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Book Review: Restoring the Global Judiciary: Why the Supreme Court Should Rule in U.S. Foreign Affairs by Martin Flaherty

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Flaherty, Martin S. *Restoring the Global Judiciary: Why the Supreme Court Should Rule in U.S. Foreign Affairs.* Princeton: Princeton University Press, 2019. xiv + 325 pages. Hardcover, $35.00.

In this timely book, author Martin Flaherty calls for restoring the constitutional balance through more active intervention of American courts in the foreign policy realm. A Fordham University law professor and visiting professor at Princeton University, Flaherty has an extensive background in international human rights, including direct participation in human rights missions in Europe, Asia, Africa, and North America.

The text is divided into four sections, preceded by an Introduction. Flaherty asserts that executive aggressiveness in the wake of the September 11, 2001 attacks demonstrated that Americans apparently forgot the lessons emanating from the 1952 Youngstown Sheet and *Tube v. Sawyer* case. Among those is that the federal courts serve as a check on an extreme presidential action regardless of policy milieu.

Part I, encompassing Chapters 2 and 3, examines how the separation of powers mechanism was integrated into governing documents during the founding period. In the post-revolutionary, pre-Constitution era, the national government under the Articles of Confederation together with most state governments tilted toward legislative supremacy. By replacing the Articles, the new government added two more branches. Within Article III, the Constitution specified a role for the courts, including in the foreign policy arena.

In Part II, which includes Chapters 4 through 6, Flaherty provides an overview of the court's role in the international sphere from the George Washington administration to the outset of the current century. Though he is credited with engaging rather than avoiding courts, President Washington's successors did not always display the same behavior. For instance, actions such as the Louisiana Purchase, war with Mexico, and annexation of Texas and Hawaii

were taken without court interference. In the Supreme Court's 1936 *U.S. v. Curtiss Wright* decision, justices strongly argued that the president is the dominant authority in foreign affairs. Following World War II, when the national security network was put in place and a permanent standing army established, executive influence in foreign affairs grew to a dangerous degree.

Conversely, Flaherty points to times throughout the nation's development where courts have utilized international law in rulings and have successfully checked the executive and legislative branches. For example, the courts have limited congressional overreach in foreign affairs through employment of legal doctrines, while presidents routinely lost treaty cases during the early years of the republic. Even if more Supreme Court cases have been decided in favor of presidents than not since World War II, rulings in the 1952 *Youngstown Sheet and Tube v. Sawyer* and 1971 *New York Times v. Sullivan* cases show that the chief executive does not always get his way.

According to Flaherty, congressional deferral and court retreat have combined to perpetuate a global imbalance referred to as "executive globalization." This segment of court history is covered in Part III, which includes Chapters 7 and 8. In the post 9-11 atmosphere where a permanent crisis exists, American presidents have co-opted Congress and evaded courts. The treatment of detainees is highlighted here.

Flaherty refers to Part IV as "Restoration;" Chapter 9, 10, 11 and the Conclusion comprise this section. American courts have the ability to impact foreign policy through interpretation of statutes, treaties, coda, and the Constitution itself. To reverse the previous trend, courts have to be willing to apply national statutes to external territories, to treat executive treaty interpretations without deference, to utilize international human rights law to justify domestic procedures such as capital punishment, and to exert authority consistent with their constitutional obligation. Even

if Donald Trump began his presidency with a series of "unitary executive" moves, recent decisions by courts opposing White House actions give hope to those who believe in "commitment to balanced government, of which judicial engagement in foreign affairs is a piece…" (p. 257).

Over the last few years, there have been three books published with the same theme and support for court activism in foreign affairs. Former Justice John Paul Stevens' 2015 study compares American Supreme Court rules with those of European courts and identifies differences between the U.S. legal system and those of other nations. For Stevens, much of the court's output is a product of ideology and assumption, the latter being needed in instances where legislative text is unclear. Kimberley Fletcher's 2018 study assesses Supreme Court rulings from the Franklin Roosevelt through the George W. Bush administrations, focusing on many of the same foreign policy decisions as Flaherty. Finally, Riaan Eksteen's book published earlier this year contrasts the U.S. Supreme Court with the highest courts in South Africa and the European Union. Eksteen identifies several factors which have led to increasing court scrutiny of foreign policy controversies, especially those involving presidential overreach.

Clearly, Flaherty's study has significantly contributed to a growing body of work evaluating the American judiciary's legacy associated with foreign policy, even if the scale is still tipped in favor of the other branches. His book, while not as comparative as either Stevens or Eksteen, analyzes the topic from a much broader time frame than Fletcher. While Part III is shorter than other sections of Flaherty's study and could be more convincing in explaining how global imbalance occurred, Part IV offers a comprehensive set of remedies, both to restore the separation of powers established by the Constitution's framers and to check contemporary efforts to subvert judicial authority in international affairs.

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