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# The War of Law

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## How New International Law Undermines Democratic Sovereignty

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*Jon Kyl, Douglas J. Feith, and John Fonte*

**R**arely does the U.S. Senate reject a treaty. But on December 4, 2012, it did just that, blocking ratification of the UN Convention on the Rights of Persons With Disabilities. President Barack Obama had argued that by joining, the United States would “reaffirm America’s position as the global leader on disability rights” and help inspire other countries to improve their treatment of the disabled. Skeptics asked why ratification would prove more inspirational than the U.S. domestic laws already on the books. When skeptics also warned of the effect on U.S. sovereignty, supporters stressed that the treaty imposed no burdensome requirements. That was a peculiar argument, for if the treaty lacks substance, then there is no point in ratifying it, and if it makes substantive demands on the parties, then the concerns about sovereignty are well founded.

What little news coverage the Senate vote did garner tended to describe the treaty’s supporters as sympathetic to the disabled and its opponents as insensitive. Little light was shed on why any senator would appear to subordinate the interests of the disabled to an ideological abstraction such as sovereignty. But what sank the treaty was not heartlessness, nor was it any abstract quibble. Rather, opponents were worried about something practical and fundamental: whether U.S. laws should be made by politicians held accountable to Americans through the ballot box or by unaccountable officials in multinational organizations.

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If the treaty has a practical effect, it will be due in large part to interpretations made by foreign government officials and judges and by nongovernmental organizations, none answerable to American voters.

This is not to say that international agreements should never become part of domestic law. After all, the U.S. Constitution specifies that treaties, together with the Constitution itself and federal statutes,

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*Transnationalist legal scholars effectively want to elevate global norms above the U.S. Constitution.*

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are “the supreme law of the land.” But in some areas, the United States has no compelling interest in involving itself in other countries’ debates, nor would it welcome interference in its own. Policy toward the disabled falls into this category, because assistance often involves expenditures, such as

for cutting sidewalks to accommodate wheelchairs. Although the United States has proudly and properly led the way in promoting greater accessibility for the disabled, a sovereign country has the right to consider the relevant tradeoffs and come up with its own budget. It should not make a vague international legal commitment to a certain standard of care for the disabled and then be subject to outside complaints that it did not take more money away from, say, programs for feeding hungry children.

Nothing should stop the president from encouraging other countries to follow the United States’ example on policy toward the disabled. But if he starts interpreting the disabilities convention as mandating what their laws should require as to wheelchair ramps and shower rails and how much they should spend on such items, then he is crossing the line into becoming an officious nuisance—and inviting others to meddle in U.S. affairs. If officials are going to make rules for Americans on such matters, those officials should be Americans, democratically accountable to voters. Given the recent history of international meddling of this kind, even when a treaty is non-self-executing (that is, its implementation requires the passage of a law), this is not merely a theoretical concern.

The debate about such treaties has heated up in the era of globalization as many policymakers have looked for international ways to solve problems traditionally addressed through domestic means. In the United States, some officials have favored a hands-off, “Fortress America” approach to such challenges, as if globalization could be

wished away. But isolationism has never been a serious option for protecting the country's security and prosperity.

Others have taken the opposite approach, embracing globalization in the name of transnationalism, the idea that growing interconnectedness should dissolve international boundaries. Like the isolationists, the transnationalists propound ideas at odds with the practical requirements of the real world and with basic American principles. National sovereignty, they contend, is growing increasingly problematic, impeding the achievement of multinational solutions to public policy problems. They argue that democratic and nondemocratic nations should share sovereignty and subordinate aspects of law-making to global legal regimes.

U.S. officials, however, can steer a course that avoids the shoals of neo-isolationism and the cataract of transnationalism. There is a way for the United States to deal with globalization and international law realistically and in accordance with American principles of democratic lawmaking and national sovereignty. This course reflects the conviction that the U.S. Constitution is up to the challenges of the twenty-first century, that the country's foundational concepts—the separation of powers, federalism, and representative democracy—remain sound. Globalization does not require the United States to set aside those ideas in favor of new, ostensibly more progressive notions of how to legislate.

### **THE TRANSNATIONALIST CHALLENGE**

Transnationalists argue that in the interest of promoting “global governance,” U.S. officials should bring the Constitution and American law into conformity with “global norms,” thus effectively elevating those norms above the Constitution. They want the United States to adopt what they deem progressive rules—for example, gun control, the banning of the death penalty, and new laws of war. But they want to do so through judicial decisions, a method that allows them to circumvent resistant legislatures and effectively smuggle new restrictions into U.S. law.

