Crystallising the International Rule of Law: Trump's Accidental Contribution to International Law

Dr. Clare Frances Moran

There is a significant amount of political and legal anxiety surrounding the presidency of Donald Trump, particularly from those who view the world from a globalist or internationalist perspective.[1] His initial executive orders have indicated a protectionist and nativist approach to international law: the infamous order to restrict entry to the U.S. by nationals from select countries received widespread coverage in the media. Others, such as the nominal withdrawal from the Trans-Pacific Partnership[2] and the undertaking to build a wall at the U.S.-Mexico border,[3] are indications of intention rather than decisions with wide-reaching consequences. His policies on international relations are viewed here as expressions of intention without concrete effect: they appear as chaotic, political statements, rather than efficiently executed decisions set to achieve specific goals. Many authors have already indicated his Presidency signals the beginning of the corrosion of legal norms,[4] but there is limited evidence to support the idea that Trump's Presidency will have any significant effect. Conversely, his edicts have provided a timely lesson in the limitations of the power of the President.[5]

The U.S. courts have wasted no time in unanimously rejecting his power

1. *See Trump's environmental policy changes threaten global action*, 507 ENDS 6 (2017); Alex M. Parker, *United States: Trump's election could change international taxes overnight*, 25 TMTPR 824–25 (2016); Richard Cornes, *The Hard Work of Democracy*, PUB. L.: THE CONST. & ADMIN. L. OF THE COMMONWEALTH, Jan. 2017, at 150; Adam Liptak, *Donald Trump could threaten U.S. rule of law, scholars say*, N. Y. TIMES (June 3, 2016), https://www.nytimes.com/2016/06/04/us/politics/donald-trump-constitution-power.html [http://perma.cc/LB5R-QEY5].

2. Memorandum from President Donald J. Trump on Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement (Jan. 23, 2017), https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific [http://perma.cc/LG6P-XQBR].

3. Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Jan. 25, 2017).

4. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan 27, 2017).

5. Monica Hakimi, *International Law in the Age of Trump*, EJIL TALK! (Feb. 28, 2017), https://www.ejiltalk.org/international-law-in-the-age-of-trump/ [http://perma.cc/J2LS-PWDR]; Robert Hennelly, *The System is Failing: Donald Trump's Rise and the Erosion of the Rule of Law*, SALON (June 13, 2016), http://www.salon.com/2016/06/13/the_system_is_failing_donald_trumps_rise_and_the_erosion_of_the_rule_of_law/ [http://perma.cc/XV73-77JY]; Clare Foran, *An Erosion of Democratic Norms in America*, THE ATLANTIC (Nov. 22, 2016), https://www.theatlantic.com/politics/archive/2016/11/donald-trump-democratic-norms/508469/ [http://perma.cc/C9WS-3A96]; Christoph Scheuermann, *Donald Trump and the Erosion of American Democracy*, SPIEGEL ONLINE (Apr. 28, 2017), http://www.spiegel.de/international/world/trump-100-days-the-erosion-of-american-democracy-a-1145294.html [http://perma.cc/2T24-72DH].

to violate international law,[6] albeit basing their reasoning on the Constitution. In this way, President Trump's power, and indeed, the power of any President, is clearly and firmly restrained by the application of the Constitution by the courts. Since the Constitution reflects many international norms, including the right of due process,[7] certain elements of international law may be protected by the enforcement of constitutional provisions by the U.S. courts. Indeed, this enforcement may be a means of guaranteeing the enforcement of international norms at the domestic level,[8] and preventing the erosion of specific international norms. Consequently, this presidency may demonstrate the usefulness of domestic courts in securing internationally-respected norms and identifying something of a "floor of rights."[9] In the international sphere, this floor would be regarded as the international rule of law; a rule which cannot be violated by any actor, regardless of their power.

Donald Trump's current approach takes a nativist and protectionist view of the world; his first speech to Congress was delivered without reference to internationalism[10] and focused instead on the rebuilding of domestic industries, without concern for environmental protections. His current approach, as noted above, does not show a high regard for international law and for the current global order. This raises the interesting question of the distance between political rhetoric and political power, which can result in legally binding decisions.[11] Consequently, this work will investigate the powers the President has, the effect he may have on the domestic system, and the impact he could have at the international level. Effectively, this work tackles the question of what effect Trump's actions, as well as his words,[12] can have on the international system, particularly as the office of President is often regarded as the most powerful in the world.[13]

---

6. Washington v. Trump, No. 17-35105, 2017 WL 469608 (9th Cir. Feb. 4, 2017).

7. U.S. CONST. amend. V.

8. Armin von Bogdandy, Matthias Goldmann, & Ingo Venzke, *From Public International to International Public Law: Translating World Public Opinion into International Public Authority*, 28 EUR. J. INT'L L. 115, 115–145 (2017); Laurence Boisson de Chazournes, *Plurality in the Fabric of International Courts and Tribunals: the Threads of a Managerial Approach*, 28 EUR. J. INT'L L. 13, 13–72 (2017).

