being sent to that war would have had a *right* not to fight in an unconstitutional, unauthorized war. If President Bush had not subsequently sought congressional authorization, then tens, if not hundreds, of soldiers would have invoked that right across the country, citing Judge Greene's decision as reason why they should not have to fight and die in an unauthorized, unconstitutional

*Yale Law School.

[1] 18 ILM 1488 (1979).

[2] 20 ILM 897 (1981).

[3] The Supreme Court recently made a similar point in *Dennis v. Higgins*, 111 S.Ct. 865 (1991).