

9-1-2000

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Recommended Citation

Paul, Joel Richard (2000) "Is Global Governance Safe for Democracy?," *Chicago Journal of International Law*. Vol. 1: No. 2, Article 7.

Available at: <https://chicagounbound.uchicago.edu/cjil/vol1/iss2/7>

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Is Global Governance Safe for Democracy?

Joel Richard Paul*

Contemporary critics of international legal institutions often frame their opposition in terms of a conflict between global governance and national democratic accountability. Both liberal and conservative critics view international entities like the United Nations, the World Trade Organization (“WTO”), or the European Union as steadily infringing upon national autonomy. In the United States, this debate often echoes the isolationist strains of earlier arguments that European colonialism, corruption, revolution, immigration, the League of Nations, or totalitarianism threatened American exceptionalism. Throughout US history, opponents of internationalism have called for disengagement from the world’s troubles. The critics of the United Nations and the human rights covenants stand with the opponents of the League and the proponents of the Bricker Amendment as resisting the ceaseless tide of internationalism.

That said, Professor Paul Stephan does not fit easily into either the left or the right camp of critics. Stephan has earned a reputation as an independent and original thinker in international law. His sophisticated critique of global governance focuses on the process of lawmaking rather than on its substance.¹ Stephan raises democratic process concerns both with the creation of customary international law and the development of international institutions, which he terms “new international law.” By addressing the way that international norms develop, rather than the norms themselves, Stephan’s thoughtful critique cuts deeper than many other contemporary critiques. I find much in Professor Stephan’s analysis persuasive. Nevertheless, in my judgment Stephan both overstates and understates the nature of the challenge that global governance poses to American democracy.

One may begin by examining Stephan’s argument against customary international law. Customary international law is the general practice of states

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1. Paul B Stephan, *International Governance and American Democracy*, 1 Chi J Intl L 237 (2000).

accepted as law.² To prove that a norm is customary international law, one must show that almost all states, or at least an identifiable group of states, actually practice this norm. If a particular state expressly objects to the norm during the norm's formation, the state is not bound by it. States are only bound by norms to which they consent, either implicitly or explicitly. In addition, to prove that a general practice is a customary legal norm and not merely a customary practice, one must show that states follow this practice out of a sense of legal obligation or *opinio juris sive necessitatis*.

Stephan points out that courts often rely on the judgment of international legal scholars to determine whether a particular practice is in fact *opinio juris*. Doubtless, the personal biases of legal scholars inform their opinions and may indirectly influence courts. A legal scholar who opposes the death penalty may be inclined to conclude that the reason virtually all industrialized countries have abandoned capital punishment is out of a sense of *opinio juris*. In Stephan's view, applying customary international law in US courts has allowed an intellectual elite to impose its political preferences through the courts on an unwitting nation. I have three responses to this democratic process concern.

First, customary international law does not spring fully formed like Minerva from the minds of legal academics. The international common law process is both more nuanced and more familiar to our legal system. Legal experts often advise courts about the state of the law, and judges regularly consult treatises and law review articles to help them decide cases. Typically, both sides in a legal dispute might present evidence from scholarly authorities. Judges reach their own opinions based upon the weight of the arguments on both sides.

Several mechanisms constrain judicial freedom to decide cases according to principles of customary international law. Courts are held accountable for their decisions by appellate courts, the bar, the legal academy, and ultimately the legislature, which can reverse any judicial interpretation of customary international law by statute. The US Constitution grants Congress the exclusive power to define and punish offenses against the law of nations.³ Congress can decide what customary international law is, or ought to be, in US courts. Courts also defer to the executive in their determinations of customary international law.⁴ Thus, as a practical matter, the executive and legislative branches have at least as large a role as the courts in determining customary international law. Most importantly, customary international

2. Statute of the International Court of Justice, Art 38(1)(b) <<http://www.icj-cij.org/icjwww/basicdocuments/basictext/basicstatute.htm>> (visited Sept 16, 2000).

