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**AFFECTING FOREIGN AFFAIRS IS NOT THE SAME AS MAKING
FOREIGN POLICY: A COMMENT ON *JUDICIAL FOREIGN POLICY***

A. MARK WEISBURD*

INTRODUCTION

Professor David Sloss’s *Judicial Foreign Policy: Lessons from the 1790s*¹ is a fascinating and provocative account of a crucial series of events from the earliest days of the government established by the Constitution. As I will note below, his narrative shows some of the growing pains of the federal government. I have some quibbles about his evaluation of the British “lawfare” policy and his suggestion that judicial application of prize law in the eighteenth century is a significant precedent for the use of international law as a generator of rules of decision in the twenty-first. However, my comments will focus mainly on what I take to be the most important inference he draws from the events he recounts: that judicial minimalism in foreign affairs is inconsistent with the Framers’ understanding of the Constitution, given that, during the period he describes, the federal Executive concluded that the judiciary was the department of the federal government best equipped to address privateering questions with significant foreign relations implications.²

I. A SNAPSHOT OF THE FOUNDING ERA

Professor Sloss’s paper offers an opportunity to reflect on the way the founding generation understood—or came to understand—the scheme of government established by the Constitution. In the first place, his narrative provides a fair degree of ammunition for those who doubt the utility of originalism as an infallible method of constitutional interpretation. As he makes clear, when French privateers started making illegal captures in 1793, no official was certain which branch of the federal government should address the problem.³ The first case raising this matter was treated as an executive

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1. David Sloss, *Judicial Foreign Policy: Lessons from the 1790s*, 53 ST. LOUIS U. L.J. 145 (2008).

2. *Id.* at 194–96.

3. *Id.* at 152–54.

matter and resolved by Attorney General Edmund Randolph; subsequently, however, the Washington administration decided that dealing with such cases was a judicial function.⁴ This uncertainty is especially striking because both President Washington and Attorney General Randolph were delegates to the Constitutional Convention⁵ and Randolph was one of the members of the committee that produced a first draft of the Constitution.⁶ That is, even when the President and the Attorney General were themselves among the Framers, they proceeded under the assumption that the Constitution was unclear on this jurisdictional issue and determined how to resolve it on the basis of practical considerations as they revealed themselves.

The situation Professor Sloss addresses also provides a glimpse of the early functioning of the federal judiciary. For one thing, it makes clear that twenty-first century ideas of the necessity of sharp limits between the Executive and Judicial Branches had not yet taken hold;⁷ it is quite striking that two treaties very relevant to the events of this period—the Jay Treaty of 1794 and the Convention of 1800 ending the quasi-war with France—were negotiated, in one case by the sitting Chief Justice, and in the other by a delegation of which the sitting Chief Justice was a member.⁸ Furthermore, questions raised by the European wars provided the occasion on which the judiciary first determined that it could not, as an institution, render advisory opinions.⁹

II. QUIBBLES

As I will note in the next section, I think that Professor Sloss is quite correct in his observation that the French prize cases provide an important perspective in considering the role of the federal judiciary in matters touching on foreign affairs. He makes certain other points, however, on which he places much less emphasis, and as to which I am uncertain. In the first place, Professor Sloss calls British “lawfare” a significant hindrance to French privateering and suggests that cases were brought without regard to their merit.¹⁰ But it is not clear to me that lawfare was as unjustified, as successful, or as troublesome to France as he argues. As he points out, trial judges in four

4. *Id.* at 161–64.

5. JAMES MADISON, *JOURNAL OF THE FEDERAL CONVENTION* 53 (E.H. Scott ed., 1894).

6. WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC* 14 (1995).

7. *See id.* at 119.

8. *Id.* at 89–90, 118–19.

9. *Id.* at 77–80.

