Subcommittee on the Constitution
Committee on the Judiciary
U.S. House of Representatives

"Judicial Reliance on Foreign Law"
Hearing of December 14, 2011

TESTIMONY

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I want to begin by thanking the Subcommittee on the Constitution for holding this hearing on "Judicial Reliance on Foreign Law." There has been extensive debate on this topic for almost a decade now, starting with the Supreme Court's appeal to foreign law in *Atkins v. Virginia* in 2002. Scholars have offered extensive commentary. Supreme Court justices have offered contrasting views – on and off the bench. There have been a number of previous congressional hearings on the subject. It would be easy to treat the whole debate as another of those interminable American debates on which we must all just agree to disagree.

But I congratulate this committee for continuing to engage with this debate. I think the underlying issues remain of enduring importance. Many objections have already been developed in legal literature and in testimony before this committee in earlier hearings. I believe subsequent developments have reinforced these concerns. Rather than repeat general arguments already offered, however, I will concentrate on a few developments of recent years that underscore the seriousness of these concerns.

The first point to notice is that, despite a great deal of controversy, the Supreme Court has persisted in this practice. There was already considerable debate – starting with dissenters on the Court, itself – when the Supreme Court invoked foreign practice in *Atkins v. Virginia* in 2002 and *Lawrence v. Texas* in 2003. Still, the Court repeated the practice in *Roper v. Simmons* in 2005 and then more recently in *Graham v. Florida* (2010). No one can now claim the practice is merely a passing fad. It is becoming – at least for the current majority – a settled practice.

And this deserves attention. Defenders of these decisions have emphasized that none actually turned on particular foreign references or on claims about emerging global trends. Certainly the Court laid more stress on other arguments in all of these cases. But if foreign citations were not necessary to decide these cases, why persist in them? The justices do not normally embrace controversial arguments when they can avoid them and still reach the same result. If these references were not necessary to decide particular cases, the justices who continue to invoke them must think they serve some other important purpose – important enough to risk continuing, ongoing controversy.

The next thing to notice is that the controversy has gone way beyond academic dispute about doctrine or method in constitutional adjudication. Critics warned from the outset that interpreting the Constitution in the light of foreign practice ran the risk of undermining public confidence in our own constitutional law. In fact, there has been a groundswell of public concern about the infiltration of foreign doctrine into our own courts.

So in recent years, some twenty states have passed (or attempted to pass) legislation (or constitutional amendments) to prohibit state courts from basing their decisions on foreign law.[i] A number of these measures include specific prohibitions on appeals to Islamic law (Sharia). There has been quite a lot of alarmist talk about internationalization or "Islamization" of American law – as if these were somehow equivalent – fanned by specialized advocacy organizations and specialized websites.[ii] The American Bar Association takes the movement seriously enough that its House of Delegates adopted a resolution in August of this year, opposing

"federal or state laws that impose blanket prohibitions on consideration or use by courts … of foreign or international law" and a companion resolution against "blanket prohibitions on consideration or use by courts … of the entire body of law or doctrine of a particular religion."[iii]

I agree with the ABA that "blanket prohibitions" are a bad idea. In fact, it is absurd to say that when an American court must interpret a treaty – a treaty duly ratified by the U.S. Senate and recognized as having the force of law in the United States -- the judges must avoid looking at what our treaty partners have said they will do under that treaty. I also agree with the ABA that we should not have "blanket prohibitions" against "consideration" of the "law or doctrine of a particular religion." There are many cases, going back many decades, in which courts have seen fit to take some notice of relevant religious doctrine – as in trying to determine the disposition of church property (requiring attention to religious doctrines on ecclesiastical organization) or in judging qualification for religion-based exemptions to civil law (as for "conscientious objector" status when military service was otherwise compulsory). There is room for debate about how far courts may go without seeming to give state endorsement to particular religious doctrines. But we won't settle these thorny constitutional debates with "blanket prohibitions," particularly if they single out the doctrines of one and only one religion for exclusion.

Still, we wouldn't have so many people so alarmed about foreign law and doctrine taking over our court system if people had confidence that our courts would always uphold our own Constitution. The ABA's House of Delegates seems to

have been persuaded by a report making this very point: "Proponents of the Bills and Amendments [prohibiting consideration of foreign law or sharia] argue that they are necessary to protect constitutional rights … That is not so …. Our courts (both state and federal) have more than sufficient legal tools to permit them to reject foreign or religious law … that do not meet our fundamental standards of fairness and justice. Constitutional rights (such as those contained in the Bill of Rights) protect everyone in the United States and all courts throughout the country are bound to respect them."[iv] That should be reassuring – except that Americans have heard so often now that our own courts are interpreting our own Constitution in the light of what foreigners think our fundamental guarantees should mean.

