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Reflections on the Role of the Judiciary in Foreign Policy

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"Where does the Constitution lodge the power to determine the foreign relations of the United States?"[1] That deceptively simple question is posed by Professor Corwin in his famous treatise on the office and powers of the president. His answer runs the better part of 100 pages of text, plus 50 pages of small-print, discursive footnotes—all this in a general guide to the main features of the presidency. Corwin's question, in one form or another, has caused animated, indeed passionate debate since the 1790s and has spawned a literature commensurate in size with the importance of the subject.[2]

Hamilton versus Madison

That question retains its vitality during the 1980s. We should not despair, however, if we are unable to provide a succinct answer—nor should we despair, for that matter, if we fail to advance the argument much beyond the confines of the exchange between Alexander Hamilton and James Madison in 1793. In that year those eminent worthies squared off at twenty paces over the legality of President Washington's Proclamation of Neutrality, which he had issued to prevent the new nation from becoming involved in the European wars.[3]

Hamilton's argument, in a nutshell, was that foreign affairs are an inherently executive function; that Article II of the Constitution, in vesting "the executive Power" in the president, meant to bestow all rights and privileges pertaining to the nature of the power, including the right to control foreign policy; that the subsequent grants of specific powers to the president illustrate, rather than limit, the general grants of executive power; and that, absent express restriction in the Constitution, the power of presidential control is to be presumed.

Spurred by an almost frantic Jefferson[4]—he would not be the last secretary of state to oppose the policies of his own chief—Madison

replied that the Constitution, in vesting the power to declare war in Congress, thereby bestowed the right to manage the foreign policy of the United States; that the president's powers in the area are ministerial, or essentially executory in the narrow sense; and that any exceptions to the grant of war-making authority to Congress are to be construed strictly against the president.

In this exchange between these two towering figures—each of whom must be supposed to know what he was talking about—may be found the seeds of virtually all subsequent constitutional debate on the question. Partisans of each position—and of every position in between—may be found today, as they may be found throughout American history, and their arguments retain the political passion (even if they sometimes lack the nobility) of the original debate. One may lament the imprecision of the Constitution on this subject in the manner of Justice Jackson, who thought it "almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh,"[5] or one may lament the inability of subsequent political experience to settle the issue with compelling finality. The beginning of wisdom on the subject, however, is to seek no more certainty than the nature of the matter under inquiry admits. The nature of the matter here is difficult not only because the Constitution is silent on certain crucial questions; not only because it brings into sharp relief the irreducible tension between the legislature and the executive; not only because one must deliberate about the meaning of that most opaque of constitutional phrases, "the executive Power"; but because in thinking about the nature and distribution of foreign policy powers in the Constitution, one is sooner or later forced to consider whether a particular construction will enable the nation to endure—and endure not just in the sense of survival but as a nation whose governors rule with the consent of the governed.

It is that last consideration which makes the 200-year-old debate about the power to control foreign affairs so complicated, so passionate, so rewarding, so unending. One mistakes the character of the exchange between Hamilton and Madison if one reduces it to a lawyers' dispute over the meaning of arcane terms of art or to a dispute in which constitutional phrases are mere rhetorical masks for hidden motives. At the heart of this debate is the desire to ensure two objectives at once: popular sovereignty and national survival. The effort to secure these goals must guard against the opposite vices of deficiency and excess. The danger is that popular sentiment may be so indifferent or so inflamed, or the government so enfeebled or so tyrannical, as to make national policy inefficient or undemocratic or both. Whatever our other differences, surely we can agree that the

Constitution was intended to be, and should be read as, an instrument capable of meeting every exigency that the concatenation of chance events can present and that its highest purpose is the execution of policy that is at once efficacious and informed by popular consent. This is the spirit that unites disputants despite their other disagreements. This same spirit has animated the Supreme Court in its several major efforts to grapple with the emanations of Professor Corwin's deceptively simple question.

Judicial Hesitancy

As Tocqueville remarked, our system tends to resolve all political disputes, sooner or later, into judicial disputes.[6] That observation, however, applies less in the area of foreign affairs than perhaps in any other. The inhospitality of the courts, or at least of the Supreme Court, to actions arising under the Constitution's foreign relations powers frustrates many, especially professors and members of Congress in opposition to the president. After all, they argue, did not the great Chief Justice Marshall lay it down once and for all that "it is emphatically, the province and duty of the judicial department to say what the law is"?[7] Is the protection of individual rights or the preservation of the separation of powers any less a duty because the source of the injury is foreign as opposed to domestic policy? Certainly nothing in the constitutional provisions empowering the judiciary suggests that the courts' jurisdiction is less potent in the one area than in the other; to the contrary, Article III presents a number of express jurisdictional opportunities for judicial involvement in foreign affairs. Why then the hesitancy?

