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How Does Elena Kagan See America's Place in the World? Why the Senate Needs to Ask Some Hard Questions

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Abstract: *What are Elena Kagan's views on foreign policy? What does she think about America's role in the world? At one time, such questions would have seemed irrelevant, if not impudent, for a Supreme Court nominee. Not anymore. Recent Supreme Court decisions, and commonly expressed views among commentators, seem to embrace a new role for international institutions, foreign practices, and foreign opinion in shaping American law. Although very little is known about Kagan's judicial philosophy, or her opinions on great constitutional issues, her record, such as it is, cries out for questioning on these matters. It remains unlikely that Kagan will jeopardize her confirmation by giving forthright answers to such questions. But Senators should not pass up the opportunity to put her on the spot by pressing for clear and direct responses to fundamental questions about her judicial philosophy. Here are particularly compelling reasons to raise these questions with Elena Kagan.*

What are Elena Kagan's views on foreign policy? What does she think about America's role in the world? At one time, such questions would have seemed irrelevant, if not impudent, for a Supreme Court nominee.

In *Marbury v. Madison*, the foundational case for constitutional review by courts, Chief Justice Marshall noted that in the conduct of foreign policy the Secretary of State answers to the President and emphatically disclaimed any authority of courts "to intermeddle with the prerogatives of the executive" in such matters: "An extravagance so absurd and excessive could not have been entertained for a moment." Marshall, as

Talking Points

- The Senate Judiciary Committee should consider where Elena Kagan stands on questions concerning international law and the status of international commitments in American domestic law.
- Raising such questions may send a signal to the White House that deficiencies in national defense or the preservation of American constitutional integrity now matter—and will be raised with future judicial nominees.
- Does Kagan agree with legal trends that encourage foreign tribunals to prosecute American officials for violations of international law?
- The confirmation hearings are a rare chance for the Senate to inform the public on these great constitutional issues.
- Recent citations to foreign authority by Supreme Court justices are not passing comments or mere scholarly ornaments, but have been used to reinforce legal arguments that otherwise seem tenuous.
- Justices claim they are not bound by foreign law, which they can then invoke when convenient to bolster their preferences and ignore when it runs in less favored directions.

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a former Secretary of State, was very clear about the difference between legal disputes properly submitted to courts and "questions in their nature political or which are, by the Constitution and laws, submitted to the executive…."[1]

Today, no one can be sure that a Supreme Court justice will know where to draw this line. The current justices themselves are closely divided on these matters. Questions involving the American position in the world—questions about international law and the status of international commitments in American domestic law—come before the Court almost every term. They are debated among legal scholars and their implications assessed on the editorial pages, sometimes even on talk radio and cable television programs.

The Senate Judiciary Committee should press these questions when it considers the nomination of Elena Kagan to serve as a justice of the Supreme Court.

Who Determines America's International Obligations?

The Constitution stipulates that treaties of the United States—along with federal statutes and the Constitution, itself—are "supreme law of the land." It is clear that, at least in some circumstances, the Framers expected American judges to interpret treaties, since the same clause goes on to stipulate that "the judges in every state [of the United States] shall be bound thereby...." In the third paper of *The Federalist*, John Jay—who helped negotiate the treaty of peace with Britain at the end of the Revolution—argued that among other advantages, a federal government with its own courts could establish uniform interpretations of American treaty obligations. Jay seems to have taken it for granted that judges in the states would feel bound by treaty interpretations established by federal courts.

What happens when foreign authorities take a different view of a treaty? Such differences may lead to disputes between the U.S. and other nations, conflicts requiring negotiation or renegotiation to reach common understandings—or such disputes may simply persist indefinitely. Partly because the full meaning of treaties might depend on how other countries interpreted their own obligations, the Supreme Court held, in one of Chief Justice Marshall's most influential decisions on the treaty power, that some treaties or some provisions of treaties might be "non-self-executing"—that is, not immediately applicable in American domestic law until Congress enacted its own implementing statute to guide American courts on their enforcement of such treaties.[2]

There is another possible answer, which, in turn, raises a new question: Can the U.S. permit an international body to instruct American courts or American administrators on how to interpret U.S. treaty obligations? That is the system now established in the European Union, which rests on nothing more than a series of treaties among the member states. What makes the EU seem so much more than a typical international organization is that the member states have delegated vast implementing powers under these treaties. After ministers from the national governments approve general policy standards (in the Council of Ministers), a specialized bureaucracy (the European Commission) then devises detailed implementing regulations and a special appellate court (the European Court of Justice) instructs national courts on how to interpret the ensuing obligations. In effect, a whole new constitutional structure has been established on top of the national constitutions of the member states. And the European Court of Justice insists that European law must take priority, even when national constitutions impose contrary obligations or restrictions.

