Book Reviews

PLAYING WITHOUT A REFEREE: CONGRESS, THE PRESIDENT, AND FOREIGN AFFAIRS

THE PRESIDENT'S AUTHORITY OVER FOREIGN AFFAIRS: AN ESSAY IN CONSTITUTIONAL INTERPRETATION. By H. Jefferson Powell[1]. Carolina Academic Press. 2002. Pp. ix, 165. $ 30.00.

Daniel A. Farber[2]

Jeff Powell, one of our leading constitutional historians, has given us an elegant little book on a much debated question: the respective powers of Congress and the President over foreign affairs. Much sound and fury has been produced by this constitutional debate. Powell sensibly advises that we agree on a reasonable solution and move on. He would prefer that our leaders address the merits of particular foreign policy issues rather than using constitutional law as a source of rhetorical bombs to be hurtled at each other. (p. xv) This is sound advice, and his solution has much to recommend it. But I doubt that his call will be heeded. Indeed, in the absence of an external referee, it seems unlikely that any solution could succeed in stilling the debate. To think otherwise is probably to misunderstand how constitutional arguments function in this context.

If there were to be a constitutional settlement between Congress and the President, Powell's solution would have much to recommend it. On his reading of the Constitution, "the president enjoys an extremely broad range of discretion in the mak-

1. Professor of Law, Duke University.
2. Sho Sato Professor of Law, University of California at Berkeley, and McKnight Presidential Professor of Public Law, University of Minnesota.

ing of foreign policy"—but equally importantly, Congress has "an array of means by which to react to presidential initiatives, favorable or not." (p. xv) Powell eschews what he views as the polarized and extremist positions often taken by the executive branch's lawyers and by scholars advocating congressional supremacy. (pp. 10-18) In his view, "the Constitution allocates authority along sequential lines: exclusively legislative power to create and maintain most of the tools of foreign policy followed by independent and generally exclusive executive authority to formulate foreign policy and pursue it, followed by the legislature's capacity to review, criticize and, within limits, forbid." (p. 140)

Although Powell lays much stress on presidential prerogatives, he also makes fair allowance for congressional power. Under Powell's reading of the Constitution, "Congress may freely enact whatever legislation it chooses, no matter how great its impact on foreign affairs," so long as it does "not require the president to engage in diplomacy . . . in accordance with its preferences." (p. 145) Within broad limits, it can use spending conditions to influence presidential actions. (p. 143) Notably, Powell also thinks that the War Powers Resolution is constitutional. (pp. 122-125) Although the president can initiate the use of force under some circumstances, he must obtain congressional approval when the military action "rises to the constitutional level of 'war'" in terms of its scope, duration, and violence. (p. 122)

There is much to be said for Powell's vision. It fits fairly well with current and historical practice. It's at least a plausible reading of the historical record, though in my view it assumes an unrealistic degree of clarity and consensus in the views of the Founding generation. It seems reasonable, giving the President plenty of power to manage foreign relations while supplying Congress with adequate checks. Overall, if there were some external referee like the Supreme Court that could lay down the law, Powell's constitutional formulation would be an attractive candidate.

The trouble is not with this solution but with the idea that this dispute can be definitively settled. The only real point of common ground is the historical record, but the record simply isn't clear enough to dictate any one answer. Even if Powell is correct that there is in some sense a "right" legal answer about the exact boundaries between the branches, the answer is too contestable to overcome the considerable interests and biases that each side brings to the debate. Politically, constitutional

rhetoric is vital for the President and Congress as each struggles to rally supporters, motivating those who agree with their positions and providing rationales for resisting the opposing side. Powell observes that the constitutional rhetoric obscures the substantive issues, but from the point of view of the political actors, this may be an important part of its function. In any event, there is no mechanism for creating a binding agreement between the branches, and neither branch can afford to unilaterally disarm its constitutional rhetoric.

I do not mean to say that the constitutional issues are completely indeterminate. What the Constitution tells us is that some balance between presidential initiative and accountability is required, but it does not specify the balance with precision. Historical practice has clarified a number of issues. By now, each side is in comfortable possession of a certain amount of territory, whether because of constitutional text, original understanding, historical practice, or contemporary exigencies. But there is a large "no man's land" where neither side has an assured claim, and each side also makes occasional raids into the other's home territory.

