International law vs. the American Constitution--something's got to give
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International Law *vs.* the American Constitution—*Something's Got To Give*

—Jeremy Rabkin

WHEN MAJOR programs of President Roosevelt's New Deal were blocked by the Supreme Court during the 1930s, Roosevelt insisted that the Court must learn to apply a more "modern" view of the Constitution. Soon enough, a reshaped Court did adopt a much more permissive approach and scholars who liked the result spoke of a "living Constitution." We heard more about "evolving standards" and a "living Constitution" from defenders of judicial activism in the 1960s and 1970s. It seemed to offer the prestige of a higher law without the inconvenience of a fixed law. But sometimes we really want a constitution to have fixed and reliable limits. So, for example, many of those who once praised the "living Constitution" have, in recent months, invoked with great solemnity the "law" of impeachment, which, they say, was "fixed" by the Framers of the Constitution in the eighteenth century.

If nothing else, America's months of debate about impeachment remind us that many Americans care deeply about "the rule of law"—and disagree among themselves on what it means. Even those most devoted to defending President Clinton have appealed to arcane legal arguments about the proper application of the Constitution's provisions on impeachment.

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But our own law may not be the only law that determines what happens in this country. At the very moment when Americans were so preoccupied with debates about the meaning of perjury or the requirements for impeachment, a series of events around the world offered a foretaste of what may become the next subject of heated legal debate for the United States: the proper reach of international law.

In Britain, the House of Lords decided last December that Augusto Pinochet could be held for extradition to Spain, where a magistrate sought to try the former Chilean dictator for tortures and murders committed by the Chilean government during Pinochet's period as chief of state. Meanwhile, halfway around the world, the government of Australia struggled to defend itself before a UN authority, which condemned the Australian government for allowing a uranium mine to be developed in the vicinity of an Australian national park. And here in the United States, the U.S. Supreme Court, after repeated displays of its own impatience with judicial second-guessing of capital sentences, suddenly ordered a halt to an execution in Texas and agreed to hear an appeal claiming that capital punishment in this case would violate international standards.

All these cases reflect the deepening insinuation of international law into the internal affairs of sovereign states. More than that, they raise sharp questions about the status of this emerging body of law. No one of these

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episodes marks a historic turning point in itself, but they are all straws in the wind. Lots of things are now rustling in that wind and it is gaining in force. We used to think that the Constitution would serve as a windbreak, but that is no longer so clear. To gauge the extent of the challenge it is necessary to look briefly first at the theoretical assumptions on which our Constitution was grounded, and in light of which it used to be interpreted on matters of international law.

The Traditional American View and its Modern Rival

RESISTANCE to international impositions has a long history in American political and constitutional thinking. Indeed, the United States was founded on a particular understanding of the limited authority of an external law applied to American society. For the American Revolution was a rebellion against the imposition of transnational law, the precise issue being whether the British Parliament possessed the rightful authority to make laws for the internal affairs of the colonies. The colonists insisted that, as they had never been represented in the British Parliament, they could not accept such authority. The British disagreed, and so brought on a revolutionary conflict.

Thus, when the Declaration of Independence asserts the "self-evident" truth that all men are "endowed by their Creator with certain unalienable rights", it proceeds almost at once to the conclusion that governments "derive their just powers from the consent of the governed." The specific grievances against British rule, enumerated in the body of the Declaration, make it plain that "just powers" are those constrained by law, and law derives from the enactments of elected legislatures. In short, no legislature, no real law.

The argument of the American Founders was not a sentimental plea for "participation." The Declaration speaks of consent to the "just *powers*" of government, not to its every particular action. The point of emphasizing constraints of law and legislative consent is that government remains, at some level, unavoidably about coercion: one submits to lawful government in the understanding that everyone else will be bound by the same law.

Americans were ready to recognize that law requires force to make it effective. Only five years after the end of the Revolutionary War, they adopted a new Constitution precisely to assure more reliable force to American government. The argument for the new Constitution as opposed to the Articles of Confederation was that reliable common policies required a common government, with its own army, its own sources of revenue and its own powers to make and enforce laws. But the underlying point was the same as in the Revolution: such powers are acceptable only if placed under the ultimate control of a common legislature.