10. *See* Sloss, *supra* note 1, at 173–74, 182 (noting that the British “successfully utilized” lawfare against the French by filing claims in U.S. courts in order to interfere with France’s military objectives and to prevent the privateers from collecting profits on their prizes, and suggesting that the fact that the majority of the cases were decided in favor of the privateers “lends credence to the French allegation that these were frivolous lawsuits”).

of the eighteen cases he identifies held against the captors.¹¹ That suggests some basis for the suits. Also, a study of these events indicates that, in the period prior to the spring of 1795, French privateers based in Charleston, S.C., had brought into port thirty-seven English prizes (as well as twenty-nine of other nationalities), which were sold for something over £66,000—a total which, of course, does not count prizes taken to other American ports.¹² If privateers were able to realize a sum of this magnitude from the sale of their prizes, it cannot be true that they were completely hamstrung by the British legal maneuvers, or that those maneuvers gave as much protection to British ships as their proponents may have claimed. Further, it should be noted that the British consul whom Professor Sloss quotes as extolling the effect of British lawfare¹³ was involved in the bringing of the suits challenging the legality of the French captures, and thus had every reason to praise the consequences of his resort to litigation.¹⁴

I have a second quibble regarding Professor Sloss's observation that these cases involve judicial recognition of private rights created by international law.¹⁵ He is certainly correct on this point, but to the extent that he seeks to imply that one could extrapolate from this point to a conclusion regarding the place of international law in the law of the United States now, it seems to me that caution is necessary. This follows because Article III expressly extends "[t]he judicial power [of the United States] . . . to all cases of admiralty and maritime jurisdiction."¹⁶ Further, it seems clear that an important reason for vesting this class of jurisdiction in the federal courts was precisely to ensure that those courts would be able to hear prize cases.¹⁷ However, nothing in Article III purports to address aspects of customary international law unrelated to admiralty, and it therefore seems something of a leap to draw very much about the courts dealing with the former from the fact that they dealt with the latter.

III. JUDGES AND CASES AFFECTING FOREIGN RELATIONS

The foregoing discussion does not address what I take to be Professor Sloss's main claim in the paper: that the United States' method of dealing with

11. *Id.* at 182.

12. MELVIN JACKSON, PRIVATEERS IN CHARLESTON 1793–1796, at 122–24 (1969).

13. Sloss, *supra* note 1, at 174.

14. *Id.*

15. *Id.* at 149, 195.

16. U.S. CONST. art. III, § 2.

17. CASTO, *supra* note 6, at 40–41. Indeed, Professor Casto argues that part of the argument for creating federal courts capable of exercising jurisdiction in prize cases was precisely that more was at stake in such cases than resolution of disputes about private rights; federal jurisdiction was, he asserts, thought necessary to ensure that the United States could avoid the national security problems that would be presented if prize law was not properly applied. *Id.*

French prize cases demonstrates that what he calls “the exclusive political control thesis”—the argument that “the judiciary is barred from participating in foreign affairs decision making because the Constitution grants the political branches exclusive control over foreign policy”¹⁸—is false.¹⁹

To the extent he means to argue that these cases show that the courts are not forbidden to decide cases having obvious and important effects on foreign and military affairs, he is clearly correct and is supported by cases decided long after the quasi-war with France.

The first of these are *The Prize Cases*²⁰ of 1863. These cases were brought by persons either owning ships or owning cargo aboard ships which were taken as prizes by the U.S. Navy in 1861 as having violated the United States’ blockade of the Confederacy.²¹ The cases were heard together because all turned on the same basic issue: whether President Lincoln had the authority to declare a blockade of the Confederacy upon the outbreak of the Civil War in 1861.²² In its decision, the Court did not simply defer to the President; it examined the facts and concluded that a civil war did in fact exist.²³ To be sure, the opinion states that the President’s proclamation of a blockade was conclusive as to the existence of a war and the necessity of a blockade,²⁴ but this statement comes after the Court has been at pains to establish a legal basis for classifying a civil war as a “war.”²⁵ Further, the Court did not simply accept the Executive’s determination that the vessels and cargo were properly subject to capture. It examined the circumstances of each case²⁶ and in fact held that one of the claimants to part of a ship’s cargo was entitled to have the cargo restored.²⁷ The question of the authority of the United States to impose a blockade in these circumstances clearly went to the foundations of the strategy of the United States in dealing with the Confederacy and with the contacts of foreign nationals with the Confederacy, but the Court did not simply rubber stamp the Executive.