The first two sections of this review analyze Powell's claim that a clear legal solution exists. Part I considers the argument that the "vesting clause" in Article II provides the president with a clearly defined reservoir of "executive power," forming a basis for presidential control of foreign affairs. Powell repeatedly invokes this argument, though it is not his main reliance. (pp. 44-45, 74, 76, 93-94) I doubt, however, that any such clear general understanding of executive power was entertained by the individuals who ratified the Constitution. Undoubtedly, the Framers had some general conception of executive power, but it was probably as cloudy and disputed as our contemporary ideas on the subject.

Part II then considers Powell's argument that later practice provides clear answers to these questions. Here, I think he is right in part, but I believe that some critical aspects of later practice are too ambiguous or contested to form a reliable guide. He relies almost entirely on the practice of early administrations, which (not surprisingly) favored executive power. But whether these practices were widely accepted as legitimate is unclear. Powell attempts to bolster the authority of the early executive claims by relying on the stature of the men who made them and on the basic plausibility of their claims. Here again, I think he makes a reasonable case but overstates its persuasive force.

Finally, Part III considers Powell's goal of lessening the role of constitutional rhetoric in the struggle between the branches. Powell complains that the "chief problem with current practice, and it is a serious one, is the focus on legal disputation that follows like clockwork from the radically opposed constitutional viewpoints at play in foreign-policy discussion." (p. xv) But we should not expect to see Powell's hoped-for switch to a less bombastic, more substantive discourse about foreign affairs. In the absence of an external referee who could provide a disinterested judgment, constitutional argument is not necessarily designed to persuade an objective observer. Rather, it will often be used to appeal to the loyalties of wavering elements within Congress or within the executive branch itself, allowing the President and the congressional leadership to garner support from individuals who may be unwilling or unable to endorse their view of the merits of the dispute.

As both lawyers and scholars, we have a natural tendency to think of constitutional disputes as addressed to some objective observer. But a better analogy here would be to labor-management disputes, in which both sides use various economic and rhetorical weapons to sway the outcome. As in labor-management disputes, some issues are not seriously contested, and the past interactions of the parties count for a great deal. Both sides have an incentive to reach a deal, but not at the expense of their own interests. Foreign relations law, then, can be considered the outcome of two centuries of strife and bargaining between the two branches. Collective bargaining agreements may be a better analog than judicial opinions, if we are seeking to understand how this form of law comes into existence.

I. THE ENIGMATIC GRANT OF EXECUTIVE POWER

Powell rests part of his case on the general grant of the "executive power" to the president. In analyzing presidential power, we should begin, at least, with the text. Article II opens with the statement: "The executive Power shall be vested in a President of the United States of America." After this "vesting" clause, almost half of Article II is dedicated to describing the election procedure, the qualifications for office, the president's salary arrangements, and similar matters. The first section of Article II then closes with the oath clause, requiring the president to swear that he will "faithfully execute the Office of President of the

United States, and will to the best of my Ability, preserve, protect and defend the constitution of the United States." The next two sections are about half as long, combined, as section 1. They set out some specific presidential powers. For present purposes, two sets of powers are crucial. First, the president is "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into the actual Service of the United States." Second, he is empowered to receive foreign ambassadors and to appoint U.S. ambassadors (with the consent of the Senate). Third, he can make treaties, also with the consent of the Senate. Article II also contains a hodgepodge of less relevant powers of varying degrees of significance—to issue pardons, to give the State of the Union Address, and to demand the opinions of cabinet officers in writing. Article II ends on a harsher tone in a section establishing the procedures for impeaching the president and all other civil officers.[3]

On its face, the text of Article II does not convey any clear impression about the stature of the office. On the one hand, the office is vested with "the executive power," which sounds weighty, not to mention the power to command the armed forces. (The Framers had never heard of Mao, but surely they would not have been unfamiliar with the Hobbesian notion that all power grows out of the barrel of a gun.) On the other hand, one might question whether the president was such a momentous figure after all, since the drafters thought it necessary to include express sanction even for the president to get written opinions from the cabinet or to recommend legislation to Congress.[4]

The Framers might have devoted more care to explaining the powers of the office if they had not had to devote so much time to more basic questions about its structure. The Virginia Plan, which provided the basic framework for discussion at the Convention, called for a national executive but left unspecified the term of office or even the number of individuals who would compose the executive. The delegates then spent most of the summer going around in circles, as they debated whether the president would be elected by Congress or otherwise, whether there would be one chief executive or several, and other attributes of the office. As of the end of July, they had decided on congressional election and ineligibility for reelection, and they

3. A useful collection of materials bearing on presidential power can be found in Peter M. Shane and Harold H. Bruff, *Separation of Powers Law: Cases and Material* (Carolina Academic Press, 1996).

