TESTIMONY OF STEPHEN B. PRESSER, RAOUL BERGER PROFESSOR OF LEGAL HISTORY, NORTHWESTERN UNIVERSITY SCHOOL OF LAW, HEARINGS ON THE CONFIRMATION OF SOLICITOR GENERAL ELENA KAGAN AS ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT BEFORE THE JUDICIARY COMMITTEE, UNITED STATES SENATE

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My name is Stephen B. Presser, and I am the Raoul Berger Professor of Legal History at Northwestern University School of Law. I have been teaching and writing about American legal and Constitutional history for the past thirty-six years. I am the senior author of the leading law school American Legal History casebook, a co-author of a Constitutional Law casebook, the author of a monograph on modern Constitutional law, as well as the author of a treatise on shareholder liability for corporate debts and a co-author of a treatise on mergers and acquisitions. I have also written many articles on legal history, Constitutional Law, and corporations. I am honored to have this opportunity to appear at the invitation of this committee, to testify in connection with the confirmation hearings regarding the nomination of Solicitor General Elena Kagan as an Associate Justice of the United States Supreme Court.

The specific question I have been asked to address is the propriety of a Supreme Court Justice's turning to international or foreign authority in order to interpret the Constitution of the United States. This question is really part of a broader problem, which is, simply stated, what a Justice is supposed to do when a Justice explicates the meaning of Constitutional provisions. This broader problem is one that I have been dealing with throughout the almost four decades I have been in the academy, and while there have been countless books and articles written by law

professors and political scientists addressing this problem, as time has gone on, the issue has become, for me, one that lends itself to relatively simple straightforward analysis. The more time I spend with this issue, the more important it seems to be to return to first principles, and, in particular, to return to the most important statement on judicial review, that offered by Alexander Hamilton, in Federalist 78, quoting the Baron de Montesquieu, to the effect that there can be no liberty when the judicial function of government is not separated from the legislative.[1] Or, to put it in the vernacular, to state a concept clearly understood by most of the American people, though not necessarily by most legal academics,[2] it is the job of Justices to *judge*, not to *make* law.

In the past few years we have seen several instances of Justices turning to international or foreign law to make American constitutional law. Thus Justice Kennedy, turning to the law of the European Community, writing his opinion in *Lawrence v. Texas*,[3] found support for his view – departing clearly from prior precedent – that consensual homosexual acts could not be criminally punished. In a similar manner, recent Supreme Court decisions, again relying at least in part on European and other international authority, have decided that it is unconstitutional to apply the death penalty to minors,[4] and that it is unconstitutional to apply the death penalty to

[1] Said Montesquieu, "Nor is there liberty if the power of judging is not separate from legislative power and from executive power." MONTESQUIEU, THE SPIRIT OF THE LAWS 157 (Anne M. Cohler et. al eds. & trans., Cambridge Univ. Press 1989) (1749), quoted in THE FEDERALIST NO. 78, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (using a slightly different formulation, which is "there is no liberty, if the power of judging be not separated from the legislative and executive powers"). The Baron de Montesquieu, Charles de Secondat (1689-1755), was a brilliant French Enlightenment political thinker who is generally credited with the modern notion of the separation of legislative, executive, and judicial powers on which, in large part, our Constitution is based.

[2] For a discussion of the different assumptions and understandings of popular culture and elite opinion (as it manifests itself in Supreme Court decisions and academic discourse), focused on the appropriateness of reliance on foreign law, see Steven G. Calabresi, "'A Shining City on A Hill': American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law," 86. B.U.L.Rev. 1335, 1410-1414 (2006).

[3] 539 U.S. 558, 572-573, 576-577 (2003) (Opinion of Justice Kennedy for the Court, referring to a decision by the European Court of Human Rights).

[4] Roper v. Simmons, 543 U.S. 551, 575-578 (2005)(Opinion for the Court by Justice Kennedy, invoking *inter alia*, the United Nations Convention on the Rights of the Child, which "contains an express prohibition on capital

persons suffering from mental retardation.[5] The results in all of these cases could conceivably be wise social policy, but they all represent, really, legislative acts by the Court. In our polity, where the people are supposed to be sovereign, changes in such social policies are supposed to be for the popular organ, the legislature, or for the ultimate popular act, amending the Constitution.

The idea that there ought to be a "living constitution," that it is the job of the Justices to remold and reinterpret Constitutional provisions to meet the needs of the times, dominates the legal academy, and, too often, wins a majority of the Court, but it seems to me that it flies in the face of Hamilton's and Montesquieu's teaching, and indeed, is nothing less than a betrayal of the core American ideal, that ours is a government of laws, not men,[6] and that we live by the rule of law, and not by the arbitrary fiat of judges or Justices.