Could the United States follow this path? Alexander Hamilton dismissed out of hand the notion that a treaty could alter the arrangement of powers which the people of the United States had vested in their constituted system of government: "the power of making treaties," he insisted, cannot "change the Constitution" because "a delegated authority cannot alter the constituting act [for that authority].... A treaty, for example, cannot transfer the legislative power to the executive department."[3] The standard

1. 5 U.S. 137 (1803) at 170.
2. Foster v. Neilson, 27 U.S. 253 (1829).

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treatise on the law of foreign relations before the Second World War still affirmed the same principle: "A delegation of political power, that is legislative or treaty-making power, to such a body [an international authority such as the League of Nations] would be unconstitutional."[4]

The traditional view was that the Constitution established a definite scheme of accountability—through Senators and Presidents (and Congressmen) chosen by the people and through judges, chosen in turn by these Representatives. To delegate governing powers to international entities—not directly accountable to the American people or the American constitutional system—would violate basic constitutional principles. But other principles once regarded as fundamental—such as the principle that Congress may only legislate within the scope of those powers enumerated in the Constitution or the principle that Congress may not delegate its powers in wholesale fashion to administrative agencies—were loosened over the course of the 20th Century. By the 1990s, one of the foremost scholars of foreign relations law offered a new view on delegation of power to international bodies: "legislative" or "regulatory" powers exercised by an international organization might "properly be seen as implementations of the original treaty establishing the organization and…in consenting to that agreement, the Senate may be said to have consented in advance to any regulations authorized by that agreement."[5]

The Supreme Court has never faced this question directly. But in 2006, the question came before the U.S. Court of Appeals for the D.C. Circuit in *Natural Resources Defense Council v. Environmental Protection Agency.*[6] An environmental advocacy organization (NRDC) urged that the EPA should impose stricter standards on emissions of particular substances. The EPA was already bound by a U.S. statute to authorize such emissions "to the extent consistent with the Montreal Protocol"—an international treaty (designed to limit threats to the ozone layer of the earth's atmosphere) which had already been ratified by the Senate. NRDC pointed to a "decision" reached at a subsequent conference of states participating in this treaty. But the Court of Appeals held that a mere "decision" of an international conference could not, by itself, change the terms of a ratified treaty. To suppose that Congress had meant to allow the EPA to incorporate such international decisions into its own statutory authority would raise "significant constitutional problems": on this reading of the statute, "Congress either has delegated lawmaking authority to an international body or authorized amendments to a treaty without presidential signature or Senate ratification."

In 2007, the Supreme Court did face a seemingly similar challenge in *Medellin v. Texas*.[7] A Texas jury had convicted José Medellin of raping and then murdering a young girl. The jury had decided that capital punishment was appropriate. But lawyers appealing the capital sentence subsequently urged that Medellin, as a Mexican national, should have been apprised of his rights under an existing treaty, the Vienna Convention on Consular Relations, to seek advice from the Mexican consulate before his trial. Medellin's claim, along with that of some 50 other Mexican nationals, was brought to the International Court of Justice by the government of Mexico. The ICJ (often called the "World Court") then directed Texas and other states to refrain from implementing capital sentences until claims under the Vienna Convention could be resolved. President George W. Bush then issued a "Memorandum," ordering state authorities in Texas and other states to comply with the ICJ ruling.

A divided Supreme Court in *Medellin* held that the treaty by which the United States agreed to

3. *Camillus*, *in* 5 WORKS OF ALEXANDER HAMILTON 30 (Lodge, ed.). Justice Joseph Story said much the same: "A treaty to change the organization of the Government, to annihilate its sovereignty, to change its republican form, or to deprive it of its constitutional powers, would be void." 3 JOSEPH STORY COMMENTARIES ON THE CONSTITUTION, §1502.
4. QUINCY WRIGHT, THE CONTROL OF AMERICAN FOREIGN RELATIONS 125 (Macmillan 1922).
5. LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 263 (2d. ed. 1996).
6. 464 F.3d 1 (2006).
7. 552 U.S. 491 (2007).

submit such disputes to the ICJ did not make decisions of that tribunal binding law for courts in the United States. The majority opinion, by Chief Justice Roberts, also denied that the President had the authority to change the terms of a treaty by unilateral executive order. So Texas state courts remained free to adhere to their ruling that Medellin had not raised his procedural objection in a timely manner.

What the Court failed to address, however, was whether the Senate *could* have indicated that it did want decisions of the International Court of Justice to enter directly into U.S. law and be treated as binding by U.S. courts. Or could the Senate—or a subsequent act of Congress—leave it to the President to decide when or to what extent American courts should be bound by decisions of international tribunals? If the Senate could leave the details of a treaty to be settled in this way by a tribunal, could it also allow a treaty to be elaborated by an international organization, empowered to write implementing regulations as the European Commission does for EU states?

