Backgrounder

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An Inconvenient Founding: America's Principles Applied to the ICC

Marion Smith

Abstract: *The Rome Statute and the International Criminal Court (ICC) are fundamentally incompatible with the political and constitutional principles of the United States. For example, the rights to trial by jury, a speedy trial, and the presumption of innocence are conspicuously absent from the ICC's legal due processes. Accordingly, the Clinton and Bush Administrations held the ICC at arm's length, continuing the centuries-old U.S. policy of abstaining from excessively entangling international institutions. The Obama Administration's enthusiastic engagement with the ICC therefore represents a significant shift in the U.S. approach and is cause for serious concern.*

In November 2009, the United States signaled a fundamental shift in its position toward the International Criminal Court (ICC). The Obama Administration sent Stephen Rapp, U.S. Ambassador-at-Large for War Crimes Issues, to a meeting of the Assembly of States Parties of the ICC as an official observer.

While the U.S. presence at the Hague-based court may indeed provide "a better understanding of the issues being considered and the workings of the court,"[1] it also risks conferring legitimacy upon an international institution that may endanger the constitutional rights of U.S. citizens. For progressive advocates of supranational solutions to the world's many problems, America's constitutional Founding presents important limitations designed to prevent a diminution of American sovereignty and democratic account-

Talking Points

- Throughout its history, the U.S. has refused to sign treaties or join alliances that risked a diminution of U.S. independence abroad.
- U.S. political sovereignty in international affairs has been the necessary condition enabling a fulfillment of individual liberty and legal equality within the United States.
- In the 19th century, the United States refused to join the International Slave Trade Tribunals because they would have violated the U.S. Constitution and sacrificed the individual rights of U.S. citizens by subjecting them to trial before foreign judges in foreign lands.
- The Rome Statute is deeply flawed and fundamentally incompatible with the political and constitutional principles of the United States.
- The Obama Administration should not provide funding or legitimacy for the International Criminal Court in its current form and should insist that the Rome Statute be altered to respect the constitutional rights of American citizens.

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Produced by the B. Kenneth Simon
Center for American Studies

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214 Massachusetts Avenue, NE
Washington, DC 20002–4999
(202) 546-4400 • heritage.org

ability. There is now a need to reaffirm the political and constitutional principles that define the American judicial system and that should guide U.S. involvement in international legal institutions.

While the early foreign policy of the United States cannot realistically be characterized as isolationist, the U.S. has historically abstained from international endeavors that risked undermining U.S. sovereignty and has maintained a practice of ratifying treaties only after including clear reservations, declarations, or interpretations designed to affirm the primacy of the U.S. Constitution, its form of government, and its legal system. From avoiding "entangling alliances" with European powers when America was young and vulnerable to the Senate's rejection of U.S. membership in the League of Nations following World War I, the U.S. has had many opportunities to weaken its national autonomy but has consistently refused to do so. The continued independence of the U.S.—its national sovereignty—has been the necessary condition for enabling a fulfillment of individual liberty and legal equality, which were asserted in the Declaration of Independence and framed by the Constitution.

The particulars of international cooperation cannot be assessed apart from their implications for the American political order. The International Criminal Court poses a fundamental challenge to American political principles.

The Obama Administration's direction on human rights and global engagement is consistent with the prevailing international mood. Pooled sovereignty is all the rage among governance experts and practitioners throughout Europe and elsewhere.

However, there are good—even necessary—reasons for continued U.S. sovereignty. American engagement in international institutions should not ultimately be based on legal technicalities or vague normative abstractions. The vital political principles at issue strike at the very core of America's Founding. Thus, the particulars of international cooperation cannot be assessed apart from their implications for and relevance to the American political order. The International Criminal Court is one institution that poses a fundamental challenge to American political principles.

The intersection of U.S. constitutional law and promotion of international human rights is a contentious area. At this juncture in U.S. engagement abroad and in relation to the ICC, the United States should seek to promote justice while protecting the integrity of the U.S. Constitution.