The answer, at once subtle and complicated, deserves more extensive treatment than can be devoted to it here. Suffice it to say here that the hesitancy is a product of factual circumstance and, more important, of the Supreme Court's considered sense of its own role. Typically, judicial power is invoked when a private party alleges that individual rights have been infringed by some action or inaction by the government. That pattern is not unknown in the field of foreign affairs, but it is not common. More commonly, the aggrieved party's primary interest lies less in the redress of personal grievances than in the alteration or reversal of a disagreeable policy. Even with a plausible statutory or constitutional claim of right, a party immediately encounters a formidable array of obstacles in the form of objections based on standing, ripeness, and the political questions doctrine (to name only three). And even if those hurdles are surmounted, the Court may hesitate to proceed as it might were the dispute wholly or

predominantly domestic in nature—and for good reason. Much of the world of international relations is *terra incognita* to the judiciary; indeed it is often *terra incognita* even to those who make it their profession. It is a world ruled by King Contingency, where caprice, deceit, and passion dominate far more than order, honor, and reason. It is a world where "ignorant armies clash by night"; a world where accurate information is hard to come by and often secretly acquired; a world where the consequences of mistakes are long-lived and frequently fatal.

Little in the training or experience of the judiciary equips it to dispose of such matters as it disposes of domestic issues. It possesses even less capacity to predict the outcome of its judgments. If that were not enough, the courts must surely recognize that foreign policy disputes tend to be partisan disputes—the more partisan, the more passionate, and the more passionate, the less susceptible to resolution by the main instrument of the courts' power, namely, reason.

Further, the judiciary knows or ought to know that in foreign policy disputes, constitutional issues of the most dramatic sort are seldom far from the heart of the matter. If the issue involves the separation of powers and if the merits of the case are considered, a court will inevitably find itself questioning the self-proclaimed and highly prized prerogatives of one of the political branches. In any event, as the only party who can do much about changing the execution of a challenged policy is the president, a court must face the daunting prospect of ordering the chief executive to do something that his considered view of the state of the world—not to mention of his oath of office—strongly disinclines him to do.

Finally, the judiciary cannot be unmindful of its own vital interests in the constitutional scheme. In the field of foreign relations, those interests may have less to do with the assertion of power than with "the inner vulnerability, the self-doubt of an institution which is electorally irresponsible and has no earth to draw strength from."[8]

For whatever reasons, the Supreme Court has evinced a studied reluctance to engage in foreign policy debates, especially when the political branches are at swords' points. In contrast to domestic policy, where the Court has been anything but a reluctant participant, the cases suggest a certain institutional timidity. This is true even where the judiciary has been most active, namely, the law involving treaties. Here we have a fairly well-developed body of judge-made law, touching such subjects as the relationship of treaties to acts of Congress[9] and the powers of the states;[10] the powers of Congress vis-à-vis those of the president;[11] the nature and extent of constitutional limitations upon the treaty power;[12] and the status of executive agreements.[13]

Even here, however, the reluctance to assert the full range of judicial powers is apparent although subject matter jurisdiction is nevertheless authorized by both Constitution and statute, and the supremacy clause places treaties on the same footing with statutory enactments.[14]

Notwithstanding general statements in Court decisions, for example, the Court has never, without the assent of Congress, given full force and effect to a treaty inconsistent with a prior act of Congress.[15] It is even unclear to what extent the Bill of Rights limits the exercise of the treaty power.[16] More recently, the Court refused to take on the still unresolved and interesting question whether the president, acting alone, may terminate a treaty.[17] In short, even where the Constitution is clear in authorizing jurisdiction, and where the judiciary has a nearly 200-year-old tradition of judge-made law to rely upon, the Court treads carefully.