Since the world as a whole has no legislature, this view might seem to leave no place for any sort of international law. But that was not quite the view of the Founders. The Constitution provided that treaties adopted by the United States (along with federal statutes) would be "the supreme law of the land." But it also stipulated that Congress should have the power to "define and punish offences against the law of nations"; and James Madison, often called the "father of the Constitution", thought it worthwhile to publish a lengthy and quite scholarly disquisition on the "law of nations" when he served as secretary of state under President Jefferson.

The founding generation and its successors did not see this as a threat to government by consent. On the contrary, some sort of international understanding is actually required by the doctrine of government by consent, since such government can only be effective if outside powers refrain from interfering in it. The Declaration of Independence itself appeals to such common understandings when it asserts the right of American states, "as free and independent states . . . to levy war, conclude peace, contract Alliances, establish Commerce and *to do all other Acts and*

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Things which Independent States may of right do" [emphasis added].

The "law of nations", as expounded in the leading European texts of that era, was focused on the relations of sovereign states, precisely with an eye to avoiding unnecessary affronts. It was concerned with such matters as security guarantees for diplomats and for neutral ships on the high seas. It was precisely to emphasize this focus of the "law of nations"—a law defining the way states deal with each other, and *not* how they govern at home—that Jeremy Bentham coined the term "inter-national law", just two years after the Framers convened in Philadelphia.

What made it seem plausible to speak of "international law" at the time of the American founding, and throughout the nineteenth century, was not only that this law was relatively undemanding, but that it was associated with a body of long-standing custom in inter-state dealings such that conformity with it could actually be expected of other states—or, if necessary, demanded. In the background to expectations of conformity was the assumption that the violation of clear rules was an invitation to retaliation, perhaps even by force—so that the law was not, after all, entirely removed from force. International law was seen as the law that sovereign states were willing to accept *and also to insist upon*. Whether or not it was really or fully "law", it rarely entered into national courts, because (apart from disputes about private property seized in naval conflicts on the high seas) it rarely concerned the rights of individuals.

IN THIS area, as elsewhere, America's founding doctrines seem to have exerted a lasting impression on subsequent American policy. The United States has generally held back from grand international schemes that might result in the imposition of international standards onto American domestic affairs. Most notably, the United States long refused to ratify international human rights conventions (along with labor standards proposed by the International Labor Organization). The Senate ratified a few human rights conventions in the past decade, but then only with severely limiting reservations, denying them any direct effect in domestic law. Critics have always complained that fuller participation would bind the United States to standards to which others would only pay lip service. In other words, for the critics these were not bona fide treaties at all but simply devices to shift fundamentally internal matters—how the American government deals with its own citizens—to international forums not directly accountable to the American people.

By now, this stance may seem less an expression of fundamental liberal principles than of particular American crochets, anachronistic survivals of eighteenth-century dogmas that make little sense even to other Western democracies. Certainly, the evolution of Europe's Common Market into the current European Union is a powerful challenge to the assumptions of the American Founders. The EU has an extremely ambitious regulatory agenda, reaching deeply into the internal policies of the member states. Yet it has no common army—and could not have, since some member states are committed to the NATO alliance and others are pledged to neutrality. The EU does not even have its own self-sustaining executive or law enforcement machinery, relying instead on the governmental machinery of the member states for ground-level enforcement and implementation of EU policies. And while it lacks the conventional elements of power or force, the EU also lacks a true legislature. There is a popularly elected assembly, called the European Parliament, but it is essentially an advisory body, with neither the power to tax nor the power to legislate.

What the European Union has, instead, is a central bureaucracy in Brussels (the European Commission) that elaborates new regulations. And it has a central court in Luxembourg (the European Court of Justice) that directs courts in the member states on the application of EU law. With the ready cooper-

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ation of national courts, this European Court has assumed the authority to hold even the acts of national parliaments invalid when they conflict (in the ECJ's view) with regulations of the Brussels bureaucrats or other requirements of EU treaty law. So half a continent is now governed by a curious collaboration of bureaucrats and judges, loyally supported by specialized interest groups that lobby the bureaucrats for favorable policies and then litigate before the judges to ensure their implementation by national governments.