The *Medellin* decision leaves all these questions open. It was a narrow decision, breaking some new ground—and generating some controversy—only in its claim that when a treaty does not clearly indicate by its terms (or by the Senate resolution ratifying it) that it should be interpreted by courts as "self-executing," courts should assume the contrary. Even that claim, however, was countered by Justice Breyer's dissent (joined by Justices Ginsburg and Souter) and qualified by Justice Stevens in his concurring opinion. It may be that the other five justices simply preferred, for general jurisprudential reasons, to avoid addressing issues they did not need to consider in this case. Or it may be that there was no majority for a stronger statement of limits on the treaty power.

What would happen, then, if the Senate agreed to ratify a treaty which delegated authority to an international body to change American law—or ratified a treaty which allowed an international tribunal to override decisions reached by American courts? Perhaps the question is not an all-or-nothing one. Perhaps there are limited circumstances in which the Supreme Court might find this practice acceptable, while still retaining major constitutional restrictions on the practice in other areas.

Given the far-reaching implications of these issues, the Senate should want to understand how Elena Kagan sees them. Does this nominee recognize any limits on how far the President and Senate might go in erecting a new international decision-making structure on top of the U.S. Constitution?

Customary International Law in U.S. Courts

Questions about treaty structures only arise when the Senate has already ratified a treaty. Nations have not always relied on formal treaties, however, to sort out their rights and duties in the society of nations. Certain mutual accommodations between states were thought to rest on customary practice, as in the treatment of ambassadors by host states or claims of jurisdiction over foreign ships in the ports of host countries. The Constitution acknowledges this practice when it authorizes Congress to "define and punish...offenses against the law of nations."[8] The phrase implies (and the records of the Philadelphia Convention confirm) that the Framers assumed there was already a "law of nations" which, apart from any formal treaty, the United States government would be bound to uphold in its own laws.

When it enacted legislation to organize a federal court system, the first Congress included a provision which authorized "aliens" to seek relief in federal courts for "torts...in violation of the law of nations." At that time, it seems to have been understood that federal courts could only have jurisdiction in cases where aliens were suing American citizens—or at least suing over some offense that took place on American soil.[9] So few cases arose under this Alien Tort Statute (ATS) that it remained almost completely unused and forgotten until 1980.

8. U.S. CONST. art. I, § 8.

9. Curtis Bradley, *The Alien Tort Statute and Article III*, 42 VIRGINIA JOURNAL OF INTERNATIONAL LAW 587 (2002).

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Then, in the last months of the Carter Administration, the Justice Department endorsed the claim of a Paraguayan father against a Paraguayan police official accused of torturing and then killing the man's son—in Paraguay. In *Filartiga v. Peña-Irala*,[10] the U.S. Court of Appeals for the Second Circuit ruled that, given modern human rights treaties, the "law of nations" had come to embrace a prohibition against torture. So the ATS could now be extended to provide relief in federal courts against those who violated this prohibition, even if the prohibition did not involve actions on American territory or actions involving American citizens.

Subsequent cases invoked this precedent to seek relief from perpetrators of atrocities in the Balkan conflict in the 1990s and in other strife-torn regions. Some courts, however, rejected the notion that federal jurisdiction could be extended to acts on foreign soil based on vague notions of evolving international custom. The Supreme Court seemed to insist on a narrower reading in 2004 in *Sosa v. Alvarez-Machain*,[11] an effort to hold a U.S. official responsible (under the ATS) for arranging to bring a member of a Mexican drug ring (accused of participating in the murder of a U.S. Drug Enforcement Administration officer in Mexico) across the border, without formal extradition. The Court rejected the claim, holding that the ATS could only provide jurisdiction for claims as well grounded as those that would have been recognized under the "law of nations" in 1789.

But the majority opinion in *Sosa* did not rule out the possibility that new standards might come to be recognized as well-grounded elements of customary law. A concurring opinion by Justice Scalia (joined by Chief Justice Rehnquist and Justice Thomas) sounded this warning:

> [When the Alien Tort Claims Act was enacted] the law of nations was understood to refer to the accepted practices of nations in their dealings with one another (treatment of ambassadors, immunity of foreign sovereigns from suit, etc.) and with actors on the high seas hostile to all nations and beyond all their territorial jurisdictions (pirates).... The notion that a law of nations, redefined to mean the consensus of states on *any* subject, can be used by a private citizen to control a sovereign's treatment of *its own citizens* within *its own territory* is a 20th Century invention of internationalist law professors and human-rights advocates. The Framers would, I am confident, be appalled by the proposition that, for example, the American peoples' democratic adoption of the death penalty...could be judicially nullified because of the disapproving views of foreigners.[12]

Advocates continued to invoke the ATS in lower courts and, as it turned out, the Supreme Court was not prepared to dismiss its relevance to modern human rights claims. Indeed, just this past term, in *Samantar v. Yousuf*,[13] the Court reinstated an ATS suit after it had been rejected by lower courts. The case had been brought by Somali victims of the former president of Somalia—for abuses committed in Somalia in the 1990s. The Court stuck to the narrow question of whether the Foreign Sovereign Immunities Act, which limits suits against foreign governments, would also protect foreign officials when sued in their personal capacities. The larger question in a case of this kind—whether federal courts had jurisdiction to begin with—was left to another day.

