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REFLECTIONS ON A CONVERSATION

H. Jefferson Powell*

INTRODUCTION

No one should doubt the proposition that the ways in which American foreign policy is formulated are worthy of discussion. It was an honor and a great privilege to participate in a conversation on that topic involving leading scholars in the field, as well as several lawyers with vast practical experience in government. The editors of the Georgia State University Law Review did a superb job of bringing together a wide range of views. The editors, furthermore, insightfully broadened the scope of the conversation to the issue of constitutional interpretation outside the courts. The exchange of ideas and expressions of disagreement were frank but also cordial and constructive. I am further grateful to my distinguished co-participants and to the editors of the

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Law Review for the opportunity to provide some brief reflections on our discussions.

I. PAST

It is easy to imagine a visitor from another world, paradoxically fluent in American English but ignorant of American culture, listening to our conversation with growing amazement. The topics supposedly under consideration involve or relate to the processes by which the only current planetary superpower (the “hyperpower” or “American empire” in currently faddish terms) makes and implements decisions about how it will deal with other states and with events beyond its borders. Given the predominance of American military, economic, and cultural power, those decisions are of the gravest importance to every human being on Earth, and they are by definition decisions which shape the future. Yet, the presentations by several of the participants, as well as the book that served as the starting point for discussion,¹ spent much time and effort talking about the past. David Gray Adler carefully parsed the constitutional goals endorsed by the American polity of two centuries ago. Philip Bobbitt commended the value of studying governmental decisionmaking in past times and on remote issues. Robert Delahunty presented a bold new thesis about the relationship between the Constitution’s structural arrangements and the strategic position of the United States in the 1780s. Louis Fisher analyzed the constitutional significance of current practice in light of eighteenth century ideas about federalism. Further, my book spent over a quarter of its pages discussing in detail the conduct of American foreign policy in the

1. H. JEFFERSON POWELL, *THE PRESIDENT’S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION* (2002).

administration of President George Washington. One could hardly blame our alien visitor for thinking that there was an essential and debilitating misconnection between what we claimed we were talking about and what we actually seemed to be saying.

One explanation for this misconnection is that we were talking in code, or more pejoratively, that some or all of us were cloaking contemporary and partisan intentions in the garb of historical assertion. These interpretations of constitutional disagreement are common, but it is to the credit of the participants in this Symposium that the conversation proceeded throughout on the assumption of good faith on the part of all. This is not simply an issue of civility (although civility's importance is, I think, greatly underrated in parts of contemporary political culture); the assumption that constitutional arguments are a veil or disguise for other presumably constitutionally improper concerns both misunderstands the very nature of constitutional interpretation and is in the end utterly corrosive of the very possibility of constitutional law.

Another view of the apparent oddity of our conversation, also a despairing one, is that the misconnection was genuine but opaque to the participants. Our earnest debates about the past stand in the same relationship to the making of American foreign policy that the deliberations of the Roman College of Augurs bore to the decisions of the Emperor Augustus.² The augurs may well have been sincere in their application of the recondite lore of the *scientia augurium*, but no skeptic, ancient or modern, would think it wise of Augustus to govern

2. On the augurs, see the entries *augures* and *auspicium* in the *Oxford Classical Dictionary*. OXFORD CLASSICAL DICTIONARY 214, 223 (Simon Hornblower & Antony Spawforth ed. 1996). The former entry describes the augurs “[a]s a college . . . a body of experts whose duty was to uphold the augural doctrine . . . which governed the observation and application of the auspices . . . in Roman public life.” *Id.* at 214.

his actions accordingly. Similarly, one might argue, the participants in this Symposium are the captives of the irrelevant and antiquarian learning of which they are the custodians, and one can only hope that no real decisions rest on the sort of arguments they employ.

There is some truth, or danger of truth, in this perspective, just as the cynicism of the first view becomes, if indulged sufficiently, a self-fulfilling prophecy. Philip Bobbitt spoke at one point of the brittleness of some constitutional arguments about the distribution of authority over foreign affairs and the danger of these arguments becoming abstracted from the factual concerns of any foreign policy. Teresa Wynn Roseborough reminded us that foreign policy decisions are largely driven by events—some decision must be made (inaction of course being one form of decision)—and the concerns of the decisionmakers are not abstract. At the same time, from her own experience in public service, Roseborough stressed the real interest of decisionmakers in legal and constitutional matters, even if their interest is not identical to that of an academic writing an article or book or (I would add) a judge deciding a case.

