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RESTORING SEPARATION OF POWERS IN FOREIGN AFFAIRS

*Martin S. Flaherty**

INTRODUCTION

This essay addresses the issue of how separation of powers relates to the domestic enforcement of international human rights standards in the face of opposition from the President. Specifically, I consider the role of the judiciary in defending international human rights standards when the Executive branch invokes its ostensible foreign relations expertise against them.

Nowhere has such conflict arisen more sharply than in the cases arising from the attacks of 9/11. Three scenarios have stood out. First, the President and Supreme Court have joined issue over statutes implicating human rights commitments. Notable in this regard is Justice Souter's concurrence in *Hamdi v. Rumsfeld*, in which he bolstered his reading of the Non-Detention Act with reference to Article 5 of the Third Geneva Convention.¹ Second, the judiciary has challenged the executive more directly on issues of treaty interpretation. In *Hamdan v. Rumsfeld*, Justice Stevens' majority opinion summarily rejected the Bush administration's idiosyncratic argument that "unlawful enemy combatants" were not entitled to the protections of the same treaties' Common Article 3.² Lastly, the Court has refused to set aside constitutional principles at the executive's behest in the name of national security. Not least, in *Hamdi v. Rumsfeld*, the Court rejected the President's arguments for a restrictive reading of Guantanamo detainees' Constitutional Due Process rights.³ Though here the parallel international standards operated offstage in *U.S. Reports*, they did make a significant appearance in amicus briefs.⁴ No less important, the

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¹ *Hamdi v. Rumsfeld*, 542 U.S. 507, 549–50 (2004) (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) (arguing that even if Hamdi was not entitled to the protections of the Non-Detention Act, as the President claimed, he is entitled to the rights of a "prisoner of war" under Article 5 of the Geneva Convention).

² *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (rejecting the President's determination that Common Article 3 of the Geneva Convention was inapplicable to members of al Qaeda).

³ *Hamdi*, 542 U.S. at 524–35 (establishing that a citizen-detainee's classification as an enemy combatant did not deprive him of the right to know the basis for his detention).

⁴ See, e.g., Brief of Amicus Curiae Global Rights Supporting Petitioners, *Hamdi*, 542

Court refused to consider only Article II's national security concerns at the expense of the Fifth Amendment.⁵

In short, the Court has stood up to the President to "say what the law is" even in foreign affairs areas that directly or indirectly implicate international human rights.⁶ However, any note of triumph, at least for advocates of human rights and judicial independence, would be premature. For one thing, the Court's rulings rarely made any difference to the actual litigants.⁷ The 9/11 decisions could have gone further by referencing international standards more forcefully. More importantly, the decisions reflected a conflicted Court. The rulings themselves were closely split, and the Court's dicta emphasized deference to the Executive branch when the law implicates foreign relations concerns.⁸

My contention is that to be faithful to the concept of separation of powers as it is implemented by the United States Constitution – and more generally applied by most governments around the world – domestic courts that are properly seized of applicable international human rights standards or that have the option to interpret the law with reference to these standards, should do so with zero deference to the views of the Executive branch. This approach expands upon a long-standing project I have been undertaking that aims one day to appear as a monograph.⁹

U.S. 507 (No. 03-6696) (2004) (arguing that the government's arbitrary detention of Hamdi violated U.S. obligations under the Geneva Conventions of 1949, the International Covenant on Civil and Political Rights and customary international law).

⁵ *Hamdi*, 542 U.S. at 535–39 (rejecting the Government's assertion that the courts must defer to the Executive's national security interests and forgo any examination of individual due process rights).

⁶ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

⁷ Martin S. Flaherty, *Human Rights Law, American Justice, and the "War on Terror"*, 25 OAH MAG. OF HIST., 35, 35–40 (2011).

⁸ *See Hamdi*, 542 U.S. at 531 (plurality opinion) (stressing that the Constitution devolves responsibility over strategic wartime decisions to the Executive branch because it is best positioned and most politically accountable for making such decisions); *see also id.* at 533–34 (plurality opinion) (allowing hearsay evidence and a rebuttable presumption in favor of the government's position because enemy-combatant proceedings place a burden on the executive during military conflict); *see also Hamdan*, 548 U.S. at 679 (Scalia, J., dissenting) (noting that the Court has interpreted certain Article II provisions as bestowing broad powers on the President with respect to foreign relations and matters of national security).