9. Coined originally as a labor law term by Lord Wedderburn. KENNETH WEDDERBURN, THE WORKER AND THE LAW, (Penguin, 3d ed. 1986).

10. Donald J. Trump, *Inaugural Address: Trump's Full Speech*, CNN (Jan. 20, 2017), http://www.cnn.com/2017/01/20/politics/trump-inaugural-address/index.html [http://perma.cc/GB8M-3P64].

11. See JULIAN KU & JOHN YOO, TAMING GLOBALIZATION: INTERNATIONAL LAW, THE U.S. CONSTITUTION, AND THE NEW WORLD ORDER 139 et seq. (OUP, 2012) for a discussion of the International Economic Emergency Powers Act, which illustrates this point.

12. For a discussion in the context of Presidential words in the context of the *Avena* case, see L. Kirgis, *International Law in the American Courts – The United States Supreme Court Declines to Enforce the ICJ's Avena Judgment Relating to a U.S. Obligation under the Convention on Consular Relations*, 9 *GERMAN L. J.* 619 (2008); John King Gamble & Christine M. Giuliano, *Case Comment: U.S. Supreme Court,* Medellin v. Texas*: More than an Assiduous Building Inspector?*, 22 LEIDEN J. OF INT'L L. 150, 150–69 (2009).

13. *See* BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC (Belknap Press eds., 2013).

This Article will explore the impact of powerful domestic systems, using the United States as an example, on the international rule of law. The idea is to explore the effect that presidential power has on the international system and the constitutional restraints which exist on presidential power. This will also involve a discussion of the significance of Congress and the Constitution, and specific focus will be rendered on the role of the Supreme Court will be debated. As the final interpreter of U.S. Constitutional norms,[14] the Supreme Court has a significant amount of power, and thus may have a significant impact at the international level. There is a clear link between the domestic and international system, but this will be explored in the context of the impact that domestic systems have on international law. The way in which the U.S. Constitution reflects international law, guaranteeing certain norms at the domestic level, will be discussed, as well as the importance of democratic domestic systems with solid constitutional protections for international law. This work will conclude by postulating how Trump's Presidency may crystallize the international rule of law, furthering its development by the U.S. courts.

Although powerful from an international perspective, there are many domestic restraints on the power of the U.S. President in his acts at the international level. Indeed, particularly from an external perspective, the President is significantly restrained by the U.S. Constitution[15] and, consequently, the U.S. Supreme Court.[16] The Constitution lays out the powers of Congress and specifically, its areas of responsibility, which extend over a great number of areas. The President's constitutional responsibilities, however, are much more circumscribed; a point acknowledged by President Truman, who noted the gap between the expectations and reality of the office.[17] The President's power to act on the international plane relate to his legal, constitutional responsibilities and his power as the central representative of the U.S., in that he can make policy and undertake diplomatic acts. The latter form of his power is much greater, but the legal effect of that power is debatable. This section will look in detail at the restraints on Presidential power, including the power of the President to veto legislation and to make executive orders, which affect international law and international relations.

Although the constitutional basis for government in the U.S. is that the President and Congress work harmoniously together, the constitutional provisions relating to international affairs separate the roles out to deal with

14. *See* Nixon v. United States, 506 U.S. 224 (1993); Charles M. Lamb and Lisa K. Parshall, United States v. Nixon *Revisited: A Case Study in Supreme Court Decision-making*, 58 U. PITT. L. REV. 71 (1996).

15. Article II of the United States Constitution lays out the President's powers; Article I notes the extensive powers of Congress.

16. *See Nixon*, 506 U.S. at 237 (wherein the United States Supreme Court noted its "ultimate authority" to interpret the Constitution); Louis Henkin, *Executive Privilege: Mr. Nixon Loses but the Presidency Largely Prevails*, 22 UCLA L. REV. 40 (1974).

17. RICHARD NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS (Free Press 1991).

certain issues. The President should make treaties with the backing of the Senate[18] and is not capable of unilaterally agreeing to a treaty. Henkin notes that federal authority for foreign affairs is given to the President via the U.S. Constitution[19] because of the duty to form a "more perfect union." This also finds persuasive authority in the constitutional responsibility of the President to exercise executive power, without any explicit limitation.[20] Henkin then goes on to note that the power to form treaties is limited by the requirement to refer such treaties to the Senate and that treaties can be placed in "cold storage" by the Senate; rather than sending the treaty to its grave, they can prevaricate through inaction.[21]

Although Congress has the power to restrain the President from ratifying treaties, international law is not simply formed through treaties. The daily exercise of political power and political discussion is within the gift of the President, and, in the words of Henkin, "the President is always in session."[22] Thus, executive orders and executive agreements can be made by the President to undertake international obligations, which, although do not emanate from the U.S. Constitution, may commit the U.S. to international obligations. Thus, the President may make executive agreements with or without the backing of Congress.[23] A recent example of the negative exercise of such power was the decision to withdraw U.S. agreement from the Paris Agreement,[24] which was possible because of the form of the U.S.'s agreement to the text. As the agreement took the form of a President executive agreement, the President could withdraw his assent without Congressional approval. Although there is a requirement to submit any international agreements to Congress within sixty days of agreement,[25] compliance with this rule is not guaranteed.[26] The power to act unilaterally has been approved by the U.S. Supreme Court,[27] which demonstrates the significant amount of power that the Supreme Court has in relation to the exercise of Presidential power.