The underlying mistake in the irrelevant-antiquarianism view of conversations such as ours is that, once again, it rests on a mistaken understanding of American constitutional law and its relationship to political and ideological commitments. Historically-oriented arguments of the sort that were prominent in the Symposium are one of the modalities of constitutional interpretation that make up “the grammar of [constitutional] law, that system of logical constraints that the practices of legal activities have developed in our particular culture.”³ In his

3. PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 24 (1991). Actually, I think that the participants in the Symposium were often making primary use of differing modalities of constitutional interpretation even when invoking the same materials (for example, *The Federalist*). Fisher, for example, deployed historical

classic formulation, Phillip Bobbitt describes six modalities: textual, historical, structural, doctrinal, prudential, and ethical.⁴ These modalities serve to identify and structure the conversation as one about constitutional law; they do not exclude but rather demand the exercise of moral and political judgment. To be sure, constitutional interpretation by legislators, executive officers, and private citizens takes place in forms and ways that are unfamiliar to someone who is obsessed with the role of courts and judicial review in our constitutional system.⁵ It is for this reason, among others, that one of the most pressing needs in contemporary constitutional scholarship is to recover a sense of the inescapable presence and distinctive character of constitutional interpretation in settings other than adjudication. Phillip Bobbitt, Neal Devins, and Michael Gerhardt, both in their contributions to this Symposium and elsewhere, are signal contributors to our understanding of the extra-judicial role of the Constitution.

Our deployment of historically-oriented arguments was, then, neither a facade nor an exercise in scholarly irrelevance but rather a corollary of the common goal of the participants in the Symposium to engage in constitutional interpretation rather than some other sort of conversation. Other features of the discussion that might seem to our alien visitor clearly contemporary in their force (for example, Louis Fisher's

references to the founders to support and give substance to his fundamental claim that the executive's present role in foreign policy-making distorts and damages our commitment to limited and republican government, clearly a central element in the ethos of American public life. Although he came to similar substantive outcomes, Adler's fundamental argument seemed to rest on his claim that his substantive views comport with the original understanding of the Constitution. Conversely, Delahunty and I both are working primarily within the structural modality, making claims about the interpretation of the Constitution that rest centrally on the principles implicit in the structures of government and relationships between government and citizens that are created by the Constitution.

4. *See id.* By "historical" argument, Bobbitt means specifically arguments based on original understanding. Bobbitt's least familiar label is the last, by which he refers to arguments that "appeal to those elements of the American cultural ethos that are reflected in the Constitution." *Id.* at 20.

5. I have borrowed and modified this formulation from Michael Gerhardt.

argument that the modern presidency's initiative in foreign affairs undermines republican government or my claim that "Congress is institutionally incapable of taking the leading role in formulating foreign policy"⁶) stand, in fact, on the same ground as our historical assertions: they too make use of the modalities of interpretation that serve as the grammar of constitutional law in this society. That said, I am certain that it was not coincidental that so much use was made of history. There is, of course, little judicial caselaw to invoke on the constitutional distribution of foreign affairs powers, and thus the first resort of the American constitutional lawyer—argument based on judicial doctrine and precedent—is largely beside the point.⁷ However, the prevalence of arguments based on history in this area also stems from a deeper source.

In his typically vivid and persuasive manner, L.H. LaRue, Jr., insisted in his presentation that "you gotta have a story" on constitutional issues that touch the vital interests of those involved and as to which there are deeply antagonistic basic perspectives; the ability to persuade depends far more on the plausibility and attractiveness of the proposed interpretation as a narrative than it does on the technical proficiency of the interpreter's legal reasoning.⁸ Given the gravity of questions involving foreign affairs and national security, and the inescapable (if

6. POWELL, *supra* note 1, at 104.

7. As Louis Henkin has observed, "the [Supreme] Court has not said much about foreign affairs and promises to say little more." LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 4 (2d ed. 1996). I am not ignoring Grant Gilmore's famous point that "[t]he only legal materials that are or ever have been or ever will be available are historical [including] cases [which, after all,] have already been decided." GRANT GILMORE, *THE AGES OF AMERICAN LAW* 146 n.6 (1977). However, the sort of doctrinal argument lawyers make on the basis of judicial precedent is different both in method and form than, for example, the links Delahunty draws between the strategic position of the United States under the Articles of Confederation and the constitutional founders' goal of creating a federal government capable of protecting American security.