⁹ *See* Martin S. Flaherty, *More Real Than Apparent: Separation of Powers, The Rule of Law, and Comparative Executive "Creativity" in Hamdan v. Rumsfeld*, CATO SUP. CT. REV. 2005-2006 (2006) (exchange with John Yoo); *see also* Martin S. Flaherty, *The Most Dangerous Branch Abroad*, 30 HARV. J. L. & PUB. POL'Y 1 (2006) [exchange with Michael Ramsey]; *see also* Martin S. Flaherty, *Judicial Globalization in the Service of Self-Government*, 20 ETHICS & INT'L AFF. 477 (2006).

Given this focus, I do not discuss several issues. Although I advocate for the United States to sign onto and ratify human rights treaties, I do not discuss these policy-making decisions here. Nor do I address the problem of reservations, understandings and declarations that curtail the applicability of those human rights norms, which I predictably oppose in most instances. With regard to both points, I am proud to channel the late, great Louis Henkin.¹⁰

I. ZERO DEFERENCE: WHY COURTS SHOULD PERSEVERE IN THE
INTERPRETATION OF INTERNATIONAL LAW

To illustrate my argument that courts should persevere in the interpretation of international law without deference to the executive branch, consider the following hypothetical. Imagine that the Court is making a decision regarding a controversial criminal statute. It may be analyzing the statute's constitutionality, applying canons of statutory interpretation or evaluating it with reference to customary international law.

Now, let's say the Executive branch asserts that based on institutional capacity and expertise, the courts should not interpret the law independently. Instead, courts should defer to the Executive branch's interpretation of what the criminal law is in light of its unique and distinct expertise in criminal law enforcement. Compared to the sheltered courts, the Executive branch is more familiar with the reality of criminal law – the statistics behind the issues, the reality of dealing with criminals, and how the law operates in the real world.

I would like to think that most people agree that this is a weak argument in the criminal law context. We would expect and want courts to independently interpret criminal statutes or constitutional provisions with respect to criminal law. That is, we expect the courts to interpret the law through conventional legal materials without any particular deference to the Executive branch or to those attempting to enforce the law. Indeed, our instincts tell us that giving deference to the executive in that situation profoundly cuts against basic rule of law norms.

Yet the Executive branch makes precisely the same argument when it comes to treaty interpretation, statutes and constitutional provisions relevant to international law. The argument is that the executive branch has a distinct and unique institutional capacity to deal with foreign affairs and

¹⁰ See, e.g., LOUIS HENKIN, *THE AGE OF RIGHTS* (1990) (extolling domestic and transnational human rights enforcement).

foreign relations that deserves deference from the courts. In the international law context, this argument has not only long been treated as plausible, but, in dicta, seems to have been gaining on the Court itself – at least until the 9/11 cases.¹¹ Moreover, versions of this approach have appeared across an array of doctrines implicating foreign relations matters. Deference to the executive has been floated not just with regard to statutes, treaties, and the Constitution, as noted. It also appears in areas such as political question doctrine¹² and sovereign immunity.¹³

A. *Treaty Interpretation*

The argument with respect to treaty interpretation has been that courts need to defer to executive interpretations, even when they implicate individual rights. Some commentators may argue that this claim has already more or less coalesced as doctrine. A closer look at the case law, however, confirms that this assertion is more apparent than real. In fact, the Supreme Court has interpreted treaties in an independent way using conventional interpretive materials.¹⁴ Only then has it occasionally added

¹¹ See Martin S. Flaherty, *Judicial Foreign Relations Authority After 9/11*, 56 N.Y.L. SCH. L. REV. 119, 151 (2011/2012) (referring to the weight of deferential entitlement that executive construction of rights rendered under the Geneva Convention).

¹² See *Baker v. Carr*, 369 U.S. 186, 209 (1962) (compelling a suit to be non-justiciable due to the presence of a political question); see also *Powell v. McCormack*, 395 U.S. 486, 495 (1969) (presenting non-justiciable litigation in the court because of the involvement of a political question).

