

ARTICLE
CONGRESSIONAL ENFORCEMENT OF
INTERNATIONAL HUMAN RIGHTS

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I. INTRODUCTION

On October 2, 2018, Jamal Khashoggi, a Saudi journalist based in the United States, walked into the Saudi consulate in Istanbul, Turkey, where he was brutally murdered and dismembered by Saudi government agents.¹ It was a brazen violation of the most fundamental, internationally recognized human rights, carried out by one close US ally in the territory of another close ally.² The US intelligence community quickly determined that the Saudi government and its Crown Prince, Mohammed Bin Salman, were responsible for the killing.³ Members of Congress briefed by the

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1. Agnes Callamard, *Khashoggi Killing: UN Human Rights Expert Says Saudi Arabia is Responsible for "Premeditated Execution"*, OHCHR, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24713> [<https://perma.cc/LVT8-FFHC>] (last visited Oct. 21, 2019).

2. *Id.*

3. Josh Lederman & Dennis Romero, *CIA Concludes Saudi Crown Prince Mohammed Bin Salman Ordered Killing of Khashoggi*, NBC NEWS (Nov. 17, 2018), <https://www.nbcnews.com/news/us-news/cia-concludes-saudi-crown-prince->

intelligence community accepted that conclusion, and on October 10, 2018, a bipartisan group of Senators wrote to President Trump demanding that he make a determination of individuals to be sanctioned for the murder of Khashoggi, in accordance with the Global Magnitsky Act.⁴

On November 15, 2018, the Treasury Department announced sanctions against several Saudi officials (not including the Crown Prince) under the Global Magnitsky Act.⁵⁶ On November 19, in an official statement that he purportedly dictated himself, President

mohammed-bin-salman-ordered-killing-n937476 [https://perma.cc/K4NB-H6W7]. While there were later statements, including by Secretary of State Pompeo that there was no “direct reporting” that the Crown Prince ordered the killing, the overwhelming consensus of the intelligence community, as briefed to Congress and discussed in the press, was that the Crown Prince was culpable in the murder. *See, e.g.*, Warren P. Strobel, *CIA Intercepts Underpin Assessment Saudi Crown Prince Targeted Khashoggi*, WALL ST. J. (Dec. 1, 2018), <https://www.wsj.com/articles/cia-intercepts-underpin-assessment-saudi-crown-prince-targeted-khashoggi-1543640460> [https://perma.cc/4CFK-TT43].

4. Press Release, Chairman of the Senate Comm. on Foreign Relations, Corker, Menendez, Graham, Leahy Letter Triggers Global Magnitsky Investigation into Disappearance of Jamal Khashoggi (Oct. 10, 2018), <https://www.foreign.senate.gov/press/chair/release/corker-menendez-graham-leahy-letter-triggers-global-magnitsky-investigation-into-disappearance-of-jamal-khashoggi> [https://perma.cc/5HFS-8JGM]. In accordance with the statute, the President was required, within 120 days, to (1) determine whether one or more foreign persons has engaged in or is responsible for “extrajudicial killings, torture, or other gross violations of internationally recognized human rights”; and (2) to submit to the two leaders a classified or unclassified report that includes “a statement of whether or not the President imposed or intends to impose sanctions with respect to the person” along with a description of any such sanctions. *See* Global Magnitsky Human Rights Accountability Act, § 1263(d), 22 U.S.C. § 2656. *See also* Complaint for Injunctive Relief, Open Soc’y Just. Initiative v. Off. Dir. Nat’l Intel., No. 1:20-cv-06625 (S.D.N.Y. Aug. 19, 2020).

5. The Treasury Department announced that it had:

designated Saud al-Qahtani, his subordinate Maher Mutreb, Saudi Consul General Mohammed Alotaibi, and 14 other members of an operations team for having a role in the killing of Jamal Khashoggi. These individuals are designated pursuant to Executive Order (E.O.) 13818, which builds upon and implements the Global Magnitsky Human Rights Accountability Act, to target perpetrators of serious human rights abuse and corruption.

Press Release, U.S. Dep’t of the Treasury, Treasury Sanctions 17 Individuals for Their Roles in the Killing of Jamal Khashoggi, (Nov. 15, 2019), <https://home.treasury.gov/news/press-releases/sm547> [https://perma.cc/Q2U3-FJSV].

6. The Global Magnitsky Human Rights Accountability Act permits imposition of sanctions against any individuals “responsible for extrajudicial killings, torture, or other gross violations of internationally recognized human rights committed against individuals in any foreign country” who are engaging in human rights promotion, advocacy and other protected exercises of their rights. 22 U.S.C. § 2656.

Trump acknowledged that Khashoggi had been murdered, but equivocated about the intelligence community's conclusion:

It could very well be that the crown prince had knowledge of this tragic event—maybe he did and maybe he didn't! . . . We may never know all of the facts surrounding the murder of Mr. Jamal Khashoggi. In any case, our relationship is with the Kingdom of Saudi Arabia. . . . I understand there are members of Congress who, for political or other reasons, would like to go in a different direction—and they are free to do so.⁷

In March 2019, the State Department complied with its obligation under a 1976 congressional statute to release its annual Country Reports on Human Rights,⁸ in which it concluded that Saudi “[g]overnment agents carried out the killing of journalist Jamal Khashoggi.”⁹ While not mentioning the role of the Crown Prince, the report noted that the Saudi prosecutor had not “named the suspects nor the roles allegedly played by them in the killing, nor had they provided a detailed explanation of the direction and progress of the investigation,” which, along with failures to punish in other cases of alleged abuses, contributed to “an environment of impunity.”¹⁰

What does the Khashoggi murder and its aftermath tell us about American human rights diplomacy in the era of Trump, and

7. Donald J. Trump, *Statement from President Donald J. Trump on Standing with Saudi Arabia*, WHITE HOUSE, <https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-standing-saudi-arabia/> [<https://perma.cc/JE2T-ECFW>] (last visited May 8, 2019). Later, he equivocated even more. See Kate Sullivan & Zachary Cohen, *Senate Dem on Armed Services Panel: Trump lying about CIA report on Khashoggi*, CNN (Nov. 23, 2018), <https://www.cnn.com/2018/11/23/politics/senate-dem-armed-services-cia-khashoggi/index.html> [<https://perma.cc/YP2U-TDXR>].

8. International Security Assistance and Armed Export Control Act of 1976, 22 U.S.C. § 2304(b); See also International Development and Food Assistance Act of 1978, 22 U.S.C. § 1515 n(d)(2).

9. U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., 2018 Country Reports on Human Rights Practices: Saudi Arabia (2018), <https://www.state.gov/reports/2018-country-reports-on-human-rights-practices/saudi-arabia/> [<https://perma.cc/KP42-P3C3>]; Courtney McBride, *State Department Rights Report Blames Saudis in Death of Khashoggi*, WALL ST. J. (Mar. 13, 2019, 4:42 PM), <https://www.wsj.com/articles/state-department-rights-report-blames-saudis-in-death-of-khashoggi-11552509726> [<https://perma.cc/3WYV-YWZC>]; U.S. Dep't of State, Bureau of Democracy, H.R. and Lab., 2019 Country Reports on Human Rights Practices: Saudi Arabia (2019), <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/saudi-arabia/> [<https://perma.cc/L84J-VXHV>].

10. 2018 Country Reports on Human Rights Practices: Saudi Arabia, *supra* note 9, at 1-2.

what does it say about the relative roles of the Executive, Congress and the Judiciary on the question of human rights governance? In his excellent book *Restoring the Global Judiciary*,¹¹ which is the subject of the symposium at Fordham Law School for which I prepared this essay, Martin Flaherty argues that the expansion of Executive power within the US government, and the shrinking role for Congress and the Supreme Court on issues of international law, have diminished the United States' role in global governance.¹² His remedy to both the expansion of Executive power and the retreat from international governance is to return to a more powerful Court, one that will take international law, including international human rights law, seriously.¹³ I agree with Professor Flaherty that a renewed engagement with international human rights is in the interest of the United States.¹⁴ But to restore American engagement, we might do well to reinvigorate the role of Congress, not the Judiciary, as the most significant branch for human rights.