But that day will come—and a Justice Kagan would have to consider how widely to extend this sort of jurisdiction. The most persistent claims have been pursued against American companies—defendants that, of course, have the potential to pay the largest damages. These cases have been argued on the theory that companies operating in foreign countries, where they necessarily cooperate with

10. 630 F.2d 876 (1980).

11. 542 U.S. 692 (2004).

12. *Id.*. at 749–50.

13. 558 U.S. ___, 130 S.Ct. 49 (2010).

local authorities, may for that reason be held liable (under the ATS) for human rights abuses of governments in places such as Burma, Indonesia, or West Africa. If cases of this kind do result in substantial damage awards, they may discourage foreign investment in countries where it is most needed.

Meanwhile, ATS cases may produce substantial headaches for American foreign policy. Imagine the furious reactions from governments in China or Russia or Pakistan, if their top officials were condemned as human rights abusers in American lawsuits. And even if such immediate problems are avoided, successful cases may set very troublesome precedents. While American law only authorizes tort claims against human rights abusers, some countries have claimed jurisdiction for criminal prosecution under the theory that all nations have a right to enforce universal human rights standards. A number of European countries have, in the past decade, allowed prosecutors to open investigations of American officials for supposed human rights offenses in Iraq. Future cases of this kind could cite American ATS cases as precedent, as, in fact, British courts cited *Filartiga* as precedent when the British government arrested former Chilean President Augusto Pinochet in 1998 for human rights offenses committed (against Chileans) in Chile in the 1970s and 80s.

Does Elena Kagan think Americans are wrong to worry about prosecutions of American officials by foreign governments? Should such concerns figure in the Supreme Court's approach to customary international law? Does Kagan think that aliens have the right to challenge—under customary international law—how they are treated in the United States? Could the U.S., as Justice Scalia warned, see the Supreme Court invoke customary international law to overturn standards enacted by this nation's own elected representatives?

In fact, something close to that is already at hand.

International Judgments on American Constitutional Law

When it comes to applying international standards through the Alien Tort Statute, Congress retains the legal authority to curtail such litigation by repealing or amending the relevant statute. What is more disturbing, at least in principle, is the Court's resort to international authorities in interpreting requirements of the U.S. Constitution—since constitutional interpretations cannot be overturned by mere statute. So it is understandable that there has been more controversy about this recent practice.

It began with *Atkins v. Virginia*[14] in 2002, where the Court ruled the Constitution's ban on "cruel and unusual punishment" should now be understood to prohibit capital punishment for individuals found to have subnormal intelligence. Among other arguments, the Court's majority noted that execution in such circumstances seemed to be banned in most countries, so "within the world community" the practice is "overwhelmingly disapproved."[15] The following year, the Court ruled, in *Lawrence v. Texas*,[16] that prohibitions on consensual sexual relations between adults of the same sex should now be seen as contrary to the Fourteenth Amendment guarantee against deprivation of liberty without due process. Here, along with other arguments, the Court cited, in the text of the opinion, rulings of foreign courts, of the European Court of Human Rights, and of the Human Rights Committee of the United Nations as evidence of international support for abolishing traditional laws in this area. In 2005, the Court again invoked international precedents for its holding in *Roper v. Simmons*[17] that capital punishment should not be applied to individuals who were under the age of 18 at the time of the crime.

All of these rulings provoked strong dissents, objecting most strenuously to the citing of foreign or international precedent. In *Atkins*, for example,

14. 536 U.S. 304 (2002).
15. *Id.* at 316 n.21.
16. 539 U.S. 558 (2003).
17. 543 U.S. 551 (2005).