The continued reverence, veneration[28] even, of constitutional norms

18. U.S. CONST. art. II, § 2.
19. Louis Henkin, *Foreign Affairs and the Constitution*, 66 FOREIGN AFFAIRS 284, 288 (1987).
20. U.S. CONST. art. II, § 1.
21. Louis Henkin, *Treaties in a Constitutional Democracy*, 10 MICH. J. INT'L L. 406, 411 (1989).
22. Louis Henkin, *A More Effective System for Foreign Relations: The Constitutional Framework*, 61 VA. L. REV. 751, 755 (1975).
23. Daniel Bodansky, *Legal options for U.S. Acceptance of a new climate change agreement*, CTR. FOR CLIMATE AND ENERGY SOLUTIONS (2015); *see also* Joe Morehead, *Treaties and Executive Agreements*, 55 THE SERIALS LIBRARIAN 615 (2008).
24. Michael D. Shear, *Trump Will Withdraw U.S. from Paris Climate Agreement*, N.Y. TIMES (June 1, 2017), https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html [http://perma.cc/B5R4-NSYQ].
25. 1 U.S.C. § 112b.
26. *See* Kiki Caruson & Victoria A. Farrar-Myers, *Promoting the President's Foreign Policy Agenda: Presidential Use of Executive Agreements as Policy Vehicles,* 60 POL. RES. Q. 631, 631–44 (2007).
27. *See Dames & Moore v. Regan*, 453 U.S. 654 (1981).
28. Kevin Cope, *Congress's International Legal Discourse*, 113 MICH. L. REV. 1115, 1141 (2015).

ignores the limitations generated by an originalist reading of the U.S. Constitution: such a perspective pays little heed to the distance between the drafting of the U.S. Constitution and the gradual development of constitutional tools, such as executive agreements, which are not mentioned in the U.S. Constitution. Thus, the President is restrained by Congress to a certain extent, but only insofar as the U.S. Constitution dictates. The restraints, as interpreted by the Supreme Court, are a more significant constraint on Presidential power: as confirmed in *Nixon v. United States*,[29] the Supreme Court is the "ultimate authority" on the interpretation of constitutional norms.[30] As *Marbury v. Madison*[31] demonstrates, the Supreme Court also considers itself capable of declaring legislative acts of Congress void. This may happen where the acts violate constitutional norms or are "repugnant" to the written constitution, which is held as the defined limits of domestic legislative power.[32] The Supreme Court has also prevented the President from imposing international law on individual U.S. states,[33] placing its power in relation to international law above that of the President's.

It is perhaps worth noting prior to moving on to the next part of the argument that similar powers exist in other mature democracies. As an illustration, the Prime Minister of the United Kingdom has the power to enter, and withdraw from, international agreements on a unilateral basis.[34] The sole caveat is that there must be Parliamentary backing for any such action, but the extent to which this ought to be proved is limited.[35] In other words, political pressure is the only "constitutional" requirement that would restrain the Prime Minister from acting. A recent example of such a restraint was the Prime Minister's intention to trigger article 50, to signal the UK's intent to leave the European Union ("EU"), without a parliamentary vote.[36] Despite a referendum in favor of leaving the EU, the UK Supreme Court decreed that a parliamentary vote would be required in advance of triggering article 50.[37] It is also worth noting the parallel importance in both the UK and U.S. of their respective Supreme Courts, and the restraints both place on modern executive power.

The role of the Supreme Court in constraining Presidential power should not be underestimated; as the guardian of the U.S. Constitution, it plays a

29. Nixon v. United States 506 U.S. 224 (1993).
30. *See id.*
31. 5 U.S. 137 (1803).
32. *Id.* at 178.
33. Missouri v. Holland, 252 U.S. 416 (1920). *See* Peter Spiro, *Resurrecting* Missouri v. Holland, 73 MO. L. R. 1029 (2008).
34. See HILAIRE BARNETT, CONSTITUTIONAL AND ADMINISTRATIVE LAW (Routledge, 12th ed. 2017) for a discussion of the prerogative powers of the UK Prime Minister.
35. See Anthony W Bradley, Keith D Ewing and Christopher J Knight, Constitutional and administrative law (Pearson, 16th ed. 2015) at 252-9 and James Grant, *Prerogative, parliament and creative constitutional adjudication: reflections on* Miller, 28 K.L.J. 35 (2017).
36. R (on the application of Miller and another) (Respondents) v. Secretary of State for Exiting the European Union (Appellant) [2017] UKSC 5.
37. *Id.*

significant part in ensuring the rule of law is secure in the United States. The issue then arises of whether the United States Supreme Court is limited in only being able to interpret constitutional norms, or whether it may incorporate international law into its rulings. This is particularly significant where we are beyond Brierly's notion of domestic courts "comparatively rarely" dealing with international norms.[38] In fact, we now arrive at a point where domestic courts can interpret and develop norms of international law, and may in fact be the primary defenders of the international law. The normative choices[39] that the U.S. Supreme Court is called upon to make will be dealt with later in this piece, but the significance of the Supreme Court in guaranteeing and enforcing constitutional norms, beyond the power of both Congress and the President has been proved. The relationship between such a domestic system, rooted in democratic constitutional principles, and international law shall be investigated next.

