U.S. Senator Jon Kyl's remarks on
"American Sovereignty and Transnational Law"
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In my first year practicing law, ASU selected William Pedrick to start a new law school. As a brand new lawyer, I well remember attending meetings at which Dean Pedrick pitched us all to support his new law school. He was a terrific salesman – witty, indefatigable, and absolutely committed to success. And he did succeed! It's fitting to recognize his significant achievement and also his incredibly fertile mind with the lecture series that bears his name.

I must confess, however, that when I think of William Pedrick, as I did on a recent trip to Australia, the first thing that comes to mind is his talent playing the didgeridoo. He used it to good effect in introducing himself to the Arizona legal community.

It's an honor to participate in a lecture in his honor and a series that has known so many prominent speakers, including Justice Sandra Day O'Connor for whom this school is named.

Introduction

I've chosen a subject that bears both on law and public policy. It is a subject that increasingly concerns me, and I submit, should be considered carefully by everyone who believes in the rule of law and in representative democracy and wants to preserve the U.S. Constitution as the safeguard of our individual and democratic rights.

Our government was founded on – and to this day remains committed to – two key principles. First, the sovereignty of the people. That means the American people are not subject to any rules imposed on them without their consent – that is, any rules imposed on them from outside their own political community. As President Abraham Lincoln defined sovereignty, it is "a political community without a political superior."

The second key principle is that laws should be made through a democratic process, whereby the people's legislative representatives can be held accountable.

Federalism and separation of powers help to effectuate these two principles of sovereignty and democracy.

The development of transnational legal theory and the growth over recent years of the transnational law movement, I believe, pose challenges to these principles. The movement, at least implicitly, aims to subordinate the U.S. Constitution and American law to rules described as "international norms." It aims to legitimate new modes of

lawmaking that are not consistent with U.S. Constitutional principles. This movement has become increasingly influential in Europe and has been gaining traction in American academic and political circles.

American proponents of transnational law propose to import into American domestic law new rules, regulations, norms, rights, and commitments by means that circumvent our democratic legislative process. The goal is to adopt various progressive initiatives and, by one means or another cause them to be enforceable by U.S. courts even though those initiatives have not been enacted by the relevant legislatures of America's federal or state governments. The effect is to override or set aside the views of the American people and their democratically elected legislators in favor of a particular policy agenda.

To be clear, the problem with the transnational law movement is not that it attempts to create a world government. Nation-states still exist in the transnational world, but they are in various ways subordinate to policies of supra-national authorities. Nor am I warning about international law in the traditional sense of consensual treaty arrangements between or among nations on matters of trade, the laws of war, diplomatic recognition, and the like.

I am talking about a political movement – the transnational law movement – that works to promote judicial recognition of new human "rights" that effectively become domestic law, though not enacted according to legislative provisions of our Constitution.

This is described by attorney and scholar David Rivkin, writing in *The National Interest* in 2000[1]:

> "Since the Cold War's end, a number of international organizations, human rights activists, and states have worked to transform the traditional law of nations governing the relationship between states into something akin to an international regulatory code. The 'new' international law purports to govern the relationship of citizens to their governments, affecting such domestic issues as environmental protection and the rights of children. Among other things, it would: nearly eliminate the unilateral use of military force; create the unattainable requirement of avoiding all civilian casualties in combat; [and] promote the criminal prosecution of individual state officials by the courts of other states and international tribunals . . ."

Advocates are not bashful about their intent. Referring to the United States, a former Mexican foreign minister put it this way: [2] I like very much the metaphor of Gulliver, of ensnarling the giant. Tying it up with nails, with thread, with 20,000 nets that bog it down: these nets being norms, principles, resolutions, agreements, and bilateral, regional, and international covenants."

[1] David Rivkin and Lee Casey, "The Rocky Shoals of International Law," National Interest, Winter 2000-2001.
[2] Mexican foreign minister Jorge Castanada. Cited in Fonte, pp. 188-189.