4. U.S. Const., art. 2, sec. 2, ¶ 1.

had assigned the president almost all the powers that would ultimately be found in Article II, except the treaty and appointments powers. In late August, when they took up the subject again, the confusion continued. On August 31, they gave up and referred the matter to a special Committee of Eleven, which reported back on September 4 with the essentials of the current Article II.[5]

One source of the difficulty was the lack of good models. The colonial governors had been widely reviled. In reaction, post-Revolutionary state constitutions sharply limited the executive power. Most state executives were chosen by the legislature; only New York originally provided for a popularly elected executive. Terms of office were as short as one year, and governors shared their authority in many states with a council. Executives were given few specific powers, and often even these were subject to legislative interference or oversight. Just to be on the safe side, Virginia warned its governor "not, under any pretence, [to] exercise any power or prerogative, by virtue of any law, statute or custom of England."[6] In contrast, New York's popularly elected governor had a three-year term, and turned out to be a more powerful figure. The state constitution directed him "to transact all necessary business with the officers of government, civil and military; to take care that the laws are faithfully executed, to the best of his ability; and to expedite all such measures as may be resolved upon by the legislature."[7] He was also commander in chief of the militia. The later state constitutions, like Massachusetts in 1780 and New Hampshire in 1784, moved somewhat in the direction of the New York model. As Madison said, the boundaries of executive, legislative and judicial power, though clear in theory, "consist in many instances of mere shades of difference."[8] Little wonder that, as one historian recently put it, "[w]hat strikes anyone who examines the era in any depth, especially those historians who have devoted years to the exercise, is its complexity, contradictions, and, at times, confusion."[9]

At least to some extent, Powell seems to agree with this view of the framing and ratification periods. He indicates that

---

5. See Daniel A. Farber and Suzanna Sherry, *A History of the American Constitution* 81-98 (West, 1990).

6. Id. at 79-81.

7. Martin S. Flaherty, *The Most Dangerous Branch*, 105 Yale L.J. 1725, 1771 (1996).

8. Id. at 1807.

9. Id. at 1775.

the "ambiguity about the location of authority over foreign policymaking apparent on the face of the Constitution's text is replicated in the materials traditionally viewed as evidence of the original understanding of the Constitution's meaning." (p. 30) He also notes that "the presidential office took shape only later in the deliberations of the Philadelphia framers, and it is difficult to identify unifying themes from their discussion about the intended role of the president beyond what one can derive from the spare text which they drafted." (p. 30) Furthermore, the "ratification period did not produce much greater clarity." (p. 30) Thus, the original understanding seems notably unclear. But the obscurity of the record has not impeded vigorous scholarly advocacy.

Recent scholars have scrutinized the relatively sparse language of Article II with almost microscopic care. One key question has been the significance of the vesting clause. Is this clause merely prefatory, or is it an independent source of presidential authority—and if so, of how much?

Advocates of broad presidential power—currently called the "unitary executive" theory—argue that the vesting clause is the key to Article II. Like the similar clause "vesting" the judicial power in the federal courts, they argue, it infuses the relevant individuals with general powers—in contrast to the clause in Article I that merely vests Congress with "[a]ll legislative Powers herein granted," leaving the actual granting of the powers until later sections. With so much emphasis placed on the introductory vesting clause, the question obviously arises of what to make of the rest of Article II. If the president's primary source of power is the vesting clause, what function is left for sections 2 and 3? Advocates of the unitary executive have not hesitated to provide an answer. In their view, to the extent sections 2 and 3 are not merely redundant reminders of some specific executive powers, their more specific grants of powers merely "help to limit and give content to the otherwise potentially vast grant of power that the vesting Clause of Article II confers on the President." In large part, according to advocates of the "unitary" executive, what appear to be grants of power are actually limitations—the treaty clause, for example, limits the president's power to make treaties by requiring him to get Senate approval. In short, enthusiastic advocates of this theory conclude, "the textual case" for their theory "is as free of ambi-

guity as the textual case that the President must be at least thirty-five years old."[10]

