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Constitutionalism, Democracy and Foreign Affairs†

LOUIS HENKIN*

The title for these remarks is the title of my recent small book.¹ I do not propose to offer you a reading from that book but to introduce you to its principal themes.

The book was published during celebratory times. Our celebrations began in 1976 with the bicentennial of the Declaration of Independence. The year 1987 was the bicentennial of the Constitutional Convention, 1989 of the coming into effect of the Constitution, and 1991 of the Bill of Rights.

My book is not celebratory. In introducing it, I said:

During these Bicentennial years, we frequently have been reminded of Gladstone's famous compliment to the United States Constitution and its framers: the Constitution, he said, is "the most wonderful work ever struck off at a given time by the brain and purpose of man." Americans have been celebrating the Bicentennial in that spirit, with visible pride and audible self-satisfaction, and with worshipful appreciation of the wisdom and prescience of the framers. Infrequent reminders that the Constitution which they framed was the product of its time, that it reflected some values we now recall with deep embarrassment—slavery, limited suffrage, the subordination of women—are decried as spoilsport. Few have apparently considered this to be the time even to recall that in important details the Constitution that the founders framed was not a perfect realization of ideals and principles, but as Charles and Mary Beard described it, "a mosaic of everyone's second choices." Not many, in the academy or in public life, have asked whether the Constitution might require tuning if not overhaul for its third century.

Students of foreign affairs, in particular, might voice a more sober mood. They could not help but note that during these Bicentennial years Americans breathed the Iran-contra miasma; followed with pained incomprehension the struggles of President and Congress over Nicaragua and her neighbors; heard the President and the Senate shout disagreement over presidential authority to interpret (reinterpret) the Anti-Ballistic Missile (ABM) Treaty; and watched the United States slip into the Persian Gulf and the Iran-Iraq War. During these years many have wondered who was in charge in Washington. The country has not verged on constitutional crisis, but few have been moved to declare that the

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1. L. HENKIN, *CONSTITUTIONALISM, DEMOCRACY AND FOREIGN AFFAIRS* (1990) [hereinafter *CONSTITUTIONALISM*]. I draw here also on other writings, notably L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* (1972) [hereinafter *FOREIGN AFFAIRS*].

constitutional arrangements for conducting the foreign affairs of the United States are worthy of celebration.²

1.

The confusion and uncertainties I have noted reflect "tension in the twilight zone,"³ the zone where the respective powers of the President and of Congress are not clear or are not agreed and where both branches keep tugging at the blanket of authority. The Constitution does not speak of any zone of uncertain or concurrent authority. That there is such a zone is our conclusion from what the Constitution does and does not say.

The Constitution allocates some powers we would denominate "foreign affairs authority" to Congress, some to the President. Congress has power to regulate commerce with foreign nations, to define offenses against the law of nations, to declare war. General powers of Congress have important applications and implications for foreign affairs, notably the power to spend for the common defense and the general welfare.⁴ The President is given the power to make treaties and appoint ambassadors. He⁵ is to receive ambassadors. He is designated Commander in Chief of the Army and Navy.⁶

On the face of the Constitution, I note, Congress has the important powers—to regulate, to spend money, to go to war.⁷ The President has comparatively little authority, even in foreign affairs. He can appoint ambassadors, but only with the advice and consent of the Senate. He can make treaties, but only with the advice and consent of the Senate. That he was designated Commander in Chief of the Army and Navy, it appears, was not intended to confer large power: the President would command the armed forces if Congress raised and supported an army and provided and maintained a navy; he would command them in war if Congress declared it.⁸ That is the sum of it. The basis in the Constitution for the common notion that the

2. CONSTITUTIONALISM, *supra* note 1, at 1-2 (footnotes omitted). After I wrote these paragraphs, we also found the President and Congress sharply disputing the President's authority to go to war against Iraq over Kuwait.

3. The phrase is the title of Chapter 1 of my most recent book. The existence of the twilight zone was suggested by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring).

4. U.S. CONST. art. I, § 8, cl. 1.

5. The Constitution refers to the President as "he." *Id.* art. II. To date, no woman has been President, but in principle, and doubtless for the future, one should speak of "he or she."

6. *Id.* art. II, § 2.

7. *Id.* art. I, § 8.

8. *See id.*; *see also* FOREIGN AFFAIRS, *supra* note 1, at 50-51.

President has "plenary," "exclusive" power in foreign affairs⁹—power that President Truman once said would make Genghis Khan green with envy—is something of a mystery, which books and articles have sought to resolve.