This notion of a living constitution was recently expressed in a Harvard Commencement address by no less a figure than recently-retired Justice Souter, who claimed that it was inevitable that Justices should remake constitutional law, since the constitution was designed for "living people," and many of the provisions in the constitution point in contrary directions, facts that called for creativity on the part of the Justices in reconciling these conflicting principles, and in

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punishment for crimes committed by juveniles under 18," and which "every country in the world has ratified save for the United States and Somalia."

[5] Atkins v. Virginia, 536 U.S. 304, 316 (2002)(Opinion for the Court by Justice Stevens, referencing the views of "the world community," and of "other nations that share our Anglo-American heritage, and [of] the leading members of the Western European community."

[6] See, e.g. Article XXX of the First Part of the Massachusetts Constitution, drafted by John Adams in 1780, "In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."

accommodating the changing needs of the American people.[7] Curiously absent from Justice Souter's commencement speech, however, was a recognition that legislatures, not Justices, are best equipped to meet the needs of a "living people," and that the task of reconciling conflicting Constitutional principles does not give license for departing from prior precedent or making new Constitutional law. Such tasks might most wisely be accomplished through the Amendment process. Also missing from Justice Souter's speech was an understanding that, as the Tenth Amendment to the Constitution makes clear,[8] and as James Madison underscored in Federalist 45,[9] the primary policy-making authority in our country ought to be the state and local governments, not the federal judiciary.

Turning to international or foreign authority, then, as a means of reworking Constitutional provisions or overturning prior precedents betrays the nature of our federalist system, and flies in the face of the rule of law.[10] As my colleague, John McGinnis, has stated, "There is no reason to think that foreign laws, including foreign judicial decisions, contain better

[7] David H. Souter, Commencement Address at Harvard University, delivered May 27, 2010, available, *inter alia*, at http://www.thedefendersonline.com/2010/06/04/text-of-justice-david-souter's-speech-harvard-commencement-remarks/ (accessed June 26, 2010).

[8] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Constitution, Amendment X.

[9] "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite." Federalist 45 (James Madison), Cooke, note 1, *supra* at 313. The Federalist Papers are generally acknowledged to be the finest contemporary guide to understanding the Constitution, and, indeed, the finest work of political science ever written by Americans.

[10] See, e.g. Donald J. Kochan, "Sovereignty and the American Courts at the Cocktail Party of International Law: The Dangers of Domestic Judicial Invocations of Foreign and International Law," 29 Fordham Int'l L. J. 507, 509 (2006) ("When judges are allowed to cherry-pick from laws around the world to define and interpret their laws at home, activism is emboldened and the rule of law is diminished.") See also Justice Thomas's comment in Foster v. Florida, 537 U.S. 990 (2002) that "While Congress, as a *legislature,* may wish to consider the actions of other nations on any issue it likes, this Court's Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans." (Thomas, J. concurring in denial of certioriari) (emphasis in original). For elaboration of Justice Scalia's view that using contemporary foreign law as a guide to interpretation of the United States Constitution is inconsistent with originalist theory and the theory of popular sovereignty on which the Constitution is based, see, e.g. "The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer," 3 Int.'l J. Const. L. 519 (2005).

norms for the United States than those made democratically in the United States, because they do not purport to be good norms for the United States, but instead emerge from complex social structures that are different from those in the United States."[11]

It should be acknowledged, of course, that from the beginning of our history federal judges and Supreme Court justices have used international authority in order to reach judicial decisions, and, indeed even to aid in the interpretation of provisions of the United States Constitution.[12] But there is a profound difference between this use of international law engaged in since the early years of our republic, and that use of Justice Kennedy's referred to earlier. In the early years of our republic, and subsequently, judges and justices have quite properly sought to understand and apply the "law of nations," a body of supra-constitutional principles that apply to every nation, and that have been the subject of work by international scholars for hundreds of years. This body of law, however, these principles of the law of nations, have been understood to be reflections of what might best be understood as the law of nature, as divinely-revealed ever-constant simple restraints on all governments and all peoples.[13]

For example, as one important eighteenth century federal court decision explored, it is one of the dictates of the law of nations that citizens of nations that are at peace with one another should not enlist in the armed forces of third nations to make war on those nations at peace, lest this be deemed a cause of war, and lead to strife and death.[14] The law of nations was a body of

[11] John O. McGinnis, "Foreign to Our Constitution," 100 Nw.U.L.Rev. 303, 308 (2006).
[12] For some discussion of the longstanding nature of this practice see, e.g. David J. Seipp, "Our Law, Their Law, History, and the Citation of Foreign Law," 86 B.U.L.Rev. 1417 (2006).
[13] For this understanding in our early republic, and, in particular, how it was understood by Justice James Wilson, who, as a law professor, lectured on the law of nations and the law of nature, see, e.g. Stephen B. Presser, "A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise of Federalist Jurisprudence," 73 Nw.U. L.Rev. 26, 48-52 (1978).
[14] U.S. v. Henfield, 11 Fed. Cas. 1099 (C.C. Pa., 1793).

timeless principles, and not a means of radically changing the law. Recourse to the law of nations was a means of aligning national conduct with rules of international law in existence since before the establishment of our Constitution, rules our Constitution actually implicitly embraced.

