LIBRARY of LAW AND LIBERTY

Taming International Law with Presidential Supremacy

Ted Galen Carpenter

Title: Taming Globalization: International Law, the U.S. Constitution, and the New World Order
Author: John Yoo and Julian Ku
Publish Date: 2012
Publisher / Edition: Oxford University Press

There has long been a tension between the requirements of the U.S. Constitution and the commitments of the United States under international law. Indeed, that tension surfaced early in the history of the new republic. The revolutionary government in France—and many of its American supporters—argued that the United States was obligated under its treaty of alliance to help that country in its armed struggles against Great Britain and other conservative European monarchies who sought to overturn the revolution. Alexander Hamilton and other advisers to President George Washington, however, argued successfully that the United States had no such obligation, given that the treaty had been concluded with the now defunct French monarchy, and that the president had the constitutional authority to keep his country neutral in the conflagration raging in Europe.

The periodic conflicts between America's international obligations and U.S. constitutional prerogatives grew more acute as the world became increasingly interdependent. The establishment of the United Nations at the end of World War II and the various treaties and conventions that international organization spawned became a source of domestic political controversy in the 1950s. So, too, did the proliferation of bilateral and multilateral security treaties that Washington concluded with various allies and client states in its new role as leader of the "free world."

Concerns about the potential power of the UN and other organizations produced a backlash. Senator John Bricker (R-OH) introduced a constitutional amendment emphasizing that no treaty or other international agreement could supersede any provision of the U.S. Constitution. His amendment failed by a single vote in the Senate, and even that narrow victory was achieved only after a massive lobbying effort by

President Dwight D. Eisenhower, who feared that the Bricker Amendment would unduly limit the president's options in managing the nation's foreign policy.

The process of globalization has further heightened the tension between domestic and international obligations in the decades since the failure of the Bricker Amendment. Globalization has ramifications in almost every arena—economic, diplomatic, and security. Julian Ku, Professor of Law at Hofstra University Law School, and John Yoo, Professor of Law at the University of California-Berkeley's Boalt Hall Law School, tackle this complex matrix of issues in their new book, *Taming Globalization: International Law, the U.S. Constitution, and the New World Order*. The quality of their effort is decidedly mixed.

Ku and Yoo are forthright in their goal, which is to produce a "workable framework for reconciling constitutional government and globalization." (p. 10) They explicitly differ from the three most prominent scholarly legal factions—internationalists, transnationalists, and revisionists—in the debate. Ku and Yoo are especially critical of the first two factions, which they believe would weaken key constitutional powers and protections while subordinating that document to the vagaries of international law and practices. The authors are more sympathetic to the revisionists, but they worry that most revisionists seem willing to sacrifice important benefits of globalization in the name of preserving a traditional conception of the Constitution. "We believe that the demands of globalization can be *accommodated*," Ku and Yoo write, "while still honoring the fundamental principle of popular sovereignty. Popular sovereignty reflects a basic American commitment to govern by exclusively *constitutional* means, such as federalism and separation of powers, both of which create the political institutions through which the people can exercise power." (pp. 10-11, emphases in original)

The mechanism they advocate has three elements. One is that, with rare exceptions, treaties and other agreements should be "non-self-executing"—i.e., that they ought to require congressional or presidential action to be binding on Americans. A second aspect is that the president should have virtually unlimited power to terminate international obligations and to interpret international law as it affects the United States. The final, and perhaps most controversial, proposal Ku and Yoo advance is that, with proper deference to America's system of federalism, there needs to be a significant reliance on the states to implement international law and agreements that encroach upon policy domains traditionally reserved to states.

Taming Globalization makes a credible effort to chart a course between the more extreme views about the proper role of international law and how America ought to conduct itself in a system where the effects of globalization are increasingly evident. It is hard not to admire their rebuke of ardent internationalists and transnationalists like Princeton University Professor (and Obama administration foreign policy adviser) Anne-Marie Slaughter, who openly scorn the Westphalian system of sovereign states as an anachronism. Slaughter and other proponents of internationalism and transnationalism would dilute crucial constitutional protections and limitations, making the American

people vulnerable to international laws and practices implemented by organizations where liberal democratic norms are, at best, weak.