Beyond doubt, presidential authority in foreign affairs has grown during 200 years. We now say that the president "conducts foreign relations" and that he "makes foreign policy," activities and functions not mentioned in the Constitution. Under a Constitution committed to the principle of enumerated powers,¹⁰ the sources of the power to conduct foreign relations and make foreign policy are not obvious; much that we would characterize as foreign affairs power is not expressly allocated or even mentioned.

The growth of presidential power is not difficult to explain.¹¹ The silences and lacunae in the Constitution, the nature of foreign affairs, and the character of the presidential office combined to invite large claims by the President. Foreign relations are largely informal, private, often confidential matters between officials and diplomats. The officials and diplomats acting for the United States are appointed by the President, and they are responsible to him. Because they report to him, the President has had a near-monopoly of information—surely before the age of television and airplanes. The President is the "sole organ" of communication with other nations, and he alone speaks for the United States.¹² He can act informally, expeditiously, secretly. Congress cannot act informally, cannot act expeditiously, and—we know—not secretly. The President, finally, is always in session. Congress is not; and early in our history, surely, one could not convoke Congress by telephone, and its members could not return to Washington by airplane. That the President was always in session and Congress was not meant that he could—had to—make many decisions without consulting Congress. Generally, Congress acquiesced. Increasingly, Congress also delegated large authority to the President.

9. In a famous dictum, the Supreme Court referred to the "very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). The reference to the President as "sole organ" derives from a statement by John Marshall when he was a member of the House of Representatives and appears to refer to the President as the organ of communication between the United States and other nations. 10 *ANNALS OF CONG.* 613 (1800), *reprinted in* 5 *Wheat*. Appendix note 1, at 26 (1820). The Court's statement refers to the President also as the "sole representative" of the United States. Neither *Curtiss-Wright* nor Marshall suggested that as "sole organ" the President had power to make law relating to foreign affairs or to determine foreign policy.

10. *Curtiss-Wright* propounded the theory that the foreign affairs powers of the United States do not derive from the Constitution and that the principle of enumerated powers does not apply. 299 U.S. at 315-18. That theory has not been revisited by the Court or subjected to critical scholarly consideration. See *FOREIGN AFFAIRS*, *supra* note 1, at 15-28.

11. See, e.g., *FOREIGN AFFAIRS*, *supra* note 1, at 37-38.

12. See *supra* note 9.

The result is a history of presidential aggrandizement, with constitutional theory developing to justify it.¹³ That the Constitution explicitly grants the President little independent authority in foreign affairs has proved to be no obstacle to the growth of presidential power. Early, presidents ceased to seek and cite constitutional sources for their authority. Soon, when presidential authority was challenged, the issue became not where his authority came from but rather whether anything in the Constitution denied him authority. Since there are few explicit limitations on presidential power, one issue became whether the Constitution denied him power by implication from its grants of power to Congress. In recent decades the President's claims have become more daring, and Congress has become more resistant, raising a second, different issue: Can Congress control the President's actions in foreign affairs, and can the President act without regard to limitations imposed by Congress? Under those two headings—what the President can do in the silence of Congress, and what he can do regardless of Congress—lie major constitutional issues of our time.

2.

Presidents have respected the clear limitations imposed by the Constitution. In the face of explicit prohibition,¹⁴ presidents have not claimed the right to spend money without an appropriation by Congress. Presidents have also respected limitations on their authority clearly implied by grants of power to Congress. Since “[a]ll legislative [p]owers” are vested in Congress, and Congress has the power “[t]o regulate [c]ommerce with foreign [n]ations,”¹⁵ presidents have not claimed authority to regulate foreign commerce or to make other laws in the United States, even for foreign affairs purposes.¹⁶ Since Congress is given the power to declare war, presidents have not claimed the right to go to war on their own authority.¹⁷ But those agreed limitations

13. Textual support for presidential power was found principally in Hamilton's reading of the “executive power” clause as a grant of power to the President, including foreign affairs power. Madison disagreed sharply. See also *Youngstown Sheet & Tube*, 343 U.S. at 641 (Jackson, J., concurring). See generally FOREIGN AFFAIRS, *supra* note 1, at 37-66.

14. U.S. CONST. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in consequence of Appropriations made by Law.”).

15. *Id.* art. I, §§ 1, 8.

16. In *Youngstown Sheet & Tube*, 343 U.S. 579 (1952), the Court held that seizing private steel mills in order to resolve a labor dispute was a legislative act that the President could not do. The President had claimed that operating the steel mills was essential to fighting the Korean War.

17. In a case arising out of the Gulf War, for the first time to my knowledge, the President's men—those who write briefs for him—claimed that the President has an independent power to go to war. Judge Greene rejected that claim. *Dellums v. Bush*, 752 F. Supp. 1141 (1990). I do not think that claim has any respectable support. In that instance, others supported the power of the President to go to war on his own authority because the United Nations Security Council

apart, presidents in effect have asserted a plenary power to conduct foreign relations and to make foreign policy. Then, putting on another hat as "Commander in Chief," they have claimed also the right to deploy forces for their foreign policy purposes, "short of war."

