COURTS AND FOREIGN AFFAIRS: "THEIR HISTORIC ROLE"

RESTORING THE GLOBAL JUDICIARY: WHY THE SUPREME COURT SHOULD RULE IN U.S. FOREIGN AFFAIRS. Martin S. Flaherty.* Princeton: Princeton University Press, 2019. Pp. xiv + 325. $35.00 (Hardcover).

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In a November 2019 address to the Federalist Society's National Lawyers Convention, U.S. Attorney General William Barr declared (among other things) that U.S. courts have taken on too great a supervisory role over the President, especially in foreign affairs.[2] Coincidentally, a book published two months earlier argued the exact opposite. In *Restoring the Global Judiciary: Why the Supreme Court Should Rule in Foreign Affairs*, Professor Martin Flaherty of Fordham Law School and Princeton University contends that U.S. courts are not doing enough to restrain the President and defend human rights in cases implicating foreign affairs and national security.[3]

As the book's title indicates, Professor Flaherty—a historian

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1. Hugh and Hazel Darling Foundation Professor of Law, University of San Diego School of Law. This Review incorporates remarks delivered at the International Law Association American Branch's conference at Fordham Law School in October 2019. Thanks to Martin Flaherty, David Golove, Rebecca Ingber, Thomas H. Lee, and David Sloss for helpful discussions and comments.

2. *See* Attorney General William P. Barr, *19th Annual Barbara K. Olson Memorial Lecture at the Federalist Society's 2019 National Lawyers Convention* (Nov. 15, 2019), https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-19th-annual-barbara-k-olson-memorial-lecture [hereinafter Barr, *Olson Lecture*] ("Courts are now willing, under the banner of judicial review, to substitute their judgment for the President's on matters that only a few decades ago would have been unimaginable—such as matters involving national security or foreign affairs.").

3. MARTIN S. FLAHERTY, RESTORING THE GLOBAL JUDICIARY: WHY THE SUPREME COURT SHOULD RULE IN U.S. FOREIGN AFFAIRS (2019).

as well as a legal academic—takes a predominantly originalist/traditionalist approach. *Restoring the Global Judiciary* argues that the Constitution's text and the Framers' understanding of it contemplate an active checking and protective role for the courts generally—and particularly in foreign affairs, because foreign affairs offers the greatest risk of abuse by the political branches. Moreover, the book argues, courts traditionally undertook that role through the late-eighteenth and nineteenth centuries, when courts routinely resolved foreign affairs disputes on the merits, often ruling against the executive branch. Only relatively recently, the account runs, have courts begun to use various gatekeeping doctrines to vindicate growing reluctance to interfere in foreign affairs controversies. The book acknowledges that modern courts do entertain some foreign affairs disputes, and even rule against executive policy at times, but it sees modern courts at something of a crossroads: the rise of gatekeeping doctrines and foreign affairs avoidance is competing with the courts' historical engagement, pushing one way in some cases and the other way in others. The book's call, then, is for courts to "reclaim their historic role" (p. 255).[4]

Restoring the Global Judiciary is a particular challenge to those who exalt text, history, and tradition to guide constitutional decision-making. The modern rise of originalism and related approaches has occurred alongside decisions signaling concern over judicial involvement in foreign affairs, and calls for reduced judicial involvement in foreign affairs are often—as in Attorney General Barr's address—linked with praise for originalist-oriented adjudication.[5] Yet, if Professor Flaherty is right, originalism's rise should enhance, not reduce, courts' willingness to constrain the foreign affairs executive.

This Review argues that Professor Flaherty is partly right. In particular, he is right about his three central historical points. First, the Constitution's text and the Framers' design placed the judiciary in a checking role expressly to protect the separation of powers and individual rights. Second, this general design extended to—and indeed was perhaps particularly appropriate to—foreign affairs, where the dangers of presidential overreaching might be the greatest. And third, courts did

4. *Id.,* at 7 ("The judiciary must commit itself to reclaiming its historic role . . . ").

5. *See* Barr, *Olson Lecture*, *supra* note 2 (expressly adopting an originalist approach at the speech's outset).

commonly decide foreign affairs-related cases in the first century of constitutional history, including ruling against the executive. *Restoring the Global Judiciary* gives an insightful, balanced and engaging account of this history that should prove highly persuasive.

Yet this Review also argues that *Restoring the Global Judiciary* deemphasizes substantial historical checks on the judiciary's role. The Constitution did not create the judiciary as a supervisory force *above* the other players in the constitutional system. Rather, the courts are actors within the system restrained by its explicit limits, by their assumed institutional role, and by judicial prudence about the role courts can constructively fill. Failing to embrace these limits leaves *Restoring the Global Judiciary* with a grander vision of the courts than text and history actually support.

First, the Constitution and its background assumptions limit the judiciary in various respects, some general and some specific to foreign affairs. Professor Flaherty complains about the proliferation of gatekeeping doctrines preventing courts from reaching the merits (political question doctrine, territoriality, non-self-executing treaties, etc.). Often he is right that the modern scope of these doctrines exceeds their historical foundations. But, for the most part, they are not modern inventions. The Constitution restrained courts as it restrained other branches of government. Second, beyond textual and doctrinal limitations, early courts played only a modest role in foreign affairs matters. While the book rightly recounts the range of foreign affairs cases early courts decided, it implies too much about their importance. It is hard to identify any case in the courts' early years that forced a substantial revision of U.S. foreign policy. That modesty, too, is part of the courts' "historic role."

More fundamentally, *Restoring the Global Judiciary* overstates the courts' role in the emergence of a powerful foreign affairs executive. The Constitution itself provided the President with a substantial independent role in foreign affairs.[6] And of

6. *See, e.g.,* SAIKRISHNA B. PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE (2016); MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS (2007); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2001). *But see* Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004) (taking a narrower view of presidential foreign affairs

central importance to modern law, Congress has delegated enormous and largely unconstrained foreign affairs powers to the President.[7] Thus, even if courts were to reach the merits of foreign affairs controversies more frequently, the results might more likely uphold rather than check executive power. And if the modern foreign affairs executive greatly exceeds the Framers' design, the chief culprit is not the courts' restraint, but Congress' abdication.

In sum, this Review concludes, neither the Attorney General nor Professor Flaherty is wholly correct about the courts' historic role in foreign affairs. Courts have long been involved in foreign affairs, and the Constitution and its Framers deliberately established them in that role. Originalist and traditionalist materials do not support a general outlook that courts should avoid foreign affairs controversies or leave U.S. foreign policy entirely to the executive. But the courts' historic foreign affairs role has been modest, constrained both by text and institutional design and by judicial caution.[8] And in any event, courts are neither the principal cause nor the likely remedy for excessive presidential foreign affairs power.

Part I of this Review describes and largely endorses *Restoring the Global Judiciary*'s basic project, which is to use originalist and traditionalist methods to defend an active role for U.S. courts in foreign affairs cases. Part II describes historical limitations on that role based in text and institutional background and discusses the modest role courts in practice played in early U.S. foreign policy. Part II further suggests that the original Constitution endorsed a foreign affairs executive more powerful than Professor Flaherty would prefer, and that, for modern expansions beyond that role, Professor Flaherty's principal concerns should be with Congress rather than the courts.

power); Julian Davis Mortenson, *The Executive Power Clause*, 167 U. PA. L. REV. __ (forthcoming 2020) (same).

7. *See infra* Part II.B.3.

8. I have previously made versions of these arguments in RAMSEY, *supra* note 6, at 321–76, and Michael D. Ramsey, *Judicial Imperialism and the War on Terror Cases*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 582–88 (David L. Sloss, Michael D. Ramsey & William S. Dodge, eds. 2011) [hereinafter Sloss et al.]. For earlier versions of Professor Flaherty's argument, *see, e.g.*, HAROLD HONJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER IRAN-CONTRA 38–101 (1990); David Golove, *The Supreme Court, the War on Terror, and the American Just War Tradition*, *in* Sloss et al., *supra*, at 561–74; Martin S. Flaherty, *Constitutional Resolve in a World Changed Utterly*, *in id.* at 575–81.

I. COURTS AND FOREIGN AFFAIRS IN THE FOUNDING ERA AND BEYOND

This Part describes *Restoring the Global Judiciary*'s basic argument. As noted, the book's central premise is that courts have come to question, and to some extent abandon, their traditional robust role in resolving controversies touching foreign affairs. Accordingly, its most important sections are those describing what it calls (pp. 7, 255) the courts' "historic role." The book acknowledges and defends its adoption of an originalist/traditionalist approach (pp. 8–11), but that defense is not its main point. Rather, the target audience is those who are already inclined toward historical arguments and are interested in how those arguments run in foreign affairs disputes.

A. COURTS, SEPARATION OF POWERS, FOREIGN AFFAIRS AND THE FOUNDING

The book's first step is to highlight the Constitution's focus on separation of powers and the courts' role in defending that separation (pp. 23–63). The Constitution's focus on separation of powers is unlikely to be controversial, and indeed is something of a cliché, but Professor Flaherty's recounting is eloquent and insightful. Particularly notable is his emphasis on the Constitution's creation of a (relatively) powerful executive to counter the tendency of legislative overreach and to provide executive leadership with energy and decisiveness (pp. 34–41).[9] Creation of this powerful position fostered fears of executive overreach (and indeed tyranny), thus focusing the Framers' attention on power-checking as well as power-enhancing provisions (pp. 40–44).

