

The Uncertain Career of Executive Power

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Essays in constitutional law are often about something more than the historical texts at hand. Professor Michael Glennon's 1988 essay—*Two Views of Presidential Foreign Affairs Power: Little v. Barreme or Curtiss-Wright?*¹—was a heartfelt effort to challenge the existence of an independent foreign affairs power in the Presidency, especially in the deployment and use of military force. Its argument was shaped around the controversy of the day—the effort by the Reagan White House in “Iran Contra” to deliver covert aid to anti-communist rebels in Nicaragua despite Congress's bar to American involvement. For any earthly observer, a well-tempered theory of separation of powers is likely to vary, at least in detail, according to the substantive values at stake. Still, it seems a little hard to blame Justice George Sutherland—as author of the famous “sole organ” theory of American presidential power in foreign affairs—for what went right or wrong with our policy in Nicaragua.

Despite the sober subject matter, it might take a Noel Coward play to capture the to-and-fro of Presidents and Congresses in foreign affairs decisions. Congressmen want final political authority over the deployment of American armed forces in areas where combat may occur,² until they discover that the political risks are formidable. Congress has authorized a conflict in its early stages, supporting earmarked appropriations, but then winsomely asserted that the war belongs to someone else.³ With equal fallibility, American Presidents and their courtiers have been tempted to act alone in areas where Congress would freely offer support after proper briefing and consultation. The marriage of the Executive and the Congress is as complicated as any other.

But frequent missteps in execution at both ends of Pennsylvania Avenue are no reason to doubt the seriousness of the theory of an independent executive power in foreign affairs. John Locke spoke of a “federative” authority that has no counterpart in a narrowed account of executive powers.⁴

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1. Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power: Little v. Barreme or Curtiss-Wright?*, 13 YALE J. INT'L L. 5 (1988).

2. See War Powers Resolution of 1973, 50 U.S.C. § 1541 (1994).

3. See JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993).

4. See JOHN LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT*, ch. 12, sec. 147 (1690)

The American Constitution was framed with the failures of the Articles of Confederation well in mind, including the difficulties of prosecuting a revolutionary war through a weak Executive. At a time when members of Congress met only in season, and were separated from the national capital by days of travel from their constituent districts, it was hardly surprising to posit some independent capability and emergency power in the Chief Executive.⁵ And in two centuries since then, the conduct of diplomacy—squarely committed to the President—sometimes has required the threat or intimation of force. Military power and diplomacy are linked—whether in discouraging European nations from meddling on the North American continent in the early republic, or in cautioning Beijing against pressuring Taipei, by moving American carrier battle groups to the Taiwan Straits in 1996.

The power of Congress to declare war has been infrequently exercised. Presidents face many short-term situations that depend upon the deployment of military assets to signal commitment and deter adversaries. These are not “wars”—even if limited force is ultimately used⁶—and requiring a declaration of war would often be a dangerous escalation. Asking the President to resort to Congress for a more graduated authorization of the use of force may be politically wise, but its proponents gain no comfort from the literal text of Article I, Section 8.

In *Curtiss-Wright*,⁷ Justice Sutherland rather modestly argued that Congress can choose to delegate to the President a greater discretion in foreign affairs decisions (in particular, in limiting arms exports) than might be permissible in a domestic matter. (In its fretful worry about delegation, the case also reveals itself as a period piece of the New Deal.) The justification for broad delegation is founded on the need for flexibility, action, and confidentiality—the very qualities of foreign affairs that may also justify a broad independent power in the Presidency. Sutherland argues that there is an independent foreign affairs competence in the Executive—“plenary,” “exclusive,” and certainly, “delicate”—based on the President’s necessary role as “the sole organ of the federal government in the field of international relations.”⁸

Our contemporary hard-wired American democracy highly values transparency and local voice. In the midst of a non-stop on-air national town meeting, it may indeed be “delicate” to talk about independent executive

(“These two powers, executive and federative . . . are always almost united. . . . [W]hat is to be done in reference to foreigners, depending much upon their actions and the variation of designs and interests, must be left in great part to the prudence of those who have this power committed to them, to be managed by the best of their skill for the advantage of the commonwealth.”).

5. Cf. U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress, . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”).

6. See generally DEP’T OF STATE, HISTORICAL STUDIES DIVISION, ARMED ACTIONS TAKEN BY THE UNITED STATES WITHOUT A DECLARATION OF WAR, 1789–1967 (1967); MILTON OFFUTT, THE PROTECTION OF CITIZENS ABROAD BY THE ARMED FORCES OF THE UNITED STATES (1928); RIGHT TO PROTECT CITIZENS IN FOREIGN COUNTRIES BY LANDING FORCES: MEMORANDUM BY THE SOLICITOR FOR THE DEPARTMENT OF STATE (3d rev. ed. 1934).

7. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

8. *Id.* at 320.

power. Yet the President is as democratically elected as the Congress. And many of the founders' warnings linger in the observed facts of real life. Members of Congress can be local in their concerns. The bluff and bargaining necessary in foreign relationships often depends on confidential sources of information that will turn to ashes if they are imprudently disclosed. And the recognized problem of "collective action" frequently hobbles a Congress, since no single member has to take responsibility for the failure to act in the face of an urgent challenge.

