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Foreign Affairs: Presidential Initiative and Congressional Control

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FOREIGN AFFAIRS: PRESIDENTIAL INITIATIVE AND CONGRESSIONAL CONTROL

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THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION. By *H. Jefferson Powell.* Durham: Carolina Academic Press. 2002. Pp. xvii, 165. $30.

Jefferson Powell[1] is one of our foremost scholars of constitutional history. He is particularly adept at bringing extrajudicial sources to bear on constitutional issues. Owing perhaps in part to his extensive service in the Department of Justice, he has a special facility for the use of executive materials; he is surely our leading academic expert on executive interpretation of the Constitution.

In his latest book Professor Powell applies his enviable skills to the recurring, fundamental, and controversial question of the division of authority between the President and Congress in the realm of foreign affairs. As is always the case when he puts the modern equivalent of pencil to paper, we are much the richer for his having done so.

The Constitution, Professor Powell reminds us, is strangely uninformative with respect to foreign affairs (pp. 19-21). The President is given authority to receive foreign ambassadors and (with the Senate's consent) both to appoint our own and to make treaties; he is made Commander in Chief of the armed forces. Congress has power to raise and support armies and navies, to declare war, and to regulate foreign commerce, and it has the power of the purse. Beyond these fragments nothing is said about who is responsible for determining foreign policy.

The great Professor Edward Corwin, perceiving all this, threw up his hands. The Constitution, he concluded, did not answer the question whether Congress or the President had general responsibility for foreign affairs; it extended to the two branches "an invitation to struggle" for primacy in the field.[2] Professor Powell disagrees: the Constitution *does* answer the question. It gives the President general

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2. P. 4.; EDWARD S. CORWIN, THE PRESIDENT — OFFICE AND POWERS 200 (1940); *see id.* at 26, 29, 93, 199, 304-05.

authority to formulate and implement foreign policy, and it gives Congress power to block most Presidential initiatives (pp. xiv-xv, 95, 108-13, 139-40, 146). In other words, it leaves most questions respecting foreign relations to the political process, which in Professor Powell's view is precisely where they belong (pp. xvi, 146, 149).

In the domestic sphere, as Justice Black made clear in the *Steel Seizure Case*, there is no doubt that it is Congress that is supposed to determine national policy; it is the President's job to carry it out.[3] This high-school-civics understanding of the separation of powers is confirmed, as Justice Black wrote, by the juxtaposition of Articles I and II of the Constitution, which vest legislative and executive authority in Congress and the President respectively. It is no secret that, as the *Curtiss-Wright* opinion insisted, foreign affairs do not fit the usual pattern — with regard to either federalism or the separation of powers.[4] As Powell tells us, nothing in the *Steel Seizure Case* casts any shadow on this conclusion; the whole point of Justice Jackson's concurrence (and I would add, of Justice Black's Court opinion) was that the case did *not* involve foreign affairs (p. 24).

True to his own model of scholarship, Professor Powell does not stop with sparse and inconclusive judicial pronouncements on the breadth of presidential authority over international relations; he goes back to the beginning. The debates of the Constitutional Convention, as he says, provide little assistance, and those of the state ratifying conventions are no better; the delegates had other issues on their minds (pp. 22, 31). The *Federalist*, on the other hand, he finds suggestive: in discussing the treaty power, in particular, Publius stressed the necessity for unity, expedition, and confidentiality[5] and the comparative advantage of the Executive in providing them.

But the centerpiece of Professor Powell's argument is his convincing demonstration, largely from executive materials, that a political rainbow of the most important members of the founding generation — including George Washington, Alexander Hamilton, Thomas Jefferson, James Madison, and John Marshall — agreed in reading the Constitution to give the President broad authority to take the initiative in foreign affairs. After a flurry of debate, for example, the early

3. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952). Professor Powell rightly notes that over the years Justice Jackson's more nuanced concurring opinion has been more popular with scholars than Black's "opinion of the Court," p. 24, but for me Black captured a basic truth about the primacy of legislative responsibility for domestic policy that the later Supreme Court, malgré its protestations, seems to have recognized once again in the so-called item-veto case, Clinton v. New York, 524 U.S. 417 (1998).

4. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936). Professor Powell is of course right that *Curtiss-Wright* actually *held* only that a particular delegation of authority to the President was constitutional. P. 23.

