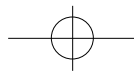
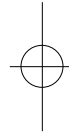
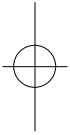
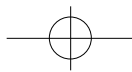
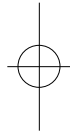
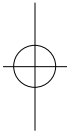


The President's Authority over Foreign Affairs





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An Essay in Constitutional Interpretation

H. Jefferson Powell
DUKE UNIVERSITY

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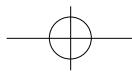
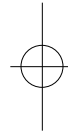
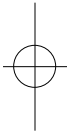
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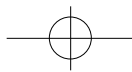
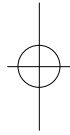
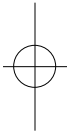
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In honor of Burke Marshall,
and in memory of Joe Goldstein,
with the deepest affection and admiration.





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FOREWORD

This essay is a book of law. To be sure, it contains a modest amount of constitutional history and an even smaller (and second-hand) bit of political science, but both history and political science are brought to bear on a question of law: how does the Constitution of the United States distribute the authority to make foreign policy for the United States between the two political branches of the federal government? In addressing this question, I shall proceed along lines that, perhaps surprisingly, are somewhat unusual. A great deal of contemporary constitutional scholarship starts from one or more commitments of the scholar which are external to the law, and attempts to develop means by which those commitments can be served within and through constitutional law. My argumentative strategy in this essay is quite different. I am presenting an argument for an interpretation of the Constitution that rests on bases within the law. Such an approach is necessary if there is to be a discipline of constitutional law with any integrity of its own, and (unlike some) I believe that such a discipline is possible. Constitutional law understood in this way can and ought to take account of considerations originating in, among other disciplines, history and political science, but in order to do so properly, the constitutional lawyer will take what has been learned and apply it to questions that the historian or political scientist would not address. What results is distinctively law, as any historian or political scientist will tell you. (To make this observation, I should add, is not to try to insulate my argument from historical or political-science criticism, an impossibility in any event, but only to apprise the reader of what to expect, and not to expect, from this essay.)

Some readers may regard as ironic my claim that I am doing law in this essay, since my most fundamental conclusion is that law has relatively little to add in resolving most disputes over the content and conduct of United States foreign policy. That, however, would be a mistake. A thoroughgoing commitment to the authority of the Constitution in American political life does *not* entail any commitment to the wholesale conversion of American political life into a matter of constitutional-law argument. A central purpose of the Constitution was to create a wider, more open domain for national political debate: at the heart of Chief Justice John Marshall's opin-

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ion for the Supreme Court in *M'Culloch v. Maryland* (arguably the greatest constitutional opinion ever written by a justice) was Marshall's urgent insistence that the Constitution's legal limitations must not be read to constrain unduly political decisionmaking by the national government. The idea that constitutional law, properly understood, protects such decisionmaking from interference on legalistic grounds, is very old.

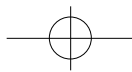
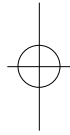
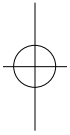
A decade ago, Professor Joseph Goldstein wrote a book contending that the justices of the United States Supreme Court "have an obligation to maintain the Constitution, in opinions of the Court and also in concurring and dissenting opinions, as something intelligible—something We the People can understand. . . . [T]hey have a professional obligation to articulate in comprehensible and accessible language the constitutional principles on which their judgments rest." As Professor Burke Marshall observed in his foreword, "[t]his is a book that takes the sovereignty of the people literally and seriously."¹ I believe that Professor Goldstein's admonition applies with equal force to commentators who advance arguments about fundamental issues of constitutional interpretation. I therefore have written this essay with the concerned citizen, not the encyclopedic scholar, in mind. The result is not, I fear, light reading, but I hope that it may be an intelligible and accessible contribution to the American people's debates over how their government makes foreign policy.

The debts I have incurred in the writing of this essay are numerous. I am grateful to George Christie, Neil Kinkopf and David Lange for advice and encouragement at an early stage. I also want to acknowledge the immense amount I have learned from other scholars who have written on the constitutional law of foreign affairs. Because, as I have just stated, I am writing for my fellow citizens rather than (only) for fellow academics, this essay seldom engages explicitly with that scholarship, and never at the depth these colleagues' work deserves. Once again, it has been a great pleasure to work with the people at Carolina Academic Press. I am grateful to Keith Sipe for his interest in this project and to Tim Colton for his superb work designing the book. My daughter Sara has endured the substantial and

1. Goldstein, *The Intelligible Constitution* 19 (1991). Professor Marshall's comment is in *id.* at xx.

sustained takeover of our study by unruly piles of books and papers without complaint. As is ever the case, by her loving example she keeps me mindful of what truly matters.

