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# The Influence of International Law on U.S. Domestic Law

It is evident to each of us in this room drawn together by an interest in international activities, global affairs and international relations, that the times are enormously unstable, filled with turmoil around the globe. Last week's bombings in London simply brought home anew the ever-constant threats to democratic norms and peaceful ways of life. [These include] clashes of mighty ideologies in the world; the troubling presidential election in Iran and what that may portend; election troubles in the Philippines; and whether, in fact, that country is going to be in a period of instability.

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And yet there are so many signs of hope in various parts of the world. Let us not forget that not many months ago we were celebrating a revolution—the Orange Revolution of the Ukraine, which had separated from the former Soviet Union after its collapse from the Russian Federation in 1991. How mighty the power of the people proved to be when people simply refused to accept the election results that were deemed by international monitors, and virtually without exception the world community, as being filled with fraud, ballot stuffing and other indicia of a lack of integrity in the democratic process. The Orange Revolution was called “Orange” because the ultimately victorious candidate had adopted orange as the color of his flags and his campaign material. We remember those crowds in Kiev, setting up tents and tent cities in the extraordinarily cold weather. The people demanded to be heard, and the matter actually went before the Supreme Court, the high court, of the Ukraine, which bravely determined on December 3 of last year that, in fact, the election was illegal and that a new election had to be held. It is now part of history that those 26 judges on that court were unanimous that the election was illegal, much to the chagrin of very powerful forces, not only in the Ukraine but also in Moscow.

It brought to mind the Velvet Revolution. The beautiful revolution of Czechoslovakia, and the determination there began with students. Students were the ones who were first in the streets insisting on a turn—I started to say a return, but really a turn—to democracy and rule of law values. The Velvet Revolution was symbolized by Havel and the return to Prague after years of exile of Alexander Dubcek who had been exiled after the uprising in 1968 was crushed by Soviet tanks. We are reminded to this day of all the challenges in Eastern Europe. We had the privilege at Pepperdine of hosting the Constitutional Court of Albania. That court would not have existed, or perhaps in form only, just a few years ago.

Albania, one of the most ardently communistic [countries], has moved strongly towards democratic values. While there are issues in connection with the recent election and there has been criticism of the Albanian vote of last week, their elections are being taken seriously, they're being monitored and there are judicial processes in place to at least check the power of those who would wield authority. Also, just last week, in a controversial decision to be sure, the Supreme Court of Nigeria issued a ruling that in the controversial election in 2003 of President Obasanjo, the election process was, in fact, fair.

That's a very nice tour of the horizon, but we are here to talk about international law and the Supreme Court of the United States. One might wonder, therefore, why it is that I'm talking about elections and the invalidation of election results. It isn't too hard for us to recall that there was a great controversy in this country by virtue of the five members of the Supreme Court.

I am here to talk about the power of the Court and some of the issues that have been swirling around the Court itself. Our own country has established a legacy and a tradition that is not without controversy, quite apart from specific opinions, but that has also wielded a power over the course of our history that continues to set the standard for judicial tribunals around the world. One can love it or one can not love it, but the fact of the

matter is, the Supreme Court of the United States speaks with the kind of authority that the Ukrainian Supreme Court and the Nigerian Supreme Court



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We remember most famously the Nixon tapes case where, notwithstanding the very able arguments of the president's counsel that there was a legal privilege of confidentiality attached to the tape recordings, still that privilege had to yield to the needs of the judiciary for evidence, and what did the president of the United States do? The president of the United States obeyed the order of the Court even though he must have known in his heart of hearts—most people in political life are optimists—but he must have known in his heart of hearts that if all that information was yielded up and revealed it would spell doom for his presidency—and so it was.

This evening what I wanted to share with you are a few thoughts about the role of international law—and I will define that—in the work of the Supreme Court, and how appropriate it is that we gather in the very month

that Sandra Day O'Connor has announced her retirement from the Court because she has been at the vanguard of the Supreme Court of the United States increasingly looking to international law. I want to be more precise now and say *foreign law*, looking to foreign sources of law, because international law, not so terribly long ago, was referred to as “the law of nations.”

In the Roman empire, international law was essentially called “the law of the people.” A great Roman scholar of the second century said, “This is the law that is common to all men”—he put it in gender non-neutral terms—now we would say “common to all men and

women.” This was in his view the universal law, the law that could fairly, and with the Roman sense of justice, be applied to foreigners when it was determined for whatever reason that Roman law was inapposite.

From the classic *Law of War and Peace* in 1625 the Dutch jurist, Hugo Grotius, found a disciple, a serious scholarly disciple of the law of nations in that colorful English philosopher, Jeremy Bentham. The great utilitarian philosopher, in 1789 when our constitution was, of course, ratified, was the first to popularize the term “international law.” It has been in no small measure Justice O'Connor who has been at the vanguard of encouraging the Court and all the courts of the country—but especially the Supreme Court of the United States—to be mindful of these international norms and of international law, including a case that arose right out of Los Angeles involving the torture and murder of DEA agent Enrique Camarena. The case involved a physician who was kidnapped in Mexico and brought forcibly to the United States to stand trial here in Los Angeles for the murder. In that particular case, there was clearly a violation of norms of international diplomacy in terms of what the United States law enforcement authorities had done in engineering this kidnapping. It developed, 15 years ago, an abiding interest on the part of Justice O'Connor in the connections of our system of law with that of the international community.