5. Pp. 31-34; *see* THE FEDERALIST NOS. 15, 31, 70, 72, 84 (Alexander Hamilton), NOS. 3, 4, 64 (John Jay), NOS. 41, 45 (James Madison).

Congress left it to President Washington to determine to which countries diplomatic officers should be appointed, and all his advisers thought Congress was right to do so (pp. 43-47). In their celebrated debate over Washington's audacious Neutrality Proclamation, both Hamilton and Madison agreed that the President enjoyed broad authority over foreign relations; Madison's only concern was that Washington might have trespassed upon Congress's exclusive authority to declare war (pp. 48-51). In the famous controversy over the Jay Treaty, President Washington defied a demand by the House of Representatives for his instructions to Chief Justice Jay on the ground that foreign affairs were none of the House's business, and the House did nothing to enforce its demand (pp. 66-76). In defending what opponents attacked as presidential interference with judicial proceedings respecting the extradition of Jonathan Robbins, Marshall, in an 1800 speech even his adversaries praised to the skies, insisted that the question whether to extradite an alleged fugitive was committed to the Executive and that the entire subject of foreign intercourse had been placed in presidential hands (pp. 79-88). In short, Professor Powell concludes, "Washington and his associates and immediate successors" all agreed that "the president determines, at least as an initial matter, what the foreign policy of the United States is to be" — relying in part upon the textual argument that this authority was embraced within the "executive Power" vested in him by Article II and in part upon the functional argument, previously adumbrated in the *Federalist*, of the "need for an effective system of making and implementing foreign policy" (pp. 93-94).

Insofar as this message concerns three of the four central components of foreign policy that Professor Powell defines for us in a much-appreciated appendix (pp. 152-55) — recognition, negotiation, and the confidentiality of diplomatic information — I should think it rather difficult to take issue with his conclusions. As he says, his basic thesis appears to find support in the text, in the original understanding, in early constitutional practice, in "its fit with the necessary institutional relations between the political branches," and in "the consequences which it entails" (p. 30). Indeed one is tempted, if that is all there is to foreign affairs, to protest that the ostensible silences of the Framers are largely illusory: recognition is implicit in the decision whether to receive ambassadors, negotiation in treatymaking, and confidentiality in the activity to be concealed.

There is, however, a fourth element in Professor Powell's conception of foreign affairs: the protection of national security. It is a grave mistake, he argues, to treat the allocation of authority over military matters as analytically distinct from that over foreign relations: "[Q]uestions about the locus of authority over national security and the use of the armed forces should start not from 'clause-bound interpretation' of particular constitutional provisions, but from an overall

understanding of the Constitution of foreign affairs" (p. 154). And that understanding, Professor Powell contends, leads to the conclusion that "the president has a constitutional responsibility, independent of any act of Congress[,] to preserve the physical safety and international interests of the United States against foreign threat" (p. 154).

It is here, I believe, that Professor Powell's thesis will encounter the greatest resistance. For he acknowledges, as his treatment of Madison's position on the Neutrality Act suggests, that the war powers present a special case (pp. 51, 93, 139). It could hardly be otherwise. Powell agrees that the explicit and substantial powers granted to Congress in this field qualify the President's general authority over foreign affairs — as Justice Jackson, whose *Steel Seizure* opinion he especially admires, insisted they qualified the "clause-bound" authority of the Commander in Chief. As usual, however, the devil is in the details, and Professor Powell seems willing to concede the President greater competence to initiate or risk hostilities than some of us may think consistent with the constitutional plan.

His bottom line, though hedged about with hints of serious definitional controversy, should command wide assent: "If the anticipated or actual severity, scope or duration of hostilities rises to the level of 'war' in a constitutional sense, congressional authorization is constitutionally necessary" (p. 139). For he agrees, as he must, that the clause giving Congress authority to declare war "sets some sort of outer boundary on the president's ability to use the commander in chief power to pursue sheerly executive-branch policies" (p. 121). He rightly adverts in this connection to "founding-era concern about unilateral presidential power to involve the United States in war" (p. 121) and to the deliberate decision of the Framers to transfer to Congress significant war powers that in England had belonged to the King.[6] He does not make the unsustainable claim that the President is free to wage war at will so long as he does not formally declare it.