The branches of government noted above identify the U.S. as a democratic system, and one which is active in the international sphere. The written constitution of the U.S. was drafted to secure its international position and to appeal to other countries so as to legitimize its existence at the beginning of the Republic.[40] It is thus evident that the Republic existed prior to the U.S. Constitution, but that the Constitution was required to further the validity of the Republic's existence. As Professor Himsworth noted in 1996, the global order which existed then, and which persists today, continues to rely on nation states,[41] all of which require constitutional principles in order to function. In his work, Himsworth poses the question of whether constitutions require nation states.[42] In partial answer to his question, we have not yet been able to divorce constitutionalism from the nation state and consequently, we still require states to create and enforce constitutions. Even in the cases of those who promote and endorse the idea of "global constitutionalism,"[43] recourse to the nation state is required for the formation of treaties, the identification of customary international law, and the enforcement of human rights, seen by many as the lynchpin of a constitutional order.[44] The building and the enforcement of

38. Antonios Tzanakopoulos & Christian J. Tams, *Introduction: Domestic Courts as Agents of Development of International Law*, 26 LEIDEN J. OF INT'L L. 531, 533 (2013) (quoting J. L. Brierly, *International Law in England*, 51 L. Q. REV. 24, 25 (1935)).

39. Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 Duke L. J. 979 (1993).

40. Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 47. (2004).

41. C.M.G. Himsworth, *In a State No Longer: The End of Constitutionalism?*, PUB. L. 639–660 (1996).

42. *Id.*

43. Erika De Wet, *The International Constitutional Order*, 55 INT'L COMP. L. Q. 51 (2006); Michel Rosenfeld, *Is Global Constitutionalism Meaningful or Desirable?*, 25 EUR. J. INT'L L. 177 (2014).

44. *See* Robert McCorquodale, *Defining the International Rule of Law: Defying Gravity?* 65 INT'L COMP. L. Q. 277 (2016); Samantha Besson, *Sovereignty, International Law and Democracy*, 22 EUR. J. INT'L L. 373 (2011); Kenneth J. Keith, *John Dugard Lecture - The International Rule of Law (2015)*, 28 LEIDEN J. OF INT'L L. 403 (2015); THOMAS BINGHAM, THE RULE OF LAW (Penguin, 2010);

norms such as human rights are entirely dependent on their execution and enforcement by domestic courts.[45] In this section, the link between domestic constitutional law and international law will be explored on the basis that international law relies heavily on the constitutional structure created by states. The idea of an "open" constitution will be entertained, deconstructing whether the idea of appealing to other countries to recognize the State is an inherent part of certain constitutions.[46]

The link between domestic law and international law is not a preposterous notion in international or even domestic law for the United States; the connection between the two forms of law has been constitutionally recognized for decades. The central question is not whether international law is part of federal law, but rather which forms of international law ought to be considered part of federal law. The U.S. Constitution notes the importance of treaties as part of the law of the United States,[47] in which treaties are noted as a source of law which can be applied and adjudicated upon by the Supreme Court. This clause has often been referred to as the "Supremacy Clause" highlighting the sources of law that the Supreme Court may apply and holding it as the Supreme Court of the United States. Furthermore, authors such as Henkin have held that The Paquete Habana[48] case is authority for the proposition that international law is part of U.S. law. He maintains that the only issue is whether customary international law should also be considered part of U.S. federal law.[49] Other authors concur that international law is part of federal law,[50] and rely upon the "Charming Betsy"[51] canon to elevate international law norms above those of state norms. The position of treaties in the U.S. Constitution equally supports the idea of the constitutionally-regarded importance of international law.[52] As derived from constitutional norms, international legal rules appear to have an elevated position in U.S. federal law, as part of the constitutional provisions.

The significance of the Supreme Court in affirming the above argument is clear: both cases highlight the importance of international law and the way in which it supports the adoption of international norms at the domestic level. However, it should be noted that both cases are not modern, and that other theories demonstrate more effectively the way in which international law norms

---

Joseph Raz, *The Authority of Law: Essays on Law and Morality*, OXFORD U. PRESS (1979).

45. *See, e.g.*, International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171. Regional instruments, such as ECHR, have their own courts and enforcement mechanisms, but the lack of executive backing can mean that rights violations remain without redress.

46. Koh, *supra* note 40.

47. U.S. CONST. art. III, § 2.

48. 175 U.S. 677 (1900).