Presidential Interpretation and Action

Although it is error to suppose, as Justice Brennan said in a much-quoted opinion on the political questions doctrine, "that every case or controversy which touches foreign relations lies beyond judicial cognizance,"[18] it is also true, as then–Chief Justice Burger said in another case, that matters "intimately related to foreign policy and national security are rarely proper subjects for judicial intervention."[19] Similar contrasting sentiments can be produced almost at will from a random sampling of Supreme Court cases dealing—or refusing to deal—with foreign policy questions. If the Court appears to be of more than one mind when deciding whether the judicial power should be invoked in these disputes, it nevertheless seems to be fairly well-settled on the nature of the president's powers. Whatever one's opinion on the original understanding of the framers, whatever one may think of the subsequent gloss applied by Hamilton and Madison, the weight of history has confirmed the essence of the Hamiltonian view. As Professor Charles Lofgren pointed out in a fine essay on the subject, "while Congress and others have debated, Presidents have acted."[20]

A frequent argument contends that although presidential action must be acknowledged as a matter of fact, it has usurped congressional power as a matter of law. That view has great appeal, as a long and thoughtful literature attests. Upon deeper reflection, however, the issue may be less a question of usurpation than an inexorable unfolding of ideas that were implicit all along in the idea of the executive. Much has been made of the last-minute appearance of the phrase "executive Power"—inserted by the Committee on Style without prior deliberation—during the Constitutional Convention. That

fact, in turn, throws the diviners of original intent back to Locke, Montesquieu, and Blackstone with interesting but hardly dispositive results. In any event, we would do well to remember that the world—including the framers of the Constitution—had never before seen anything like a *republican* executive. For that reason alone, prior experience and commentary are less useful than they might otherwise be as guides to our understanding. In short, the idea of the executive as set forth in the Constitution is not exactly an experiment but it is something close to it.

Subsequent events, happily, confirm this experiment as an outstanding success, and history has thus blessed us with a meaning that even the most careful reading of the original design has been unable to yield. That meaning is no mere creature of chance events or presidential contrivance, as if the major actors were motivated simply or primarily by a desire for power. It is in large part a product of mature reflection by our leading statesmen, honed by their experience in office. Although this influence is a subject for another time and place, we would rob this discussion of much needed light if we failed to mention how much the presidential office and our understanding of it have been shaped by its most memorable occupants, especially during the first fourscore and seven years of the nation's history—most notably, Washington, Jefferson, Jackson, and Lincoln. Our opinings about the meaning of executive power do not occur in a vacuum, nor do they consist merely of variations of what Bagehot called the "literary theory" of the Constitution. They are formed decisively by the reflections of men who understood themselves not as would-be despots but as *republican* chief executives, holding office under and through a form of government that derives its just powers from the consent of the governed. In a sense, our greatest presidents may rightly be said to have "created" the office; in doing so, they were inspired by a Constitution that instructed them about the kind of office it ought to be.

Ratification of Hamilton's Concept

We have every reason to believe that the opinings of the Supreme Court itself have been formed by the same experience, even as they contribute in their own way to a refinement of that experience. Although the Court's participation in foreign policy debate is limited as compared with its participation in domestic policy, it has contributed mightily to our understanding of the constitutional status of the executive's diplomatic and military powers. Much of this constitutional jurisprudence, at least in larger conceptualization, is a twen-

tieth-century phenomenon, a fact altogether befitting the growth of the United States as a world power. In *Myers* v. *United States*,[21] decided in 1926, the Court in effect gave final ratification to Hamilton's concept of inherent presidential power, a concept that had long since been ratified by presidential action and, more important, by the court of public opinion. Appropriately enough, the Court's opinion in *Myers* was written by the only man who enjoyed the honor of serving as head of two branches of government. Chief Justice Taft, in adopting Hamilton's latitudinarian reading of Article II, stated, "The executive power was given in general terms, strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed. . . ."[22] As long as the activity in question may be rightly understood as executive in nature, said Taft, the president's authority is implied unless expressly limited.

As *Myers* was principally concerned with the removal power, its implications for foreign policy were necessarily indirect, although significant. The opinion did not deal, for example, with the question of the executive's relation to Congress in respect of shared foreign policy powers. Ten years later, however, Justice Sutherland filled at least part of the void in *United States* v. *Curtiss-Wright Export Corp.*[23] The case arose on appeal from an indictment for violation of a presidentially declared arms embargo. A joint resolution of Congress had empowered the president to declare an embargo if he found that the sale of arms would prolong a South American war. The narrow question before the Court concerned the constitutionality of the congressional delegation to the president, which Sutherland quickly settled in the affirmative. He took the occasion, however, to expound his views (in which all but one colleague joined) on the nature of the foreign relations power in general and the president's constitutional role in particular. In words that have ever since warmed the hearts of proponents of the executive power, he noted:

> Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiations the Senate cannot intrude; and Congress itself is powerless to invade it.[24]

Sutherland distinguished sharply between the chief executive's more limited implied power to act in domestic matters and his more expansive implied power to act on his own authority and discretion in the nation's dealings abroad. The breadth of presidential discretion, he suggested, was required by the nature of the activity in question and derived from the Constitution itself rather than from any grant of legislative power:

> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.[25]

Certain aspects of Sutherland's opinion have been severely criticized by scholars, particularly his theory that the power to conduct international relations passed to the United States government not from the Constitution but from the British Crown.[26] The fragility of his theory of national sovereignty and its origins notwithstanding, the other emanations of Sutherland's opinion concerning the nature of the executive power remain largely intact. Significantly, the Supreme Court has never denied them.

Curtiss-Wright can be understood in a number of ways, as Charles Lofgren, among others, has shown.[27] At one extreme, it can be read narrowly as certifying maximum discretionary power in the president only or primarily when it is exercised pursuant to an act of Congress—as in *Curtiss-Wright*. At the other extreme, it can be read as an endorsement of that discretion with or without express congressional authorization. While scholars and others have debated these polar positions (and virtually everything in between), events have tended to ratify a more expansive view of the *Curtiss-Wright* holding. In its immediate aftermath, certainly, it provided important support for Franklin Roosevelt's assertion of executive power before our formal entry into World War II, including, most prominently, the Declaration of Panama, the destroyer-base agreement with Great Britain, and the promulgation of the Atlantic Charter. Because of the scope of these

agreements, any traditional understanding of the relationship between Congress and the president would have required some sort of legislative authority in the form of either a treaty ratification or more general implementing legislation. Roosevelt, however, sought neither because he deemed it unnecessary as a matter of law (and given the mood of Congress, probably impolitic as well).

The destroyer agreement of September 1940 was in constitutional terms perhaps Roosevelt's boldest move because it flew in the face of an express congressional enactment to the contrary. The agreement was justified in an opinion by then–Attorney General Jackson that rested on an exceedingly artful piece of legislative interpretation: in essence, Jackson read a statute to mean exactly the opposite of what Congress clearly intended. Roosevelt's action and Jackson's opinion brought forth a scathing attack from, among others, Professor Corwin, who called the agreement "an endorsement of unrestrained autocracy in the field of our foreign relations," and said of Jackson's legal rationale that "no such dangerous opinion was ever before penned by an Attorney-General of the United States."[28]

Congress, however, failed to rise in its wrath because Roosevelt's action prevailed in the court of public opinon. (Apparently no one thought to invoke the judicial power to resolve this arguably unconstitutional exertion of presidential prerogative, which says something about the then-prevailing view of the role of judiciary.) Roosevelt, it is true, was nothing if not a master of securing his political base; in this, perhaps his finest hour, he later sought and was given legislative support in the prewar years for a wide range of activities that were notable chiefly for the extraordinary breadth of authority they delegated to the president.

Roosevelt's prewar leadership might have been sustained without benefit of the *Curtiss-Wright* doctrine. There was, after all, some precedent for his behavior in the actions of a number of his predecessors, chiefly Lincoln and Wilson. But there is no doubt that *Curtiss-Wright*, by affirming the breadth of presidential discretion in foreign affairs, provided him with a constitutional rationale, one that presidents ever since have relied upon as authority for their behavior.

With or without *Curtiss-Wright*, however, Roosevelt's prewar actions might have led to a major constitutional confrontation between Congress and the president, had they not later been dissolved by our formal entry into the war. Whether in that event there was anything the Supreme Court could or should have done, I leave for another occasion.

I dwell here on Roosevelt's behavior in the years immediately before World War II to draw into sharp relief the kinds of difficulties

the Court faces when it attempts to assert its reach over the subject matter of foreign relations, especially at moments of arguable national emergency. The Court is caught on the horns of a dilemma: it must either limit the reach of the undoubted constitutional power to legislate or second-guess the judgment of the president, who, by the nature of his office, claims not only the constitutional power but also the factual base requisite to intelligent judgment. The outcome cannot be happy either way—for Congress, the president, the Court, or the Constitution.