The Khashoggi incident can be viewed simply as more evidence of the incoherence, disharmony, and chaos of the executive branch under President Trump. It also reflects President Trump's personal disregard for human rights. He is a president who does not deploy "presidential human rights talk," the rhetoric of human rights promotion that has infused the public diplomacy of every president since Jimmy Carter.¹⁵ Trump denied the facts of the murder, while he simultaneously noted its irrelevance to the bilateral US-Saudi relationship. This illustrates that he is untroubled both by human rights atrocities and by spreading disinformation. Yet, while his rhetoric may have been inconsistent with past presidencies, forging ahead with the close relationship with the Saudi regime was generally consistent with prior presidential approaches to human rights abuses by friendly regimes.¹⁶ The US-Saudi relationship is an example of how human

11. MARTIN S. FLAHERTY, *RESTORING THE GLOBAL JUDICIARY* (2019).

12. *Id.* at 220-51.

13. *Id.* at 252-57.

14. *Id.* at 19.

15. Margaret E. McGuinness, *Presidential Human Rights Talk*, 56 *WASHBURN L.J.* 471 (2017).

16. In the case of Saudi Arabia in particular, the US economic and strategic relationship with the royal family that governs the Kingdom as an absolute monarchy has for decades taken precedence over pushing hard for political reform or the promotion of

rights policy has worked in strategic relationships: despite known and publicly acknowledged human rights abuses, presidents generally opt to preserve the relationship citing national security grounds.¹⁷ It illustrates the potential—and limits—of a more robust congressional role in international human rights governance.

The official US government acts taken at the State and Treasury departments after Trump’s initial statement illustrate the entrenchment of human rights in executive branch institutions and processes that Congress created. How is it possible that a President can dismiss—indeed, publicly reject—the conclusions of his own intelligence services to brush off Saudi government responsibility for an act that violates international human rights law, only to be followed by imposition of sanctions by his own Treasury Department? Under what mandate or authority does the State Department publish a report that underscores the Saudi government’s responsibility and express official US government concern about an “environment of impunity” when the president has disclaimed any certain knowledge of what happened? Why would a president, who is regarded in the US constitutional

human rights. For general overview of the strategic alliance between United States and Saudi Arabia, see *U.S.-Saudi Arabia Relations*, COUNCIL ON FOREIGN RELATIONS, <https://www.cfr.org/backgrounders/us-saudi-arabia-relations> [https://perma.cc/B2P3-483F] (last visited Oct. 11, 2020). For discussion of human rights practices in Saudi Arabia and the scope of US support for Saudi Arabia see *World Report 2019: Saudi Arabia*, HUM. RTS. WATCH, <https://www.hrw.org/world-report/2019/country-chapters/saudi-arabia#> [https://perma.cc/NDZ4-HCXS] (last visited May 7, 2019). The State Department 2019 Country Report on Saudi Arabia describes the human rights conditions in Saudi Arabia as follows:

Significant human rights issues included: unlawful killings; executions for nonviolent offenses; forced disappearances; torture of prisoners and detainees by government agents; arbitrary arrest and detention; political prisoners; arbitrary interference with privacy; criminalization of libel, censorship, and site blocking; restrictions on freedoms of peaceful assembly, association, and movement; severe restrictions of religious freedom; citizens’ lack of ability and legal means to choose their government through free and fair elections; trafficking in persons; violence and official discrimination against women, although new women’s rights initiatives were implemented; criminalization of consensual same-sex sexual activity; and prohibition of trade unions.

In several cases the government did not punish officials accused of committing human rights abuses, contributing to an environment of impunity. 2018 Country Reports on Human Rights Practices: Saudi Arabia, *supra* note 9, at 1-2.

17. See discussion of waivers in Part II *infra*.

tradition as the “sole organ” in foreign affairs,¹⁸ invite Congress to “go in a different direction”¹⁹ when balancing human rights concerns against other US policy priorities? And what do these contradictory moves suggest about the nature of American engagement with international human rights law?

One answer to these questions lies in the unprecedented nature of the Trump presidency: occupied by an outsider, one with no prior public service or experience in US legal and political institutions. Another answer is that Congress, not the President, created and entrenched the normative practice of human rights diplomacy. Through statutory mandate creating executive branch agencies and offices and the annual Country Reports on Human Rights for all foreign states, Congress has directed the means and methods of US human rights policy. This is ironic, since, as Flaherty chronicles in his book, Congress has served as the main obstacle to direct, formal participation in international human rights governance through treaties.²⁰ Human rights diplomacy, not the courts, has been the central tool through which the US has engaged in the global governance of international human rights.²¹

This Essay is intended as a complement (and partial reply) to Flaherty’s argument for a more robust judiciary. Part II addresses the role Congress plays—or has the institutional capacity to play—in human rights governance. Part III discusses the role of the Court in giving effect to congressional human rights governance. My hope is to illuminate the ways in which Congress can improve the role the United States plays in international human rights governance and contribute more effectively to state accountability and justice in the face of gross abuses.

18. CURT BRADLEY, *INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM* 23-24 (2d ed. 2015) (discussing the origins of the “sole organ” formulation).

19. Trump, *supra* note 7.

20. FLAHERTY, *supra* note 11, at 224-27.

21. See Margaret E. McGuinness, *Human Rights Reporting as Human Rights Governance*, 59 *COL. J. TRANSNAT’L L.* (forthcoming 2021). See generally BARBARA J. KEYS, *RECLAIMING AMERICAN VIRTUE: THE HUMAN RIGHTS REVOLUTION OF THE 1970S* (2014); SARAH B. SNYDER, *FROM SELMA TO MOSCOW: HOW HUMAN RIGHTS ACTIVISTS TRANSFORMED U.S. FOREIGN POLICY* (2018).

II. HUMAN RIGHTS MANDATES AS ALTERNATIVES TO HUMAN RIGHTS TREATIES

Flaherty's book is both an impressive history of and passionate argument for the US Supreme Court's role in international governance. On the question of international human rights governance, Flaherty argues that the Court—particularly in the era of Chief Justice Roberts—has strayed from historical practice by blocking access to American courts by human rights claimants, and by wrongly interpreting the scope of US international human rights obligations under treaties and statutes, as well as the Constitution.²² I admire the tenacity and optimism of Flaherty's approach, and find myself largely in agreement with his assessment of the past practices of the Court. He is not wrong to criticize and lament the Court's shift toward a jurisprudence that may undermine US commitments to the international rule of law—particularly those made in the form of treaties.²³ At a time of US withdrawal from the global stage under a president who sees little value in the international institutions and legal regimes that have served as useful instruments for the projection of American power and values in the past, the Court should serve as an important check on the Executive. But it is not the key to restoring American leadership in global governance.²⁴

22. FLAHERTY, *supra* note 11, at 221-51. Current critiques of the international human rights system abound. *See, e.g.*, ERIC POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* (2014) (claiming that the international human rights system is almost over); Samuel Moyn, *On Human Rights and Majority Politics Keynote Articles*, 52 VAND. J. TRANSNAT'L L. 1135 (2019) (stating that the system is anti-democratic); SAMUEL MOYN, *NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD* (2018) (stating that it has failed to achieve its purported goal of advancing human equality); John Tasioulas, *Saving Human Rights from Human Rights Law*, 52 VAND. J. TRANSNAT'L L. 1167 (2019) (arguing that it needs to extricate itself from international law to restore its moral grounding).

23. *See, e.g.*, FLAHERTY, *supra* note 11, at 227-29 (questioning the death of treaty supremacy).

24. Advocates for continued engagement on issues such as climate change have also turned, not surprisingly, to federalism and state and local governments as alternative spaces in which to engage the United States in global governance. *See, e.g.*, UNITED STATES CLIMATE ALLIANCE, <http://www.usclimatealliance.org/> [https://perma.cc/554Z-Y8AB] (last visited Oct. 10, 2020). The United States Climate Alliance is a cooperative program formed by New York, California and 23 other states (led by Democratic and Republican governors) to commit to the goals of the Paris Agreement on Climate Change following the US withdrawal from the agreement in 2017. *Id.*

I start from the view—shared by Flaherty—that the United States would benefit from more, not less, engagement with international governance. Among other values, reengagement would allow the US a greater voice in the much-needed reform of international institutions. This is particularly the case for international human rights governance.

Human rights governance is constituted by interconnected policy-making institutions, treaty bodies, courts and commissions. States, NGOs, corporations and individuals engage with these governance structures to identify, elaborate and enforce international human rights norms.²⁵ Despite its interconnectedness, the polycentric nature of the international human rights system means it is not always coherent. Fragmentation and disjunction in norm-setting and elaboration and, often, institutional disfunction, are just some of the challenges facing human rights governance.²⁶ Nonetheless, the international legal project of human rights has, over time, proved to be resilient and a significant factor in improved conditions around the globe.²⁷ The United States has played a leading role in creating international human rights institutions but has been uneven in its efforts to reform them. The Trump administration, deploying the powerful tools of the presidency, has worked actively to undermine their effectiveness.