This argument has not gone unchallenged. Critics argue that there was no well-understood bundle of executive powers that could simply be conveyed by the clause, and that the subtle differences of phrasing between the vesting clauses for the various branches simply escaped any notice at the time. What the term "executive power" actually meant was unclear. Perhaps the Framers were more concerned about insuring a proper balance of power between the branches than in delineating the exact boundaries of their authority. What the evidence does not allow, says one critic, "is an assertion that the cryptic phrase 'executive power' refers to a clear, eighteenth-century baseline that just happens to dovetail with the modern formalist conception of that same term."[11]

Other critics of the unitary executive theory point to other subtle differences in language that might undermine that theory.[12] The Appointments Clause allows certain officers to be selected by the "heads of departments," while the Opinions Clause speaks of the "principal Officer" of "each of the executive Departments". Does this suggest that some "departments" have heads, but are not "executive Departments" with "principal Officers"? If so, perhaps the government has officers who are not "executive" and therefore not part of the "executive power" or subject to presidential control. In turn, advocates of the unitary executive argue that this difference in terminology (unlike the different phrasing of the vesting clauses) is entirely "meaningless."[13]

These efforts to hypothesize some indisputable meaning for Article II seem to miss the point. The main argument for reliance on the original understanding is based on the concept of popular consent: We the People gave life to the Constitution through ratification, and therefore its meaning must correspond to the understanding of a reasonable person of the time. Without pausing to debate whether this is actually a decisive argument

10. Steven G. Calabresi and Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541, 559 (1994).

11. Flaherty, 105 Yale L.J. at 1792 (cited in note 7).

12. See Lawrence Lessig and Cass Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1 (1994) (distinguishing between executive departments and other administrators).

13. See Calabresi and Prakash, 104 Yale L.J. at 629 (cited in note 10). But see A. Michael Froomkin, *Still Naked After All These Words*, 88 Nw. U.L. Rev. 1420 (1994) (critiquing Calabresi's views).

for some form of originalism, we must observe that there is a limit to the amount of weight that can be placed on the idea of the reasonable reader. Is the reasonable reader supposed to be someone with microscopic powers of linguistic analysis, a complete knowledge of English and American legal history, an intimate knowledge of the works of Locke and Montaigne, and an unlimited time to ponder the logical implications of subtle structural features? If so, perhaps this so-called reasonable reader would have finally settled on the unitarian interpretation (or on its opposite). But such a "reasonable reader" never existed and had no connection with the limited human abilities of the people who in fact had to vote on the Constitution.

Nor is there any reason to think that the average ratifier had a coherent theory uniting the general grant of executive power, the specific grants of presidential power, and the overlapping grants of legislative power over military and foreign affairs. If generations of later scholars have not been able to agree, why assume that the gentleman farmers, businessmen, and local politicians at the ratification conventions would have been magically able to discern the one true answer?

If the legitimacy of the Constitution rests on the consent of real human beings rather than imagined ideal interpreters, its meaning ought to be tied to what they had some reasonable chance of understanding, not to the deductions of some entirely hypothetical reader with unlimited expertise, time, and intelligence. And if we ask what an actual intelligent Eighteenth Century reader, who made a reasonable effort to understand the text, would have understood about Article II, the answer can only be that such a reader would have been unsure about the exact parameters of executive authority. To bind such a ratifier to esoteric deductions made long after the fact would make the Constitution an exercise in bait-and-switch, not in the consent of the governed.

As Justice Robert Jackson said in a famous opinion on presidential power, "Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh." [14] He added that a "century and a half"—now over two centuries—"of partisan debate and scholarly speculation yields no net result but

14. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

only supplies more or less apt quotations from respected sources on each side of any question."[15] It is an exaggeration to say that the historical records teach us nothing, but they clearly fail to provide any precise guidance about the boundaries of presidential power. Thus, the most accurate originalist answer is that the original understanding of the text suffered from ambiguity. For the non-originalist, of course, there is even less reason to obsess over eighteenth century linguistics in an effort to decode Article II.