It may be too soon to concede the success of this remarkable form of government, however—if indeed it can be considered a government. Even today, after decades of integrationist effort, European "law" does not mean the same thing in Greece or Italy as it does in Britain. While specialized interests lobby for specialized policy measures in Brussels, popular political protests still center on the elected governments of the member states. And European authorities, lacking the confidence of a direct electoral mandate, are wary of leaning too heavily on recalcitrant member states.

For the United States, at any rate, the problems of the EU are, for the moment, other peoples' problems. Indeed, by the classical principles of international law, the United States would have no clear right to object to how European states decide to share out their governing powers with neighboring states. The European Union, however, is only the most extreme instance of a larger trend that now does threaten to engulf the United States.

Pinochet's Revenge?

FORMER CHILEAN President Augusto Pinochet was sought by a Spanish magistrate wishing to try him for human rights abuses committed by the Chilean government while Pinochet was head of state. In September, with no prior warning, he was seized by British police, weeks after he had entered Britain—on a diplomatic passport for an arms-buying mission for the Chilean government. No one disputes that the military coup that brought Pinochet to power in 1973 was followed by nearly three thousand deaths or disappearances, the work of government security forces acting outside the restraints of due process. But it is also true that Chile has had a freely elected democracy since 1990 and that successive elected governments there have declined to challenge the amnesty law that protected Pinochet from domestic prosecution. Indeed, Chile's democratic government has declined even to challenge the constitutional scheme that made Pinochet commander-in-chief of the armed forces until 1997 and senator for life thereafter. So when British police arrested Pinochet, the Chilean government launched sharp and persistent protests and tried to assist Pinochet in his legal battle in the British courts.

The case for Pinochet's release turned on what had seemed a firm point of law. There has long been a customary rule of international law that courts of one country will not sit in judgment on the sovereign acts of, or the officials exercising sovereign power in, another country. As a matter of principle, to let courts in one country put the government of another on trial would be tantamount to an assertion by the first country that the second was actually subject to its authority and hence no longer fully sovereign: it would be, in effect, an attempt at conquest by courts. As a more practical matter, putting the government of another country on trial was assumed to be such a belligerent act as to be virtually an invitation to war. Thus the only exceptions to this rule until now have been cases where the home country of the defendant did not object—as in the Nuremberg trials (where the occupying Allied powers, which organized the trials, claimed to be the lawful government of Germany at the time), or in the more recent U.S. trial of deposed Panamanian dictator Manuel Noriega (whose successors were delighted to have him taken into U.S. custody and removed from their midst).

Now, of course, the world at large has no legislature to establish a new rule of interna-

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tional law, supervening the customary rules about sovereign immunity. Supporters of the Pinochet prosecution claimed that the rules had been changed by a succession of human rights conventions, by which governments around the world have promised to suppress and punish genocide, torture and other human rights abuses. But none of these treaties gives clear indication that it is supposed to supersede the customary rules of sovereign immunity, and certainly none gives explicit authority for third-party states to try government officials from other countries.

So in October Britain's High Court of Justice ruled unanimously that Pinochet should be released. On appeal in the House of Lords, a five-man panel split 3-2 the other way in early December. But in a subsequent appeal, Britain's Lord Chancellor directed that a new panel should be convened to reconsider this ruling. One of the three Law Lords making up the majority turned out to have been closely associated with fund-raising efforts for Amnesty International, a human rights advocacy group that had strongly advocated Pinochet's extradition and prosecution. The Lord Chancellor held that this made the ruling of the original panel look improper and Pinochet should therefore be accorded a new appeal before a new panel of Law Lords.

But it is hard to say why Amnesty International had any less right to participate in the judgment of Pinochet—for misdeeds committed in Chile, against Chileans—than the governments of Britain or Spain. In fact, both the British prime minister and his Spanish counterpart insisted that their governments were leaving the matter to the courts and taking no policy stand on the issues. Both declined to exercise the statutory powers that political ministers in either country could have invoked to stop the extradition process. So the whole momentous prosecution was supposed to be proceeding on the say-so of career prosecutors—that is, essentially, bureaucrats—in each country.

While the British courts were deliberating, the European Parliament sought to ensure that the prosecution would go forward. It adopted a resolution urging Britain to extradite, and other governments to take up the prosecution, if Spain finally declined to do so itself. This intervention of the European Parliament had its own ironic logic: a parliament that is not a real legislature demanded enforcement of a new international doctrine that is not a real law.