Perhaps somewhat more controversially, the book emphasizes the creation of a new and independent federal judiciary as part of the check (pp. 41–44). While acknowledging that few in the Founding Era could have foreseen the modern

9. *See also* RAMSEY, *supra* note 6, at 115–31 (providing a similar account). Professor Flaherty acknowledges the creation of "a supreme magistrate [that] was truly awesome"; FLAHERTY, *supra* note 3, at 39 (quoting GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 521 (1968)) and endorses a modest version of the "unitary presidency," *id.* at 40–41. Thus his starting point is not so far from Attorney General Barr's. *See* Barr, *Olson Lecture*, *supra* note 2 (discussing the Framers' creation of a strong executive as a remedy for previous failed models). The divergence comes at the next step, with Professor Flaherty emphasizing the creation of counterbalancing restraints, particularly in the judiciary.

scope of judicial review (p. 43), Professor Flaherty rejects the suggestion that judicial review is a post-ratification invention. Rather, he sees it as an inevitable, if underdeveloped, aspect of separation of powers and of the courts' role as independent adjudicators. As he concludes, "*Marbury*, in short, in asserting judicial review, confirmed a power that was neither novel by that time nor modest in light of the circumstances" (p. 44). And, though the most immediate application of judicial review in the Framers' minds likely was unconstitutional state actions, there was no reason in principle or practice to think it would not extend to executive actions as well, particularly in light of the Framers' concern over enhanced executive power.[10]

The book's second step is to show that the Constitution's concern for separation of powers extended to foreign affairs and encompassed a strong judicial role in that field (pp. 46–63). Again, the first part of this argument is straightforward. On its face, the Constitution divides the most important foreign affairs powers—war, control of the military, treaty-making, appointing and receiving ambassadors (p. 58–60). Importantly, many of these functions were part of the traditional power of the English monarch/executive but were assigned elsewhere, in whole or part, in the Constitution.[11] As Professor Flaherty argues, this illustrates the Framers' particular concerns that the powerful presidency they had created would lead to overreach in foreign affairs. Thus separation of powers was actually more, not less, important in foreign affairs than elsewhere. In the book's assessment (pp. 56-57):

> [T]he value of separation of powers learned on the domestic front became a key to taming the stronger national government required to ensure the new republic's survival both as a viable nation and a free republic.
>
> This connection belies a persistent historical misunderstanding that treats the Founders' commitment to separation of powers as purely a domestic story. The doctrine, to be sure, came into its own first to diagnose, and then cure, the vices of democratic despotism in the states. The idea nonetheless transcended its

10. This view seems widely shared across the political and methodological spectrum. *See, e.g.*, RAMSEY, *supra* note 6, at 321–41; Saikrishna Prakash & John Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887 (2003); William Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455 (2005). A leading contrary view is Larry Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4 (2001).

11. *See* Prakash & Ramsey, *supra* note 6, at 252–61.

> origins to serve as a device both to check tyrannical power and promote efficiency. As such, it was ideally suited to ensuring that the concentration of foreign affairs authority in a stronger national government would not threaten liberty, while still leveraging the expertise of each branch for effective foreign policy.[12]

As to the judiciary, its foreign affairs role is less clearly set forth in the Constitution's text. But, as the book argues, one central innovation of the Constitution illustrates the Framers' embrace of an active judicial role: the idea of treaties as judicially enforceable law (pp. 60–63). Describing treaties in Article VI as part of supreme law, with equivalent status to statutes, indicated that courts would have a central and independent role in construing them (as they did with statutes), a point confirmed by Article III's granting federal courts jurisdiction over cases arising under treaties. As the book acknowledges, the paradigm case in the Framers' minds was presumably state violations of treaties; state violations of the Treaty of Peace with Britain were a central headache for U.S. foreign affairs under the Articles of Confederation. But, taken with the Constitution's general invitation to judicial enforcement of separation of powers and its explicit adoption of separation of powers in foreign affairs, there seems little foundation for a claim that courts were necessarily excluded from deciding foreign affairs cases involving branches of the national government.

12. One quibble is that, if anything, this passage understates the historical roots of separation of powers in foreign affairs. In the English system, it is true that most core foreign affairs powers (war, treaty-making, diplomacy, appointments) were concentrated in the executive monarch. But a centerpiece of the English system of separated powers was that Parliament controlled expenditures (or, at least, that it should control expenditures). Crucially, this proposition extended to expenditures related to foreign affairs, and indeed Parliament's use of control over expenditures to check the monarch's foreign policy was a substantial point of tension in multiple episodes.

As a second quibble, Professor Flaherty unnecessarily goes out of his way here to disparage the view that "Article II's grant of power . . . impl[ied] plenary foreign affairs authority unless otherwise indicated" (p. 60). *See* Bradley & Flaherty, *supra* note 6 (expanding on this criticism). *Compare* Prakash & Ramsey, *Executive Power over Foreign Affairs, supra* note 6, *with* Saikrishna Prakash & Michael D. Ramsey, *Foreign Affairs and the Jeffersonian Executive: A Defense*, 89 MINN. L. REV. 1581 (2005) (responding directly to Professors Bradley and Flaherty). The idea that Article II, Section 1 vests "residual" foreign affairs power (that is, power not otherwise allocated by the Constitution) in the President is entirely consistent with *Restoring the Global Judiciary*'s emphasis on separation of powers in foreign affairs. Concluding that separation of powers applies to foreign affairs does not say anything about how the Constitution allocated any particular foreign affairs power. *See also infra* Part II.B.3 (arguing that the original Constitution's foreign affairs President may be stronger than Professor Flaherty would like).

B. COURTS AND FOREIGN AFFAIRS IN HISTORICAL PRACTICE

The centerpiece of *Restoring the Global Judiciary* comes at its next step. For Professor Flaherty, the courts' constitutional role in foreign affairs is confirmed by what happened after ratification. In his telling, courts embraced a robust role in foreign affairs controversies from the outset, one that continued into the twentieth century. In an engaging tour that touches upon the nation's great foreign affairs controversies from the Neutrality Proclamation to the Spanish-American War and beyond, the book shows that U.S. courts commonly (indeed, routinely) resolved foreign affairs disputes—even during wartime, even as to policies expressly formulated at the presidential level, and even with conclusions adverse to the executive branch (pp. 67–90).

The book's core is here for at least three reasons. First, despite Professor Flaherty's masterful presentation, the initial chapters do not fully provide an affirmative case for judicial engagement in foreign affairs. The evidence from the Founding Era is largely negative: there is little evidence that the Framers rejected judicial review in separation of powers disputes, or that they thought foreign affairs was a special category insulated from broader separation of powers imperatives. But the affirmative case for judicial engagement comes principally from what happened next: courts treated it as part of the ordinary course that matters touching foreign affairs would reach their docket and would be resolved as ordinary disputes. Second, the book's methodology is expressly not originalist (although it is influenced by original meanings and understanding). As Professor Flaherty explains, in his view constitutional meaning is developed by traditional practices as well as original meaning, in ways pure originalists likely would not accept. And third, a central aspect of his project is to draw a contrast between courts' historical practices and the modern intuition in some quarters that courts should not be involved in foreign affairs.

On balance, this part of the project is successful, at least as a threshold matter. One cannot come away from the book doubting that courts decided important issues implicating foreign affairs throughout the nineteenth century. As Professor Flaherty summarizes (pp. 67–68):

> The courts would first [act] for the purpose of checking the states. Second, they would also consistently do so for purposes of limited congressional excesses through artful interpretation

> of quasi-wartime federal statutes. Third, and particularly striking today, the judiciary would also check the executive by refusing to defer to that branch's interpretation of treaties, rejecting the executive's claims that it could violate the law of nations absent congressional authorization, and generally upholding Congress's own checks on presidential foreign affairs assertions.

Among the early cases highlighted are *Ware v. Hylton*[13] (invalidating state laws contrary to the 1783 Treaty of Peace); *Murray v. The Schooner Charming Betsy*[14] (narrowly construing a federal statute to avoid violating international law, and therefore finding the U.S. seizure of a ship unlawful); *The Schooner Peggy*[15] (finding that a treaty with France required restoring a French ship to its owners, over the U.S. executive branch's objections); *Little v. Barreme*[16] (finding U.S. seizure of a ship illegal under a statute); and *Brown v. United States*[17] (finding executive seizure of enemy property during wartime unauthorized by Congress and therefore unlawful).[18] And, the book contends, this pattern continued through the end of the nineteenth century, most notably in *The Prize Cases*[19] (reviewing and to some extent limiting the President's authority to seize ships during the Civil War) and *The Paquete Habana*[20] (finding military seizure of a ship during the Spanish-American War to be unlawful).