This is not to say that presidential power was a complete cipher. The specific grants of power to the president, as well as related grants of power to Congress in military and foreign affairs, give some guidance. The framers built on a history of disputes about executive power. We know that they considered the post-revolutionary governors too weak. We also know that they considered the pre-revolutionary governors and the English monarch too strong. Like Goldilocks, they wanted something that was "not too strong" and "not too weak" but "just right." They wanted as much executive energy and initiative as possible without upsetting the proper balance of republican government. But these principles were too general to resolve hard cases. Thus, when particular questions about executive power arise, text and original understanding can provide only limited guidance.[16]

It is not merely speculation to say that reasonable readers would have found the meaning of the "executive power" to be unclear. We know that, in fact, quite a number of very intelligent, careful readers did in fact find it unclear. No sooner was the Constitution ratified than the very men who had drafted and enacted it found themselves at odds over the scope of executive power. In a Congress full of members of the Constitutional Convention and participants in the ratification debate, no consensus existed even on the basic question of whether the president had the power to fire his own subordinates. After considerable debate, Madison seems to have persuaded a majority of his colleagues in the House that the President did have this power—though the sequence of votes and coalitions makes this a little unclear. Half the Senators disagreed. Since Senate approval was required to appoint cabinet members, many Senators thought, it

15. Id. at 634-35.

16. On the conflicting values involved in assessing executive power, see Geoffrey P. Miller, *The Unitary Executive in a Unified Theory of Constitutional Law: The Problem of Interpretation*, 15 Cardozo L. Rev. 201 (1993) (energy versus avoidance of faction); Flaherty, 105 Yale L.J. at 1802-804 (cited in note 7) (energy, accountability and balance).

should also be required for their removal.[17] And even Madison seems to have been confused about the issue: shortly thereafter, he argued that Congress did have some control over the tenure of certain officials.[18] As a recent historian remarks, "leading framers thought about the executive in notably divergent ways," and it was "precisely because their views diverged so sharply that disagreements over the power of the presidency emerged as a potent source of constitutional controversy in the 1790s."[19]

My view is not, of course, an original one. Edward Corwin, the great Twentieth Century expert on the presidency, concluded that the Constitution's provisions on foreign power did not definitively divide authority, but instead were "an invitation to struggle for the privilege of directing American foreign policy." (p. 4) Far earlier, Madison had commented on the general difficulty of defining the separate powers of the three branches. In *Federalist 37*, he said that "[e]xperience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary; or even the privileges and powers of the different legislative branches."[20] Madison observed that questions arise on a daily basis "which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science."[21] (After all, he said, "[w]hen the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful by the cloudy medium through which it is transmitted."[22]) He added that "[a]ll new laws, though penned with the greatest technical skill and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications."[23]

To some extent, later practice has indeed succeeded in clarifying the scope of presidential authority over foreign affairs, but

17. Forrest McDonald, *The American Presidency: An Intellectual History*, 219-220 (U. Press of Kansas, 1994).

18. Calabresi and Prakash, 104 Yale L.J. at 652 (cited in note 10).

19. Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 245 (Knopf, 1996).

20. Federalist 37 (Madison), in Isaac Kramnick, ed., *The Federalist Papers* 244-45 (Penguin, 1987).

21. Id.

22. Id.

23. Id.

not to the extent that Madison may have hoped or that Powell now contends.[24]

II. LET US NOW PRAISE FAMOUS MEN

Powell's view is that a "clear answer" to the question of foreign affairs power was "advanced in the first decade or so of the Constitution's practical interpretation by high officials of the government, including George Washington, James Madison, Thomas Jefferson, and Alexander Hamilton." (p. 27) "[T]o a remarkable extent," these major figures agreed "on the constitutional locus of authority" over foreign affairs. (p. 36) Even Powell's own account of the key incidents, however, indicates that the views of Washington and other early presidents were poorly articulated or ill-accepted at the time. Three of the episodes that Powell addresses stand out.

The first episode was the famous debate between Hamilton and Madison over Washington's neutrality proclamation. (pp. 47-51) Even Powell concedes that this exchange is "on its face, the clearest example of important constitutional disagreement over the distribution of foreign affairs powers within the group of founders I am discussing." (p. 49) He argues, however, that they "actually disagreed on constitutional issues far less than is usually believed." (p. 49) But Powell makes a major concession: Even on Powell's view the "fracas" "suggests that issues involving war raise special constitutional concerns." (p. 51) But a framework on foreign affairs that settles everything except the power over war and peace has a gaping hole in it.

