University of Miami Law Review

Volume 43
Number 1 *Symposium: Foreign Affairs and the Constitution: The Roles of Congress, the President, and the Courts*

Article 12

9-1-1988

Constitutional Fidelity and Foreign Affairs

Edwin Meese III

Constitutional Fidelity and Foreign Affairs

EDWIN MEESE, III*

CLOSING ADDRESS

Once again, the Federalist Society is sailing into the wind and bringing its awesome intellectual firepower to bear on today's most controversial issues of law and public policy. During this bicentennial year of our nation's Constitution, public attention focuses on such issues as the War Powers Resolution,[1] arms control negotiations, the Iran-Contra hearings,[2] and the President's foreign policy in the Persian Gulf. Therefore, there is no better time for the Federalist Society to address the role of the Constitution in our nation's foreign policy.

In its relatively short but very intensive and potent history, the Federalist Society has promised an interesting experience for those who participate in its activities. This conference shows once again that it can fulfill that promise. Perhaps more than any other group, the Federalist Society has been faithful in relating critical public policy issues to the Constitution, thereby reminding us that the Constitution is the wellspring from which we must always derive our fundamental government doctrines.

Several times per year throughout the country, the Federalist Society conducts conferences that attract top conservative intellects from law and politics, as well as a few intellectually honest individuals from the other side of the aisle. These conferences, however, are not exercises in philosophical antique-hunting. Rather, partially because of the way the Society has approached these issues, these conferences are bold explorations of the future; a future that we hope will be characterized by pro-freedom economics, pro-family social policies, and pro-Constitution jurisprudence. I am pleased that this group, which surely includes the law school deans, the Supreme Court Justices, and

---

* Edwin Meese, III is currently a Distinguished Fellow at the Heritage Foundation in Washington, D.C. and a Distinguished Visiting Fellow at the Hoover Institution of Stanford University, in California. He was Attorney General of the United States from February, 1985, to August, 1988, and Counselor to the President from January, 1981, to February, 1985.

1. War Powers Resolution, 50 U.S.C. §§ 1541-1548 (1982) (requiring the President to report in writing to Congress within 48 hours of introducing United States armed forces into hostilities or imminent involvement in hostilities in the absence of a declaration of war, and further requiring that he terminate the use of the armed forces within 60 days after issuing the report).

2. *See* REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 433, S. REP. NO. 216, 100th Cong., 1st Sess. (1987).

the Attorneys General of the twenty-first century, has been reaffirming its faith in the Constitution and stimulating increased confidence in the system of democratic-republican politics that the Constitution established. These discussions demonstrate that the Federalist Society is ready to carry on the intellectual patrimony of James Madison, Alexander Hamilton, John Marshall, Joseph Story, Benjamin Curtis, John Harlan, and, if you will, Robert Bork.

We are brought together today to engage in the debate over the Constitution and foreign policy and how the original intent of the Framers of the Constitution affects that policy. This debate is significantly connected to the relationship between the executive and legislative branches. Perhaps no other issue of public policy brings the relationship between these two branches into a sharper focus, or causes more disputes between the major departments of the government.

What authority does each branch possess, and what limitations are placed on that authority? Both the original intent of the framers of the Constitution and common sense call for a strong Executive in foreign policy. The threat of encroachments on both the original intent of the framers and common sense may weaken the Executive and, in turn, cause great damage to our national security and our position in the world. Moreover, the Founding Fathers were deliberately ambiguous regarding the exact limits of the authority of the executive and the legislative branches in foreign policy. The struggle to define these limits is more political than constitutional or judicial.

Some who specialize in research concerning the Founding Fathers and the original constitutional debates claim that the framers intended for Congress to be the sovereign branch among the three branches of the government. Or, if they argue that the three branches are co-equal, these people would nevertheless have us believe that Congress is, to borrow a phrase from George Orwell, "more co-equal" than the other two branches. One possible source of this interpretation of the power of Congress is *The Federalist Papers*[3] and its authors Alexander Hamilton, James Madison, and John Jay, who attempted to assure their readers that the Presidency would not be a monarch under the Constitution. Nevertheless, the Presidency was, and is, a very powerful office. Nothing like it existed under the Articles of Confederation. Furthermore, the framers by no means believed that the Legislature was infallible. In fact, James Madison wrote about what he called the "tendency of republican governments . . . to an aggrandizement of the legislative at the expense of the other

3. J. MADISON, A. HAMILTON & J. JAY, THE FEDERALIST.

departments."[4]

The Constitution itself shows a more concerted effort to restrict the powers of Congress, rather than those of the President. Article II of the Constitution, which concerns the power of the Presidency, expressly confers the executive power upon the President.[5] Article I, however, which concerns the power of Congress, confers to that branch "[a]ll legislative Powers herein granted."[6] The texts of these articles suggest that although Congress was given only certain enumerated powers, the Presidency was given all of the powers that could be implied by the term "Executive," according to the political theory and practice of that time. The framers clearly did not envision either a weak Executive or one whose actions were to be dependent upon the pleasure of Congress.