Proponents of transnationalist law argue that national sovereignty is becoming outdated and that law-making will become increasingly transnational.

The movement has gained a following in Europe and has resulted in a great deal of practical rule-making being taken out of the hands of democratically elected local or national legislatures and moved into the hands of judges and supra-national commissioners, who are not effectively accountable to any electorate. Many major decisions of political life and of Europeans' personal lives are now made by unelected officials in Brussels or judges in Luxembourg.[3]

Some of the issues that the transnational law movement has focused on are international in nature (such as the laws of war, arms control, global climate change, and other environmental concerns) and some are domestic (such as the death penalty, women's rights, and racial discrimination). Reasonable people, of course, can debate the substance of the movement's views on these issues. We do a lot of debating of this kind in our democratic process. But the transnationalist movement promotes its agenda in ways (1) that tend to deprecate national sovereignty – that is, the right of a nation's people to formulate their own laws – and (2) that derogate from the authority of democratically elected legislatures.

Transnational legal process

Some of the clearest statements about the goals and reasoning of the transnationalist movement come from an American – Harold Koh, currently the State Department legal adviser and formerly a widely respected dean of Yale Law School. Koh has been an outspoken advocate.

In a 2006 *Penn State International Law Journal* article,[4] Mr. Koh explained what is meant by the "Transnational Legal Process." Nations and "transnational private actors," Mr. Koh says, blend domestic and international legal processes to incorporate or "internalize" international legal norms into domestic law: "[K]ey agents in promoting this process of internalization include transnational norm entrepreneurs, governmental norm sponsors, transnational issue networks, and interpretive communities."[5]

I need hardly observe that none of these actors are elected officials. None are answerable to the public. In many cases, the rules they favor could not win support from a majority of elected legislators in their communities. This is what Mr. Koh means when he refers to a country as a "resisting nation-state."

Here's how Mr. Koh describes the way that domestic law should be written[6]:

[3] John Fonte, "Sovereignty or Submission: Will Americans Rule Themselves or Be Ruled By Others?" Encounter Books, 2011, pp. 145-147.
[4] Harold Koh, "Why Transnational Law Matters," Penn State International Law Review, 2006, pp.745-747.
[5] Ibid.
[6] Ibid.

> "[O]ne 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*."

Let's pause for a second so we can absorb how remarkably undemocratic it is to talk of "internalizing" proposals into "domestic laws" in a "resisting nation-state" – that is, a democratic country whose elected lawmakers refuse to give majority support to the transnationalists' proposed new law.

Yet, Mr. Koh's transnational law theories strike many political activists as creative and appealing. If you are frustrated that you can't win support in Congress for your ideas, you may find it highly useful to think of yourself as an "agent of internalization" so you get to convert those ideas into domestic law through the courts without having to dirty your hands in legislative or electoral politics.

I oppose "transnationalism" because I remain attached to the old but well-considered idea that the American people should be able to elect – and to eject from office – the officials who make laws for us. What the advocates of transnationalist law put at risk, is not mere technicalities of lawmaking, but the essence of the idea of democratic accountability by law makers. Here's the main objection that I have: In the interest of turning their substantive ideas into law, the transnationalists would short-circuit our constitutional processes.

It's important to make a point here about the substance of our rights as citizens and the issue of mere process. The highest aim of our Constitutional system is to protect the inalienable rights that Providence gave to each of us as human beings. The Constitution does this by creating processes. The substance of the Constitution is process. As a law professor once profoundly observed: The difference between a lynching and a fair trial is one of "mere procedure."

Now someone may be convinced that society would be better off with a new law, even though Congress is unwilling to enact it – just as someone else may be convinced that society would be better off if a certain accused person were imprisoned (or hanged), even though the criminal court is unwilling to convict him. But in neither case would it *really* be good for society to bring about any result in violation of our Constitutional processes. It is dangerous zealotry to look on those processes as mere technicalities that annoyingly stand in the way of the right legislative or judicial result. Those processes are the substance of our constitutional system. Democracy is a process. Short-circuiting democracy in the name of making society better, more enlightened and progressive is self-defeating, even when well-intentioned.

