Berlin Speech – US Supreme Court Jurisdiction

I. [Slide] [Introduction]

A. Thank you. Pleasure and privilege. Professor Calliess asked if I would talk about the US Supreme Court and its jurisdiction, with particular attention to human rights and federalism issues.

B. In order to understand the US Supreme Court, one must first understand a little about the United States judicial system generally and about the federal court system in particular. So I will begin with that background. Then, I talk a little about how the Supreme Court generally and how it works in practice. Then I will turn to how the Supreme Court deals with rights and federalism issues.

C. Obviously, in the time allowed, I will only be able to discuss these things most generally, but I would be happy to answer more specific questions afterward.

II. [Slide] Background –

A. The US has two wholly separate judicial systems – one federal and one state, reflecting the dual sovereignty of the United States.

1. Example: There is state criminal law and federal criminal law. They are two separate systems. The same physical act might violate both a state law and a federal law – for example, assaulting a person to stop him from voting in a federal election would constitute criminal assault under state law and would constitute a federal crime under federal law. The person could be tried, convicted and sentenced to state prison under state law, and the person could be separately tried, convicted, and sentenced to federal prison under federal law, thereby having to serve two separate sentences for the same act.

2. The two systems generally parallel each other – with trial court decisions appealed to a court of appeals and then a Supreme Court with discretionary jurisdiction – that is, it decides which cases it hears; it need not hear all cases that seek to be heard.

3. At this point it might be well to note that the US Supreme Court is not a "constitutional court" as may be found in Germany and some other nations.

a. Any of these courts may declare a law of Congress or an act of the federal executive to be unconstitutional. Ultimately, if appealed, the case may be decided by the Supreme Court, but only if the Supreme Court wishes to hear the case.

b. Similarly, the Supreme Court decides many non-constitutional law

cases. Typically, less than half of its cases involve constitutional issues.

B. The federal system derives from Article III of the US Constitution.

1. [Slide] Article III establishes the Supreme Court but it leaves to Congress to establish whatever lower federal courts it deems necessary.

a. Thus, the very existence of lower federal courts and what kinds of cases they can hear, within the outer limit prescribed by the Constitution, are determined by Congress.

2. [Slide] It also establishes the outer limits of the jurisdiction of federal courts.

a. Most important is the jurisdiction over cases involving the US Constitution or federal laws or treaties, cases in which the United States is a party, controversies between states and between citizens of different states, and cases involving foreign powers.

b. This jurisdiction reflects what was viewed as national interests that should be decided by national courts.

c. Accordingly, there are wide ranges of cases that do not come before federal courts and are decided only by state courts.

d. Moreover, as a general matter, this jurisdiction is not exclusive to federal courts. For example, state courts may consider the constitutionality of government actions under the US constitution.

3. [Slide] With respect to the Supreme Court,

a. Article III specifies a limited class of cases in which the Court has original jurisdiction – that is, the case is first filed in the Supreme Court: cases affecting ambassadors and those in which a state is a party.

b. [Advance Slide] It then says the Supreme Court has appellate jurisdiction over all other cases within the federal judicial power – to the extent that Congress so provides.

(1) This is an important point, because it means that Congress controls the appellate jurisdiction of the Supreme Court.

c. [Slide] But the Constitution says nothing about the composition of the Supreme Court, which has ranged from five to ten justices over history, but it has remained at nine since 1868. Nor does the

Constitution say anything about how the Court operates. These are all handled by statute or Court rule.

(1) The Constitution does specify, however, that the President nominates and with the advice and consent of the Senate appoints all federal judges.

(a) There is no legal requirement that judges have any legal experience or even be law-trained, although traditionally they always have been.

(b) Nevertheless, it is only in recent years that appointees to the United States Supreme Court have previously been judges on lower courts. For example, in 1954, when the Supreme Court decided Brown v. Bd of Education, holding racial segregation unconstitutional, only one of the nine justices had previously been a judge before being appointed to the Supreme Court.

(2) [Slide] Currently, as you may know, Justice Souter has announced his intention to resign from the US Supreme Court, and President Obama has nominated Sonia Sotomayor to replace him. She is a longstanding court of appeals judge and also a former trial judge.

(a) The politics of appointments/party opposing the President regularly tries to raise objections to the nominee, but it is a bit unusual even when the President's party is in the minority in the Senate for the Senate to reject a nominee.

d. And the Constitution specifies that federal judges hold their positions "during periods of good behavior," which means for life, unless impeached for treason, bribery, or other high crimes of misdemeanors. There is no mandatory retirement. Today, six of the nine justices of the Supreme Court are over 68.

e. States differ in how their judges obtain office and for how long they hold office. Some state judges are appointed; some are elected in popular elections by the people in the same manner as representatives and governors. The election of judges is somewhat anomalous, but is deeply engrained in the culture of many states.