And clearly, it cannot be a real law. Weak and distant Chile will not go to war with Britain or Spain or the EU. But the notion that "international law" will now hold evil-doers of all lands to account is absurd. If "international law" requires the trial of Pinochet in an outside country, then it must require similar trials to hold accountable far worse butchers from many other places. Nothing in international law, however, says that only former dictators from small countries can be held to account in this way. There is no distinction in the relevant human rights treaties between dictators and democratic officials, between top officials of small countries and top officials of powerful countries, or even between former officials and currently serving ones. But no one expects EU countries to hold a top Chinese leader to account for massacres in Tibet, or to hold former Russian officials for extradition to Latvia—or American officials for extradition to Sudan, which has been threatening to charge them with war crimes for the bombing of an undefended aspirin factory last August. The European Parliament seems to have in mind a "law" that applies only to Pinochet.

HUMAN RIGHTS advocates insist that the whole problem could be equitably handled if there were an international criminal court. And a UN conference did indeed come out with a treaty proposal to establish such a court in the summer of 1998. Its provisions were so vague and all-encompassing, however, that even the Clinton administration felt compelled to refuse its assent and the United States has since been lobbying other countries not to ratify the

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International Criminal Court (ICC) Statute. In effect, Spain's prosecution of Pinochet was a forcing of the issue by asserting the right of national courts to proceed in the name of the international community without waiting for the explicit agreement of other countries. It thus presents reluctant nations with the choice of submitting to the ICC (which does have a number of explicit procedural safeguards not recognized here by Spanish courts) or trusting to the vagaries of legal reasonings in the national courts of dozens of separate countries.

But even the ICC bids to force its jurisdiction on unwilling participants. The new court will be empowered to assert jurisdiction over war crimes and extreme abuses, not only when committed by nationals of signatory states, but also when committed against *victims* who are nationals of a signatory state. In theory, then, the ICC could be turned against the United States at the behest of Sudan, even if the United States does not itself ratify the treaty establishing the ICC. So we are back to the same basic problem. Either the ICC does not act, because its independent prosecutors have the bureaucratic nimbleness to avoid confrontation with a great power, or we have in store for us some troubling confrontations down the road.

Or would the United States finally agree to cooperate if its own citizens were called to account? Human rights advocates insist that the United States has nothing to fear because the ICC Statute acknowledges the right of home countries to conduct their own trials. But it also provides that if the trial result is judged to be inadequate or unsatisfactory, then the international prosecutor retains the authority to demand a new trial before the ICC. Then the United States would have to decide whether it would or would not go along if one of its own citizens were sought for a trial by the ICC.

Could the United States hand over an American citizen to an international tribunal, even for trial on the basis of acts committed while in the service of the U.S. government and even within the boundaries of the United States? A host of legal authorities have insisted that there is no constitutional objection to the U.S. government doing so. No one disputes that international tribunals violate guarantees in the U.S. Bill of Rights—such as the guarantee of trial by jury, which follows an English common law tradition that means nothing to international authorities. The argument is simply that if the United States can extradite its citizens to other countries for crimes committed in those countries, it can also extradite to international authorities for international crimes. But if it could do so for "war crimes", why not for other crimes? In that case, why not hand over drug dealers to an international drug court?—another venture that has received serious discussion. But then what do the guarantees in the Bill of Rights mean if they can be side-stepped any time our government finds it more convenient to have Americans tried by foreign authorities? We would then have a Constitution that can be amended without the bother of persuading three-quarters of the states to adopt a formal amendment.

Perhaps it will not come to that. But it is remarkable that we no longer feel the need for a constitutional boundary. Do we rely on public sentiment to stiffen the resolve of our government? If so, we may be misguided, for the new trend in international affairs is for transnational coalitions of advocacy groups to play on public sentiment in order to bolster the authority of international institutions.

Global Civil Society vs. Australia

THAT IS just what happened in Australia at the same time the Pinochet case was proceeding through the British courts.

On November 30, 1998 the World Heritage Committee of UNESCO voted to condemn the government of Australia for allowing a uranium mine to operate in close proximity to an Australian national park that had been designated as a World Heritage site.