8. See L.H. LARUE, JR., *CONSTITUTIONAL LAW AS FICTION: NARRATIVE IN THE RHETORIC OF AUTHORITY* (1995). This is not to excuse either illogic or historical inaccuracy. However, LaRue's assertion is, I believe, inescapably correct.

changing) interdependence between the processes of decisionmaking and the substance of the decisions, no proposed interpretation will carry conviction that does not embody a compelling account of how the United States has acted, as a republic and as an international sovereign, from the founding until now. As I suggested in my book, much of the power of the pro-congressional view of the Constitution stems from a (sometimes implicit) narrative about how the growth of unchecked presidential power has created in the modern era an irresponsible elected monarchy capable of dragging the nation into unjustified and potentially disastrous foreign adventures.⁹ In parallel fashion, my own argument can be stated abstractly: the best reading of the Constitution creates an essentially political means of foreign policymaking that is anchored at opposite ends by broad presidential initiative and by a near-plenary congressional power to curtail or defeat presidential policy. However, the heart of my effort to persuade the reader that this is the best reading of the Constitution lies in a portrayal of the wisdom and democratic appeal of this presidential-initiative reading that is explicitly presented through narratives from the early Republic.

II. FUTURE

No scholar of the U.S. Constitution would deny that significant change over time has occurred in the de facto constitutional arrangements by which the United States is governed. We argue over the modes of change, the legitimacy of specific changes, and the relationship between change and continuity in constitutional law. From the perspective of some who write on the Constitution and foreign

9. POWELL, *supra* note 1, at 150-51.

affairs, enormous changes have occurred since the inauguration of government under the Constitution in 1789, and the changes have been overwhelmingly illegitimate and harmful to the underlying constitutional order.

For others, myself included, the story is a much more complicated one. In either case, one of the most difficult issues is how to draw conclusions about legitimacy in the exercise of authority across time when the goals, the tools, and the consequences of American foreign policy have been radically transformed. The small, decentralized, militarily insignificant confederation that devised the Constitution faced, as Robert Delahunty shows, a radically different geopolitical situation than does the twenty-first century United States. Consequently, its twenty-first century foreign affairs, however conducted and by whom, are of necessity radically different than foreign affairs when this country was founded. The processes of decision-making, and the characteristics of the decisionmakers, are necessarily so dissimilar that *no* contemporary interpretation of the Constitution's normative distribution of authority could generate a set of actual constitutional arrangements that repristinate those of the early Republic.

Modern constitutional scholarship has produced a great many theoretical solutions to the problem of preserving (or demonstrating) normative continuity across substantive change, but scholars have paid little attention to the specific issues this problem presents in the area of the Constitution and foreign affairs. This neglect, I hope, will change in the wake of Philip Bobbitt's major new work, *The Shield of Achilles: War, Peace, and the Course of History*.¹⁰ Bobbitt's argument, to be

10. Published in 2002, *The Shield of Achilles* appeared too late for me to take account of it in *The President's Authority*. My brief use of it will do no justice to what is destined to become a classic and a seminal work in the study of the relationship between constitutional law and national strategy.

sure, goes beyond questions of foreign affairs authority to encompass the relationship between any state constitutional order and that state's geopolitical or "strategic" position and objectives:

The State exists by virtue of its purposes, and among these are a drive for survival and freedom of action, which is strategy; for authority and legitimacy, which is law; for identity, which is history [T]hese three are not merely interrelated elements, they are elements composed at least partly of the others.¹¹

The "mutually affecting relationship between strategy and constitutional law," Bobbitt continues, is "such that some strategic challenges . . . encourage and even demand constitutional adaptations; and that some constitutional changes . . . enable and sometimes require strategic innovation."¹² The central thesis of *The Shield of Achilles* is that the United States, like other polities, is now in the process of transition from what Bobbitt calls "the nation-state" as a form of domestic constitutional order (with a corresponding ordering of international society) to "the market-state," which will assume a dramatically different internal constitutional structure and pursue dramatically different strategic goals than were characteristic of the nation-state form that existed in this country between the Civil War and the end of the Cold War.¹³ Bobbitt's argument is not, I should make

11. PHILLIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* 6 (2003) [hereinafter BOBBITT, *THE SHIELD*]. The State has two primary functions: to distribute questions appropriately among the various allocation methods internal to the society, determining what sorts of problems will be described in what sorts of ways, and to defend that unique pattern of allocation by asserting its territorial and temporal jurisdiction vis-à-vis other states. These two tasks are, respectively, the work of constitutional law and strategy. *Id.* at 206.

12. *Id.*

13. Bobbitt sees the Cold War as the final phase of the twentieth century's "Long War" beginning in 1914.

clear, that the United States will formally replace or amend in radical fashion the existing written Constitution but rather that regardless of formal continuity or a substantive desire to preserve twentieth-century arrangements, there *will be* constitutional change, and that change will affect both American constitutional law and American international strategy.