The second episode was the affair of the *Little Sarah*. The *Little Sarah* had been captured by the French in May of 1794 and was refitted to sail under the French flag as the privateer *Petite Democrate*. (p. 56) Allowing the ship to sail could lead to an angry British response for failure to observe the terms of neutrality, while halting the ship by force could conceivably be considered an act of war against France. (p. 57) The cabinet seemed to be agreed that the President had the power to order the gover-

---

24. I agree with Powell on the relevance of later practice, in part for the reasons given by Madison. John Hart Ely argues that later practice cannot modify the War Clause in Article I because its meaning is unmistakable (a requirement of prior congressional consent to war is required when feasible). John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* 10 (1993). Given this textual clarity, he argues, "[u]surpation isn't precedent, it's usurpation." Id. Whatever may be said of this argument in the specific context of war powers, the question of how much general authority the vesting clause gives the president is by no means so clear.

nor to halt the ship,[25] but disagreed about the right course and on whether they had the power to give the order in his absence. (pp. 57-58) In any event, the governor of Pennsylvania apparently ignored their request. (p. 58) Moreover, as Powell indicates, the constitutional premises of the cabinet's actions "were largely implicit," though Powell claims they can be "teased out with some confidence." [26] (p. 59)

In any event, the lesson which Powell draws from this and earlier incidents is that "Washington and his advisors clearly believed" in a broad presidential power over foreign affairs. But it's not surprising, after all, that presidents take a broad view of their own power; it would be much more impressive if we had evidence that Congress or the general public agreed. But the evidence of such consensus is weak. In one dispute with Congress over the confidentiality of certain papers, for example, a majority of the House ultimately did demand the papers and assert its right to withhold funds to implement the related treaty (p. 75); the fact that the House decided not to exercise this power "by a razor-thin majority" hardly proves acceptance of the executive's view of the constitutional issue.[27]

A third episode is more promising in this respect. This episode involved a petty officer in the British navy, who had been accused of committing murder and who may or may not have been an American citizen. (p. 79) He was in federal custody, but a federal judge refused to allow him to be turned over to the British without the president's sanction. The case became something of a cause celebre, which the Jeffersonians used as an excuse to badger the reigning Federalists. (p. 81) John Marshall gave a brilliant speech defending the president's action[28]; whether the House concurred is left unclear from Powell's account. In any event, Marshall was defending a "client" who had

25. David Currie raises some significant questions about whether this conclusion was correct. See David P. Currie, *The Constitution in Congress: The Federalist Period, 1789-1801* at 174-80 (U. of Chicago Press, 1997).

26. Given Powell's view that only Congress can legislate domestically, it is not clear to me that under his view, Washington had any right to order the use of force on American soil to prevent the ship from sailing.

27. Currie argues that the House was right to insist on its discretion in whether to implement the treaty. See Currie, *The Constitution in Congress* at 211-17 (cited in note 25).

28. The most recent, comprehensive treatment of the episode speaks of the "ambitious, even radical, character of John Marshall's claim for the Presidency." Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 Yale L.J. 229, 234-35 (1990). She characterizes Adams himself as "surprisingly delicate concerning the Executive's relation to a judge." Id. at 290. Notably, Jefferson was unpersuaded by Marshall's argument. See id. at 354.

asserted something less than plenary presidential power over everything touching foreign relations. President Adams himself, in the action that was the subject of the controversy, had expressed doubt about his authority to direct the judge to turn the prisoner over to the British and had only been willing to offer the judge his "advice and request" to that effect. (p. 80) Marshall may have taken a more aggressive view of presidential powers in debate (p. 85), but surely his defense cannot count for more than the view of the president himself on the matter.[29]

On Powell's version of the facts, what all of this proves is that early Presidents and their supporters were keen advocates of presidential authority in foreign affairs. Why should this matter? Here, Powell offers two answers. The first is that Washington, Jefferson and company were great men, whose constitutional views are entitled to great respect. (p. 36) I have no quarrel with this general principle, but we may want to apply it with a grain of salt in this context. All of these great men were connected with the executive and had a strong motive for promoting a broad view of presidential power. Moreover, one of the reasons that they are so well remembered today is simply that they *were* connected with the executive. (Marshall is of course much more famous as Chief Justice than as Secretary of State or a Member of Congress, but if he had not been such a staunch supporter of Adams it seems unlikely that he would have received the last-minute judicial appointment.) It is very difficult for a member of Congress to enjoy lasting historical fame, regardless of ability or historical significance. Notably, the few exceptions that come to mind such as Clay, Calhoun, and Webster, also served in prominent executive positions and had serious presidential aspirations. So a decision to privilege the views of the famous is in effect almost inevitably biased in favor of the executive's views as opposed to those of Congress.

