Congressional Testimony

Judicial Reliance on Foreign Law

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My name is Andrew Grossman. I am a Visiting Legal Fellow in the Center for Legal and Judicial Studies at The Heritage Foundation. The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

The Subcommittee is to be commended for holding this hearing today to consider the proper role of foreign and international laws in United States courts and the consequences to the nation when foreign and international laws are improperly elevated above our own laws and, in particular, the original meaning of the United States Constitution. This issue, however, extends beyond constitutional law to many other areas of legal practice, including criminal law and family law, where Americans' rights are no less at stake. Those legal academics who complain that too much attention has been paid to the use of foreign law are wrong; an issue that implicates our system of democratic self-government and the balance of power between the branches of the federal government, and between the federal government and the states, deserves attention and consideration. One suspects that those who attempt to downplay the importance of this issue do so merely because they do not quarrel with, or even support, the policies that tend to result when the will of the people is thwarted by the arbitrary application of foreign law.

In this testimony, I begin by presenting a brief taxonomy of the uses and abuses of foreign and international law. (Note that, by "foreign law," I refer to the laws of other nations; by "international law," I refer to treaties and the law of nations.) In several contexts, such as the law of contracts, the use of foreign or international law is perfectly legitimate. In other contexts, including certain tasks of constitutional interpretation, to reference such laws is to abuse both them and our own laws—it is illegitimate.

After those general remarks, I will briefly discuss three specific issues that have received far too little attention from legal scholars and from Congress. First is that the abuse of foreign and international law has, as a practical matter, primarily served to undermine our system of federalism by arrogating the reserved powers of the states. Second is that Congress's practice of "outsourcing" U.S. law through the implementation of treaties that have significant domestic effects undermines our usual democratic processes for lawmaking, reduces accountability, results in bad law, and puts Americans' liberties at risk. The third issue is a hopeful one: while the misuse of foreign and international law is often attributable to the courts, Congress does have the power to address this problem in several ways.

Abusing Foreign and International Law

It is useful to define, with some precision, those areas where the use of foreign or international law has proven controversial. The one which has appropriately been subject to the greatest criticism is the use of foreign legal materials in the interpretation of the U.S. Constitution. To be clear, in this, I do not refer to old English law, Roman law, and those practices, cases, and treatises which established the background principles of common law and the law of nations to which the Framers of the Constitution referred in their work. Without resort to this body of law, we would struggle to identify the substance and boundaries of such constitutional terms as "habeas corpus," "bill of

attainder," and "letters of marque and reprisal." These sources are legitimate because they elucidate the meaning of the Constitution as it was originally understood and give us insight into the structure and purpose of its provisions. These sources thereby serve to limit judicial discretion by fixing the meaning of the constitutional text. This, in turn, delineates the space in which the political branches of government, as well as the states, may act in response to public will.

But lacking all such legitimacy is the citation of more recent foreign precedents, which the Supreme Court has applied in a perfectly contrary manner, to unmoor, rather than to fix, constitutional meaning and thereby to broaden judicial discretion, at the expense of the powers of the political branches and the states. In their authoritative article reviewing two hundred years of Supreme Court citations to foreign sources of law[1], Steven Calabresi and Stephanie Dotson Zimdahl trace the Court's "modern" usage of foreign law to Chief Justice Warren's plurality decision in *Trop v. Dulles*, in which the Court held that forfeiture of citizenship as punishment for wartime desertion violated the Eighth Amendment's proscription against cruel and unusual punishment. 356 U.S. 86, 101-103 (1958). That proscription, stated Chief Justice Warren, "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," thereby introducing that loose standard into the Court's jurisprudence. *Id*. at 101. And by example, he indicated that the practice of foreign nations is relevant to ascertaining the present state of these "standards of decency":

> The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime. It is true that several countries prescribe expatriation in the event that their nationals engage in conduct in derogation of native allegiance. Even statutes of this sort are generally applicable primarily to naturalized citizens. But use of denationalization as punishment for crime is an entirely different matter. The United Nations' survey of the nationality laws of 84 nations of the world reveals that only two countries, the Philippines and Turkey, impose denationalization as a penalty for desertion. In this country the Eighth Amendment forbids that to be done.