The shadowy life of executive constitutional power is, in part, a reflection of political discretion. At the beginning of the nineteenth century, even the English king's law officers advised that it was wiser to revert to the Parliament, where possible, than to assert infrequently used prerogative powers.⁹ That is all the more true in a twenty-first-century democracy. But the "delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations" of which George Sutherland wrote,¹⁰ was held in high esteem by men as politic as Alexander Hamilton and John Marshall. Congressman Marshall's famous "sole organ" speech,¹¹ upon which Sutherland drew, concerned the power of the President to surrender a defendant to face foreign trial and execution, even without an implementing statute by Congress to regulate the terms of criminal arrest under the hated Jay Treaty.¹² John Marshall's view of presidential power was broad indeed, for he contemplated a final authority in the President to determine certain questions of treaty law, beyond the power of judicial revision.¹³

The Great Chain of Being for the "sole organ" theory leads back one step more, to the famous text upon which Marshall drew in his description of the President's powers—and this was Hamilton's celebrated *Pacificus* essay. Hamilton hails the President

as the *organ* of intercourse between the Nation and foreign Nations—as the interpreter of the National Treaties in those cases in which the Judiciary is not competent, that is in the cases between Government and Government—as that Power, which is charged with the Execution of the Laws, of which Treaties form a part—as that Power which is charged with the command and application of the Public Force.¹⁴

For Hamilton, the Constitution's vesting of "the EXECUTIVE POWER . . . in the President" is a "comprehensive grant."¹⁵ Article II omits any exhaustive enumeration of his tasks precisely because the President's residual power

9. See generally LAW OFFICERS' OPINIONS TO THE FOREIGN OFFICE, 1793–1860 (Clive Parry ed., 1970–73).

10. *Curtiss-Wright*, 299 U.S. at 320.

11. See 10 ANNALS OF CONG. 613–14 (1800).

12. See Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229 (1990).

13. See *id.* at 348–49.

14. Alexander Hamilton, *Pacificus No. I* (June 29, 1793), reprinted in 15 THE PAPERS OF ALEXANDER HAMILTON 33, 38 (Harold C. Syrett ed., 1969).

15. *Id.* at 39.

must treat the matters that are too irregular for legislation.¹⁶ The President must serve (even if reluctantly so) as a well-spring, when other mechanisms of government have failed.

Hamilton's views were disputed in his own day by James Madison, and by Thomas (although not President) Jefferson, as well as other Republicans. (There is nothing new, under the sun, in most corners of constitutional law.) The early Republicans saw the Presidency as far more robotic, carrying out appointed ministerial duties set by Congress. Michael Glennon thus enjoys distinguished company in a preference for legislative dominance. But the constructive tension between Hamiltonian and Jeffersonian views of democratic government should not obscure the somber consequences that attach to a democratic perfectionism that depends solely on Congress.

Indeed, Justice Robert Jackson could be enlisted as an ally in this view. A close reading of his famous concurrence in the *Steel Seizure Case*¹⁷ shows a remarkable latitude for executive power. The rule is famous as a triptych, stating in outline that the President's power is at its apex when authorized by Congress, at its nadir when opposed by Congress, and of middle strength when Congress is indifferent. Yet the opinion is really about five categories, not three, including several different varieties of Congressional silence. An American President is entitled to act upon his good-faith reading of constitutional power, and Justice Jackson allows him plenty of room to forge ahead so long as Congress has not attempted to stop him dead in his tracks. In Justice Jackson's account, the President has greatest power when he acts in accordance with the "expressed *or implied* authorization" of Congress.¹⁸ His power ebbs to its lowest mark when he acts in opposition to the "expressed *or implied* will" of Congress.¹⁹ And of course, a Congress that has no view is also silent. Congress is not put to much work in this model. Its wishes can be left hanging in the air, in the mysterious clouds of inchoate legislative history, without the burden of coming to an actual decision.

The real lesson of the *Steel Seizure Case* is, rather, that citizens are off-limits. The constitutionally protected entitlements of citizens, in liberty and property, may sharply limit the domain of presidential foreign affairs power. The *Steel Seizure Case* demanded clearer authorization for the war in Korea, and for the seizure of steel plants, than Harry Truman had. When citizens are burdened and gain standing, the locus of decision may switch from the Oval Office to a federal courtroom. But in the absence of such domestic effect a President retains the power of initiative, even under Justice Jackson's test, and is able to read Congress's silence as he believes is fair.

It is true, as Professor Glennon suggests, that a theory of sovereignty does not tell us which branch should exercise a nation-state's inherent powers.

16. One might note, here, the distinction drawn between *jurisdictio* and *gubernaculum* in English constitutional theory. See CHARLES HOWARD MCILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* 84-85 (rev. ed. 1947).

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

18. *Id.* at 635 (emphasis added).

19. *Id.* at 637 (emphasis added).

Indeed, the Supreme Court has used an implicit theory of sovereignty to strengthen Congress's own legislative powers as well, permitting Congress to legislate in areas that are otherwise inadmissible, so long as it is in execution of a foreign agreement.²⁰ But the latitude allowed to Congress, when it acts in foreign affairs, may also be a clue to the range permitted to the President.

In the current period, the views of the Executive and the Senate have frequently diverged on proposed treaty engagements. The place of executive power, in these circumstances, may gain a kinder hearing. One observer of the Washington scene has speculated that in the future the United States will rarely be able to ratify multilateral treaties, but rather will have to seek engagement with our allies and arrangement with our adversaries through parallel understandings, gentlemen's agreements to abide by treaty norms even when the treaty cannot be sworn to. One assumes that Professor Glennon's skepticism towards executive power may well adapt to the times.

It is not obscurantism to suppose that some questions in constitutional law should never be finally answered. Competing theories of legitimate power are part of what helps to provide political balance. An unbounded sense of constitutional entitlement may tempt a beneficiary branch to act immodestly, without the chastened sense that acceptance will turn upon good judgment as well as procedure. Hence, even in disagreement, one may salute Professor Glennon's eloquence and purpose, and, of course, celebrate the role of *The Yale Journal of International Law* in continuing the debate.

20. See *Missouri v. Holland*, 252 U.S. 416 (1920).