This recourse to the law of nations, this traditional recourse to international law, is very different from turning to recent international or foreign jurisprudence to implement policies and rules very different from those previously prevailing. One is a longstanding legitimate use of international authority, the other is a usurpation of the sovereignty of the people.

As you members of the Senate examine the qualifications of General Kagan for this awesomely responsible position, you must ask yourselves whether she is a person who believes that it is appropriate to turn to international or foreign authority to alter the meaning of the federal Constitution. I do believe that if she is, this may lead you to question her qualifications as a potential Supreme Court Justice.

This is, of course, a call for you to make, and not for law professors like me. Still, I can say that I am aware of at least some troubling comments made by General Kagan when she was Dean Kagan, at the law school from which we both graduated. About two years ago, when Dean Kagan was introducing Justice Anthony Kennedy, before he spoke to Harvard Law students as part of the celebration of his twenty years on the Supreme Court bench, Dean Kagan praised him both as a jurist who addressed constitutional questions from an "independent" perspective, and as one who understood that questions of Constitutional interpretation had to be made pursuant to a

realization that the United States is part of an international community.[15] Thus, Dean Kagan observed that "Justice Kennedy has emerged as a fiercely independent voice on cases involving all manners of legal issues," and that "He has also spoken and written as many of you know about the importance of looking outward and of recognizing that our own legal system operates in an international context." Further, Dean Kagan remarked that "I would point to Justice Kennedy's independence. I would point to Justice Kennedy's integrity, and I would point to Justice Kennedy's unique and evolving vision of law. Far from swinging between positions that are defined by others, Justice Kennedy consistently charts his own course." Dean Kagan concluded her introduction of the Justice by stating that Justice Kennedy was "one of our nation's most admirable and greatest jurists."[16] It seems very likely to me, that in her words to introduce Justice Kennedy then, Dean Kagan laid out her own jurisprudential philosophy, and while I have reviewed a fair amount of Ms. Kagan's comments in her professional career, it seems to me that this introduction of Justice Kennedy may well be the most concise and clear statement of where Ms. Kagan herself stands.

When a law school Dean is welcoming a graduate who sits on the United States Supreme Court, the Dean certainly does not make disparaging comments, and Ms. Kagan's words might lend themselves to a variety of benign interpretations, but her praise of Justice Kennedy's jurisprudence and his independence could certainly be interpreted as Ms. Kagan's suggesting both that it was appropriate for Justices to formulate their own notions of what the Constitution should mean, and that it was appropriate for Justices to change the meaning of the Constitution by reference to emerging international norms and policies. As I have tried to suggest here, it is

[15] Elena Kagan, Dean, Harvard Law School, Introduction at Q & A with Justice Kennedy at Harvard Law School (Mar. 11, 2008).
[16] Ibid.

our tradition that both of those ideas are betrayals of what a Justice is supposed to do, and I do believe it is your task to try to discover if that is, in fact, what General Kagan believes.[17] If she does, I think you have cause to hesitate before voting to confirm her as a Justice of the Supreme Court. In a country such as ours, governed by the rule of law, it is not the job of a judge or a Justice to have a "unique and evolving vision of law," or to "chart his own course." It is, to the best of his or her ability, to determine what the law is, and then to follow it. Before you vote to confirm a Justice Kagan, you must be sure that she understands that.

Respectfully submitted,

Stephen B. Presser[18]

[17] This would seem to be Ms. Kagan's view as well. In an important review of a book on the confirmation process, then Professor Kagan wrote that it ought to be the job of Senators reviewing the qualifications of a nominee to the Court to understand the jurisprudence that a nominee would implement on the Court, and that , in particular, Senators ought "to ascertain the values held by the nominee, and to evaluate whether the nominee possesses the values that the Supreme Court most urgently requires." Elena Kagan, "Confirmation Messes Old and New," 62 U.Chi.L.Rev. 919, 935 (1995).

[18] I want to thank my research assistants, Ted Wells and Amy Chung, for thoroughly exploring the debate on using international and foreign sources for Constitutional interpretation, and to acknowledge the kindness of Steven Calabresi, John McGinnis, Laura Bridges, ArLynn Presser, and Elizabeth Stein in commenting on drafts of this testimony. The errors and inconsistencies that remain are mine alone.