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Justice Scalia (in an opinion joined by Chief Justice Rehnquist and Justice Thomas) protested that the Court's references to "the practices of the 'world community'" were "irrelevant" because its "notions of justice are (thankfully) not always those of our people."[18] In *Lawrence*, Scalia's dissent (again joined by Rehnquist and Thomas) concluded with an earlier protest submitted by Justice Thomas: "this Court…should not impose foreign moods, fads, or fashions on Americans."[19] Speaking for the same dissenters in *Roper*, Scalia offered the biting observation that while the majority opinion had measured actual state laws against the apparent reluctance of juries to impose capital punishment on juvenile offenders in practice, "the Court is quite willing to believe that every foreign nation—of whatever tyrannical political makeup and with however subservient or incompetent a court system—in fact adheres to a rule of no death penalty for offenders under 18."[20]

It is true, as defenders of these decisions have emphasized, that the Court's actual holdings did not hinge directly on foreign citations. In every one of these cases, the Court's majority offered other reasons, which it discussed at much greater length. But it is also true that each one of these rulings reversed an earlier decision holding exactly the opposite—allowing capital punishment in these situations and upholding traditional laws against sodomy. As the earlier decisions had been handed down within the past two decades, the Court seemed particularly eager to show that it was not simply reversing past precedent in response to changing moods (or changing vote counts) among the Court's majority but acting in accord with some broader trend in opinion—not only a national trend (as the Court claimed in all these cases and the dissenters disputed) but an international trend. So rather than acting as mere passing comments or scholarly ornaments, these appeals to foreign authority did seem to be advanced by the Court to reinforce legal arguments that might otherwise seem rather tenuous.

The practice proved quite controversial, however. Amidst much critical comment by commentators and pundits, resolutions condemning the practice were introduced in both houses of Congress. Yet the practice has also had supporters, and not only among scholars writing in law reviews. While legal commentators emphasized the potential to improve American jurisprudence by learning from foreign courts and commissions, several justices—in public speeches outside the Court—defended the practice as a way of reassuring foreigners about the United States. Justice Ginsburg argued that citations to foreign practice were means of implementing the admonition of the Declaration of Independence to show "a decent respect to the opinions of mankind" (which she characteristically updated to the gender-free phrase, "respect to the opinions of [human]kind").[21] Justice O'Connor in a similar vein claimed that citing opinions of foreign courts "will create that all important good impression."[22]

And, despite changes on the Court, a majority of the justices still seems committed to the practice of looking to foreign authority. Just this term, in *Graham v. Florida*,[23] the Court again invoked foreign practice in holding that a life sentence for an offender under the age of 18 would also run afoul of the Eighth Amendment guarantee against "cruel and unusual punishment"—because, among other reasons, it is a punishment rejected by most other countries. Justices Scalia, Thomas, Alito and Chief Justice Roberts again protested this appeal to international authority.

The most frequently heard defense to this practice—that such foreign citations merely serve as "per-

18. 536 U.S. at 347–48.
19. 539 U.S. at 598 (internal quotation omitted).
20. 543 U.S. at 623.
21. R.B. Ginsburg, "A Decent Respect to the Opinions of [Human]kind: The Value of a Comparative Perspective in Constitutional Adjudication, Address Before the American Society of International Law, Annual Meeting (April 2005).
22. S.D. O'Connor, Remarks at the Southern Center for International Studies (October 28, 2003).
23. 560 U.S. __ (2010).

suasive authority" to help clarify underlying issues, rather than binding authority to determine the outcome—simply underscores one of the most common objections: If the Court is not actually bound by foreign practice, then it seems free to invoke it when convenient to bolster its own preferences and ignore it when it runs in less favored directions. As Justice Scalia pointed out in *Roper*, the Court shows no signs of considering foreign practice to constrain its own highly permissive approach to abortion or to relax its highly stringent approach to government entanglement with religion—though most Western democracies place more limits on access to abortion and allow direct government subsidy to churches and religious schools. Indeed, the justices drawing inspiration from foreign citations have been so cavalier about the practice that they have not even limited their attention to constitutional democracies, but invoked "precedent" from countries as remote from American constitutional standards as China and Zimbabwe.[24]

A deeper objection is that the freewheeling appeal to foreign practice, as it appeals to amorphous "trends," undermines respect for actual legal commitments. The premise is that the Constitution is open-ended, evolving, subject to new trends—so almost anything, anywhere might be relevant to reinterpreting it. Meanwhile, the practice seems to undermine the status of treaties and the formal procedures for treaty ratification. In *Roper*, for example, the Court appealed to one treaty (the Convention on the Rights of the Child) which the Senate has not actually ratified and another (the Convention on Civil and Political Rights) which the Senate ratified only with the express reservation that the United States would not be bound by its provisions on capital punishment. The Court readily leaped past these complications to invoke a more amorphous "trend"—as if the formalities of actual treaty commitments did not matter.

Justice Oliver Wendell Holmes once derided the notion that international law should be seen as a "mystic over-law."[25] At the deepest level, the appeal to foreign practices seems to invite the notion that there is, after all, some moral authority in emerging international trends. A prominent legal scholar thus defended the practice, in an article in the *Harvard Law Review*,[26] by describing appeals to emerging international consensus on basic constitutional standards as a new form of *jus gentium*—that is, a new kind of customary international law, not quite binding but, rather like natural law, guiding and inspiring judges in all nations.