Id. at 102-03 (footnote omitted).

And so the die was cast. The citation to foreign and international materials soon became a regular feature of the Court's Eighth Amendment cases, particularly regarding limitations on capital punishment. *See Coker v. Georgia*, 433 U.S. 584, 592 n.4, 596 n.10 (1977) (citing "the legislative decisions . . . in most of the countries around the world" and "the climate of international opinion" to support the holding that imposition of the death penalty for rape was cruel and unusual punishment); *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982) (citing the decisions of various countries to abolish the doctrine of felony murder to support the holding that imposition of the death penalty for vicarious felony murder was cruel and unusual punishment); *Thompson v. Oklahoma*, 487 U.S. 815,

[1] Steven Calabresi and Stephanie Dotson Zimdahl, The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision, 47 Wm. & Mary L. Rev. 743, 846-47 (2005).

830 (1988) (citing "the views that have been expressed by respected professional organizations, by other nations that share our Anglo-American heritage, and by the leading members of the Western European community," as well as Soviet law, to support the holding that imposition of the death penalty on a person less than 16 years old at the time of his offense was cruel and unusual punishment); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) (citing the alleged views of the "world community," as well as polling data, to support the holding that imposition of the death penalty on mentally retarded offenders was cruel and unusual punishment); *Roper v. Simmons*, 543 U.S. 551, 575-78 (2005) (citing the United Nations Convention on the Rights of the Child and other countries' practices to support the holding that imposition of the death penalty on minors was cruel and unusual punishment).

Two recent decisions citing to foreign law outside of the death penalty context bear special mention. *Graham v. Florida*, 130 S. Ct. 2011 (2010), an Eighth Amendment case, is notable for applying the Court's approach to foreign law to hold that life-without-parole sentences may not be imposed for crimes committed by juvenile offenders other than homicide. It remains to be seen whether this case is an aberration or whether it signifies the breach of the firewall that had limited the application of foreign law, and the loose "evolving standards" inquiry that gives it putative relevance, to capital punishment. An early indication may come soon, as the Court has agreed to hear two cases this term that present the question of whether a teenage murderer may ever be sentenced to life without parole. *Miller v. Alabama*, No. 10-9646; *Jackson v. Hobbs*, No. 10-9647.

In *Lawrence v. Texas*, 539 U.S. 558, 576-77 (2003), the Court struck down Texas's anti-sodomy statute as violating of the Fourteenth Amendment's Due Process Clause. In reaching this decision, the Court cited to judgments of the European Court of Human Rights, as well as claims that "[o]ther nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct." Unlike in the Eighth Amendment context, the Court was somewhat clearer in *Lawrence* in stating that its decision relied on these sources: "The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent." *Id*. at 577. *Lawrence's* approach, it should be noted, is consistent with the Court's reasoning in *Roe v. Wade*, 410 U.S. 113, 137-38 (1973), which placed significant weight on recent developments in English statutory law in reaching its conclusion that state criminal abortion laws also violate the Fourteenth Amendment's Due Process Clause. No logical limiting principle, of which I am aware, cabins the application of foreign law, through the Due Process Clause, to striking down the laws at issue in *Lawrence* and *Roe*. This method will, no doubt, be put to use in future cases concerning hot-button social issues that divide public opinion, particularly where elite opinion may be less balanced.

Why has the Supreme Court's citation to foreign law and international law materials in these opinions attracted such opprobrium? I think the objections can be classified into four basic propositions:

- **Foreign law is constitutionally irrelevant.** The Constitution should be interpreted according to its original public meaning. The present-day practices of foreign nations do not elucidate that meaning, particularly with respect to the Eight Amendment or the Fourteenth Amendment's Due Process Clause. (The same is true of treaties that the United States has declined to sign or ratify.) Indeed, in the usual case, the present-day practices of foreign nations are inconsistent with, or contrary to, original public meaning. Discussion of foreign law therefore distracts the Court from its core interpretive task. It is also contrary, in both form and appearance, to the Supremacy Clause, by elevating foreign statutes or court decisions to "the supreme law of the land," superior to U.S. statutory law and even the constitutional text.

