The President as Commander in Chief

An Essay in Constitutional Vision

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For Walter Dellinger
with admiration and affection

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Preface

Writing this book took a long time, in large measure because it took me a long time to understand that I was less interested in staking out particular positions than in expressing a mental attitude toward the task of reasoning about legal issues, specifically the issues arising out of presidential decisions about national security. In the end, the book does take positions on a number of highly debated constitutional questions, but I hope the reader will keep in mind that my central concern is with *how* the president and the president's legal advisors should think rather than with *what* they conclude.

In attempting to set out what I call in the subtitle and elsewhere a vision of how to approach the intersection of law and national security, I have often referred to the moral dimension that I think is unavoidable in both giving advice and making decisions in this area. I do not presuppose the existence of any broad moral consensus in our society on most of the issues. I do assume, in part because I think the language we use in government and law makes no sense otherwise, that the oaths public servants take are not a meaningless ritual, but commit those persons to carry out the tasks they have undertaken, and to exercise the authority with which they are entrusted, conscientiously and in good faith.

I owe an intellectual debt to a great many people, of whom I can only mention a few. I learned a tremendous amount from the many outstanding lawyers with whom I worked in the United States Department of Justice in two administrations. Wells Bennett, David Lange and James Boyd White have been ongoing conversation partners on these topics and many others, and Jim gave a draft of the book a generous and helpful read, as did Margaret

Hu and Virginia Seitz: I am grateful to all of them. My many conversations about the book and its subject with my wife Sarah and my older daughter Sara have sustained and challenged me. My younger daughter Zoe has kept me grounded by reminding me that work is not the most important part of life.

One of my regular teaching assignments is the introductory course in constitutional law, and one of the things I tell my students each year, more than once, is that the best way to learn law is to study great lawyers. I also tell them, at some point, that one of the greatest lawyers I know is Walter Dellinger, my friend and for several years my immediate superior at the Justice Department. I have learned more about law and life from him than I can say, and it is with great pleasure and gratitude that I dedicate this book to him.

The President as Commander in Chief

Introduction

This book is about a difficult and controversial issue in American constitutional law, the scope of the president's authority to protect the safety of the Republic. That authority is centrally located in the Constitution's designation of the president as "Commander in Chief" of the armed forces, although presidential responsibility for national security is not limited to the president's strictly military role. Presidents, members of Congress, judges, scholars, pundits and ordinary citizens have argued over exactly what the president's powers and duties are, and how the president's role fits in with that of Congress, which all agree is the other branch of national government with direct responsibility for national security. Most discussion assumes that Congress and the president are in a sense competitors for power and influence in this area; many people view constitutional-law arguments as little more than the rhetorical garb in which partisans of one branch or the other dress up their preferences in national security policy, or even the interests of their political party.

It would be hopelessly naive to deny the enormous role that politics plays in the formulation and execution of American national security policy. Naive and also wrong-headed: politics—in the ordinary language sense of the resolution of policy disputes by familiar electoral and parliamentary processes—is the usual means, in this Republic, by which contestable public decisions are made. There is nothing sordid or unseemly about the fact that men and women act for political reasons and out of political motivations when they argue over national defense, and in particular over the respective roles of Congress and the president in making decisions about national defense. Of course individuals can and do act politically out of motivations or in pursuit of goals that most of us would find selfish or repulsive, but that is an observation about hu-

manity, not a condemnation of politics. There is, furthermore, no bright line separating "ordinary" political disagreements from arguments over the constitutional ordering of the American Republic. Justice Robert H. Jackson, of whom I shall have much to say in this book, once wrote that "[i]t is hard to conceive a task more fundamentally political than to maintain amidst changing conditions the balance between the executive and legislative branches of our federal system."[1] This is true above all when the immediate conflict between the branches concerns national security, where the stakes are so high and the conditions in which decisions must be made so ever-changing and unpredictable. Yet as Jackson also said, in his most famous judicial opinion, more is at issue in the political struggle between congressional and presidential power and influence than the "transient results" of any particular decision, no matter how grave. Overreaching (or the reverse) by either branch of government may have "enduring consequences upon the balanced power structure of our Republic" as damaging to the United States as a serious setback in foreign policy.[2] The maintenance of the American system of divided governmental power may involve "fundamentally political" thought and action, but that does not preclude a crucial role for the law, and thus for lawyers.[3]

The thesis of this book is that the central contribution of constitutional law to debate over issues of national security is to maintain the carefully balanced power structure created by the Constitution.[4] The lawyers in the debate should write no blank

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1. Jackson, *The Supreme Court in the American System of Government* 62 (1955).

2. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring). In light of the many citations to Justice Jackson's concurrence in the Steel Seizure Case, I will use a short citation form, e.g., Jackson, at 634.

3. The last paragraph in the text of Jackson's Steel Seizure concurrence refers to the duty of the Supreme Court in this regard: "Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up." *Id.* at 655.

4. "A president has great responsibility, but part of that responsibility is not only to execute the laws with care and fidelity, but also to play a role in

checks (whether to the executive or the legislature) and they should be intensely skeptical of any neat theory of plenary presidential authority or congressional supremacy. In the process of making national security decisions, the role of constitutional law, and of the lawyers who must articulate it, is to take the long view, to ensure that one constitutional principle (the national government is empowered to protect the nation) does not swallow up another (the national government's powers are exercised by separate branches). Constitutional law cannot perform this task if it is reduced to a set of abstract legal propositions any more than if it becomes nothing more than a grab bag of after-the-fact rationalizations. Nor can we simply rely on the judiciary to keep the Constitution safe and absolve the politicians of responsibility for the enduring constitutional consequences of their actions: as Justice Jackson warned, the courts can play only a limited role in this regard, and the government's fidelity to the Constitution depends far more on the intelligence and good faith with which members of Congress and the president, and their lawyers, address the constitutional issues that necessarily arise in the course of making decisions about protecting the nation. In doing so, national security decision makers necessarily presuppose a perspective on, or vision of, the constitutional order, whether they express one or not. Indeed it is one of the roles of the lawyers to suggest what perspective might be adequate to the discharge of their duties by legislators and executive officers.

Books and articles about the constitutional distribution of power over national security issues usually take one of two forms. Those with a political-science orientation focus on institutional structures and incentives, and address empirical questions about what in fact goes on within the legislative process and how decisions are actually made in the interplay among executive-branch agencies and presidential advisors. Good scholarship in this vein

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constituting the community through constitutional practices and commitments." Thomas P. Crocker, Presidential Power and Constitutional Responsibility, 52 Boston Coll. L. Rev. 1551, 1626 (2011). Professor Crocker's article is a profound reflection on the issues addressed in this book.

is enormously valuable, not least in that it often puts in question easy bromides about "Congress" or "the unitary executive." But political-science writing often ignores altogether normative questions about what public officials *should* do, either out of a conviction that such inquiries are pointless or because the writer simply has other concerns. Since constitutional *law* is inherently normative, there is a limit to what this sort of political-science work can contribute to it.

In contrast, books and articles with a legal orientation are almost invariably normative through and through. The style of presentation varies: some writers address supposed British precursors to American political arrangements, others the founding-era understanding of the Constitution or the history of governmental practice since the founding, and still others directly address the doctrinal rules and principles that in the writer's opinion make up the constitutional law relevant to national security. In virtually every case, however, the objective is to demonstrate what the correct law is or should be. The problem is that this legal work tends to succumb to the constitutional version of Manichaean dualism: it is Congress that is supreme—or it is the president; this or that decision must be left to the legislature—or it is exclusively executive.

I am a lawyer and I share the normative orientation of my fellow lawyers. But this book adopts a rather different approach than most to resolving the normative issues, and in doing so I hope that it avoids getting caught in the dualistic trap. The reader will find neither an extended historical inquiry nor a detailed presentation of doctrine, although she will encounter a little of both history and doctrine along the way. My approach is to ask instead about the fundamental constitutional perspective or vision, as I put it above, within which executive-branch officers and their lawyers ought to reach decisions about national security issues. Because it is a *constitutional* vision, this perspective must be shaped by the ways in which American government is organized and functions under the written Constitution. Because it is a constitutional *vision*, not a detailed checklist of legal do's and don'ts, this perspective addresses the character of executive officials, and the moral quality of the decisions they make. A moral vision is more about how one makes

decisions, what ends those decisions serve, and what kind of people make and are shaped by different decisions, than it is a code of correct choices—although a crucial test of any moral vision lies in the choices it excludes as well as those that it requires.