The word most frequently used in *The Federalist Papers*[7] to describe the advantages that would be gained from a strong Presidency is "energy." An energetic President is capable of acting with both dispatch and firmness. In foreign affairs, secrecy is an additional requirement of success. These requirements are fully relevant in matters of foreign policy because it is in foreign affairs that a President's role is most clear and complete. In foreign affairs, the President serves as both the spokesman and advocate for the nation, and periodically, as its agent and negotiator. It is also in foreign affairs that the President is most likely to encounter lawlessness and threats to the peace and security of the nation. These challenges must be expeditiously responded to if the President is going to carry out his pledge to defend the United States. The President must respond to threats to our security without a lawlessness of his own. He must, however, fully use the power he derives from both the so-called executive power given to him by the framers, and the duty he has to provide for the defense of the nation.

Our history is full of famous examples of Presidents who have used the power of their office to its fullest. President Jefferson dispatched the Navy to Tripoli to quash the Barbary pirates without first consulting Congress. This particular event is commemorated in the words of the Marines hymn about the shores of Tripoli. President Lincoln took a number of actions early in the Civil War that stretched the Constitutional powers of the Presidency to their limits, including

4. THE FEDERALIST NO. 49, at 315-16 (J. Madison) (G. Carey & W. Kendall ed. 1966).

5. U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

6. U.S. CONST. art. I, § 1.

7. J. MADISON, A. HAMILTON & J. JAY, *supra* note 3.

direct defiance of the Supreme Court. He suspended the writ of habeas corpus and ordered a blockade of Southern ports without permission or affirmance from Congress. Over the decades, President Lincoln has taken a lot of criticism for these actions. His overarching motivation, however, was to save the Union, and when the dust had settled, that was in fact what he had accomplished.

Another Executive who used his official power to its fullest was Franklin Delano Roosevelt, a President from a different party. President Roosevelt sent military aid to Britain after the fall of France in 1940, at a time when the Nazis seemed to be an unstoppable juggernaut. Here at home, isolationism was a strong sentiment and Congress consistently voted against military aid for our friends in Europe. President Roosevelt saw, however, that world freedom would receive a devastating blow if Hitler defeated Britain and seized control of the British Navy. Consequently, he heeded the pleas of Winston Churchill and found a way to send Britain that aid. Many people have since questioned President Roosevelt's actions, just as they questioned President Lincoln's. Robert Jackson, who was then serving as Attorney General under President Roosevelt, wrote an advisory opinion finding that Roosevelt's actions were legal. Nevertheless, President Roosevelt's actions have always been the subject of great debate. Once again, however, the presidential responsibility for preserving the national defense was fulfilled only through the President's bold action. More recently, President Kennedy used the power of the Office to its fullest when he used his executive prerogatives to quarantine Cuba and confront the Soviets in 1962.

These exercises of Executive power are not the products of result-oriented pragmatism. All of these Presidents based their particular courses of action on one definite principle: The Executive must do what is necessary for the preservation of the nation. This principle was set forth in the extreme by John Locke, a theorist of early classical liberalism. It is important to discuss this principle in light of my original suggestion that the framers, in giving the President the executive power, were implementing a political concept that was clearly understood by observers at that time. John Locke was among the many political theorists read by the framers who gathered in Philadelphia. The framers were familiar with his theory of executive prerogative.[8] In his *Two Treatises of Government*,[9] Locke called the Legislature "the supream power,"[10] yet he affirmed a right, even

8. *See infra* notes 9-12 and accompanying text.

9. J. LOCKE, TWO TREATISES OF GOVERNMENT (P. Laslett rev. ed. 1960) (3d ed. 1698).

10. *Id.* at 374.

an obligation, on the part of the Executive to go beyond the law when the Executive's duties so required.[11] In Locke's words, the Executive should be able "to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it."[12]

There was a feeling in Locke's writings that the Executive must have the power and the ability to take necessary actions, however extreme, in order to preserve the security and the essence of the nation. Because of Locke's rather extreme view of the extent of executive powers in any government, it is, therefore, perilous to directly apply his argument to the intentions of the framers. It is important to understand Locke's views, however, so that we can then see how the framers adopted and modified them to fit the limited form of government that ultimately became the basis for the Constitution. The framers integrated Locke's theory into the overall democratic structure that they were building as they developed the constitutional doctrines of 1787.