As the Obama Administration continues to increase U.S. cooperation abroad, many on the left will naively advocate for initiatives and treaties that will undermine U.S. sovereignty. At the same time, some on the right will be overly critical of U.S. diplomatic engagement abroad. America should engage, promote justice, and cooperate internationally, but it should do so within the bounds of the Constitution, no matter how inconvenient it may seem. The maintenance of democracy in the United States is linked irrevocably to independence abroad. Moral self-satisfaction in the international arena is a poor substitute for government legitimacy at home.

Cause for Revolution: The British Vice-Admiralty Courts of the 1700s

The Founding generation's opposition to the practice of British vice-admiralty courts demonstrates the centrality of the principle of sovereignty and self-government in early U.S. history. Beginning in the 16th century, British vice-admiralty courts were established to judge crimes and disputes related to maritime law and trade. These juryless courts existed in regional jurisdictions throughout the vast and growing British Empire.

Following the French and Indian War and in the face of growing political dissent in the American colonies, the British government attempted to tighten its political hold in North America by extending the

1. Reuters, "U.S. Makes Debut Attendance at Hague War Crimes Court," November 19, 2009, at *http://www.reuters.com/article/idUSTRE5AI3G220091119* (January 25, 2010).

scope of the vice-admiralty courts. The Trade and Navigation Acts imposed a tedious and complex legal code and created a significant overlap between maritime and ordinary criminal law.

The Currency Act of 1764 created a super vice-admiralty court in Nova Scotia with jurisdiction over all North American British colonies, and it was presided over by judges from England. Unsurprisingly, British agents would bring trial in the court that was most likely to rule in favor of the British Crown and England. American colonists viewed these developments as threats to their English constitutional legal rights and took action to defend them.

Besides taxation without representation, the patriots of Boston declared "the Jurisdiction of the Admiralty" to be their "greatest grievance."[2] Indeed, one of the chief objections to the infamous Stamp Act was that it expanded the reach of vice-admiralty courts, thereby enabling the British government to circumvent trial by jury of American colonists more conveniently. In an ironically conservative tone, the revolutionaries of Boston compared their struggle with the controversy that led to the Magna Carta:

> Unlike the ancient Barons, who answered with one Voice "We will not that the Laws of England be changed, which of old have been used and approved," the Barons of modern Times seem to have answered, that *they* are willing those Laws should be changed, with Regards to America, in the most tender Point and fundamental Principle![3]

In a similar vein, the people of Newburyport, Massachusetts, complained: "we are obliged to submit to a Jurisdiction naturally foreign to" the British constitution, "where the Laws of Justinian are the measure of Right, and the Common Law, the collected Wisdom of the British Nation for Ages, is not admitted."[4] To deprive American colonists of their due process as British citizens was to deny their equality before the law.

Although perhaps less memorable than "taxation without representation," it is clear that "the inequality grievance against vice-admiralty was one of the most serious constitutional contentions leading to the American Revolution."[5] From this keenly felt and infuriating sense of injustice, the American patriots possessed a persuasive *casus belli* that would indelibly commit them to legal equality and the rule of law as guiding principles when establishing a new government.

In the summer of 1775, the Second Continental Congress drafted the "Declaration of the Causes and Necessity of Taking up Arms" to explain their grievances to the people of the British Empire. They accused the legislature of Great Britain of passing laws "peculiarly reprobated by the very constitution of that kingdom." These included statutes "extending the jurisdiction of courts of admiralty and vice-admiralty beyond their ancient limits; for depriving us of the accustomed and inestimable privilege of trial by jury, in cases affecting both life and property." Further, it had "also been resolved in parliament, that colonists charged with committing certain offences, shall be transported to England to be tried."[6]

In 1776, the Declaration of Independence repeated the grievances against King George III: "subjecting us to a jurisdiction foreign to our constitution"; having "deprived us, in many cases, of the benefits of trial by jury"; and "transporting us beyond the seas to be tried for pretended offences." After independence had been won, this recent history was fresh in the minds of America's Founders as they drafted the Constitution for the young nation.