At this point, the wary reader may well object that this talk about vision and perspective and morality seems to have little to do with the Constitution, which is—is it not?—a practical blueprint for governmental organization created by and "for people of fundamentally differing views," not a governmental ethic based on a non-existent moral consensus.[5] This concern is understandable but it rests on a faulty premise. The Constitution, it is true, creates a government that can act on the basis of many different and conflicting political, economic and moral commitments, as from time to time people holding one or another set of commitments come to exercise governmental authority, for a limited period and as a result of their inevitably temporary success in the American political system. In the area of national security, for example, the Constitution provides a very wide range of discretion to those officials entrusted under it with the duty of making decisions. But this need not imply that the constitutional system has no content. Constitutional law is the interpretation not just of the words in the text, which in this area are a curious mixture of precision and ambiguity, but also an interpretation of the institutions that the words authorize. Neither words nor institutions can be treated as a blank slate on which the interpreter may put whatever gloss he prefers, not at least if the interpreter intends to act within what is by now

5. The quotation is from Justice Oliver Wendell Holmes's celebrated opinion in *Lochner v. New York*, 198 U.S. 45, 75–76 (1905) (Holmes, J., dissenting): "a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." Holmes's specific concern in *Lochner*, as this passage indicates, was with the erroneous assumption that the Constitution ordains an economic orthodoxy.

over two centuries of political and legal practice. Constitutional decisions, if they are to maintain continuity with this past, necessarily depend on the background assumptions of the decision makers. It bears emphasis that there is no escape in the constitutional law of national security[6] from reading text, structure and history within a normative perspective on what the constitutional enterprise is about. An inquiry into constitutional vision is therefore not an attempt to avoid precision in reasoning but the reverse: ultimately it is the only means of asking whether the president or Congress or we as citizens are reaching our specific conclusions in a fashion that is faithful to the Constitution.

There is no "vision clause" in the Constitution, but what we might call "the fundamental American constitutional ethos" suffuses the entire document: "the idea of limited government," that government is subject to the authority of law and cannot act legitimately beyond or against the limits the law imposes. "The whole theory of the U.S. Constitution is that it applies law to the acts of the State. Without a constitutional authorization, there can be no lawful acts of State."[7] In itself, this principle is crucial but still too general to provide much guidance for executive officials (or legislators or judges or citizens) who want to make hard national security decisions lawfully as well as wisely. In this book I argue that Justice Jackson's great opinion in the 1952 Steel Seizure Case, *Youngstown Sheet & Tube Co. v. Sawyer*, expands the fundamental constitutional ethos of limited government into a full-scale constitutional vision on the basis of which the president and his or her advisors can make decisions that are faithful to the Constitution, both as text and as ethos. It will not surprise some readers that I single out *Youngstown*, or Jackson's opinion, for this purpose. The Supreme Court's decision in that case was a dramatic rejection of a major presidential decision, taken in wartime and justified on

6. Or any other area of constitutional law, in my view, but we need not pursue that broader claim in this book.

7. Philip Bobbitt, *Constitutional Interpretation* 20 (1991); Bobbitt, *Terror and Consent: The Wars for the Twenty-First Century* 265 (2008) [henceforth, Bobbitt, *Terror and Consent*].

the ground that the decision was necessary to protect the nation; Jackson's opinion, although joined at the time by no other member of the Court, has long since come to hold a central place in discussions of *Youngstown*'s meaning. What I hope to contribute is a clearer understanding of the way that the bits of Jackson's opinion that lawyers understandably mine for their use in specific legal arguments are in fact part of a broader and indeed potentially comprehensive understanding of the Constitution's distribution of authority over national security matters, what I am calling a constitutional vision. This book, then, is an interpretation of Robert Jackson's vision.

It remains to ask why the reader should accept Justice Jackson's vision as the best account of we have of the perspective the president or anyone else should take on national security matters. There are formal arguments for doing so: *Youngstown* is a leading and indeed iconic decision on what we misleadingly call the separation of powers, and the Supreme Court takes Jackson's opinion very seriously as a key to the ongoing significance of *Youngstown*. I believe that there are other and deeper reasons, as well. Jackson's vision, I hope to show, is the product of intense reflection on the constitutional issues by a remarkably wise and articulate lawyer, reflection that came out of his deep experience both in the executive branch and on the bench. In his thinking, Jackson came to transcend the supposed oppositions between the practical and the legal, congressional supremacy and executive authority, that distort many of our debates and render them interminable, but he did so without falling into a formless and unprincipled attempt to split all the differences. Jackson's vision is both intensely practical and faithfully legal, respectful of both Congress and of the executive, and committed to maintaining the respective contributions of the two elected branches of the federal government in a properly functioning constitutional system. Above all, Jackson's perspective makes the ethos of limited government, what in *Youngstown* he called the principle of free government, a coherent and normatively attractive guide for national security decision-making under our Constitution. We should accept Jackson's vision because in fact it *is* the most persuasive account we have of how these decisions

should be made if the decision makers want to act in fidelity to the Constitution.

