

GINSBURG, FOREIGN LAW, AND THE CONSTITUTION

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Supreme Court Justice Ruth Bader Ginsburg recently revealed that she and Justice Sandra Day O'Connor were the targets of an Internet death threat last year. Ginsburg divulged this information during a speech before the Constitutional Court of South Africa.

Who does Ginsburg blame? Congressmen (almost exclusively Republicans) who have the gall to suggest that foreign laws should not be relevant in interpreting the United States Constitution. Their efforts to introduce legislation to this effect, Ginsburg claims, "fuel the irrational fringe."

Not surprisingly, several media outlets immediately latched on to the story, bemoaning the fact that Justice Ginsburg has had to endure death threats from crazy right wing kooks.

Obviously, death threats against a public official are completely inappropriate and outrageous. But let's put the issue into perspective. President Bush must receive several death threats per year, but most of those threats don't make the evening news—or even a handful of blog postings. Why are the threats against Ginsburg considered earth-shattering news? Worse, why are other, much more disturbing details of her speech being largely ignored by the mainstream media?

Justice Ginsburg should be criticized for at least two aspects of her comments before the South African court.

First, Justice Ginsburg's speech went well beyond a general discussion and comparison of South African versus American jurisprudence. Instead, she blamed pending legislation, sponsored primarily by Republicans, for a death threat that had been made against her. Such a statement reeks of partisanship and is wholly inappropriate. Ginsburg should be doing her utmost to be independent, above the political fray.

Moreover, something about partisan, political statements in a foreign country feels even worse than the same partisan statement at home. Imagine the uproar if Justice Scalia were to travel to London to give a speech about the scope of presidential power. Then, during that speech, he decided to blame anti-wiretapping legislation introduced by Democrats for death threats that he had received. The outrage directed at Scalia would be palpable. Why is Ginsburg different?

Second, Justice Ginsburg's tale about the death threat masks the problematic substance of her speech.

Justice Ginsburg used the speech as an opportunity to praise the South African legal system, which requires the use of international law and allows the use of foreign law when its constitution is construed. Fine. South Africans are a self-governing people, and they can set their own rules. But Justice Ginsburg took her praise one step further, bemoaning the fact that Americans apparently have not seen fit to formally establish such an enlightened system of jurisprudence. To the contrary, Justice Ginsburg noted, congressmen are working to ensure that judicial interpretation of the Constitution is not based upon "judgments, laws, or pronouncements of foreign institutions unless such [materials] inform an understanding of the original meaning of the Constitution." The "sizable" support behind such efforts, Justice Ginsburg declared, is "disquieting."

Gasp! Those nasty Republicans. They want the American Constitution to be interpreted based purely on American legal considerations? They should be ashamed of themselves. They want the Constitution to be interpreted based purely on legal considerations? They should be ashamed of themselves.

There are important reasons to avoid using foreign law in interpreting the U.S. Constitution. Perhaps most importantly, a focus on American legal precedents encourages judges to keep their eye on the ball, reminding them that their job is to judge, not to legislate. An ability to use foreign law encourages the opposite result.

Foreign laws are many and varied; they differ drastically across cultures. The broad range of differing foreign precedents can't be applied simultaneously; therefore, judges who rely upon foreign law easily fall into the trap of letting their personal biases influence the manner in which they selectively apply foreign laws to the cases before them.

As Chief Justice John Roberts stated in his confirmation hearings:

[L]ooking at foreign law for support is like looking out over a crowd and picking out your friends. You can find them. They're there. And that actually expands the discretion of the judge. It allows the judge to incorporate his or her own personal preferences, cloak them with the authority of precedent because they're finding precedent in foreign law, and use that to determine the meaning of the Constitution.

But let's say, for argument's sake, that such problems did not exist. A reliance on foreign law is still inappropriate. British or German or French laws should not be used to govern Americans. Such a concept is fundamentally incompatible with the concept of self-governance—one of the most basic principles behind the U.S. Constitution.

How sad that Justice Ginsburg does not know that.