¹³ The Supreme Court suggested that the views of the State Department with regard to foreign sovereign immunity had special relevance. See *Samantar v. Yousuf*, 130 S. Ct. 2278, 2291 (2010) (holding that the State Department maintains a role in determining individual official immunity); see also *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35–36 (1945) (suggesting that the courts respect the executive determination to treat a foreign vessel as immune, an idea that was later formalized in the “Tate Letter” (Letter of Jack B. Tate, Acting Legal Adviser, to the Acting Attorney General Phillip B. Perlman (May 19, 1952), in 26 DEP’T STATE BULL 984 (1952)); see also Beth Stephens, *The Modern Common Law of Foreign Official Immunity*, 79 FORDHAM L. REV. 2669, 2710 (2011) (evaluating the deference given to the Executive branch in determining foreign official immunity).

¹⁴ See *Eastern Airlines v. Floyd*, 499 U.S. 530, 536, nn. 3–4 (1991) (suggesting that the simplest method of determining the proper meaning of a word in foreign legal text would be to consult a bilingual dictionary); see also *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184–85 n.4 (1982) (noting that the meaning attributed to treaty provisions by Government agencies is not conclusive; see also Anthony C. Arend, *Who’s Afraid of the Geneva Conventions? Treaty Interpretation in the Wake of Hamdan v. Rumsfeld*, 22 AM. U. INT’L L. REV. 709, 725–26 (2007) (explaining that the Supreme Court’s reasonably well-established approach to treaty interpretation begins with giving words their ordinary meaning).

that its conclusions comport with what the executive branch has said, and that the executive's views are owed some "weight."¹⁵ That is why the doctrine currently remains more apparent than real. Yet it is also a doctrine that appears en route to becoming more and more real, and so will likely do more and more work as time goes on. That said, at least the terrorism cases suggest that this trend is not inexorable.

There are two basic, yet very different sets of arguments against deference to the Executive branch in treaty interpretation, which combine to make what I believe is a dispositive case. One set entails backward-looking reasons – in two words, original understanding. The other involves forward-looking claims that in my mind are more novel and interesting. In this regard, restoring to the courts a robust role in international human rights enforcement comports with a proper appreciation of recent ideas and analysis in international relations.

1. Original Understanding: the Founders as Internationalists

With regard to original understanding, what must suffice for the moment is a grand conclusory assertion: the Founders were internationalists. They were internationalists, in part because they were establishing what was at the time a weak would-be republic. Then as now, such republics tend to like international law, which. That commitment assumed special urgency under the Articles of Confederation.¹⁶ Though underappreciated today, one of the urgencies motivating constitutional reform in the 1780s was the states' failure to implement domestic individual rights secured by international law – a failure that in turn threatened to plunge the new nation into renewed international hostilities.¹⁷ The result

¹⁵ See *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 355 (2006) (stating that although the Executive branch is afforded some weight, courts interpret treaties for themselves); see also Martin S. Flaherty, *Judicial Foreign Relations Authority After 9/11*, 56 N.Y.L. SCH. L. REV. 119, 128 (2011/2012) (declaring that leading cases often give great weight to the executive interpretations of relevant treaties); see also Scott M. Sullivan, *Rethinking Treaty Interpretation*, 86 Tex. L. Rev. 777, 779 (2008) (arguing that the current doctrine of judicial deference to executive treaty interpretation is "obtuse" and unclear).

¹⁶ See David M. Golove & Daniel J. Hulseboch, *A Civilized Nation: The Early American Constitution, The Law of Nations, and the Pursuit of International Recognition*, 86 N.Y.U. L. REV. 932, 935 (2010) (asserting that the United States' priority in constitution-making was to create a respectable nation in the eyes of the international community).

¹⁷ See JAMES A. CURRY, RICHARD B. RILEY & RICHARD M. BATTISONI, *CONSTITUTIONAL GOVERNMENT: THE AMERICAN EXPERIENCE* 55–56 (5th ed. 2003) (describing state conditions and noting that the failure to secure individual rights led to reforms in the 1780s); see also Martin S. Flaherty, *History Right?: Historical Scholarship*,

was a Constitution with a central commitment to the enforcement of these norms by domestic courts.

