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Focus: Foreign Affairs Under the United States Constitution

Introduction

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Events during the bicentennial year of the United States Constitution focused America's attention on the way in which that document both authorizes and structures an ongoing institutional struggle for dominance in the realm of foreign affairs. As the year progressed, constitutional clashes between the President and Congress spilled across the spectrum of U.S. foreign policymaking—covert operations, warmaking, arms control, foreign assistance, immigration, international human rights, emergency economic power, and international trade—even as those clashes marched across the front pages of the *New York Times*. The term “Iran-*Contra* affair” alone came to encompass a welter of statutory and constitutional disputes over the legal rights and duties of all three branches of the federal government: over the National Security Council's legal authority to conduct covert operations and the President's constitutional obligation to take care that the laws be faithfully executed; over Congress' constitutional authority to condition its power of the purse and its statutory right to be notified and consulted about arms sales and intelligence operations; and over the federal judiciary's constitutional authority to appoint special prosecutors and its duty to adjudicate or abstain in lawsuits engendered by foreign policy crises.

At only slightly lower volume, the constitutional colloquy over other foreign relations questions shifted from forum to forum and from confrontational to cooperative mode. While Congress debated whether to support a policy of U.S. naval protection of neutral tankers in the Persian Gulf, congressmen sued in federal court to force the President to acknowledge the War Powers Resolution's application to that situation.¹

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1. See *Lowry v. Reagan*, 56 U.S.L.W. 2376 (D.D.C. 1987) (dismissing the complaint).

The contest between the Legal Adviser to the State Department and the Chairman of the Senate Armed Services Committee over the compatibility of the 1972 Anti-Ballistic Missile Treaty with the Strategic Defense Initiative cast its shadow upon the Senate's advice and consent to the Intermediate Nuclear Forces treaty, which was signed in the waning days of the bicentennial year.² Questions about the constitutionality of various legislative constraints upon presidential trade management hovered over congressional consideration of an omnibus international trade bill and the Canada-United States Free Trade Agreement.³ At times, even the Senate Judiciary Committee hearings on the confirmation of Robert Bork as an Associate Justice of the United States Supreme Court became a constitutional seminar on the respective roles of individual rights, the courts, Congress, and the President in the conduct of our nation's foreign affairs.⁴

Almost without exception, the antagonists in these bicentennial controversies conceded that constitutional law matters in foreign affairs; far from denying the relevance of that body of law to their conduct, most of them expressly invoked its support.⁵ But even if the institutional combatants have traditionally understood *that* constitutional law matters in

2. Treaty Between the United States and the Union of Soviet Socialist Republics on the Elimination of Their Intermediate-Range and Shorter-Range Missiles, signed Dec. 8, 1987. 23 WEEKLY COMP. PRES. DOC. 1459 (Dec. 8, 1987). Compare Nunn, *The ABM Reinterpretation Issue*, 10 WASH. Q. 45 (Autumn 1987), with Sofaer, *The ABM Treaty: Legal Debate in the Political Cauldron*, 10 WASH. Q. 59 (Autumn 1987).

3. For a discussion of some of these questions, see Koh, *The Legal Markets of International Trade: A Perspective on the Proposed United States-Canada Free Trade Agreement*, 12 YALE J. INT'L L. 193, 201-18 (1987).

4. That Judge Bork's elevation would have profoundly affected the institutional balance of power in foreign affairs emerged from his publicly stated pro-Executive views on war powers, foreign intelligence, national security, and the unconstitutionality of congressional standing and the Independent Counsel Act. The impact a Justice Bork would have had is suggested by two D.C. Circuit decisions under review in the Supreme Court's 1987 Term. See *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), *aff'd by an equally divided Court*, 108 S. Ct. 252 (1987) (upholding, over Judge Bork's dissent, a challenge to the administration of the visa denial provisions of the McGovern Amendment to the McCarran-Walter Act); *Finzer v. Barry*, 798 F.2d 1450 (D.C. Cir. 1986), *cert. granted sub nom. Boos v. Barry*, 107 S. Ct. 1282 (1987) (opinion by Judge Bork upholding constitutionality of District of Columbia statute banning hostile picketing near foreign embassies). In each case, Judge Bork favored executive prerogative in foreign affairs over claims of individual right.

5. The exception, of course, was National Security Council staff secretary Fawn Hall, who told the congressional committees investigating the Iran-*Contra* affair that sometimes in the conduct of foreign policy, the President must obey a law higher than the Constitution. Far more typical, however, was Lt. Colonel Oliver North, who claimed that "[w]ithin the limits of the constitutional authority to prosecute the foreign policy of the United States, the President has a very wide mandate to carry out activities secretly or publicly, as he chooses. . . . I do not believe that the things that we did . . . were in any way prohibited . . ." O. NORTH, *TAKING THE STAND* 523, 525 (1987) (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)).

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foreign affairs, what they have comprehended far less clearly is *what* that constitutional law is.