A second famous case illustrating these points is *Youngstown Sheet & Tube Co. v. Sawyer*.²⁸ That well-known case arose from labor difficulties in the steel industry while the Korean War was taking place.²⁹ President Truman,

18. Sloss, *supra* note 1, at 146.

19. *Id.* at 146, 194–96.

20. 67 U.S. (2 Black) 635 (1863).

21. *Id.* at 636–38.

22. *See id.* at 665–66.

23. *Id.* at 666–70.

24. *Id.* at 670.

25. *Prize Cases*, 67 U.S. at 666–70.

26. *Id.* at 674–82.

27. *Id.* at 681–82.

28. 343 U.S. 579 (1952).

29. *Id.* at 582.

claiming concern that a steel strike could impede the war effort, purported to seize the steel mills, that is, to take control of them to maintain production; he had no statutory basis for doing so.³⁰ Despite the President's invocation of his war powers, however, and despite the potential effect on an ongoing foreign war, the Supreme Court examined the President's claim of authority and held that he was without power to carry out the seizure.³¹

Not only does other precedent support Professor Sloss's conclusion, then, but as he points out, the role of the courts during the period he discusses was modest, at best.³² The decision to declare neutrality was made by the Executive and enacted into law by Congress; once the precise role the United States was to play had been decided by the political branches, the courts simply applied federal statutory law and well-established rules of admiralty law to the facts they found in individual cases.³³ (Indeed, once it became clear that such questions would continue to arise about violations of American neutrality by French privateers, this judicial role seems almost inevitable. The Attorney General was hardly well placed to make such inquiries, and the United States did not have the option of relying on the Navy to protect its neutrality—the Navy had no warships.³⁴)

A crucial point, I believe, is that while the cases Professor Sloss addresses certainly had an impact on the foreign affairs of the United States, they did not involve judicial determination of foreign policy. Similarly, in *The Prize Cases* and *Youngstown*, the Court determined that the relevant policy had been set out in the Constitution but, again, did not purport to make policy itself. This distinction between policy making and the application of policy seems to me to be what is crucial here.

In this connection, it is helpful to remember the standards enunciated by Justice Brennan in his discussion of the political question doctrine in *Baker v. Carr*:³⁵

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an

30. *Id.* at 585.

31. *Id.* at 582–89.

32. Sloss, *supra* note 1, at 146 (quoting CASTO, *supra* note 6, at 3).

33. *See id.* at 155–60.

34. MICHAEL J. CRAWFORD & CHRISTINE F. HUGHES, THE REESTABLISHMENT OF THE NAVY, 1787–1801: HISTORICAL OVERVIEW AND SELECT BIBLIOGRAPHY (1995), available at <http://www.history.navy.mil/biblio/biblio4/biblio4a.htm>.

35. 369 U.S. 186 (1962).

unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.³⁶

The textual commitment in the Constitution most relevant to the cases Professor Sloss describes would seem to be Article III's inclusion of admiralty cases within the judicial power of the United States. Deciding them depended on "judicially discoverable and manageable standards"³⁷—policy decisions made by the President and Congress in proclaiming the neutrality of the United States and in implementing that proclamation. Since these cases required only the application of settled rules of law to facts as found by the court, there was no risk of showing disrespect for the political branches. Nor was there any risk of different departments of the government taking different positions on the matter, since the Executive clearly intended to leave the matter to the courts.

