



# The EU to Member States – We Now Control Your Borders

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In response to complaints filed by Hungary and Slovakia, the European Union's (EU) highest court, recently held that EU member states are legally obligated to admit tens of thousands of migrants seeking refugee status. Americans who are concerned about preserving U.S. sovereignty – in particular our ability to control our own borders – should be alarmed by this decision.

What does a decision made by a multinational court in Europe have to do with U.S. immigration law? It turns out that the answer may be: "Quite a bit." First, there is a movement afoot, among senior judges and legal scholars, to bring U.S. legal principles into conformity with the laws of the rest of the world. And secondly, American sovereignty is under assault by activist federal judges, who believe that foreigners with no prior connection to the United States may have a legally enforceable right to be migrate here. Both camps may be inclined to rely on decisions by international tribunals like the EU Court as the basis for finding that certain foreigners have a right – pursuant to international law – to be let into the United States.

## **The European Union and the Erosion of National Sovereignty**

Hungary and Slovakia were contesting a refugee quota system<sup>1</sup> implemented in the wake of the mass migration crisis that engulfed Europe beginning in 2015.<sup>2</sup> According to Hungarian and Slovakian authorities, the quota system violates the Dublin Regulation, which requires people seeking asylum within the EU to apply for protection in the first member state they reach.<sup>3</sup> The court disagreed and, in *Slovakia and Hungary v. Council*, ruled against the complainants.<sup>4</sup> The decision represents a significant decrease in the ability of European national legislatures to exercise control over their borders and their immigration policies.<sup>5</sup>

Although the decisions of the EU Court are binding only on union member states, this holding is likely to have prominent effects on courts far and wide. Because the actions of international organizations are considered a source of international law, the decision may be relied upon as authoritative by other international tribunals. In addition, it sets a dangerous precedent for the erosion of national border controls in favor of arbitrary immigration rules created by multi-national non-governmental entities, like the EU, the Organization of American States, and the United Nations.

## **Ignoring Established Principles of International Law and Placing National Sovereignty in Peril**

Sovereignty is the cornerstone of the current system of international law.<sup>6</sup> That system acknowledges the rights of independent states to establish the rules by which their citizens will live, free from outside interference.<sup>7</sup> Implicit in sovereignty is the ability of a state's government to determine who may cross its borders. Control of national borders is of particular significance in a democracy, where the people retain the right to determine who may become a fellow citizen.

Over a century ago, the Supreme Court of the United States acknowledged this when it stated, "It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."<sup>8</sup> At the close of the Nineteenth Century, the justices of America's highest court understood that governments exist in order to protect both their citizens and their national territory.

The EU Court's response to the Hungarian and Slovakian complaints seems to imply that European Union jurists have abandoned the notion of fundamental sovereignty. It would also appear to indicate that EU membership means giving up the right to formulate national immigration policies. This is part of a disturbing trend. Over the last decade the unelected representatives of international organizations have regularly taken to deriding the concept of sovereignty and the independent nation state. A former United Nations Special Representative for Migration has publicly stated that, "sovereignty is an absolute illusion that has to be put behind us," and insists that individual nations are bound to blindly accept whatever refugees show up at their door.<sup>9</sup>

## Why Americans Should Care

The EU Court's decision appears to be the first time that any authoritative international court has held that there are exceptions to a nation's absolute right to control its borders. Previously, states had a legal obligation to refrain from returning migrants to countries where they would likely face persecution. But there was no obligation to admit them or grant asylum.<sup>10</sup> Now, it is only a matter of time before a refugee files a suit before the EU Court, or another international tribunal, claiming a personal right to be admitted to a nation other than his country of citizenship – and prevails.

A series of decisions from international tribunals mandating the acceptance of any migrant fleeing generalized conditions of civil strife in his/her homeland might well be accepted as persuasive by activist judges in the United States. Supreme Court Justices Stephen Breyer,<sup>11</sup> Ruth Bader Ginsburg<sup>12</sup> and Anthony Kennedy<sup>13</sup> have publicly supported the use of foreign law by U.S. judges. The alleged basis for considering foreign law in resolving American legal questions is a desire to bring U.S. law into line with the norms and practices accepted by the majority of the world's nations.<sup>14</sup> Supporters argue that making American law more like that of other nations will improve international relations and make the U.S. legal system more just.