To overcome the powerful presidency, Flaherty seeks to “tip the balance” toward a less skeptical view of the role for the judiciary in the exercise of US foreign affairs powers.²⁸ Flaherty

25. For a discussion of the polycentric nature of human rights governance, see John Gerard Ruggie, *Global Governance and “New Governance Theory”: Lessons from Business and Human Rights*, in 20 *GLOBAL GOVERNANCE: A REVIEW OF MULTILATERALISM AND INTERNATIONAL ORGANIZATIONS* 5-17 (Aug. 2014). See also JIM WHITMAN, *The human rights regime as global governance*, in *THE FUNDAMENTALS OF GLOBAL GOVERNANCE* 139 (2009).

26. For a general critique of fragmentation and disjunction in global governance, see Frank Biermann et al., *The Fragmentation of Global Governance Architectures: A Framework for Analysis*, *GLOB. ENV'T POLITICS* 9, 14-40 (2009). For critique of international human rights governance, see STEPHEN HOPGOOD, *THE ENDTIMES OF HUMAN RIGHTS* 166-82 (2015). For a discussion of reform in international human rights, see EMILIE M. HAFNER-BURTON, *MAKING HUMAN RIGHTS A REALITY* 116, 110-21 (2013) (discussing “streamlining” the system).

27. See generally KATHRYN SIKKINK, *EVIDENCE FOR HOPE: MAKING HUMAN RIGHTS WORK IN THE 21ST CENTURY* (2017).

28. FLAHERTY, *supra* note 11, at 9, 251.

sees the judiciary as important to bolstering US compliance with international law in the face of lawless executives (like Trump), and believes that the US should comply with international law for instrumental reasons:

Furthermore, judicial reliance on international law would keep the United States in compliance with its obligation to other nations. All things being equal, such compliance would help the country avoid conflict and further promote peace and prosperity by demonstrating that the republic would act as an honorable and reliable member of the international order.²⁹

On the more specific issue of international human rights, the Supreme Court's interpretation of international human rights treaty obligations, and the effect of federal statutes on human rights violations beyond US borders, Flaherty notes that the practice of the Court has been "heading in the wrong direction."³⁰ He seeks to restore the "tools of globalization" to the Court both as a means to improve compliance with international human rights (which he refers to as "global norms"), but also to restore the constitutional separation of powers on questions of foreign policy.³¹

The US approach to international human rights governance has been contradictory. Up through the Trump presidency, it adopted a foreign policy that demands that American exercise of its global power reflect the ideals of its constitutional democratic origins. At the same time, the US has maintained a deep skepticism of the projects of international law and human rights that were established to enforce those ideals. The United States has declared a commitment to the values of the international human rights system and served as a leading architect of the treaties and institutions that promote those values and norms. But the United States has, with relative consistency, disclaimed that those same substantive and procedural international human rights norms can or should be applied to its own behavior—at home or abroad. Flaherty describes this paradox as the "Janus-faced" American

29. *Id.* at 219.

30. *Id.* at 221.

31. *Id.* at ch. 10-11.

approach to international human rights.³² This approach can also be fairly described as human rights hypocrisy.

When it comes to assessing US participation in international governance generally, and the role of the various branches in that governance more specifically, Flaherty is unimpressed with Congress's record. In Flaherty's view, Congress has not played a meaningful role in the formulation of foreign policy and participation in international law and governance, acting as "an occasional check, at best" over a powerful presidency that, in exercising foreign affairs powers, has aggregated to itself the power to make or break international law.³³

On the role of the United States in international human rights governance, it is tempting, as Flaherty does, to dismiss Congress's role in checking the President, and look to the Court. Congress has under-utilized its power to approve treaties and adopt legislation implementing international human rights standards for the United States. More than the presidency, Congress has been subject to the narrow politics that often drive US skepticism of international law making. In contrast, the Court has a natural appeal to those concerned with giving effect to human rights abroad. The Court played a key role in bringing about seismic changes to human rights practices at home,³⁴ albeit couched in the particularized American language of, for example, "civil rights," "criminal procedural rights," "free speech," "voting rights," "women's rights," and "LGBTQ rights."³⁵ Litigation in US courts also has an appeal to victims and advocacy groups who face no reasonable alternatives because the rule of law is weak or non-existent in the places where the rights violations occur.³⁶ For many victims of human rights

32. *Id.* at 225 (describing the Eisenhower administration's retreat from international human rights in the face of the threatened Bricker amendments.).

33. *Id.* at 2.

34. Morton J. Horowitz, *The Warren Court and the Pursuit of Justice Annual John Randolph Tucker Lecture*, 50 WASH. & LEE L. REV. 5 (1993).

35. When it comes to human rights at home, the United States does not generally speak the "language" of international human rights, though that has begun to change.

36. The lure of the courts may also reflect the experiential bias of American human rights lawyers—many of whom had participated in (or had learned from) the litigation-centered strategies of the civil rights and women's rights movements of the 1960s and 1970s. KEYS, *supra* note 21, at 32-47. *See also* John Cerone, *The ATCA at the Intersection of*

abuses outside the United States, federal court litigation is not the “last resort” but the first and only resort to actual adjudication of their claims. Adjudication of rights claims is a central component of an international human rights governance system grounded in the rule of law. Human rights victims around the globe have used the federal courts because they have no effective alternative: domestic redress does not exist or has been denied in the places where the human rights abuses take place, and international human rights institutions have proved inadequate.³⁷

Two central constitutional powers make Congress the key branch for engaging international human rights. First, no US commitment to adjudication of international human rights claims can happen without the Senate exercising its treaty power and the full Congress implementing international human rights treaty commitments into federal law. Second, Congress controls appropriations, and thus the means and methods of human rights diplomacy: US engagement with international human rights institutions; the conditioning of assistance to foreign states; and the use of sanctions against individuals, states, and other legal entities.³⁸

Exercise of the first power—treaty approval and implementation—at least for the Roberts court, is a predicate to any engagement of the Supreme Court in the direct adjudication and interpretation of international human rights treaties.³⁹ The predicate of congressional action has been underscored by recent cases that have expanded the scope of treaty non-self-execution,⁴⁰

International Law and U.S. Law Symposium: The Bhopal Disaster Approaches 25: Looking Back to Look Forward, 42 *NEW ENG. L. REV.* 743 (2007-2008).

37. See FLAHERTY, *supra* note 11, at 184. These factors drove the Alien Tort Statute litigation in US courts in the 1980s, 1990s, and 2000s. Victims who had no redress at home or internationally viewed the ATS as an opportunity to use US law to achieve justice. See *id.* at 183-87 (discussing extraterritoriality and the Alien Tort Statute). See *id.* at 231-37 (discussing ATS litigation generally).

38. McGuinness, *supra* note 21.

39. It is possible that Congress could adopt the language of a treaty into a statute that is not, technically, an implementing statute, as it did with the Refugee Act. See *infra* note 46 and accompanying text. But the Roberts court is unlikely to look to international sources in interpreting such a statute. See, e.g., *Bond v. United States*, 572 U.S. 844 (2014). CIL may also play a role, but again, the current composition of the Court makes it unlikely to incorporate CIL into any interpretation of rights—even one incorporated into statute.

40. See, e.g., *Medellin v. Texas*, 552 U.S. 491 (2008).

narrowed the extraterritorial application of federal statutes,⁴¹ and generally rejected the influence of international law on the interpretation of constitutional or statutory rights claims.⁴² Taken together, these cases are a clear signal from the Court that Congress, the reflection of popular democracy, must exercise its powers to make international law part of domestic law. For those concerned with the democracy deficit in international lawmaking, this should be viewed as a positive development, even as it is seen as a frustrating speed bump to those who value convergence in international human rights law.

Some pessimism about Congress's willingness to act pursuant to this first set of powers is warranted.⁴³ Given the fate of the Convention on the Rights of Persons with Disabilities (the "CRPD")—the last human rights treaty to be signed by the United States (by President George W. Bush), which failed on a Senate floor vote—it is unlikely Congress will soon take up for approval any of the human rights treaties the US has signed but not ratified.⁴⁴ Moreover, even in what seemed to be a relatively uncontroversial effort to give domestic legal effect to the Vienna Convention on Consular Relations (the "VCCR")—and thereby legislatively overturn the *Medellin* decision—Congress failed to

41. See, e.g., *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108 (2013); *Morrison v. National Australia Bank, Ltd.* 561 U.S. 247 (2010).