Youngstown Steel and the Separation of Powers

Perhaps the most notable venture of the Court onto this unhappy ground occurred in the *Youngstown Steel* case.[29] The Court ruled, six to three, against President Truman's seizure of the steel mills to prevent a threatened strike during the Korean War, but no theory of the case was able to command a majority. Justice Black wrote a plurality opinion, in which he denied the existence of inherent presidential power. Four of his brethren, however, seemed to place primary emphasis on the fact that Truman acted in opposition to clearly expressed legislation to the contrary; one could argue that they would have voted differently in the absence of contrary statutory expression. Along the way, Justice Jackson contributed his famous three-part test for judging the constitutionality of inherent presidential power (that is, action pursuant to, contrary to, or in the absence of congressional authority). Three justices voted to support the president.

The Court's judgment made clear that President Truman lacked constitutional authority for his actions, but almost everything else was unclear, or at least arguable, and has remained so to this day. Seven of the nine members of the Court, however, conceded in principle the existence of inherent executive power. As to the circumstances under which that power can be validly exercised, only the law reviews know for sure. Even at the remove of thirty-seven years, the precedential value of the case remains problematic, although we are surely richer for the Court's troubled deliberations. Clearly, a majority of the Court was of the view that a genuine national emergency did not exist, but we have no legal criteria to guide us toward defining the real thing. Presumably, that is why we have presidents—and a Congress to keep them in check.

The *Youngstown Steel* case cannot have been a pleasant undertaking for the Court. Here was the president of the United States asserting his considered judgment that continued steel production was vital to the supply of arms in an ongoing war and that a strike would

"immediately jeopardize our national defense."[30] On the other side, ultimately, were arrayed the considerable legislative powers of Article I, which argued that Congress, and Congress alone, could authorize what the president had done and that, lacking such authorization, the president was acting unconstitutionally. The Court's mighty efforts to resolve this confrontation were unavailing to almost all concerned. It made clear that inherent presidential power was not unlimited power, but we already knew that. Justice Black's embrace of Madison's Whiggish view of executive power commanded only his own vote and that of Justice Douglas. Three members of the Court said that the president's actions were lawful, and the remaining four said, in effect, that it was a close call. In the end, however, we are no closer to a workable test for determining where the powers of Congress end and those of the president begin than we were at the outset. The final word, perhaps, was stated by Justice Jackson, who said that in the absence of either a congressional grant or denial of authority, "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[31]

Youngstown Steel thrust the Court against the ultimate meaning of the separation of powers and against the implicit proposition that exigencies of political life can test the limits of the rule of law. It thereby brought the Court to the limits of its own institutional powers. Perhaps that is why in the intervening years the so-called political questions doctrine has received so much attention in the field of foreign relations. The issues raised by the doctrine cannot receive any more than cursory examination here, but by way of background, the Court over the years has articulated a number of rules whereby the judiciary can sidestep the merits of certain kinds of cases or controversies. Among them are considerations of standing, ripeness, mootness, and political questions—considerations sometimes based on a sense of institutional propriety, sometimes derived from the Constitution itself.[32]

In its initial formulation at the hands of John Marshall, the political questions doctrine held that judicial review is inappropriate where the Constitution has committed the resolution of the issues to the political branches.[33] His statement of the rule and his reliance on the separation of powers as its ultimate ground have been ratified by the Court on numerous occasions, with some frequency in the field of foreign relations. At times, the Court has dismissed cases on this basis and noted the particular branch to which the Constitution committed the issue,[34] but it has also done so without deciding whether Congress or the president has the constitutional power to decide the matter.[35]

The most interesting and recent case of the latter type was *Goldwater* v. *Carter,* which the Court confronted in 1979. Senator Goldwater had filed suit arguing that without the advice and consent of the Senate, President Carter could not terminate a treaty with the government of Taiwan. The Court dismissed the case as a nonjusticiable political question, but no rationale could muster a majority. Justice Rehnquist, writing for a plurality of four, adopted a broad view of the political questions doctrine "because it involves the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President."[36] He specifically distinguished *Youngstown Steel,* on which Goldwater had relied, on the grounds (a) that the petitioners there were *private* litigants and (b) that the president's action was one of "profound and demonstrable *domestic* impact" (emphasis added). He continued:

> Here, by contrast, we are asked to settle a dispute between coequal branches of our Government, each of which has resources available to protect and assert its interests, resources not available to private litigants outside the judicial forum.[37]

Rehnquist's position, which came one vote shy of commanding a majority of the Court, has been the occasion of (even as it reflects) a widespread debate.[38] With the subsequent change in membership on the Court, it will be interesting to see whether his view will enjoy a richer life.