3. US Const Art I, §§ 8, 10.

4. 1 Restatement (Third) of Foreign Relations Law § 112, comment c (ALI 1987).

law can always be superseded by legislative, executive or judicial action.⁵ When courts reach conclusions that are inconsistent with the political will, Congress has acted to reverse the result.⁶

Second, when one compares customary international law to the common law, one finds that customary international law is no less likely to reflect the democratic consensus than common law does. Judges applying either customary international law or general common law create law informed by their own reading of the relevant precedents and the writings of legal scholars. Stephan argues that customary international law, unlike the common law, does more than merely fill interstices in legislative enactments. In fact, common law does not merely fill gaps in legislation. Historically, common law courts created new law that preceded legislative enactments. By contrast, customary international law is not purely court-made law, because courts derive customary international law from their observation of actual state behavior. If the sovereign objects to a new customary international norm, the sovereign is not bound by it. A common law judge may decide that capital punishment violates some state or federal constitutional principle and strike down a penalty enacted by the legislature. By contrast, a US court interpreting customary international law is unlikely to strike down a capital punishment statute. Even if all other industrialized states insist that the death penalty violates customary international norms, the United States is not bound by the general practice of other states, if it expressly objects. In this sense, customary international law is more deferential to US democracy than common law is.

Third, what US courts interpret and apply as customary international law is often US constitutional law in disguise. In other words, courts derive international norms from the principles of separation of powers and federalism, principles that reflect the unique American experience. For example, the act of state doctrine holds that a US court should not question the validity of a foreign government's acts of state within that government's own territory.⁷ In the past, some US courts have confused the act of state doctrine with customary international law or comity.⁸ More recently,

5. See *The Paquete Habana*, 175 US 677, 700 (1900) (stating that "where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations. . .").

6. For example, following the Supreme Court's opinion in *Banco Nacional de Cuba v Sabbatino*, 376 US 398 (1964), Congress adopted the Hickenlooper Amendment, designed to protect the right of US investors to prompt, adequate and effective compensation in the event of expropriation according to Congress's determination of the applicable customary international norm. Foreign Assistance Act, Hickenlooper Amendment, Pub L 88-633, pt III, § 301(d)(4), 78 Stat 1013 (Oct 7, 1967), codified at 22 USC § 2370(e)(2) (2000).

7. See *Sabbatino*, 376 US 398 (1964) (cited in note 6) (holding that a US court cannot question the validity of a foreign state's expropriation of property within its own territory).

8. See *First National City Bank v Banco Nacional de Cuba*, 406 US 759, 765 (1972) ("The act of state doctrine. . . has its roots, not in the Constitution, but in the notion of comity between independent

however, the Supreme Court has characterized the act of state doctrine as derived from separation of powers principles found in the Constitution.⁹ Indeed, foreign courts rarely apply an equivalent act of state doctrine.¹⁰

Another example of the confusion between customary international law and constitutionally-derived principles arises in connection with the doctrine of international comity. International comity often requires US courts to apply foreign law, defer to the jurisdiction of foreign courts, or enforce foreign judgments. To justify these actions, US courts generally say that they are deferring out of respect for the foreign sovereign. Close examination reveals that no other country justifies its conflicts principles based upon a rule of international comity.¹¹ In fact, Justice Joseph Story introduced into US law the notion of international comity in his *Commentaries on the Conflicts of Law*.¹² Story borrowed the idea from an opinion of Lord Mansfield,¹³ who discovered comity in the writings of an obscure 17th century Dutch jurist, Ulrich Huber. Huber wrote that a court may apply the law of another state out of comity, by which he meant courtesy or protocol.¹⁴ Justice Story reinvented comity as a solution to the conflict between the slave and free states. Applying the principle of comity, Story meant that free states would apply the law of slave states but would not be obligated

sovereigns"); *Underhill v Hernandez*, 168 US 250, 252 (1897) (holding that "[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory"); *Oetjen v Central Leather Co*, 246 US 297, 303–304 (1918) (stating that the act of state doctrine rests upon "the highest considerations of international comity and expediency"). Compare with *W.S. Kirkpatrick & Co v Environmental Tectonics Corp*, 493 US 400 (1990) ("We once viewed the [act of state] doctrine as an expression of international law. . . . We have more recently described it, however, as a consequence of domestic separation of powers. . . .").