I wish to dedicate this book to two of my law teachers. Joe Goldstein and Burke Marshall were wonderful in the classroom: in both cases I often wished I knew shorthand so that I could record every word. Even more important to me, however, has been their continuing friendship over the years, and the proof they provide that someone who is a great lawyer can be, and should try to be, a great human being. Joe (who died before I had done more than conceive the idea of this book) and Burke are and will always be an inspiration to me.



INTRODUCTION

In the opening years of the twenty-first century, the government of the United States of America possesses almost incalculable power to affect the lives of people all over the globe. The United States is the world's mightiest military power, its largest economy, and a pervasive cultural influence, for good and ill. The decisions which its government makes in the name of American foreign policy thus are of the greatest human significance. How those decisions are actually made is therefore of great importance as well.

As a matter of American political theory, the basic framework for the making of foreign policy is, or ought to be, the Constitution of the United States. A central feature of that framework is the Constitution's creation of two distinct political branches within the federal government. American foreign policy is the product of independent and often antagonistic institutions—the legislative and executive branches of the federal government—whether or not one of the major political parties has achieved temporary political dominance in national politics. Even if one is skeptical about the influence that constitutional law has in these matters, the political potency, real and potential, of Congress and the president makes what we may call the Constitution of foreign affairs a subject of more than academic concern.

There is an enormous body of scholarship on this topic, much of it written at a very high level of intellectual ability. There is also, of course, voluminous public commentary on questions relating to the authority to make foreign policy from within both political branches and the media. For all the volume, however, I think that the current state of the discussion is unsatisfactory. Most scholars believe that the Constitution gives Congress “the dominant hand in the establishment of basic policy regarding foreign relations.” “[U]nder a detached and narrowly ‘legal’ analysis, Congress has virtually plenary authority over all aspects of foreign policy.”² As the scholars are unhappily aware, however, the executive branch

2. Francis D. Wormuth & Edwin B. Firmage, *To Chain the Dog of War: The War Power of Congress in History and Law* 177 (1986); Phillip R. Trimble, The President's Foreign Affairs Power, in *Foreign Affairs and the U.S.*

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often asserts what appears to be a diametrically opposed view: the Constitution, according to the presidents and their lawyers, vests the president with “plenary authority to represent the interests of the United States in dealings with foreign States.” “The Constitution makes the President the Nation’s ‘guiding organ in the conduct of our foreign affairs.’” The internal quotation in this last statement is from a Supreme Court decision; another feature of the discussion is the fact that much of the judicial branch’s rhetoric supports the executive’s position, which makes the scholarly majority even less happy.³ Disagreement over constitutional issues is no surprise, but there is on the face of it something curious about an area of constitutional interpretation in which the split between (majority) scholarly opinion and (apparent) actual practice is so stark. Given the human importance of American foreign policy, such a fissure ought not to be tolerated if it can be overcome.

There is, I believe, an answer to the question of the Constitution’s distribution of authority over foreign affairs that addresses this cacophony. As the executive branch asserts, it is the president on whom the Constitution places the duty to formulate and implement the foreign policy of the United States. While the president is dependent on Congress for the provision of most of the tools of foreign policy—the executive cannot itself raise an army or appropriate funds for diplomacy—the president needs no legislative authorization to use such tools as may exist to create and pursue a foreign policy, and in most instances (though not all) is constitutionally entitled to adhere to presidential policy even in the teeth of the contrary wishes of the legislature. As the pro-congressional scholars insist, however, the Constitution in no way excludes Congress from using the powerful legislative instruments it does pos-

Constitution 39, 40 (Louis Henkin et al. ed. 1990). Constitutional foreign-affairs scholarship abounds with such statements.