Powell's other reason for favoring the views of these men is that he thinks they were right. As he explains, "Washington and

29. In addition, by Powell's description, Marshall's defense sounds suspiciously overbroad. According to Powell, Marshall's view was that in extradition and prize cases, the President was the "only branch of the government responsible and empowered to act in such a case." (p. 87) But prize courts obviously did have the power to decide cases, and while they may have been guided by the "principles" established by the executive (p. 85 n. 94), the judicial decisions would have been nothing more than advisory opinions if it were true that only the executive has the power to act in matters affecting foreign affairs. Indeed, such an exclusive presidential prerogative would also seem to fly in the face of Article I, sec. 8, cl.11, which gives Congress the power "to make Rules concerning Capture on Land and Water."

his associates grounded their reading of the Constitution of foreign affairs in the Republic's fundamental need for an effective system of making and implementing foreign policy and in the institutional relationships which they thought must govern between the branches." (p. 94) Entrusted with some key specific powers over foreign affairs, "the president must equally be entrusted by the Constitution with responsibility for the substance of American foreign policy if we are to have the 'efficient national' government responsible for foreign affairs by 'uniform principles of policy' which Publius promised us [in the Federalist papers.]" (p. 94) Powell goes on to argue that as a practical matter, the president should have the power of initiative and control over foreign affairs. (pp. 105-106) There is nothing wrong with these arguments, but they are unlikely to persuade those who are less focused on efficiency and more worried about the need to avoid tyranny by limiting unchecked presidential authority.

III. FOREIGN AFFAIRS LAW AS A FORM OF COLLECTIVE BARGAINING

One of Powell's key points is that the Constitution "generally provides for political rather than legal decisionmaking in the domain of foreign affairs." (p. 6) Whatever may be said of this as a normative matter, there is no question that it is true as a descriptive matter. Powell would like to free those political disputes from constitutional rhetoric. He would like to eliminate "constitutional quibbles over the power of congressional doves to veto executive hawkishness, even as it dismisses similar quibbles over the president's power to pursue those policies (hawkish or dovish) that he or she believes in the interest of the republic." (p. 150) In this vision, Congress and the president are both free to use their own armaments in their struggle with each other, with victory ultimately determining on the balance of political power.

This vision is something like the traditional picture of union-management relationships in American law, which the Court has pictured as a contest with few holds barred. The Court has been vigilant to prevent state interference with conduct that Congress intended "to be controlled by the free play of economic forces."[30] Although the Court has often addressed the issue in the context of union activities, "self-help is of course also

30. *Lodge 76 v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 140 (1976) (quoting *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971)).

the prerogative of the employer because he, too, may properly employ economic weapons Congress meant to be unregulable."[31]

The Court's view of labor relations is not unlike Powell's view of foreign relations. Except for a few activities prohibited by statute, the Court's position is that the labor-management struggle was deliberately left unregulated:

> Our decisions hold that Congress meant that these activities, whether of employer or of employees, were not to be regulable by States any more than by the NLRB, for neither States nor the Board is "afforded flexibility in picking and choosing which economic devices of labor and management shall be branded as unlawful." Rather, both are without authority to attempt to "introduce some standard of properly 'balanced' bargaining power," or to define "what economic sanctions might be permitted negotiating parties in an 'ideal' or 'balanced' state of collective bargaining." To sanction state regulation of such economic pressure deemed by the federal Act "desirabl[y] . . . left for the free play of contending economic forces, . . . is not merely [to fill] a gap [by] outlaw[ing] what federal law fails to outlaw; it is denying one party to an economic contest a weapon that Congress meant him to have available."[32]

Under this view, the heart of labor-management relations is conflict rather than consensus:

> [C]ollective bargaining . . . cannot be equated with an academic collective search for truth—or even with what might be thought to be the ideal of one. The parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. . . . The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system . . . .[33]

Of course, not every dispute results in a strike or lockout, and relations between employers and unions may be cordial and cooperative. But when push comes to shove, the legal regime leaves it to the parties to mobilize their economic weapons and do battle.[34]

---

31. Id. at 147.
32. Id. at 149-150 (citations omitted).
33. *NLRB v. Insurance Agents' Intl. Union*, 361 U.S. 477, 488-89 (1960).
34. For further discussion of the preemption issues, see Douglas E. Ray, Calvin W. Sharpe, and Robert N. Strassfeld, *Understanding Labor Law* 372-79 (M. Bender, 1999).