But the question that must be asked is, "More just for whom?" The American form of government is often cited as the prime example of a democratic republic. Relying on foreign law to justify the decisions of American courts simply undermines democratic self-governance.<sup>15</sup> It also provides a convenient excuse for ignoring the well-developed body of constitutional jurisprudence that has evolved in the United States over the last 228 years.<sup>16</sup> That corpus of law represents the views of learned Americans interpreting applying statutes drafted and passed by other Americans, within the framework of a Constitution drafted and accepted by the founding fathers of this nation.<sup>17</sup>

Americans citizens have expressed their will with regard to immigration, through Congress, which enacted the current version of the Immigration and Nationality Act (INA). In furtherance of their own interests, they want secure borders, a stable economy, and protection from crime and terrorism. But, in recent decades, they have repeatedly seen these desires undermined by Congress and the courts.

In 1972, the Supreme Court was still comfortable announcing in its decision on *Kleindienst v. Mandel*, that non-resident foreigners with no prior connections to the U.S. have absolutely no constitutional right to be admitted to the U.S.<sup>18</sup> Today, it is unclear whether judges who are pre-disposed to interpret the Constitution in light of foreign

laws, and decisions by international tribunals, will be inclined to observe existing precedent like *Ekiu v. United States* or *Kliendienst v. Mandel*.

It is entirely possible that they will attempt to rely on decisions like *Slovakia and Hungary v. Council* as the basis for departing from existing American legal authority in order to establish new rules aimed at complying with international norms, rather than the standards established by Americans, for Americans. In addressing the so-called “Trump travel-ban,” at least two federal appellate courts have signaled that they are willing to consider legal arguments that certain foreigners with no pre-existing connection to the U.S. have a legally enforceable “right” to be granted admission. This flies directly in the face of the Supreme Court’s decision

## Conclusion

At present, it is difficult to determine whether the nations of Europe will voluntarily surrender their sovereignty or push back against the undemocratic institutions of the EU. However, Slovakia and Hungary’s loss before the EU Court is a significant setback for the causes of sovereignty and nationally formulated immigration policies. Now that the EU has ruled against national sovereignty in *Slovakia and Hungary v. Council*, how long will it be before the United Nations, or another international organization, attempts to resolve the next migration crisis by mandating that member states are legally obliged to accept an annual quota of foreigners?

The Supreme Court has specifically held that the United States is not obligated to govern its internal affairs in accordance with specific provisions of international agreements because treaty obligations are subordinate to the U.S. Constitution.<sup>19</sup> However, in an era when Justices of the Supreme Court openly advocate their preference for foreign law over the Constitution of the United States, that holding seems far from secure.

The federal courts’ handling of the so-called “Trump travel ban” and Deferred Action for Childhood Arrivals suits has signaled that many American jurists are willing to re-write the INA to suit their globalist agenda. Will references to *Slovakia and Hungary v. Council* be their opening salvo? Only time will tell.

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<sup>1</sup>David Martin, “The EU Migrant Relocation and Resettlement Scheme – What You Need to Know,” *DW News*, June 9, 2017, <http://www.dw.com/en/the-eu-migrant-relocation-and-resettlement-scheme-what-you-need-to-know/a-40378909>

<sup>2</sup> James Crisp, Matthew Day, “European Divisions Over Migration Brutally Exposed by EU Court Judgment on Refugee Quotas,” *The Telegraph*, September 6, 2017, <http://www.telegraph.co.uk/news/2017/09/06/eu-court-rejects-refugee-quota-challenge-hungary-slovakia/>

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<sup>3</sup> Soeren Kern, "European Court Orders EU Countries to Take Migrants," *The Gatestone Institute*, September 7, 2017, <https://www.gatestoneinstitute.org/10956/european-court-migrants>

<sup>4</sup> Jennifer Rankin, "EU Court Dismisses Complaints by Hungary and Slovakia Over Refugee Quotas," *The Guardian*, September 6, 2017, <https://www.theguardian.com/world/2017/sep/06/eu-court-dismisses-complaints-by-hungary-and-slovakia-over-refugees>