9. See, for example, *W.S. Kirkpatrick*, 493 US at 404 (1990) (cited in note 8) (acknowledging that the Court's view of the act of state doctrine has evolved from relying upon customary international law as its source to recognizing that the doctrine is "a consequence of domestic separation of powers"); *First National*, 406 US at 765 (cited in note 8) (reaffirming that the act of state doctrine is intended to prevent the courts from interfering with the "conduct of foreign relations by the political branches of the government"); *Sabbatino*, 376 US at 423 (cited in note 6) (stating that the act of state doctrine has "constitutional underpinnings").
10. Admittedly, the House of Lords in the last twenty years has adopted a limited act of state doctrine in cases of expropriation. See *Buttes Gas & Oil Co v Hammer*, 1982 AC 888 (HL(E)). With rare exception, other foreign courts have not followed suit. See, however, 1 Restatement (Third) of Foreign Relations at § 443, rep n 12 (cited in note 4) (referring to cases where foreign courts have applied the doctrine).
11. See generally Joel R. Paul, *Comity in International Law*, 32 Harv Intl L J 1, 27–44 (1991).
12. Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic* ch II, §§ 29–38 (Hilliard, Gray 1834).
13. See *Somerset v Stewart*, 98 Eng Rep 499 (1772) (holding that an American slave, who initiated process against his master while in England, must be set free under English law).
14. Ulrich Huber, *De Conflictu Legum*, cited and quoted in Ernest G. Lorenzen, *Huber's De Conflictu Legum*, 13 Ill L Rev 375 (1919).

to recognize the property rights of slave owners in conflict with the public policy of the free state.

Story's naïve faith in comity formed the foundation for all of US private international law.¹⁵ Today, courts adhere to international comity both to avoid interference in the conduct of foreign relations by the political branches and to protect the autonomy and justified expectations of private parties to international contracts.¹⁶ None of these purposes is compelled by customary international law.

I presume that Stephan's criticism of customary international law is not aimed at either of these doctrines. He more likely aims to criticize the one aspect of customary international lawmaking in which academics *have* played a significant role: the development of human rights law. Ever since the Second Circuit applied the Alien Tort Claims Act to provide a remedy for egregious human rights violations overseas,¹⁷ human rights advocates have brought claims to US courts bolstered by the testimony and affidavits of US law professors. Perhaps Stephan is correct in his assertion that some of these academics have disproportionately influenced the jurisprudence in this field without reference to any underlying legislation and with only weak evidence of an emerging international customary norm. Even if Stephan is correct, does it threaten US democracy to permit a plaintiff to collect money damages against a foreign official who has committed kidnapping, rape, torture or murder? It is hard to imagine that a majority of Americans or a majority of Congress would disagree with the proposition that torture constitutes a violation of customary international law. US democracy can only be strengthened by US courts defending human rights principles on the basis of customary international norms.

In sum, the claim that the process of making customary international law threatens democracy is not persuasive. But what of Stephan's second claim that the development of new international law threatens the democratic process?

New international institutions like the WTO and the North American Free Trade Agreement often seek to displace domestic laws and regulations that conflict with international norms. For example, the WTO and the General Agreement on Tariffs and Trade ("GATT") dispute settlement panels have ruled that US laws

15. See Paul, 32 Harv Intl L J at 22–24 (cited in note 11).

16. Id at 54–70. See for example, *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc*, 473 US 614 (1985) (enforcing an arbitration clause in an international contract based on concerns of comity and the need to protect the parties' expectations); *The Bremen v Zapata Off-shore Co*, 407 US 1 (1972) (enforcing a choice of forum clause out of respect for foreign courts).

17. See *Filaritiga v Peña-Irala*, 630 F2d 876 (2d Cir 1980) (holding that under the Alien Tort Claims Act, the court has jurisdiction over a Chilean police officer for an alien's tort claims of torture and murder).

protecting sea turtles,¹⁸ dolphins,¹⁹ and clean air,²⁰ and certain US tax laws violate the GATT.²¹ Stephan argues that these new international institutions impose international standards upon the United States, threatening its democracy. Stephan points out that these international institutions are not democratically accountable—they usually operate in secrecy and generally only the executive branch participates in decision-making that may displace congressional authority.

I share Stephan's concern that these international institutions threaten democracy because of their lack of public accountability and secret decision-making, but I disagree with his proposed solution. Stephan recommends that we rely on the fast-track model of legislation in which the executive must submit a trade agreement to Congress for a simple majority vote of both houses before the agreement can take effect. Applying the fast-track procedure, Congress would vote on the agreement in an abbreviated period of time without any amendments, filibusters, or delays. Stephan would extend the fast-track model to non-trade-related international agreements as well.

