Transaction SOCIAL SCIENCE AND MODERN Society

Volume 30, No. 6
September/October 1993
Whole No. 206

Undue Process: A Story of How Political Differences Are Turned Into Crimes

By Elliott Abrams. New York: Free Press, 243 pages, $22.95

Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?

By Thomas M. Franck. Princeton, N.J.: Princeton University Press, 198 pages, $24.95

Reviewed by Kevin J. McNamara

Given the rising tide of exposés, investigations, lawsuits, indictments, and partisan mud-slinging surrounding the conduct of U.S. foreign policy, one may be forgiven for suspecting that the struggle to shape America's new world role is as likely to take place in the pages of *The National Enquirer* as it is in the hushed chambers of the Council on Foreign Relations, that new developments are as likely to be announced on *Hard Copy* as in the U.S. Department of State *Bulletin.* The Abrams book is evidence of the problem; Franck points to a possible solution.

The number and intensity of disputes between the Congress and the Executive, especially during the Reagan and Bush presidencies, created an atmosphere in which, Leslie Gelb noted, "foreign policy has become synonymous with scandal." It may not be an exaggeration to argue that the biggest potential problem facing U.S. foreign policymakers today is not Russia, trade deficits, or nuclear proliferation, but the criminalization of policy disputes.

Undue Process is more a symptom than a description of the institutional warfare that has consumed the attention of Washington in recent years. Elliott Abrams, a former assistant secretary of state and the point man for the Reagan administration's controversial policies in Central America, was first an eager gladiator in this arena and later one of its notable victims. Abrams' book is a cautionary tale of what can happen to an individual caught between a Congress and an Executive that strongly disagree on policy.

Abrams, who with great reluctance pleaded guilty to two counts of withholding information from Congress about the diversion of funds to the Nicaraguan rebels from arms sales to Iran, had convinced prosecutor Lawrence E. Walsh and his grand jury that he had no knowledge of the diversion. Long after he had left government, Abrams was prosecuted under an obscure statute, not for perjury, but for the much narrower (and very rare) charge of making incomplete, and thus misleading, statements to Congress.

The book focuses on the period in 1991 during which Walsh's office prosecuted Abrams. This is an intensely personal memoir with searing insights into what it is like to be at the center of these disputes. It also contains detailed information on how these politicized prosecutions proceed, from the perspective of someone who also is a lawyer. Though a memoir necessarily skims over the more substantive issues, Abrams' tale is compelling testimony to the devastation that results when responsibility for sorting out our most controversial foreign policies is turned over to prosecutors.

Not only are executive branch officials deterred from taking decisive actions, thus draining from U.S. foreign policy the "energy" of the Executive, but prospective policymakers may well avoid joining the government altogether, concluding that the risks and costs of public service have become too great. Anyone who reads this book will shudder at the prospect of defending a controversial policy in testimony before Congress.

It would be easier to accept this very aggressive standard for the prosecution of government officials, of course, were one standard applied to all officials. This, however, is not the case. The Ethics in Government Act of 1978 mandates that special prosecutors (called independent counsels) be used to investigate executive branch officials, for instance, but exempts members of Congress.

The Constitution's "speech and debate clause" grants members of Congress the freedom to speak in the course of their official duties without fear of legal reprisals, while executive branch officials must fear prosecution not only for what they say to Congress but, as Abrams learned, for what they fail to mention. Abrams reluctantly pleaded guilty to the charge of having misled Congress, yet how many members of Congress can say they are entirely innocent of this charge?

If Congress is so serious about getting the truth from its witnesses, moreover, why do many congressional committees routinely not bother to swear in witnesses? After all, the testimony that got Abrams in trouble was unsworn. The institution of the independent counsel created by the 1978 law is particularly troubling. As Abrams points out, when Congress demands a prosecutor be appointed, "Congress has not said, 'A crime may have been committed. Find a culprit.' It has said, 'Here are some possible culprits. Find a crime.'" That such an approach inevitably leads to witch-hunts was confirmed in Walsh's revealing comments to the *Washington Times* about a prosecutor who had left his staff: "He missed his target. He was supposed to get Abrams. We hit the target after he left."

Until legal and ethical standards apply to officials of all branches of government

in equal measure, and consistently so, congressional finger-pointing at the Executive will appear hollow, hypocritical, and self-serving. Yet, an end to congressional hypocrisy will not solve the growing crisis in foreign policymaking. The solution to this problem may instead depend on whether "the least dangerous branch" of government enters the fray.