Mr. Powell's claim of presidential authority is more modest. "The ability to warn of, or threaten, the use of military force is an ordinary and essential element in the toolbox of that branch of government empowered to formulate and implement foreign policy," he argues, and the threat of force would be hollow if its implementation "depended in every instance on congressional approval" (p. 119). Thus:

6. P. 113; *see, e.g.*, THE FEDERALIST NO. 69 (Alexander Hamilton); Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 15 THE PAPERS OF THOMAS JEFFERSON 392, 397 (Julian P. Boyd ed., 1955) ("We have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body . . . .").

> the argument that military action must always be authorized in advance by Congress is erroneous, and not only in those circumstances in which the president is responding to a direct attack on the United States . . . .
>
> If Congress provides the president with the wherewithal, and if Congress leaves the president legally unfettered, the president has the prima facie power to employ military force in the pursuit of foreign policy objectives. (pp. 119-20)

Congress's sweeping powers to deny the President the necessary resources and restrict the purposes for which they may be used take much of the sting out of this conclusion; Professor Powell insists that Congress, if it chooses, may have the last word (pp. 120-21). Otherwise, he argues, in accord with an opinion of the Office of Legal Counsel respecting the dispatch of armed forces to Haiti in 1994, the question of presidential authority is one of degree: "The use of military force is a tool of foreign policy, but at some point of severity, it implicates the American people in a fashion that demands the approval of their elected legislators as well as their elected president."[7]

Those who recall the strenuous argument over congressional and presidential war powers during the Vietnam controversy may perhaps be forgiven if they question Mr. Powell's conclusion as to where to draw the line. For it was common currency at the time, and has remained so ever since, to understand the familiar decision of the Constitutional Convention to authorize Congress to "declare war" rather than to "make war" as drawing a distinction between defensive and aggressive action. That is indeed how it was explained by Madison and Elbridge Gerry, who proposed it: the Executive should be permitted (and who would dispute it?) "to repel sudden attacks."[8] It is true, as Professor Powell points out, that Roger Sherman is reported as having doubted that the terminology they proposed would do the trick (p. 116), but that seems to me not to leave the Framers' intentions quite so murky as the author depicts them (pp. 116-17).

To sustain his rejection of Madison and Gerry's distinction, Professor Powell again relies heavily on early practice, the relevance of which I should be the last to deny.[9] There may nevertheless be room for disagreement as to the lessons that practice imparts.

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7. P. 122; *see* 18 Op. Off. Legal Counsel 173, 179 (1994).

8. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318 (Max Farrand ed., rev. ed. 1966).

9. From the beginning the Supreme Court has relied on early practice as evidence of what the Constitution means. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 190 (1824); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 401 (1819); Martin v. Hunter's Lessee, 14 (1 Wheat.) U.S. 304, 351-52 (1816). That does not mean, of course, that the early practice was never mistaken. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 173-74 (1803) (rejecting the First Congress's apparent interpretation of the Article III provision respecting the Supreme Court's original jurisdiction).

Professor Powell's historical case for presidential authority to risk or initiate hostilities rests essentially on two early examples: efforts to enforce President Washington's Neutrality Proclamation and President Jefferson's attempts to deal with the notorious Barbary pirates.[10] Both are of first importance to anyone who wishes to understand the war powers, and I shall say a few words about each of them.

After warning that he would prosecute those who offended American neutrality by supporting French war efforts in the conflict that followed that country's Revolution (on the debatable premise that international laws were among those whose execution the President was expected to ensure and at the arguable expense of poaching on congressional authority to define offenses against the law of nations), Washington directed the Governors of the several states to stop them (raising interesting questions of his authority to employ the militia to execute the laws without, so far as appears, complying with the formalities prescribed by the governing statute). Then, when the *Little Sarah* was all fitted out and ready to sail in defiance of the Proclamation, the Cabinet — in Washington's absence — agreed he had power to use force to detain the ship, and the President issued orders requiring the Governors to do just that in future cases (pp. 53-59).

I do not believe it can be said that this revealing incident suggests a consensus within the Administration that the President had general authority to formulate and execute foreign policy; each step in the saga appears to follow logically from Washington's initial decision that he had a specific duty to enforce the law of nations. It does seem to demonstrate, however, that both the President and his Cabinet thought neither Congress's war powers nor the concerns that lay behind them precluded the Executive under the circumstances from using force against a vessel in the service of a foreign nation — and not merely, Professor Powell emphasizes, when it acted in self-defense (pp. 57, 60-61).

