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Speech

The Constitution, the Presidency, and the Rule of Law*

BY L. PETER SCHULTZ**

My topic of discussion is the presidency within the Constitution and how this office affects, or should affect, our understanding of the "rule of law." At the very beginning, let me state my argument as follows. It is, to my mind, a mistake to try to understand the Constitution in light of the traditional concept of the "rule of law." Indeed, interpreting the Constitution in light of the "rule of law" puts the cart before the horse, so to speak. The task is to understand the "rule of law" in light of the Constitution because, if I am correct, the wisdom of the Constitution is that it is a law that knows the limits of law and, therewith, qualifies the "rule of law." I focus my remarks on the presidency because it is in article II that the Constitution's qualification of the "rule of law" is most visible. To illustrate my argument in a preliminary way, I would say that it is altogether fitting that a distinct minority of our presidents have been lawyers. This is fitting because, ultimately, the powers and responsibilities of the presidency are as often political as they are legal. But I am getting ahead of myself, so let me retreat and speak first about the Constitution, then about the presidency, and finally about the rule of law.

First, the Constitution. It is customary in our attempt to interpret the Constitution, to say what that law means, that we look for signposts to guide us on our way. Some have looked to "the higher law background of the Constitution"; some have

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looked to the Enlightenment and its philosophers such as Hobbes, Locke, and Montesquieu; some have looked to the English legal tradition, to Blackstone, to Lord Coke, and to others; some have looked to Scotland and those known as the "communitarians"; and some have even looked further back to the very origins of political science in the works of Aristotle and, for some, Machiavelli.

Often, other signposts are used. More particularly, long-standing ideas, ideas with a pedigree, so to speak, are used as aids in interpreting the Constitution. We can call these ideas "big ideas," or if you wish to sound more sophisticated, "concepts." Whatever you might call these ideas, let me illustrate how useful they are in interpreting the Constitution, using for purposes of illustration that "big idea," "the rule of law."

Apparently, the rule of law is not a bad place to begin in interpreting the Constitution. It has a long history and an honorable pedigree, being traceable at least as far back as Aristotle and his *Politics*, where it is argued that the rule of law is the best practicable form of government. Moreover, besides this honorable pedigree, the rule of law sounds acceptable, even praiseworthy. Although some ambiguity exists as to its meaning, it is generally taken to be a substitute for the rule of men (or persons), a rule which replaces discretion and arbitrariness with rules and certainty and maybe even fairness. This seems good.

Once we undertake to use the rule of law as the polestar of our constitutional jurisprudence, much more follows quite logically from this. If the rule of law is the guiding principle of the Constitution, then the legislature should be supreme, or at least predominant, since it is the legislature that makes the laws. And if the legislature is supreme or predominant, then it should be *the* policy-maker and its policy, having the form of law, should be superior to other forms of policy—e.g., that concocted in the bowels of the White House. Finally, if the legislature is supreme, then we should understand the separation of powers as a way of checking government to render it "safe," while not undermining the principle of legislative supremacy.

Beginning then with the apparently uncontroversial concept of the rule of law, we have gone a long way toward rendering the Constitution intelligible. We know now, for example, that the separation of powers is a way of rendering government safe,

although inefficient. As Justice Brandeis wrote in his dissenting opinion in *Myers v. United States*,¹ in a statement that is probably familiar to all:

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.²

Again, beginning with the rule of law, we can read “legislative supremacy” into the Constitution, much as Justice Holmes did in his dissenting opinion in *Myers*. As Holmes argued there:

We have to deal with an office that owes its existence to Congress and that Congress may abolish tomorrow. Its duration and the pay attached to it while it lasts depend on Congress alone. Congress alone confers on the President the power to appoint to it and at any time may transfer the power to other hands. With such power over its own creation, I have no more trouble in believing that Congress has power to prescribe a term of life for it free from any interference than I have in accepting the undoubted power of Congress to decree its end.³

Finally, beginning with the rule of law, we can then subordinate the president to the law, making him an enforcer of the law, as much bound by those laws as a policeman is when on his “beat.” As Justice McReynolds argued in his dissenting opinion in the *Myers* case:

A certain repugnance must attend the suggestion that the President may ignore any provision of an Act of Congress under which he has proceeded. . . .

Congress, by clear language, is empowered to make all laws necessary and proper for carrying into execution powers vested in [the President]. Here he was authorized only to appoint an officer of a certain kind, for a certain period, removable only in a certain way. He undertook to proceed under the law so far

¹ 272 U.S. 52 (1926).

² *Id.* at 293 (Brandeis, J., dissenting).