42. See FLAHERTY, *supra* note 11, at 240-51 (addressing the question of judicial borrowing from foreign and international law sources). For an example of non-enforcement of international law through statutory interpretation, see *Bond v. United States*, 572 U.S. 844 (2014) (applying clear statement rule to dismiss claim brought under the Chemical Weapons Convention Implementing Statute). There are ways in which international human rights standards can be introduced into federal law without treaty commitments, in the same way the language of human rights treaties is incorporated into state and local law. As Professor Ashley Deeks has demonstrated, international law that is not implementing a treaty obligation of the United States is sprinkled throughout the United States Code, representing a kind of customary international law practice of the United States. See Ashley Deeks, *Statutory International Law*, 57 VA. J. INT'L L. 263 (2017).

43. FLAHERTY, *supra* note 11, at 231. Professor Flaherty is refreshingly blunt: "Relying on today's polarized Congress for much of anything, much less incorporating human rights obligations, might seem like an idle hope," but he admits that, "[t]he legislature can still, from time to time, surprise." *Id.*

44. See Josh Rogin, *Senate GOP rejects U.N. disabilities treaty*, FOREIGN POL'Y (Dec. 2, 2012), <https://foreignpolicy.com/2012/12/04/senate-gop-rejects-u-n-disabilities-treaty/> [<https://perma.cc/KT4C-96UD>].

act.⁴⁵ As Professor Flaherty notes, there are only a handful of bright spots where Congress has directly implemented international human rights law: the Refugee Act and Anti-Torture Act, which create obligations on state actors, and the Torture Victim Protection Act and the Trafficking Victims Protection Act, which create civil liabilities under federal law.⁴⁶

But in contrast to Professor Flaherty's general pessimism about Congress, I see Congress as institutionally capable of steering US human rights governance through the second set of powers: human rights policy appropriations and oversight. Though not the subject of Flaherty's book, these powers are essential to assessing the full scope of US engagement in international human rights governance. Indeed, in light of the Court's reluctance to serve as a check on presidential excesses and its turn away from giving effect to international law in its jurisprudence, Congress is essential to rebalancing US commitments to international human rights law. Fortunately, Congress already has all the tools it needs at its disposal.

US foreign policy began taking human rights seriously in the mid-1970s, with Congress, in the face of a reluctant Ford administration, taking the lead.⁴⁷ The congressional human rights mandates were legislation designed to restrain the ability of the President to support and promote regimes and policies that amounted to "gross abuses of internationally recognized human rights."⁴⁸ These congressional human rights mandates ushered in the era of American human rights diplomacy, proceeding on a separate track from the international human rights treaty

45. See H.R. 6481, 110th Congress (2008) (the stated purpose was "[t]o create a civil action to provide judicial remedies to carry out certain treaty obligations of the United States under the Vienna Convention on Consular Relations and the Optional Protocol to the Vienna Convention on Consular Relations.").

46. Refugee Act, 8 U.S.C. § 1101, § 1108; Anti-Torture Act, 18 U.S.C. § 2340A; Torture Victims Protection Act, 28 U.S.C. § 1350; FLAHERTY *supra* note 11, at 231.

47. SNYDER, *supra* note 21, at 148-67. See also Daniel Sargent, *Oasis in the Desert? America's Human Rights Discovery*, in *THE BREAKTHROUGH* 125 (Jan Eckel & Samuel Moyn eds., 2013).

48. The first statute to incorporate this language into binding legislation was the International Development and Food Assistance Act of 1975, 22 U.S.C. § 2151n(a) (1975). For a full discussion of the legislation, see David Weissbrodt, *Human Rights Legislation and U.S. Foreign Policy*, 7 GA. J. INT'L & COMP. L. 231 (1977).

institutions the United States remained outside.⁴⁹ Political support for congressional action on human rights was part of broader Watergate and Vietnam-era concerns about executive branch overreach, at home and abroad.⁵⁰ The human rights mandates reflected a growing view among the American public that foreign policy should reflect American virtues and its best values, and disassociate itself from the dark images of American complicity in war crimes and atrocities in Vietnam, and also from those carried out by allies in Greece, Chile, and Korea.⁵¹ Just as important, the mandates were part of a broader reassertion of congressional constitutional prerogatives against what was an increasingly powerful presidency on issues of national security and foreign policy.⁵²

For effective human rights governance, what other states do in the face of non-compliance by a state (or non-state actors, including individuals) has mattered as much as the work of domestic or international courts and commissions.⁵³ States wield political and legal tools to reward or punish behavior of other states, including for noncompliance with international law, and have adopted these tools for the human rights era.⁵⁴ Rewards may come in the form of: membership and access to club goods in defense, trade and/or investment agreements; cash transfers (loans, access to financing at international financial institutions, direct humanitarian assistance); military assistance (access to weapons, training and cooperation); and/or support for

49. For a full discussion of this development, see Weissbrodt, *supra* note 48.

50. See SNYDER, *supra* note 21, at 148-67. See also KEYS, *supra* note 21, at 48-74.

51. See KEYS, *supra* note 21, at 75-102. See also SNYDER, *supra* note 21, at 60-147.

52. Louis Henkin made the case for a stronger congressional role in testimony in support of the Murphy Commission proposals to reform the State Department. Louis Henkin, "A More Effective System" for Foreign Relations: *The Constitutional Framework*, 61 VA. L. REV. 751 (1975).

53. Harold Hongju Koh, *The 1994 Roscoe Pound Lecture: Transnational Legal Process*, 75 NEB. L. REV. 181, 194-205 (1996) (articulating how the interactions of states constitute a central dimension of "transnational legal process" that leads to state compliance with human rights). See also Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 AM. J. OF SOCIO. 1373 (2005).

54. Emilie M. Hafner-Burton, *The Power Politics of Regime Complexity: Human Rights Trade Conditionality, in Europe*, 7 PERSPECTIVES ON POLITICS 33 (2009).

commercial, cultural and other relations.⁵⁵ Penalties may range from withholding of rewards to more active sanctions targeted at institutions of a foreign state's government, to individual sanctions.⁵⁶ For the United States, the congressional human rights mandates operate as shared congressional-executive powers, deploying these tools to regulate human rights.

In the past 45 years, Congress has passed dozens of statutes and amendments that together constitute the congressional human rights mandates. These include: the original legislation mandating annual human rights reporting, along with several amendments broadening the scope of that reporting;⁵⁷ conditions attached to the Foreign Military Sales Act (for governmental arms transfers) and the Arms Export Control Act (for private military sales to foreign governments);⁵⁸ expansion of sanctions legislation aimed to punish governments, non-state actors, and individuals who engage in human rights violations;⁵⁹ legislation creating particular human rights offices and positions within the state department and elsewhere in the executive branch, and also congressional and congressional-executive commissions addressing human rights issues.⁶⁰

55. ANDREW GUZMAN, *HOW INTERNATIONAL LAW WORKS, A RATIONAL CHOICE THEORY* 25-70 (2008).

56. In the United States, Congress delegated to the President the powers to take broad decisions on economic sanctions under the International Emergency Economic Powers Act, 50 U.S.C. § 1701 (1977).

57. The original "sense of Congress" resolution conditioning assistance on human rights compliance was passed in 1974. Foreign Assistance Act of 1974, Pub. L. No. 93-559, § 46, 88 Stat. 1795, 1815 (codified as amended at 22 U.S.C. § 2304(a) (Supp. IV 1974)). The first reporting requirement was added when the aid conditionality was passed into binding law in 1975. 22 U.S.C. § 2151n(d) (Supp. V 1975) (enacted by Pub. L. No. 94-161, § 310, 88 Stat. 849, 860). The first Country Reports were published to Congress in 1977. For a discussion of the first reports submitted, see Weissbrodt, *supra* note 48.

58. 22 U.S.C. § 2304(b) (1976). The year following the amendments to the AECA, conditions were also attached to the International Development and Food Assistance Act. 22 U.S.C. § 2151n(d)(2) (1977).

59. *See, e.g.*, discussion of the Leahy Law and the Global Magnitsky Act, *infra* note 73 and accompanying text. Sanctions legislation has been extensive, frequently operating as a delegation of presidential discretion under the International Emergency Economic Powers Act ("IEEPA"). 50 U.S.C. § 1701 et seq.