Undeniably, the jurisdictional and equality objections to the British vice-admiralty courts were crucial intellectual causes of the American Revolu-

2. John Phillip Reid, *Constitutional History of the American Revolution: The Authority of Rights*, Vol. 1 (Madison: University of Wisconsin Press, 1986), p. 177.
3. John Adams, *Papers of John Adams*, Vol. 1 (Cambridge, Mass.: Belknap Press of Harvard University Press, 1977), p. 227.
4. Reid, *Constitutional History of the American Revolution*, p. 180.
5. *Ibid.*, p. 183.
6. Second Continental Congress, "Declaration of the Causes and Necessity of Taking Up Arms," Philadelphia, July 6, 1775.

tion, yet these objections were raised as part of a more fundamental contention about the very nature of the British legal system. The emerging concept of the rule of law and its importance to the maintenance of liberty served to legitimize the struggle against the British Parliament's authority and gave rise to calls for a written constitution.

The right to trial by jury was so important that it was twice explicitly guaranteed, once in the Constitution[7] and again in the Bill of Rights.[8] Furthermore, the Constitution was designed to check and balance the judiciary and to safeguard the nearness of the judicial system to individual citizens.

Subjecting American citizens to judicial bodies unaccountable to or outside of the U.S. legal structure is contrary to the most vital principles set forth in the U.S. Constitution—legal equality, political accountability, and the ultimate sovereignty of the American citizenry. As future engagement abroad would reveal, these explicit constitutional guarantees were not superfluous.

John Quincy Adams and the International Slave Trade Tribunals of the 1800s

The rule of law and due process guarantees established by the Constitution were soon challenged by an early international legal institution, providing an indispensable example of the limits of extra-constitutional authority in U.S. law. In the 19th century, the United States was presented with the prospect of joining a British-led International Slave Trade Tribunal to enforce abolition of the slave trade. The U.S. decision to refrain from participating in this international legal entity and, more important, the political and constitutional reasons given offer guidance to the United States today.[9]

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Writing in 1821, John Quincy Adams could have been objecting to the scope of today's International Criminal Court when he warned against allowing U.S. citizens:

> [To be] carried away by the…officers of a foreign power, subjected to the decision of a tribunal in a foreign land, without benefit of the intervention of a jury of accusation, or of a jury of trial, by a court of judges and umpires, half of whom would be foreigners, and all irresponsible to the supreme authorities of the United States.[10]

The "supreme authorities" of which he spoke were the American polity and Constitution. In 1807, Congress had passed the Act to Prohibit the Importation of Slaves; thus, European allies assumed that the U.S. would welcome an opportunity to enforce its laws in international waters, not least as an effective instrument to combat piracy. The British viewed the U.S. decision to abstain from the international tribunal as unjust, so Adams, who was a stanch abolitionist, determined to lay out the principles that guided U.S. engagement abroad.

At the age of 26, John Quincy Adams began his public career, advocating the interests of the United States abroad.[11] Between 1794 and 1797, Adams officially represented the U.S. in the Netherlands,

7. "The Trial of all crimes…shall be by Jury: and such Trial shall be held in the State where the said Crimes shall have been committed." U.S. Constitution, Art. III, Sec. 2.
8. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Constitution, Amend. VI.
9. For a detailed legal analysis, see Eugene Kontorovich, "The Constitutionality of International Courts: The Forgotten Precedent of Slave Trade Tribunals," *Northwestern Public Law Research Paper* No. 09-06, February 10, 2009.
10. John Quincy Adams, *Writings of John Quincy Adams*, Vol. 7, ed. Worthington Chauncey Ford (New York: Macmillan, 1917), p. 172.
11. He would become a U.S. Senator from Massachusetts (1803–1808), U.S. Secretary of State under President James Monroe (1817–1825), and the sixth President of the United States (1825–1829).

Portugal, and Germany during George Washington's Administration. As one of the very first U.S. diplomats, he became very familiar with the ends and means of Washington's foreign policy.