Restoring the Global Judiciary acknowledges some difficulty in pinpointing when and why this approach began to change. It identifies some usual suspects. The Court's decision in the *Curtiss-Wright* case[21] in 1936 suggested an enhanced, exclusive, and possibly unreviewable role for the President in foreign affairs—

13. Ware v. Hylton, 3 U.S. 199 (1796).

14. Murray v. The Schooner Charming Betsy, 6 U.S. 64 (1804).

15. The Schooner Peggy, 5 U.S. 103 (1801).

16. Little v. Barreme, 6 U.S. 170 (1804).

17. Brown v. United States, 12 U.S. 110 (1814).

18. *See* David L. Sloss, Michael D. Ramsey, & William S. Dodge, *International Law in the Supreme Court to 1860*, *in* SLOSS ET AL., *supra* note 8, at 7–54 (discussing these cases); RAMSEY, *supra* note 6, at 321–41.

19. The Prize Cases, 67 U.S. 635 (1863).

20. The Paquete Habana, 175 U.S. 677 (1900).

21. United States v. Curtiss-Wright Export Co., 299 U.S. 304 (1936). The classic discussion of the shifting judicial view is G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1 (1999). For originalist-based critiques of *Curtiss-Wright*, see, for example, Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379 (2000); Charles A. Lofgren, United States v. Curtiss-Wright Export Corporation: *An Historical Reassessment*, 83 YALE L.J. 1 (1973).

though that was tempered by the Court's subsequent review and invalidation of an executive wartime measure in *Youngstown Sheet & Tube Co. v. Sawyer*,[22] which the book celebrates as adopting the appropriate judicial role (pp. 91–104). The rise of the United States to superpower status raised the stakes in foreign affairs controversies, from World War I to World War II to the Cold War to the war on terrorism. Advances in technology made speed and secrecy of greater importance (pp. 105–133). Many factors came together to suggest that judicial involvement in foreign affairs, especially at the expense of the executive, was ill-advised, dangerous, and inconsistent with institutional capacities. The details of the shift are, for the book, largely unimportant; the key point is that, over the twentieth century and into the twenty-first, an idea about judicial hesitancy in foreign affairs took root where it had not previously existed.

The book does not contend this shift was or is complete. It emphasizes the *Youngstown* case as a mid-century counterpoint to *Curtiss-Wright* (at least as to matters with strong domestic implications), and it celebrates the judicial involvement (to an extent) in constraining executive conduct in the war on terrorism (pp. 200–219). Its central contention is that a modern sense of judicial reluctance to decide foreign affairs cases exists in tension with remnants of the historical judicial engagement with foreign affairs cases. As it concludes this section (p. 133):

> Leading up to the millennium, then, the judiciary had retreated yet by no means surrendered. The rise of the national security state, and the commensurate empowerment of the presidency, necessarily put substantial pressure on the Constitution's commitment to separation of powers in foreign affairs. For the most part the Court held true to its assigned role . . . Yet in numerous areas during this period the Court applied or introduced principles that suggested a loss of confidence . . . A path leading away from a robust role for the judiciary in foreign affairs was, however, clearly coming into view. . . .

C. MODERN IMPLICATIONS

The final sections of the book provide a roadmap for why and how to return courts to their historic role. As to the "why," the book uses political science and international relations insights to argue that the dangers of executive overreach are especially

22. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

enhanced in modern foreign affairs (pp. 137–163). In particular, it identifies "executive globalization" as an interaction of executives and executive agencies across borders that develop international networks of information sharing, harmonization, and—critically—enforcement (pp. 145–146). These developments, it contends, enhance executive power relative to other actors in a system of separation of powers, with corresponding negative effects on individual liberty.[23] The book's solution is to strengthen the checking power of the judiciary by returning U.S. courts to their "historic" role.

As to the "how," Professor Flaherty identifies a series of doctrines that inhibit courts from reaching the merits of foreign affairs controversies. These include the political question doctrine (p. 176), the presumption against extraterritoriality (p. 181), the state secrets doctrine (p. 187), deference to executive arguments and fact-finding (p. 191), deference to executive readings of treaties and (as to foreign affairs matters) statutes and the Constitution (pp. 204–219), non-self-executing treaties (p. 221), and reluctance to engage with customary international law (pp. 231–251). These doctrines and outlooks, the book contends, should be abandoned as inconsistent with the courts' historic role in foreign affairs (and, it emphasizes, none is sufficiently fixed in precedent and practice that *stare decisis* or custom precludes abandoning any of them).

II. ASSESSMENT

This section critiques *Restoring the Global Judiciary*'s account of courts and foreign affairs. As noted, it finds broad agreement on the basic themes but expresses some skepticism on particular points—especially on the proposition that courts ever played a dominant role in checking executive foreign policymaking or enforcing global human rights, or that today's powerful foreign affairs executive is primarily the fault of under-engaged courts.

23. The book focuses on examples of extraordinary rendition, especially the cases of Maher Azar (pp. 150–53) and Humberto Alvarez-Machain (pp. 160–61), in which courts were unable to offer relief as a result of deference to the executive or other limiting doctrines.

A. AGREEMENT

Restoring the Global Judiciary's most basic themes should be relatively uncontroversial. Though eloquently stated, they likely reflect general agreement among foreign affairs law scholars across the political and methodological spectrum. That separation of powers was a central preoccupation in the Founding Era is well known. Further, despite *Curtiss-Wright*'s expansive dicta, it cannot be seriously doubted that the Framers' idea of separation of powers extended to foreign affairs. One need only look at the Constitution's text, which expressly divides the leading foreign affairs powers among the Congress, the President, and the President-plus-Senate.[24]

Restoring the Global Judiciary's claim of judicial engagement in foreign affairs—which is the centerpiece of its argument—is also unlikely to be controversial among foreign affairs scholars but may be less familiar to (and perhaps more controversial with) a wider audience. This point may be the book's leading contribution. Though the nineteenth century cases revolve around relics of a bygone era—pirates, prizes, blockade-runners, territorial conquest—the cases have modern significance in illustrating the extent to which foreign affairs cases occupied the courts' dockets.[25]

Restoring the Global Judiciary also seems correct that in the twentieth century a sense arose—contrary to the experience of the previous century—that foreign affairs were to some extent inappropriate for judicial involvement. As the book recounts, this reflected not so much a single doctrine (though it is particularly associated with the modern political question doctrine), but rather the application of an assortment of doctrines in ways that tended to push foreign affairs-related claims away from the judiciary. Many of these rules (or their expanded application) did

24. For accounts broadly in harmony with the focus on separation of powers in foreign affairs, *see, e.g.*, RAMSEY, *supra* note 6, at 13–131; PRAKASH, *supra* note 6 (assessing the Constitution's allocations of power to the President and elsewhere without sharp distinctions between foreign affairs powers and other powers); David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. REV. 932 (2010). Of course, these accounts may differ substantially in their assessment of *how* the Constitution allocated foreign affairs powers. *See infra* Part II.B.3.

25. *See generally* Sloss et al., *supra* note 8, at 7–163 (recounting the Supreme Court's use of international law in foreign affairs cases in the eighteenth and nineteenth centuries); WILLIAM R. CASTO, FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF FIGHTING SAIL (2006) (discussing early maritime cases).

not seem rooted in the Constitution's text or the courts' traditional role to "say what the law is," but rather arose from what has been called "foreign affairs exceptionalism"—that is, that the unique needs of foreign affairs require a different judicial mindset.[26]

Further, despite the book's somewhat adversarial and alarmist tone, there are indications that the modern Supreme Court has some sympathy with its overarching themes. Ganesh Sitaraman and Ingrid Wuerth recently described what they call the "normalization of U.S. foreign relations law."[27] By this, they mean the return of foreign relations law to an ordinary realm of judicial analysis that would be applied to routine domestic claims, unaffected by an inchoate sense that there is something different about foreign affairs adjudication.

Sitaraman and Wuerth discuss a range of cases, but the most significant is *Zivotofsky v. Clinton* in 2012.[28] The issue there was whether Congress could by statute direct the executive to issue passports reflecting a person's birth in "Jerusalem, Israel" (rather than, as the executive preferred, simply "Jerusalem"). The court of appeals found this to be a non-justiciable political question, but the Supreme Court reversed. Although the matter implicated a potentially sensitive issue of foreign affairs, the actual question presented was—the Court emphasized—simply one of constitutional interpretation: whether Congress had constitutional power to override the executive's preferences. That matter was well within the Court's power to decide, and the fact that its decision might unsettle executive foreign policy was not a barrier to adjudication. *Zivotofsky*, in Sitaraman and Wuerth's phrasing, approached the matter as a "normal" constitutional question that happened to implicate foreign affairs rather than an

26. *See, e.g.,* Curtis A. Bradley, *A New American Foreign Affairs Law?,* 70 U. COLO. L. REV. 1089, 1096 (1999) (describing "foreign affairs exceptionalism" in twentieth-century law as "the view that the federal government's foreign affairs powers are subject to a different, and generally more relaxed, set of constitutional restraints than those that govern its domestic powers").

27. Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897 (2015). For skepticism, see Curtis A. Bradley, *Foreign Relations Law and the Purported Shift Away from "Exceptionalism,"* 128 HARV. L. REV. F. 294 (2015).