At the heart of the problem lies the Constitution's astonishing textual brevity regarding the allocation of foreign affairs authority and obligations among the branches. Far from resolving most debates over which institution may take the lead in the conduct of foreign affairs, reference to the constitutional text merely opens them.⁶ To fill the textual silences, the President and Congress have invariably turned to judicial precedent and quasi-constitutional "custom"⁷ to find support for their claims of constitutional right. Yet both judicial precedent and institutional practice have their own limitations as reliable sources of foreign relations law. The judicial precedents are not only sparse, but tend to employ sweeping language that renders them subject to multiple and self-serving interpretation.⁸ Studies of congressional and executive practice in foreign affairs, like studies of state practice in international law, often fail to reveal

6. As Professor Henkin has noted, "[T]he constitutional blueprint has proved to be unclear and incomplete as regards foreign affairs and there is no agreed guiding principle to help make its provisions clear, or to fill the lacunae." Henkin, *Foreign Affairs and the Constitution*, 66 FOR. AFF. 284, 285 (Winter 1987/88).

7. Under the heading of "quasi-constitutional custom," I would of course include executive practice of which Congress has approved or in which it has acquiesced. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring) ("[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, . . . making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President by § 1 of Art. II."). See generally Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109 (1984). But the category of "customary constitutional law" could just as easily embrace "constitutional 'framework' legislation which interprets the Constitution by providing a legal framework for the governmental decision-making process." Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463, 482 (1976) (citation omitted). Some framework statutes, such as the War Powers Resolution, may be of dubious constitutionality. But the extent to which the President has historically complied with some of the Resolution's provisions, particularly the reporting requirements, has bolstered Congress' claim that those provisions are constitutional. See Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 104 & n.17 (1984). Finally, some of the most frequently cited customary "norms" in the foreign affairs realm have emerged from recent lower court judicial opinions that have ruled on the merits of a foreign affairs claim, but then been vacated by the Supreme Court on procedural grounds. See, e.g. *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1985), *vacated as moot sub nom. Burke v. Barnes*, 107 S. Ct. 734 (1987); *Ramirez v. Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984), *vacated and remanded for reconsideration in light of subsequent legislation*, 105 S. Ct. 2353 (1985); *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir.), *vacated and remanded with directions to dismiss the complaint*, 444 U.S. 997 (1979). Although strictly speaking, those vacated opinions have no precedential weight, the President and Congress frequently cite them against one another as predictions of how a court would rule if a particular constitutional claim were to arise again in the future.

8. The most famous example is Justice Sutherland's sweeping description of 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), a quotation popularly known among some government lawyers as the "*Curtiss-Wright*, so I'm right" cite." Cf. *supra* note 5.

whether and when national institutions act out of a sense of political prudence, as opposed to legal constraint.

In recent years, this Journal has examined the law-shaping force of numerous international "incidents", "regarding . . . the incident as a basis for the systematic observation and generalized understanding of international law as a distinctive type of law."⁹ The five articles in this Focus section carry forth this tradition in the constitutional realm, by exploring the ways in which interpretations of constitutional text, judicial precedent, and quasi-constitutional custom shape and are shaped by specific U.S. foreign policy initiatives. In *Two Views of Presidential Foreign Affairs Power*, Professor Glennon begins this exploration with an analysis of two leading Supreme Court decisions that set forth competing understandings of the exclusive and concurrent constitutional powers of the President and Congress; he reviews the claim that the President possesses a plenary unenumerated foreign affairs power and finds it wanting. Jeffrey Meyer's *Congressional Control of Foreign Assistance* and Tanya Broder's and Bernard Lambek's *Military Aid to Guatemala* describe the constitutional and statutory distribution of institutional authority over foreign economic and military aid. Both articles review the control devices by which Congress has attempted to maintain its oversight role in this area and the techniques that the Presidency has successfully developed to evade each of these devices. The two remaining articles inquire into the power of constitutional rights, with and without judicial enforcement, to check institutional prerogatives. Edward Tanzman, in *Constitutionality of Warrantless On-Site Arms Control Inspections in the United States*, explains how the Fourth Amendment might restrict the United States' freedom to offer and enforce on-site inspection provisions in arms control treaties. The author concludes by suggesting technological, contractual, and legislative solutions that might minimize this conflict. Finally, in *Economic Sanctions, Domestic Deprivations, and the Just Compensation Clause*, Alexander Cohen and Joseph Ravitch urge courts to enforce the Just Compensation Clause of the Fifth Amendment to award redress to individual American citizens who have suffered losses abroad from international emergency economic measures imposed by the Executive to benefit the nation as a whole. All five articles ultimately address the same question raised, but left unanswered, by all of the events of the Constitution's bicentennial year: By what means shall we subject presidential action in the foreign affairs realm to the rule of law?

9. Falk, *The Validity of the Incidents Genre*, 12 YALE J. INT'L L. 376, 376 (1987), reviewing *Special Feature—The Incident as a Decisional Unit in International Law*, 10 YALE J. INT'L L. 117 (1984).