<sup>5</sup> Curia – The Official Website of Court of Justice of the European Union, "Judgment in Joined Cases C-643/15 and C-647/15, Slovakia and Hungary v. Council," September 6, 2017, <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-09/cp170091en.pdf>

<sup>6</sup> Brad R. Roth, "The Enduring Significance of State Sovereignty," 56 Fla.L.Rev. 867 (2004), <https://www.law.upenn.edu/live/files/1644-roth-brad-the-enduring-significance-of-state>

<sup>7</sup> Thomas Nagel, "The Need for Nations," *New Republic*, June 27, 2005, <https://newrepublic.com/article/68274/the-need-nations>

<sup>8</sup> *Nishimura Ekiu v. United States*, 124 U.S. 651 (1892), <https://www.law.cornell.edu/supremecourt/text/142/651>

<sup>9</sup> UN News Centre, "Interview: Peter Sutherland," October 2, 2015, <http://www.un.org/apps/news/story.asp?NewsID=52126#.WbLc3rKGNpi>

<sup>10</sup> Roman Boed, "The State of the Right of Asylum in International Law," *Duke Journal of Comparative and International Law*, Vol. 5 – Issue 1, <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1342&context=djcl>

<sup>11</sup> Robert Barnes, "Breyer Says Understanding Foreign Law Is Critical to Supreme Court's Work," *Washington Post*, September 12, 2015, [https://www.washingtonpost.com/politics/courts\\_law/breyer-says-understanding-foreign-law-is-critical-to-supreme-courts-work/2015/09/12/36a38212-57e9-11e5-8bb1-b488d231bba2\\_story.html?utm\\_term=.7f9a691337ed](https://www.washingtonpost.com/politics/courts_law/breyer-says-understanding-foreign-law-is-critical-to-supreme-courts-work/2015/09/12/36a38212-57e9-11e5-8bb1-b488d231bba2_story.html?utm_term=.7f9a691337ed)

<sup>12</sup> Adam Liptak, "Ginsburg Shares Views on Influence of Foreign Law on Her Court, and Vice Versa," April 11, 2009, <http://www.nytimes.com/2009/04/12/us/12ginsburg.html?mcubz=3>

<sup>13</sup> Stephen McCaffrey, "There's a Whole World Out There: Justice Kennedy's Use of International Sources," *McGeorge Law Review*, Vol. 44 – Issue 1, [http://www.mcgeorge.edu/Publications/The\\_University\\_of\\_the\\_Pacific\\_Law\\_Review/Archives/McGeorge\\_Law\\_Review\\_Volume\\_44.htm](http://www.mcgeorge.edu/Publications/The_University_of_the_Pacific_Law_Review/Archives/McGeorge_Law_Review_Volume_44.htm)

<sup>14</sup> See Justice Kennedy's Opinion in: *Roper v. Simmons*, 543 U.S. 551 (2005), <https://www.law.cornell.edu/supct/pdf/03-633P.ZO>

<sup>15</sup> Ilya Shapiro, "The Use and Misuse of Foreign Law in U.S. Courts," *Cato at Liberty*, May 19, 2010, <https://www.cato.org/blog/use-misuse-foreign-law-us-courts>

<sup>16</sup> Richard Posner, "No Thanks, We Already Have Our Own Laws," *Legal Affairs*, July/August 2004, [http://www.legalaffairs.org/issues/July-August-2004/feature\\_posner\\_julaug04.msp](http://www.legalaffairs.org/issues/July-August-2004/feature_posner_julaug04.msp)

<sup>17</sup> William D. Bader, David R. Cleveland, "Precedent and Justice," *ValpoScholar*, 2011, [http://scholar.valpo.edu/cgi/viewcontent.cgi?article=1155&context=law\\_fac\\_pubs](http://scholar.valpo.edu/cgi/viewcontent.cgi?article=1155&context=law_fac_pubs)

<sup>18</sup> *Kleindienst v. Mandel*, 408 U.S. 753 (1972), [https://www.law.cornell.edu/wex/kleindienst\\_v.\\_mandel](https://www.law.cornell.edu/wex/kleindienst_v._mandel)

<sup>19</sup> *Medellin v. Texas*, 552 U.S. 49 (2008), <https://www.law.cornell.edu/supct/html/06-984.ZS.html>