One may contrast these prize cases with other cases involving foreign affairs but where the Court held that it was required to defer to determinations made by the Executive. These cases involved such subjects as recognition of governments³⁸ or recognition of a state of belligerency.³⁹ For such matters, even international law would not provide a court with standards sufficiently precise to apply as rules of law, and the questions would be ill-suited for judicial fact-finding. Other cases involved issues concerning which legal rules could have been applied but were nonetheless resolved by the Court by deferring to the Executive. For example, even though the Court has taken note of the fact that international law provided standards for resolving competing claims to sovereignty over land territory,⁴⁰ the Supreme Court has held itself bound by executive determinations regarding sovereignty over territory, both in situations involving disputes between the United States and another sovereign⁴¹ and in cases where the United States itself has made no claim to sovereignty.⁴² These cases, however, reached the Supreme Court *after* the Executive, in diplomatic correspondence, had announced to other states its position on the territorial issues in question, and the Court in both cases expressly based its holding on the fact that the United States, through the Executive, had already spoken on the territorial matter.⁴³

In other words, Justice Brennan's standards for the identification of political questions clearly have governed in foreign affairs cases in which the

36. *Id.* at 217.

37. *Id.*

38. *See, e.g.*, *United States v. Belmont*, 301 U.S. 324, 324 (1937).

39. *See, e.g.*, *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1863).

40. *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415, 420 (1839).

41. *Jones v. United States*, 137 U.S. 202, 202 (1890).

42. *Williams*, 38 U.S. at 420–22.

43. *Id.* at 419–20; *Jones*, 137 U.S. at 202, 212–14, 216–24.

courts have simply deferred to the Executive. In such cases, either there were simply no legal standards to apply or, by re-examining the issue, the Court would have been inserting itself into matters where the policy of the United States had already been communicated to foreign governments by the Executive. Even if legal standards existed in this latter group of cases, the Court by addressing the matter would have risked the difficulties identified by Justice Harlan in *Banco Nacional de Cuba v. Sabbatino*:⁴⁴

The dangers of such adjudication are present regardless of whether the State Department has . . . asserted that the relevant act violated international law. If the Executive Branch has undertaken negotiations with [a] . . . country, but has refrained from claims of violation of the law of nations, a determination to that effect by a court might be regarded as a serious insult, while a finding of compliance with international law, would greatly strengthen the bargaining hand of the other state with consequent detriment to American interests.

Even if the State Department has proclaimed the impropriety of the [other country's action], the stamp of approval of its view by a judicial tribunal, however impartial, might increase any affront and the judicial decision might occur at a time, almost always well after the taking, when such an impact would be contrary to our national interest. Considerably more serious and far-reaching consequences would flow from a judicial finding that international law standards had been met if that determination flew in the face of a State Department proclamation to the contrary. When articulating principles of international law in its relations with other states, the Executive Branch speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns. In short, whatever way the matter is cut, the possibility of conflict between the Judicial and Executive Branches could hardly be avoided.⁴⁵

We see then that the Court has distinguished between cases involving application of policy in a foreign affairs matter and those involving the making of foreign policy. The former include matters such as those described by Professor Sloss, where there were not only legal standards available to decide the cases, but the language of Article III itself made clear that the controversies were to be resolved by the judiciary. The latter include cases where there were no legal standards to apply or where, even given such standards, the interests of specific foreign states were involved, and the Court could not act without risking contradicting the position taken by the Executive in its dealings with those states. This distinction helps to explain the error in Justice Thomas's

44. 376 U.S. 398 (1964).

45. *Id.* at 432–33.

opinion in the *Hamdi* case,⁴⁶ to which Professor Sloss makes reference.⁴⁷ *Hamdi* was a case in which an American citizen, captured in Afghanistan by groups allied with the United States and subsequently surrendered to and detained by the United States, sought release from detention.⁴⁸ The Court held that Hamdi was entitled to challenge his confinement in *habeas* proceedings; that in those proceedings the Government was obliged to put forward evidence, which would be disclosed to Hamdi, establishing that Hamdi was, in fact, an “enemy combatant”;⁴⁹ and that Hamdi was entitled to an opportunity to rebut the Government’s showing.⁵⁰