A consideration of the substance of Bobbitt's analysis is beyond the scope of this commentary, as my immediate purpose is much narrower. I want to make explicit a question that our conversation at the Symposium implicitly posed but did not expressly address: In what ways ought constitutional scholars working on issues of foreign affairs respond to the inevitability of constitutional change and to the possibility or likelihood of radical constitutional change? What are our tasks, as scholars, with respect to the future? I propose a very short and surely incomplete list.¹⁴

Perhaps the broadest of these tasks is to respond to the challenge implicit in Bobbitt's insistence that constitutional law; domestic cultural, social, political and technological realities; and international strategy are inextricably and tightly related in such a fashion that significant change in one will necessarily affect the others.¹⁵ Little scholarship on the constitutional distribution of authority over foreign affairs makes a sustained effort to understand the possible ramifications for constitutional law of changes in, for example, the basic vision

For his description of the domestic aspects of the market-state, see *id.* at 228-46.

14. Of course, a heightened awareness of the impact of change on constitutional law will not end discussion of familiar topics. Four participants in the Symposium, for example, recently contributed to a special issue of another journal which addressed the current significance of the Supreme Court's famous decision in *Youngstown Sheet & Tube Co. v. Sawyer*. See David Gray Adler, *The Steel Seizure Case and Inherent Presidential Power*, 19 CONST. COMM. 155 (2002); Philip Bobbitt, *Youngstown: Pages from the Book of Disquietude*, 19 CONST. COMM. 3 (2002); Neal Devins & Louis Fisher, *The Steel Seizure Case: One of a Kind?* 19 CONST. COMM. 63 (2002).

15. See BOBBITT, *THE SHIELD*, *supra* note 11.

underlying American foreign policy or American society's understanding of the meaning of republicanism or democracy.¹⁶ The point is not to commend an interdisciplinary approach for its own sake but instead to suggest that we cannot perform well our own intradisciplinary task of analyzing and commenting on the issues of constitutional interpretation that the future will present in negligent or willful ignorance of cultural and strategic issues.

Earlier in these reflections, I suggested that contemporary constitutional scholarship does not have a fully-developed understanding of how constitutional law functions or should function outside the familiar context of adjudication. While this general problem cuts across all areas of constitutional law, it is particularly acute in the area of foreign affairs, both (1) because so many of the issues are (currently) non-justiciable and thus cannot be resolved through litigation and (2) because the judicial-review paradigm for constitutional interpretation actually can make it very difficult to see how such interpretation can have any real impact in non-judicial settings.¹⁷ A good illustration of this latter problem surfaced during the Symposium. Following a Department of Justice opinion from the mid-1990s, I endorsed the view that the President must seek congressional approval, if he or she does not already have statutory authorization, before

16. *See, e.g.*, WALTER A. MCDUGALL, *PROMISED LAND, CRUSADER STATE: THE AMERICAN ENCOUNTER WITH THE WORLD SINCE 1776* (1997) (changing foreign policy visions); ROBERT H. WIEBE, *SELF-RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY* (1995) (changing cultural understandings of the United States as a democratic republic). I cite them not to endorse (or disparage) these particular books but rather to note the absence from most scholarship on the Constitution and foreign affairs of any engagement with the sort of issues McDougall and Wiebe address.

17. While not directly related to foreign affairs, Michael Gerhardt's book on the impeachment provisions of the Constitution is an important attempt to work out the shape of an area of constitutional law in which judicial review of political-branch action can only matter (if there) on the margin. *See* MICHAEL GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* (2d ed. 2000).

committing U.S. armed forces to a conflict that is likely to amount to “war” in a constitutional sense.¹⁸ Because I also assert that the President’s constitutional authority over foreign affairs empowers the executive to make use of military force without specific statutory authorization in conflicts that are not “wars,” my view requires the President, at least in the first instance, to make a decision about whether a projected conflict meets the constitutional standard for “war.” This decision involves probabilistic judgments about the conflict’s scope, duration, risks, and consequences.

It became clear during our conversation that some Symposium participants object to my position in part because they view the proposed standard as too indeterminate and because they doubt that the President or other executive branch officials would take this (or possibly any) standard seriously. These grounds of objection illustrate contemporary scholarship’s problems in discussing extra-judicial constitutional interpretation. I agree that it is difficult to imagine how a court could apply the proposed standard except in the clearest of cases, but contemporary scholarship would answer the question of political-branch interpretation simply by equating constitutional standards with those that can be utilized by courts. That said, it is incumbent on those of us who resist such constitutional reductionism to say more about the forms of judgment necessary in making constitutional decisions that involve or require the exercise of political and strategic discretion. I disagree sharply with any suggestion that officials in a political branch (or specifically the executive branch) are incapable of incorporating principled constitutional considerations into their decisions. As I have

18. POWELL, *supra* note 1, at 121-22 (citing Deployment of United States Armed Forces into Haiti, 18 Op. Off. Legal Counsel 173 (1994)).

already indicated, that view is a counsel of despair, one that is both self-fulfilling if entertained and unnecessary.

