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“We Are The World” — Or Are We? The United States’ Conflicting Views on the Use of International Law and Foreign Legal Decisions

by Hadar Harris

CONTROVERSY WITHIN THE SUPREME COURT

IN A COUNTRY IDEOLOGICALLY DIVIDED into what the world has come to know as “red states” and “blue states,” another kind of ideological divide is underway. This time, however, the divide splits the three major branches of government in the United States. The emerging controversy surrounds the place of international and foreign law in U.S. judicial interpretation and decision-making.

The legislative, judicial, and executive branches of the U.S. government each have specific roles when it comes to law-making and interpretation. The legislative branch drafts laws, the executive branch implements and enforces them, and the courts interpret them in the case of conflict. Each branch is independent and serves to balance the others. Thus, the emerging struggle over the place of international and foreign law not only underscores a deep ideological debate, but it also cuts to the core of the separation of powers and the traditional role that each branch of government has historically played. In this system of checks and balances, it is unclear who is checking and who is balancing.

In recent decisions, the Supreme Court of the United States (Court) has increasingly cited international and foreign law. This trend has emerged without fanfare and with little explanation. In addition to the recent juvenile death penalty case of *Roper v. Simmons*, the Court has used international standards and comparative case law in cases as varied as those focused on the legality of homosexual sodomy (*Lawrence v. Texas*), the expropriation of artwork in war time (*Republic of Austria v. Altmann*), and the use of affirmative action in law school admissions (*Grutter v. Bollinger*).

Ironically, such decisions come against the backdrop of an executive branch that has repeatedly shown disdain for the international legal regime. It has reinforced its unilateralist world view by withdrawing from treaties, selectively ratifying international agreements, and narrowly (and sometimes mistakenly) reinterpreting existing obligations and well-settled principles of international law. Nowhere was this more clearly and publicly exemplified than in the now-infamous “Torture Memos” which argued that the “War on Terror,” including the treatment of detainees, should be exempt from the constraints of the Geneva Convention.

The tension between the Supreme Court’s efforts to look outward and the executive branch’s restrictive interpretations have resulted in a clash of perspectives now playing itself out in the U.S. Congress. Members of Congress have recently introduced two troubling pieces of legislation that seek to limit judicial interpretation and the use of foreign law in U.S. courts. This article will review recent conflicting trends among the judicial, executive, and legislative branches of the U.S. government regarding the use of international and foreign law in American jurisprudence and policy.

ON MARCH 1, 2005, THE HUMAN and civil rights community in the United States won a long-awaited victory when the Supreme Court overturned the juvenile death penalty in *Roper v. Simmons* with a five-four decision. The Court cited to both international and foreign law in its decision, making it the latest in a welcome string of cases in which the Court has recognized the relevance and importance of foreign and international law. The use of international and foreign law, however, has become a point of deep contention among the Justices. In each case in which the majority has referred to foreign sources, the minority has written withering dissents disavowing the use of comparative cases or international principles. The latest decision in *Simmons* is no different.

ROPER V. SIMMONS: THE LATEST FLASHPOINT OF CONTROVERSY FROM THE SUPREME COURT

The use of international standards and foreign law to help articulate established principles of law has given rise to tremendous discord in the Court, led primarily by Justices Kennedy and Breyer on the pro-international side and Justice Scalia as the crusader against the use of international standards and foreign law. The *Simmons* decision clearly exhibited the stark contrast between the two camps. After finding that the juvenile death penalty should be overturned due to the emergence of a “national consensus” against the execution of minors, Justice Kennedy went on to write in his majority opinion that “it is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty, resting in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime. . . . The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.” He continued, “It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and people simply underscores the centrality of those same rights within our own heritage of freedom.”

Justice O’Connor further affirmed the place of foreign and international law in the decision-making process, even as she dissented on the majority opinion. She wrote, “[o]ver the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency. . . . Obviously, American law is distinctive in many respects, . . . [b]ut this Nation’s evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries.”

In sharp contrast, Justice Scalia, in a scathing dissent joined by Chief Justice Rehnquist and Justice Thomas, stated that “the basic premise of the Court’s argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand.” He argued that “[t]he Court should either profess its

The full transcript of Justices Scalia’s and Breyer’s debate on the uses of foreign law in U.S. courts can be found at www.wcl.american.edu.