In my view, rather than solving the problem, the fast-track model lies at its core. It is both the cause and consequence of the slow erosion of congressional power in favor of executive authority in foreign relations. The fast-track model offers the executive an alternative to an Article II treaty, which would require approval by a supermajority of two-thirds of the Senate. If the president does not believe he can command the support of a supermajority of the Senate, he may try to negotiate a fast-track agreement. While it is true that the fast-track model often involves congressional leaders during part of the actual negotiations, it prevents Congress from altering the final product of the negotiations, and it puts pressure on Congress to approve the agreement quickly. By expediting congressional action, the fast-track model often means that there is less time for a thorough public debate that would air all the arguments. Indeed, the executive can use the fast-track to speed an agreement through Congress before public opposition builds. If the president does not have enough congressional support for a fast-track agreement, and he does not need implementing legislation, then he may sign the agreement acting alone as a "sole executive

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18. See World Trade Organization, Report of the Appellate Body, *US—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct 12, 1998).
 19. *US—Restrictions on Imports of Tuna*, DS29/R GATT BISD (unpublished report) (not adopted) (June 16, 1994), printed in 33 ILM 839 (1994).
 20. See World Trade Organization, Report of the Appellate Body, *US—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr 29, 1996).
 21. See World Trade Organization, Report of the Appellate Body, *US—Tax Treatment for "Foreign Sales Corporations,"* WT/DS108/AB/R (Feb 24, 2000).

agreement.” Even without implementing legislation, some sole executive agreements have displaced US state²² and federal law.²³

The fast-track model allows the executive to perform an end-run around the US Senate in the name of expediency. The rhetoric of executive expediency has justified the concentration of authority in the executive branch since the beginning of the Cold War. Arguably, during the Cold War the threat of Soviet aggression and the urgency created by nuclear missiles may have justified allowing the executive to operate in secret without congressional participation. A decade after the end of the Cold War, there is less urgency and more opportunity for public deliberation. In a world in which the Soviet Union does not threaten the United States or its allies, the executive expediency argument does not justify abdicating congressional power to the executive.²⁴

If the Senate were to insist that the president submit international agreements for the Senate’s advice and consent as required by Article II of the Constitution, the Senate would have adequate time and opportunity for a full public debate.²⁵ To obtain a supermajority of senators, the president would have to negotiate an agreement that adequately addressed Senate concerns. If the Senate were dissatisfied with the treaty as negotiated, it could amend the treaty or impose reservations and understandings to clarify the treaty’s terms. The final treaty that would emerge from the Senate would therefore represent a broad consensus of the *demos*. As an added benefit, the United States would more likely honor an agreement approved through this deliberative process.

One strategy for containing executive power in foreign relations is to take seriously the Senate’s power to advise on and consent to treaties. More generally, courts must compel Congress to take responsibility for the exercise of its constitutional powers to regulate foreign commerce and the military. The failure of the courts and Congress to limit executive power is most evident with regard to the war power. Since Congress adopted the War Powers Resolution (“WPR”)²⁶ in 1973, no president has ever notified Congress as required under section 4(a)(1) of the

22. See *United States v Pink*, 315 US 203 (1942) (upholding the Litvinov Assignment of Russian assets to the Federal Government even though it directly conflicted with New York State public policy of not recognizing foreign expropriations without compensation).

23. See *Dames & Moore v Regan*, 453 US 654 (1981) (upholding the Iranian Agreement by barring the right of a US corporation to execute on a default judgment against Iran, even though the suit against Iran in principle was authorized by the Foreign Sovereign Immunities Act).

24. See generally Joel R. Paul, *The Geopolitical Constitution: Executive Expediency and Executive Agreements*, 86 Cal L Rev 671 (1998).

25. Although Paul Stephan has attributed to Laurence Tribe and me the “ingenious idea” of requiring two-thirds of the Senate to give its advice and consent, I cannot take any credit; the framers thought of it first.