Just beyond the current arguments, then, may be the prospect of judicial appeals to a world which can instruct Americans—and the American legal system—on fundamental questions of right and wrong. To take such arguments seriously, judges must consider not simply what is right for this nation—given the Constitution Americans have "ordained" for themselves, given our own national experience and our own history—but what is right in the eyes of the world. If that is the right question for judges, then perhaps it is morally suspect—and legally unsound—for American judges to uphold American ways, when they conflict with the opinions of others.

Does Elena Kagan embrace this philosophy? To determine where she stands on the role of world opinion in deliberations of the U.S. Supreme Court, the Judiciary Committee needs to ask her some very direct questions on the matter. What does she believe about the moral status of the American Constitution or the moral groundings of American law? Such questions may not be of merely academic interest. They may turn out to have quite painful urgency in the very near future.

Judicial Monitoring of Military Action Abroad?

The Bush Administration's approach to fighting terrorism provoked a great deal of controversy, both in the United States and even more in the world at large. And for the first time in American history, it drew American courts into monitoring American military actions outside the United States.

24. Knight v. Florida, 528 U.S. 990 at 990 (1999) (Breyer, J., dissenting from the denial of cert.).

25. The Western Maid, 257 U.S. 419, 432 (1922).

26. Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*,119 HARV. L. REV.129, (November 2005).

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The Supreme Court has so far been preoccupied with treatment of detainees at the Guantanamo detention facility. Building detention facilities at Guantanamo seemed to ensure that detainees would remain under military authority and not become entangled in the complex holding requirements for criminal suspects in domestic prisons. In a 1950 ruling, the Supreme Court had emphatically rejected a habeas corpus petition from a German prisoner of war, held by American authorities at a military prison in Germany. The Court ruled in *Johnson v. Eisentrager*[27] that military officers could not be held to answer in domestic American courts for actions taken against military prisoners—even after the end of a war. In 1993, in *Sale v. Haitian Centers Council*,[28] the Court ruled that refugees taken to Guantanamo could not claim the rights of asylum seekers already in the United States—because the U.S. naval base at Guantanamo Bay in Cuba was not actually in American territory.

Critics, however, particularly those in Europe, denounced the Guantanamo detention center as a "law free zone." It was no more a "law free zone" than American prison camps for enemy prisoners in the world wars. It would have been a remarkable reversal of previous law if the Bush Administration had invited even military prisoners overseas to challenge their detentions in domestic courts. But in 2004 a divided Supreme Court decided, in *Rasul v. Bush*,[29] that prisoners in Guantanamo must be given some form of hearing by military authorities there, if they claimed to have no connection with paramilitary or terrorist groups battling American forces—and the detainees should have access to U.S. courts to appeal the determinations of those hearings.

Two years later, in *Hamdan v. Rumsfeld*,[30] a divided Court again struck down Bush Administration policy, holding that procedures for trials of detainees on charges of war crimes did not satisfy proper legal standards. Among other innovations, the Court relied on its own reading of the 1949 Geneva Convention on Prisoners of War—the first time an American court had ventured to tell military authorities how to interpret that treaty (or its predecessors in place during the world wars). The Court claimed that it was authorized to insist on its reading of this treaty because a congressional enactment, the Uniform Code of Military Justice (setting out, among other things, trial procedures for military trials) had implicitly incorporated Geneva standards into American law. This claim was, to the say the least, not irresistible—since the UCMJ was enacted several years before the Senate actually ratified the relevant Geneva Convention.

When Congress sought to limit judicial interference with Guantanamo, the Court ruled in *Boumediene v. Bush*,[31] in 2008, that Congress could not cut off resort to habeas corpus appeals from Guantanamo. The Court did not say that anyone held by American forces anywhere in the world could pursue appeals to domestic courts in the United States. But it ruled that Guantanamo was, unlike occupied Germany in 1950, a territory closely connected with American territory and therefore the same sorts of judicial redress should be available there as in actual American territory.

These cases raise many troubling questions. By no coincidence, all these rulings provoked dissents from the same justices who have voiced objections to citing foreign precedents. The Court's opinion in *Hamdi v. Rumsfeld*,[32] one of the initial detention cases, was written by Justice O'Connor—perhaps already thinking of that "all important good impression" on foreign opinion. This first case was decided in the midst of international outcry over the revelation of abuses at the Abu Ghraib prison in Iraq.

27. 339 U.S. 763 (1950).
28. 509 U.S. 155 (1993).
29. 542 U.S. 466 (2004).
30. 548 U.S. 557 (2006).
31. 128 S.Ct. 2229 (2008).
32. 542 U.S. 507 (2004).