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The committee agreed that the government of Australia should be given six months to defend the mine against findings of an international inspection team that the mine would endanger the scenic values of the Kakadu Park and its cultural significance for aboriginal people nearby. If Australia could not by then satisfy the committee, the park would be placed on the list of sites "in danger."

What made this episode remarkable was, in the first place, the willingness of this UN forum to enter into a confrontational dispute with a participating government. The World Heritage Convention essentially establishes a registry of sites in participating countries that are judged to be of special significance for the whole world. Essentially, it is the UN equivalent of a landmark registry, which has come to include such sites as India's Taj Mahal, America's Yellowstone National Park and France's Louvre Museum. A committee of representatives from twenty-one states, elected from all the states party to the convention, oversees the list. The committee not only decides which sites may qualify but purports to monitor their continuing safekeeping. Its only sanction for such purposes is to list a deteriorating site on a separate list of sites "in danger" and ultimately, if the dangers are not addressed, to de-list the site. No site has ever been de-listed.

Indeed, no site has ever been put on the "in danger" list except at the request of the home state. Some states have requested such listing as a way of dramatizing problems and seeking international financial assistance for corrective actions. But states that fear embarrassment have often resisted listing on the "in danger" list. Ecuador, for example, asked the World Heritage Committee to organize international assistance for what it admitted were serious problems in its management of its World Heritage site in the Galapagos Islands. But it specifically requested that the site not be listed as "in danger"—and it was not. The obvious reason to avoid such listing is that the whole scheme—such as it is—depends on the cooperation of the affected

Remote, Unaccountable Elites

At one level, it's extraordinary that some pip-squeak Spanish magistrate can spur half the governments of the EU, NATO, and the Group of Seven industrialized nations into making a grab for General Pinochet. But in America, the playground of judicial activism, it's a familiar trajectory: Progressive thinkers have long understood that on matters on which there's no social consensus, you can make quicker changes through the courts than in the legislature. It's no coincidence that international human-rights law shares the same thinking. . . .

Needless to say, the traffic's all in one direction. Those Muslim and Third World countries that regard abortion as an abomination would be unlikely to persuade a British court to place a visiting Bill Clinton under house arrest on the grounds of "crimes against humanity" for the million and a half American fetuses aborted each year.

And that's why international law is a bad thing. In the end, there are very few things the world agrees on. Different jurisdictions generally reflect the will of their people. But a global jurisdiction reflects not the will of the world's population, only the morality of a remote, unaccountable elite increasingly disinclined to respect the once fundamental premise of international law—that states should respect each other's sovereignty.

—*Mark Steyn*, Sunday Telegraph, *November 29, 1998*

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governments; a government that does not want to cooperate can simply walk away.

But the committee in this case took a very hard line because of another difference: within Australia itself, political opponents of the current conservative government were prepared to support—indeed, even invite—international intervention. The environmental spokesman for the opposition Labor Party actually wrote to the World Heritage Committee to urge it to take a tough stand. The networking skills of domestic opponents were altogether remarkable. Environmentalists, who seem to have opposed the mine in large part due to general opposition to nuclear power, managed to draw attention to the handful of aboriginal people who did oppose the mine, obscuring the majority view of local aborigines who stood to gain substantial payments from the mining company. Australian environmentalists have organized a separate Green Party, but with only two seats in the Australian parliament it is in itself a negligible threat to the government. But an Australian Green leader managed to make his case to important Green ministers in the governments of Western Europe and, in this way, secured a vote of the *European* Parliament urging Australia to shut down the mine. The same sort of back-channel mobilization has been credited with persuading the French government to take a tough stand against the mine through the French representative on the current World Heritage Committee.

The ultimate result is still uncertain but the pattern is clear. An international institution with no real authority has gained special leverage by acting as a bridge between opposition factions in one country and allies in other countries—over a matter that has no real connection to those other countries.

And this is not an isolated case. In its 1995 report, the UN Commission on Global Governance hailed the emergence of what it called "global civil society", which it saw as "best expressed in the global non-governmental movement." It did not mean business firms, churches or sports clubs—all of which are also "non-governmental." It meant advocacy groups. It noted that NGOs have proliferated at a remarkable rate over the past decade and praised their "vital assistance to the UN in the conduct of its work." Such organizations

> often provide independent monitoring, early-warning and information gathering services that can be especially useful in preventive diplomacy. They can serve as unofficial or alternative channels of communication and can help establish relationships that create the trust necessary to bridge political gaps.