28. Zivotofsky v. Clinton, 566 U.S. 189 (2012). *See also* Michael D. Ramsey, *War Powers Litigation after* Zivotofsky v. Clinton, 21 CHAP. L. REV. 177 (2018) (discussing *Zivotofsky* as an important clarification of and limitations on the political question doctrine).

exceptional foreign affairs case. In that approach, the Court went some way in restoring a traditional judicial role in constitutional foreign affairs adjudication.[29]

Restoring the Global Judiciary thus seems correct to describe foreign affairs law as at something of a crossroads. Various factors—including concerns about overreaching Presidents, but also the rise of formalism, textualism, and originalism in constitutional adjudication generally—may unite a range of scholars and judges in a broad sense that courts have a robust role in foreign affairs adjudication. To the extent Attorney General Barr's speech sought to the contrary to invoke a general *Curtiss-Wright*-based sense that courts should leave foreign affairs entirely to the executive, his argument seems more in tune with the twentieth century than the twenty-first.[30]

B. THREE DISAGREEMENTS

Nonetheless, the campaign to return courts to their "historic role" in foreign affairs may not produce all of what *Restoring the Global Judiciary*'s author would like. That is so for at least three reasons. First, the courts' historic role includes not only judicial engagement in foreign affairs, but also limiting doctrines designed to constrain the judicial role and protect the political branches' exercise of U.S. foreign policy. Second, even beyond doctrinal limitations, the courts' historic role in foreign affairs was one of

29. But notably, in subsequent litigation, the Court found on the merits that Congress' attempt to control the President was unconstitutional. Zivotofsky v. Kerry, 576 U.S. 1 (2015). *See infra* Part II.B.3.

30. Barr, *Olson Lecture*, *supra* note 2. Barr argued, for example:

> In a nutshell, under the Constitution, when the government is using its law enforcement powers domestically to discipline an errant member of the community for a violation of law, then protecting the liberty of the American people requires that we sharply curtail the government's power so it does not itself threaten the liberties of the people. Thus, the Constitution in this arena deliberately sacrifices efficiency; invests the accused with rights that essentially create a level playing field between the collective interests of community and those of the individual; and dilutes the government's power by dividing it and turning it on itself as a check, at each stage the Judiciary is expressly empowered to serve as a check and neutral arbiter.
>
> None of these considerations are applicable when the government is defending the country against armed attacks from foreign enemies. In this realm, the Constitution is concerned with one thing—preserving the freedom of our political community by destroying the external threat. Here, the Constitution is not concerned with handicapping the government to preserve other values . . .

Stated as a general proposition, that view seems inconsistent with U.S. courts' historic role, as *Restoring the Global Judiciary* describes.

caution, with few if any decisions directly challenging significant ongoing executive foreign policies. And third, even if modern courts did decide more foreign affairs cases on the merits, they would not necessarily or even commonly check presidential power in ways Professor Flaherty prefers.

1. Limiting Doctrines

There have always been limiting doctrines. The courts are part of a system of separation of powers, not an enforcer that stands above that system. Like the other branches, they are historically (and properly) subject to constitutional and institutional limits on the exercise of their judicial powers. Many of the limiting doctrines that *Restoring the Global Judiciary* criticizes are themselves part of the historical judicial role. It may be true, as *Restoring the Global Judiciary* argues, that some doctrines have been expanded inappropriately (although some may have expanded to keep pace with what *Restoring the Global Judiciary* acknowledges has been an expansion in the force and intrusiveness of judicial review itself). But their roots remain as much a part of the courts' historic role as judicial engagement.

Consider, for example, the political question doctrine. *Restoring the Global Judiciary* rightly complains that some modern versions of the political question doctrine amount to little more than judicial evasions, prompted by fear that judicial resolution might have negative practical impacts on foreign affairs. The Court in *Baker v. Carr*,[31] for example, suggested that courts should avoid decisions that might "embarrass" the executive branch in foreign affairs. Professor Flaherty is right that this formulation has no foundation in Founding Era materials or post-ratification practice.[32] But a narrower version of the political question doctrine has longstanding roots. Chief Justice Marshall suggested it in *Marbury v. Madison*, writing that the Court would not reexamine matters that the Constitution placed under executive discretion.[33] As Professor Tara Grove has demonstrated, a related idea took hold in the nineteenth-century courts, that the judiciary would be bound by executive and legislative factual determinations. In *Williams v. Suffolk Ins. Co*.,

31. Baker v. Carr, 369 U.S. 186, 217 (1962).

32. *See* Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908 (2015); *see also* Ramsey, *supra* note 28, at 188–90.

33. Marbury v. Madison, 5 U.S. 137, 165–66 (1803).

for example, the Court thought itself bound by the executive's determination regarding the rightful sovereign of the Falkland Islands.[34] The decision in *Williams* followed from Marshall's observations on a related matter in *United States v. Palmer*:

> Those questions which respect the rights of a part of a foreign empire, which asserts, and is contending for its independence, and the conduct which must be observed by the courts of the union towards the subjects of such section of an empire who may be brought before the tribunals of this country, are equally delicate and difficult.
>
> As it is understood that the construction which has been given to the act of congress, will render a particular answer to them unnecessary, the court will only observe, that such questions are generally rather political than legal in their character. They belong more properly to those who can declare what the law shall be; who can place the nation in such a position with respect to foreign powers as to their own judgment shall appear wise; to whom are entrusted all its foreign relations; than to that tribunal whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it. In such contests a nation may engage itself with the one party or the other—may observe absolute neutrality—may recognize the new state absolutely—or may make a limited recognition of it. The proceeding in courts must depend so entirely on the course of the government, that it is difficult to give a precise answer to questions which do not refer to a particular nation. It may be said, generally, that if the government remains neutral, and recognizes the existence of a civil war, its courts cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy. To decide otherwise, would be to determine that the war prosecuted by one of the parties was unlawful, and would be to arrange the nation to which the court belongs against that party. This would transcend the limits prescribed to the judicial department.[35]

Professor Grove concludes:

> Throughout the nineteenth and early twentieth centuries, both

34. Williams v. Suffolk Ins. Co., 38 U.S. 415, 419–20 (1839). *See* Grove, *supra* note 32, at 1909–15 (citing cases); Ramsey, *supra* note 28, at 192–93.

35. United States v. Palmer, 16 U.S. 610, 634–35 (1818). As *Palmer* and *Williams* (and several similar cases) involved questions of the sovereignty of foreign nations, in modern terms they might be understood as applications of the President's power over recognition. *See, e.g.*, Zivotofsky v. Kerry, 576 U.S. 1059 (2015). The nineteenth-century cases, however, did not limit their conclusions in this way.

> federal and state courts viewed certain issues as "political questions," including which government controlled a territory; the date on which a war began or ended; whether the United States continued to have a treaty with a foreign country; and whether a certain group of Native Americans constituted a "tribe." Although jurists and scholars in that era often described these issues as "questions of fact," most such political questions would likely now be considered mixed questions of fact and law.[36]

Professor Grove rightly argues that this historic limitation does not support the more extravagant versions of the modern political question doctrine—which have, in any event, been curtailed by *Zivotofsky*. But this limitation does give a historical foundation for modern courts treating certain executive determinations of fact (or mixed law and fact) as conclusive (or nearly conclusive).

In the war powers area, for example, *Restoring the Global Judiciary* rightly criticizes undifferentiated application of the political question doctrine to bar any adjudication of war powers issues (pp. 176–179). As I have argued elsewhere, *Zivotofsky* should call that broad application into serious doubt, and the broad application had weak roots in prior war powers cases in any event.[37] But war powers cases also illustrate how a narrower political question doctrine, with appropriate roots in the courts' historic role, might impose material limitations on justiciability. In *Jaber v. United States*, for example, the D.C. Circuit considered claims arising from a U.S. drone strike in Yemen; the plaintiffs contended that the strike violated international law because it was made without adequate consideration of collateral damage risks.[38] Applying *Zivotofsky*, the court found the matter to be a political question because assessment of collateral damage risks was a matter of executive discretion.[39] Similarly, in the Vietnam conflict

36. Grove, *supra* note 32, at 1917–18. *See also* Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 592 (2007) ("[A]n important branch of [the political question] doctrine [in the nineteenth century] operated to identify factual questions on which courts would accept the political branches' determination as binding.").

37. *See* Ramsey, *supra* note 28, at 184–88.

38. *See* Jaber v. United States, 861 F.3d 241 (D.C. Cir. 2017).

39. *Id.* at 248–49. The court noted that *Zivotofsky* involved only pure questions of constitutional interpretation, not review of executive branch factual determinations and policy; specifically it found that the claims in *Jaber* "require the Court to second-guess the wisdom of the Executive's decision to employ lethal force against a national security target." *See also* El–Shifa Pharmaceutical Industries Co. v. United States, 607 F.3d 836, 842 (D.C. Cir. 2010) (concluding that "[t]he political question doctrine bars our review of

the Second Circuit declined to decide whether President Nixon's increased bombing campaign was consistent with a strategy of winding down the war effort, because that decision would involve second-guessing executive branch policy determinations.[40] These conclusions seem consistent with *Zivotofsky* and the historical conception of the political question: the court was asked to review executive factual and policy determinations on matters of executive discretion.[41]

Much of *Restoring the Global Judiciary*'s discussion elides the distinction between applying constitutional rules to maintain the textual separation of powers and overseeing executive branch discretion and policymaking. The leading historical cases of judicial engagement generally fall into the former category—including *Youngstown*, the book's most celebrated intervention.[42] They are not a license for extending judicial power into the latter category, which courts have historically avoided.