60. *See* 22 U.S.C. § 2651(a). The State Department Office of Human Rights and Humanitarian Affairs was created during the Ford Presidency and upgraded to the Bureau of Human Rights and Humanitarian Affairs in 1977, under President Carter. *See* SNYDER, *supra* note 21. It was renamed the Bureau of Democracy, Human Rights and Labor in 1993.

Beyond the year-to-year appropriations leverage that Congress holds, these long-standing mandates created ongoing monitoring, reporting, and sanctions requirements that have proved durable governance mechanisms. Their durability is a result of several characteristics: (1) they are mandatory and permanent (they require monitoring, reporting and staffing at the State Department beyond the current fiscal year);⁶¹ (2) they incorporate international human rights law, not US constitutional standards, as the means of measuring and assessing other states' human rights practice;⁶² and (3) they are the result, generally, of bipartisan consensus that the United States should be promoting human rights in its foreign policy, even where the parties may disagree as to the priorities and content of particular rights.⁶³ Perhaps most important, the mandates have endured because they contain flexibility in the form of waiver provisions, through which any conditionality or hold on appropriations designated for a foreign state can be waived by the president upon certification of a national security need.⁶⁴ In short, while the monitoring and

See 22 U.S.C. § 2304. Congress created its own Human Rights Commission, The Lantos Human Rights Commission, as a formal follow on to the creation Congressional Human Rights Caucus, created in 1983. *See* H.R. Res. 1451, 110th Cong. (2008) (passed by unanimous consent); David P. Forsythe, *Congress and Human Rights in U.S. Foreign Policy: The Fate of General Legislation*, 9 HUM. RTS. Q. 382 (1987). In 2000, Congress created an Executive-Congressional Commission on China, to monitor and address human rights conditions. H.R. 4444, 106th Cong. (2000). It created the US Commission on International Religious Freedom as part of the International Religious Freedom Act of 1998. 22 U.S.C. § 6411.

61. *See* 22 U.S.C. § 2651(a).

62. *See* 22 U.S.C. § 2304(a); 22 U.S.C. § 2151n(a); *see also* International Religious Freedom Act of 1998, PUB. L. NO. 105-292, 112 STAT. 2787, § 2(a)(3) (referencing Article 18 of the UDHR as well as the ICCPR).

63. Adam Schiff and Mike Pence co-sponsored the Daniel Pearl Act, which amended the requirements of the Annual Country Reports to include a section on press freedoms. *See* Daniel Pearl Freedom of the Press Act of 2009, Pub. L. No. 111-166, 124 STAT. 1186.

64. The 1974 Sense of Congress resolution used the language "except in exceptional circumstances" to describe when security assistance might continue notwithstanding gross human rights abuses. The current general language reads that Congress must be informed:

[W]hether, in the opinion of the Secretary of State, notwithstanding any such practices—

(i) extraordinary circumstances exist which necessitate a continuation of security assistance for such country, and, if so, a description of such circumstances and the extent to which such assistance should be continued (subject to such conditions as Congress may impose under this section), and

reporting mandates are non-waivable, the “sticks and carrots” of human rights diplomacy—the withholding of aid or imposition of sanctions—are waivable.

The criticism of such presidential “waivers,” whereby a congressional statutory mandate contains a loophole that permits full authority of a president to waive the statutory requirements upon the meeting of certain conditions, is that they undermine Congress’s lawmaking authority, and generally do not include requirements for procedurally sound justifications for waiver.⁶⁵ In the human rights context, such waivers may be criticized for permitting the president to downgrade the role of international human rights compliance in strategically valuable bilateral relationships, and in particular contexts, such as counter-terrorism operations.⁶⁶ Under this view, waivers are detrimental to the broader project of human rights governance: if human rights are to be prioritized and foreign assistance conditionality used to coerce good practices and punish bad practices, waivers undermine the central purpose of the mandates.

The waiver provisions should be seen, however, as a feature— with limits. The waiver provisions were much discussed, and facilitated the original passage of human rights mandates, and many subsequent amendments.⁶⁷ As David Barron and Todd Rakoff have concluded about a variety of presidential waiver provisions, the waiver provisions assist in encouraging Congress to pass legislation that is more aggressive and bolder than that which they might have originally considered.⁶⁸ Because the waiver

(ii) on all the facts it is in the national interest of the United States to provide such assistance.

22 U.S.C. § 2304(c)(1)(C) (2018).

65. For general critique of the lack of objective criteria for presidential factfinding, see Shalev Roisman, *Presidential Factfinding*, 72 VAND. L. REV. 825 (2019). For a defense of such waiver provisions, see David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265 (2013).

66. For an early critique of the original legislation, see Forsythe, *supra* note 60.

67. See, e.g., Veto Message from the President of the United States Returning Without Approval the Bill (S. 2662) Entitled An Act to Amend the Foreign Assistance Act of 1961 and the Foreign Military Sales Act, and for Other Purposes, Sen. Doc. No. 94-185 at III (2d Sess. 1976) (pointing to lack of executive discretion as a reason for vetoing the original bill).

68. Barron & Rakoff, *supra* note 65 (stating a waiver provision “[a]llows Congress to codify policy preferences it might otherwise be unwilling to enact.”).

provisions preserve presidential discretion in strategic relationships, they have resulted in a general pattern of executive compliance with the reporting mandates.⁶⁹ The waiver provisions require transparency about what a president does when he declares the national security interest paramount, notwithstanding official reports of human rights abuses.⁷⁰ Moreover, the waiver provision only applies to presidential certifications on aid expenditures.⁷¹ Waivers do not apply to the monitoring and reporting requirements, which ensures that fact-finding done at the State Department is kept separate from waiver determinations at the White House.⁷² This has the effect of clarifying, for Congress and the broader public, that aid is being approved by the president notwithstanding human rights problems. It also has the effect, over time, of reducing the tendency of presidents to downplay human rights problems of strategic allies.⁷³ In some cases, it has prompted Congress to amend the prior reporting and sanctions statutes to narrow such waivers in the future.⁷⁴ By decoupling monitoring and reporting from

69. See Bureau of Democracy, Human Rights and Labor, *2019 Country Reports on Human Rights Practices*, U.S. DEP'T OF STATE (Mar. 11, 2020), <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/> [<https://perma.cc/4YM6-SJV8>] (discussing compliance since 1977 with the annual reporting).

70. See 22 U.S.C. § 2304(a)(2) (providing that military assistance and military sales licenses will be prohibit to states in that abuse human rights human rights “unless the President certifies in writing to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate that extraordinary circumstances exist warranting provision of such assistance [or license].”). See also Weissbrodt, *supra* note 48.

71. 22 U.S.C. § 2304(a)(2).

72. See 22 U.S.C. § 2304(b) (outlining reporting requirements).

73. For an early discussion of the tendency of presidents to downplay abuses in strategic allies, see Scott Horton & Randy Sellier, *The Utility of Presidential Certifications of Compliance with United States Human Rights Policy: The Case of El Salvador*, Commentary, 1982 WIS. L. REV. 825 (1982).

74. Amendments to the original Congressional Human Rights Mandates (CHRM) have been plentiful. For example, the Leahy Law was adopted as 1997 and 1999 amendments to the Foreign Assistance Act (FAA), 22 U.S.C. § 2378(d) (which applies to the State Department), and the Arms Export Control Act (AECA), 10 U.S.C. § 362 (which applies to the Department of Defense) to prohibit US assistance to any foreign security forces unit where the United States has “credible information that the unit has committed a gross violation of human rights.” The Magnitsky Act was passed to identify and impose sanctions on individuals involved in the murder of Russian journalist Sergei Magnitsky as well as “other gross human rights violations committed against individuals exposing illegal

decisions about aid and sanctions, the waiver provisions have helped to make monitoring and reporting valuable, and generally reliable, governance tools.

Waivers are not the only challenge to congressional oversight in this area. Signing statements represent a particular challenge to congressional oversight powers, as they tend to suggest that the ultimate, and exclusive, interpretation of the scope of shared congressional-executive authority in foreign affairs lies with the President.⁷⁵ In recent confrontations over the full scope of congressional power to subpoena documents and testimony from the President, the Court has left open some questions regarding the ability of Congress to enforce such oversight.⁷⁶ Most challenging, perhaps, is a presidential veto, which operates as a formal limit on congressional lawmaking. In circumstances when either the House

activity of the Russian government.” Russia and Moldova Jackson-Vanik Repeal and Sergei Magnitsky Rule of Law Accountability Act (Magnitsky Act) of 2012, 22 U.S.C. § 5811(n).

