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# CONSTITUTIONAL DECISION-MAKING OUTSIDE THE COURTS

Michael J. Gerhardt\*

## INTRODUCTION

Constitutional scholars agree about remarkably little. We even disagree about what counts as the Constitution. For example, many constitutional scholars believe that the Twenty-Seventh Amendment is a lawful addition to the Constitution;<sup>1</sup> but many other scholars believe that the amendment was approved by dubious and probably illegitimate means. Nor do they agree on whether the process by which it was added to the Constitution is amenable to judicial review. Constitutional scholars also sharply disagree about the appropriate methodology for interpreting the Constitution. Constitutional scholars can, however, agree on at least one thing—the very thing that brought us together for this Symposium—the authority of H. Jefferson Powell as a constitutional scholar. When Professor Powell speaks, people, particularly constitutional scholars, should heed his call. Professor Powell’s erudition, eloquence, research, and insights about constitutional law are, at least in my judgment, unparalleled among my

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1. Compare, e.g., Laurence H. Tribe, *The 27th Amendment Joins the Constitution*, WALL ST. J., May 13, 1992, at A15 (arguing that the amendment was validly ratified), with Richard L. Berke, *1789 Amendment is Ratified but Now the Debate Begins*, N.Y. TIMES, May 18, 1992, at A1 (quoting Walter Dellinger’s statement that the amendment was incapable of ratification). The Twenty-Seventh Amendment states that “[n]o law, varying the compensation for the services of the Senators and Representatives, shall take effect until an election of Representatives shall have intervened.” U.S. CONST. amend. XXVII.

generation of constitutional scholars. So, when Professor Powell speaks about foreign affairs, it behooves us to listen and to learn.

Professor Powell is distinctive (and distinguished) because he is one of the few constitutional scholars who have contributed and written extensively about a subject of keen interest to me—the Constitution outside of the Court.<sup>2</sup> Legal scholars are regrettably preoccupied with the work of the federal courts, particularly the U.S. Supreme Court. I will not speculate as to why this obsession persists. Instead, my concern is with its costs. In particular, this obsession leads to a lack of appreciation for the extent to which national political leaders deliberate over, and even shape, constitutional meaning. As Professor Philip Bobbitt indicated, no systematic analysis of the quality and significance of these deliberations has yet been undertaken.

My contribution to this Symposium will not fill this void. Instead, my focus will be on the risks and costs of the scholarly preoccupation with the Court, particularly with respect to how constitutional authorities other than the Court take the Constitution into account in deliberating over questions pertaining to constitutional meaning and their constitutional authority. One such question is whether the Constitution constrains or guides decision-making outside the courts? If so, how does it do this? To answer these (and other fundamental questions about the Constitution outside the Court), we need to examine closely what national political authorities say and do about the Constitution.

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2. See, e.g., H. JEFFERSON POWELL, *THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS* (Carolina Academic Press 2002); H. JEFFERSON POWELL, *THE CONSTITUTION AND THE ATTORNEYS GENERAL* (Carolina Academic Press 1999).

## I. THE TRADITIONAL MODALITIES OF CONSTITUTIONAL ARGUMENTATION

At the outset, what national political leaders say about the Constitution confirms Professor Bobbitt's trenchant insight, reiterated in this Symposium, that they employ all six of the traditional modalities of constitutional argumentation.<sup>3</sup> Three examples illustrate the deployment of these modalities in constitutional discourse outside the courts. The first example is the federal impeachment process. Throughout the impeachment proceedings against President Bill Clinton, both sides made arguments based on text, history, precedent, ethos, structure, and consequences.<sup>4</sup> Those supporting President Clinton's ouster made the following arguments: First, the constitutional text supports a single standard of impeachable misconduct. Invariably, those seeking President Clinton's removal argued that there is only a single, constitutional clause spelling out the conditions for removal of those officials subject to it. In particular, they inferred a single standard for impeachment in the Constitution's particular provision subjecting "the President, Vice-President, and officers of the United States" to possible removal for "Treason, Bribery, or other high Crimes or Misdemeanors."<sup>5</sup> Second, proponents of the President's ouster argued that history supported treating his misconduct as grounds for his removal. They pointed out, for instance, that the Framers' generation considered violating oaths to constitute a serious transgression,<sup>6</sup> and the

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3. See generally PHILIP C. BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* (Knopf 2002). PHILLIP C. BOBBITT, *CONSTITUTIONAL FATE* (1982).

4. See generally 145 CONG. REC. S1,703, S1,703-18 (1999).

5. U.S. CONST. art. III, § 4.

6. See Stephen B. Presser, *Would George Washington Have Wanted Bill Clinton Impeached?*, 67 GEO. WASH. L. REV. 666, 669 (1999).