Also, though the report does not quite note the fact, NGOs never have to face voters or bear any sort of accountability. It is not clear, in any case, who would be entitled to demand accountability from them, since they so often claim to speak for "humanity" or "the earth", constituencies that are not well equipped to demand any sort of direct accounting.

"Global civil society" is, in the older understanding, virtually an oxymoron. What makes a society "civil", in the classical liberal view, is a common government, able to enact and enforce common rules. The United Nations is not a government. What UN agencies seek is an authority that is somehow above government, without the accountability that actual governments have toward particular electorates or defined citizen bodies. Actual governments can be awkward for UN agencies. It is usually much easier to deal with constituencies that do not themselves have to pay UN bills or submit to UN directives. NGOs—a sort of phantom citizenry—are the perfect partners for the phantom authority exercised by UN agencies. So the UN and other international institutions have become great sponsors of NGOs, which figure prominently at UN conferences on global concerns. The World Bank, eager to deflect NGO criticism, has actually poured over a third of a billion dollars into NGO coffers in recent years. (And, not coincidentally, the European Commission in Brussels funds European NGOs on an even more lavish scale.)

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Past Australian governments have cheerfully cooperated with NGOs working through international forums on other issues. Now the current government is finding it hard to ignore the World Heritage Committee, as local advocates demand adherence to the Committee's direction in the name of "international law."

Thinking Globally, Acting Locally

ON December 12, 1998 the U.S. Supreme Court issued a stay of execution for Joseph Stanley Faulder less than thirty minutes before he was scheduled to die by lethal injection in Texas. The state of Texas was hardly acting with undue haste: Faulder had been on death row for twenty-one years. It was, in other words, the classic sort of death penalty appeal in America's endless litigation over capital punishment.

Faulder had been convicted for the brutal killing of a seventy-five year-old woman, leaving her to be found by her relatives "bludgeoned, bound with tape and Christmas wrapping paper, a knife protruding from her chest." Faulder never denied the charges. But years after his conviction he remembered that he was a Canadian citizen, something he had not mentioned to Texas officials at the time of his arrest, when he was found with a Colorado driver's license. So after many other failed appeals on other grounds, Faulder's lawyers launched the argument that his conviction violated the Vienna Convention on Consular Relations, which obligates signatory states, when they arrest a foreign citizen for a serious crime, to notify the nearest consulate of the defendant's home country. Texas officials, not knowing of Faulder's Canadian citizenship, did not notify Canadian officials until 1991—when he was deep into his various procedural appeals on other grounds.

What made the Supreme Court's intervention so notable was that a very similar case had been presented earlier in the same year. In that case, lawyers for a Paraguayan national, Angel Breard, who were appealing his death sentence in Virginia, persuaded the government of Paraguay to file claims before the International Court of Justice in The Hague, based on Virginia's failure to notify Paraguayan officials at the time of the trial. The ICJ asked Virginia to postpone the execution while the matter was considered by international authorities, and Secretary of State Madeleine Albright pleaded for Virginia to do so out of respect for international law. But Virginia refused and a last-minute attempt to appeal to the U.S. Supreme Court was denied by the justices.

The Faulder case followed the same script—earnest diplomatic entreaties from the Canadian foreign minister, followed by earnest entreaties from Albright, followed by the rejection of these entreaties by state officials in Texas. Only this time, the U.S. Supreme Court ordered the execution postponed to give itself time to consider the issues.

The Court may yet decide that the execution can go forward. The preamble to the relevant Vienna Convention stipulates that its purpose is to clarify "consular relations privileges and immunities" and "is not to benefit individuals but to ensure the efficient performance of functions by consular posts." In a survey conducted through U.S. embassies around the world, the State Department was unable to find a single case in which another country had overturned a criminal conviction in its own courts solely because a foreign defendant had not been advised of his rights to consult consular officials from his own country. And there seems to be no reason at all to believe that Faulder's trial would have turned out any differently if he had sought and received the opportunity to consult with a Canadian consulate before his trial commenced.

But none of that may matter. The United States remains one of the few countries in the Western world that still maintain capital punishment. And by no coincidence the state with the largest number of capital sentences is Texas, followed in second place by Virginia.