If the Court can exercise jurisdiction over an American base in Cuba, why not over other American facilities in actual battle zones? The Court did reject an appeal to intervene in a lawsuit by a prisoner in Iraq—but on the narrow grounds that he was in Iraqi custody, not that Iraq was necessarily beyond the reach of American courts.[33] So a district court subsequently proceeded to assert jurisdiction on behalf of a foreign detainee held at the American prison in Bagram in Afghanistan.[34] And while that ruling was recently reversed on appeal,[35] such claims will probably find their way to the Supreme Court in coming years, since Justice Kennedy's grounds for distinguishing Guantanamo from postwar Germany are not, to the say the least, clear.

Over the horizon, the Court may face still harder challenges. For example, if courts can say which military prisoners should be released, why leave the military a free hand in deciding which enemies can be targeted in missile strikes or infantry attacks? If courts must ensure that innocents are not detained, why not ensure that innocents are not killed in improper military actions? There are international treaties aiming to protect innocent civilians from bombing just as there are international treaties protecting prisoners of war. It happens that the most relevant treaty—the 1977 Additional Protocol I to the Geneva Conventions of 1949—has not been ratified by the Senate. But many commentators insist that it has by now become a part of customary law, since so many other countries have ratified it and so many of its provisions have entered into other instruments, such as the Statute of the International Criminal Court (which the United States has also not ratified—but many other nations have).

Many legal trends may converge at this point. There is, for example, mounting international criticism of current U.S. policy in targeting terror suspects in Afghanistan and in neighboring Pakistan with airborne drone strikes. Commentators at the International Committee of the Red Cross and the U.N. Human Rights Council have questioned whether such strikes are consistent with international law. Suppose the criticism reaches new levels of intensity—after, for example, a mistaken targeting decision shown to have cost the lives of many innocent civilians, including visiting Europeans. Suppose another country demands a proceeding against American officials at the International Court of Justice or the International Criminal Court or attempts a prosecution in its own courts on the claim that it may exercise "universal jurisdiction" over war crimes.

Presumably the Obama Administration or its successors would invoke jurisdictional objections to such international or foreign trials. But the Reagan Administration invoked procedural objections in 1984, when the International Court of Justice accepted a suit by the Marxist government of Nicaragua, arguing that American support of anti-Marxist rebels there violated various international standards on the conduct of warfare. In the late 1980s, the Reagan Administration simply ignored the resulting adverse decision. The D.C. Court of Appeals then rejected a subsequent effort to enforce the ICJ decision on the grounds that decisions of the ICJ had no effect in American law.[36]

Would American courts—would the Supreme Court—be quite so confident today in dismissing international legal challenges to American military policy? Four justices questioned the Court's grounds for rejecting the ICJ ruling in the *Medellin* case. A majority of current justices insist that foreign practice and international conventions—even when the latter have not been ratified by the United States—may rightly guide American court rulings on fundamental questions of American law. A majority of current justices have insisted that the Court may overturn the security policies chosen by the President, policies pursued outside the United States during a time of war, even when no precedent and no clear legal standard required the Court to do so.

33. Munaf v. Geren, 553 U.S. 674 (2008).

34. Maqaleh v. Gates, 604 F. Supp. 2d 205 (D.D.C. 2009).

35. Maqaleh v. Gates, 2010 U.S. App. LEXIS 10304 (May 21, 2010).

36. Committee of U.S. Citizens in Nicaragua v. Reagan, 859 F.2d 929 (1988).

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Is it outlandish, then, to worry that a future Supreme Court will think it needs to save America's international reputation by deferring to the more cosmopolitan outlooks of other countries? Why prefer American lives to the lives of foreigners? Why, in particular, prefer American military lives to the lives of foreign civilians? Why insist on the priority of U.S. defense strategy if Americans can no longer insist on the priority of their own Constitution—even in disputes about U.S. constitutional law?

Conclusion: Why It Is Right to Press These Questions

Whatever questions are posed to Elena Kagan when she is called to testify before the Senate Judiciary Committee, the likelihood is that she will not provide clear or straightforward answers. Recent nominees have learned that it is safer to avoid commenting on controversial constitutional questions or even on basic questions of judicial philosophy.

And whatever assurances Elena Kagan does offer to Senators on hypothetical or general questions about the Court's role in foreign and security policy, it is certain that nothing she says can bind her when she faces actual cases coming before the Supreme Court. Indeed, during her confirmation process, Judge Sonia Sotomayor assured the Judiciary Committee that in her view, citations to foreign law should not be considered relevant to disputes about the proper interpretation of the United States Constitution.[37] And less than year later, Justice Sotomayor signed on to the Court's opinion in *Graham*, which cited foreign practice in support of its holding that the Eighth Amendment prohibits life terms for juvenile offenders.[38]

Still, there are good reasons to pursue these questions with Elena Kagan. Indeed, these questions about the Constitution and international law are particularly pertinent to consideration of the Kagan nomination.