49. Louis Henkin, *International Law as Law in the United States*, 82 Mich. L. Rev. 1555, 1555–56 (1984).

50. *See* Henkin, *supra* note 49; Cope, *supra* note 28.

51. *See* Curtis A. Bradley, *The 'Charming Betsy' Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 *GEO. L. J.* 479 (1998).

52. U.S. CONST. art. III, § 2.

connect to the domestic system.[53] The Supreme Court continues to play a role through suffusing international norms with its reasoning, rather than open agreement via treaties and other international agreements. The use of international norms as part of the normative choices made by the Supreme Court may demonstrate a significant degree of what Louis Henkin notes as "slippage"[54] and Harold Hongju Koh refers to as internalization.[55]

Henkin's idea is based on the notion that international law pervades domestic systems and that the Senate cannot maintain a cast-iron grip on the interpretation of norms.[56] When the Supreme Court begins to interpret international law, it may do so in a way which is vastly different from that envisaged by Senate. Taking this idea further, the use of international law in domestic courts makes the judiciary more familiar with international legal principles, which inescapably affects their reasoning: McGinnis's idea of a complete and clear separation between the domestic constitutional system and the international system presumes a barrier between the two which does not exist.[57] Spiro equally supports the idea that international legal norms need not be wholly adopted by the domestic to have effect, and that compliance may be "secured by other means."[58] This indirect effect is most likely to be political or economic, but the increasing relevance of international legal norms in areas such as human rights may mean that that only precedents to persuade and exemplify the application of rules in particular situations are those from foreign and international sources. The "other means" may be the only aids to interpretation available, rather than an economic imperative.

Koh argues that international law forms part of the domestic system's norms because of the way in which international legal norms operate.[59] He argues that norms are internalized through interaction and interpretation in three specific areas: social, political, and legal.[60] The social aspect of internalization, according to Koh, relates to the norm acquiring "public legitimacy" and achieves widespread adoption.[61] The political internalization occurs when the political elites adopt the norm and accept its use,[62] while the legal internalization relates to the legal use of the norm, transforming the norm into a domestic legal rule through means such as executive action or judicial

53. *See* Andrea Bianchi, *International Law Theories: An Inquiry Into Different Ways of Thinking*, OXFORD U. PRESS (2016).
54. Henkin, *supra* note 21, at 415.
55. Harold Hongju Koh, *1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1999).
56. *See* Henkin, *supra* note 21.
57. John McGinnis, *Contemporary Foreign and International Law in Constitutional Construction*, 69 ALB. L. REV. 801, 808 (2006).
58. Spiro, *supra* note 33, at 1040.
59. Koh, *supra* note 55, at 726.
60. *Id.* at 626.
61. *Id.* at 642.
62. *Id.*

interpretation.[63] Through these interactions and subsequent need for interpretation of norms, these norms then have a domestic impact through internalization.[64] This could happen through Presidential action and, in fact, arguably the President would have the greatest potential to internalize international norms. As argued by Johnstone, the exercise of soft power has the potential to internalize norms through the exchange and acceptance of different values.[65] The exercise of soft power by the President could internalize and accept norms, but not in an effective, or legally binding, fashion. The internalization of norms by the Supreme Court, however, makes the norms part of the domestic system and raises a persuasive argument for the continual application of international norms at the domestic level.

Thus, international law relies upon the domestic constitutional order to become part of the domestic legal system: expressly, through the ratification of treaties and subsequent internalization of the norms, or through the influence of customary international law, which could be internalized. However, the necessity of one system to another is made possible through the drafting of what could be described as an "open" constitution: one which permits reference to other systems and forms of law. The U.S. Constitution is more open than many others, with its explicit reference to the supremacy of treaty law over other types of law, as discussed above. Koh argues that the reason for this can be traced back to the timing of the U.S. Constitution, in which the "fledgling" U.S. sought to appeal to other countries to recognize it as an independent entity.[66] The openness towards other countries is furthered by Martin's thesis that the U.S. Constitution is, in fact, a treaty.[67] He argues that the U.S. Constitution is a treaty among U.S. states and should be considered international law.[68] The logical conclusion to this perspective is that international law can then be safely and openly internalized in domestic law on account of the fact that the U.S. Constitution makes it directly part of domestic law, since states have accepted the U.S. Constitution. Even writers such as McGinnis and Somin struggle to contend with this argument and are limited to stating that only customary international law should not be considered directly part of U.S. law.[69] However, the notion of the U.S. Constitution as a treaty disregards the reliance that international law has on a domestic constitutional order. By ignoring the importance of the domestic order created by governments and enforced by domestic courts, the international order is unified entirely with the domestic

63. *Id.*
64. *Id.*
65. Ian Johnstone, *US-UN Relations After Iraq: The End of the World (Order) as We Know It?*, 15 EUR. J. INT'L L. 813 (2004).
66. Koh, *supra* note 40.
67. Francisco Forrest Martin, *The Constitution as Treaty*, CAMBRIDGE U. PRESS (2007).
68. *Id.*
69. John McGinnis & Ilya Somin, *Should International Law be Part of Our Law?*, 59 STAN. L. REV. 1175, 1247 (2007).

system. Although there is overlap, this is clearly not an accurate depiction of the international system as it operates. The U.S. Constitution's appeal to the international community for recognition is only possible because the state existed outside the international order and sought recognition in order to become part of it. Recognition would be a key part of accessing rights internationally as a state, but the state machinery and constitutional operation would be required in order to secure that recognition. A full discussion of self-determination is out of the scope of this work, but it is worth highlighting that the domestic system must exist for the international system to function.