There are two striking examples, the most obvious of which is the Supremacy Clause.¹⁸ By this provision, the Founders sought to ensure that treaties would be self-executing – that is judicially enforceable – in Federal and state courts. This approach came about as a direct response of the states’ refusal to implement not just any treaty, but the Treaty of Paris ending the War of Independence. Articles 4 and 6 of that Treaty established individual rights for British creditors and loyalists respectively.¹⁹ The other example comes from work by Professor David Sloss, which shows how the Supremacy Clause was implemented.²⁰ Specifically, Sloss looks at treaty cases in the early Republic that involve denials by the executive that treaty-based rights were infringed. And in all of those cases, Sloss finds that in no case did the courts defer in any way to the Executive branch, either in word or deed.²¹ In short, to be true to our Founding ideas and practices, when it comes to the interpretation of international law properly before the courts – especially with regard to individual rights claims – the executive is entitled to exactly zero deference.

2. Imbalance of Power: The Executive in International Relations

Now consider the “forward-looking” international relations concept. This idea rests on innovative work by such scholars as Robert Keohane,²² Joseph Nye,²³ and Anne-Marie Slaughter.²⁴ In various ways, they have explored the insight that it not longer suffices to think of foreign affairs as primarily that story of sovereign nation states acting upon one another as

Original Understanding, 99 COLUM. L. REV. 2095, 2122–23, 2125 (1999) (arguing that domestic misapprehensions in the treaty-making process may have affected the body’s role in foreign affairs).

¹⁸ See U.S. CONST. art. VI, cl. 2.

¹⁹ See THE DEFINITIVE TREATY OF PEACE, U.S.-Gr. Brit., art. 4, art. 6, Sept. 3, 1783, 8 Stat. 80 (declaring that creditors right to collect debts shall be valid but prosecutions and confiscations relating to the Revolutionary War shall cease and be void).

²⁰ See David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 N.Y.U. ANN. SURV. AM. L. 495, 498–99 (2007) (positing that, in relation to Executive authority, the Judiciary has exhibited zero deference to the Executive branch in the first decades of the Republic).

²¹ See *id.* (contending that the Constitution does not require the judiciary to defer to the executive branch on issues of treaty interpretation).

²² See ROBERT O. KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION* (1977).

²³ See *id.*

²⁴ See ANN-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004).

monoliths. Instead, they argue, sovereignty has become increasingly disaggregated. By this they mean that more and more the key interactions between nations come at the level of governmental sub-units: executive regulators, judges, and legislators. And those sub-units tend to track the classic division found in the separation of powers.

Start with the executive. Increasingly, nation states interact via members of their Executive branches, not on the cabinet level, but instead on the level of regulators, administrators, and enforcement officers.²⁵ In simplest terms, such officials meet simply to network, or to use a New York term, “schmooze.” Often they share information to aid in respective rules generation or enforcement. At times they form or make use of organizations on a sub-cabinet level.

Judges, too, directly interact with one another across borders. This also involves schmoozing, through international get-togethers such as the Aspen Institute or through various academic venues, such as those run for Ghanaian judges by the Leitner Center in New York. An even more prominent method is what one might call the “international shout out,” through judges citing one another’s case law. Some courts and judges are routinely cosmopolitan; others less so.²⁶ Yet even among U.S. judges, who tend to be on the less internationalist side, the practice appears here to stay.²⁷ Regardless of the method, judicial globalization, as executive globalization, permits sharing of information and expertise with a resulting mutual empowerment.

Legislators participate in this type globalization as well. They too travel, meet with their counterparts, share information, and at times undertake joint initiatives. Here, however, collective action problems and party turnover tend to diffuse the benefits to respective legislative bodies.

²⁵ See Eric J. Pan, *Challenge of International Cooperation and Institutional Design in Financial Supervision: Beyond Transgovernmental Networks*, 11 CHI. J. INT'L L. 243, 254 (2010) (explaining that states are disaggregating into functionally distinct parts such as courts, regulatory agencies, and legislatures in order to deal with global issues); see also David Zaring, *Rulemaking and Adjudication in International Law*, 46 COLUM. J. TRANSNAT'L L. 563, 575 (2008) (claiming that networks allow domestic officials to interact with their foreign counterparts directly, without the need for supervision by foreign offices or senior Executive branch officials).

²⁶ For an example from one of the more cosmopolitan courts, see *Democratic Republic of the Congo v. FG Hemisphere Assocs*, [2011] H.K.C.F.A.R., Final Appeals Nos. 5, 6, & 7 of Civil 2010 (CFA) (Bokhary, J.).