26. See 50 USC §§ 1541–1548 (2000).

Resolution before sending US forces into combat.²⁷ Presidents have sent US forces to evacuate persons from South Vietnam during the collapse of Saigon, free a merchant vessel captured by Cambodia, assist the Government of El Salvador during its civil war, maintain peace in Lebanon, invade Grenada and Panama, escort Kuwaiti ships through the Persian Gulf during the Iran-Iraq War, repel Iraq's invasion of Kuwait and its attack on its own nationals, bomb Libya and Serbia, and impose peace on Somalia and Kosovo—all without regard for the WPR. Members of Congress have repeatedly sought to enforce the act in the courts, but the courts have refused to exercise jurisdiction either because they regarded the issue as nonjusticiable or they questioned the standing of members of Congress.²⁸

To restore balance to the Constitution, the courts should exercise jurisdiction over any claim arising from the president's failure to invoke the WPR. By forcing the president to provide the required notice to Congress, the courts would compel Congress to decide within sixty days whether to authorize the use of force. Whether Congress approves or disapproves of the president's action, Congress should be obliged to say so. The present situation allows Congress to take the course of least resistance by doing nothing. At present, if the military exercise succeeds, Congress can congratulate the president; if it fails, Congress can avoid the blame. But democracy suffers when Congress does not make a decision, because the voters cannot hold their representatives accountable for the use of military force. Moreover, when Congress avoids taking responsibility for foreign commitments, US foreign policy suffers. While Congress waits to see which way popular opinion is swinging, the United States appears weak and irresolute. US allies cannot depend upon its foreign commitments if the executive is acting without the public support of Congress. Thus, courts would strengthen our democracy and our foreign policy by imposing upon Congress the duty to decide on the record whether to support the president's use of military forces. Enforcing the WPR is one illustration of how US courts could correct the executive's encroachment on congressional foreign relations power.

Another area in which the executive's power has undermined constitutional limitations concerns the use of executive agreements to settle outstanding property claims against foreign governments. For example, when President Carter negotiated a sole executive agreement for the release of US hostages from Iran, he agreed to bar claims in US courts against the Government of Iran by US nationals and companies. Such claims had been expressly authorized by Congress under the Foreign Sovereign

27. 50 USC § 1543(a)(1) provides that the president must notify Congress when military forces are sent into "hostilities or situations where imminent involvement in hostilities is clearly indicated by the circumstances." The president must terminate the use of armed forces within sixty days of giving notice, unless the president obtains congressional approval or obtains an extension. See 50 USC § 1544(b).

28. See, for example, *Dellums v Bush*, 752 F Supp 1141 (D DC 1990); *Lowry v Reagan*, 676 F Supp 333 (D DC 1987); *Crockett v Reagan*, 558 F Supp 893 (D DC 1982).

Immunities Act. In this case, the president unilaterally denied US nationals their due process rights, effectively taking property rights without compensation. The Supreme Court sustained President Carter's executive agreement, reasoning that since Congress had consented to some claims settlement agreements in the past and had not objected in this case, Congress had acquiesced in the president's action.²⁹ If congressional silence can be read as acquiescence, then the president needs only enough votes to sustain a veto in order to exercise foreign relations powers without Congress. To respect congressional power over foreign relations, the courts should refuse to give domestic effect to sole executive agreements that purport to regulate commerce or private assets without congressional authority.³⁰

Paul Stephan has raised important questions that cannot be addressed fully in this brief response, but I do not agree with his characterization of the threat to democratic process posed by customary international law or international institutions. In my view, the real threat to democracy is posed not by international law or institutions per se, but by the concentration of executive power, which the framers wisely anticipated and sought to deter by the checks and balances that are the hallmark of the US Constitution.

29. See *Dames & Moore*, 453 US at 686-688 (cited in note 23).

30. Another example of the use of sole executive agreements to override domestic law concerns the GATT. President Truman signed the GATT as a sole executive agreement in 1947. Until it was replaced in 1994, the GATT was never submitted for congressional approval. Yet US courts repeatedly held that the GATT was domestically effective and displaced conflicting state statutes. See, for example, *Hawaii v Ho*, 41 Hawaii 565 (1957) (holding that a requirement that grocers must post notice if they sell foreign eggs violated GATT); *Baldwin-Lima-Hamilton Corp v Superior Court*, 208 Cal App 2d 803 (Cal Ct App 1962) (holding that San Francisco's domestic manufacture requirement for electrical equipment violated GATT).