At the same time, Ku and Yoo provide a much more sophisticated treatment of complex issues than do many conservative critics of globalization. There is little hint of the exaggerated fears often found in such circles that the hapless United Nations is poised to become an all-powerful world government, or that American citizens are in imminent peril of having their civil liberties stripped by international bureaucrats. One does not detect the slightest aroma of "black helicopter" conspiracy theories or even the milder worries about World Trade Organization domination of the American economy in the pages of *Taming Globalization*.

Nevertheless, while Ku and Yoo provide a sober discussion of the complexities of international law and practices within the U.S. constitutional system, the book does have its weaknesses. An especially disappointing feature was its brief, superficial treatment of the Bricker Amendment controversy. The authors concede that the amendment "required that all treaties receive legislative implementation, and allowed treaties to run only as far as the scope of Congress's preexisting powers. This would have effectively made all treaties non-self-executing, and it would have put to rest the idea that treaties could regulate matters beyond the normal competence of the federal government." (p. 96) Since Ku and Yoo clearly harbor wariness about self-executing international agreements, one would have thought they would have devoted more than one brief paragraph to the Bricker Amendment campaign. It was also disappointing that they include the snide comment that an important motive for the amendment was to prevent international agreements from ending racial segregation in the South. That contention was an unfair analysis of the 1950s debate.

The most troubling feature of *Taming Globalization*, though, is the authors' effort to use the broader discussion to push the doctrine of presidential supremacy. That perhaps should not come as a surprise. John Yoo served as a legal adviser in the Justice Department during the administration of George W. Bush and was one of the authors of the controversial "torture memos," which made the strained case that the president could disregard venerable principles of international law—and even explicit treaties, such as the Geneva Conventions–prohibiting torture, if he believed that the nation's security warranted using such tactics on terrorist suspects.

Yoo's belief in aggressive presidential power comes through with clarity in the pages of *Taming Globalization*. Dealing with the issue of customary international law (those, often long-standing, practices not covered by specific treaties) Ku and Yoo assert that "CIL should not be considered domestic law unless and until Congress chooses to incorporate a CIL norm via statute." (p. 149) That is a prudent approach and a proper response to overly enthusiastic internationalists. But the authors go on: "Absent congressional action, we take the view that CIL is left to presidential interpretations to which the other branches should defer." Specifically, "the President, and not the courts, is the entity best positioned to mediate between the increasing demands of CIL and the U.S. constitutional system." (p. 149)

The hostility toward a meaningful role by the federal courts in deciding whether an alleged U.S. international obligation is consistent with the Constitution is evident throughout the book. The authors' defense of the executive branch's view in *Hamdan v. Rumsfeld* and other cases involving the so-called war on terror (chapter 7) highlights their perspective on that point.

Indeed, Ku and Yoo appear to advocate a greater role for the individual states than they do for the federal courts in deciding whether international commitments are valid within the U.S. political and legal system. The authors envision a "robust role for state governments in the interpretation, incorporation, and implementation of international legal norms. By looking to state governments to take the lead in responding to some of the pressures of globalization, we seek to honor the basic U.S. constitutional commitment to a federal system of government." (p. 14)

Leaving aside the obvious objection that their framework might enable a single state to undermine, if not negate, an important international commitment the federal government has undertaken, it is curious in the extreme why Ku and Yoo are willing to show deference to federalism but are unwilling to rely on the judiciary to perform its traditional role in determining whether laws or policies are consistent with the Constitution. Instead, they insist that the president have that power in those instances when Congress has not taken explicit action. That approach bypasses the branch with the greatest expertise in legal matters.

Taming Globalization is a useful, albeit somewhat turgid, book on an important topic. But its relatively weak treatment of relevant historical matters, combined with a pronounced, unhealthy bias in favor of presidential power, makes it a flawed and ultimately disappointing analysis.