As becomes clear from even a cursory reading of leading American law journals and official communiqués of the European Union, transnationalism is an influential school of thought in academic and official circles in the United States and throughout the developed world. A key proponent of the movement is Harold Koh, the former dean of Yale

Law School who served four years as the State Department's legal adviser in the Obama administration.

Koh has been a compelling advocate of what he calls "the transnational legal process," whereby "transnational private actors" blend domestic and international legal processes to incorporate or internalize so-called global legal norms into domestic law. "Key agents in promoting this process of internalization include transnational norm entrepreneurs, governmental norm sponsors, transnational issue networks, and interpretive communities," he wrote in a 2006 *Penn State International Law Review* article. "In this story, one of these agents triggers an interaction at the international level, works together with other agents of internalization to force an interpretation of the international legal norm in an interpretive forum, and then continues to work with those agents to persuade a resisting nation-state to internalize that interpretation into domestic law." In the same law journal article, Koh wrote about the way international law can be "downloaded" into U.S. law.

These ideas no doubt appeal to those who support the progressive policies at issue. But they are disrespectful toward the U.S. Constitution and dismissive of the idea that the American people should be able to elect—and eject—the officials who make their laws. The transnationalists challenge not merely the technicalities of lawmaking but the very essence of democratic accountability. Transnationalists do not have grandiose plans for one-world government, but they do want to give various rules the force of law without having to win majorities for those rules in democratically elected legislatures. This is not the way lawmaking is supposed to work under the U.S. Constitution.

Nor is the transnationalist school in line with traditional international law. For centuries, international law addressed relations among sovereign nations, not relations between a nation and its citizens or between a nation and the citizens of other countries. Since the 1990s, a new international law has emerged, incorporating aspects of transnational and supranational law. This view takes an innovative approach to what is known as customary international law, the slowly developing body of law that is induced from nations' long-standing and widespread practice—for example, refraining from harming ambassadors. Traditionally, a rule qualifies as customary international law if it meets two standards: first, numerous nations have adhered to it in practice over a long period of time, and second, the nations

adhered to it not for reasons of convenience or mere policy but out of a sense of legal obligation. As the legal scholars Curtis Bradley and Jack Goldsmith have pointed out, those two requirements mean that “international law was grounded in state consent.” They cite a 1927 decision by the Permanent Court of International Justice that declared, “International law governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will.”

Transnationalists are attempting to change the meaning of “state practice.” To make it easier to assert that a rule has become customary international law, they contend that the state-practice requirement can be satisfied with words—that is, by proof not that states have actually complied with the rule, let alone consistently, but that officials have merely spoken in favor of it. As the University of Virginia law professor Paul Stephan has noted, this view of customary international law holds that “state practice entails not the observable behavior of states, which is messy and often lawless, but rather what states assert as norms.” “In other words,” he writes, proponents of this view “mean not what states and their agents do, but rather what they say.” Stephan observes that this kind of “new international law . . . embraces a system of formulating and imposing norms on state and individual behavior that operates outside of any publicly accountable institution.” He rightly labels this approach “the antithesis of democracy.”

### **A VERY REAL THREAT**

This discussion of new approaches to international law may sound abstract, but the growing acceptance of transnational legal concepts has practical consequences. One has been the practice of courts targeting foreign officials for supposed wrongdoing. Using a 1994 law originally aimed at Rwanda’s genocidaires, activists in Belgium filed war crimes charges in 2003 against former U.S. President George H. W. Bush, U.S. General Colin Powell, U.S. Vice President Dick Cheney, and retired U.S. General Norman Schwarzkopf, alleging that they killed civilians by ordering a missile attack on Baghdad during the Persian Gulf War. In 2005, a British court issued an arrest warrant for retired Israeli Major General Doron Almog as he arrived at Heathrow Airport, alleging war crimes committed against Palestinians in Gaza. On the advice of his embassy, Almog stayed on the plane and flew right back to Israel. In 2006, American

and German lawyers filed war crimes charges in Germany against U.S. Secretary of Defense Donald Rumsfeld, U.S. Attorney General Alberto Gonzales, and U.S. Lieutenant General Ricardo Sanchez. In 2011, a prominent member of the largest party in the Swiss parliament called for the arrest of Henry Kissinger if he visited the

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annual Bilderberg conference. All these instances reflect transnational legal theory's expansive view of jurisdiction and represent views that run counter to traditional interpretations of international law.

The UN has taken advantage of transnational legal theory to lecture sovereign countries on the appropriateness of their behavior. In 2009, Philip Alston, then the UN's special rapporteur on extrajudicial killings, suggested that the Obama administration's use of drones

in Afghanistan and Pakistan was violating international law, calling the White House's refusal to respond to the UN's concerns "untenable." The idea that a UN official can sit in judgment of the U.S. president on such a matter is a transnationalist innovation in international law.