In keeping with Washington's own understanding, Adams wrote in 1821 that U.S. foreign policy is necessarily limited by "two principles: first, the boundaries of their own authority delegated to them in the constitution of the United States; and secondly, the respect due by them to the independence of other nations."[12] On the matter of international legal institutions, the Slave Tribunals provided a clear test case for the limits of enforcing U.S. or foreign laws through international mechanisms.

Adams understood that promoting universal justice was not best served by weakening the sovereignty of the American political order:

> Nor is the aggravation of the crime for the trial of which a tribunal may be instituted, a cogent motive for assenting to the principle of subjecting American citizens, their rights and interests, to the decision of foreign courts. However ready Great Britain may be willing to abandon those of her subjects who defy the laws and tarnish the character of their country by participating in this trade, to the dispensation of justice even by foreign hands, the United States are bound to remember that the power which enables a court to try the guilty, authorizes them also to pronounce upon the fate of the innocent; and that the very question of guilt or innocence is that which the protecting care of their constitution has reserved for the citizens of this Union to the exclusive decision of their own countrymen.[13]

In essence, regardless of how noble the cause or powerful the diplomatic pressure, international cooperation abroad must not go beyond U.S. constitutional boundaries.

Adams's objection was based neither on mere legal technicalities nor on vague abstractions. It was a practical political principle informed by recent experiences prior to the American Revolution. He wrote that "among the securities in the political institutions of the [United States] deemed the most important and precious to individual liberty are the rules established to shield from oppression the rights of persons accused of crimes."[14]

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With the War of 1812 only recently concluded, the memory of the struggle for political liberty was too near in the national consciousness for Americans to seriously consider an extra-constitutional subversion of their legal system. "To agree to treaty stipulations in violation of these principles was not within the competent authority, or not within the just discretion, of the American government." The U.S. government could not "sacrifice the individual rights of their citizens, by subjecting them to trial…before foreign judges in countries beyond the seas."[15]

In the end, the American and British governments worked out a compromise enabling judicial cooperation among national courts, thereby rejecting the supranational nature of the proposed tribunals. Their cooperative efforts saw much success in curbing the illegal transatlantic slave trade. However, it would not be the last time the United States would need to defend its institutions from ill-designed human rights institutions.

Global Justice and the International Criminal Court

The International Criminal Court presents the U.S. with a situation very similar to the interna-

12. Adams, *Writings of John Quincy Adams*, p. 172.
13. *Ibid.*, p. 501.
14. *Ibid.*, p. 174.
15. *Ibid.*

tional slave trade tribunals. However, the current international environment is remarkably more oriented against national sovereignty. The momentum of global legal institutions appears to be unimpeded by operational vagueness or constitutional objections.

The ICC was established in 2002 pursuant to the terms of the Rome Statute, which was adopted in 1998 and governs the court's procedures. Although the United States signed the Rome Statute in 2000, President Bill Clinton refused to submit it to the Senate for the advice and consent necessary for ratification because of "serious flaws" in the treaty that first needed to be addressed.[16] The Bush Administration concurred.

After failing to convince the other signatories to adopt changes to alleviate U.S. concerns, the Bush Administration determined that further action was necessary. When entry into force was imminent in 2002, the United States notified the treaty depositor (the U.N. Secretary General) that it did not intend to ratify the Rome Statute and declared that "the United States has no legal obligations arising from its signature."[17] Concerned about the potential for politically motivated ICC investigations of American military personnel and officials, the Bush Administration also sought to negotiate bilateral agreements (commonly called Article 98 agreements) under which countries would not turn U.S. persons over to the ICC without U.S. consent.

Mere ink on paper cannot imply constitutional legitimacy, nor can the participation of some democratic countries confer democratic accountability upon the ICC.

The Obama Administration's enthusiastic engagement with the ICC represents a significant shift in the U.S. approach. The United States remains ill served by participating in the ICC before achieving a fundamental revision of its mandate and procedures. One of the Rome Statute's more troubling deficiencies is the lack of a definition for the prosecutorial crime of "aggression." The crime of aggression will be clarified by a two-thirds majority of the Assembly of State Parties, almost ensuring that at least some signatory states will disagree with any efficacious definition. This scenario also highlights the political nature of the ICC's mandate and reach.