But I want to talk about that which we're now reading a lot about, which is a close cousin of focusing on international law: the reliance on issues or bodies of foreign law for interpreting the United States Constitution. How appropriate when we gather to talk about the Supreme Court and the Constitution that we begin with a

and courts around the world are increasingly speaking with. In contrast to what occurred not so terribly long ago in human history—about a century and a half ago, when John Marshall issued an opinion and a decision from the Supreme Court and Andrew Jackson said famously, “Mr. Marshall has rendered his opinion, now let him enforce it,”—we have long since gone beyond that and developed such a fidelity to the principles of the rule of law that we cannot imagine a president willfully disobeying an order or judgment of the Court, even if the president fervently disagrees with it, even if the president believes that the particular judgment of the Court lacks solid foundation in the law.

simple sentence – the Preamble: “We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility,” and so forth “do ordain and establish this Constitution for the United States of America.” Now, there is an enormous controversy these days about whether judges, in appropriately

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interpreting the provisions of the United States Constitution, look to foreign sources of the law. This reached a crescendo this year in the Supreme Court’s decision in a closely-watched death penalty case. The Court was deeply divided and ruled that it was impermissible, as a violation of the 8<sup>th</sup> Amendment prohibition against cruel and unusual punishment, to administer the death penalty to juvenile offenders who had not reached their 18<sup>th</sup> birthday at the time of the offense. The decision generated an enormous amount of interest. A very provocative part of the opinion for the majority Justice Anthony Kennedy noted that “Our conclusion is confirmed by the stark reality that the United States is the only country in the world that continues to give official sanction”—notice official sanction – “to the juvenile death penalty.” Now, Justice Kennedy was guarded in his use of the “foreign law” materials, and he was quick to say, “This is not controlling or

driving our judgment, but it is nonetheless highly relevant” and, indeed, at a minimum, “it is instructive,” he said, “to look to the laws of other countries for illumination.”

Now, this built on an earlier decision by the Court, again on the death penalty area, holding that, once again the 8<sup>th</sup> Amendment’s prohibition against cruel and unusual punishment prohibited the execution of mentally retarded persons. And by the way this is categorical, no matter what the circumstances were, it is constitutionally impermissible to administer the death penalty to these categories of persons. No individual determination of moral culpability—it’s over as soon as you establish age or mental retardation. Definitional issues [exist] to be sure, with respect to mental retardation, but nonetheless, that’s the category and that is it. Now, in the case involving issues of mental retardation and the appropriateness of the death penalty there, in contrast to what was to come two years later in the Justice Kennedy opinion, in a simple footnote Justice John Paul Stevens, the senior member of the court for the majority, simply wrote this:

“Additional evidence makes it clear that the judgment of those who had abolished the death penalty for the mentally retarded reflects on much broader social and professional consensus.” He notes various organizations such as the American Psychological Association and the like. “Those religious organizations cutting across faith community lines, some of which did not object to the death penalty as a matter of principle, but did object under the circumstances,” and then here’s the key sentence: “Within the world community the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved” He cited

a single brief, and the brief is by the European Union.

Now, this movement to essentially look to foreign law and foreign practice to determine or divine the meaning, or at least to confirm the interpretation, of the Supreme Court’s reading of the constitution has vigorously been the subject of dissent on the court. Several justices have said, “This ruling is quite wrong,” and I want to assure you that I am here as a faithful, I hope faithful reporter, and not as an advocate for one side or the other. The leading opponent is Justice Anthony Scalia, who has set forth a number of concerns, but the principal concern he has articulated is “we the people.” This is an organic document of the government of the people of the United States. It is not designed to be essentially a communal document of the world community. And he wrote very powerfully in this most recent opinion just issued two months ago, the juvenile death penalty case, and he wrote this and I’ll quote just a little bit to stir the pot: “The basic premise of the Court’s conclusion that American law should conform to the laws of the rest of the world ought to be rejected out of hand. In fact, the Court itself does not believe it. In many significant respects, the laws of most countries differ from our laws, including such exclusive provisions of our Constitution as the right to jury trial and indictment by a grand jury. The 4<sup>th</sup> Amendment exclusionary rule is distinctively American and has been rejected by virtually every country that considered having the exclusionary rule, which is when the police violate an individual’s rights and the evidence is excluded at trial. That is uniquely and distinctly American and we have not, as Justice Scalia said, been particularly concerned that other nations have seen fit not to follow that example. Our sisters and brothers in the United Kingdom and our neighbors to

the north in Canada have chosen not to embrace that rule. And so his point is that it's being used very selectively.

Now Justice Breyer has joined Justice O'Connor as one of the most articulate proponents of the use of foreign materials, and he has set forth in scholarly addresses, including his address to the American Society of International Law fairly recently, four basic reasons for looking, as an American judge, to foreign law. He says, first, we face an increasing number of legal questions that directly call for us to look to foreign law. He talks about some specific examples, including intellectual property and the copyright laws. Do we look to conforming our laws with those of Europe, which are very important to the Congress in terms of our membership in these international communities?