3. *Waiver of Claims for Damages Arising out of Cooperative Space Activity*, 1995 WL 917147 (OLC) (preliminary print); *Validity of Congressional-Executive Agreements that Substantially Modify the United States’ Obligations under an Existing Treaty*, 1996 WL 1185163 (OLC) (preliminary print), quoting *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948). These documents are formal legal opinions of the Justice Department’s Office of Legal Counsel and thus represent official statements of the Department’s views on the law.

sess to express its views on foreign affairs, to create incentives and pressures on the executive to concur, and (if it can muster the political will) to exercise an effective veto on most (though not all) executive policies. On the reading of the Constitution which I am proposing, the president enjoys an extremely broad range of discretion in the making of foreign policy, and the Congress an array of means by which to react to presidential initiatives, favorably or otherwise.

Two features of the constitutional argument this essay presents may already be apparent. The first is that if my reading of the Constitution is persuasive, the reality of current practice is not too distant from what it should be in principle. For the most part, the executive *does* take the initiative in formulating and implementing American foreign policy, a reality which, to be sure, the majority of scholars lament.⁴ At the same time, as we shall see the executive branch seldom acts on its rhetoric of plenary and exclusive presidential authority. Congress's power is acknowledged, if much of the time in a backhanded way, by the executive's preference for arguments that it is actually complying with legislation that appears to limit or balk the president's foreign-policy options. 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. Rather than debating presidential policies or proposed legislation on their political and moral merits, a substantial amount of time and energy is consumed by legal arguments about whether the president has or doesn't have the authority to pursue a given policy, arguments that are irresolvable on the present terms of discussion.

A paradoxical result of the prominence of legal (and legalistic) discussion in foreign-affairs controversies is to reduce presidential

4. See, e.g., Larry N. George, Democratic Theory and the Conduct of American Foreign Policy, in *The Constitution and the Conduct of American Foreign Policy* (David G. Adler & Larry N. George eds. 1996), at 57 ("Throughout this century, and particularly since World War II, presidents have usurped authority over foreign affairs in ways that directly violate both the letter and the intent of the Constitution."). Once again, similar statements are legion in the pro-congressional literature.

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accountability to Congress and to public opinion: considerations of the wisdom or lack of wisdom of the president's decisions often vanish into a fog of legal assertion and counterassertion. The second obvious feature of my argument that should be acknowledged is my claim that the best (legal) reading of the Constitution permits—and requires—us to see foreign policy controversies as, almost invariably in practice, political disputes about what it is wise and just and prudent for the United States to undertake, and only rarely as questions amenable to legal resolution. By providing us with clear lines of responsibility, the reading of the Constitution which this essay presents serves the goals of effectiveness and accountability that, I will argue, are built into our constitutional structure. American foreign policy should be constituted, not by lawyers' arguments, but by democratic debate over the interests, and the responsibilities, of the Republic.

ABBREVIATIONS AND ACKNOWLEDGMENTS

Whenever possible citations to matters quoted in the text are gathered, in sequence, in a single endnote at the end of the paragraph. I have drawn on material originally published as articles in the *George Washington University Law Review* and the *William & Mary Law Review*: I am grateful to those journals for permission to use these materials. See Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 *Geo. Wash. L. Rev.* 527 (1999), and *The Founders and the President's Authority Over Foreign Affairs*, 40 *William & Mary L. Rev.* 1471 (1999).

The following shortened titles are used in the endnotes.

Documentary History	<i>Documentary History of the First Federal Congress of the United States of America</i> (Linda Grant De Pauw et al. ed. 1972–1995).
Hamilton Papers	<i>The Papers of Alexander Hamilton</i> (Harold C. Syrett & Jacob E. Cooke ed. 1961–1987).
Jefferson Papers	<i>The Papers of Thomas Jefferson</i> (Julian P. Boyd et al. ed. 1950–on).
Madison Papers	<i>The Papers of James Madison</i> (William T. Hutchinson & William M. E. Rachal et al. ed. 1962–on).
Washington Diaries	<i>The Diaries of George Washington</i> (Donald Jackson & Dorothy Twohig ed. 1976–79).
Washington Journal	George Washington, <i>The Journal of the Proceedings of the President: 1793–1797</i> (Dorothy Twohig ed. 1981).
Washington Papers	<i>The Papers of George Washington</i> (W.W. Abbot & Dorothy Twohig et al. ed. 1983–on).