What are some of the means by which the transnationalists aim to short-circuit democracy to implement their theories?

Treaties and customary law

One technique used by proponents of transnational law is to on build on multilateral human rights treaties that have come into effect since the end of World War II. In those treaties, nations promised not to violate the rights of their own citizens, and they agreed to international supervision. The United States has, in many cases, either refrained from ratifying those treaties or ratified them with reservations providing that the treaties are not self-executing and that their provisions are not valid if in conflict with the U.S. Constitution.

The transnationalists also work to "domesticate" foreign rules by making use of the concept of customary international law. For centuries, nations have recognized what is now called customary international law. A practice qualified for this status as law if it met two standards. First, the practice was implemented by numerous states over a long period of time; and second, the states engaged in it not for reasons of convenience or mere policy but out of a sense of legal obligation. This second standard is the rule known as *opinio juris*. An example of customary international law is the prohibition against harming ambassadors from other nations.

Law professors Gerald Bradley and Jack Goldsmith point out[7] that the two standards of "state practice" and "a sense of legal obligation" ensured that "international law was grounded in state consent." They cite[8] the *Lotus* decision in 1927 by the Permanent Court of International Justice in The Hague which declared: "International law governs relations between independent states. The rules of law binding upon states therefore emanate from their own free will."

Proponents of the "new" international law, however, want to change the meaning of state "practice" under customary international law. University of Virginia law professor Paul B. Stephan has criticized[9] this new, transnationalist approach for allowing empty rhetoric to substitute for the objective standard of visible action. He explains that, in the transnationalists' view, the standard of state practice "entails not the observable behavior of states . . . but rather what states assert as norms." Professor Stephan says[10] that the transnationalists want the term "state practice" to mean "not what states and their agents do, but rather what they say." Observing that the "new international law . . . embraces a system of formulating and imposing norms on state and individual behavior that operates outside of any publicly accountable institution," Professor Stephan rightly labels this, "the antithesis of democracy."

But, of course, the point of transnational law theory is to get around the problem that the democratic lawmaking system can be slow or produce imperfect results from this point of view. For instance, in the journal *Transnational Environmental Law*,[11] Professors

[7] Curtis Bradley and Jack Goldmith, Harvard Law Review, February 1997, pp. 838-839.
[8] Ibid.
[9] Paul Stephan, "International Governance and American Democracy," University of Virginia Law, May 2000.
[10] Ibid.
[11] "Transnational Law, Unilateralism, and International Law," 2011 Cambridge University Press, pp. 2-3.

Gregory Shaffer[12] and Daniel Bodansky[13] write, "Transnational environmental law is substantively needed, among other reasons, because the processes of international treaty negotiation and custom formation can be slow and ponderous. Even when concluded, they result in weak standards, which commit states to do little if anything more than they intended to do anyway."[14]

Courts

Once the norms favored by transnationalists have been talked up, touted, made the subjects of resolutions and otherwise "established" or "recognized" in international conferences, commission reports, resolutions of U.N. bodies, and the like, transnationalists count on domestic courts to play a large role in integrating them into national law.

Just as courts have played a major role in extending transnational law in Europe, advocates see a similar role for American judges. Anne-Marie Slaughter, former director of policy planning at the State Department, says judges are part of the "dense web of relations…building a global community of law."[15] They see themselves as "insulated from direct political influence" and can, she says, "make common cause with their supranational counterparts against their fellow branches of government."[16] This is what has occurred in Europe.

Law professor Peter Spiro predicts[17] that "the Constitution is likely to be increasingly entangled in the tentacles of international norms," thus allowing those norms to "be adopted under the cover of constitutional supremacy."[18]

Examples

Now, let's turn to a few very specific examples[19] of this phenomenon over the last couple of decades. The first five are efforts to restrain U.S. or Israeli foreign policy; the remainder deal with treaty rights of citizens against their own governments.