Specifically, the time may have come to encourage federal courts, which have traditionally shied away from foreign affairs litigation, to begin to articulate the constitutional principles governing the shared powers of the other two branches in foreign affairs, a course of action urged by Thomas M. Franck, professor of international law at New York University and editor in chief of *The American Journal of International Law.*

Marbury vs. Madison established the American constitutional principle of judicial review, the notion that federal courts can consider both congressional and executive branch actions in light of the Constitution. The author of *Political Questions/Judicial Answers* makes a logically compelling argument that this principle should be extended to the field of foreign relations, which has traditionally been exempt from review. Typically, Franck writes, courts "announce that a case deals with 'foreign relations' and that this makes the issue being litigated a 'political question' requiring 'judicial deference' to the political branches. None of the three terms are defined; they are used as if their content and relevance to the case were self-evident."

True, in the landmark 1962 *Baker vs. Carr* decision, Justice William Brennan offered a list of definitions of a "political question," yet the standards failed to clarify the matter adequately. Today, lower federal courts continue to assert a political question doctrine, but do not bother to explain or justify it.

Judicial review likewise has its critics. Though it has since become a bedrock constitutional principle, judicial review was rather arbitrarily asserted by former Chief Justice John Marshall in *Marbury,* and it furthers judicial power in much the same way that the political question doctrine shelters executive power. Franck reveals here an unstated bias. He is clearly bothered by the political question doctrine, but not by judicial review. He is disturbed when the White House takes the initiative to decide its own constitutional role in foreign relations, but he urges the courts to rule in cases in which their own power is at issue. Yet, Franck is ultimately convincing. "A foreign policy exempt from judicial review," he writes, "is tantamount to governance by men and women emancipated from the bonds of law." Without a set of rules, policymakers, like Abrams, will eventually get into trouble.

Franck plows through the entire history of judicial review and its relevance to foreign affairs, an area of law that has been the subject of few book-length studies. He travels from colonial British legal precedents to a comparative analysis of the manner in which the current German Constitutional Court, working from a constitution that is much like ours, reviews foreign affairs cases. He

carefully examines each of the reasons that have been offered for judicial abstention on foreign affairs cases, and shows where the reasoning went wrong. In the end, his argument is as strong as the institution of judicial review itself.

Most major foreign policy controversies arise within Justice Robert Jackson's "zone of twilight," according to the oft-cited formulation of his concurring opinion in *Youngstown Sheet and Tube Co. vs. Sawyer* (the "steel seizure" case), "when the President acts in absence of either a congressional grant or denial of authority . . . ."

This is an important point in view of the fact that though many members of Congress make much noise about foreign policy, for instance, bringing suit in federal courts, Congress as an institution is very often silent. The Senate passed a resolution on February 4, 1993, authorizing the deployment of U. S. troops to Somalia nearly two months after former President Bush sent in the Marines. The House had yet to act at the time, despite the fact that the first U. S. troops had begun to withdraw.

Such legislative lethargy, compounded by the failure of U.S. courts to "say what the law is" in foreign affairs cases, creates a climate in which officials in the Congress and the White House believe that the exercise of foreign affairs powers need not conform to constitutional requirements or limitations. The ensuing power struggles inject into foreign policy-making all of the utility and decorum of a food fight.

Having introduced a prosecutorial element into these disputes in recent years, Congress has criminalized policy differences by bringing executive branch officials up on charges in much the same way British monarchs once used courts to punish and intimidate members of Parliament.

The result? Partisan bickering, policy paralysis, and lost opportunities to re-define and defend America's national interests in a world that is rapidly changing.

U. S. courts have held that judicial review poses a danger of "multifarious pronouncements" on foreign policy. This was one of the reasons why Justice Brennan felt that "political questions" ought not be addressed by the courts.

Yet, Congress pronounces itself on foreign policy regardless of executive branch policy. Nicaraguan Contras were supported, often through extralegal means, by the Reagan White House, for instance, but their enemies, the Sandinistas, were supported by former House Speaker Jim Wright.

Judicial review, as it defines appropriate institutional roles, would likely reduce, rather than intensify, this cacophony. While there has been a justified fear that the courts may unduly limit the necessary discretion exercised by the White House in the administration of foreign policy, today courts are at least as likely to rein in members of Congress as to limit the options of the president.

Finally, the courts already deal competently with national security secrets, such as when they rule on government requests for intelligence wiretaps and handle litigation surrounding requests for sensitive information under the Freedom of Information Act.

Franck wisely recommends that courts limit themselves to declaratory judgments to avoid confrontations with the White House or Congress that might jeopardize U. S. national interests. The record of those few decisions where courts have ruled in foreign affairs cases is encouraging. It shows that the Executive has more to fear from a foreign policy making system that appears to observe no rules than from courts that could articulate a few rules for the other two branches.

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