The argument of the book consists of four parts. In chapter one, we address a preliminary question of fundamental importance. Many commentators on national security issues, and on constitutional law generally, assume that constitutional law in fact has no distinctive role or significance, that it is simply a rhetorical mask for sheerly political arguments. This view is sometimes express and cynical (or despairing). Other people hold it in effect if not in theory, by adopting what amounts to an equation between "the Constitution" and whatever institutional interests or policy conclusions they advocate. I illustrate this latter position, which preserves the form of constitutional authority while evacuating "the Constitution" of meaning as law, by a close examination of a well-known (if generally excoriated) legal opinion, the 2002 Interrogation Memo in which Justice Department officials justified the legality of brutal interrogation techniques. The chapter concludes with a discussion of the fundamental errors underlying such arguments, which rest on a distorted understanding of the Constitution as law and a mistaken view of Congress and the president as locked in inexorable conflict over national security issues.

In chapter two, we turn to the Steel Seizure Case. The chapter begins by discussing *Youngstown*'s importance as the leading Supreme Court decision on the relationship between the powers of Congress and those of the president. Despite the case's well-known status as proof that the rule of law applies, even in wartime and even to the president, the actual legal significance of the decision is unclear, and the chapter reviews the perceived defects in the official "opinion of the Court" in *Youngstown* and the emergence of Justice Jackson's concurring opinion as the de facto explanation of the case's legal meaning. We then step back to review the evolution of Jackson's views on the constitutional law of national security from his service as FDR's attorney general, when he played a major role in a controversial 1940 executive decision about national defense, through a series of opinions Jackson wrote as a member of the Court before *Youngstown*. Finally, I provide a close reading of Jackson's *entire* concurrence, not simply the snippets

that generally are all that is read or quoted. What emerges is a clear and comprehensive vision of the president's powers, written with great understanding of the executive's role and deep sympathy with the executive viewpoint, but which interprets executive powers in light of what Jackson calls the principle of "free government." This principle allows for wide presidential discretion in making national security decisions when Congress has not spoken, but insists that "the Executive be under the law," and thus obliged to act consistently with legislative limits on the president's discretion in all but a few circumstances.[8]

Chapter three is in the nature of a intermezzo, illustrating Justice Jackson's vision at work in the legal thinking of William H. Rehnquist, who was at time of *Youngstown* one of Jackson's clerks, but later a senior executive-branch lawyer, an associate justice, and ultimately the Chief Justice of the United States. Called on to provide a legal justification for President Richard Nixon's decision to send US troops into Cambodia in 1970, a decision that was roundly condemned in many circles both on political and constitutional grounds, Rehnquist wrote a careful legal opinion in the Jackson vein that provided a persuasive legal rationale for Nixon's action while at the same time confining the precedential significance of the president's decision so as to leave unimpaired the authority of Congress. I also review Rehnquist's opinion for the Court in a 1981 case that confirms his adherence to Jackson's vision.

Chapter four addresses the ultimate prescriptive question: is my claim persuasive that Justice Jackson's vision is the best interpretation of our constitutional system? I present my argument that it is in terms of whether Jackson's perspective makes sense. The question has two separate aspects. Does Jackson's vision give us a coherent account of the constitutional text, our legal traditions, and our institutional practices? And is his account normatively attractive in that it enables us to resolve difficult constitutional issues, provide intelligent legal guidance to the executive branch, and reconcile the demands of national security and the authority of the

8. Jackson, at 646, *id.* at 655.

law? I show that the answer is, in both respects, a resounding yes. Our system of dispersed yet interdependent national security powers, as Jackson understood it, empowers a robust and energetic executive fully capable of taking the initiative in protecting national security while doing so with full recognition of the preeminent role of the legislative process as the ordinary means of articulating American national security goals and commitments. Rather than resting on a self-defeating dualism in government, Jackson's vision safeguards the interdependence and cooperation between Congress and the president that are crucial to protecting the safety of this Republic.