- In the early years of the 21st century, lawyers filed war crimes charges under Belgium's universal jurisdiction law[20] against President George H.W. Bush, General Colin Powell, and General Norman Schwarzkopf for allegedly killing civilians by ordering a missile attack on Baghdad during the 1991 Gulf war. The charges were only dropped[21] after then-Defense Secretary Donald Rumsfeld

[12] University of Minnesota.
[13] Arizona State University.
[14] Their paper states that Senate procedure is flawed because of the filibuster and prevents "effective action."
[15] Anne-Marie Slaughter, "The Real New-World Order," Foreign Affairs, September 1997.
[16] Ibid.
[17] Peter Spiro, "Disaggregating U.S. Interests in International Law," Law and Contemporary Problems, Fall 2004.
[18] Incidentally, Koh wrote in 2006 that he was pleased that Yale Law School was recommending courses in in transnational law "to shift the students' minds from the largely domestic first-year curriculum into a transnational mindset."
[19] Documented by Fonte.
[20] Lawyers in Belgium filed the charges, not the Belgian government.
[21] New York Times, "Belgium Plans to Amend Law on War Crimes," June 23, 2003.

observed that NATO headquarters could be moved to another country to allow these leaders to attend.

- In 2004, under Germany's universal jurisdiction law,[22] German and American lawyers filed war crimes charges against U.S. Defense Secretary Donald Rumsfeld, Attorney-General Alberto Gonzales, and General Ricardo Sanchez. German prosecutors dismissed the lawsuit, but a Spanish court later opened an investigation, citing its own universal jurisdiction law.[23]

- In 2005, in Great Britain, the Bow Street magistrates court issued an arrest warrant[24] for alleged war crimes in violation of the Geneva accords, committed by retired Israeli General Doron Almog as he arrived at Heathrow Airport. His embassy advised him not to exit the plane. He flew back to Israel.

- In 2009, *The New York Times* reported[25] that the Obama Administration could be "violating international law" with its use of drones in Afghanistan and Pakistan. The UN Special Rapporteur for extra judicial killings – yes, there is such a thing – said the Obama administration position was "untenable."

- In 2011,[26] a prominent member of the largest party in the Swiss parliament called for the arrest of Henry Kissinger as he visited the annual Bilderberg conference. The request to the Swiss General Prosecutor, later rejected, was based on criminal complaints by a number of activists in different courts around the world.

- Just last week,[27] Abu Qatada, a radical cleric from Jordan, once described as "Osama bin Laden's right-hand man in Europe," was freed from a British jail after the European Court of Human Rights ruled that his detention was unlawful. The court also ruled that Britain must not send him back to Jordan because he might be persecuted. As of now, he remains in Britain under house arrest.[28]

- In 2002,[29] the UN committee monitoring the UN Convention on the Rights of the Child found that British government budget priorities were at odds with the rights of children. The New Labour government of Tony Blair was ordered to analyze its budget to "show the proportion spent on children" and then create a "permanent body with an adequate mandate and sufficient resources" to implement the UN Child's treaty, presumably along the lines set by the monitoring committee.

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[22] Fonte, p. 245.
[23] Der Spiegel, April 30, 2007.
[24] According to the article in the UK Guardian entitled, "Terror Police Feared Gun Battle With Israeli General," an arrest warrant was issued "under the Geneva conventions of ordering the demolition of 59 civilian Palestinian homes," February 19, 2008.
[25] "CIA to Expand Use of Drones in Pakistan," New York Times, December 3, 2009.
[26] Various news reports.
[27] Reuters, "Britain Frees Radical Cleric."
[28] Situation is in flux.
[29] Fonte, pp. 215-216.