After all, very little is known about Kagan's judicial philosophy, since she has never served as a judge. Not much is known about her opinions on great constitutional issues, since she has a remarkably scanty publication record—especially remarkable for someone who rose to higher and higher positions in two of the most distinguished law faculties in the country. It is always awkward to ask a nominee about matters outside that person's past experience or to press a nominee on issues not visible in that person's record. But Kagan's record, such as it is, cries out for questioning on these matters.

To begin with, there is her endorsement of the Harvard policy requiring the study of international law while maintaining the lack of any requirement for the study of constitutional law. She cannot claim lack of experience with relevant materials, if she is asked why (or to what extent) she thinks international law is more important to training future lawyers than American constitutional law. Her answers to such questions should be quite instructive.

Then there is the issue of whether Kagan believes that the U.S. military—in deference perhaps to her understanding of customary international standards—should disregard an act of Congress. As Dean of Harvard Law School, Kagan implemented the school's policy banning military recruiters from participating in job interviews with students (or at least, excluding Defense Department recruiters from the same access given to private law firms and private advocacy organizations). Kagan explained that this policy was intended to register the law school's opposition to "the military's policy" of excluding open homosexuals from military service. Given the Supreme Court's recent propensity to micromanage how the war on terrorism is conducted predicated on a commitment to heretofore unrecognized rights, it is surely fair to ask whether Kagan's actions indicate that she also adheres to such a judicial philosophy.

37. Sen. Chuck Schumer Holds a Hearing on the Nomination of Judge Sonia Sotomayor to Be an Associate Justice of the U.S. Supreme Court (July 14, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/07/14/AR2009071402630.html.

38. Graham v. Florida, 558 U.S. ___, 176 L.Ed. 2d 825, 848–50 (2010).

While Kagan has said very little about contemporary courts and judges, there is one very notable exception. Not long ago she saluted, as her "judicial hero," Chief Justice Aharon Barak of the Israel Supreme Court, calling him "the judge who has best advanced democracy, human rights, the rule of law and justice."[39] Justice Barak was certainly a jurist of remarkable confidence—he makes activist judges in America look timid by comparison. He helped develop a whole corpus of constitutional requirements in Israel, despite the fact that the country does not have a formal, written Constitution. He was known for filling gaps by invoking standards from other countries—so much so that he made it a practice to hire at least one clerk each year from a foreign country (that is, a clerk whose legal training had been acquired in a foreign country rather than in Israel). And Justice Barak is famous for involving the Israel Supreme Court in reviewing actions of the Israel Defense Force in military operations—on at least one occasion reviewing a proposed air strike before it took place. Senators should ask Elena Kagan, which practices of Chief Justice Barak does she think American judges would do well to emulate?

It remains unlikely that Kagan will jeopardize her confirmation by giving forthright answers to such questions. But Senators should not pass up the opportunity to put her on the spot by pressing for clear and direct responses to fundamental questions about her judicial philosophy. There are several compelling reasons to do so.

In the first place, raising these questions may send a signal to the White House. Kagan has such limited qualifications of the traditional sort, it is reasonable to assume that the White House was looking for a candidate who would not arouse opposition. The very opacity of her record thus seems to have been an attraction for the Obama White House. But if she has said almost nothing in public about abortion or affirmative action or gay marriage or other contentious social issues, her record still seems to reflect a very low priority on national defense or the preservation of American constitutional integrity. It is worthwhile to send a signal that deficiencies in these areas now matter—and will be raised with future judicial nominees.

Second, pursuing such questions with Elena Kagan can send a signal to judges and courts. Lower court judges who hope to be confirmed to positions in higher courts should be on notice: Senators care about these issues and will now be paying close attention to decisions on these matters. Supreme Court justices should be aware that there is public concern, not just on which way the Court goes on a controversial social question but on the underlying principles of what should and should not count as an argument in American constitutional law.

Finally, perhaps most importantly, the public watches confirmation proceedings. It is a rare chance for the Senate to inform the public on these concerns. If Americans are going to have a Constitution which "evolves" with new trends—instead of being anchored in well-established American traditions and in the understandings of those who first ratified the Constitution—then the priorities of contemporary Americans must matter. Those who care about American security and American independence need to mobilize American public opinion. A Supreme Court nomination proceeding can be a very educational forum for American citizens. What is at stake is not only American national security but the very meaning of American citizenship.

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39. Kagan made the remarks at a Harvard Law School ceremony, in which the school conferred an award on Justice Barak. For background on the event and on Justice Barak (including a summary of critical remarks by Judge Richard Posner of the 7th Circuit Court of Appeals), *see* Stuart Taylor, *Elena Kagan's "Judicial Hero"*, NEWSWEEK, May 25, 2010, *available at* http://www.newsweek.com/2010/05/25/elena-kagan-s-judicial-hero.html.