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And once again the specific case turns out to be the flashpoint of a larger international campaign. At the beginning of 1998, a UN special reporter issued a report condemning the United States for racist and abusive applications of the death penalty—ignoring the repeated judgments of U.S. courts, up to and including the U.S. Supreme Court, to the contrary. The European Parliament was—for once—not dragged into this dispute. But Amnesty International, taking time out from its advocacy for the prosecution of Pinochet in Europe, took notice.

An Amnesty report on human rights abuses in the United States, issued in 1998, devotes an entire chapter to abuses of the death penalty, which it asserts to be contrary to international law. Yes, it acknowledges, the U.S. Senate specifically inserted a reservation into its ratification of the Covenant on Civil and Political Rights, stipulating that the Covenant's death penalty restrictions were not accepted by the United States. But this reservation, according to Amnesty, conflicts with a subsequent ruling of the UN's Human Rights Committee about evolving standards of customary international law that must now make the U.S. reservation on this point unlawful. And, of course, Amnesty lawyers in Canada helped to organize the Faulder appeal, as other human rights groups had mobilized to resist the earlier execution of Angel Breard.

What Next?

SO WE have free-floating, evolving standards of "law" defined by international bureaucrats. We have organized advocacy groups in transnational coalitions. And we may soon have U.S. courts applying this law at the behest of these groups. In other words, all the elements of EU-style governance are already in place. Is this kind of government really consistent with the U.S. Constitution?

In at least three ways, the most prominent commentators have already promulgated legal theories that prepare the way. First, the latest *Restatement of Foreign Relations Law* (1987), a privately sponsored treatise that holds special prestige in an area of law with very little case law, asserts that there is now a federal common law of foreign relations, by which federal courts are empowered to impose their rulings on states and localities, even where there is no direct treaty or statute on which to rely but simply a federal court's notion of evolving international law. In domestic law, the notion of a free-floating judge-made common law of this kind was firmly repudiated by the Supreme Court in the 1930s. The *Restatement* argues, however, that international obligations of the federal government require a different approach for cases with an international dimension. Thus it has an entire chapter on "customary international law of human rights", which is supposed to be drawn from the spirit of existing treaties but applicable to the United States even where the Senate has not ratified the relevant treaty or has attached particular exceptions by reservation. Already a number of lower federal courts have relied on this "law" to allow suits against U.S. corporations (pursued in U.S. courts by U.S.-based advocacy groups) for supposed human rights or environmental depredations by their corporate subsidiaries in Asia and South America.

Second, the historic constitutional doctrine was that even formal treaties—let alone customary law, adopted without treaties—could not reach entirely domestic affairs. The treaty power and other foreign affairs powers of the federal government could only reach genuinely inter-national matters. The latest *Restatement* insists that such restrictions can no longer be maintained. And understandably so. If human rights conventions and the World Heritage Convention are bona fide treaties, then it is reasonable to say that what the U.S. Park Service does in Yellowstone National Park and what Philadelphia police do to Americans in Philadelphia are properly subject to international inspection—as indeed they have been over the past decade, though

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the binding effect of international interventions in these cases is much in dispute.

Finally, it was once clear doctrine that the treaty power could not be delegated to foreign bodies—that Senate ratification could bind the United States to the terms of an agreement, but not to subsequent extensions or extrapolations of the agreement by an international authority. While the *Restatement* skirts the issue, Professor Louis Henkin, who was the chief reporter for the *Restatement*, published in 1996 a new edition of his own treatise, *Foreign Affairs and the Constitution* (Oxford University Press), which explicitly repudiates such a non-delegation doctrine. Thus what the UN Human Rights Committee or the World Heritage Committee of UNESCO pronounces to be the law may well be taken as binding law for the United States (which is the case even though the United States is no longer a member of UNESCO). At least in Henkin's view, the Constitution does not forbid the United States from submitting to an arrangement in which this would be so.