75. See AMERICAN BAR ASSOCIATION, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE 5 (2006) (arguing they are an unconstitutional practice); Robert Pear, *Legal Group Says Bush Undermines Law by Ignoring Select Parts of Bills*, N.Y. TIMES (July 24, 2008), <https://www.nytimes.com/2006/07/24/washington/24prexy.html> [https://perma.cc/9XJQ-MF3K]. For an early critique of signing statements, see Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J. ON LEGIS. 363 (1987). But see Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307 (2006) (arguing that signing statements are constitutional, potentially helpful as a signal to statutory interpretation, and not an institutional challenge to separation of powers). Scholars have concluded that signing statements have been less successful in influencing the ways in which courts interpret legislation. See, e.g., John M de Figueiredo & Edward H Stiglitz, *Signing Statements and Presidentializing Legislative History* 1-41 (Nat'l Bureau of Econ. Rsch. Working Paper No. 23951, 2017).

76. See *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020); see also *Trump v. Vance*, 140 S. Ct. 2412 (2020). Both these cases concerned the challenge of seeking personal information (tax returns) of the person occupying the presidency, which raises the issue of the “two bodies” in each presidency: the person and the office of the Presidency. As Daphna Renan has commented, the two-bodies prism can elucidate the controversy at the crux of the subpoena cases: *Mazars* is rooted in the principle that the two bodies are inextricable, their boundaries difficult to define. *Vance* cautions, however, that public law must not entirely collapse them. In this sense, the duality provides a normative justification for both opinions. Daphna Renan, *Mazars, Vance and the President’s Two Bodies*, LAWFARE (July 22, 2020), <https://www.lawfareblog.com/mazars-vance-and-presidents-two-bodies> [https://perma.cc/E4CW-86XD]. In the case of congressional oversight of human rights, the body implicated is generally that of the office of the presidency. However, the entanglement of President Trump’s personal interests with those of foreign states and their leaders may complicate this question in foreign policy oversight as well.

or Senate is closely split on a particular issue, bipartisanship may not be enough to overcome it. This played out in the final challenge to President Trump on the Khashoggi issue, which by 2019 became explicitly linked to US support for Saudi Arabia's war in Yemen.⁷⁷ In July 2019, Congress passed legislation which would have prohibited arms sales to Saudi Arabia and other Gulf States.⁷⁸ Trump vetoed the legislation,⁷⁹ and Congress failed to garner the votes necessary to override the veto.⁸⁰

The Khashoggi case illustrates where Congress will draw the line on gross human rights abuses, even—or perhaps especially—when carried out by a strategic ally whose general behavior has caused moral outrage in the American electorate. The fact that the United States government was in possession of incontrovertible evidence of the murder of Khashoggi at the hands of the Saudi government made it less palatable for Congress to acquiesce to any administration stonewalling or soft peddling. But the case also illustrates, ultimately, the limits of congressional power in the face of a president unconcerned about human rights and willing to push presidential constitutional power to its limits. The judiciary, in this context, becomes essential to rebalancing the separation of powers and enforcing congressional oversight. But is there a separate role

77. See Catie Edmondson, *House Votes to Block Arms Sales to Gulf Nations, Setting Up Trump's Third Veto*, N.Y. TIMES (July 17, 2019), <https://www.nytimes.com/2019/07/17/us/politics/saudi-arms-vote.html> [<https://perma.cc/49KD-QQYG>] (“Lawmakers in both parties have been incensed that the president has done nothing to punish the kingdom for the grisly killing of Jamal Khashoggi, a Saudi dissident and Virginia-based Washington Post columnist, even after the Central Intelligence Agency concluded that Crown Prince Mohammed bin Salman ordered the killing.”).

78. Ethan Kessler, *Trump Vetoes Challenge to Arab Arms Sales*, ARMS CONTROL ASS'N (Sept. 2019), <https://www.armscontrol.org/act/2019-09/news/trump-vetoes-challenge-arab-arms-sales> [<https://perma.cc/H36W-XMQW>].

79. Karoun Demirjian et al., *Trump Vetoes Congress's Attempt to Block Arms Sales to Saudi Arabia*, WASH. POST (July 24, 2019), https://www.washingtonpost.com/politics/trump-vetoes-congresss-attempt-to-block-arms-sales-to-saudi-arabia/2019/07/24/7b047c32-ae65-11e9-a0c9-6d2d7818f3da_story.html [<https://perma.cc/M8KZ-Z9RM>].

80. *Senate Fails to Override Trump vetoes of bills stopping Saudi weapons sales*, REUTERS (July 29, 2020), <https://www.reuters.com/article/us-usa-saudi-arms/senate-fails-to-override-trump-vetoes-of-bills-stopping-saudi-weapons-sales-idUSKCN1U02BN> [<https://perma.cc/2Z64-XTND>].

for the judiciary in enforcing congressional human rights governance?

III. CONGRESSIONAL HUMAN RIGHTS MANDATES IN THE COURTS

Professor Flaherty laments that the Court has closed the proverbial courthouse door to international human rights litigation in federal courts.⁸¹ The Court's narrow role in international human rights adjudicatory governance is a logical consequence of the United States' decision not to join many of the central human rights treaties. Further, it is the consequence of the attachment to those treaties it did join of the so-called reservations, understandings and declarations ("RUDs"), which render the treaties obligations of international law, but without effect in domestic law.⁸² The United States is a party to several other treaties that can be said to include human rights obligations, such as the VCCR, which incorporates international standards into the arrest and detention of foreign nationals.⁸³ The Court has determined that even a binding adjudication clause in the VCCR is not self-executing, thus removing the federal courts from the international adjudication and enforcement process.⁸⁴ One of the few bright spots of judicial participation in international governance that Flaherty briefly mentions is the Court's approach to US obligations under the Refugee Convention of 1951 and its Protocol of 1967.⁸⁵ It is here that Congress's authority to

81. FLAHERTY, *supra* note 11, at 220-30.

82. *But see* David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129 (1999).

83. *See* The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. (Oct. 1, 1991). The Inter-American Court of Human Rights tied the consular notification right in Art. 36 of the VCCR to the international human rights guarantee of due process. *Id.*

84. *See* *Medellin v. Texas*, 552 U.S. 491 (2008). The Court has also signaled that federalism may provide an additional obstacle to treaty enforcement against individuals, even where Congress has adopted implementing legislation. *See* *Bond v. United States*, 572 U.S. 844 (2014). Concurring opinions of Justices Scalia, Thomas, and Alito noted that some treaty subject matter, even where approved as an Art. II Treaty by the Senate, and subsequently implemented through bicameral legislation, may not be compatible with federalism principles. *Bond*, 572 U.S. 844.

85. The central international human rights obligations relating to refugees and asylum seekers are found in the Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 and the Protocol of 1967, 606 U.N.T.S. 7 (1967). The United States became a party to the Protocol in 1968. The Refugee Act was passed into law in 1980 (since

implement an international human rights obligation, which it exercised when it enacted the Refugee Act of 1980 and subsequent amendments to US immigration law, has been amplified by Congress's creation of human rights reporting obligations.

Asylum cases arise when foreign nationals claim a "well-founded fear of persecution" and request *non-refoulement* (non-return to the place of origin) and the right of protection (i.e., permission to remain temporarily or permanently) in the United States.⁸⁶ The United States immigration courts make determinations of claims for asylum, as well as *non-refoulement* claims that arise from US obligations under the Convention Against Torture.⁸⁷ In reviewing these claims, and any appeals of those claims through the Board of Immigration Review and the federal appeals courts, both asylum seekers and the government in a significant number of cases come to rely on the Country Reports to support or rebut a claim for asylum.

For almost four decades, asylum cases in the United States cited the State Department reports in support of claims about human rights conditions abroad. Between 1980 and 2017, over 4,000 reported federal asylum cases cited the Country Reports as evidence (through judicial notice) of human rights conditions on the ground in the country of origin of the asylum seeker.⁸⁸ Former

amended) and incorporated the basic protections of the Convention and Protocol into US immigration law. See 8 U.S.C. § 1101 et. seq.

86. 8 U.S.C. §§ 1101(a)(42)(A), 1158.