Future Challenges to the Executive

The Court may not want for an opportunity, given the frequency with which members of Congress now seek to invoke the judicial power in their disputes with the president over foreign policy.[39] A recent case may afford an example of things to come. In 1987, 110 members of the House of Representatives and three members of the Senate filed suit in Federal District Court in Washington, D.C., arguing that President Reagan violated the War Powers Resolution by failing to file a report concerning incidents in the Persian Gulf.[40] They asked the court to order the president to submit a report. The president responded by arguing that the doctrines of standing, political questions, and equitable discretion all precluded judicial review.

The court sidestepped the standing question and dismissed the case on the other two grounds. In the context of exercising equitable discretion, the court noted that the plaintiff's dispute was primarily with their fellow legislators:

> This Court declines to accept jurisdiction to render a decision that, regardless of its substance, would impose a consensus on Congress. Congress is free to adopt a variety of positions on the War Powers Resolution, depending on its ability to achieve a political consensus. If the Court were to intervene in this political process, it would be acting "beyond the limits inherent in the [c]onstitutional scheme." Moreover, in view of a sponsor's statements that the determination of "hostilities" under the War Powers Resolution is a question for the executive and legislative branches, federal jurisdiction would be especially inappropriate in this case.[41]

The court expressly noted, however, that judicial review of the War Powers Resolution was not precluded by its decision: "A true confrontation between the Executive and a unified Congress, as evidenced by its passage of legislation to enforce the Resolution, would pose a question ripe for judicial review."[42]

With that by way of predicate, the court embraced the political questions doctrine on prudential rather than on constitutional grounds but noted that had the constitutionality of the War Powers Resolution been squarely presented, those considerations would not have been relevant.[43] An open invitation, thus, has been extended by a federal court.

Conclusion

In the nearly 200 years since the Hamilton-Madison argument over President Washington's Neutrality Proclamation, the Supreme Court has frequently blessed the Hamiltonian conception of the presidency. It has done so at times broadly and explicitly and at other times narrowly and implicitly. The cases demonstrate, if nothing else, that there are many mansions in the house of Hamilton. However one reads the cases, the Court has never embraced the errand-boy or merely ministerial conception of the presidency that is logically implicit in Madison's position—a conception that, ironically, Congress was only too willing to impose on Madison during his own unhappy presidency. There are dangers to an unbridled Hamiltonian understanding of the executive power, but there is no reason to believe that the Court has been blind to them.

Although those dangers are never to be regarded lightly, the risk in our time may lie elsewhere. With the political branches controlled by opposition parties, sharp political fights between Congress and the president over foreign policy have become an everyday occurrence. Much to the chagrin of recent presidents, Congress has not hesitated

to impose increasingly detailed terms and conditions on the conduct of foreign policy by the executive. This has occurred more or less simultaneously with an expansion of federal judicial power, which itself is highly controversial. That expansion may reflect little more than the growth of government to the point where it regulates, or can regulate, virtually every aspect of human life. Thus far, the judiciary has not systematically asserted power over foreign affairs of the sort it has come to exercise with some frequency over domestic affairs. But if Congress is disposed to regulate the details of the president's conduct of international relations as it has recently, the courts may find themselves drawn willy-nilly into a major constitutional controversy, the seeds of which have clearly been planted.

What the Supreme Court can or should do when and if those seeds reach full flower is a question on which intelligent differences of opinion can be entertained. But at such moments, it is good to be reminded of Tocqueville's words, published in 1835:

> The peace, prosperity and very existence of the Union rest continually in the hands of these seven [now nine] federal judges. Without them the Constitution would be a dead letter; it is to them that the executive appeals to resist the encroachments of the legislative body, the legislature to defend itself against the assaults of the executive, the Union to make the states obey it, the States to rebuff the exaggerated pretensions of the Union, public interest against private interest, the spirit of conservation against democratic instability. Their power is immense, but it is power springing from opinion. They are all-powerful so long as the people consent to obey the law; they can do nothing when they scorn it. Now, of all powers, that of opinion is the hardest to use, for it is impossible to say exactly where its limits come. Often it is as dangerous to lag behind as to outstrip it.
>
> The federal judges therefore must not only be good citizens and men of education and integrity, qualities necessary for all magistrates, but must also be statesmen; they must know how to understand the spirit of the age, to confront those obstacles that can be overcome, and to steer out of the current when the tide threatens to carry them away, and with them the sovereignty of the Union and obedience to its laws.[44]