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willingness to reconsider all these matters in light of the views of foreigners, or else it should cease putting forth foreigners' views as part of the *reasoned basis* of its decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision making, but sophistry."

A PUBLIC DEBATE

On January 12, 2005, Justice Antonin Scalia and Justice Stephen Breyer, ideological opponents on the use of foreign and international law, held a rare public discussion about the role that cases from foreign courts can play in U.S. constitutional interpretation at American University Washington College of Law. The Justices, conscious of their role in interpreting law rather than inserting their own opinions into cases, vigorously debated the place of foreign judicial decisions in U.S. constitutional interpretation.

Justice Scalia strongly opposed the citation of foreign law in U.S. constitutional interpretation. He argued that using foreign

matter of contract law, where a different legal system might have given the same words totally different application . . . you're trying to get a picture how other people have dealt with it. And am I influenced by that? I am at least interested in reading it. And the fact that this has gone on all over the world and people have come to roughly similar conclusions, in my opinion, is the reason for thinking it at least is the kind of issue that maybe we ought to hear in our court, because I think our people in this country are not that much different than people other places."

Although Justice Scalia is joined by Justice Thomas and Chief Justice Rehnquist in sticking to non-international, "originalist" views, the rest of the Court has shown an increasing interest and concern with looking at outside opinions and international standards when deciding issues before the Court. This is not the case, however, in the executive branch.

EXECUTIVE BRANCH REJECTION AND REINTERPRETATION OF INTERNATIONAL LAW

AS THE SUPREME COURT CONTINUES to recognize the importance of looking outward by referencing international standards and noting judicial decisions from abroad, the Bush administration has consistently moved away from its international legal obligations and has reinterpreted long-standing international legal principles. The administration's intent has been demonstrated through its withdrawal from the Kyoto Protocol negotiations in 2001, reinterpretation of the United Nations Charter to support "preemptive" war, misapplication of the Geneva Conventions, and mistaken understanding of the legal concept of torture outlined in the infamous "Torture Memos."

A recent study by the Institute for Agriculture and Trade Policy entitled, "The Treaty Database: U.S. Compliance with Global Treaties," shows that the Bush administration has adopted fewer international treaties than nearly any other U.S. President in recent history. The Bush administration has not only refrained from signing and ratifying new agreements, but has also opted out of previous treaty commitments. George W. Bush is the first U.S. President ever to nullify U.S. signature of a multilateral treaty (the Rome Statute in 2002), and he is the only major world leader to withdraw from a nuclear treaty after it has become legally binding (the Anti-Ballistic Missile Treaty in 2002).

The latest in this string of repudiations of international law and standards came in early March when the Bush administration withdrew from the Optional Protocol to the Vienna Convention on Consular Relations. The Optional Protocol, which the United States helped author in 1963, requires the International Court of Justice (ICJ) to resolve disputes over whether citizens of countries party to the treaty have been denied the right to see consular officials of their home country while jailed abroad, as required by the Consular Relations treaty. The United States had initially hailed the Optional Protocol as a means of protecting its citizens abroad, and it brought the first case using the Protocol when it successfully sued Iran for taking 52 American hostages in Tehran in 1979. More recently, however, the Optional Protocol had been used as a tool to help fight against the death penalty by bringing cases before the ICJ asserting the rights of foreign nationals sentenced to death in the United States.

The decision to withdraw from the Optional Protocol came as the United States was preparing oral arguments in the U.S. Supreme Court on the case of *Medellin v. Dretke*. Medellin involved a Mexican national sentenced to death in Texas who



Justice Scalia (far left) and Justice Breyer (far right) debate the use of international and foreign law in Supreme Court decisions (January 2005).

law out of context provides an opportunity for justices to pick and choose persuasive jurisprudence to promote a personal agenda based on their own view of morality, rather than pursuing a strict interpretation of the Constitution. He commented, "what does the opinion of a wise Zimbabwean judge or a wise member of the House of Lords law committee, what does that have to do with what Americans believe, unless you really think it's been given to *you* [as a judge] to make this moral judgment, a very difficult moral judgment? And so in making it for yourself and for the whole country, you consult whatever authorities you want. Unless you have that philosophy, I don't see how [foreign law] is relevant at all."