A good way of demonstrating the importance of this is the concept in international law of complementarity, exemplified most clearly through the approach of the International Criminal Court. Via the Rome Statute, the International Criminal Court pushes international responsibility back to the nation state by requiring the state to prosecute and punish criminal offences.[70] Rather than the International Criminal Court being the central organ for enforcement, the state must take primary responsibility for the prosecution and punishment of serious violations of international criminal law.[71] The International Criminal Court will not undertake prosecution, unless the nation state is "unwilling or unable,"[72] placing the nation state at the center of the system for enforcing international criminal law. Although the ICC is a separate institution from the domestic system, and is perhaps one of the few examples of international law functioning without ongoing state support, the significance of its recourse to the state machinery for enforcement should not be underestimated.

The linkage between nation states and international law endures and there is a degree of reliance on state machinery and constitutional law for the continuation of the international order. Such an approach undermines Spiro's argument that sovereignty is in its twilight;[73] his approach is only defensible from the perspective that any enduring division between international law and domestic law is fading, rather than the interpretation that the sovereignty of nation states is dying. The idea that the individual states' constitutional order will not endure is undeniable, as there is currently no structure that international law can use to supplant that of state constitutional machinery. Consequently, a hard, impermeable sovereignty has arguably not existed since the Second World War, or only exists in isolationist states, but there remains a requirement for a domestic system until international structures can be built or development to bridge the gap. Any notion posited by President Trump that an isolationist

70. Article 1, Rome Statute of the International Criminal Court 1998.

71. Federica Gioia, *State Sovereignty, Jurisdiction, and "Modern" International Law: The Principle of Complementarity in the International Criminal Court*, 19 LEIDEN J. OF INT'L L. 1095 (2006).

72. Article 17, Rome Statute of the International Criminal Court 1998.

73. Peter J. Spiro, *Sovereigntism's Twilight*, 31 BERKELEY J. INT'L L. 307 (2013).

policy will operate with the degree of success he would wish is overly optimistic, at best, unless he begins to deconstruct the domestic system first. This Part of the work will look at the idea of global constitutionalism and iterate the argument that the international system relies upon the domestic system for the continued development of the international order.

A functioning and effective international system, with a reliable rule of law, is wholly dependent on the domestic system in order to operate successfully. The basis of the rule of law has been held by several authors to reflect clarity and consistency of the law.[74] Bingham's account, in particular, noted the centrality of human rights and equality before the law as the significant elements of a rule of law, and writers viewing the idea of the rule of law from an international perspective endorse the importance of human rights as part of a modern conception of the rule of law.[75] Reliance on clarity and consistency as the sole defining characteristics of a rule of law is considered to be overly simplistic, and so human rights is a central part to a rule of law. The connection between the domestic systems is augmented by the increased importance of human rights for an enduring rule of law: As argued by Kleinlein, international law depends on respect for human rights at the domestic level to ensure the same respect for rights at the international level.[76]

Furthermore, the rule of law requires courts to ensure its enforcement.[77] Domestic courts are best placed to ensure that the rule of law is respected and that the values of the international community are enforced.[78] Indeed, d'Aspremont argues that the global order rests on global values[79] and for the continuation of that order and of those values, a court must uphold them.[80] Constitutional law is a requirement for the continuation of the international order. It should be noted at this juncture that it is not any domestic system which would support the international order, but rather democratic systems with respect for human rights. International law is entirely dependent on constitutional domestic protections for its continuation, and a failure of domestic systems would lead to the eventual failure of the international human rights system. This concept is based upon the idea of internalization, enunciated by Koh, in part, but also based on the acknowledged contribution of domestic systems to the formation and endurance of customary international law norms. Although McGinnis's fears were of the incorporation of "raw"

74. Bingham, *supra* note 44; Raz, *supra* note 44.
75. McCorquodale, *supra* note 44; Besson, *supra* note 44; Keith, *supra* note 44.
76. Thomas Kleinlein, *On Holism, Pluralism, and Democracy: Approaches to Constitutionalism Beyond the State*, 21 EUR. J. INT'L L. 1075 (2010).
77. Bingham, *supra* note 44.
78. *Id.*
79. *See* Jean d'Aspremont, *The Foundations of the International Legal Order*, 18 FINNISH YEARBOOK INT'L L. 219 (2009). S*ee also* Johannes Gerald Van Mulligen, *Global Constitutionalism and the Objective Purport of the International Legal Order*, 24 LEIDEN J. OF INT'L L. 277 (2011).
80. *See* d'Aspremont, *supra* note 79.

international law in the domestic U.S. system,[81] the international system is reliant on democratic domestic system to avoid autocratic norms and the abuse of human rights becoming the default customary position. It is a distant and unlikely possibility, but highlighting that possibility demonstrates the role that democratic domestic systems play in the international system.