Then he points to the globalization of human rights as the second reason. It's not surprising, he said, to see that there are numerous legal systems that are being called upon to address issues not of whether torture is right or wrong, but rather, is the making of a campaign contribution in the political environment in fact an action of freedom of speech? He also says we should look to actual problem solving by these countries to how they are addressing specific issues. Finally, he says, "Look, we should also learn from practices such as some interesting experiments in Asia with respect to alternative dispute resolution."

The response again is as was set forth in a very scholarly presentation by the distinguished Constitutional lawyer from Northwestern University, Professor John McGinnis, who, in testimony before Congress looking at these issues, has said that in essence it is exactly what we heard from Justice Scalia: that it is essentially a picking and choosing—that you choose a law

that you like from some foreign jurisdiction. And hence his conclusion is this: that the Supreme Court has felt free to pick and choose from decisions around the world. It chooses the ones that it likes and uses them as a justification for its own ruling, but nonetheless it then chooses not to follow the laws that are not to its liking.

Well, where are we? Good question!! I'm not here to advocate, I'm just here to flag this very intriguing issue that has now arrested the attention of the Congress of the United States, including some pretty severe and sharp criticisms of one or more Justices from leaders of the Congress.

In the Declaration of Independence, interestingly enough, there are laws in fact on foreign focus. Mr. Jefferson in penning those words indicated that it was important for us, in separating from the mother country and declaring our independence, to show what he called "peace and respect to the opinions of mankind." Mr. Hamilton in Federalist No. 63, one of the Federalist Papers which is viewed as being very influential, in the understanding of what the Constitution meant at the founding, an originalist interpretation if you will, goes to this effect: "an attention to the judgment of other nations is important to every government. Independently of the merits of any particular measure, it is desirable that it should appear to other nations as the offspring of a wise and honorable policy as opposed to an aspect of passion or momentary interests."

Let me close with an antidote from a colloquy between Justice Scalia and Justice Breyer, two great Titans on the court, two intellectual leaders of the court, two eminently respected jurists whether one agrees or disagrees with one or the other. It would be odd to disagree with both, but if you do that's

fine as well. Justice Breyer, in this colloquy at American University quite recently, which has had a good deal of attention from the scholarly community and is increasingly being looked at by those who are interested in what it is that we are looking to in terms of foreign law, describes the following situation. He says he was at a seminar and there were professors, a member of Congress, a United States senator, and judges who were discussing relationships between the branches. The member of Congress—and this is Justice Breyer describing the recent event—a very nice man, a very intelligent man, started to say how terrible it was to use foreign law in our decisions interpreting the United States Constitution, and so Justice Breyer said, "Well Congressman, I guess that's aimed at me, so let me tell

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you why: first, foreign law does not bind us because this is Constitutional law, it's our Constitution; but there are human beings called judges around the world and these human beings are being called upon to address problems that are similar to our own. They're dealing with texts that protect more and more basic human rights. Their

societies have become more and more democratic and they're faced not with things that should be obvious—should you stop torture? They're faced with some really difficult ones where there's a lot to be said on both sides. So if I have a judge in a different country, facing a similar problem, why don't I just read to see what the judge has to say and maybe I'll learn something? The Congressman replied, "Fine, go ahead and read it, just don't cite it in your opinion." So Justice Breyer said, "all right. Let me be a little more frank. In some of these countries (think of the Ukraine) there are institutions, courts that are trying to make their way in societies that didn't used to be democratic, and they're trying to protect human rights, they're trying to protect democracy. They have this document called a constitution, they want to be independent judges, and for years people all over the world have cited the Supreme Court of the United

States, so Congressman, why don't we cite *them* occasionally? They will then go to their legislators and say, "See? The Supreme Court of the United States is citing us. " And it might give them a leg up in the battle for democracy. So you see it shows that we're reading their opinions and that's important." And so the Congressman said, "I understand what you're saying. Write them a letter."

Well, that's the battle line and you will come to your own view especially the lawyers in the community who probably already have a view. Let me just close with this: certainly we are blessed as a country that the decisions of the Supreme Court of the United States are frequently cited by foreign courts. A Kurdish union leader was sentenced in 1993 to do time in a Turkish prison. What was his crime? Writing a newspaper article urging political action against the government

of Turkey and policies concerning the Kurdish people. In the year 2000 the European Court of Human Rights, in finding that his punishment violated human rights law, borrowed the words, now words of the European Court of Human Rights, of one of the mightiest Constitutional jurists of all times – Oliver Wendell Holmes, Jr. The court went on to cite several United States Supreme Court cases, including *Brandenburg v. Ohio*, which upheld the free speech rights of the Klu Klux Klan, not approving of the Klan, but approving the free speech rights.

Where shall we go? What is to be done? That I leave to each of you as citizens of a country whose judiciary, albeit under criticism, is increasingly looked to for leadership in the world community.

Thank you for your attention.

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