The analogy between labor law and foreign affairs law is based on some important structural similarities. On one side of each dispute is a hierarchical bureaucracy—the executive branch in foreign affairs and management in labor law. On the other side is a group governed by majority rule, and prone to internal division and faction—Congress in one case, the union in the other. The two sides have some important overlapping interests. In the labor setting, neither wants the company to fail or to face a prolonged strike, while in foreign affairs, neither wishes to sacrifice national security or tie up vital government activities. Management, like the executive, has a sphere of unilateral action. For example, it can close an operation without prior consultation with the union, because of management's need for speed, flexibility, and secrecy in critical business matters.[35] These reasons are remarkably similar to the conventional justifications for presidential autonomy in foreign affairs. On the other hand, in both instances, the other side has economic weapons of considerable force: workers can strike; Congress can withhold funding. In short, the resemblance is more than skin deep.

This comparison sheds some light on Powell's aspiration for a more substantive deliberative process, free from bombastic claims of illegitimacy. Labor relations are notorious for rhetorical overkill, a fact of which the Supreme Court has taken official notice. For example, in *Linn v. United Plan Guard Workers of America, Local 114*,[36] a leaflet falsely accused a supervisor of engaging in criminal misconduct in depriving a some workers of their right to vote in three NLRB elections, robbing them of pay increases, and lying to employees.[37] The Court stressed that labor disputes are "ordinarily heated affairs" and that disputes over union representation "are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations, and distortions."[38] Both sides, the Court observed, "often speak bluntly and recklessly, embellishing their respective positions with imprecatory language."[39] Short of deliberately circulating factual information known to be false, the parties are entitled to use "intemperate, abusive, and inaccurate statements."[40] For similar reasons, in a later case the Court protected a union publication

35. See *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 682-83 (1981).
36. 383 U.S. 53 (1966).
37. Id. at 56-57.
38. Id. at 58.
39. Id.
40. Id. at 61.

that characterized a named non-member as a scab, which the publication helpfully defined as a "two-legged animal with a corkscrew soul, a water brain, a combination backbone of jelly and glue. Where others have hearts, he carries a tumor of rotten principles." A scab like that nonmember, the publication concluded, "is a traitor to his God, his country, his family and his class."[41]

Such extreme language, replete with charges of illegality and illegitimacy, is not surprising in the labor context. The union faces difficult collective action problems, with the need to forge a diverse group of employees into an effective united front under trying conditions. Correspondingly, management wants to undermine union support by marginal members. Much the same is true in foreign affairs. Congressional opponents seek to present a united front against the President, who in turn tries to lure marginal opponents over to his side. To a lesser extent, congressional opponents may be able to play the same game against the president, undermining his support in the bureaucracy and at the fringes of his political coalition. Individuals who may be unwilling to take a strong public stand about the merits of the president's policy may be moved by attacks on its legitimacy, while the president attempts to defend the legitimacy of his actions and delegitimize those of Congress. The rhetoric inevitably becomes heated as each side strives to hold its own supporters in line while causing defections on the other side.

Thus, Powell may well be right to think that disputes over foreign affairs are at heart political rather than legal. But for this very reason, like labor and management, Congress and the president must use every rhetorical weapon in their battle. Claims of constitutional illegitimacy are an important part of their arsenal which neither side is likely to relinquish. For that reason, Powell's aspiration to eliminate constitutional debate from foreign policy disputes is probably doomed to failure.

As I said at the beginning of this review, Powell's efforts to resolve the constitutional issues have much to recommend them. It might be nice to live in a world in which Congress and the president explicitly agreed to play by the same rules, a world where measured discussion of substance replaced impassioned charges of illegitimacy. But given the nature of the political process, and particularly the need for Congress to overcome its

41. *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264, 268 (1974). The language was drawn from a pamphlet by Jack London.

collective action problem in order to play any effective role at all, such a farewell to arms seems unlikely. And even if the parties were reasonably open-minded about the legal merits, I think that Powell overestimates the degree of clarity they would find. There may be a right answer in some theoretical sense, but there is also plenty of room for reasonable disagreement.

Neither the dynamics of the situation nor the merits are likely to push the parties to consensus on the legal issues. Thus, after two centuries of seemingly incessant bickering over the constitutional rules of the game, we are likely to face such disputes for the indefinite future. With no impartial referee to decide their dispute, the players are likely to respond to opposing arguments mainly by shouting louder and using nastier language. Let the games begin.