- In 1997 the UN Committee monitoring the UN Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW) condemned Slovenia for violating women's rights because only 30% of Slovenian children were in day-care centers. The others apparently were being raised at home.[30]

- Also in 1997, the same UN CEDAW monitoring committee chastised Denmark, a party to the treaty, because it "had yet to reach gender parity"[31] in politics "although it was at a higher level than other countries."

- In 2003, the UN CEDAW monitoring 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." As a result of that criticism, Norway established a quota system mandating that forty percent of all corporate board members in the private sector had to be women. *The New York Times* reported[32] that as a result of this UN pressure, Belgium, the UK, Germany, and Sweden were considering similar quotas.

As we see from these examples, the transnational law movement affects both foreign and domestic policy, and can reach deeply into the private sphere of life. Do we really need UN monitors (with the assistance of numerous litigants) establishing so-called global "norms" about daycare centers and corporate boards? Would we want to give up our First Amendment right to free speech and adopt the European "norm" of governments prosecuting so-called hate speech?[33]

The term "norm" here frequently means only that some individuals – judges, academics, government officials from one nation or another, leaders of private "activist" organizations, NGOs – are advocating the establishment of a rule. In many cases, proponents use the term "norm" because they cannot get the rule they favor adopted as law through democratic means.

The transnational legal field is fairly new and rapidly evolving, so we don't know what precisely may be coming around the corner. But it's time now to start considering the issues raised by transnational legal theory – especially the question of *who gets to make law for whom*. This question is essential to the idea of self-government and to the concept of national sovereignty.

To use an actual proposal, let's dig more deeply into what might follow if the United States were to ratify the CEDAW Treaty on women's rights.

It's fair to ask, as many people have, why hasn't the U.S. Senate ratified CEDAW? Isn't America a world leader in women's rights? CEDAW is far more than a means to promote

[30] Fonte, p. 218.
[31] Fonte, p. 213.
[32] "Getting Women Into Board Rooms, By Law," January 27, 2010.
[33] The European Union passed a treaty which specifies that hate speech would be sanctioned and punitive measures could be taken against individuals or groups engaged in hate speech. *NPR.org*, March 3, 2011.

equal opportunities for women. Let's take a look at something called the CEDAW Assessment Tool, a work produced by the American Bar Association (ABA), which supports the CEDAW treaty.

The ABA created this Assessment Tool, a 200-page document,[34] to encourage nations to comply with the treaty. The Bar Association report begins by explaining that CEDAW's focus is on "substantive" or "de facto" equality (that is, equality of results), not equality of opportunity and not equality before the law.

The ABA's Assessment Tool consists mostly of questions that treaty parties are supposed to answer in detail. There are hundreds of these questions. I'll read just a few for you.

> "Are there quotas, targets or specific goals regarding compliance with CEDAW? Are these quotas, targets or goals being met? Is there a national mechanism to promote de facto equality of women?
>
> What measures has the State undertaken to encourage shared parental responsibility? Does the national machinery or the State track national budgetary expenditures for programs that promote the advancement of women? What are the results of this study (e.g., percentage of funds spent on social and family support programs, awareness campaigns, temporary special measures to promote women's advancement in all fields)?
>
> Do gender quotas exist for increasing the number of women elected? What percentage of judges are women? What percentage of prosecutors are women?"

Now, there is already a UN Treaty Committee that monitors compliance with the CEDAW treaty and what I have just quoted are the types of questions that this UN committee asks. Most of the matters addressed in these questions – such as government support for parental leave or employment quotas – are controversial in America and in other democratic countries. Contrary to what CEDAW proponents claim, the interests at issue are *not* universal human rights.

U.S. ratification of CEDAW would remove a long list of important matters, including budget priorities, employment policy, electoral law, education, and social services from the give and take of democratic politics. By categorizing the interests involved as universal human rights, the treaty would, in effect, push democratically elected legislators aside and invite judges to manage these matters in accordance with transnational legal practices.