- **Reliance on foreign law is anti-democratic.** The Constitution establishes and preserves systems of representative government (at the state and federal levels, respectively), but the Court's use of foreign law services to limit the range of permissible policy choices that may be made by the people's representatives, and establishes these limitations based on the preferences or political decisions of peoples not entitled to any say in our governance. Judge Richard Posner put this point particularly well: "Judges in foreign countries do not have the slightest democratic legitimacy in a U.S. context. The votes of foreign electorates, the judicial confirmation procedures (if any) in foreign nations, are not events in our democracy. To cite foreign decisions in order to establish an international consensus that should have weight with U.S. courts is like subjecting legislation enacted by Congress to review by the United Nations General Assembly."[2]

- **The Court is incompetent at canvassing "the climate of international opinion."** The Court's typical approach to applying foreign law, particularly in the Eighth Amendment context, has been to "count the noses" of foreign nations on any particular issue, but the Court seems unaware, or uninterested in, exactly what it is counting. Foreign laws and institutions differ in meaningful ways from their domestic counterparts, such that counting statutes or court decisions may not be an accurate means to gauge world opinion. In many instances, for example, foreign practice does not reflect the will of foreign peoples—for example, capital punishment retains widespread public support in many countries where political actors have abolished it. *See* Josh Marshall, Europeans Support Capital Punishment Too, *The New Republic*, Jul. 31, 2000. In that case, does foreign practice reflect "evolving standards of decency" or simply the preferences of a relatively small group of political elites? Then, there are basic factual inquiries that are beyond the Court's institutional competence and role. Does the Court know, for example, "that every foreign nation — of whatever tyrannical political makeup and with however subservient or incompetent a court system — in fact *adheres* to a rule of no death penalty for offenders under 18"? *Roper*, 543 U.S. at 623 (Scalia, J. dissenting). Evidence suggests that the justices have, at times, been misled or mistaken on basic factual points concerning foreign practices. *See,*

[2] Richard A. Posner, *Foreword: A Political Court*, 119 Harv. L. Rev. 31, 88-89 (2005).

e.g., Knight v. Florida, 528 U.S. 990, 996 (Breyer, J., dissenting from denial of certiorari) (citing Zimbabwe's humane practices).

- **The Court's citation of foreign law is opportunistic.** The Court's citation of foreign law has been arbitrary in two respects that suggest opportunism is at play. First, what Justice Scalia has said about the citation of legislative history applies equally to foreign law: "the trick is to look over the heads of the crowd and pick out your friends." *Enmund* discusses the law of a few Commonwealth and European countries, while *Lawrence* fixates on a decision of the European Court of Human Rights. And *Thompson* is almost comical in its arbitrary survey of foreign practices: "Although the death penalty has not been entirely abolished in the United Kingdom or New Zealand (it has been abolished in Australia, except in the State of New South Wales, where it is available for treason and piracy), in neither of those countries may a juvenile be executed." 487 U.S. at 830-31. Second is the Court's choice of those areas of law in which to cite to foreign law. For example, as Calabresi and Zimdahl note, "Foreign law is more conservative than U.S. constitutional law with respect to separation of church and state, admission of illegally obtained evidence, and allowance of governmental restrictions on speech."[3] In these areas, foreign law is (apparently) irrelevant, for reasons unknown. At best, the Court's haphazard practice may indicate that its citations to foreign law are simply "interpretive bricolage," "essentially a random, playful, and perhaps even unconscious process of reaching into a grab bag and using the first thing that happens to fit the constitutional problem at hand."[4] At worst, the Court is being selective in its choice and application of law to reach its preferred outcomes. One cannot help but wonder whether the decisive factor governing the citation of foreign law is, in the final analysis, simply "our own judgment." *E.g., Coker*, 433 U.S. at 597.