That brings me to the third general point. Yes, a lot of people now warning about foreign influence on our law seem to be getting quite fevered, worrying over international conspiracies of UN bureaucrats or jihadi jurists. But as the old saying goes, even paranoiacs may have real enemies. There is, in fact, an international movement to establish what has been called "global constitutionalism." At the core of this vision is a set of international guarantees of human rights, which all nations – or at least, all respectable nations – will integrate into their own national legal systems, so they will be enforced by their own courts. A considerable body of scholarly literature now argues that international human rights treaties must have constitutional or quasi-constitutional status, taking precedence over national or local law.[v]

This vision has been embraced more widely in Europe than in the United States. Europeans have much more experience with supranational authorities

overruling their own governments. The 27 nations of the European Union allow the European Court of Justice to overrule national laws. Many more -- 47 nations in all -- have committed to the European Convention on Human Rights, enforced by the European Court of Human Rights. In both of these systems, it is the national courts which do most of the application and enforcement of European standards.

Something of the sort – with perhaps less centralized guidance – has been suggested for American courts. Harold Koh, when dean of the Yale Law School, argued that courts would "download" international standards by "integrating" them into our own Constitution.[vi] Anne Marie Slaughter, when dean of the Woodrow Wilson School at Princeton University, explained that "global governance" would be achieved by "coordination" among national courts in such areas as human rights.[vii] These are not scholars at the far fringe of legal scholarship. Koh is currently Legal Adviser to the State Department. Anne-Marie Slaughter served, between 2009 and 2011, as Director of Policy Planning at the State Department.

Perhaps when we started debating appeals to foreign precedents – almost a decade ago, during the first term of the Bush administration – it was a remote, visionary prospect that the United States would integrate international human rights norms into our own constitutional structure. The project no longer seems quite so remote. The Obama administration has brought advocates of this project into its own inner councils. It has insisted that the United States must rejoin the UN Human Rights Council and must embrace a policy of "engagement" with the International Criminal Court. When we argue about the internationalist gestures of the Supreme Court, we are no longer speculating about remote implications.

I think the most reasonable explanation for current Supreme Court practice in this area is that it is meant to lay the foundations for American participation in a larger scheme of global governance for human rights protection. Perhaps the justices who invoke foreign precedent intend to keep the resulting commitments under their own control. But clearly they mean to expand the reach of the Constitution beyond the control of the American political system.

It is otherwise hard to understand what point there could be in citing conventions to which the United States is not a party, such as the Convention on the Rights of the Child, which the Court cited in *Roper v. Simmons*. It is otherwise hard to understand why the Court has cited rulings from the European Court of Human Rights, as the Court did in *Lawrence v. Texas* – appealing to the judgment of an international authority to which the United States not only does not now adhere, but very clearly would not join. The United States has declined to commit itself to the cognate body, the Inter-American Court of Human Rights. One way or another, justices of the current Supreme Court seem to think it is helpful to weave the views of these international human rights instruments and authorities into our own constitutional process. I think Americans are right to be worried about where this practice will lead us.

Let me, in closing, suggest three dangers in this trend. First, it may make it harder for the United States to maintain a different stance than other nations or at least other western nations. One example is the American commitment to free speech. The International Covenant on Civil and Political Rights provides that the right to free speech must be qualified by laws against hate speech ("advocacy of

national, racial or religious hatred that constitutes incitement to … hostility") and "propaganda for war." (Art 20) The Organization of Islamic Cooperation has repeatedly urged that nations of the world must take more vigorous action to suppress "Islamophobic speech" and has repeatedly persuaded the UN General Assembly to pass resolutions calling for such measures. The Council of Europe (embracing the nations that subscribe to the European Convention on Human Rights) has established its own Commission Against Racism and Intolerance, which lobbies for stricter enforcement of laws penalizing "hate speech" against particular ethnic or religious communities.[viii]

I don't know whether the Supreme Court has any inclination to accommodate this international trend. That would require the Court to reinterpret the First Amendment guarantee of "freedom of speech." But the Court has reinterpreted other parts of the Constitution to accommodate what it sees as an emerging international consensus, based on UN admonitions and European practices. Whatever the current justices now intend, we may experience much more pressure in coming years to accommodate the international trend toward imposing penalties on those guilty of "Islamophobic expression." We certainly will find it harder to deflect such pressure by invoking our own constitutional obligations – so long as a persistent majority of Supreme Court justices holds that we ought to be interpreting our own Constitution to accommodate international human rights norms in general.

A second and related danger concerns American defense policy. The Supreme Court has held that detainees at Guantanamo must have access to review of their detention (and their military trials) in domestic courts. Our Court has not

yet said that the same constitutional reasoning must apply to foreign combatants detained on foreign battlefields. But the European Court of Human Rights has made exactly that ruling for alleged enemy combatants held by the British in Iraq.[ix] That practice invites an obvious follow-on: if human rights law protects enemy combatants in overseas detention, why not combatants still fighting? That may now sound absurd to Americans. But the European Court of Human Rights has already done that, too – holding that Britain must answer for claims that it used excessive force in trying to pacify its area of occupation in the aftermath of the invasion of Iraq in 2003.[x]

There is a great deal of literature arguing that the law of armed conflict – often called "international humanitarian law" – should now be seen as a specialized branch of international human rights law.[xi] In its own terms, it is quite logical: if we are to have something like a global constitution for human rights, then all acts of force might seem to be bound by it, just as domestic police measures are bound by constitutional norms, enforced by our domestic courts. Again, I do not know how far the current justices might be prepared to pursue this logic. But it is not easy to see a principled line between invoking international human rights norms for capital punishment at home (as in *Atkins* and *Lawrence*) and for extending protective norms to international conflict. The whole appeal of international human rights norms is that they apply everywhere – or at least, that they apply internationally. Why not, then, apply international human rights norms (as many advocates already urge) to situations of armed conflict?