Justice Thomas dissented from this conclusion, arguing that the detention fell “squarely within the Federal Government’s war powers, and [the Court lacked] the expertise and capacity to second-guess that decision.”⁵¹ He based this conclusion on the importance to the country of the protection of national security and the President’s primary responsibility in that regard, and on the courts’ lack of the information and expertise that would permit them to question the President’s judgment in national security matters.⁵² He further asserted that, “the decision whether someone is an enemy combatant is, no doubt, ‘delicate, complex, and involv[es] large elements of prophecy.’”⁵³ He suggested that this complexity explained the fact that the Government had not provided the courts with the full criteria it used to classify individuals as enemy combatants.⁵⁴

Justice Thomas sought to bolster his argument through references to several cases. Two are of particular importance. He cited *Ex parte Quirin*⁵⁵ for the proposition that the Court in that case was “not . . . concerned with any question of the guilt or innocence of the petitioners.”⁵⁶ He also quoted language from *Moyer v. Peabody*,⁵⁷ a suit under what is now 42 U.S.C. § 1983 brought by the president of a labor organization against a former governor of

46. *Hamdi v. Rumsfeld*, 542 U.S. 507, 579 (2004) (Thomas, J., dissenting).

47. Sloss, *supra* note 1, at 146.

48. *Hamdi*, 542 U.S. at 510–11 (plurality opinion).

49. For purposes of deciding the case, the Court’s plurality defined the term “enemy combatant” to mean at least someone who “was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there.” *Id.* at 516 (internal quotation marks omitted).

50. *Id.* at 533–34.

51. *Id.* at 579 (Thomas, J., dissenting).

52. *Id.* at 580–83.

53. *Hamdi*, 542 U.S. at 586 (Thomas, J., dissenting) (quoting *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948)).

54. *Id.*

55. 317 U.S. 1 (1942).

56. *Hamdi*, 542 U.S. at 584 (Thomas, J., dissenting) (quoting *Quirin*, 317 U.S. at 25).

57. 212 U.S. 78 (1909).

Colorado.⁵⁸ The labor leader had been imprisoned for seventy-eight days in the course of the suppression of what the governor had proclaimed to be an insurrection;⁵⁹ the labor leader had not been charged or brought before a judge during that period, and he had been released when the state government had determined that the insurrection had been suppressed.⁶⁰ It was conceded, apparently, that the governor's determination of the existence of an insurrection could not be challenged, and that the arrest had been made in good faith as part of the effort to suppress the disorder.⁶¹ The court held that a damage suit would not lie if good faith was assumed, in light of the necessity that the governor, as the man on the spot, deal with the immediate problem.⁶²

Finally, Justice Thomas sought to distinguish *Ex parte Endo*.⁶³ That case held that a concededly loyal, law-abiding American citizen of Japanese descent could not be confined under the regulations imposed on those persons of Japanese ancestry held in camps after their removal from the West Coast.⁶⁴ The Court observed that the executive order that provided the legal basis for the removal of Japanese-descended persons spoke only of removal; it did not explicitly authorize detention.⁶⁵ Further, the Court noted the order justified the measures it established as intending to prevent espionage and sabotage.⁶⁶ Since a person conceded to be loyal necessarily posed no threat of espionage or sabotage, the Court held that it could not read an order—which did not even explicitly authorize detention—as a basis for detention in such a case.⁶⁷ According to Justice Thomas, *Endo* was distinguishable because the Government in that case sought to justify the detention on the basis of reasons unrelated to the rationales set out in controlling legal instruments.⁶⁸

The errors in Justice Thomas's analysis help to underline the argument Professor Sloss has made. Preliminarily, the authority Justice Thomas cited in support of his argument in fact does not support it. As Justice Scalia observed in his dissent in *Hamdi*, the Court could ignore questions of the defendants' status in *Quirin* because there was no dispute as to their status; they were admitted to be German agents.⁶⁹ However, as Justice Scalia further noted, the

58. *Hamdi*, 542 U.S. at 587 (Thomas, J., dissenting) (quoting *Moyer*, 212 U.S. at 84).

59. *Moyer*, 212 U.S. at 82.

60. *Id.* at 82–83.