These claims of presidential authority, I emphasize, arose when Congress was silent. With the end of the Vietnam War and the Watergate scandal, however, Congress stopped being silent and began to try to keep power from slipping from its hands. Congress began to deny, limit, and regulate presidential authority in foreign affairs. The precedents supporting presidential power built up over 200 years became essentially inapplicable, and surely insufficient, since they were instances of presidential action when Congress was silent. Where Congress has legislated, presidents must not only claim authority to act without reference to any explicit grant of power in the Constitution, but presidents would have to claim that presidential power is exclusive and not subject to control by Congress.

Presidential challenges to congressional regulation have been prominent in respect of two subjects. Congress has attempted to regulate the use of covert intelligence activities, also known as "dirty tricks," such as the mining of Nicaraguan harbors and the actions involved in the Iran-Contra scandal.¹⁸ To limit United States involvement in hostilities, Congress has also asserted its war powers.

In the War Powers Resolution of 1973, Congress declared that, without congressional consent, the President may not introduce United States armed forces "into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances."¹⁹ Presidents have not liked that law. President Nixon vetoed it, saying it was unconstitutional. The veto message did not state why it was unconstitutional, only that it would take from the President powers that he "has properly exercised under

had authorized the United States to use force to liberate Kuwait. In my view the President did not have authority to go to war because the Security Council authorized it. See Henkin, *Congress, the President and the United Nations*, 3 *PACE Y.B. INT'L L.* 1, 20-21 (1991). In any event, there have been only two such instances: Korea (1950) and Iraq (1990). Those special cases apart, it is virtually universally accepted that the President cannot go to war on his own authority.

The Constitution also requires the consent of the Senate to appointments and treaties. Presidents have sometimes appointed special agents for diplomatic missions without Senate consent. They have also made many international agreements as executive agreements on their own authority. Generally, however, presidents have not made appointments to permanent, important office without the consent of the Senate or made international agreements that under the Constitution were properly treaties requiring Senate consent. There have been no disputes about the constitutionality of such presidential acts in recent years. See *FOREIGN AFFAIRS, supra* note 1, at 45-46, 176-87.

18. Congress has distinguished such activities from intelligence gathering, a traditional executive activity that Congress has respected from our national beginnings.

19. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-48 (1988)).

the Constitution for almost 200 years."²⁰ I think Mr. Nixon's statement was misleading, if not inaccurate. The President has not exercised some of the powers at issue for 200 years, and he did not exercise any of them in the face of congressional prohibition or regulation. If indeed the President exercised such power "properly" when Congress was silent, he can no longer exercise it "properly under the Constitution" when Congress declares that he shall not.²¹ In the history of the United States, there is no precedent to support the proposition that the President can act in disregard of what Congress legislates within its constitutional authority.

The War Powers Resolution is not unconstitutional. It is an act of Congress to regulate the war powers of the United States. If, in the absence of congressional regulation, presidents had assumed authority to introduce United States forces into some hostilities (short of war), Congress under its war powers may insist that the President not do so because hostilities may lead to war. One or more of the provisions of the resolution—such as the "legislative veto"²²—may be questionable, but the problems with the War Powers Resolution as a whole are not constitutional, but political problems, practical problems, drafting problems. Presidents would like to see it repealed; that would be unfortunate. The resolution suffers critical ambiguities, and Congress should revise it and take other steps to ensure that presidents take care that it be faithfully executed.

3.

Now to the title of my book and its relevance to this discussion. The title means to suggest what is perhaps a novel principle of constitutional construction. We normally read the Constitution by reference to the text, and the text on our subject is sparse and laconic, giving the President very little. The intent of the Framers, too, gives the President little.²³ Two hundred years tell a history of expanding presidential power, but there is no history, no precedent for presidential power in foreign affairs in the face of a congressional "no."

The new, small suggestion encapsulated in the title of my book is that there ought to be—are—two additional principles of constitutional interpretation. They cannot modify the text of the Constitution: when there is text, we respect it (or are stuck with it). But when the text is silent or uncertain,

20. Veto Message, War Powers Resolution, 31 CONG. Q. WEEKLY REP. 2855 (Oct. 24, 1973).

21. Congress overrode Nixon's veto. See 119 CONG. REC. 36,198, 36,221 (1973).

22. War Powers Resolution, 50 U.S.C. § 1545(c) (1988); see *INS v. Chadha*, 462 U.S. 919 (1983).

23. Original intent in the interpretation of the Constitution has been a favorite theme of the Executive Branch in the past decade, but one does not hear a word about original intent as regards the conduct of foreign affairs. The reason is clear: there is no original intent supporting the large powers the President has acquired.

two themes ought to be relevant: one is constitutionalism, the other, democracy.