For these reasons, Congress, and all Americans, should be concerned that the Supreme Court's abuse of foreign law continues apace and appears to be gradually expanding to reach more punishments under the Eighth Amendment and more hot-button issues of social controversy. One can predict, with reasonable confidence, that one or another justice on the Court—perhaps even in a majority opinion—will, within the next several terms, rely on irrelevant foreign laws to justify his or her position on life without parole for juvenile murderers; life without parole for adults; same-sex marriage; permissible delays in the administration of capital punishment; and possibly even universal health care. To the extent that the Court relies on foreign laws to decide these and other issues, it gives short shrift to our Constitution, our representative institutions, and the will of the American people in favor of the opinion of foreign elites who are unaccountable to the American people and pledge no fealty to our Constitution or laws. And to the extent that the citation of foreign law is just a fig leaf to cover or "confirm" the Court's application of its own preferences in place of the rule of law, the rule of law suffers no less.

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[3] Calabresi and Zimdahl, *supra*, at 751.
[4] Roger Alford, *Misusing International Sources To Interpret the Constitution*, 98 Am J. Int'l L. 57, 64 (2004).

Using Foreign and International Law

It is also useful to delineate those areas where the citation and application of foreign or international law is appropriate in principle and less controversial in practice, so as to understand the challenges presented by such citation (when it is, conceptually, legitimate) and to narrow debate to those areas where there is actual controversy and disagreement. These can be grouped into several broad classes.

The first, representing probably the largest classes of cases in the federal court applying foreign law, is private law. These cases often implicate contracts that specify a choice of law under which they are to be interpreted and applied or tort claims (or the like) that arose abroad. Consider, for example, a lawsuit to enforce a contract that was struck in France and is, by its terms, subject to French law. This may appear to be straightforward and even mechanical: the court is charged to determine the applicable law, determine the meaning of the contract in light of that law, and then measure the facts and circumstances of the case against the obligations specified in the contract. But even in this simple case, there may be pitfalls. For example, the contract, and the law upon which it rests, may be contrary to our own public policies, in which case it may be, in whole or in part, unenforceable. And even where there is no issue of public policy, there is the matter of ascertaining the substance of the foreign law itself, which is no easy task. (A recent opinion by Judge Frank Easterbrook, of the United States Court of Appeals for the Seventh Circuit, illustrates as much, in the course of applying French law to a routine contract dispute. *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624 (7th Cir. 2010)). And even where the law can be ascertained and is found enforceable, the courts must also take account of the difficulties in translating and applying foreign legal concepts divorced from their institutional settings. *See id.* at 631; *id.* at 635-37 (Posner, J., concurring). These tasks becomes only more difficult, and fraught with error, the more wide-ranging the court's inquiry, such as when the Supreme Court attempts to determine world opinion on some broad question of law.

The second class concerns the interpretation and application of international law. This includes treaties to which the United States is party, which in some instances have been interpreted by the courts of other nations or by international tribunals. *See Medellin v. Texas*, 128 S. Ct. 1346, 1357-58 (2008) (citing cases). But even here, where courts of different nations are called upon to construe and apply the same text (though perhaps in translation, which presents its own difficulties), they may arrive at very different results. A treaty, though creating an international law obligation on the United States, may still not constitute binding federal law enforceable in United States courts. *Id.* at 1356-57. That is, it may not be self-executing. And in some instances, the United States may have entered into reservations or understandings that alter a treaty's domestic effect. The Vienna Convention on the Law of Treaties defines a reservation as "a unilateral statement . . . made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State." Under the convention's formulation, reservations are effective so long as they are not prohibited by the treaty or incompatible with its "object and purpose." Understandings serve to notify other parties to the treaty of a nation's interpretation of specific terms, particularly as those terms

apply to its laws. Both reservations and understandings may alter the application of a treaty's terms to a particular party. So may subsequent actions by Congress or the Executive Branch. For example, subsequent statutory enactments will be construed so as not to conflict with international obligations only "where fairly possible" to do so. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 348 (1936).

