

SYMPOSIUM
**THE INTERACTION OF THE LEGISLATIVE,
JUDICIAL, AND EXECUTIVE BRANCHES
IN THE MAKING OF FOREIGN
POLICY**

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The late Justice Potter Stewart was a great influence in shaping my views about the role of judges, perhaps more influential than any other individual. He was a very dear friend of mine, and a man of extraordinary integrity, ability, and humility. His humility, his sense of his own mortal limitations, was what struck you. He used to say that the greatest difficulty on the bench was to avoid the temptation to allow his sense of what was good policy to substitute for his judgment of what the law required. To resist that temptation is a judge's greatest virtue, and one that we look for in our judicial appointments, as exemplified by the new Chief Justice and by Justice Scalia.

I agree with Justice Stewart that lawyers and judges need to be restrained and disciplined in the exercise of power, but the other two branches of government must be equally disciplined in their exercise of power. This means that the legislative and executive branches, in interpreting the Constitution subject to the Supreme Court's final review, must constantly recognize the constitutional limits on the judiciary.

How did the Framers intend for the executive branch to interact with the legislative branch in conducting the government's foreign policy? As much as I would argue for the primacy of the executive branch in foreign affairs, especially covert operations, I recognize that foreign policy is a shared power. But there must be a better way to share that power than our current system. In the last twenty years we have witnessed a departure from the way in which this nation had conducted its foreign policy for nearly two centuries. Congress has asserted an increasingly influential role in the day-to-day micromanagement of foreign policy, of foreign operations if you will. At the same time, Congress, through its use of law rather than the ex-

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executive branch's traditional tools of diplomacy and negotiation, has ushered the courts and lawyers into an uncomfortable but very visible role in the development of America's foreign policy.

The Founders did not intend for the foreign policy of our nation to be conducted or reviewed by grand juries. I know that Alexis De Tocqueville observed 150 years ago that Americans have a tendency to convert political issues into legal issues,¹ but this conversion can go too far. The Founders neither intended nor anticipated judicial intervention into foreign policy. Rather, the Founders sought to focus the conduct of foreign policy into one man, the President, so that we as a nation would be able to act quickly, decisively, and where necessary, secretly, to achieve our goals abroad.² The envisioned role for Congress was political, not regulatory. There was no role envisioned for the courts. Accordingly, we must simplify, deregulate if you will, the conduct of our foreign policy generally, and covert actions particularly.

In an anti-terrorist report of 1986, which Attorney General Meese greatly assisted in formulating and of which I was in charge, the executive branch suggested a joint intelligence committee as a way of building mutual confidence, reducing tensions and leaks, and ridding us of inefficiencies in the conduct of foreign policy. Establishing a single committee might make it possible to ensure that covert activity is confined to the

1. See A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 98, 280 (P. Bradley ed. 1948) ("Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question.").

2. See, e.g., *THE FEDERALIST* No. 64, at 392-93 (J. Jay) (C. Rossiter ed. 1961):

It seldom happens in the negotiation of treaties, of whatever nature, but that perfect *secrecy* and immediate *dispatch* are sometimes requisite. . . . [T]here doubtless are many . . . who would rely on the secrecy of the President, but who would not confide in that of the Senate, and still less in that of a large popular assembly. The [Constitutional Convention has] done well, therefore, in so disposing of the power of making treaties that although the President must, in forming them, act by the advice and consent of the Senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest (emphasis in original).

See also *THE FEDERALIST* No. 75, at 450-52 (A. Hamilton) (C. Rossiter ed. 1961):

To have intrusted the power of making treaties to the Senate alone would have been to relinquish the benefits of the constitutional agency of the President in the conduct of foreign negotiations. . . .

. . . . Accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character; decision, *secrecy*, and *dispatch*, are incompatible with the [House of Representatives who are] so variable and so numerous.

CIA, subject to appropriate but disciplined executive and legislative oversight, that is based on mutual trust rather than complicated regulations that frustrate the development of trust.

In this light, do the Founders have anything to teach us about the shared nature of conducting foreign policy? What role, if any, is appropriate for lawyers and the judiciary, and what role is appropriate for the executive and legislative branches? Members of Congress contend that Congress should have greater control over the nation's foreign policy, whereas members of the executive branch, who have, in recent history, witnessed the erosion of presidential authority over foreign affairs, argue in favor of returning power to the executive branch. We must ask ourselves what roles would the Founders have assigned to each of these groups.

We must establish, under the law, with objectivity, what the proper balance between the branches is. There are many questions that must be answered, but can be adequately answered only by looking to the objective principles embodied in the law. Did the War Powers Act³ encroach too far on presidential power? Are the proliferating congressional committee hearings compatible with the vision of the Framers? Can Congress properly dictate the micromanagement of foreign policy by an increased use of subcommittees and the use of the appropriations process? Should a presidential administration be required, in advance of operations, to consult or advise Congress? These are pressing questions of vital importance that must be answered intelligently and responsibly, lest we destroy our government's ability to function effectively.