Congress had previously removed federal judges for misconduct similar to the President's misconduct.<sup>7</sup> Third, President Clinton's detractors argued that judicial precedent counted against him as well. In particular, they observed that the Supreme Court generally had left matters relating to the President's (and other impeachable officials') removal to the final, non-reviewable decision-making of the Congress.<sup>8</sup> Fourth, the American ethos called for President Clinton's removal. In particular, they argued that respect for the rule of law is indispensable for the integrity and unique character of the federal judicial process in the United States,<sup>9</sup> and that the President had engaged in misconduct that disgraced the White House.<sup>10</sup> Fifth, inferences and arguments derived from the structure of the Constitution supported President Clinton's removal. They invariably claimed that the President's lying under oath constituted an attack against the federal judiciary.<sup>11</sup> Sixth, pragmatic considerations weighed in favor of removing the President. They argued that acquitting the President would encourage similarly bad behavior from others<sup>12</sup> and even threaten his relationship with the military, whose members could be court martialed for similar misconduct.<sup>13</sup> Those opposed to President Clinton's removal drew on

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7. *The Background and History of Impeachment: Judicial Impeachment*, 1998 WL 781679 (testimony of John C. Harrison, Professor of Law, University of Virginia).

8. See *Nixon v. United States*, 506 U.S. 224, 249-50 (1993) (White, J., concurring); see also MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS* 182 (2d ed., Univ. of Chi. Press 2000).

9. See *U.S. Senate Continues Impeachment Trial*, 1999 WL 55235 ("[President Clinton's] perverse example inevitably undermines the integrity of both the office of the president and the judicial process.").

10. See generally RICHARD A. POSNER, *AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT WILLIAM JEFFERSON CLINTON* (Harvard Univ. Press 1999).

11. See *David Schippers Questions Kenneth Starr at Judiciary Committee Hearing*, 1998 WL 804443 ("So when the President of the United States lies under oath . . . and obstructs justice . . . he is effectively attacking the judicial branch of the United States constitutional government.").

12. Cf. 145 Cong. Rec. S1,513, S1,523 (1999) ("[A]nyone who votes to acquit has to say that we are going to hold this President to a lower standard of conduct and behavior than we hold other people.").

13. See *id.*

the same modalities of argumentation. First, they claimed that the constitutional text established an especially high threshold for impeaching presidents. In their judgment, the text requires that the misconduct for which a President may be removed has to be on the same order of magnitude or seriousness as “Treason” or “Bribery.”<sup>14</sup> Second, historical materials supported acquitting the President. In particular, President Clinton’s defenders argued that the Framers meant to restrict bases for removal to a President’s abuse of the unique powers of his office,<sup>15</sup> and that the Congress had previously refused to sanction presidents for personal misbehavior (for example, the House Judiciary Committee refused to approve an article of impeachment against President Richard Nixon for income tax fraud).<sup>16</sup> Third, judicial precedent did not support, at least in the judgment of President Clinton’s defenders, treating President Clinton’s misconduct as impeachable. They argued that judicial precedents (and prosecutors) do not treat all lies under oath as the same.<sup>17</sup> Fourth, the American ethos did not dictate President Clinton’s removal. In particular, they claimed, *inter alia*, lying about sex is a sensitive, personal matter better left to mechanisms other than impeachment, such as censure, the judgment of history, or even criminal prosecution subsequent to his departure from office.<sup>18</sup> Fifth, President Clinton’s defenders argued that the structure of the

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14. See *History of Impeachment*, 1998 WL 786423 (testimony of Laurence H. Tribe, Tyler Professor of Constitutional Law, Harvard University).

15. See Cass R. Sunstein, *Lessons from a Debacle: From Impeachment to Reform*, 51 FLA. L. REV. 599, 606 (1999).

16. See *White House Presentation—Day 1*, 1998 WL 846806 (testimony of Elizabeth Holtzman, former member of Congress from New York).

17. See *White House Presentation—Day 2*, 1998 WL 854460 (testimony of William F. Weld, former Governor of Massachusetts); *White House Presentation—Day 2*, 1998 WL 854472 (testimony of Ronald K. Noble, Associate Professor of Law, New York University).