The second incident is more quickly told: President Jefferson risked war by sending Navy vessels to protect United States shipping in the Mediterranean and (contrary to what he told Congress in asking for authority to retaliate) ordered aggressive action against Tripoli in response to its declaration of war (pp. 91-93).

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10. He also invokes Jefferson's hard-nosed conduct toward France in pursuit of his policy of keeping French troops off the Mississippi River, pp. 90, 119, which included the threat of a United States alliance with Great Britain. Like President Monroe when he issued his famous edict against European intervention in the New World, Jefferson was plainly playing with fire, as was President Polk in his later belligerent posture toward the British with respect to Oregon. In none of these instances, however, do I recall any suggestion that the President thought he had authority actually to initiate hostilities without congressional approval.

Of these two incidents, that of the *Little Sarah* strikes me as the more damaging to the conventional distinction between offensive and defensive action. Yes, the President was simply enforcing the law of nations, which (on his assumption that it was one of the laws he was supposed to enforce) was mere fulfillment of his explicit constitutional duty. Yet in so doing he came perilously near to employing armed force against a sovereign nation, which looks very much like initiating war. And that grave step, the popular theory assures us, may be taken only by Congress.[11]

Jefferson's actions against Tripoli seem far easier to reconcile with the traditional distinction. To begin with, what he *told* Congress was a classic exposition of that theory: only Congress, he argued, might authorize anything beyond self-defense — even in retaliation for an alleged attack on the United States Navy. What Jefferson said may be more important than what he did, for it suggests he thought the country would not accept a broader interpretation of presidential power. In addition, even his actions conformed to the essence of that principle, which Hamilton himself in his attack on Jefferson's self-denying message accepted: only Congress may *initiate* martial conflict. When Jefferson sent ships to the Mediterranean it was for strictly defensive purposes; surely the power to protect American shipping includes authority to move men-of-war into positions where they can respond to actual attacks.[12] And when his commanders finally took aggressive action it was in reply to the enemy's declaration of war — raising questions only of the extent of presidential authority to respond to foreign aggression, not of Congress's monopoly on initiating offensive action.

But my principal reservation about Professor Powell's use of history with respect to presidential war powers is its selectivity. For there are a surprising number of early extrajudicial precedents on the subject, many of which go unmentioned. And although the *later* history, as the Fulbright Committee graphically demonstrated, reveals a disturbing drift of warmaking authority from Congress to the

11. It should be noted that President Jefferson took no such step in the later and more famous case of the British attack on the *Chesapeake* but soberly referred the question of reprisals to Congress, although it was a plain case of self-defense, saying that the decision "[w]hether the outrage is a proper cause of war" was one "belonging exclusively to Congress." Letter from Thomas Jefferson to William H. Cabell (June 29, 1807), *in* 10 THE WRITINGS OF THOMAS JEFFERSON 432, 433 (Paul Leicester Ford ed., 1905); DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829, at 126-27, 147 (2001) [hereinafter CURRIE, THE JEFFERSONIANS].

12. Compare President Polk's dispatch of troops to what he considered the Texas border in the face of the obvious risk (which became reality) of provoking a Mexican attack. DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTRÖM, 1845-1861, at ch. 2 (forthcoming 2004) [hereinafter CURRIE, DESCENT INTO THE MAELSTRÖM].

Executive,[13] the bulk of the early material tells quite another story. Moreover, even on those rare occasions when early Presidents arguably *did* initiate hostilities against foreign powers, they almost invariably argued that they were acting either defensively or to carry out some legislative command.