4. [Slide] Supreme Court Practice – there are three possible routes to the Supreme Court: Original jurisdiction, Mandatory Appeal, and Petition for Certiorari

a. [Advance slide] As mentioned, the Supreme Court has original jurisdiction over cases involving ambassadors or when a state is a party. As a practical matter, the Court only hears original jurisdiction cases when it is a dispute between two states, usually a boundary dispute – one to two cases a year.

b. [Advance slide] Historically, Congress provided for almost all cases at courts of appeals or state supreme court cases involving federal questions to be heard by mandatory appeal. That is, the Supreme Court would be required to hear the case. Beginning in 1870, however, Congress began to restrict the types of cases that required the Supreme Court to hear them. Today, there are only a handful of situations in which cases must be heard by the Court – typically less than two per year.

c. [Advance Slide] The remainder of the Supreme Court cases come to it by Petition for Certiorari – a petition for an old English form of writ that authorizes a court to review a case.

(1) [Slide] A party who loses in a federal court of appeals or in a state supreme court (if the state case involves a question under either the US Constitution or a federal statute) may file the petition. Currently, the Supreme Court hears about 70 cases a year from the more than 8000 petitions for certiorari it receives.

(2) [Advance Slide] The Court decides in a private conference whether to hear the case. A case is heard if 4 of the 9 justices wish to hear it. This is called the Rule of 4.

(a) Not in constitution, law, or published rule.

(3) [Advance Slide] If the case is to be heard, the parties file briefs on the case – often there are a number of amicus curiae briefs as well –

(4) [Advance Slide] Oral argument (normally one hour per case or one half hour for each side) is held some time between October and April.

(5) [Advance Slide] The case is argued before the entire Court of nine justices, who decide the case.

(a) The Supreme Court does not sit in panels, senates, or chambers.

(6) After oral argument, the Court again meets in private, discusses the cases, preliminarily decides how the case will be decided, and the Chief Justice (if he is in the majority) assigns who will write the opinion.

(a) A draft opinion is circulated among the justices.

(b) Changes may be made.

(c) Concurring and dissenting opinions may be written.

(7) Finally, the final opinions are released to the parties and the public. Generally, all the opinions are identified as being written by a particular justice and the other justices either agree without separate opinion, write a concurring opinion to comment on some aspect of the majority opinion, or write a dissenting opinion, explaining why they disagree with the majority opinion.

III. [Slide] Supreme Court Jurisdiction – earlier we described the constitutional statement of the outer limit of federal courts', including the Supreme Court's, jurisdiction. That list of types of cases and controversies focused on either the subject matter (federal law or the Constitution) or the parties involved (e.g., states or ambassadors). However, whatever the subject matter and whoever the parties, there must be a "case" or "controversy" in order for a federal court to have jurisdiction.

A. [Advance Slide] For example, in 1793, Secretary of State Thomas Jefferson, on behalf of President George Washington, sent a letter to the Supreme Court asking for its opinion concerning certain legal matters relating to the United States' neutrality in the then ongoing war between France and Great Britain. The question certainly involved a question of federal law, but the Supreme Court replied to President Washington that to decide the question asked would be to act "extra-judicially"; that is, it would be rendering an opinion outside the decision of a case or controversy before it.

1. In other words, the Supreme Court has held that so-called "advisory opinions," the equivalent of "abstrakte Normenkontrolle," are not possible under the US Constitution.

2. Some states in the US do allow for advisory opinions by their supreme courts.

B. Thus, for a federal court to render a decision, it must be the exercise of a judicial function in deciding a case. [Advance Slide] The Supreme Court has established three requirements for an action to constitute a case for decision. This is called the doctrine of Standing. Does a person have standing to bring a case to a court?

1. First, the plaintiff must have been injured or about to be injured in the immediate future.

2. Second, the injury must be caused or about to be caused by the alleged unlawful action.

3. Third, a favorable court decision must be able to remedy the injury.

C. [Slide] Examples:

1. During the Vietnam War, the U.S. Army's Military Intelligence engaged in surveillance of certain public demonstrations in the US against the war. This activity was challenged by persons who attended public demonstrations against the war, alleging that their rights had been violated by this surveillance. However, they could not establish that they had suffered any harm as a result of the alleged surveillance. The Supreme Court held by a 5-4 vote that these plaintiffs had not established standing, because they had not proven that they were in fact injured. The ***dissent*** believed that the mere fact that they were chilled in the exercise of their First Amendment rights by reason of their fear of being watched by the military was a sufficient injury to establish standing. [Army Surveillance (Laird v. Tatum, 408 US 1 (1972)]

    a. After 9/11, the Bush administration utilized the National Security Agency to monitor certain US-to-foreign nation telephone calls in violation of federal statutes. So far, challenges by persons to this action have failed because the persons cannot show that their communications were in fact monitored.