However, the most contentious problems are those points that are already settled. The substance of the Rome Statute is heavily influenced by a global governance approach, a fact that makes it difficult for some constitutional democracies both to honor their constitutions and to promote the international legal enforcement of human rights through the ICC. Despite a growing body of international law developed through treaties and charters, mere ink on paper cannot imply constitutional legitimacy, nor can the participation of some democratic countries confer democratic accountability upon the ICC.

Although there may be significant normative motivations for U.S. membership in the ICC, not least of which would be international justice, there are principled and practical objections to the current Rome Statute that are irreconcilable.

First, the ICC's jurisdiction is theoretically universal and, if the U.S. ratified the Rome Statute, could extend to crimes committed by Americans against Americans in U.S. territory, even if the U.S. investigates and concludes that no crime occurred or that there is insufficient evidence to convict a suspect. The Rome Statute provides that the ICC "shall satisfy itself that it has jurisdiction in any case brought before it."[18] Thus, any U.S. investigation or trial, no matter how robust, could face review by the ICC and even be overturned by a subsequent trial at The Hague. In effect, ratification of the

16. Bill Clinton, "Statement on the Rome Treaty on the International Criminal Court," BNET, December 31, 2000, at *http://findarticles.com/p/articles/mi_m2889/is_1_37/ai_71360100* (January 25, 2010).
17. John R. Bolton, letter to U.N. Secretary General Kofi Annan regarding the Rome Statute of the International Criminal Court, May 6, 2002, at *http://www.asil.org/ilib0506.cfm#r3* (January 25, 2010).
18. Rome Statute of the International Criminal Court, Art. 19, July 17, 1998.

Rome Statute would make the ICC the high court of last resort, superseding the legal authority of the U.S. Supreme Court and replacing the Constitution as the supreme law of the land.

Second, even if the U.S. never ratifies the Rome Statute, Americans could fall under the court's jurisdiction. The ICC's interpretation of its jurisdiction could result in the prosecution of U.S. citizens (both military and non-military personnel) for alleged crimes occurring in the territory of an ICC party, such as Afghanistan. In 2009, ICC Chief Prosecutor Luis Moreno-Ocampo commenced an investigation of alleged U.S. and NATO atrocities committed in Afghanistan. Afghanistan is one of the 110 countries that are party to the Rome Statute, which gives the ICC jurisdiction over Afghan territory.[19]

The United States has attempted to protect its citizens from ICC jurisdiction in places such as Afghanistan through bilateral Article 98 agreements and status of forces agreements (SOFAs), but these protections are imperfect. SOFAs can be altered unilaterally by foreign governments and are vulnerable to domestic political changes. Article 98 agreements can also be terminated unilaterally.

Moreover, neither SOFAs nor Article 98 agreements would protect an American under ICC indictment from being arrested when traveling abroad in an ICC state party without such an agreement. For instance, a U.S. military officer or enlisted soldier could be indicted by the ICC for alleged crimes in Afghanistan, be protected by the Afghan Article 98 agreement and SOFA, but be arrested and transferred to the ICC when he is redeployed to Japan, South Korea, or the United Kingdom because the U.S. does not currently have Article 98 agreements with those countries.

Third, the system of legal due processes adopted by the ICC differs radically from the due process guaranteed in the U.S. Constitution. The right to trial by jury is conspicuously absent. Justice Joseph Story wrote in 1833 that the purpose of explicit constitutional guarantees of trial by jury was "to secure the party accused from being dragged to a trial in some distant state, away from his friends, and witnesses, and neighborhood; and thus subjected to the verdict of mere strangers, who may feel no common sympathy, or who may even cherish animosities, or prejudices against him."[20] If the security of basic legal rights cannot be entrusted to the integrity of elected and appointed American judges, how much more should the U.S. be wary of democratically unaccountable foreign judges who are uninhibited by constitutional restraints?