Because of this, it is necessary that there is a continuation of democracy at the domestic level to develop resilience in international legal norms. In this way, American exceptionalism is not really such an obstruction for the international system. Politically, exceptionalism is almost a required continuation of policy for any U.S. President and the Congressional lawmakers, but respect for human rights in the U.S. Constitution prevents any significant impact from being made at the international level. In cases such as *Hamdi v. Rumsfeld*[82] and *Boumediene v. Bush*,[83] a rejection of international law norms made little difference where domestic norms, which protect individual rights, were used instead. In Kumm's view, this is because the international system stabilizes the domestic system;[84] these cases demonstrate that the domestic norms were not only available, but applied satisfactorily by the Supreme Court. This domestic jurisprudence strengthened international law, rather than enshrining exceptionalism in international law,[85] and also provides a useful example of the political expediency, rather than the concrete effect, of American exceptionalism.

The independent interpretation of the U.S. Constitution by the U.S. Supreme Court demonstrates the way in which American exceptionalism does not have the effect of undermining the international system despite the power that the U.S. wields at the international level. Although there is undoubtedly comfort in constitutional norms, where these reflect international norms, the international system is strengthened. The U.S. Supreme Court has the power to make normative choices about the rules it applies, but Ku and Yoo[86] argue that the U.S. Constitution does not permit the Supreme Court to look to international law and embed such norms in its judgments unless these have already been internalized by Congress or the President.[87] Ku and Yoo's work highlights the similarity of U.S. constitutional norms and international legal norms, and indicates that the choices the Supreme Court should make should be predicated on internalized international law or constitutional norms. However, they neglect the idea that the U.S. Constitution reflects much of

81. John McGinnis, *The Comparative Disadvantage of Customary International Law*, 30 HARV. J.L. & PUB. POL'Y 7 (2007).
82. 542 U.S. 507 (2004).
83. 553 U.S. 723 (2008).
84. Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT'L L. 907 (2004).
85. Fleur Johns, *Guantanamo Bay and the Annihilation of the Exception*, 16 EUR. J. INT'L L. 613 (2006).
86. Ku & Yoo, *supra* note 11.
87. *Id.*

international law norms. Their argument also stands on the premise that the separation between international law and constitutional law should be maintained as separate on account of the democratic deficit in international law: they view the incorporation of self-executing treaties to U.S. law as a constitutional betrayal, as the Constitution should function without input from other countries.[88] This disregards the idea that a strong domestic system supports the international system effectively, rather than the reverse position undermining the domestic system. As Cope has noted, siding with international law is politically unpopular,[89] and thus constitutional norms are the typical recourse for a court such as the Supreme Court of the United States.

The existence of domestic constitutional orders and democracies is required for the rule of law, and a strong domestic system enhances the international rule of law. Because of this, the anxiety of those who view the world with internationalist eyes is unwarranted thus far. Nativists, such as Trump, fondly mention the U.S. Constitution with pride and a sense of ownership that would be notably absent in reference to global affairs.[90] Koh notes that this preference is not restricted to the Presidency and, indeed, the Supreme Court appear to prefer to root their reasoning in domestic constitutional norms.[91] However, it is such a nativist perspective that ought to be more aware of Trump's intentions than the internationalists of the world. International law is reasonably safe and indeed strengthened by Trump's acts, while the domestic institutions may be at greater risk from his actions. There are innumerable possibilities which could result from Trump's future executive orders and his continued focus on the travel ban, but there is a limit to their effect in international law, unless he decides to make good on his promise to undermine the "archaic" constitutional provisions he views as obstructive to efficient government.[92] The possibilities outlined below are the damage to the domestic constitutional system his regime may do, and the effect this could have on the U.S.'s position in the international system.

In an interview with CNN in April 2017, Trump stated:

> You look at the rules of the Senate, even the rules of the House—but the rules of the Senate and some of the things you have to go through—it's really a bad thing for the country, in my opinion. They're archaic rules. And maybe at some point we're going to have to take those rules on, because, for the good of the nation, things are going to have to be different.[93]

88. *Id.*
89. Cope, *supra* note 28.
90. Trump, *supra* note 10.
91. Boumediene v. Bush, 553 U.S. 723 (2008).
92. Martha McCallum, *President Trump Reflects on His First 100 Days*, FOX NEWS (Apr. 28, 2017), http://www.foxnews.com/transcript/2017/04/28/president-trump-reflects-on-his-first-100-days.html [https://perma.cc/55JG-F7X4].
93. McCallum, *supra* note 92.