Justice Breyer, in contrast, explained that where justices are presented with hard issues, he finds it instructive to look to the decisions of other courts to see how they have thought about the issues and reached their decisions. He said particularly when dealing with issues of general principles such as "liberty" or determinations of "cruel and unusual punishment," these concepts have similar application and understandings in many countries around the world. To Justice Breyer, "one is not trying to figure out the meaning, really, of the words 'cruel and unusual punishment,' one is trying to deal with their application. And it isn't some arcane

appealed his conviction on the grounds that American officials failed to notify the Mexican consulate of his arrest as required under the Vienna Convention. Mr. Medellín argued that as a result, he was unable to seek and obtain the assistance from his Embassy guaranteed by the Vienna Convention, assistance that may have prevented his conviction and subsequent death sentence.

In 2003, the ICJ agreed with Mr. Medellín and 53 other Mexicans sentenced to death in the United States and ruled that the Mexican nationals should receive new hearings in Texas courts to review their death sentences (*Avena and other Mexican Nationals (Mexico v. United States of America)*). In the days leading up to the March 28, 2005, arguments on domestic implementation of the ICJ decision before the U.S. Supreme Court, the Bush administration issued an unexpected Executive Order ordering state court review of the detainees' cases, per the ICJ opinion, and announced the United States' complete withdrawal from the Optional Protocol.

State Department spokesperson Darla Jordan explained the withdrawal by saying, "[t]he International Court of Justice has interpreted the Vienna Consular Convention in ways that we had not anticipated that involved state criminal prosecutions and the death penalty, effectively asking the court to supervise our domestic criminal system." She went on to say that withdrawal from the Protocol is a way of "protecting against future International Court of Justice judgments that might similarly interpret the consular convention or disrupt our domestic criminal system in ways we did not anticipate when we joined the Convention."

“The tension between the Supreme Court’s efforts to look outward and the Executive Branch’s restrictive interpretations have resulted in a clash of perspectives now playing itself out in the U.S. Congress.”

Although the ICJ only required that the obligations of consular visits to detained foreign nationals be upheld, Ms. Jordan's statement clearly articulates the executive branch's current approach to international law—withdrawing from treaties it deems overly critical of U.S. positions and showing disdain for long-standing international obligations which the United States itself helped to create.

The withdrawal from the Optional Protocol to the Vienna Convention is only one example. Bush administration officials have repeatedly expressed their disregard for international law, from Attorney General Alberto Gonzalez's characterization of the Geneva Conventions as "quaint," to statements in the recently

released National Defense Strategy, which seem to equate legal challenges to U.S. policies with terrorism. In a section entitled, "Our Vulnerabilities," the Strategy states, "[o]ur strength as a nation-state will continue to be challenged by those who employ a strategy of the weak, using international fora, judicial processes and terrorism."

In comments meant to explain this language, senior Defense Department official Douglas Feith said, "[t]here are various actors around the world that are looking to either attack or constrain the United States, and they are going to find creative ways of doing that that are not the obvious conventional military attacks. And we're just pointing out that we need to think broadly about diplomatic lines of attack, legal lines of attack, technological lines of attack, all kinds of asymmetric warfare that various actors can use to try to constrain, shape our behavior. And that's what that point is flagging." This explanation does not voice a great vote of confidence for the use of legal mechanisms to ensure accountability and fight impunity.

REACTION AND CONTROVERSY IN THE U.S. CONGRESS

THE SUPREME COURT, in its growing embrace of constitutional comparativism and the legitimization of international law, is in direct conflict with the executive branch's clear discomfort with international treaties and agreements. This tension between branches has also focused growing attention on the place of international law and foreign court decisions in the legislative branch of government.

In recent months, the U.S. Congress has begun to discuss what role international law and foreign court opinions should play in domestic decision-making. The decision in *Roper v. Simmons* rekindled a fledgling effort started last term in favor of an intellectual protectionism which would ban all "foreign opinions" from American judicial decision-making.

In a statement released the day after the *Roper v. Simmons* decision, Congressman Bob Goodlatte (R-VA) stated, "[y]esterday's opinion flies in the face of the rule of law in our country. It is a dangerous precedent, indeed, to blatantly cite foreign laws when interpreting the original meaning of the United States Constitution. The opinions of foreign governments have no place in interpreting the original meaning of the Constitution, and it is high time that these justices be reminded that their duty is to interpret the Constitution, not to impose the will of foreign entities on the people of the United States."