18. See Sunstein, *supra* note 15, at 611.

Constitution opposed transforming our government into a parliamentary system in which the legislature may remove a chief executive in whom it has lost confidence (or simply does not like). They claimed that the President's misconduct was a purely personal failing and not an official one.<sup>19</sup> Last but not least, President Clinton's defenders found that pragmatic concerns weighed in favor of acquitting President Clinton. Removing President Clinton, they claimed, would weaken the presidency immeasurably; conceivably destroy the national, and perhaps international, economy; and invite attacks—perhaps even domestic attacks—against the United States.<sup>20</sup>

These arguments support Professor Bobbitt's insight that no authority exists, or at least no obvious authority, on which there could be consensus for prioritizing the different modalities of constitutional argumentation. The federal political process seems to constitute a crucible for measuring the relative strengths and significance of the different modalities. Furthermore, these arguments reflect the obvious concern among political leaders regarding constitutional authorization, or limits, on their respective authorities.

Similar concerns appear to operate in another important realm outside the Courts—namely, federal judicial selection, the second example which demonstrates the use of the conventional modalities of constitutional argumentation. The sharp divisions within the Senate over judicial selection have been in place for some time. Republicans blame the rejection of Robert Bork as a watershed event in judicial selection, while Democrats suggest it dates as far back as to the beginning of the Republic. However, each side justifies its position

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19. See *History of Impeachment*, 1998 WL 781680 (testimony of Arthur Schlesinger, Jr.).

20. See *U.S. Representative Henry Hyde Holds Hearings on Impeachment of the President*, 1998 WL 857487.

regarding judicial nominations based on past practice and on structural inferences about the Senate's authority in the confirmation process. A recent argument supporting greater deference for judicial nominations states that the Senate should not inquire into federal district or circuit court nominees' ideologies because lower court judges have to follow Supreme Court precedent, and therefore they have no discretion to implement any disagreements they might have with Supreme Court precedent.<sup>21</sup> Frankly, I find this contention hard to take seriously, for the simple reason that Republican senators do not appear to be prepared to sign off on all lower court nominations regardless of the nominating President's political party. The Clinton years demonstrate that, *inter alia*, Republican Senators are not prepared to make this concession because they (1) believe there are acceptable and unacceptable judicial ideologies and (2) care deeply about ensuring the appointments of judges with their preferred ideologies.

A third example that illustrates national political leaders' recourse to the modalities of constitutional interpretation is foreign affairs. Professor Powell's excellent book illustrates his own extraordinary sensitivity to employing all the modalities of traditional constitutional argumentation. Even those whom he criticizes employ these modalities. Professor Powell points out, rightly I think, flaws in their use of these modalities. Indeed, the main factor demonstrating whether Professor Powell agrees or disagrees with the Office of Legal Counsel opinions is the manner in which<sup>22</sup> authoritative figures prioritize the modalities. While it is tempting to think that political leaders will use the modality

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21. See *Ideology and Judicial Nominations: Hearing Before the Senate Judiciary Committee*, 108th Cong. (2001) (statement of Sen. Orrin G. Hatch); Thomas L. Jipping, *Winners and Losers Versus How You Play the Game: Should Ideology Drive Judicial Selection?*, 15 REGENT U. L. REV. 1, 10 (2002).

22. Cf. Michael Stokes Paulsen, *The Many Faces of Judicial Restraint*, 1993 PUB. INT. L. REV. 3 (1993).



that best supports their contention, one can see that national political authorities, including lawyers, disagree vigorously over the prioritization and proper interpretation of the various modalities. Thus, it is easy to see that leaders care about the Constitution, but it is less clear how and in what ways it matters, including whether it constrains their decision-making.<sup>23</sup>

## II. THE CONSTITUTIONAL DECISION-MAKING OF POLITICAL LEADERS

Another possible source of illumination on how the Constitution constrains or guides constitutional decision-making outside the Court is the activities of political leaders in foreign affairs. Does the Constitution ever constrain presidents or members of Congress from doing what they personally want to do in the realm of foreign affairs? It is fair to say that Professor Powell cites no instance in which the Constitution apparently has precluded, or barred, national political leaders from doing what they were bent on doing in the realm of foreign affairs. Is this because the Constitution exerts no constraint on them? Or is it because the Constitution impacts their decision-making in some other way(s)?

Consider two examples. The first example is President Abraham Lincoln's unilateral suspension of habeas corpus.<sup>24</sup> As soon as President Lincoln had suspended habeas corpus, Chief Justice Taney

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23. Professor Powell suggests that this might not be the right question to ask. Instead, he suggests one should think differently about how the Constitution operates, particularly outside the Court. I do not think there is any disagreement between us. Here, I reiterate a point made previously that the critical question in constitutional law is not how the Constitution constrains official decision-making, but rather how the Constitution is implemented. See Michael J. Gerhardt, *The End of Theory*, 96 NW. U. L. REV. 283 (2001).