In framing the U.S. Constitution, the Founders were convinced that the protection of liberty required not only that we have a "government to control the governed," but also that we "oblige it to control itself."[21] No formal mechanisms control or limit the ICC other than its likely inability to enforce its decisions. However, this inability should be understood merely as a temporary lack in capabilities rather than a permanent legal barrier. The due process of a speedy trial is also effectively absent in the Rome Statute. ICC operating procedure allows for indicted persons to be detained for years before trial, and there is effectively no presumption of innocence.

Fourth, the provisions of the Rome Statute further challenge constitutionally guaranteed equality before the law through the role of the ICC Chief Prosecutor. The unaccountable and permanent office of the ICC independent prosecutor presents a unique opportunity for politically charged investigations. Even if the United States were to become party to the Rome Statute, U.S. citizens could still be investigated and indicted without the involvement of—and even against the objections of—the U.S. government.

19. Brett D. Schaefer and Steven Groves. "The ICC Investigation in Afghanistan Vindicates U.S. Policy Toward the ICC," Heritage Foundation *WebMemo* No. 2611, September 14, 2009, at *http://www.heritage.org/research/internationallaw/wm2611.cfm*.

20. Joseph Story, *Commentaries on the Constitution of the United States* (1833; repr. Carolina Academic Press, 1987), p. 658.

21. James Madison. *The Federalist*, No. 51.

The problematically broad definitions of the crimes for which the ICC is responsible[22] make possible an infinite number of disastrous scenarios in which a politically motivated prosecution could do great harm to U.S. interests. In the court's short history, opponents of the Iraq war have attempted to use the ICC to punish U.S. officials, and an investigation is currently ongoing in Afghanistan. The prosecutor is also investigating alleged crimes committed by Israel in Gaza, despite the fact that neither Israel nor the Palestinian Authority is party to the Rome Statute. Indeed, the ICC's present trajectory accommodates politically motivated charges and risks subverting domestic legal systems and turning international criminal law into a politically charged free-for-all under the guise of impartial justice.

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These issues must be of primary concern in determining U.S. foreign policy. Because of its troubling and far-reaching implications for U.S. law, the Rome Statute creates a deeply entangling and badly structured international institution. The ICC's current practices suggest its bias and ineffectiveness as a permanent court of international criminal prosecution. Because the ICC does not have jurisdiction over a global polity and receives no authority from an enforcing government, its most valuable role would be in continuing to serve as an *ad hoc* arbiter in extraordinary situations resulting from international conflict.

At present, the U.N. and the ICC are attempting to establish the Hague-based tribunal as an international high court that can adjudicate at will the ordinary actions of national governments. Such an entity is at best an illegitimate international tribunal that does not enjoy the democratic support of any polity, and its decisions cannot be neutrally enforced by any country. At worst, it would be a source of politicized investigations and biased decisions that would give cause for international clashes couched in high-minded legalese.

Because of its troubling and far-reaching implications for U.S. law, the Rome Statute creates a deeply entangling and badly structured international institution.

ICC enthusiast and European Parliament Member Ari Vatanen, writing for the Parliament's Committee on Foreign Affairs, reveals a surprising confidence in this vision: "The only answer to global problems is global Governance." Furthermore, "if we follow the logic of alleviating human suffering, mankind should one day have a binding code of conduct which would be enforced by a world army."[23] The price of such an experiment would be the monumental sacrifice of constitutional rule of law and national self-government. The United States has been perfecting its union for over 200 years. Why would we gamble the success of previous generations on an ill-founded international legal order?

There is a moral imperative to seek justice, but there is no moral imperative to globalize its pursuit.

There is a moral imperative to seek justice, but there is no moral imperative to globalize its pursuit. It is far from obvious that international

22. See Brett D. Schaefer and Steven Groves, "The U.S. Should Not Join the International Criminal Court," Heritage Foundation *Backgrounder* No. 2307, August 18, 2009, at *http://www.heritage.org/research/internationalorganizations/bg2307.cfm*.
23. European Parliament, "Report on the Role of NATO in the Security Architecture of the EU," January 28, 2009, p. 7, at *http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2009-0033+0+DOC+PDF+V0//EN* (January 25, 2010).

justice is best served by putting it into the hands of the ICC.