For Locke, there was no earthly appeal against an invocation of executive prerogative and no check on its use. In our system, however, the contrary is true. The Executive faces two limitations upon his power. One is the possibility of electoral defeat. The President is elected to a limited term, and either he or his party may face such defeat if the electorate is not convinced that his actions were necessary or proper. The second factor that limits a President's power is the constitutional process of impeachment. In a sense, the impeachment process of our Constitution improves upon Locke. According to Locke, on certain occasions the Executive might have to act outside the law. But under our Constitution, the Executive can exercise the power that Locke envisioned and stay within the law.

The factors that act as checks on executive prerogatives, elections and impeachment, are both democratic and political in nature. Obviously, there is no better example of the exercise of democratic government than elections. Even impeachment, however, is democratic in nature because it forces both sides to air their differences publicly, and because the impeachment vote is influenced by the electorate. It is unlikely that Congress would vote to impeach a President without first being convinced that either the majority of the electorate supported impeachment, or that such support could be garnered in the course of the impeachment proceedings. The Constitution, therefore, does provide political means for the resolution of grave disputes con-

11. *Id.* at 373-75, 392-98 (discussing the extent of the legislative power in relation to that of the Executive).

12. *Id.* at 393.

cerning executive power. This model is in accord with the framers' general belief that problem solving by democratic means should be used in the United States. Because the authority of government is derived from the people, it is ultimately appropriate that political solutions be found to check the power of the Executive.

The Constitution simply does not give us all the answers to all the questions about the relative positions of executive and legislative power. Foreign policy disputes between the executive and legislative branches are, therefore, political matters, rather than subjects for judicial determination as part of the judiciary's function of interpreting the Constitution.

The Constitution is not a comprehensive set of laws or a "high level municipal code." Rather, the Constitution provides a framework for government. Contained in it are the structure and the principles that should be followed in administering that government. Certainly, the framers did not view it as their job to attempt to referee all future disputes between the branches; rather, their concern was to fashion a political system that could accommodate and solve interbranch disputes by the ordinary give and take of republican politics.

There are, to be sure, some acts by either Congress or the President that would clearly be unconstitutional. It is very clear, for example, that it is unconstitutional for the President to unilaterally declare war.[13] It is similarly unconstitutional for Congress to micromanage the deployment of our armed forces, regardless of whether the country is at war or peace.[14] This latter view is based upon the experience of the Founding Fathers during the Revolutionary War. They learned that a successful war could not be conducted by a committee, as the Continental Congress attempted for a while. The war was succesfully concluded only after that power was given to a Commander-in-Chief. Similarly, it is the position of this Administration that the War Powers Resolution[15] is unconstitutional.

We would look in vain, however, for a clause in the Constitution that precisely governs the outcome of foreign policy disputes between the President and Congress. The framers understood that they could neither rigidly define these relationships with exactness, nor draft the document to resolve every possible situation that could arise in the future. Rather, they left these struggles to the realm of politics.

One reason that the political debate becomes so complicated is

13. *See* U.S. CONST. art 1, § 8, cl. 11 (granting Congress the power to declare war).

14. *See* U.S. CONST. art II, § 2, cl. 1 (making the President the Commander-in-Chief of the armed forces).

15. *See supra* note 1.

because in such a controversy, it is often in the interest of one party to attempt to make that political dispute appear to be a dispute of a different nature. In other words, a party will try to translate a political contest of wills into a legal fight, or even into a constitutional fight. Such a translation of a political debate is exemplified in the current attempts to portray the issues in the Iran-Contra affair as legal technicalities, rather than as basic political questions concerning an appropriate presidential response to Soviet intervention in Central America.

People with certain political views are attempting to make those views prevail without resorting to an election. Elections, however, are the ultimate mechanisms for resolving interbranch political disputes because they give the people both the opportunity to determine whether the President or Congress is correct, and the power to determine the proper course of presidential action. For instance, if a simple referendum was presented to the American people on whether the United States should allow the arrival of Communist totalitarianism on the American mainland, there is little doubt about the outcome of their vote. Rather than presenting the electorate with such issues, however, some factions have sought the use of the appropriations process, the advice and consent process, and even the ethics-in-government process to work their will.