The Tripolitan incident, I have suggested, was a part of this tradition. So was President Washington's earlier explicit refusal, on constitutional grounds, to send troops to fight troublesome Indians on the Georgia frontier: only Congress, he told the importunate Governor, could empower him to take offensive action. Similarly, when Andrew Jackson, in pursuit of marauding Seminole Indians who had taken refuge beyond the border, took possession of Spanish forts in Florida, President Monroe emphatically disowned him: not even the President could lawfully commit an act of war against a foreign state. The belligerent Monroe Doctrine, warning European powers to keep their hands off the Western Hemisphere, was attacked as usurping congressional authority by creating a risk of war; Monroe's successor defended it on the ground that in reiterating the Doctrine he had neither the competence nor the intention to commit the United States to war. On similar grounds President Tyler refused to promise to defend Texas before its annexation, and President Fillmore refused to defend Hawaii or Santo Domingo. President Madison asserted that he was following congressional orders in occupying West Florida, President Polk that Mexico had invaded the state of Texas. President Pierce employed force in Greytown against what he dismissed as a band of private adventurers, not a sovereign nation; President Buchanan pleaded for congressional support with the assertion that he could not so much as fire a gun to protect American interests abroad without congressional sanction. There were occasional exceptions,[14] but the pattern seems clear: the President might make warning noises that risked war, but the official position down to the Civil War was that only Congress could initiate hostilities against a foreign power. Against this array of precedent, the *Little Sarah* incident seems to me to pale considerably. However President Washington and his advisers may have justified the dangers of war they were prepared to assume in that case, it cannot in my opinion outweigh the abundance of early authority against presidential initiation of actual hostilities.

13. *See* S. REP. No. 90-797 (1967).

14. President Pierce sent the Navy to Panama to enforce perceived American rights, and President Fillmore authorized reprisals against the authorities of the island of Johanna, in the Indian Ocean. These and the other incidents noted in the text are discussed in DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801, at 55-115, 172-238 (1997); CURRIE, THE JEFFERSONIANS, *supra* note 11, at 123-55, 191-218; and CURRIE, DESCENT INTO THE MAELSTRÖM, *supra* note 12, at chs. 2-3.

Toward the end of his book Professor Powell speaks briefly to a collage of specific issues regarding the allocation of power over foreign affairs — including the War Powers Resolution, the role of the courts in interpreting the relevant law, the effect of executive agreements, and the locus of authority to terminate treaties (pp. 122-38). Granting that the main purpose of this slim volume lies elsewhere, one may still regret that he did not expand his treatment of some of these topics ever so slightly. In the discussion of treaty abrogation by statute or by unilateral executive action, for example, I miss acknowledgment and evaluation of a third possibility suggested by the constitutional text and both practiced and defended in the mid-nineteenth century controversy over a commercial convention with Denmark: that treaties are to be unmade, as they are made, by the President with the Senate's consent.[15] Similarly, in connection with executive agreements, I should have been pleased to encounter a reminder that the requirement that treaties be endorsed by an extraordinary Senate majority, like the vesting of war powers in Congress, was a considered and deliberate restriction of presidential authority. Finally, while I agree with much that Professor Powell has to say about the War Powers Resolution, I would not have dismissed so quickly the provision requiring the President to withdraw military forces on congressional command as an obvious violation of the rule against legislative vetoes established in *INS v. Chadha*.[16] For as I understand the record of the Constitutional Convention, the President's inherent power is essentially to prevent irreparable harm until Congress can make the policy decision whether or not to wage war; the declaration of both Houses that the President should desist, like a simple pronouncement that Congress is ready to exercise its constitutional responsibility, may arguably be enough to show that of its own force the President's authority has expired.

If I have gone out of my way to find issues on which there may be room to differ with Professor Powell's conclusions, that is not to disparage but rather to underline the challenging nature of his book. *The President's Authority Over Foreign Affairs* is an important contribution to a continuing debate, and one that deserves to be taken seriously. It is not, like so much else in this highly charged field, a mere polemic. It is a careful, knowledgeable, measured, thoughtful, sure-footed, reliable, responsible, and even modest investigation of a difficult question by a scholar who takes both law and history seriously and for whom, as my colleagues of the *Supreme Court Review* once admiringly wrote of the late Gerald Gunther, the Constitution is a

15. *See* CURRIE, DESCENT INTO THE MAELSTRÖM, *supra* note 12, at ch. 1.

16. 462 U.S. 919 (1983).

guide and not a tool.[17] When I read Professor Powell's work, I invariably learn something about our constitutional history I did not know, and I see what I did know from a new perspective. Professor Powell wastes neither words nor his readers' time, and he writes very well. Anyone who has the slightest interest in his important subject should read this book.

Professor Powell has since completed yet another study of constitutional history that has just been published.[18] It is, if anything, even more ambitious and challenging than the present volume, and the inquiring reader would be well advised to scarf it up as well.

17. *See* p. ix. Professor Powell purports to give us not a definitive answer to the question of presidential power but "only the best answer" based upon legal and historical evidence. P. 5.

18. H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS (2002).