Similarly, in 2002, the UN committee monitoring the UN Convention on the Rights of the Child found that the British government's budget priorities were at odds with the rights of children. The government of British Prime Minister Tony Blair was told to analyze its expenditures to "show the proportion spent on children" and then create a "permanent body with an adequate mandate and sufficient resources" to implement the UN convention in line with the views of the monitoring committee. In 1997, the UN committee monitoring the UN Convention on the Elimination of All Forms of Discrimination Against Women criticized Slovenia for violating women's rights because only 30 percent of Slovenian children attended daycare; the others were apparently being raised at home. That same year, the committee reproached Denmark because it "had yet to reach gender parity" in politics, "although it was at a higher level than other countries." In 2003, the committee praised Norway as a "haven for gender equality" in many areas of politics

and law but complained about “inequalities in economic decision making in the private sector.” In response, Norway established a quota system that mandated that 40 percent of all corporate board members in the private sector be women, and *The New York Times* reported that Belgium, Germany, Sweden, and the United Kingdom were considering similar requirements.

As all these examples show, the ideas and approaches of the transnationalist school affect both foreign and domestic policy and reach deep into the private sphere of life. Fortunately, many of these initiatives have failed to achieve their aims. But the transnational law movement is creative, determined, and championed by prestigious figures. It has already altered the legal landscape and could inflict further harm on federalism and democratic accountability.

The progress transnational law has made in Europe has served as a cautionary tale, undoubtedly influencing the Senate’s deliberations on the disabilities convention. The transnationalists achieved great influence there decades ago, as many Europeans now recognize to their regret, and contributed to the growth of intrusive yet unaccountable bureaucracy. As the British diplomat Robert Cooper has written, the EU represents “a highly developed system for mutual interference in each other’s domestic affairs, right down to beer and sausages.” In contemporary Europe, sovereignty is pooled, and a great deal of practical lawmaking has moved from democratically elected national legislatures to supranational judicial and administrative bodies. Indeed, today, more than half of all legislation in Europe is initiated by the unelected European Commission in Brussels—not by national parliaments. The EU has, as former German Foreign Minister Joschka Fischer put it in his famous Humboldt University speech in 2000, a “democratic deficit.”

Europe developed its postnational administrative-judicial rule gradually, primarily through the transnational legal process. Over decades, the European Court of Justice established judicial supremacy over national parliaments and courts, thanks in large part to national judges who enforced the court’s rulings against their own national parliaments. Such jurisprudence has earned the praise of Koh. “Domestic courts,” he has written, “must play a key role in coordinating U.S. domestic constitutional rules with rules of foreign and international law.”

## A MADISONIAN RESPONSE

In *The Federalist Papers*, no. 46, James Madison compared the powers of the federal and state governments, noting that the power of both federal and state authorities ultimately derives from the consent of the American people. Thus, he wrote:

Notwithstanding the different modes in which [federal and state governments] are appointed, we must consider both of them as substantially dependent on the great body of the citizens of the United States. . . . The federal and State governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes. . . . The ultimate authority, wherever the derivative may be found, resides in the people alone.

Madison was articulating a basic concept of American constitutional democracy, and it is one that should guide the country's approach to international law and world politics today. By following that path, the United States could obtain the benefits of globalization while preserving its sovereignty and democracy.

In a Madisonian framework, federal courts cannot unilaterally decide which putative international laws should be domesticated to bind Americans at home. If U.S. judges or officials enforce new international laws, they are engaged in lawmaking, which is a legislative, not a judicial, function. If the people deem a law unwise, they can hold lawmakers accountable at the polls, a crucial check on power in a constitutional democracy. Not so with judges. Obviously, federal courts have a major role to play in interpreting international law, but there are often serious questions as to whether a rule or a norm supposedly qualifying as international law is really law and actually applies to the United States. Federal courts should not be the sole arbiters of such questions, and neither should executive-branch officials.

In *Taming Globalization*, the law professors John Yoo and Julian Ku argue that Americans should interpret international law in a manner consistent with the United States' constitutional framework, including the separation of powers, federalism, and popular sovereignty. The most crucial question in politics is always, who decides? When it comes to determining what constitutes binding international law, the answer should be officials accountable to the American people. As Alexander Hamilton noted, the people are the principal and the government is the agent.