²⁷ See Martin S. Flaherty, *Judicial Globalization in the Service of Self-Government*, 20 ETHICS & INT'L AFF. 477, 491 (2006) (recognizing that US judges are increasingly looking to international materials in deciding domestic cases); see also Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1003, 1117–19 (2000) (discussing several U.S. Supreme Court Justices’ tendencies to use foreign law as persuasive authority).

Legislative bodies are simply too large and too unstable for interaction between legislators to result in benefits on the same scale as with the administrators and judges.²⁸

For all their insight, there is one thing international relations scholars do not ask, and that is how these different sub-units of any given government fare relative to one another in light of the type of globalization they describe. Put in more conventional legal terms: How does modern international relations affect the balance among the branches of government that is at the core of separation of powers? That question is critical to the extent any constitutional democracy embraces the doctrine. It is therefore important even in parliamentary systems, insofar as judicial authority is meant to serve as a counterbalance to the usual mixture of legislative and executive authority evident in a ministerial government comprised of legislators. The question becomes even clearer in a system like the United States, in which the legislature, executive, and judiciary are designed to be relatively independent and co-equal.²⁹

My increasingly educated guess is that the relative winner emerging from modern foreign relations are executives the world over. They are better placed to interact with, and so empower, one another than reactive judiciaries, which remain generally reactive, or legislatures, which suffer from obvious collective action problems. Concerns borne of 9/11 have only strengthened the executive hand that much more, as is true any time national security fears spike. Running substantially behind in second, it turns out, is the judiciary, which appears to be less hampered by collective action difficulties than legislatures. Which means that lawmakers come in a far distant third and last place.

As a descriptive matter, then, international relations disproportionately enhance executive power, at the expense of legislative as well as judicial power, throughout the world. Two aspects of this phenomenon should cause concern, if not alarm, especially in combination. First, globalization's comparative enhancement of executive authority comes in a context in which at least the American executive is powerful well beyond any original expectations, and has been augmenting power at a dizzying rate.³⁰

²⁸ See ANN-MARIE SLAUGHTER, *A NEW WORLD ORDER* 106 (2004) (acknowledging the difficulty in achieving cohesiveness among legislators on a global scale).

²⁹ See Martin S. Flaherty, *The Most Dangerous Branch*, 105 *YALE L.J.* 1725, 1784 (1996) (describing how the Constitutionally mandated separation of powers serves fundamental goals of balance, accountability and improves government efficiency).

³⁰ See BRUCE ACKERMAN, *THE END OF THE AMERICAN REPUBLIC* 84 (2010) (highlighting the growing power of the Executive branch); see also Aida Torres Perez, *The*

CONCLUSION

Which at last brings me to my normative conclusion. Contrary to conventional wisdom, the last rather than first place that courts should defer to the executive is in cases in which the law implicates foreign relations. That conclusion follows from venerable tenets of separation of powers that we have somehow forgotten, as well as modern pressures on that doctrine that we do not yet fully appreciate. Today, we must recall that among the preeminent Founding ideas was a basic balance among the branches, not to mention primacy in their respective fields, and that this conception was held nowhere more strongly than in relation to judicial resolution of legal matters affecting foreign relations. We need to appreciate that the dynamics of modern foreign relations work to further empower executives in general, and the American executive in particular, exacerbating an imbalance that has already long been pronounced.

The time to learn these lessons is now. Already the courts have parroted presidentialist rhetoric concerning judicial foreign affairs rhetoric. But they have yet to make that rhetoric a reality. Should they do so, one more key check on executive power will have been discarded in an area in which it was supposed to have been entrenched, and in which it has never been needed more. Checks such as judicial independence in foreign relations may be destined to pass away. Yet as Justice Jackson proclaimed, "it is the duty of the Court to be the last, not the first, to give them up."³¹

Internationalization of Lawmaking Processes: Constraining or Empowering the Executive?, 14 TULSA J. COMP. & INT'L L. 1, 8-9 (2006) (stating that internationalization provides a unique opportunity for the expansion of the Executive branch power).

³¹ *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 634, 655 (1952) (Jackson, J., concurring) (emphasizing the importance of maintaining checks on executive power).