A third, and related, area is where U.S. law incorporates foreign or international law. For example, the Alien Tort Statute gives federal courts jurisdiction over "any civil action by an alien, for a tort only, committed in violation of the law of nations." 28 U.S.C. § 1350 (2006). The Supreme Court has taken this language to authorize "any claim based on the present-day law of nations [that] rest[s] on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized [i.e., violation of safe conducts, infringement of the rights of ambassadors, and piracy]." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004). The vagueness of the ATS continues to sew confusion over the precise nature and substance of the claims recognized under it. Though there has not been a flood of judgments under the ATS, there has been a flood of complex, slow-moving litigation that has proven burdensome to the courts and expensive to litigants. The law that courts apply under the ATS is underdetermined, and this has been a recipe for inconsistent and arbitrary rulings. Congress would do well to clarify and limit the ATS, or simply to repeal it.

A more typical example of the incorporation of foreign law is the Lacey Act, which criminalizes the importation, possession, or transfer of any wildlife in violation of any treaty or where the wildlife was taken, possessed, transported, or sold in violation of any foreign law. 16 U.S.C. § 3372. In this way, the Lacey Act incorporates into U.S. law both the broad species listings made under the Convention on International Trade in Endangered Species ("CITES") and the laws and regulations concerning the possession and export of flora and fauna of *every country in the world*. In some cases, these laws do not even address conservation. For example, it was under the auspices of the Lacey Act that the federal government dispatched heavily armed federal law enforcement officers to raid Gibson Guitar factories this past August to seize woods from India that, under the U.S. Department of Justice's interpretation of Indian law, may have been illegally exported because they were not finished by workers in India. *See, e.g.,* Deborah Zabarenko, Gibson Guitar CEO slams U.S. raids as "overreach," Reuters, Oct. 12, 2011. I have written previously about the misuse of CITES listings to protect commercial interests and the heavy personal toll that this practice imposed on a U.S. orchid dealer whose home was raided and who was ultimately imprisoned for importing orchids that are plentiful in the wild and easily bred. Andrew M. Grossman, The Unlikely Orchid Smuggler, Heritage Foundation *Legal Memorandum* No. 44, Jul. 27, 2009, at http://bit.ly/tSPeQc.

While it is usually not controversial that court would apply foreign or international law in this context—after all, Congress has mandated as much—

"outsourcing" U.S. law in this manner to foreign countries and international bodies is usually bad policy, for reasons that I discuss below.[5]

The Abuse of Foreign And International Law Undermines Federalism

One telling feature shared by all but one of the cases discussed as "abuses" of foreign law is that the losing parties were states. Put more directly, in each case, the Supreme Court struck down a state law in part because it conflicted not with any valid and proper federal statute or explicit limitation on state power under the Constitution, but because it conflicted with foreign laws and practices that, according to the Court, effectively have the force of federal constitutional law. In effect, the usage of foreign law in this manner serves to aggrandize federal power at the expense of the states' retained police power—that is, their power to provide laws to protect the public welfare and to enforce those laws. In this way, the Court's abuse of foreign law is yet another area in which the structural balance of power between the states and the federal government has been tilted decisively in the federal government's favor. This undermines the instrumental purposes of federalism: to safeguard individual freedom, to provide for responsive government closest to the people, and to encourage local experimentation.