I raise this subject of CEDAW not to argue about the proper definition of women's rights in an enlightened society, but to illustrate how some political forces, when their proposals are rebuffed by their societies' democratic law-making processes, adopt the anti-democratic technique of trying to remove their issues from the legislative process and transfer them to the jurisdiction of courts. This is an end-run around the Constitution.

[34] Fonte, p. 224.

The European Experience

I mentioned that Europe is the center of much of this activity; so allow me to elaborate on the European experience with regard to the disintegration of national sovereignty in Europe and the gradual imposition of transnational law. I'll then describe why America's founding principles provide us with unique tools to reject the imposition of transnational law and ensure that courts do not bind Americans to international laws created outside of the democratic process.

How did it happen that the democratic nation-states of Europe accepted the loss of a large part of their sovereignty and embraced "shared or pooled" sovereignty? Today, more than half of all legislation in Europe is initiated not by democratically elected parliaments like the British House of Commons, but by the European Commission in Brussels, which is not effectively accountable to European voters.

It happened gradually, over decades – primarily through the transnational legal process. Over several decades, the European Court of Justice established judicial supremacy over the parliaments and courts of the nation-states. The key players in what has been called the "constitutionalization" of the European Union were national judges. In precedent-setting decisions, national judges enforced European Court of Justice rulings in favor of individual litigants against their own national parliaments. This is exactly how people like Harold Koh see it playing out in the United States. "Domestic courts", he says,[35] "must play a key role in coordinating U.S. domestic constitutional rules with rules of foreign and international law."

Part of the reason this happened in Europe is that Europeans think of sovereignty differently than Americans do. For Europeans, sovereignty is "Westphalian," a term referring back to the European state system organized in the 1648 peace settlement of Westphalia that ended the Thirty Years' War. The sovereign, the King, prince, or duke, and later the nation-state, was the highest political authority within a particular territorial unit. Sovereignty in the people is not emphasized, as it was in the United States. After the Second World War, European elites aimed to move towards a post-sovereignty, post-Westphalian system of greater European integration.

In his book *Sovereignty or Submission,* Hudson Institute scholar John Fonte documents[36] that Americans rarely think in Westphalian terms of sovereignty as coming from the state – but instead think in "Philadelphian" terms: that sovereignty emanates from "We the People of the United States," the opening words of the Preamble of the Constitution created in Philadelphia in 1787.

An American Response

[35] Koh, "International Law as Part of Our Law," American Journal of International Law, January 2004.
[36] Fonte, pp. 32-37.

This brings me back to America's unique founding principles and the unique defense we possess against encroachments on our sovereignty. Constitutional democratic sovereignty can be defended through what I call a Madisonian approach to international law.

In this regard, I recommend a new book that argues for a constitutional democratic approach to international law. It's called *Taming Globalization: International Law, the US. Constitution, and the New World Order*. It's by law professors Julian Ku of Hofstra and John Yoo of Berkeley, published by Oxford University Press, due out on March 6. Professors Ku and Yoo innovatively provide a Constitutional lens through which to view international law. The book focuses on how Americans can reap the benefits of globalization and increased international cooperation while remaining faithful to the pillars of America's constitutional order: separation of powers, federalism, and popular sovereignty. One doesn't have to agree with all of their prescriptions to recognize that this is a very good place to begin to examine these issues.

For example, they recommend a presumption that treaties are not self-executing, which means treaties would generally not have "direct effect." They would require implementing legislation by Congress. Because the European Court of Justice created the doctrine of "direct effect,"[37] national courts could directly enforce purported individual litigants' rights against European states with no legislative intervention.

Madisonianism is rooted in the basic concepts of American constitutional democracy: separation of powers, federalism, and representative democracy. In Federalist 46, Madison compares the powers of federal and state governments. He notes that the power of both federal and state authorities ultimately derives from the consent of the American people. Thus, Madison writes:

> " 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 . . ." [p. 294].