Previous interviews and public statements have highlighted his disdain for the judicial decisions, which have undermined his proposed travel ban,[94] and taken together, he appears unimpressed with the current constitutional order. It is this which would be in the greatest danger, and which would have the greatest impact on the international system, if Trump wished to make good on his public statements to remove the domestic constitutional protections. Damage would most likely be done to the domestic system first: as Spiro notes, compliance with norms can be secured by other means,[95] in terms of international trade. Even Trump recognizes that "international sales"[96] are of import for the U.S. But normative constitutional protections for rights and so forth could be undermined for the domestic population without a great deal beyond political pressure effecting any change. There is no guarantee that political pressure would effect that change.

It would be naïve to assume that the international system would fail without the United States and vice versa on a short-term, and indeed this would be an extreme situation. However, perceptibly reductions in freedom and rights could reduce the influence that the U.S. would have. The international rule of law requires stable democracies at the domestic level, with functioning, independent courts in order to be secure. This could be undermined by any impact on the domestic constitutional order. Johnstone highlights Koh's argument that there is a positive angle to American exceptionalism, in that it provides a degree of leadership and support for global governance.[97] However, this influence endures only as long as the domestic protections exist via Congress and the U.S. Constitution. The restraints on Presidential power outlined above would need to function strongly to prevent, among other consequences, a loss of U.S. influence on the international plane.

Constitutional law is required for the international rule of law, and stable democracies allow the development of the international rule of law. The post-state world does not exist, or at least the vision thereof has not yet been realized, but the international system has become more integrated over time.[98] There is thus a greater degree of reliance among states, but states remain at the center of the international system. Through control of both land and populations, as well as the potential to limit economic power through legal and political means, statehood is one of the main ways by which an entity can be a significant agent of action at the international level. International norms thus have an impact on domestic systems, but constitutional norms allow the state itself to participate in that international system.

---

94. Washington v. Trump, No. 17-35105, 2017 WL 469608 (9th Cir. Feb. 4, 2017)
95. Spiro, *supra* note 33.
96. Donald J. Trump, *Remarks by President Trump in Joint Address to Congress*, WHITEHOUSE.GOV (Feb. 28, 2017), https://www.whitehouse.gov/the-press-office/2017/02/28/remarks-president-trump-joint-address-congress [http://perma.cc/2S9F-5KZB].
97. Johnstone, *supra* note 65.
98. De Wet, *supra* note 43.

The existence, and continued relevance of this debate, reflects the growing importance of international law[99] on the domestic system, and the continuing influence that it will have. However, the destabilizing effect that a President, such as Trump, would have is limited on the basis that the international system, and the international rule of law, is rooted in the domestic order of stable democracies. Although his policies may appear chaotic and his public statements are frequent, there is nothing to suggest that he is due to have any concrete action. A view of his executive orders so far, as well as the launching of rockets towards Syria, demonstrate a continuation of existing U.S. policy,[100] rather than sharp breaks with the past. States which are stable democracies and which are run as such further the development of the international rule of law. This work has demonstrated that the main protection for and development of the international rule of law is rooted in the domestic order, because global constitutionalism is based on statehood and nation states. States which uphold democratic standards through their democratic institutions and which maintain constitutional protections for human rights are simultaneously upholding international standards: the constitutional protections and respect for rights at the international level is only possible if safeguarded at the national level. Consequently, strong domestic systems further the international rule of law and the U.S. is of particular import because of its political and economic power and influence. Donald Trump, as a relatively new President, is learning how the complex constitutional and political system works and is developing an understanding of exactly how restrained his powers are by the constitution. Tests of those restraints are particularly useful in a politically engaged country, because of the likelihood that the courts will hear cases on the matter. The dispensing of further judgments on constitutional points secures the development of the rule of law at the domestic level, and further cases may contribute to the development of the international rule of law.

As demonstrated above, the internalization of international norms can arise in a number of ways: via Presidential exercise of soft, executive power, via the adoption of treaties by Congress, or through the exercise of judgment by the Supreme Court. As the power to internalize norms via Congress stems from the Constitution, the Supreme Court sits atop this normative hierarchy as it possesses the sole authority to interpret the Constitution. The role of the Supreme Court is key in both restraining the President, and even Congress, but also in developing the international rule of law.

However, any attempt at the deconstruction of constitutional protections would jeopardize both the domestic and international rule of law for the U.S. Domestic protections secure the rule of law in both spheres, and Trump's

99. Peter J. Spiro, *A Negative Proof of International Law*, 34 GA. J. INT'L & COMP. L. 445 (2006).

100. *See* Eyal Benvenisti, *The U.S. and the Use of Force: Double-edged Hegemony and the Management of Global Emergencies*, 15 EUR. J. INT'L L. 677 (2004) (discussing the Bush doctrine and demonstrating how little U.S. foreign policy on the use of force has changed in the past two decades).

comments in the CNN interview, highlighted above, demonstrates his growing awareness of the constitutional limits on his office. His further acts, providing these are the subject of litigation, are helpful and supportive of international law as long as the domestic institutions persist. A failure to uphold the domestic institutions would undermine the cherished constitutional protections of democracy in the U.S., and would undermine the international rule of law.