87. *Id.*; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Apr. 18, 1988, 94 T.I.A.S. 1120.1, 1465 U.N.T.S. 85. See also International Religious Freedom Act of 1998, PUB. L. No. 105-292, 112 STAT. 2787 § 2(a)(3) (adding to the religious persecution elements for non-refoulement, creating a separate statutory claim).

88. A review of the case law demonstrates the increased use of the reports (1) over time, and (2) as the reports expanded in depth and breadth of issues covered. Between 1980 and 1985, only six asylum cases (out of 134) reference the Country Reports. Six cases (out of 172) discussed the report between 1985 and 1990; 203 cases (out of 1,152) between 1990 and 2000; 2,445 (out of 16,719 cases) between 2000 and 2010; and 1,405 cases (out of 7,177) between 2010 and 2017. (Data on file with author.) As the reports became a permanent feature of international human rights facts finding, they were used in a variety of national court and international court, commission, and committee settings. See McGuinness, *supra* note 21. See also *Humanitarian-based Immigration Resources*, DEP'T OF HOMELAND SEC., <https://www.dhs.gov/humanitarian-based-immigration-resources> [<https://perma.cc/J6AJ-DCW7>] (last visited Oct. 15, 2020) (listing the Country Reports as "additional government resources"). DHS included the most recent Country Reports release in their blog. See Kendall Scherr, *State Department Releases reports on Human Rights Practices*, HOMELAND SEC. DIGIT. LIBR. (Mar. 13, 2020),

Judge Richard Posner, in two separate opinions, criticized “overreliance” on the reports, particularly by the government, noting that they are “anonymous” and therefore restrict the ability of asylum seekers to cross-examine them.⁸⁹ He expressed the “perennial concern that the Department soft pedals human rights violations by countries that the United States wants to have good relations with.”⁹⁰ The risk of politicization of the reporting has always hung over the reporting process. Over time, however, even the human rights NGO community began to trust the Country Reports as a reliable source of factual reporting from which to draw legal conclusions about a state’s compliance with its human rights obligations.⁹¹

The courts themselves grapple with the human rights questions at the heart of asylum claims: has the asylum seeker suffered a human rights violation that would meet the general criteria of a “well-founded fear of persecution” based on “race, religion, nationality, and/or membership in a particular social group or political opinion?”⁹² As a matter of factual and legal adjudication, asylum claims are no more or less complex than any other adjudication of human rights claims brought in domestic or international courts. Courts in asylum cases address hard questions of fact and law, and may reach inconsistent results.⁹³ What is notable in these cases is the influential role of the work product of the executive branch created under the congressional mandates, and the fact that they have guided the adjudication in many cases.

Moreover, adjudication of claims of refugees is a component of global human rights governance. The act of granting asylum represents both a factual and legal determination that the acts of one state toward a person or group of people was in breach of

<https://www.hsdl.org/c/state-department-releases-reports-on-human-rights-practices/> [<https://perma.cc/G3XS-AV5C>].

89. *Niam v. Ashcroft*, 354 F.3d 652, 658 (7th Cir. 2004) (citing *Gailius v. INS*, 147, F.3d 34, 46 n.7 (1st Cir. 1998)).

90. *Gramatikov v. INS*, 128 F.3d 619, 620 (7th Cir. 1997).

91. See McGuinness, *supra* note 21.

92. 8 U.S.C. § 1101(a)(42)(A).

93. Inconsistency raises questions of both fairness within the US legal system, as well as general US compliance with the obligations of international refugee law. See Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. R. 295 (2007).

international human rights law. A grant of asylum represents the direct implementation of an international human rights law obligation of the United States. The rights at issue are enjoyed by non-citizens and claimed in response to persecution that takes place outside the United States. It is thus a form of indirect horizontal governance across borders, aided by the direct vertical governance of statutorily adopted treaty obligations. Congress's role here can be viewed as both direct governance, in implementing the treaty obligation, and indirect, in creating the Country Reports, which are then provided as evidence to the courts to facilitate adjudication of a claim about non-compliance of foreign states with their international human rights obligations.⁹⁴ Asylum law has served as a mechanism of protection of individuals, but also of opprobrium of the human rights behavior of foreign states, even those that have disclaimed formal human rights treaty membership.

What the refugee cases make clear is that human rights governance is both political and legal. Placing faith in the Court to re-orient American engagement with international law and governance needs to acknowledge the ways in which the blending of law and politics will also play out in the Court. Indeed, one way to view the historical dimensions of Professor Flaherty's book is to track the Court's turn away from enforcement of international law and human rights to trends in the Court's overall composition. The Court's more conservative wing has been consistently on the side of closing the courthouse door to claims based in treaties or customary international law, and to narrowing extraterritorial application of statutes, while the liberal wing has generally been more open to those cases, as well as to allowing international human rights law to influence constitutional rights interpretation.⁹⁵

94. Not all asylum cases rely on Country Reports. Other fact-finding, by NGOs, civil society, journalists and direct witnesses in particular cases, are also frequently relied on to supplement or undermine the testimony of the asylum seeker. See McGuinness, *supra* note 21.

95. Late Justice Ruth Bader Ginsburg is an example of a liberal Justice willing to apply international law in cases. See Chris Borgen, *Justice Ginsburg and Secretary of State Rice at the ASIL; More on Citation to Foreign Sources by U.S. Courts*, OPINIO JURIS (Apr. 04, 2005), <http://opiniojuris.org/2005/04/04/justice-ginsburg-and-secretary-of-state-rice-at-the-asil-more-on-citation-to-foreign-sources-by-us-courts/> [https://perma.cc/JLU4-9RAL]. About Ginsburg, Sean D. Murphy wrote "[t]o cite but one example, in her concurring

Politics at the Court runs head on into Professor Flaherty's central claim that the United States and the world benefit from more, not less, American participation in global governance.⁹⁶ The conservative wing of the Court largely disagrees with this proposition.⁹⁷ According to Republican party orthodoxy and the so-called Trump Doctrine, prosperity and peace are best served by treating international relations with more politics and less law.⁹⁸ I agree that more, rather than less, engagement in global systems of governance is better for the United States and, generally speaking, for the management of international relations and disputes. But given the shift in Court politics and doctrine, it may not be the branch poised to restore American global governance, even if—as Flaherty so convincingly lays out—it once endorsed it.

To the degree that the United States participates in the non-adjudicatory, diplomatic elements of international human rights governance, the Court will have no role in adjudication of any issues arising in those *fora*. That is, in part, due to the moves made by the Supreme Court on issues of standing and justiciability that Flaherty critiques.⁹⁹ Any challenges to the ways in which Congress

opinion on race-conscious university admissions policies in *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003), she turned to both the Convention on Racial Discrimination (to which the United States is a party) and the Convention on the Elimination of Discrimination against Women (to which it is not) as guidance for considering the meaning of the equal protection clause of the Fourteenth Amendment." *Remembering RBG*, AM. SOC'Y OF INT'L L., <https://www.asil.org/rememberingRBG> [<https://perma.cc/R5L6-DA9F>] (last visited Oct. 15, 2020). Justice Stephen Breyer provides another example. See Justice Stephen Breyer, Address at the Am. Soc'y of Int'l L., (Apr. 4, 2003) (transcript available at https://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_04-04-03 [<https://perma.cc/2XXL-SH9L>]).

96. See FLAHERTY, *supra* note 11, at 19.

97. The late justice Scalia was a standard-bearer for the anti-globalist stance on issues of constitutional interpretation. See Melissa A. Waters, *Justice Scalia on the Use of Foreign Law in Constitutional Interpretation: Unidirectional Monologue or Co-Constitutive Dialogue Symposium Issue: International Law and the 2003-04 Supreme Court Term: Building Bridges or Constructing Barriers between National, Foreign, and International Law*, 12 TULSA J. COMP. & INT'L L. 149 (2004–2005). See also William Dodge, *Justice Scalia on Foreign Law and the Constitution*, OPINIO JURIS, <http://opiniojuris.org/2006/02/22/justice-scalia-on-foreign-law-and-the-constitution/> [<https://perma.cc/LHL4-WPPD>] (last accessed Oct. 15, 2020). For more examples of conservative stances, see Chief Justice Roberts' decisions in *Medellin v. Texas*, 552 U.S. 491 (2008) and *Bond v. United States*, 572 U.S. 844 (2014).

98. Michael Anton, *The Trump Doctrine: An insider explains the president's foreign policy*, FOREIGN POL'Y (Apr. 20, 2019), <https://foreignpolicy.com/2019/04/20/the-trump-doctrine-big-think-america-first-nationalism/> [<https://perma.cc/WEZ7-W6MM>].