If we adopt a Madisonian approach, we would not allow Federal courts to serve as the sole arbiters of what purported elements of new international law should be "domesticated" to bind Americans at home. In a proper Madisonian framework, if U.S. judges or officials are to recognize and enforce new international law (including treaties, customary international law, global norms, peremptory norms – all of it), this should be understood as lawmaking. That is a legislative not a judicial function, so, if the people in large numbers deem a law unwise, they can hold the lawmakers accountable at the polls. That is the essence of self-government and democracy. This means that new international law should not be recognized and applied as law to the United States and its citizens solely by courts.

Obviously, federal courts have a major role in interpreting treaties, treaty-implementing legislation, and even customary international norms. But federal courts should not be the

[37] Fonte, p. 127.

sole arbiters of what provisions of purported international law should apply domestically in the United States.

Respect for the U.S. Constitution requires ensuring that international law is not used as an excuse for violating our system of legislative accountability and federalism. The fifty states' respective authorities regarding criminal justice, education, property, contracts, and the like should not be infringed through international commitments. In ratifying treaties, the United States has often defended federalism by adding reservations to clarify that it is preserving the authority of the states in their traditional domains. Professors Bradley and Goldsmith have written[38] that "the Senate and the President have made clear in their conditional ratifications of multilateral human rights treaties: with minute exceptions, the federal political branches do not want international human rights law to preempt state law."

The most crucial question in governance is always who decides. Who should decide what constitutes binding international law? The answer, in general in our democracy, should be officials accountable to the American people through elections, which means the members of both houses of Congress and the President. The courts resolve disputes about adopted treaties. But in today's world of treaties creating rights in people against their government and customary law being claimed after just a brief time, the political branches should have a say.

Congress and the President should play their proper roles. If not, laws can be imported and imposed on the American people through the courts rather than through our democratic legislative processes. The "transnational litigation process" suggested by Harold Koh, which gives extensive interpretative (essentially law making) powers to the federal courts does not give democratic legitimacy to the rules it produces. Bradley and Goldsmith persuasively reject the Koh-transnationalist approach and argue in their essay[39] "Federal Courts and the Incorporation of International Law," that the political branches should help decide whether international laws or "norms" are absorbed into domestic law.

Regarding the truncated development of customary international law, about which I spoke earlier, I believe that new legislation is advisable to ensure that there are authoritative, proper, Constitutional means in place to incorporate customary international law into American law. For example, rules should not be imposed by extra-constitutional Executive Branch machinations or by usurpation of the legislative function by judges exploiting the anti-democratic theories of the transnational law movement.

Protocol I

Let me give you an example of an abuse of power that calls for new legislation.

[38] Harvard Law Review, 1997.
[39] Harvard Law Review, 1997.

Additional Protocol I to the Geneva Conventions was drafted in the 1970s to amend the Geneva Conventions of 1949. There are numerous problems with the Additional Protocol, which has provisions that would hamper American combat operations in various ways. Among the Protocol's major problems is that it gives increased protection to groups that use terrorist tactics. Unlike the 1949 Conventions, the Additional Protocol permits insurgent groups to receive POW privileges even if they hide among civilian populations and do not reveal themselves until just before an attack. This puts civilians at greater risk, undermining a key purpose of the laws of war, which is to protect non-combatants. The traditional law of war put the interests of non-combatants over the interests of irregular forces, especially if those forces use terrorist tactics.

In other words, Additional Protocol I creates new rules that contradict the humane provisions of traditional international law. That's why, though U.S. officials had signed Additional Protocol I during the Carter administration, President Ronald Reagan declared that the United States would not ratify Protocol I.[40] In taking that position, President Reagan had the support[41] of the Joint Chiefs of Staff and of the Secretaries of State and Defense, the editorial boards of both the *New York Times* and *Washington Post,* and others. The Protocol remains unratified by the United States to this day.