It may also serve to knock away what limitations remain on the federal government's power. In *Printz v. United States*, 521 U.S. 898 (1997), the Court held that the Tenth Amendment precluded federal commandeering of state officials. This decision was based on the structure of the Constitution and longstanding historical practice. Justice Breyer, who dissented, would have elevated over those sources the practices of other nations. *Id*. at 976-78. "The federal systems of Switzerland, Germany, and the European Union," he explained, "all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations, or decrees enacted by the central 'federal' body." *Id*. at 976. While acknowledging that "we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own," Justice Breyer posits that these other nations' experience "may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem—in this case the problem of reconciling central authority with the need to preserve the liberty-enhancing autonomy of a smaller constituent governmental entity." *Id*. at 977. The "problem" that Justice Breyer identifies is the correct one (or, at least, one of the correct ones), but it is not one that is empirical in nature—the Constitution rarely is. Instead, the Framers themselves provided a categorical answer, as the majority opinion convincingly explains. Justice Breyer, by contrast, would revisit limitations on federal power on a case-by-case basis, relying on the experiences of foreign states whose institutions, circumstances, and values differ markedly from our own. The inevitable result would be a federal plenary power, with the states relegated to the role of Washington's deputies—after all, it is America that

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[5] That this practice may be uncontroversial, in the main, does not mean that it is lawful. *See* Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 Minn. L. Rev. 71 (2000); John C. Yoo, *New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 Const. Comment. 87 (1998).

is exceptional in its form of government, meaning that, empirically-speaking, our distinct practices and limitations on government are likely to be outliers.

International law presents a similar threat, under the Department of Justice's current view of the Treaty Clause power. Consider the case of Carol Bond, the Pennsylvania woman who, after smearing caustic chemicals on the mailbox and car-door handle of her husband's paramour, was prosecuted under federal law implementing the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction. This was a routine domestic dispute—no injury resulted—and the chemicals were taken from her employer and purchased through Amazon.com. Bond's offense is within the heartland of those matters reserved to the states under their general police power, but the Department of Justice argues that the Convention empowers it to address any conduct involving a toxic chemical. (At oral argument before the Supreme Court, the federal government suggested that it could, for example, make a federal offense of an act involving the use of vinegar to poison a goldfish or could enforce a nationwide ban on vinegar.) The federal government claims that the Treaty Clause power is not subject to the limitations of the Tenth Amendment. This is an extreme position, one that reaches far beyond the Supreme Court's holding in *Missouri v. Holland*, 252 U.S. 416 (1920), which attempted to balance the state and national interest, while limiting its holding to "valid treaties"—that is, those addressing issues traditionally considered to be the proper subjects of international law.[6]

It is not unthinkable, and it may even be likely, that foreign and international law will play some role in the Supreme Court's consideration of currently-pending challenges to Congress's power to enact the Patient Protection and Affordable Care Act's individual mandate. Those countries whose laws are cited most often by the Court's internationalists generally have national healthcare systems, sometimes even administered or governed by law at a federal level—for example, Canada. Surely, it could be argued, their experience demonstrates empirically that a national healthcare system and federalism may coexist. International treaties—in particular, the U.N.

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[6] *Bond* is not an aberration. In a recent oral argument before the Supreme Court, the Solicitor General argued that the Berne Convention for the Protection of Literary and Artistic Works provided a basis for the federal government to expand copyright protection beyond that which may be allowed by the Copyright Clause and perhaps even to abrogate First Amendment rights. Transcript, *Golan v. Holder*, No. 10-545 (Oct. 5, 2011), at 31-32. Pressed by Justice Scalia, the Solicitor General refined his remarks, but without fully repudiating that view. *Id*. at 32. To the contrary, he argued consistently that the promise of securing greater protection for the works of domestic authors abroad legally justified the "price of admission"—that is, changes to domestic law to remove from the public domain works whose copyrights had expired. While the restoration of expired copyrights may be authorized by the Copyright Clause—I take no position on the issue—the Solicitor General's argument is independent of the Clause and would be unchanged if, for example, the "price of admission" were to reenact and enforce the provision of the Gun-Free School Zones Act struck down in *Lopez*.