61. *See id.* at 82–84.

62. *Id.* at 84–85.

63. *Hamdi*, 542 U.S. at 584–85 (Thomas, J., dissenting) (citing *Ex parte Endo*, 323 U.S. 283 (1944)).

64. *Endo*, 323 U.S. at 294–95, 297–301.

65. *Id.* at 300–01.

66. *Id.* at 297.

67. *Id.* at 297–302.

68. *Hamdi*, 542 U.S. at 584–85 (Thomas, J., dissenting).

69. *Id.* at 571 (Scalia, J., dissenting).

issue in *Hamdi* was precisely that the detainee denied that he was an enemy combatant and sought to require the Government to at least permit him to refute the allegation—a situation very different from that in *Quirin*.⁷⁰ Justice Scalia also showed that *Moyer* was distinguishable, involving as it did a suit for damages rather than a challenge to the confinement itself, and a relatively limited period of confinement⁷¹ as opposed to the indefinite confinement Hamdi faced. He might have added that the Court in *Moyer* also suggested that the result in that case might have been different if the labor leader had been detained longer.⁷² Further, Justice Thomas's attempt to distinguish *Endo* does not really work. The difficulty is that the Government was represented before the Court by the Solicitor General;⁷³ surely that indicates that the Executive had determined that the petitioner's continued detention was necessary to the war effort, whatever the language of the executive orders on which the Government's actions were based. And it was exactly that executive determination that the *Endo* court rejected.

Justice Thomas is thus left with the argument that determining whether a person is an enemy combatant is somehow beyond judicial competence. Yet he never explains why that should be so. He states “the decision whether someone is an enemy combatant is, *no doubt*, ‘delicate, complex, and involv[es] large elements of prophecy.’”⁷⁴ One could argue just as plausibly that that decision would have to be one that could be made on the basis of clear and explicit criteria, since it would have to be made by relatively low-ranking persons on the battlefield, and such persons would presumably require some sort of definite guidance from these criteria. In any case, however, since the Government refused to inform the Court as to the criteria it employed,⁷⁵ it is very unclear how Justice Thomas or anyone else could determine the ability of judges to apply those criteria.

Certainly, the cases Professor Sloss discusses show the Court's ability to address matters involving the use of force. Among those cases were some requiring courts to decide whether a French privateer had increased its fighting strength while in an American port⁷⁶ and the role played by each of two different alleged privateering vessels in the capture of a particular prize.⁷⁷ It is not obvious why resolving such questions is inherently more judicial, or less

70. *Id.* at 571–72.

71. *Id.* at 572 n.4.

72. *Moyer v. Peabody*, 212 U.S. 78, 85 (1909).

73. *Ex parte Endo*, 323 U.S. 283, 285 (1944).

74. *Hamdi*, 542 U.S. at 586 (Thomas, J., dissenting) (emphasis added) (quoting *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948)).

75. *Id.* at 516 (plurality opinion).

76. *See Moodie v. The Betty Cathcart*, 17 F. Cas. 651 (D.S.C. 1795) (No. 9742).

77. *See Talbot v. Jansen*, 3 U.S. (3 Dall.) 133 (1795).

difficult, than determining whether a particular individual meets the criteria defining an enemy combatant.

In short, Justice Thomas's argument for judicial incapacity in foreign relations matters cannot be sustained in the face of the implications of the cases Professor Sloss has described.

CONCLUSION

The cases Professor Sloss has described render untenable any argument that cases affecting foreign relations are somehow off limits to the federal courts. To be sure, cases requiring judges to, in effect, establish foreign policy may well not be appropriate for judicial resolution, but such cases form only a part of all those that could be said to affect foreign relations. In particular, it would appear to be a quintessentially judicial task to decide cases requiring nothing more than resolving factual disputes on the basis of evidence and applying clear rules of decision to the facts so found. If these conclusions fail to determine the answers to all questions raised when matters affecting foreign policy come before the courts, they at least show the mistakes of those who would simply bar the courthouse door to such cases.