Thus *Restoring the Global Judiciary* overstates in saying that "as far as the 'political question' doctrine is concerned—like Oakland, California, there is no there there" (p. 177). How much is "there" may be disputed, but the idea of some judicial deference to the executive in factual and policy determinations is part of the courts' traditional role in foreign affairs.[43]

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claims that, regardless of how they are styled, call into question the prudence of the political branches in matters of foreign policy or national security constitutionally committed to their discretion").

40. *See* Orlando v. Laird, 443 F.2d 1039, 1041 (2d Cir. 1971); DaCosta v. Laird, 471 F.2d 1146, 1152–53 (2d Cir. 1973).

41. *See* Ramsey, *supra* note 28, at 183–88 (discussing the political question doctrine in Vietnam-era cases). A similar issue would be whether President Obama's military actions against the Islamic State were authorized by earlier acts of Congress; that turns on whether the Islamic State was an outgrowth of the al-Qaeda organization, a difficult factual question determined by the executive. *See id*. at 199–20. *But see* RESTORING THE GOBAL JUDICIARY, pp. 178–79 (taking the opposing view).

42. In *Youngstown*, the issue was whether the President's seizure of the steel mills was constitutionally authorized, not whether it was a good idea. And that inquiry turned—especially in Justice Black's majority opinion—on the Constitution's text and structure, not on assessing the factual foundations of the executive branch's policy claims. *See* Ramsey, *supra* note 6, at 51–73. The *Youngstown* Court was not called upon to decide (and likely would have resisted deciding) whether support for U.S. operations in the Korean War in fact required seizing the steel mills.

43. Barr, *Olson Lecture*, *supra* note 3. Part of Attorney General Barr's complaints about the modern judiciary focus on this point; he argued:

> [M]any critical decisions in life . . . cannot be reduced to tidy evidentiary standards and specific quantums of proof in an adversarial process. They require what we used to call *prudential judgment*. They are decisions that frequently have to be made promptly, on incomplete and uncertain information and necessarily involve

Other examples of limiting doctrines are to similar effect. Non-self-executing treaties are a target of *Restoring the Global Judiciary*'s criticism (pp. 221–223), but, as *Restoring the Global Judiciary* itself acknowledges, they are part of the courts' historic role in foreign affairs. The modern doctrine of non-self-execution may go well beyond its origins,[44] and some modern cases may be wrongly decided. But the non-self-execution doctrine itself is conventionally dated to Marshall's opinion in *Foster v. Neilson*,[45] and in fact has roots in the Founding Era: Justice Chase in *Ware v. Hylton* in 1796 noted that treaties might be addressed to the executive or legislative branches rather than the judiciary, and non-self-execution, properly understood, is consistent with the Constitution's text.[46] As with the political question doctrine, the goal should be applying the doctrine properly, not embracing it fully nor abandoning it entirely.[47]

A third group of limiting doctrines involves extra-territoriality. Again *Restoring the Global Judiciary* sharply criticizes modern courts' restraint in this area, while acknowledging some historical foundation for it (pp. 181–187). Indeed, historical caution regarding extraterritorial application of U.S. law was extensive. As a general matter, constitutional protections were not thought to extend to noncitizens abroad.[48]

> weighing a wide range of competing risks and making predictions about the future. . . .
>
> It was once well recognized that such matters were largely unreviewable and that the courts should not be substituting their judgments for the prudential judgments reached by the accountable Executive officials.

Whatever one thinks of this view, it is more in harmony with courts' historical role in foreign affairs than a broader idea that would exclude courts' checking functions altogether. *See supra* note 30 (quoting part of the Attorney General's speech appearing to make much broader claims).

44. *See* DAVID L. SLOSS, THE DEATH OF TREATY SUPREMACY: AN INVISIBLE CONSTITUTIONAL CHANGE (2016); Paul B. Stephan, *Treaties in the Supreme Court, 1946–2000*, in Sloss et al., *supra* note 8, at 317–53.

45. See Foster v. Neilson, 27 U.S. 253 (1829). But *see Sloss*, *supra* note 44 (contesting the conventional reading of *Foster* and arguing for a much narrower one).

46. *See* Michael D. Ramsey, *A Textual Approach to Treaty Non-Self-Execution*, 2015 BYU L. REV. 1639 (2015). *See also* Ernest Young, *Treaties as "Part of our Law,"* 88 TEX. L. REV. 91 (2009) (arguing that treaty non-self-execution is not inconsistent with treaties' status as supreme law).

47. Relying on scholarship by David Sloss, *see* SLOSS, *supra* note 44, *Restoring the Global Judiciary* seems to argue (pp. 221–29) that non-self-execution should (sometimes) apply to the relationship between treaties and federal law but not to the relationship between treaties and state law.

48. Andrew Kent, *Against a Global Constitution*, 95 GEO. L.J. 463 (2007). On this ground, Professor Kent argues that one of the modern cases *Restoring the Global Judiciary*

Further, courts interpreted general statutory language not to reach noncitizens outside U.S. territory. For example, in *Palmer*, Marshall read statutory provisions criminalizing "any" robbery on the high seas to encompass only acts by U.S. citizens or in respect of U.S. ships. Admitting that "the words of the section are in terms of unlimited extent," he nonetheless concluded that "[e]very nation provides for such offenses the punishment its own policy may dictate, and no general words of a statute ought to be construed to embrace them when committed by foreigners against a foreign government." As he asked rhetorically, "Can it be believed that the legislature intended to punish with death the subject of a foreign prince who, within the dominions of that prince, should advise a person, about to sail in the ship of his sovereign, to commit murder or robbery?"[49]

Restoring the Global Judiciary criticizes territorial limitations particularly in respect of the Court's curtailing the reach of the Alien Tort Statute (ATS) in *Kiobel v. Royal Dutch Petroleum Co.* and *Jesner v. Arab Bank plc* (pp. 231–240).[50] Both cases involved ATS claims by foreign plaintiffs against foreign defendants for injuries suffered in foreign countries; the Court declined to recognize causes of action for such injuries. *Restoring the Global Judiciary* does not show that the courts' historic role suggests a different outcome. To the contrary, *Palmer* indicates that nineteenth-century courts would have read the statute narrowly not to apply to foreigners abroad. And in any event, as Justice Gorsuch argued in *Jesner*, under the Constitution's original meaning federal courts likely lacked Article III jurisdiction in such cases; Article III does not extend federal jurisdiction to cases between two noncitizens.[51]

Restoring the Global Judiciary is not able to show, either in the general case or with the ATS specifically, that the courts' historic role supports a rejection of limits on extraterritoriality.

celebrates, *Boumediene v. Bush*, 553 U.S. 723 (2008), was wrongly decided. Andrew Kent, *Boumediene, Munaf, and the Supreme Court's Misreading of the Insular Cases*, 97 IOWA L. REV. 101 (2011).

49. *Palmer*, 16 U.S. at 632, 633.

50. Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108 (2013); Jesner v. Arab Bank plc, 138 S.Ct. 1386 (2018).

51. *Jesner*, 138 S.Ct. at 1412 (Gorsuch, J., concurring in part and concurring in the judgment); *see* Michael D. Ramsey, *The Constitution's Text and Customary International Law*, 106 GEO. L.J. 1747 (2018) (similarly arguing that alien-versus-alien claims under customary international law are not part of Article III federal jurisdiction).

Rather, it argues that modern conditions and priorities call for a different approach. That may be so. But adopting that approach would not *restore* the courts' role. Rather, extraterritoriality (like other categories discussed above) illustrates the need for an intermediate approach. Professor Flaherty is on stronger ground in suggesting that the ATS should apply to misconduct of U.S. citizens abroad. Early cases such as *Palmer* show more willingness to find authority to regulate the conduct of citizens abroad,[52] and, in the specific case of the ATS, there are historical reasons to think Congress might have intended such an application.[53] Thus, the Supreme Court may have been too aggressive in rejecting extraterritoriality in *Kiobel* and *Jesner*, while *Restoring the Global Judiciary* is too aggressive in embracing it.

In sum, courts have a role in foreign affairs disputes but (as with all institutions in a separated-powers system) that role is limited. *Restoring the Global Judiciary* emphasizes the historic reach but not the historic limits. A more balanced approach would call not for disregarding the limits but for examining them closely to assure consistency with the Constitution's text, original meaning, and historical application.

2. Judicial Caution

While *Restoring the Global Judiciary* understates the significance of limiting doctrines in historical cases, it overstates the significance of the Court's leading historical decisions. As noted, *Restoring the Global Judiciary* is undoubtedly correct that nineteenth-century courts routinely decided foreign affairs controversies. But the book falls short of establishing that in doing so courts exercised a material checking function on the political branches. Rather, courts acted to further—or at least not to interfere with—executive branch foreign policy.[54] The idea of a lost golden age of U.S. courts enforcing separation of powers

52. *Palmer*, 16 U.S. at 631–32; The Appollon, 22 U.S. 362 (1824).