2. The US Constitution requires that "a regular statement and account of the receipts and expenditures of all public money shall be published from time to time." From the creation of the CIA in 1947 to 1974 never had its expenditures been published by the government. This was challenged by a group of US taxpayers and citizens. The Supreme Court by a 5-4 vote said that the plaintiffs did not have standing because they did not suffer any particularized injury. Only a particularized injury suffered by an individual (or a number of individuals separately) qualifies, not a generalized grievance suffered by all persons. The ***dissent*** believed that a violation of a constitutional right (the right to have expenditures published) was sufficient injury for a citizen and taxpayer. [CIA Expenditures (United States v. Richardson, 418 U.S. 166 (1974)]

3. The Clean Air Act requires the Environmental Protection Agency to set emission limits for automobiles for any pollutant EPA finds endangers the public health or welfare. The state of Massachusetts petitioned EPA to make an "endangerment" finding with respect to carbon dioxide, because of its effect on global warming. EPA refused, and Massachusetts sought

judicial review. When the case reached the Supreme Court, by a 5-4 vote, it held that Massachusetts did satisfy the three requirements for standing. The majority found that Massachusetts had suffered and continued to suffer an injury from the loss of its own coastal land to sea level rise, that sea level rise was caused by global warming and in part the failure of EPA to regulate carbon dioxide in automobiles, and that a favorable court decision would require EPA to regulate carbon dioxide, which would in part remedy global warming and hence sea level rise in Massachusetts. Four justices disagreed, finding future sea level rise speculative and not imminent and that there was a lack of causation shown between EPA's failure to regulate carbon dioxide emissions on new cars and any subsequent sea level rise, or that a favorable court decision requiring EPA to regulate carbon dioxide would retard sea level rise. [Global Warming (Massachusetts v. EPA, 549 US 497 (2007))]

D. [Slide] Several lessons may be drawn from these examples.

1. [Advance Slide] First, the Supreme Court is not of one mind as to what is necessary in order to justify judicial action.

a. The test remains the same, but the application differs because different justices read the facts to have different significance.

2. [Advance Slide] The differences reflect a different view of the role of courts in American government

3. [Advance Slide] Those who see the courts as having a broader role are called "liberal," while those who see the courts having a narrower role are called "conservative."

a. Explanation of American "liberals" versus European liberals. Libertarians.

E. [Slide] The Court today is deeply split between its conservative faction and its liberal faction, with one justice, Anthony Kennedy, sometimes leaning one way and sometimes the other.

1. The first year in which the current membership of the Court was present (2006-2007) one third of all the cases were decided by a 5-4 vote and Justice Kennedy was the fifth vote in every one.

IV. The conservative/liberal split is not limited to questions concerning the scope of courts' jurisdiction. It also is reflected in the Court's "rights" cases.

A. Turning now to the Supreme Court and the protection of rights, we need a little background

1. [Slide] ["Human" rights vs. constitutional rights.]

a. In much of the world the focus is on protecting so-called human rights. Human rights as international law, universally accepted rights.

(1) As a matter of international law the United States supports the extension of human rights to those denied them.

2. [Advance Slide] In the United States, however, we don't speak of "human rights" in terms of rights enjoyed by persons in the United States protected by courts. American courts can only enforce domestically adopted statutory and constitutional rights.

a. Even most treaties must be given domestic force through domestic legislation.

3. In other words, the concept of international human rights does not play a role in either state or federal courts in the United States.

B. [Slide] In the United States we also distinguish between "positive" rights and "negative" rights.

1. Some constitutions provide what may be called "positive" rights – rights that obligate government to do something for its people.

a. Example of Basic Law's requirement for the state to protect human dignity, marriage, and the family.

2. [Advance Slide] Almost all constitutions provide certain "negative" rights – rights that prohibit the government from doing certain things.

a. Example of the Constitution's First Amendment prohibition against any law abridging the freedom of speech.

3. [Advance Slide] The United States Constitution does not contain any positive rights; only negative rights.

a. There is no federal constitutional right to adequate housing, food, clothing, medical care, or education. Whatever rights exist in these areas stem from statutes passed by Congress.

C. [Slide] Because only statutory and constitutional rights are protected in US courts, one must look to those texts to determine what is protected. In the Constitution we have what are called enumerated rights.