Constitutionalism, as the newspapers announce, has become the commanding ideology of our time. The principal alternative model, Communism, is dead, and political leaders who used to wave the banner of "socialism" to justify authoritarian repression and human rights violations are silenced. Virtually every state now has a constitution, and every political leader proclaims commitment to constitutionalism, to the rule of law. For the United States, I stress, that has been our commitment from the beginning. That *was* the intent of the Framers, and surely it is legitimate to resort to principles of constitutionalism to help interpret the Constitution.

"Constitutionalism" is nowhere authoritatively defined. Clearly, it includes a principle that government is legitimate only in accordance with the Constitution. Constitutionalism implies also limited government, notably by checks and balances.²⁴ Our constitutionalism, from the beginning, sought to prevent too much power from accumulating in any political institution, in any one pair of hands. If, then, there were any doubts in text, or in original intent, or in history, the principle of constitutionalism requires that the Constitution be construed to preclude unlimited power, even in foreign affairs, perhaps especially in foreign affairs. To me that argues against large independent presidential power that can be exercised in the face of denial by Congress acting within its constitutional authority. In some respects, it argues even against presidential action without affirmative congressional approval or participation. Certainly, to allow the President to take the United States to war on his own authority would be deeply "anti-constitutionalist."

The second principle of constitutional interpretation I offer is democracy, also part of the reigning ideology today. Here we leave the Framers behind. They were republicans, not democrats.²⁵ The Framers were committed in principle to popular sovereignty ("We the People . . . do ordain and establish this Constitution"²⁶), but their conception of popular sovereignty and how it was to be reflected and represented was narrow. Suffrage was strictly limited: generally, men without sufficient property did not vote, women did not vote, slaves did not vote, and in some states free blacks did not vote. The Framers had a little sympathy for representative government, but only a little. In the Constitution, only one institution was designed to be "representative," therefore called the House of Representatives. The Senate

24. See Justice Brandeis's dissent in *Myers v. United States*, 272 U.S. 52, 293 (1926): The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.

25. See, e.g., *THE FEDERALIST* No. 10 (J. Madison).

26. U.S. CONST. preamble.

represented states, not people. The President represented no one. Even in the House of Representatives, representation was not reflected in suffrage: only those—few—whom the states allowed to vote for state legislators could vote for United States Representatives.²⁷ Many of the governed were not even counted for the purpose of being represented.²⁸

Our polity has changed. Now everybody counts and everybody votes. Senators are now elected by vote of the people, and, in fact, though not in theory or in form, the President too is now elected by the people. We are now committed to democracy. Principles of democracy, then, I suggest, ought to illuminate our interpretation of the Constitution and help to determine the allocation of authority when text, and original intent, and history are inconclusive.

Ours, however, is an extraordinary kind of democracy, different from most others. Ours is a dual democracy, a democracy represented separately and differently by Congress and by the President. In my view, representation by Parliament—"Congress"—better expresses democracy than does a quadrennial plebiscite for the President. In any event, when the text of the Constitution does not compel the contrary, our democracy is favored when President and Congress participate in the making of major national policy. In particular, important decisions in foreign affairs, certainly a decision to go to war, should require the consent and the participation of both representative democratic bodies, the Presidency and the Congress.

4.

My title implies more.²⁹ In a word, constitutionalism requires respect for individual rights. Our representative constitutional democracy is subject to individual rights in foreign as in domestic affairs. Courts should give no undue deference to either the Executive or to Congress at the expense of individual rights, in foreign as in domestic affairs.

A final word. Constitutionalism requires that conformity to the Constitution be monitored. Judicial review is as necessary in foreign as in domestic affairs. The courts ought not refuse to adjudicate issues of power or of rights, of constitutionalism or democracy. I have long thought that the "political question" doctrine is a mistake, even in traditional jurisprudential terms.³⁰ When invoked to preclude adjudication of competing claims to authority or individual rights, it is an important derogation from constitutionalism in a democracy subject to rights, in foreign as in domestic affairs.

27. U.S. CONST. art. I, § 2, cl. 1.

28. Only three-fifths of slaves counted. U.S. CONST. art. I, § 2, cl. 3.

29. See CONSTITUTIONALISM, *supra* note 1, at 69-92.

30. See Henkin, *Is There a 'Political Question' Doctrine?*, 85 YALE L.J. 597 (1976).