The call that I issue today, along with others in this conference, is for a return to the framers' intention that the boundaries of legislative and executive authority in foreign affairs be resolved through the political process. In a sense, I am calling for politicization, but only for the politicization of issues that are properly political, and not for the politicization of the law or the Constitution. Above all, I discourage any notion that the judiciary ought to be called in to resolve these ongoing foreign policy disputes. The "political questions" doctrine may have been abandoned in domestic issues, but in foreign affairs the Supreme Court and the lower courts have generally shown admirable restraint. Such judicial restraint is praiseworthy, even when a liberal policy is challenged by a conservative. Such a set of events was observable in the case of *Goldwater v. Carter*,[16] wherein Senator Goldwater sued to enjoin President Carter from abrogating a defense treaty with Taiwan.[17] The Supreme Court remanded the case to the district court with directions to dismiss the complaint.[18] A plurality of the Court found that the case presented a nonjusticiable political

16. 444 U.S. 996 (1979).

17. *Id.* at 997-98 (Powell, J., concurring).

18. *Id.* at 996.

question.[19]

Treating foreign policy disputes as justiciable questions would complete the unwarranted constitutionalization of policy differences. In the process, the American people would lose the right to choose their policies by electing their leaders. Some may argue against a call for political resolution of foreign policy disputes because that might militate against reaching a consensus in foreign affairs. After all, from Pearl Harbor to the Tet offensive, American politics stopped at the water's edge. We need very badly to renew that type of foreign policy consensus today. A genuine consensus regarding the defense of our nation and its foreign policy interest is the best possible situation. Good faith efforts by both the executive and the legislative branches are essential if they are to reach such a consensus.

There are times, however, when the two branches cannot reach a consensus. Whether it is in the Persian Gulf or elsewhere, there will be particular situations in which the gap between ideas is too great. When that happens, the best method for resolving the issue is through candid political debate. Through political debate, the people may be led to an understanding of the issues and can make their views known through their elected representatives. The worse course of action is to pretend that a dispute over a fundamental policy should be unilaterally decided by the wording of an amendment in an appropriations bill. This action is especially undesirable when the President is coerced to sign such a bill by circumstances in which bad policy and the unconstitutional usurpation of authority are made a part of the law because of the necessity of maintaining the funding of the government. Many have said that democratic politics is untidy. Indeed, sometimes it is. But, as Winston Churchill once said, "democracy is the worst system of Government except [for] all [the] other[s]."[20]

Continual debate and controversy is unquestionably an unwieldy way of conducting foreign policy. That is precisely the reason, however, that the framers of the Constitution provided the Executive with the principal power to conduct foreign affairs. Through their experiences during the Revolutionary War and the years prior to 1787, the framers became familiar with the requirements of energy, dispatch, and secrecy in the conduct of foreign policy. They thought it clear that although certain powers were given to the Congress for the development of policy, the conduct of foreign affairs was to be left strictly to the President.

Simultaneously, however, the framers preserved the checks and

19. *Id.* at 1002 (Burger, Stewart, Rehnquist & Stevens, JJ., concurring).

20. THE OXFORD DICTIONARY OF QUOTATIONS 150:19 (3d ed. 1979).

balances on the Executive by giving Congress the power to declare war, the power to appropriate funds for defense, and in extreme cases, the power to impeach the President. Thus, in foreign affairs, as in so many areas, the Constitution is carefully balanced. This characteristic of the framers' work is the reason why that famous document has lasted these 200 years; during this same period, many other constitutions around the world have foundered and been replaced numerous times.

In this bicentennial year of our nation's Constitution, it is therefore proper that we contemplate the work of the framers with special admiration and special awe. In dealing with the subject of foreign policy and national security, we should similarly contemplate the framework and the structure that is set forth in the Constitution. In obedience to the Constitution, it is paramount that the leaders of both the executive and legislative branches determine how they can best reach a consensus and formulate a coherent foreign policy strategy for this country. If the two branches cannot reach agreement, however, they should develop quick, expeditious, candid, and civil means for resolving policy debates. Following the resolution of an issue, the President can effectively implement policies that these two branches have determined to be necessary for the good of the nation and for world peace.

I conclude where I began—with the Federalist Society. It is the Federalist Society, and those in law and politics who adopt similar positions, who keep our written Constitution on the front pages, rather than relegating it to a museum. The deliberations during this Symposium have marked another contribution to the thinking and the discussion about how our living Constitution conveys the authority and the guidance for dealing with the critical public policy issues of our day.