In the two weeks following the *Simmons* decision, two very troubling pieces of legislation were introduced in Congress, which seek to restrict the judicial branch of government from looking to international cases and legal precedents, even as persuasive authority, in U.S. courts. The first is a non-binding Sense of the Congress resolution introduced by Congressman Tom Feeney (R-FL) called the "Reaffirmation of American Independence Resolution" (H.R. 97, Feeney Resolution). The second and even more troubling piece of legislation is the "Constitution Restoration Act."

The non-binding Feeney Resolution was originally introduced in 2004 to affirm the "Sense of the United States Congress that judicial decisions should not be based on any foreign laws, court decisions, or pronouncements of foreign governments unless they are expressly approved by Congress." When first introduced, the human and civil rights communities in the United States took note of the resolution with limited concern. The general sense was that it "would go away" and that concerned activists should not

aggressively fight this resolution because it would only draw more attention to it. The resolution, however, did not go away on its own. It gained more than 50 co-sponsors and passed out of Committee to be debated by the entire House of Representatives before the 108th Congress adjourned last year. The Resolution was reintroduced two weeks after the *Simmons* decision and is again gaining momentum.

Even more troubling, however, is the introduction of the “Constitution Restoration Act of 2005” (S.520 and H.R.1070), which is binding legislation and seeks to limit the jurisdiction of

but also on issues of international trade, intellectual property, environmental issues, and more.

While the prospect for passage remains unclear, and the constitutionality of such legislation is highly questionable, the very fact that the legislation has been introduced and has growing support is troubling. Many believe that this legislation is, as one prominent activist put it, “a shot across the bow,” warning prospective judicial nominees (particularly those who may be candidates for any anticipated openings on the U.S. Supreme Court) that they must limit their use of international law and foreign court decisions in order to have their appointments confirmed by the Senate. The ideological battle for the place of international perspectives and legal obligations continues to rage.

CONCLUSION:

THE MISGUIDED IMPACT OF FEAR ON DECISION-MAKING

ULTIMATELY, THE CONTROVERSY OVER THE USE of foreign and international law is based on a fundamentally flawed understanding of the Court’s current decisions and the role which international law and foreign court decisions have played. As Professor Timothy Wu of the University of Virginia Law School said, “[these critics] are mixing up the difference between *listening* to foreign ideas and *obeying* foreign commands.” The Court has never found that foreign law is binding on the United States. Indeed, the Court has gone to great lengths to reinforce its belief that the United States has a unique and exceptional legal history and form of government.

The United States has historically been a leader in developing and promoting international standards. The current dispute within the three branches of government over the United States’ commitment to looking outside its borders runs the risk of even more deeply alienating a world community which has much to offer in thinking through complex global issues that face us today. Justice Ruth Bader Ginsburg spoke explicitly about these risks in a recent address to the American Society of International Law. She said, “[r]ecognizing that forecasts are risky, I nonetheless believe we will continue to accord ‘a decent Respect to the Opinions of [Human]kind,’ [as the drafters of the Declaration of Independence advised], as a matter of comity and in a spirit of humility. Comity, because projects vital to our well being—combating international terrorism is a prime example—require trust and cooperation of nations the world over. And humility because, in Justice O’Connor’s words, ‘[o]ther legal systems continue to innovate, to experiment, and to find new solutions to the new legal problems that arise each day, from which we can learn and benefit.’”

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Justice Scalia strongly opposes the citation of foreign law in U.S. constitutional interpretation (January 2005).

federal courts in certain situations, including prohibiting a court of the United States from relying upon “any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional and common law up to the time of the adoption of the Constitution of the United States.” The bill further seeks to ban the consideration of any matters in federal court which are brought against a government entity, officer, or agent on the basis of “that entity’s officers or agent’s acknowledgment of God as the sovereign source of law, liberty, or government.”

Not only does the bill seek to limit courts’ sources of law and discretion to interpret cases as they see fit, the proposed legislation goes a step further by determining that if any Supreme Court Justice or federal court judge “exceeds his or her jurisdictional limitations” by using those international sources of law, he or she will be deemed to have committed an impeachable offense and can be removed from the bench.

Although widely discussed on conservative websites and in churches, the bill has received little national attention. It would, however, have a tremendous impact if passed. Such expansive language could have profound implications in the Court’s ability to interpret treaty obligations, not only on human rights issues,