Universal Declaration of Human Rights and the U.N. International Covenant on Economic, Social, and Cultural Rights—have been read by activists and others to declare medical care a human right that the U.S. government has an obligation to provide to its citizens. Of course, those treaties do not establish any such obligation, and Canadian law, which differs so greatly from our own, is irrelevant to the task of constitutional interpretation. But these are only minor impediments to judges who are willing to cite, as legal authority, treaties that the United States has never even ratified, *Roper*, 543 U.S. at 576, and Soviet law on capital punishment, *Thompson*, 487 U.S. at 831.

The Problems with Outsourcing U.S. Law

Judges are not always to blame for the problems caused by excessive reliance on foreign and international law. At times, they are merely following Congress's directives, and Congress has directed them to apply foreign or international law, despite that it may be vague, obscure, ill-suited to the task at hand, incompatible with U.S. norms, or simply unwieldy. Congress should be very wary of "outsourcing" U.S. law to foreign and international bodies. Two examples of this practice are discussed above, the Alien Tort Statute and the Lacey Act. As to the former, blame the first Congress for its enactment, but more recent Congresses share in the responsibility for its persistence after it was rediscovered by legal activists thirty years ago. As to the latter, its breadth has been repeatedly expanded by Congress over the years. There are many other examples.

As an initial matter, vesting power to determine U.S. law in foreign or international bodies raises grave constitutional doubts with respect to delegation. For reasons of accountability, legislative power is vested in Congress, and individuals who exercise delegated power to make policy are subject to the requirements of the Appointments Clause of Article II. Dynamically incorporating foreign or international bodies of law into U.S. law hands significant policymaking discretion to individuals who are not Members of Congress and have not been properly appointed.[7] Indeed, they are subject to no political check recognized by the U.S. Constitution. Incorporation of such bodies of law is therefore constitutionally suspect.[8]

Second is the difficulty of ascertaining and applying foreign law. I already described the difficulty in applying French commercial law in a typical contract case. But what about foreign laws and environmental regulations, particularly where the stakes are high and the penalty for noncompliance is imprisonment? In one instance, individuals importing Honduran lobsters into the United States were charged, in U.S. courts through the Lacey Act and conspiracy statute, with violation of Honduran regulations that had either been repealed or had never even gone into effect and which the Honduran government claimed had never, in any case, been violated. No matter, four businessmen were sent to jail, despite that their conduct was not unlawful under Honduran law (and thus should not have been unlawful under U.S. law) and despite that

[7] Static incorporation—that is, the incorporation of a particular body of law at a particular point in time—would not run afoul of this limitation.
[8] *See* Yoo, *supra*.

the lack of any evidence evincing an intent to violate the law.[9] In this way, incorporation of foreign and international law exposes honest, law-abiding individuals to criminal liability, without providing them any notice of how they may comply with the law and avoid the risk of prosecution.

A third, and related, problem is vagueness. The Alien Tort Statute, as discussed above, provides jurisdiction over torts "committed in violation of the law of nations." 28 U.S.C. § 1350. The courts have struggled to define the "law of nations" and, even where its contours may be apparent, its details are uncertain at best. This results, again, in liability risks, a lack of guidance to the law-abiding, and extensive legal wrangling.

Fourth, these laws are not subject to the usual give-and-take politics of our representative democracy. Important American interests may go unrepresented (to say the least) when, for example, we incorporate Indian trade-protection law into our criminal code. International bodies are less responsive to public opinion and U.S. interests. Why should we adopt laws that are not only difficult to ascertain and apply, but are also inconsistent with, or even contrary to, our preferences, values, and interests?

Fifth, in large part because foreign law is anti-democratic, it is also likely to be inferior to laws devised by this Congress and by the states' representative institutions. That is the insight of John McGinnis and Ilya Somin, in a recent article in the *Stanford Law Review*. Surveying the means by which law is made in domestic and international bodies, and analyzing the incentives facing policymakers in those bodies, they conclude:

> Both American law and raw international law are imperfect. But there are strong reasons to believe that the latter is systematically more flawed than the former. The political processes that produce U.S. law have stronger democratic controls and are less vulnerable to interest group capture than those that produce what we have called "raw" international law. This comparison provides a strong argument that Americans will be better off under a legal regime that rejects the use of raw international law to override domestic law. Only those international obligations that have been validated by domestic political processes should be part of our law because they alone can avoid the democracy deficit of raw international law.

John McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 Stan. L. Rev. 1175, 1246 (2007). But when lawmaking is outsourced wholesale to foreign and international bodies, this crucial check goes undone.

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[9] *See* Trent England, A Lobster Tale: Invalid Foreign Laws Lead To Years in U.S. Prison, November 2003, http://www.overcriminalized.com/CaseStudy/McNab-Imprison-by-Foreign-Laws.aspx.

Recommendations for Congress

Although Congress cannot address all of the problems that arise when federal courts apply foreign laws—in particular, Congress probably lacks the power to preclude the courts from citing to current foreign materials in interpreting the provisions of the Constitution—it can and should make meaningful improvements to U.S. law to reduce dependence on foreign and international legal sources and thereby enhance the rule of law. To correct the specific problems discussed in this testimony, Congress should:

- **Concede limits to the Treaty Clause power.** To prevent the courts from interpreting treaties and legislation implementing treaties as impinging on the rights retained by the states and the people, Congress should legislate a rule of interpretation that its legislative acts are not to be construed to rely on the Treaty Clause power and do not rely on that power. This would, at the least, ensure that laws implementing treaties are consistent with both the limitations of Article I and those provisions of the Constitution that protect individual rights, including the Bill of Rights. Congress should also make clear that this is its interpretation of the Treaty Clause. Although that interpretation would not be binding on the courts, it would be due consideration and some deference as the view of a co-equal branch.

- **Reform or repeal the Alien Tort Statute**. Congress could reform the ATS by specifying those causes of action to be recognized within its jurisdictional grant—for example, violation of safe conducts, infringement of the rights of ambassadors, and piracy. It should clarify that the ATS is not an open-ended grant of lawmaking (or law-discovering) authority to the courts, but a limited and bounded grant of jurisdiction over a finite set of claims by aliens that, for historical reasons, may be properly heard in U.S. federal courts. In the alternative, Congress could simply repeal the ATS, which would, in effect, return the law to its pre-1980 state.

- **Reform the Lacey Act and other acts incorporating foreign or international law**. Outsourcing lawmaking to foreign or international bodies raises grave constitutional doubts and, as a matter of policy, is likely to produce bad results. Congress should reject such incorporation, particularly when violations of incorporated laws may give rise to criminal liability, and should instead define in the text of the statutes that it passes what conduct is prohibited. For example, rather than incorporate the CITES appendices into the Lacey Act, Congress should list those species that it believes should be covered or, at the least, require a U.S. administrative agency to undertake that task based on the evidence before it. If Congress is to retain provisions that incorporate foreign or international law, it should ensure that those provisions provide strong *mens rea* protections to guard against unjust liability.

- **Provide administrative safe-harbors to protect the law-abiding.** Uncertainty regarding the content or application of foreign and international laws that are incorporated into U.S. laws plagues U.S. citizens and businesses. In every instance where Congress has incorporated foreign or international laws into U.S. law, it should create a process by which parties subject to those laws may seek a

determination of the law that is binding on the federal government. This process must be cost-effective—that is, in routine cases, it should not require extensive legal representation and complicated administrative process—and expedient, to accommodate the needs of individuals and business.

Conclusion

There are good reasons to be wary of judicial reliance on foreign and international law. The present laws and practices of foreign nations have no place in constitutional interpretation. The citation of such laws serves to constrain the legitimate range of democratic action and to empower the federal government (and in particular, judges) at the expense of the people and the states. This is also the trend in international law, which increasingly seeks to dictate domestic policies. Even where the use of foreign or international law may be constitutionally permissible, it is difficult to apply, creates enormous legal uncertainty, and threatens Americans' liberty. In general, the use of such law is anti-democratic and leads to poor results.

Congress need not accept the status quo in this area. It can limit the application of foreign and international law and should take action to do so.

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