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Symposium: Introduction

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Introduction

John Yoo*

In June 2012, the American Enterprise Institute hosted a symposium, “I Pledge Allegiance to the United . . . Nations? Global Governance and the Challenge to the American Constitution.” Scholars and public officials discussed how globalization not only provokes change in the international order, but also the American constitutional and political system. Speakers examined several issues, including whether global governance fundamentally differs from earlier forms of international cooperation, constitutional limits to the United States’ engagement in multilateral cooperation, and the U.S. treaty-making process. The authors featured in the following section all spoke at the symposium, and their papers were selected for publication in this journal.

The book, *Taming Globalization: International Law, Sovereignty, and the U.S. Constitution*,¹ which I co-authored with Julian Ku, helped provide context for the different panels, though we cannot claim that our theses were met by universal agreement. Our book, which examines the tension between accelerating twenty-first-century globalization and the eighteenth century Constitution, seeks to identify the points of conflict and bring together scholarship of the last decade to suggest potential solutions. In the book, we make two broad claims. First, we identify a series of challenges that globalization creates for the U.S. constitutional system. Those challenges manifest themselves, we argue, in a new and expansive form of international law and new international institutions empowered to interpret and apply that law.

Second, we offer a framework for interpreting the U.S. Constitution in a way that both accommodates the new pressures flowing from globalization, but also maintains the fundamental aspects of American sovereignty. Our framework relies upon giving the Constitution’s political branches—the President, the Congress, and the states—the central roles in the accommodation of globalization.

As for our first claim, all of the panel’s participants agreed that globalization, in the form of international law and international institutions,

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1. JULIAN KU & JOHN YOO, *TAMING GLOBALIZATION: INTERNATIONAL LAW, THE U.S. CONSTITUTION, AND THE NEW WORLD ORDER* (2012).

poses a real and serious challenge to the American constitutional system. Indeed, several participants offered new examples of these challenges that we did not address in our book. For instance, Tai-Heng Cheng, Professor of Law at New York Law School and Partner at Quinn Emanuel Urquhart & Sullivan LLP, described how globalization affects the United States and other nations through the International Centre for the Settlement of Investment Disputes (ICSID). ICSID arbitration addresses a classic dilemma for international cooperation: Nations have an interest in advancing foreign private investment in their countries, but investors suffer from the possibility of government expropriation or discriminatory practices favoring local parties. One way for a government to signal a commitment to obey promises against expropriation or discrimination is to adopt a treaty with independent adjudication of disputes—encouraging investment by giving up some sovereignty. On the other hand, such commitments may reduce the ability of nations to correct errors made by international adjudicators. Reviewing past ICSID decisions, Professor Cheng finds no link between a nation’s annulment of arbitration awards and reductions in investment flows. As a result, he argues that considerations of “justice” should have greater place in reviewing ICSID decisions, effectively strengthening national sovereignty at the expense of the independence of international institutions.

Professor Thomas Lee of Fordham Law School attempts to resolve another tension between globalization and national sovereignty: the call of the international community for the use of military force. Under the United Nations Charter, the Security Council has the authority to ask member nations to use force in response to threats to international peace and security. Even then, some scholars have argued that an American President who sends troops under U.N. authorization must still receive congressional consent because of the Declare War Clause.

This debate intersects with the second broad claim of *Taming Globalization*: The Constitution should be interpreted to favor political branch decision-making on questions of how to accommodate globalization. Taking the 2011 Libyan intervention as his starting point, Professor Lee offers his own approach to interpreting the Constitution, arguing that:

neither the text of the Constitution nor historical precedents foreclose the constitutionality of the President’s *discretion* to deploy U.S. military forces in a foreign-civilian-protection mission outside of the United States without the express approval of Congress, in a case where such deployment is reasonably justified by international law.

Professor Lee seeks to resolve the tension between globalization and the Constitution by arguing that the Constitution is flexible enough to be interpreted to allow the President to use force when it is consistent with international institutions.

Finally, while Professor Peter Spiro of Temple Law School agrees with our claim that globalization is creating pressure on sovereignty, he concludes that

sovereignty must lose. Professor Spiro acknowledges a conflict between globalization and the Constitution, but unlike Professors Cheng and Lee, he does not try to find an accommodation between the two. Professor Spiro declares: “International law will make its way into U.S. law and practice through one channel or another. The Constitution will not stop the imposition of international law on the United States.” International law may have hit roadblocks in the doctrine of non-self-execution in *Medellin*,² the possible narrowing of the Alien Tort Statute in the Supreme Court’s coming decision in *Kiobel*,³ or the insulation of the counter-terror policies of the Bush and Obama administrations from international agreements and judicial review. Nevertheless, Spiro argues, globalization is an irresistible process that will force international norms to filter one way or the other into the United States.

We believe that our second claim—that globalization is best accommodated by a re-commitment to constitutional sovereignty—provides a more effective way for the United States to cooperate with other nations. In our view, the Constitution provides the sole route for managing U.S. sovereignty approved by the American people. Cooperation consistent with the Constitution will not only benefit from the popular legitimacy that only the Constitution can confer, but will also lead to more secure commitments internationally. Nonetheless, we recognize that there are reasonable alternatives to our proposal for reconciling globalization and sovereignty, and we welcome their exploration and development. Indeed, one of the main goals of our work is to spur discussion about how best to reconcile globalization and American sovereignty. We are therefore gratified that the contributors to this symposium have done so.

2. *Medellin v. Texas*, 554 U.S. 759 (2008).

3. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 132 S. Ct. 472 (2011).