A First Principle of Foreign Policy: Sovereignty of U.S. Political and Legal Institutions

American leadership, moral or otherwise, should not be confused with unqualified international cooperation. The principled vigor for justice and legal equality that spurred the American Revolution was tempered by an indispensable aspiration to secure national autonomy.

Thus, when a young United States was forced to decide whether or not to endorse the French Revolution of 1789, which appeared to spring from the same political ideals as America's own revolution, the choice was neutrality. Likewise, Woodrow Wilson's international leadership in creating the League of Nations following World War I was unable to stop the Senate's rejection of the Treaty of Versailles. Led by Senator Henry Cabot Lodge (R–MA), the Senate voted to keep the U.S. out of the League of Nations to protect against any diminution of U.S. sovereignty.

American engagement abroad was guided by an awareness of the inherent risk that international involvement can jeopardize American autonomy and democratic legitimacy. Such actions represent more than merely an "old American reluctance to pool sovereignty with other countries."[24] They reflect the very nature of the American political order. The rule of law embodied in the Constitution demands the continued political independence of the United States. This applies to involvement in the ICC as well as to any international legal or administrative body that could have power over an American citizen's life, liberty, or property.

Secretary of State John Quincy Adams stands in stark contrast to current Secretary of State Hillary Clinton, who feels "a great regret" that the U.S. is not party to the International Criminal Court.[25] For the United States, as Adams understood, remaining aloof from some of the more intrusive international institutions is *not* regrettable.

Legally binding rulings, appeals, and reviews must be wholly contained within the constitutionally mandated judicial system of the United States government. The United States should be neither ashamed nor viewed as hypocritical for pursuing international justice in a manner consistent with the U.S. Constitution. The U.S. need not abandon American political principles when addressing its friends and allies abroad. Justice requires continued American independence: in the words of John Quincy Adams, "applying with earnestness and sincerity the means of its own choice, and reconcilable to the genius of its own institutions."[26]

The apparent fragility of liberty and justice among modern political orders bears out the benefit of protecting the American experiment. The merits of European-style pooled sovereignty are far from decided. In Europe, the legacy of devastating wars has largely decided the question of sovereignty. Since 1945, European defenders of the nation-state and polity-based politics have been fighting an uphill battle.

In the American context, checks and limits on government are not fantastical and outdated concepts. Rather, the U.S. constitutional structure is the foremost sustaining quality of the American Republic. The U.S. possesses the world's longest-standing written constitution, which continues to provide the political and legal structure of a state that is relatively young in the continuum of world history. This is more than mere coincidence. The Framers of the Constitution sought to ensure that external influence, internal dissension, and competing factions would not diminish the continuity and autonomy of the American government.

24. Walter Russell Mead, *Special Providence: American Foreign Policy and How It Changed the World* (New York: Knopf, 2001), p. 290.
25. Mary Beth Sheridan, "Clinton Regrets U.S. Not Part of Court," *The Washington Post*, August 7, 2009, at *http://www.reuters.com/article/vcCandidateFeed1/idUSL6274568* (January 25, 2010).
26. Adams, *Writings of John Quincy Adams*, p. 176.

That continuity was essential to the regular and peaceful exchange of political power and to the steady fulfillment of the Declaration of Independence, bringing liberty and justice to all. Therefore, that which diminishes U.S. sovereignty in international affairs must also necessarily be understood to endanger the democratic and legal structures of American government. Just because no state is currently in a position to coerce the United States does not diminish the constitutional wisdom of political autonomy.

That which diminishes U.S. sovereignty in international affairs must also necessarily be understood to endanger the democratic and legal structures of American government.

American advocates of global governance may well feel that the governing principles embodied in the Constitution should be renegotiated, but a question of that magnitude must not be decided by any international agreement that would crack the core of the American political construct. The Rome Statute is one such agreement.

Constitutionalism vs. Supranational Governance

The United States has traditionally refused to jeopardize its independence abroad and should continue to do so. The historical example of the British vice-admiralty courts reveals the degree to which the rule of law embodied in the U.S. Constitution and practiced within the U.S. legal system is inextricably woven into American political principles.