53. *See* Anthony J. Bellia, Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445 (2011) (emphasizing the goal of giving non-citizens a remedy for injuries suffered at the hands of U.S. citizens); Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 COLUM. L. REV. 830, 900 (2006) (describing the goal of the ATS as providing redress for aliens whom the United States had an international obligation to protect).

54. A leading expositor of this view—and a useful counterpoint to *Restoring the Global Judiciary*—is ANTHONY J. BELLIA JR. & BRADFORD R. CLARK, THE LAW OF NATIONS AND THE UNITED STATES CONSTITUTION.

limits at the President's expense is largely a myth.

Most of the historical cases discussed in *Restoring the Global Judiciary* were either challenges to acts of low-level executive branch officers rather than to presidential policies, or came long after the relevant events (or both). Consider these examples, which are the principal ones the book invokes:

Murray v. Schooner Charming Betsy.[55] The Court in *Charming Betsy* famously ruled that a statute prohibiting commerce with French possessions extended only to U.S. ships, apparently, at least in part, because imposing it on non-U.S. ships would violate international law—and thus giving the name to the "Charming Betsy canon" of statutory construction.[56] The President did not appear to have had a contrary policy; the seizure had been done on the initiative of a local naval commander who suspected (but could not prove) that the ship was actually a U.S. ship. Moreover, the statute was no longer operative, having been part of the "Quasi-War" with France, resolved in 1800.

Little v. Barreme.[57] *Little* was one of only a few early cases that directly challenged a presidential-level policy. The President's policy was to seize U.S. ships coming from or going to French possessions, but relevant statutes authorized seizure only of ships going to such possessions. The Court applied the statute literally, over executive objections. But, critically, the case occurred long after the policy had lapsed—as with *Charming Betsy*, the seizure had been part of the previously resolved conflict with France.

The Schooner Peggy.[58] This case applied a treaty to override an executive branch seizure of a French ship. Like *Little* and *Charming Betsy*, it occurred after the conflict with France had concluded. The case is significant (as *Restoring the Global Judiciary* emphasizes) for the Court's refusal to defer to an executive branch interpretation of a treaty,[59] albeit not on a

55. *Charming Betsy*, 6 U.S. 64 (1804).

56. *See* Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479 (1998).

57. *Little*, 6 U.S. 170 (1804).

58. *The Schooner Peggy*, 5 U.S. 103 (1801).

59. David L. Sloss, Michael D. Ramsey & William S. Dodge, *International Law in the Supreme Court to 1860*, in Sloss et al., *supra* note 8, at 17–18 (discussing *Schooner Peggy*); David L. Sloss, *Judicial Deference to Executive Branch Treaty Interpretation: A Historical Perspective*, 62 N.Y.U. ANN. SURV. AM. L. 497 (2007) (generally finding that courts did not give deference to executive branch treaty interpretations in nineteenth-century cases).

matter of much significance.

Brown v. United States.[60] *Brown* involved a local U.S. official seizing a small amount of British property (cut timber) at the onset of the War of 1812. Nothing in the opinion indicates that the President ordered the seizure, that it was critical to the war effort, or that it was part of a comprehensive executive program to seize British property. The Court ruled against the executive branch, on the plausible ground that seizure of enemy property needed congressional authorization and Congress' generally worded declaration of war was insufficient (a purely legal conclusion).[61]

These four cases are the only ones from the early nineteenth century that *Restoring the Global Judiciary* discusses as limiting the executive (pp. 67–82).[62] The book, of course, is illustrative rather than comprehensive, telling an engaging story about its main cases rather than providing an exhaustive account. Other examples could be adduced[63]—and they appear to fit a common pattern. Judicial decisions contrary to the executive in foreign affairs were not unusual, but they were also not particularly significant in their practical effects.

Restoring the Global Judiciary also relies on the Court's later decision in *The Paquete Habana,*[64] which famously applied customary international law to invalidate a U.S. military seizure in the Spanish-American War. But, again, the seizure was the work of a local commander reviewed by the Court after hostilities

60. *Brown*, 12 U.S. 110 (1814).

61. Specifically, the Court held that the seizure violated the law of nations (which typically allowed civilians a grace period to withdraw their property after the start of a war) and so needed to be authorized by Congress. *See* David L. Sloss, Michael D. Ramsey & William S. Dodge, *International Law in the Supreme Court to 1860*, in Sloss et al*., supra* note 8, at 34–35. Because both the majority (by Marshall) and the dissent (by Story) appear to assume the President cannot violate the law of nations without Congress's authority, *Brown* has potentially broad implications. But as a general matter those implications were not developed in subsequent cases.

62. Other early cases of judicial engagement in foreign affairs are discussed in this section of the book but they do not limit the executive. *E.g*., Ware v. Hylton, 3 U.S. 199 (invalidating a state law contrary to a U.S. treaty); Schooner Exchange v. McFaddon, 11 U.S. 116 (1812) (invoking the limiting doctrine of sovereign immunity to avoid deciding a sensitive foreign affairs case); United States v. La Jeune Eugenie, 26 F.Cas. 832 (C.C. D. Mass. 1821) (upholding U.S. seizure of a French slave trading ship though denying prize money to its captors).

63. *E.g*., Mitchell v. Harmony, 54 U.S. 115 (1851) (holding invalid a U.S. military seizure of personal property during the Mexican War). Like the cases discussed in the text, *Mitchell* was not a challenge to a presidential policy and it was decided after the war ended.

64. *The Paquete Habana*, 175 U.S. 677 (1900).

had ended; it does not appear that the President had a policy on the matter (ambiguous orders were issued) and the Court noted that there had been no presidential interpretation of the relevant international law. Indeed, the Court indicated that such a presidential interpretation would be binding (or at least highly influential) in court: the majority stated that the Court would examine the practices of nations to establish the content of customary international law in the absence of a "controlling executive or legislative act."[65]

Moreover, in a number of important nineteenth-century cases discussed in *Restoring the Global Judiciary*, courts directly validated important presidential policies under challenge. During the 1793 neutrality controversy, the President ordered federal prosecutions of U.S. citizens who served on French warships in the war between France and Great Britain. Although the matter never reached the Supreme Court, lower courts upheld the prosecutions, even though no statute criminalized the relevant conduct; in the leading case, the jury acquitted defendant Gideon Henfield, likely because of the lack of a statute, despite the judges' instructions.[66] In *Schooner Exchange v. McFaddon*[67] in 1812, the Supreme Court agreed with the executive branch that foreign warships should have sovereign immunity in U.S. courts. Most famously, in *The Prize Cases*[68] the Court upheld President Lincoln's Civil War blockade of the Southern States against a war powers challenge, carefully ignoring Lincoln's pragmatic but

65. *Id.* at 700 ("where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had [by the court] to the customs and usages of civilized nations"). *Restoring the Global Judiciary* cautions (pp. 89–90) that this statement should not be overread as licensing presidential violations of international law. At minimum, however, the Court appeared to indicate judicial deference to presidential interpretations, if not to violations. RAMSEY, *supra* note 6, at 368 (reading *Paquete Habana* to mean that "where there is a presidential act 'ascertain[ing] and administer[ing]' the law of nations, courts would look to the executive act, not to the practices of nations and other related sources").

66. Martin S. Flaherty, *The Neutrality Controversy: Struggling over Presidential Power Outside the Courts*, in PRESIDENTIAL POWER STORIES (Christopher H. Schroeder & Curtis A. Bradley, eds., 2009); Prakash & Ramsey, *supra* note 6, at 340–46 (discussing the neutrality prosecutions as beyond the President's constitutional power absent a statute).

67. Schooner Exchange v. McFaddon, 11 U.S. 116 (1812). Other examples might include *Bas v. Tingy*, 4 U.S. 37 (1800) (endorsing the authority of the President and Congress to fight an undeclared naval war against France) and *Durand v. Hollins*, 8 F. Cas. 111 (C.C.D.N.Y. 1860) (endorsing the President's authority to bombard Greytown, Nicaragua).

68. The Prize Cases, 67 U.S. 635 (1863).

legally questionable approach of treating the South as an enemy nation for some purposes but not others.[69]

Restoring the Global Judiciary rightly notes the *potential* scope of doctrines established in some key nineteenth century cases: that the President could not violate clearly established international law without Congress's approval; that ambiguous statutes would be read not to violate international law; and that executive branch interpretations of treaties would not receive material deference. But in application these doctrines turned out to have relatively little bite. The courts' foreign affairs role remained modest throughout the century.[70]

One final point about the judicial role in foreign affairs comes up only briefly in *Restoring the Global Judiciary*, when the book admits that modern judicial review has expanded beyond what anyone in the Founding Era could have imagined (p. 43). This point is far more important than the book acknowledges. Although the judicial role has expanded on many dimensions, one notable dimension is the increased availability in modern adjudication of broad anticipatory challenges to executive action, facilitated by procedures such as streamlined declaratory relief actions, class actions, wide-ranging injunctive relief, and other measures promoting what has been called the "public law litigation model."[71] In contrast, the nineteenth-century cases were

69. *See* Thomas H. Lee & Michael D. Ramsey, *The Story of the Prize Cases: Executive Action and Judicial Review in Wartime*, in PRESIDENTIAL POWER STORIES (Christopher H. Schroeder & Curtis A. Bradley, eds., 2009). The Court did rule against the executive claims as to a portion of cargo found on the facts to be property of U.S. citizens not encompassed by the blockade. *See* The Prize Cases, 67 U.S. at 682.