99. FLAHERTY, *supra* note 11, at 173-81.

and the President share human rights governance powers, as well as any challenges brought by one branch against the other, are those most likely to fail on standing, justiciability and other grounds for non-adjudication or dismissal of claims.¹⁰⁰ As a result, complex questions of legal compliance with international human rights norms—as they are applied to the United States—are left to non-adjudicatory institutions. Politics and civil society move in to fill the gap when the courts have a reduced role, picking and choosing among international human rights norms that can be “brought home” to local, state or even federal law.¹⁰¹ Once international law “comes home” and becomes part of domestic politics and law making, the Court’s role is not as a global court, but as a national court adjudicating claims arising under the Constitution or statute. In short, the more the United States participates in non-treaty international human rights governance, the less likely it is that the Supreme Court will be involved in adjudicatory international human rights governance.

There is an important limitation to this argument. By treating all international human rights as a question of *foreign* policy, or even *foreign* legal policy, it frames international human rights as an issue of how the United States should behave in its relations with other states and institution outside its borders. This is a frame of human rights policy as external governance. Such an approach ignores how the United States governs questions of human rights at home, including whether international human rights jurisprudence should influence constitutional interpretation at the Court.¹⁰² The challenge faced by this approach is that it attempts to draw a bright line between what we mean by “external” human rights and “internal” human rights. Drawing this line has never been entirely successful, even in the United States.¹⁰³ Since the

100. *Id.*

101. See Koh, *supra* note 53 (describing the role for non-state actors in transnational legal process). For an example of activist efforts to bring international human rights law into US law at the state and local level, see Human Rights Institute, *State and Local Implementation of Human Rights*, COLUM. L. SCH., <https://web.law.columbia.edu/human-rights-institute/human-rights-us/state-and-local-implementation> [<https://perma.cc/W75Z-8T5P>] (last visited Oct. 10, 2020). For a discussion of NGOs and civil society, see HAFNER-BURTON, *supra* note 26, at 151-63.

102. FLAHERTY, *supra* note 11, at 242-51. See also McGuinness, *supra* note 21.

103. See generally CAROL ANDERSON, *EYES OFF THE PRIZE* (2003). For a history of the ways in which Cold War politics extinguished hope of linking the fight for racial equality in the United States to the burgeoning UN human rights system, see *id.* at 5 (“The Cold War

beginning of the post-World War II era of international governance, the idea of international human rights has sought to modify the nature of two central principles of international law: non-interference in internal matters, and the principle of international law as consensual form of law making.¹⁰⁴ As a matter of foreign policy, the United States has attempted to navigate this space by arguing that the American constitutional order is in harmony with the general goals and approach of international human rights law, while also refusing to consent to supranational governance of that internal human rights order.¹⁰⁵

That position was never entirely defensible, but it has become increasingly untenable in the last two decades as the US domestic rights behavior has come under international scrutiny. Ironically, it is through governance of monitoring and reporting that the United States promoted within the UN and regional human rights bodies that US behavior has been assessed.¹⁰⁶ The external means and methods of measuring human rights behaviors have “come home” to the United States in ways that the US government had hoped to block by not joining human rights treaties or attaching non-self-executing reservations to them.¹⁰⁷ In this light, Congress is a complementary governing mechanism to international human rights political governance, as well as to international and domestic adjudication of rights. It has been through the human rights diplomacy of the congressional mandates, not the federal courts, that the United States has had the most influence and

also systematically eliminated human rights as a viable option for mainstream African American Leadership.”).

104. Since the founding of the UN, the conflict between human rights and non-interference under Art. 2 (7) had been highly contested. See Maziar Jamnejad & Michael Wood, *The Principle of Non-Intervention*, 22 LEIDEN J. OF INT’L L. 345 (2009). See also Andrea Bianchi, *Human Rights and the Magic of Jus Cogens*, 19 EUROPEAN J. OF INT’L L. 491 (2008) (discussing the relationship between customary international human rights law and *jus cogens* norms).

105. See MICHAEL IGNATIEFF, *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 19 (2005).

106. See, e.g., *Universal Periodic Review – United States of America – Reference Documents*, OCHR, <https://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRUSStakeholdersInfoS9.aspx> [https://perma.cc/674A-9ULJ] (last visited Oct. 15, 2020). See also Jamil Dakwar, *In an Unprecedented No-Show, the U.S. Pulls Out of Planned Human Rights Hearing*, ACLU BLOG (Mar. 21, 2017), <https://www.aclu.org/blog/human-rights/unprecedented-no-show-us-pulls-out-planned-human-rights-hearing> [https://perma.cc/H68V-9KWP] (assessing US human rights practices at the inter-American Commission of Human Rights).

107. See Sloss, *supra* note 83 and accompanying text.

impact on the international human rights system. Whether the influence of American human rights diplomacy endures, will depend on the political branches, not the courts.

IV. CONCLUSION

As the Constitution designed, Congress cannot engage in any foreign policy—including human rights governance—on its own. Foreign affairs powers are shared with the president, and the president holds the constitutional authority to carry out the foreign policy of the United States. Moreover, congressional human rights governance has not always meant congressional human rights dominance. At times, the active participation of Congress in international human rights governance has been more prominent than the Executive, and at other times it has taken a back seat to presidential agenda-setting. Over time, the interaction between presidential and congressional human rights policy-making has operated as a kind of feedback loop, with one or the other branch acting or reacting to the initiatives of the other. Where a president is hostile to international human rights, as with the Trump administration, there may be additional significant limits to congressional power.

Congressional human rights mandates have endured because American presidents of the modern era have generally embraced international human rights as an ideal and a framework through which to legitimize their own foreign policy agendas. Presidents of both parties have generally rejected formal membership in international human rights treaties and institutions. Yet up until the Trump administration, presidents of both parties have used human rights diplomacy as a tool to frame US behavior, rebut claims of amorality in foreign policy, and deploy as a cudgel against so-called strategic competitors. Indeed, the breadth, scope and malleability of the phrase “international human rights” has allowed it to be used by different presidents for different purposes. This permits presidents to differ on such issues as which rights are fundamental, what is the hierarchy of rights protection, and which rights demand protection of law and which are merely part of moral, cultural or religious commitments of particular societies.

For those depending on international human rights law to provide the content of substantive rights and mechanisms for their enforcement, these distinctions are not insignificant. But the

Trump era represents a jarring break from *any* rhetorical commitment to human rights—whether a legal or moral claim—by the President. As I have argued elsewhere, Trump has abandoned the typical “presidential human rights talk,” and has instead embraced and excused the worst human rights behavior of foes (North Korea, China) and allies (Saudi Arabia, Turkey, Hungary) alike in equal measure, while downplaying the virtues of rule-of-law democracies with good human rights records (e.g., Canada, Germany).¹⁰⁸ This lack of human rights talk extends to domestic human rights issues as well. The erosion of rule of law and human rights norms at home under the Trump administration—also accompanied by personal presidential rhetoric that has been described as coming from “the authoritarian playbook”—deepens the fissure between the United States and the ideals of international human rights governance.

If it were ever true that the United States speaks with “one voice” when it comes to foreign affairs, the Trump turnabout on human rights rhetoric might mark an endpoint to US human rights diplomacy. But the United States has never spoken with “one voice” on the subject of international human rights. Indeed, since the beginning of the international human rights era in the 1950s, the United States has spoken with multiple voices, which have only infrequently been in harmony with one another.¹⁰⁹ Any effective restoration of a robust role for the United States in human rights governance will require a president who returns to a rhetorical commitment to human rights—or at least does not actively seek to undermine human rights. Such presidential policy is necessary but not sufficient to meaningful human rights governance. At the national level, it has been Congress, not the judiciary, that has served to both hamper and promote the role of the United States in international human rights governance. Without appropriations, active oversight of executive branch human rights diplomacy, and other congressional lawmaking in support of robust human rights governance, a return to presidential leadership on human rights will fall short. Congress holds the keys

108. McGuinness, *Presidential Human Rights Talk*, *supra* note 15.

109. The dissonance has been between the political branches, but also between the federal government and the states. *See, e.g.*, Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States Social Movements and Law Reform*, 150 U. PA. L. REV. 245 (2001–2002).

to any restoration of US leadership in human rights governance. And the Khashoggi case is recent evidence that, in the wake of President's Trump's undermining of human rights diplomacy, Congress may be reawakening to its role.