Finally, I would reaffirm the concern that many critics expressed years ago, in response to *Atkins* and *Lawrence*. As we go further down this road, we risk provoking more and more public uneasiness about the status of our own Constitution. We risk undermining the public faith that our Constitution is a heritage from our own Founders, secured in our own Civil War and other great struggles in our history, reflecting the unique contours of our own national experience. We invite people instead to see the Constitution as no more than a set of local adjustments to international obligations, worked out by our judges in consultation with foreign judges, who have no special concern about American well-being and over whom we have no control. We can't go far down that road without endangering public support for the Constitution. Didn't we start this nation with a revolution against outside control? Why not replace the Constitution with a truly American charter, if the existing Constitution must be shared with so many foreigners who have so many different aims and priorities? At the least, as we go down this road, we risk provoking much more suspicion about the ultimate loyalties of our own judges. How does that serve the rule of law?

I do not advocate that Congress enact a "blanket prohibition" on references to international or foreign practice, not even for decisions interpreting our own Constitution. I do not think it likely that Congress has the constitutional authority to tell Article III courts what they can or cannot consider when interpreting the Constitution. But I think it would be appropriate for the House to vote a non-binding resolution, expressing concern about this trend. The justices who are so determined to consider foreign opinion should at least be exhorted to give special

weight to American opinion when they interpret the American Constitution. I believe the House would be speaking for most Americans if it affirmed that we do not need foreign assistance in interpreting our own Constitution.

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[i] For a survey of such measures, see "The Law of the Land," ABA JOURNAL, April 2011, p. 14. An Oklahoma measure, adopted by public referendum, was suspended by a federal district court in *Awad v. Ziriax*, 754 F.Supp.2d 1298 (W.D. Ok 2010).

[ii] For what seems a representative example, "Conservative Action Alerts" posted an appeal called "Shariah law takes courts by surprise," urging readers to "**Fax every member of our U.S. Congress**" to support a bill purporting to "prevent the misuse of foreign law in United States federal courts, **including Shariah Law!** [original emphases] Don't let our Justice System be infiltrated by radical, foreign religious laws!" A Google search on "Islamization of America," on December 12, 2011, turned up more than 1.5 million items.

[iii] Resolution 113A, adopted at the 2011 Annual Meeting of the ABA House of Delegates, meeting in Toronto, Ontario.

[iv] Report in support of Resolution 13A, distributed at ABA Annual Meeting, submitted by Salli A. Swartz, chair of the ABA Section of International Law

[v] Some recent examples: Garrett Wallace Brown, *Grounding Cosmpolitanism: From Kant to the Idea of a Cosmopolitan Constitution (*Edinburgh University Press, 2009); Jeffrey Dunoff and Joel Trachtman, eds., Ruling the World? *Constitutionalism, International Law and Global Governance* (Cambridge University Press, 2009); Stephen Gardbaum, "Human Rights as International Constitutional Rights," *European Journal of International Law*, Vol. 19 (2008), pp. 749-68.

[vi] Harold Koh, "International Law as Part of Our Law," *Am.J.Int'l L.,* Vol. 98 (2004), 43, lauding "the emergence of a transnational law, particularly in the area of human rights, that merges the national and the international" in which "domestic courts must play a key role in coordinating U.S. domestic constitutional rules with rules of foreign and international law, not simply to promote American aims, but to advance broader development of a well-functioning international judicial system." (52-54)

[vii] Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004)

[viii] So, for example, in its Fourth Report on the United Kingdom (dated March 2, 2010), the European Commission Against Racism and Intolerance urged that UK authorities "keep the effectiveness of existing [UK] legislation against racist expression under review," (par. 33) emphasizing the relevance of the Commission's General Policy Recommendation No. 7 which advocates that "the acts criminalized under domestic law include the public expression, with a racist aim, of an ideology which claims the superiority of, or which depreciates or denigrates, a grouping of persons on the grounds of their race, colour, language, religion, nationality or national or ethnic origin." Simultaneously, the commission urged British authorities "to keep under review the existing [UK] legislation against incitement to religious hatred in England and Wales to ensure that the existence of higher thresholds for prosecution does not deprive individuals of necessary protection against incitemnte on religious grounds." (Par. 39)

[ix] *Al-Jedda v. United Kingdom*, ECHR 100 (2011), Judgment of July 7, 2011

[x] *Al Skeini v. United Kingdom*, ECHR 095 (2011), Judgment of July 7, 2011

[xi] Mark Osiel, *The End of Reciprocity* (Cambridge University Press, 2009), Ch. 3 ("Humanitarian vs. Human Rights Law: The Coming Clash") offers a useful overview of more recent contenders in this debate. For an earlier (and more sympathetic view) of the convergence, see Rene Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press, 2002).