I will conclude this Part with a brief mention of two quite specific tasks for, respectively, pro-congressional scholars and those who, with me, support a presidential-initiative interpretation of the Constitution's allocation of foreign affairs authority. A recurrent lacuna in pro-congressional accounts of the Constitution is the failure to explain how the pro-congressional perspective could actually be put into operation. Would all foreign-policy decisions require a statutory basis? Would Congress enjoy the authority directly to negotiate with foreign states or to issue directives to American diplomats? If not, why not? If *Congress* is the predominant actor in the formulation of foreign policy, is there any distinctive role for the Senate, and indeed, what is the rationale for Article II's assignment to the Senate alone of the power of advice and consent to treaties and to the appointment of diplomatic officers? How the presidential-initiative perspective would work in practice is clear for the most part: my claim that it is the best interpretation of the Constitution rests in part on the further claim that this perspective makes pragmatic sense. The argument for the pro-congressional perspective needs to present a parallel case for its practical consequences.¹⁹

It is particularly, though not exclusively, incumbent on the defenders of presidential initiative in the conduct of foreign affairs, on the other hand, to address a major, if often unacknowledged, problem in the current functioning of our constitutional system of foreign policymaking. On any but the broadest and most untenable assumption of presidential supremacy in foreign affairs, Congress possesses broad

19. During the Symposium, David Gray Adler graciously conceded the validity of this point.

powers to curtail or forbid—indirectly if not directly—presidential policies. However, while the executive branch seldom acts on the self-aggrandizing claims of power sometimes found in its statements, its practice of statutory construction goes a very long way, much of the time, toward achieving a substantive negation of Congress' powers of limitation and prohibition. As I pointed out in my book, executive-branch lawyers often use abstract and very broad statements about presidential power to suggest that a statutory provision limiting executive discretion is constitutionally problematic, and they then "construe" the provision into impotence on the ground that doing so is necessary to avoid a serious constitutional question.²⁰ The result of these statutory "constructions" is to enable the executive simultaneously to claim it is adhering to the statute, without conceding Congress's power to limit the executive in the manner the statute on its face sought, while freeing the executive to act without regard to what is often a clear congressional intent to cabin the executive's actions.

This approach to statutes addressing issues of foreign policy is inconsistent with the presidential-initiative interpretation of the Constitution and ought to be unacceptable to us all.²¹ It is less damaging to Congress's role in American foreign policy, whatever one thinks that role ought to be, for the executive simply to deny the validity of a statute and act accordingly—with the executive then having to pay the political price for such boldness. The current, objectionable practice, however, seems well-entrenched and deserves scholarly

20. See POWELL, *supra* note 1, at 9-13, for an illustration. No criticism whatsoever is intended of the career government lawyers who draft most of these statements. Responsibility for the practice (and for its reform) lies elsewhere.

21. Because the presidential-initiative interpretation fully recognizes Congress's wide power to speak to matters of foreign affairs, this interpretation provides no support for any general presumption that statutes which do so are constitutionally problematic.

attention to shed light on its scope and ramifications. We should also give careful consideration to the principles that ought generally to govern the executive's interpretation of statutes that trench on presidential authority.²²

CONCLUSION: PRESENT

In his remarks at the Symposium, Philip Bobbitt spoke of the struggle against cynicism. This struggle is a necessity at all times and in all circumstances if the conduct of politics and the activity of law are to remain humane to any degree. In concluding these reflections on the conversation of the Symposium, I wish to advance a proposition that relates to this struggle.

It is an error to assume that the exercise of political judgment is necessarily evil or unprincipled and that wise, moral, and constitutional decisions on matters of foreign policy can be obtained or assured through the application of some sort of apolitical legal calculus. No such calculus is available and if it were, it would not be desirable. The Constitution demands the exercise of such judgment not just on non-constitutional issues of policy but frequently at the heart of its own interpretation and execution as law. To deny the existence of decisions that are constitutional and political, or the possibility that human beings can actually make such decisions in a principled fashion, is to deny the possibility of constitutional law itself.

22. The judiciary's employment of constitutionally-based canons of construction has been the subject of considerable attention in recent years, but it is unclear that this scholarship provides much guidance for determining how and whether the executive should make use of such canons.