But it is not only courts that can abuse their power by taking advantage of the murky concept of customary international law; the federal government's executive branch has done so, too, as a recent attempt to change the laws of war showed. In the 1970s, diplomats proposed amending the 1949 Geneva Conventions with Additional Protocol I. The protocol contains some good provisions, but it also creates some problems. Unlike the 1949 conventions, Protocol I would grant prisoner-of-war privileges to terrorists, even if they hid among civilian populations and waited until after an attack to reveal themselves. The provision would give terrorists a more favored status than conventional forces, and it would put civilians at greater risk, thus undermining a major

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purpose of the laws of war. In other words, Additional Protocol I creates new rules that contradict the humane provisions of traditional international law. That is why President Ronald Reagan declared that the United States would not ratify the protocol, a position supported by the Joint Chiefs of Staff, the secretaries of state and defense, and the editorial boards of both *The New York Times* and *The Washington Post*. To this day, the United States has not ratified the protocol.

Nevertheless, the International Criminal Court cites the protocol as binding law. In a report released in 2000 on NATO's 1999 bombing campaign in Yugoslavia, Carla Del Ponte, the chief prosecutor for the International Criminal Tribunal for the Former Yugoslavia, acknowledged that the United States does not accept Additional Protocol I, but she nevertheless declared that it "provides the contemporary standard which must be used when attempting to determine the lawfulness of particular attacks." The report investigated a U.S. Air Force strike on a Belgrade television station and took NATO to task for its "apparent failure to provide clear advance warning of the attack, as required by Article 57(2) [of Additional Protocol I]."

What Del Ponte was saying, in effect, was that the United States was subject to the protocol as a global "contemporary standard" for the laws of war, even though the U.S. government has refused to become a party to it. If allowed to stand, this argument would deprive the United States of an important element of its sovereignty: the right to choose its treaties.

In March 2011, Secretary of State Hillary Clinton announced that the United States, “out of a sense of legal obligation,” would adhere to Article 75 of Additional Protocol I, the part that deals with “fundamental guarantees” for unlawful combatants. Some portions of Article 75 are unobjectionable. But others—for example, the language granting rights to unlawful combatants to examine witnesses—are a problem, in some cases embodying ideas that Congress has considered and rejected. In effect, Clinton asserted that the State Department can deem parts of a treaty binding on the United States, presumably as customary international law, even if that treaty has never been ratified according to the U.S. Constitution, and even if the president has expressly rejected that treaty, as Reagan did with Additional Protocol I.

### **LEGISLATORS AND THE LAW**

Congress can and should counter this affront to the Constitution. Under the circumstances, although it should not have to, it would do well to clarify that Additional Protocol I is not, in whole or in part, legally binding on the United States. More generally, new legislation could help ensure that there are authoritative, proper, and constitutional means in place to incorporate new norms or new customary international law into U.S. law.

Such legislation would not be easy to craft and enact. Whatever his or her political party, the president would likely oppose the effort, advised by executive-branch lawyers, who in every administration resist constraints on the president’s ability to act in international affairs. Supporters of transnational legal theory can be expected to oppose it, too, because customary international law is a valuable vehicle for them. It is in their interest to argue that customary international law is the same thing as “the law of nations,” which, since the earliest days of the Republic, the Supreme Court has accepted as applicable to the United States.

But the law of nations in the eighteenth century differs from what many of today’s international lawyers think of as customary international law. When the United States was born, it lacked national legislation, so it made sense to accept in principle that the new country would abide by those long-established rules embraced universally by civilized nations. Such rules were confined to but a few fields (such as the treatment of diplomats, actions against pirates, and financial relations between states), and they tended to be general in nature, not detailed.

Nowadays, however, legal entrepreneurs contend that numerous rules, treaties, and norms, some highly detailed, qualify as customary international law, even though there are no established standards for how this is determined. There is no consensus on how long a rule must be in existence, the number of nations that must endorse it, whether the endorsement must take the form of actions or simply statements of support, or whether the endorsement must be made out of a sense of legal obligation or simply given as an expression of policy preference.

These are important questions, because depending on how they are answered, the president can make law without Congress by recognizing as customary international law any rules that have been popular abroad for a few decades. Congress should resolve these questions with legislation, but this will happen only if legislators with a Madisonian point of view find a way to obtain the support of at least some of their more progressive colleagues. In the absence of new legislation, the legal status of rules that officials or judges accept as customary international law will remain uncertain. And courts may view at least some disputes between the president and Congress about such rules as political questions not resolvable by the judiciary.

The United States has an interest in promoting respect for international law that strengthens, rather than undermines, its constitutional system. Indeed, Americans can benefit from international cooperation that is rooted in countries' widespread acceptance of useful rules of the road. But U.S. officials should adopt such rules, as they do with domestic legislation, through democratic processes. New rules should not be imposed by the executive branch through extraconstitutional machinations, and they should not be decreed by activist judges exploiting the democracy-unfriendly theories of the transnational legal movement. 🌐