24. See Exec. Order of Apr. 27, 1861; Sanford Levinson, *Was the Emancipation Proclamation Constitutional? Do We/Should We Care What the Answer Is?*, 2001 U. ILL. L. REV. 1135, 1144 (2001).

## 2003] CONSTITUTIONAL DECISION-MAKING OUTSIDE THE COURTS 1131

slapped him down;<sup>25</sup> the Congress later, however, ratified President Lincoln's actions.<sup>26</sup> A possible lesson to be inferred from these actions is that the Congress and the Chief Justice helped to curtail, or impose a limit to, the illegality of President Lincoln's action. Another possible lesson might be that the political branches—President Lincoln and the Republican Congress—simply arrived where they wanted to go and needed to get. If the Constitution constrained activity at all, it appears to have constrained procedurally rather than substantively; it provided the path that national political leaders had to follow in order to achieve their preferred policy objectives.

The second example, foreign affairs, drives this dynamic home. It appeared, for a long time, that war against Iraq had been inevitable. Bob Woodward's new book is just one source that confirms the popular suspicion that President George W. Bush had made up his mind to invade Iraq long before the actual invasion took place.<sup>27</sup> Initially, the President had indicated a willingness to order the invasion without explicit congressional acquiescence, but then in apparent response to public pressure he sought and received an approving resolution passed by the Congress. The President appeared resistant to get the approval of the United Nations, but then begrudgingly allowed the United Nations to address his concerns, including ordering further weapons inspections in Iraq, before signaling his willingness to go ahead, with or without the United Nations' approval. This sequence of decision-making fits neatly into Professor Powell's conception of foreign affairs. This conception seems to be that the Constitution creates a process for interaction

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25. *Ex parte Merriman*, 17 F. Cas. 144 (C.C.D. Md. 1861).

26. Act of Mar. 3, 1863, 12 Stat. 755 (1863); see also DANIEL A. FARBER, *LINCOLN'S CONSTITUTION* (University of Chicago Press 2003).

27. See generally BOB WOODWARD, *PLAN OF ATTACK* (2004).

between the President and the Congress over foreign affairs, but the Constitution sets forth no substantive limit on what either branch may do. So, we are left at the end of Professor Powell's book with a scenario in which the Constitution seems to matter largely, if not wholly, for creating a process for decision-making outside the courts.

### CONCLUSION

In closing, I want to express some skepticism of the notion that the Constitution provides no substantive check on presidential or congressional authority in the realm of foreign affairs. In assessing the Constitution outside the courts, we need to be careful to avoid employing the conceptions, or mind-set, we commonly employ in analyzing the Supreme Court. With the Court, there are winners and losers. There are also substantive outcomes. There is also often the cessation of a specific conflict, if not some resolution of a larger question of constitutional meaning. It is, however, a mistake to think that when the Court speaks it is the end of the story. In some cases, this might be true, but more often than not, the Court's decisions are part of a larger story or sequence of events. *Bush v. Gore*<sup>28</sup> and *Clinton v. Jones*<sup>29</sup> are just two examples of this common phenomenon.

We need to recall that one branch rarely has final or unchecked authority on a subject. Indeed, the only realm in which this is technically accurate is impeachment, over which the Congress exercises sole formal authority. The common dynamic outside the courts is that the parties must reach accommodations or face painful conflicts. These accommodations occur on more than one level. Accommodations may

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28. 531 U.S. 98 (2000).

29. 520 U.S. 681 (1997).

**2003] CONSTITUTIONAL DECISION-MAKING OUTSIDE THE COURTS 1133**

exist at the constitutional level, which involve, as we know, a special kind of politics—often referred to as “higher” politics as opposed to the ordinary politics involved in the everyday machinations of the Nation’s capitol. These accommodations might sometimes be reflected in ordinary law or other forms, including, for example, international trade agreements such as NAFTA and treaties. In such circumstances, we find ourselves back to where Chief Justice John Marshall in *McCulloch v. Maryland*<sup>30</sup> warned we would be, that is, recognizing that the Constitution, in spite of what some might think, provides a “great outline” or framework that channels decision-making on various subjects. Stated slightly differently, the critical question in constitutional law, as reflected in foreign affairs (and other matters outside the Court), is how constitutional values are implemented, that is, how the Constitution is translated into action. If government respects those channels and implements values pursuant to its constitutionally granted authority (and procedures), one cannot say that the Constitution has no force outside of the courts. To the contrary, its force is evident from its implementation. For this insight, among many other things, we have Professor Jefferson Powell to thank.

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30. 17 U.S. (4 Wheat.) 316 (1819).