1. These are the rights that are listed in the Constitution, most notably in the Bill of Rights (the first 10 amendments to the Constitution) and the 14th

Amendment.

2. [Advance Slide] With respect to these rights, the issue that arises is one of interpretation – what does the text protect?

3. [Advance Slide] There is a strong debate in the United States today regarding the appropriate theory of interpretation of the constitution's text.

   a. Originalism – the original meaning, either with respect to the reader or the writer.

      (1) E.g., the right to bear arms for one's self defense

   b. Purposive interpretation – to give effect to the purposes behind the language in light of contemporary circumstances.

   c. Conservatives are associated with Originalism; liberals with Purposive interpretation.

D. [Slide] However, for at least a century, the "due process" clauses in both the Fifth and Fourteenth Amendments have been interpreted to protect other unenumerated rights.

1. Examples:

   a. Griswold v. Connecticut (1965) – the right to take contraceptives

   b. Roe v. Wade (1973) – a woman's right to an abortion

   c. Troxel v. Granville (2000) – right for parents to raise children

   d. Lawrence v. Texas (2003) – right to engage in non-commercial intimate acts in private

   e. BUT, there is no right to have a physician assist you in terminating your life, even if you are terminally ill.

2. [Slide] How does the Court determine in the absence of text whether or not there is such an unenumerated right?

   a. [Advance Slide] The case law precedent uses two general formulations:

      (1) Implicit in the concept of ordered liberty or

      (2) Deeply rooted in the Nation's history and tradition.

b. Both of these, if narrowly applied, are deeply conservative, because they only recognize that which has always been recognized.

(1) "Liberals" can use these formulations in a more broadly principled manner to expand rights beyond what has been recognized in the past.

(a) For example, the private decisions of a married couple whether or not to have a child was held to be deeply rooted in the nation's history and tradition, so it could be read to provide a right to modern contraceptives.

c. [Advance Slide] However, liberals are more likely simply to find a fundamental right as recognized by contemporary civilized societies.

(1) Look to what most states and civilized nations allow.

(2) Conservatives do not approve of this basis because they believe it empowers judges to act on their personal preferences, rather than the law.

V. [Slide] I turn now to federalism issues.

A. The United States began as a confederation of independent, sovereign states. In the Articles of Confederation, our first constitution, ratified in 1781, the states entered into what must be considered a treaty, providing for a "United States" congress, but its powers were limited, and there was no United States executive or judicial entities.

B. The failure of the Articles to resolve interstate disputes, to raise necessary funds to pay off the Revolutionary War debt or to establish sufficient security for incurring new debt, and to deal with a deep recession, together with a fear of unbridled democracy and near anarchy in some of the states, led to the Constitutional Convention in 1787.

1. The effect of the Constitution was to provide the new national government with significant new powers.

2. [Advance Slide] Nevertheless, the understanding was that the new national government only had those powers granted to it by the sovereign, independent states. Those powers not granted to it were reserved to the states.

a. I think unlike the Federal Republic of Germany, the United States

was created by and out of the states. The Constitution does not grant states any powers. The powers the states possess antedate the Constitution. Nevertheless, the Constitution sometimes expressly and sometimes implicitly recognizes powers retained by the states.

3. [Slide] The Constitution addresses federalism issues in at least three places.

   a. Article I prohibits the states from doing certain things because it was understood that these activities would be carried out by the federal government.

      (1) negotiate with foreign nations, create a monetary system or a bankruptcy system, or maintain an army or navy.

   b. [Advance Slide] Article VI contains the Supremacy Clause, which states that the Constitution and laws of the United States are the supreme law of the land, notwithstanding any contrary state constitutions or laws.

   c. [Advance Slide] And finally, the 10th Amendment espressly reserves to the states those powers not delegated to the federal government.

C. [Slide] In light of the 10th Amendment, the question historically arose what powers were delegated to the federal government.

   1. The Constitution provides no textual authority for the United States government to make laws protecting the environment, regulating worker or consumer safety or health, or criminalizing the possession of drugs or terrorist activity, just for example. This is not surprising given the concerns paramount in the minds of the founders in 1787.

   2. [Advance Slide] However, two provisions of the Constitution have been relied upon as authority for all these activities and many more. They are the "Commerce Clause" and the "Necessary and Proper Clause."

D. [Slide] For the past 70 years, the Supreme Court has given a very broad reading to the Commerce Clause. In essence, it is read to authorize Congress to make any law regulating economic matters.

   1. Thus, it authorizes labor laws, worker and consumer health and safety laws, and the criminalization of drug possession and terrorist activities, the last because they utilize the means of interstate commerce to further their goals.