Similarly, in *Cross v. Harrison*, 57 U.S. 164 (1854), the Court upheld (on doubtful constitutional grounds) the President's military governance of California after the Treaty of Peace ended the Mexican War. *See* GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY (2004) (sharply criticizing the *Cross* decision). In the early twentieth-century *Insular Cases*, the Court created the constitutionally unfounded doctrine of unincorporated territories to avoid interference with the President's policy of imperial acquisitions. *See* LAWSON & SEIDMAN, *supra*, at 103–28 (describing and criticizing this line of cases arising from the Spanish-American War). True, these cases reached the merits without considering whether they posed political questions (reinforcing the idea that the nineteenth-century political question doctrine was narrow and distinct from some modern versions). But, in contrast to cases in which major executive branch policy was not at stake, the Court consistently ruled for the executive—at times on doubtful grounds.

70. *See* Ramsey, *supra* note 8 (making this point in the context of law-of-war litigation). To be clear, this description is not necessarily an endorsement. It depends on the nature of the case.

71. *See* Harold Honju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347

typically (a) individualized disputes about particular property (often ships or cargo); and (b) brought after the fact, with the goal of having the particular property restored or specific compensatory damages assessed. Their intent and effect was not to change existing executive branch policy in a broader sense. The project of restoring the judiciary to its historical role needs to grapple with the ways courts have been empowered (or have empowered themselves) to oversee executive actions in ways they previously could not (or at least did not). It may well be that many of the limiting doctrines Professor Flaherty criticizes arose or expanded in parallel with (or as a reaction to) the expansion of the judicial role more generally.

3. The Merits

Restoring the Global Judiciary assumes (or hopes) that if courts actively reach the merits in foreign affairs cases, that will result in courts substantially limiting the President. But that may not be true, for several reasons. The Constitution conveys considerable independent foreign affairs power to the President. And, of greater significance, in modern law Congress has delegated broad foreign affairs power to the President and shows little sign of wanting to reclaim it. These are not reasons for courts to stay out of foreign affairs controversies, but they are reasons to doubt that a more active foreign affairs judiciary will have the effect *Restoring the Global Judiciary* wants.[72]

The *Zivotofsky* case illustrates the first point. *Restoring the Global Judiciary* rightly applauds the Supreme Court in *Zivotofsky v. Clinton* for narrowing the political question doctrine and finding that courts should decide on the merits the controversy over passports that it posed. But in subsequent

(1991). Specifically on the expansion of injunctive relief, *see* Samuel Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017); *see also* Mila Sohoni, *The Lost History of the 'Universal Injunction,'* 133 HARV. L. REV. 920 (2020) (describing the emergence of broad injunctive relief in the early twentieth century).

72. As a result, Restoring the Global Judiciary's argument is on strongest ground when applied to cases that most clearly resemble traditional nineteenth-century claims. For example, in Hernandez v. Mesa, 140 S.Ct. 735 (2020), decided after the book was published, the Supreme Court refused to allow a cause of action for harm caused by a rogue U.S. border patrol agent who fired across the international border, killing a Mexican citizen. The Court rested its decision in part on concerns over potential harms to executive management of foreign affairs. The case, however, seems to differ little from an ordinary tort claim, and did not call for judicial second-guessing of executive branch policy or factual assessments.

litigation the lower courts found for the President on the merits, and in *Zivotofsky v. Kerry* the Supreme Court agreed.[73] Reading presidential recognition power broadly and exclusively, the Court held that Congress could not direct the President to make statements about Israel's sovereignty over Jerusalem, even in the limited context of describing a birthplace on a passport.[74] Thus, as Chief Justice Roberts complained in dissent, the *Zivotofsky* case ended up powerfully reaffirming the President's ability to disregard foreign affairs-related statutes infringing the President's independent powers.[75]

An earlier political question case, *Goldwater v. Carter*,[76] points in a similar direction. The issue in *Goldwater* was whether President Carter could unilaterally terminate the U.S.–Taiwan mutual defense treaty in accordance with the treaty's terms. Writing for a plurality of the Court, then-Justice Rehnquist found this to be a political question.[77] That conclusion, though, seems unlikely to survive *Zivotofsky v. Clinton*; like *Zivotofsky*, *Goldwater* involved a straightforward issue of constitutional interpretation, not a review of executive discretion. The question was not whether the treaty should be terminated, but which branch had the power to terminate. That is the kind of purely legal question *Zivotofsky* found to be ordinarily committed to courts.[78] But if the Court had reached the merits in *Goldwater*, it likely would have held for the President: both the court of appeals[79] and Justice Brennan's concurrence[80] argued persuasively that treaty termination (at least when the termination accords with the

73. Zivotofsky v. Secretary of State, 725 F.3d 197 (D.C. Cir. 2013), *affirmed*, Zivotofsky v. Kerry, 576 U.S. 1 (2015).

74. *See* Zivotofsky v. Kerry, 576 U.S. at 28–32. My view is that the Court's decision would have more appropriately rested on the President's executive foreign affairs power derived from Article II, Section 1, rather than what seems a stretch of the recognition power. *See id*. at 2096–2101 (Thomas, J., concurring in the judgment in part and dissenting in part); Prakash & Ramsey, *supra* note 6, at 350–351 (discussing the passport power as part of the President's executive foreign affairs power).

75. *See Zivotofsky v. Kerry*, 576 U.S. at 61–67 (Roberts, C.J., dissenting). Relatedly, President Obama defended releasing Taliban prisoners in exchange for a U.S. soldier held by the Taliban, contrary to a statute requiring advance notification of Congress, by suggesting the statue was unconstitutional in that circumstance. *See* Justin Sink, *Obama rejects finding that he broke the law in Bergdahl swap*, THE HILL, Aug. 14, 2014.

76. Goldwater v. Carter, 444 U.S. 996 (1979) (per curiam).

77. *See id*. at 1002–06 (Rehnquist, J., concurring in the judgment).

78. *See* Ramsey, *supra* note 28, at 179 (arguing that *Zivotofsky* implicitly rejected Justice Rehnquist's *Goldwater* opinion).

79. *See* Goldwater v. Carter, 617 F.2d 697 (D.C. Cir. 1979).

80. *See Goldwater*, 444 U.S. at 1006–07 (Brennan, J., dissenting).

treaty's terms) is a presidential power.[81]

War powers litigation might lead to similar results. *Restoring the Global Judiciary* argues that the political question doctrine should not bar courts from reaching the merits of war powers litigation (and I generally agree).[82] But on the merits, the courts likely would uphold presidential power over a range of low-level conflicts, even if they understood the declare war clause to exclude presidential war initiation. Many disputed modern conflicts have been justified by Presidents as limited actions to defend U.S. citizens abroad or to respond to attacks.[83] (As discussed below, others may be justified as authorized by Congress pursuant to broad delegations).

The short of it is that the Constitution grants the President substantial independent powers in foreign affairs. Professor Flaherty may think otherwise, but the courts seem unlikely to agree. Indeed, as discussed, during the courts' supposedly more aggressive nineteenth-century phase, on matters of particular significance to presidential policies the courts tended to uphold presidential power, even without much constitutional foundation.[84]

But, in any event, in modern law, the President's independent constitutional foreign affairs power is not the chief source of presidential authority in foreign affairs. And the courts are not the chief culprits in the modern expansion in presidential power. That culprit, rather, is Congress, which has enhanced presidential power through broad and unconstrained delegations. In the

81. *See* Michael D. Ramsey, *Torturing Executive Power*, 93 GEO. L.J. 1213 (2005). The *Goldwater* litigation itself probably should have been dismissed for lack of standing, as the district court held, and as the Supreme Court's subsequent decision in *Raines v. Byrd*, 521 U.S. 811 (1997) strongly indicates. *Restoring the Global Judiciary* says little about standing doctrine, but a robust version of standing doctrine is also an important and appropriate factor limiting courts' involvement in foreign affairs—particularly in limiting courts' review of broad-based challenges to executive foreign policy.

Restoring the Global Judiciary raises President's Trump's termination of President Obama's nuclear agreement with Iran and the Paris climate accord as instances of presidential overreach. But neither of these agreements was a treaty; if the President likely can terminate a treaty, these lesser terminations seem under even lesser constitutional doubt. After *Zivotofsky*, though, there should be nothing preventing courts from upholding these terminations on the merits.

82. *See* Ramsey, *supra* note 28.

83. *See* Michael D. Ramsey, *Constitutional War Initiation and the Obama Presidency*, 110 AM. J. INT'L L. 701 (2016).

84. *See supra* Part II.B.2 (noting for example *Cross v. Harrison* and the *Insular Cases*).

Constitution's original design, the central checks on the President (in foreign affairs and elsewhere) were that the President could not make law and the President lacked funding authority.[85] These limits have been considerably diluted by Congress' delegations.