World Order in a Post-Liberal World

DOES ANY OF this really matter? Before dismissing the significance of recent episodes, one ought to step back and look at the larger picture. Along with human rights treaties, we have begun to spin out a network of far-reaching new environmental treaties, culminating in the stupifyingly ambitious project of the Kyoto Protocol, which envisions international authorities empowered to enforce dramatic reductions in energy use among the world's major economies. The U.S. Senate has balked at ratifying this treaty, but its champions—in the Clinton administration and in a host of environmental advocacy groups—insist that it is necessary to avert global warming. The necessity is disputed by many respectable scientists and policy analysts. But surely this undertaking is at least as "necessary" as international supervision of parks policy in Australia or criminal justice in Texas. The ideology of global governance already has considerable momentum.

Meanwhile, there is continuing pressure to extend the terms of international trade agreements, which up until now have largely focused on reciprocal lowering of barriers to imports, while scrupulously refraining from imposing any standards for how goods entering into international trade are actually produced in their home countries. But President Clinton has repeatedly urged that the World Trade Organization must begin to develop standards that would prevent countries with unfair labor practices or unacceptably lax environmental controls from unfairly flooding the markets of countries whose own producers must observe higher standards.

At Kyoto, it was decided that if poor countries are not now willing to participate in energy reduction schemes, then a select group of richer nations should set them an example by taking one-sided commitments on themselves. We might see the European Union seek to negotiate such an approach to labor and environmental standards, which would apply to the United States and other affluent countries, even if rejected by China and India. And it is not altogether inconceivable that the United States would participate in such a venture, since it has already made limited—but precedent setting—commitments about internal labor and environmental standards in the NAFTA accords with Canada and Mexico. Clinton himself limned the vision in his latest State of the Union address: we must strive to give international trade "a human face", as earlier in this century we supplied a "human face" to interstate commerce at home. In plainer language, the New Deal for the U.S. economy must now be followed up with a New Deal for the world economy, with the United States itself fully accepting the new international controls this will require.

If the Constitution sets no barrier to such projects, then we may see the United States drawn deeper into a style of governance that looks very much like what the EU countries are now experiencing. True, it would not nec-

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essarily involve such a systematic program of integration or such powerful central institutions. But we could, like the Europeans, start by forswearing any notion of a super-legislature and end up with more and more governance by courts and bureaucrats, answering only to advocacy groups that are themselves unaccountable.

On the other hand, it may turn out that the American political system will summon a deep resistance to any such serious foreign intrusions. The United States has been a holdout against many sorts of grand international ventures in this century—from the League of Nations to the Law of the Sea Treaty, from the Children's Rights Convention to the International Criminal Court. Perhaps the first time an international commitment imposes real cost or hardship in domestic affairs, without any direct U.S. legislative endorsement, Congress will rise up and sweep away all the grand visions of the law professors and the advocacy groups. In its domestic applications, international law may turn out to be the equivalent of those codes of proper political campaign tactics or proper journalistic practice, which are sponsored by well-meaning foundations, adumbrated by idealistic academics, endorsed by high-minded editorialists—and ignored by all real-world practitioners.

But the most likely development may not follow either of these alternatives. Lacking an international legislature or an international executive, champions of international law have maintained their credibility by learning to pick their spots—ducking out of sight when legal claims are strongly resisted, re-emerging in those settings where issue networks have prepared the way for success. It will, in other words, be a selective, inconsistent, bureaucratic sort of law, which has a lot of "give" along with its occasional "bite."

That is, after all, what should be expected from the demise of our founding constitutional traditions—a reversion to a pre-liberal world. Sovereignty was itself a concept of the Enlightenment and a part of the liberal vision of law and politics. There was certainly law of a kind in medieval Europe. As Enlightenment thinkers saw it in retrospect, the problem in the medieval world was not too little law but too much. There was the legal edict of the medieval emperors, battling with the opposing constitutional claims of the medieval church, and both in constant tension with a network of feudal relations with their own legal claims. It was also a world without distinct peoples—in the constitutional sense—and without legislatures, in the modern sense of lawmaking bodies. Above all the conflicting, often highly parochial legalistic claims, medieval Europe had a set of visionaries who conversed across borders in a common language unknown to ordinary people—Latin. And its most devoted visionaries talked endlessly about the unity of Christendom, a vision they sustained for centuries in the face of all evidence to the contrary.

This is not a world that any of the American Founders looked back on with nostalgia. But it seems to appeal very much to the champions of global civil society. It remains unclear whether the Constitution can still keep the United States from joining it. □

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