From the debate surrounding the international Slave Trade Tribunals of the 19th century, it becomes apparent that the issues raised by prospective membership in the ICC have been considered before. The world has not changed so much that the U.S. should now abandon the proven sources of American liberty and justice—the U.S. Constitution and the ultimate sovereignty of the American people. As it currently stands, the International Criminal Court is fundamentally incompatible with the political and constitutional principles of the United States.

Even if ratification of the Rome Statute is currently infeasible due to domestic political considerations, the issue bears out a fundamental tension between constitutionalism and the trend toward global governance. Simply ignoring the goals of the International Criminal Court is not enough. The ethos of its existence must be defined and the limits of its powers delineated. This process should begin with an articulate defense of the United States' principled objections to the Rome Statute.

A court can be legitimate only as part of an existing body of laws or constitution to which the people have consented. The courts are not sovereign; rather, the rule of law is sovereign. In the American context, the U.S. Constitution represents the ultimate manifestation of the people's sovereignty in the applicable rule of law.

Any evaluation of the ICC must be guided by the goals of justice and legal equality, which are best served by adhering to the U.S. constitutional imperatives of political independence and democratic accountability. As constitutional scholars Lee Casey and David Rivkin have argued:

> If the United States can be bound by norms to which it has not agreed or that are otherwise inconsistent with its own constitutional institutions and values, its government no longer can be said to derive its "just Powers from the Consent of the Governed." Consequently, to be true to its unique heritage and identity, the United States can and must oppose any effort to establish international lawmaking authorities. This is especially true with entities such as the International Criminal Court, which could claim authority to interpret the international legal obligations of Americans and their government.[27]

27. Lee A. Casey and David B. Rivkin, Jr., "Making Law: The United Nations' Role in Formulating and Enforcing International Law," chap. 2 in Brett D. Schaefer, ed., *ConUNdrum: The Limits of the United Nations and the Search for Alternatives* (Lanham, Md.: Rowman & Littlefield, 2009), p. 55.

Even though the present Rome Statute is irreconcilable to the U.S. Constitution, the Obama Administration's approach has been to praise the formation of the ICC and to "regret" U.S. nonmembership. Instead, the United States should be defending the role of constitutionalism in sustaining individual liberties. Legal scholar Eugene Kontorovich has noted that our founding principles should not be considered "a constitutional straitjacket but rather a guide to tailoring" the jurisdictions of international legal entities to "avoid constitutional constraints."[28] The United States can promote international justice while adhering to its founding principles, but not through ratification of the Rome Statute.

The current trend in global law inevitably diminishes the sovereignty of nation-states, and thereby renders constitutionalism obsolete, because the settled will of the people can no longer limit the actions of government. For the United States to join such radically global governance institutions as the ICC "would require fundamental changes in American constitutional and political culture."[29] Ultimately, this would ill serve human liberty, because "the sovereign state is the instrument of the protection of rights" precisely because it alone possesses the legitimate "force to protect them."[30] Why would we now subvert the judicial system of the United States and its constitutionally ordained role in the checks and balances of American government? The cause of international human rights is not advanced by such imprudence.

For the United States to sacrifice the proven wisdom of the U.S. Constitution on the glowing altar of international goodwill would only deprive the world of its first successful model of just and equitable government. The realities of the International Criminal Court prove that there are constitutional limits to the types of international institutions and global governance mechanisms in which the United States can participate. The principles of America's Founding can and should continue to guide U.S. foreign policy.

—Marion Smith is completing a research fellowship in the B. Kenneth Simon Center for American Studies at The Heritage Foundation.

28. Kontorovich, "The Constitutionality of International Courts," p. 5.
29. Jeremy Rabkin, *Law Without Nations: Why Constitutional Government Requires Sovereign States* (Princeton, N.J.: Princeton University Press: 2007), p. 248.
30. Pierre Manent, *A World Beyond Politics? A Defense of the Nation-State* (Princeton, N.J.: Princeton University Press, 2006), p. 173.