2. [Advance Slide] Nevertheless, in two cases at the end of the last century, the conservative justices found limits on the Commerce Clause power.

   a. In United States v. Lopez (1995), by a 5-4 vote, the Court found unconstitutional, as beyond Congress's authority, a law making it a crime to have a gun within 1000 feet of a school. Mere possession of a gun was not economic activity, the Court said, and whatever effect there might be on the economy from the negative impacts on education resulting from guns within 1000 feet of schools was too attenuated to justify federal action.

      (1) The law was amended to provide that one could not possess within 1000 feet of a school a gun that had traveled in interstate commerce. This law was upheld.

   b. [Advance Slide] In United States v. Morrison (2000), again by a 5-4 vote, the Court held that Congress could not create a federal cause of action for damages against any person who commits a crime of violence motivated by gender. Again, the Court said that the effect on the economy of such crimes did not justify a federal law.

      (1) However, a separate portion of the law, criminalizing the travel interstate for the purpose of committing a crime of violence motivated by gender was upheld.

3. However, the broad reading of the Commerce Clause remains and is the foundation for most of the laws passed by Congress, even if they seem to have little to do with commerce.

E. [Slide] Even if the subject matter is within the Commerce Clause jurisdiction of Congress, there remained a question whether Congress could regulate the states themselves. For example, Congress might be able to regulate the maximum hours and minimum wages required for employees of private firms, but could it regulate the hours and wages of state government employees?

1. In a series of conflicting cases that culminated in 1985, the Court struggled with this issue, with the conservatives holding that Congress could not regulate the states themselves while the liberals held they could. In Garcia v. SAMTA (1985), the Court concluded that there was no particular barrier to regulation of state activity, if it was otherwise within the Commerce Clause jurisdiction of Congress.

2. This decision has remained in effect even after the Court became more conservative.

F. [Advance Slide] Finally, there was a question whether Congress could, with

respect to a matter within its Commerce Clause jurisdiction, pass a law requiring states to regulate the matter in a particular way. In other words, could Congress require states to act as agencies of the federal government.

1. In 1992, the Court answered this question in the negative. The conservative majority believed such a power was simply incompatible with the notion that the states remain sovereign entities.

2. However, the fact that Congress cannot *require* states to act as agencies of the federal government does not mean that states cannot voluntarily act as agencies of the federal government. Because the choice is left to the state whether or not to act as the agent, the state's sovereign interests are protected.

    a. There are two primary ways Congress can induce voluntary cooperation by the states without actually requiring it.

        (1) Money – we will give you money if you do this.

        (2) Threaten states with federal regulators – if you don't do this, we will do it with federal regulators and you may not like the results.

    b. As a practical matter, these inducements are usually enough. They are the inducements used by the Clean Air Act, and every state has agreed to act as the agent of the federal government to administer the Act pursuant to EPA oversight.

VI. [Slide] Separation of Powers

A. We have now discussed two of the major areas of constitutional dispute under the the US Constitution. We have not mentioned the third major area – separation of powers.

B. This refers to questions as to the individual and relative powers between the three branches of the federal government – the Congress, the President, and the Judiciary.

1. For example, may the President hold persons from the battlefield in military detention indefinitely absent congressional authorization?

2. May Congress pass a law limiting the President's ability to fire a Cabinet officer?

C. Unlike a parliamentary system where whoever controls the parliament necessarily controls the government, under the US system it is not unusual for Congress to be controlled by one party and the President to be from the other party. This sets up

significant opportunities for conflict.

1. Even when it is the same party in control of the Congress and the Presidency, the nature of the party system in the US, which historically has not been top-down control, means there often is grave disagreement over policy.

2. Finally, institutional prerogatives are important.

D. This is a particularly difficult area for the Court, because it may well have an institutional interest in the outcome. Nevertheless, this is an area where judicial decisions have potentially major structural impacts on US government.

VII. Conclusion:

A. This necessarily brief and simplistic overview of the US federal court system and particularly the Supreme Court and their approaches to applying the US Constitution hopefully suggests some significant differences between the US and European systems, even federal systems such as the Federal Republic.

B. While there are Americans who believe the US system is the best in the world, that is usually because they are ignorant as to what else is out there.

C. At the same time, there are Europeans who believe the American system is simply crazy and that their system is clearly superior.

D. What is clear, is that national systems reflect their own history and culture. Importing one nation's system into a different history and culture is likely to be counterproductive.

E. The more our cultures and histories tend to converge, the more will our governmental systems tend to converge. We are seeing it in Europe today. Perhaps someday the world.

F. Thank you. Questions.