In many foreign affairs-related areas, statutes confer extraordinarily broad policymaking and lawmaking authority on the President without meaningful limits. For example, in trade law, the President has broad authority to impose tariffs on foreign goods that the President determines threaten national security.[86] In economic and financial regulation, the International Emergency Economic Power Act (IEEPA) confers on the President broad authority to respond to emergencies as the President perceives them,[87] and the Foreign Investment Risk Review Modernization Act (FIRRMA) gives the President broad authority to approve or reject foreign investments in the United States.[88] As the Court recently emphasized in *Trump v. Hawaii*,[89] the Immigration and Nationality Act (INA)[90] gives the President broad power to exclude from the United States aliens that the President finds threaten national security. President Obama also found in the INA broad delegation of authority to exempt from removal large classes of aliens not lawfully present in the United States.[91]

85. *See* Saikrishna B. Prakash & Michael D. Ramsey, *The Goldilocks Executive*, 90 TEX. L. REV. 973 (2013).

86. Trade Expansion Act of 1962, 19 U.S.C. § 1862 *et seq*. *See* American Institute for International Steel, Inc. v. United States, 376 F. Supp. 3d 1335 (C.I.T. 2019) (rejecting nondelegation challenge to President Trump's tariffs imposed under Section 232 of the Trade Expansion Act). *See also* Arms Export Control Act of 1976, 22 U.S.C. § 2751 *et seq.* (granting President broad discretion over arms exports).

87. 50 U.S.C. § 1701 *et seq*. *See also* National Emergencies Act of 1976, 50 U.S.C. § 1601 *et seq*. (allowing a range of presidential activities upon the President's declaration of a national emergency). In practice, Presidents have aggressively used the authority to declare emergencies even as to matters that continue for long periods of time and on which Congress could easily legislate more specifically if it chose. One source identifies over 30 presidentially declared "emergencies" currently in effect, some having persisted for a decade or more. Brennan Center for Justice, *Declared National Emergencies under the National Emergencies Act*, www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act.

88. 50 U.S.C. § 4565 *et seq.*

89. Trump v. Hawaii, 138 S.Ct. 2392 (2018).

90. 8 U.S.C. § 1101 *et seq.* Specifically as to the *Hawaii* case, 8 U.S.C. § 1182(f) allows the President to exclude aliens whose admission the President finds to be "detrimental to the interests of the United States." The Court in *Trump v. Hawaii* described this section as "exud[ing] deference to the President in every clause." 138 S.Ct. at 2408.

91. *See* U.S. Department of Homeland Security v. Regents of the University of California, U.S. Supreme Court, No. 18-587 (June 18, 2020) (discussing President Obama's

Much contested presidential direction of armed conflicts in the modern era rests on broad delegations as well. Most of the President's conduct of the Vietnam War, for example, reflected authority delegated to the President in the Gulf of Tonkin Resolution, and had the Court reached the merits of the war powers litigation of that time most of the President's actions likely would have been upheld on that ground.[92] More recently, authority for military actions connected to the war on terror in an array of countries rests on Authorizations for the Use of Military Force (AUMFs) enacted in 2001 and 2002, which contain broad language and leave policy judgments as to the scope of appropriate action largely to the President.[93]

Statutory delegations (of which these are only a few examples) give the President largely unconstrained policymaking and in effect lawmaking authority over wide expanses of U.S. foreign policy and even domestic matters relating to foreign affairs. Indeed, one might say that near-comprehensive presidential authority over foreign affairs can be claimed by the President without reference to the President's independent authorities. To be sure, one might argue that the courts are complicit in this shift of constitutional authority, by failing to take an aggressive stand against unconstitutional delegations. But *Restoring the Global Judiciary* does not materially indict the courts' under-enforcement of the nondelegation doctrine (it is not clear what Professor Flaherty thinks of it), and foreign affairs delegations date to the early years of constitutional practice, so it is not clear they are in fact unconstitutional.[94] The Constitution

programs and President Trump's authority to rescind them).

92. *See* JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH.

93. *See* Ramsey, *supra* note 83, at 707–11 (discussing war-on-terrorism authorizations); Curtis A. Bradley & Jack L. Goldsmith, *Obama's AUMF Legacy*, 110 AM. J. INT'L. L. 628 (2016); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005). For example, President Trump justified the controversial assassination of Iranian General Qassam Soleimani by invoking the 2002 AUMF relating to Iraq, as well as Article II. *See* Rebecca Kheel, *Trump administration outlines legal justification for Soleimani strike,* THE HILL, Feb. 14, 2020.

94. *See* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding* (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3512154; Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for* Clinton v. City of New York, 76 TUL. L. REV. 265, 268 (2001). Restoring the Global Judiciary does rightly fault the Court for finding implied congressional authorization too readily. *E.g.*, Dames &

relies principally on Congress, not the courts, to check unconstrained delegations, as reflected in Madison's famous aphorism that ambition would check ambition.[95] But that generally has not occurred in foreign affairs.[96]

Beyond statutory delegation, Congress' broad approach to appropriations also greatly enhances presidential foreign affairs power, especially in military matters. In the eighteenth and early nineteenth centuries, the nation's tiny military establishment practically limited the President's ability to engage in military adventurism, regardless of the Constitution's formal allocations of war and military power.[97] The modern Congress provides the President with a global military establishment and an enormous, relatively unspecific military budget. The consequence is that the President as a practical matter has the ability (even if lacking the formal authority) to conduct military operations as the President thinks appropriate, with Congress reduced to a largely reactive role.

My point here is not that these broad President-empowering delegations are bad policy (or unconstitutional). In the complex, fast-moving world in which the United States seeks a hegemonic role, they may be inevitable.[98] The point instead is that, to the extent the modern foreign affairs presidency looks so different from the nineteenth-century foreign affairs presidency, that difference is not principally attributable to abdication by the courts, and there does not seem much courts can or will do about it.

III. CONCLUSION

In sum, *Restoring the Global Judiciary* is an outstanding and insightful book. It should be read by everyone interested in the courts and separation of powers in foreign affairs—especially

Moore v. Regan, 453 U.S. 654 (1981).

95. THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961) ("Ambition must be made to counteract ambition.").

96. One might argue that courts should construe statutory delegations narrowly to preserve the separation of powers in foreign affairs. But there is no historical basis for courts doing so, and unless the delegations are unconstitutional, this would be a judicial policy choice that should not override Congress' policy choice.

97. RICHARD H. KOHN, EAGLE AND SWORD: THE BEGINNINGS OF THE MILITARY ESTABLISHMENT IN AMERICA (1975).

98. *See* ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC (2013); *but see* Prakash & Ramsey, *supra* note 85 (criticizing Posner and Vermeule).

those in the executive branch who would deny a judicial role in such matters. Professor Flaherty reminds us of three essential postulates: that the Constitution's protection of liberty rests on separation of powers; that courts have a key role in preserving that separation; and that foreign affairs matters are no exception. Along the way, he takes the reader on an engaging tour of the history of foreign affairs adjudication from the Neutrality Proclamation to the war on terrorism. And he eloquently urges courts not to give in to the ahistorical intuition that foreign affairs matters lie outside judicial cognizance.

But Professor Flaherty's eloquence may sweep the reader beyond where the Constitution, history, and prudence would indicate. In particular, *Restoring the Global Judiciary* overstates in three respects. First, courts have always applied limiting doctrines that may restrict their ability to reach the merits of foreign affairs disputes. That is entirely appropriate: the courts are actors within a system of separation of powers, not enforcers that stand above it. The Constitution and the court's institutional capacities limit the role courts can and should play. The right question is not whether, broadly speaking, courts should or should not resolve foreign affairs disputes. Rather, the question in any particular case is whether the claims it raises are appropriate for judicial resolution: sometimes they will be, and sometimes they will not. The courts' "historic role," to which *Restoring the Global Judiciary* appeals, affirms this mixed approach.

Second, *Restoring the Global Judiciary* invokes a lost age of judicial assertiveness in foreign affairs that is largely a myth. Although nineteenth-century courts resolved many foreign affairs cases, few if any of these decisions resulted in material limitations on presidential policies as a practical matter. The historical cases frequently came up after the policy had run its course, and involved narrow questions of interest to particular plaintiffs, such as ownership of a particular ship or other property. And when important issues of presidential policy were at stake, the courts tended to side with the President, even when the Constitution's text and structure seemed to point the other way. Indeed, one might say that faithful application of the text's original meaning, rather than the historical experience of the nineteenth century, would be a surer restraint on presidential power.

Third, the modern President's power in foreign affairs does not stem chiefly from judicial reticence. In part that is because the

Constitution gives the President more power in foreign affairs than *Restoring the Global Judiciary* admits. But, more significantly for modern practice, much of the President's foreign affairs power rests on open-ended congressional delegation. Rightly or wrongly, constitutionally or unconstitutionally, Congress has decided that management of modern foreign affairs calls for presidential flexibility and discretion. *Restoring the Global Judiciary* does not materially engage this condition, and courts seem unlikely to address it constructively. And ultimately the courts' role is to validate Congress' choices (unless they are unconstitutional).

In sum, *Restoring the Global Judiciary* is right to reject an inchoate sense that courts should never be involved in foreign affairs matters. But it should not sweep us to the opposite conclusion that courts should always be involved, or that judicial intervention is the principal remedy for excessive presidential power in foreign affairs.