Harold Koh Is Too Dangerous for America

by Phyllis Schlafly May 29, 2009

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Does Barack Obama really want to make Americans subject to foreign law and courts? That is the question Senators should ask when they vote on his nomination of Harold Hongju Koh, former dean of the Yale Law School, to be the top lawyer at the State Department.

Koh is encumbered by a long paper trail that proves he is eager to use foreign and international law to interpret American law. He calls himself a transnationalist, which means wanting U.S. courts to "domesticate" foreign and international law, i.e., integrate it into U.S. domestic law binding on U.S. citizens.

Koh wants to put the United States under a global legal system that would diminish our "distinctive rights culture" such as our broad speech and religion rights, due process and trial by jury. Koh complains that our First Amendment gives "protections for speech and religion ... far greater emphasis and judicial protection in America than in Europe or Asia."

Yes, our Constitution does give individuals more rights and freedom than any other country, and we Americans like those rights and freedoms. But Koh thinks we should bow to foreign rules and court decisions, and to United Nations treaties whether or not we have ratified them.

The State Department's chief lawyer is not just any lawyer. He becomes the voice of the United States on international legal issues such as the negotiation and U.S. interpretation of treaties and UN pronouncements.

Importing treaties and foreign law into American law could impose lots of rulings that the American people don't want, such as approval of same-sex marriage, unlimited abortion, legalized prostitution, and abolition of the death penalty. This would be a broadside assault on American sovereignty.

Foreign law is fundamentally different from American law. Whereas our Constitution sets forth limited governmental powers and recognizes broad individual rights against government (such as freedom of religion and speech), European constitutions proclaim entitlements to government services such as education, health care, maternity leave, housing and environmental protection.

We certainly don't want to import law from foreign countries that recognize polygamy, arranged marriages between cousins, so-called honor killings of women who reject such arrangements, cutting off hands as punishment for theft, stoning women to death as punishment for adultery, and prohibiting the private ownership of guns.

As Judge Robert Bork has written, international law is really not law as Americans understand the term; it is just international politics. Not passed by any legislature, international law is often written ex post facto and administered by foreign or UN bureaucrats pretending to be judges.

Unfortunately, Harold Koh's views are not unique among leftwing lawyers or even among Supreme Court justices, and it's long past time for us to rise up and put an end to this un-American nonsense. The confirmation of Koh would give legal support to the Supreme Court justices who have already said they favor using foreign law.

Justice Stephen Breyer, who calls himself a "comparativist," suggested in a dissent in Knight v. Florida that it was "useful" to consider court decisions in India, Jamaica, and Zimbabwe on allowable delays of execution. Zimbabwe may have

much experience with executions, but we don't need its guidance about due process.

Justice Ruth Bader Ginsburg has been making speeches advising lawyers that "your perspective on constitutional law should encompass the world. . . . Our island or lone ranger mentality is beginning to change."

While still on the High Court, Sandra Day O'Connor told a Georgetown University audience that international law "is vital if judges are to faithfully discharge their duties. . . . International law is a help in our search for a more peaceful world."

Even Justice Anthony Kennedy invoked foreign "authorities" when he couldn't find any language in the U.S. Constitution to justify overturning the Texas sodomy law in 2003. His decision cited non-American sources including a committee advising the British Parliament, decisions of the European Court of Human Rights, the European Convention on Human Rights, a brief filed by former UN High Commissioner for Human Rights Mary Robinson, and "other nations, too."

Kennedy emphasized the "values we share with a wider civilization." In fact, most other countries do not share American values, and we certainly do not want to share theirs.

During his confirmation hearings, Chief Justice John G. Roberts pointed out a particular danger of using foreign law. He said that reliance on foreign law wrongly "expands the discretion of the judge" and substitutes a judge's "personal preferences" for the U.S. Constitution.

Citing foreign law gives a veneer of respectability to liberals who espouse the "living Constitution" heresy and want to change it without obtaining the approval of the American people through the amendment or legislative processes.

The Senate should reject the nomination of Harold Koh. Then, the Senate should require all judicial nominees to proclaim their adherence to the U.S. Constitution as written, and their rejection of the use of foreign or international law to interpret American law.