Nevertheless, the chief prosecutor at the International Criminal Court treats Protocol 1 as law, binding every nation. The International Criminal Tribunal for the former Yugoslavia (ICTY) has also cited Protocol I as binding law. The ICTY's chief prosecutor, Carla Del Ponte, has acknowledged that the United States does not accept Protocol I, but issued a report[42] nevertheless stating that Protocol I "provides the contemporary standard when attempting to determine the lawfulness of particular attacks." The report declared that NATO apparently failed to provide clear advance warning of a U.S. air force attack on a Belgrade TV station, "as required by Article 57 (2) [of Protocol I]."

So, here we have a treaty provision treated as the "contemporary standard" binding on all by an international court even though the provision has explicitly never been ratified by the U.S. It gets worse.

In March 2011, Secretary of State Hillary Clinton announced that a different part of Additional Protocol I, specifically Article 75, which deals with so-called fundamental guarantees for non-state combatants – is "deemed" to be legally binding on the United States. Parts of Article 75 are unexceptionable. But other parts – for example, the language dealing with the "right" to examine witnesses – are a problem, in some cases embodying ideas that Congress has considered and rejected. If the administration wants Article 75 to be law in the United States, it should ask Congress to enact it. Congress should have the opportunity, for example, to review how Article 75 compares with the Military Commissions Act and with current Defense Department guidance.

[40] Fonte, pp. 229-233.
[41] Fonte, p. 233.
[42] Cited in Fonte, p. 239.

The State Department's announcement on this Article 75 matter was a portentous development, even though the matter seems technical and obscure. It was a power play by State Department lawyers, headed by Legal Adviser Harold Koh, on a matter of principle of great importance for the transnational law movement. That announcement was in, effect, an assertion that the State Department can "deem" a treaty, or even a part of a treaty, binding on the United States as customary international law, even if the United States has never ratified the treaty. In this case, President Reagan considered asking the Senate to approve ratification but formally notified the Senate that he decided not to seek such approval, and no later President has even attempted to take a different course.

Though it shouldn't have to, I think Congress should clarify that Protocol I is not, in whole or in part, legally binding on the United States. And on the general principle of proper international law-making, Congress should clarify through legislation that the President lacks the authority to bind the United States to a treaty, let alone to a part thereof, simply by "deeming" it to be legally binding. The President may think such a treaty has achieved customary international law status, or may hope that it will someday do so, but that is no excuse for a sleight of hand procedure that allows the Executive Branch to legislate unilaterally, without any congressional input whatever.

I want to emphasize that this view does not arise out of any aversion on my part to international law as such. I believe America and the world benefit from proper international legal order. In this era of globalization, law can play a larger role in international affairs, regulating the actions of states in the interests of trade, peace, security and prosperity. America has an interest in promoting respect for international law abroad and at home in a manner that strengthens rather than undermines our constitutional system. The Madisonian principles I have discussed today could help legitimate and strengthen proper international law, harmonizing it with our Constitution and, thereby, increasing popular support for it.

Conclusion

In sum, Americans want the benefits of international cooperation based on widespread acceptance of useful international "rules of the road." But such rules, like our domestic legislation, should be adopted through democratic processes that ensure accountability on the part of the legislators. Such rules should not be imposed by extra-constitutional Executive Branch machinations or by usurpation of the legislative function by judges exploiting the democracy-belittling theories of the transnational law movement. International law and global norms are all well and good if they are incorporated into American law with the consent of the American people through our Constitutional processes.

What is needed is more serious thinking in defense of sovereignty and democratic accountability. It is time to get reacquainted with our political principles and the reasons why American self-government is preferable to "sharing" or "pooling" sovereignty with political forces outside of our Constitution.

As I noted, sovereignty is not just an abstract concept. It is a condition for self-government. It is a condition for democracy.

I appreciate this chance to talk with you about American law-making, sovereignty and international law. Every generation has the duty to renew an appreciation of what our Founding Fathers accomplished in establishing American independence and in crafting our political institutions to secure our personal liberties. Every generation has the responsibility to guard that independence, protect those institutions and continue to secure liberty for ourselves and our posterity. It's a weighty but ennobling responsibility.