³ *Id.* at 177 (Holmes, J., dissenting).

as agreeable, but repudiated the remainder. I submit that no warrant can be found for such conduct.⁴

I have relied on these dissenting opinions in the *Myers* case because, first, they are used often as statements that capture the essence of the American constitutional order. Second, I use them because they are dissents, indicating that there is another view of the Constitution. In fact, I think that this alternative view, presented in *Myers* by Chief Justice Taft, is more consistent with the Constitution. This suggests that it is a mistake to interpret the Constitution so as to square it with tradition or convention. The Constitution was conceived, I think, as a significant break with the past and, therefore, needs to be understood on its own terms and not in terms of "tradition" as in the phrase "the British tradition" and perhaps not even as in the phrase "the Judeo-Christian tradition." To be sure, the Constitution does have roots in a particular historical situation. But in reading and interpreting the Constitution, we should leave behind such baggage as "tradition," and take that document as we find it, unenhanced or unencumbered by external trappings. Only when we have done this can we say what the separation of powers means in the Constitution; can we say whether legislative supremacy has a place in the political order created by the Constitution; and can we say what the rule of law means under the Constitution. In sum, we should interpret the "rule of law" in light of the Constitution; we should not interpret the Constitution in light of the "rule of law."

Before turning to article II and the presidency, let me offer one example or illustration of my argument that the Constitution constitutes a significant break with tradition. Consider the qualifications for office under the Constitution. It is fair to say that these qualifications are limited, even sparse. There are no property qualifications under the Constitution, a fact too often overlooked when we assess the democratic credentials of that document. Also—and again this is all too often overlooked by the document's critics—there is no sexual qualification—or disqualification—for holding office. When it comes to holding office, the Constitution only knows "citizens." It knows neither male nor female, neither rich nor poor. And perhaps most interesting of all—and certainly overlooked today—the Constitution contains no religious qualifi-

⁴ *Id.* at 179, 231-32 (McReynolds, J., dissenting).

cation for holding office. In fact, in article VI the Constitution says that “no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”⁵

This want of a religious test for holding office did not go unnoticed by the Anti-Federalists, those who opposed the ratification of the Constitution. They thought this a grievous oversight, one which would make it possible for atheists and, even worse, for papists to hold the office under the Constitution. This may seem humorous today, but from the point of view of tradition, the Anti-Federalists' concerns are sensible. Can it be thought that a person's religion—or whether a person has a religion—is unimportant in determining whether that person is qualified to hold office? Certainly, whatever we might think today, religion was deemed to be very important in 1787. Even Thomas Jefferson was prepared to exclude the testimony of atheists from the courts because their oaths were unsupportable by faith.

From the traditional point of view, the one espoused by the Anti-Federalists, the person makes the office and, therefore, one should be very careful in determining who may hold what office. The Constitution is not careful, however, and this is because it breaks with tradition, stands it on its head, so to speak, by assuming that the office will make the person. Hence, the Constitution does not rely on religion, wealth, or sex as qualifications for office. It does not need them. The offices created and arranged by the Constitution allow us to choose our representatives from the great mass of the people who inhabit the American republic, whether those chosen are trained in the law, in the military, in the business world, in a seminary, or even by Zen Buddhists in the art of motorcycle maintenance, to say nothing of even more exotic teachings.

A reminder of what has been said so far. I have been arguing that the Constitution is a most untraditional document and, therefore, that it is best to leave aside traditional concepts when interpreting that document. One such concept is the rule of law and, like other traditional concepts, this one does more to obscure than to illuminate the Constitution, an argument that I will now attempt to defend. For this purpose, I will focus my attention on article II of the Constitution.

⁵ U.S. CONST. art. VI, cl. 3.

Article II is a most interesting part of the Constitution, especially when read with this question in mind: What legal limits exist on presidential power or on the president himself? This question is relevant especially if you understand the Constitution as taking its bearings from the rule of law. But if you read article II with that question in mind, you will find it difficult to identify any such limits.

Consider, by way of example, the president's tenure of office. In one way, this term is limited by the Constitution to four years. Every four years the president must face an election. But in another way, the president's tenure is unlimited by law because, under the original, unamended Constitution, the president could succeed himself indefinitely. In other words, there are no legal limits on the president's tenure of office. (In fact, there are no legal limits on the tenure of any office established by the Constitution.)

It is useful to allow this constitutional fact its fullest impact. What determines the number of years a president may serve is not the Constitution, is not the supreme law of the land. The supreme law leaves open the question of the length of the president's tenure; it leaves this question unsettled, much as it leaves open the qualifications of the heads of departments and of the justices of the Supreme Court, even while entrusting the selection of both to the president with the advice and consent of the Senate. Putting this differently, the length of any particular president's tenure—under the original Constitution—was not a question decided by the law. It was a question to be decided politically. Thus, it is not unfair to ask those who advocate the view that the Constitution embraces the concept of the rule of law to explain why this rather important issue is to be settled politically and not legally.

Let me explain more fully where I am going, in case it remains unclear. When one reads article II of the Constitution, the legal limits on the executive power are very difficult to identify and to establish. So far, I have used the president's tenure as my example. I did so because this is a particularly important issue and because it illustrates as well as anything that the limits on presidential power are more political than legal. And this is, of course, the core of my argument herein: The Constitution does not establish a limited executive in a traditional or legal sense. Rather,

the limits on executive power are political. In terms of the rule of law, we may say that the Constitution recognizes a realm of activity that is beyond the reach of law, a realm of activity in which law or even legal standards are insufficient.

For a recent manifestation of this argument, I invite you to read *Nixon v. Fitzgerald*⁶ in which the Supreme Court decided that the president is, under the Constitution, absolutely immune from civil suits. As Justice Powell argues there for the Court, this decision does not put the president beyond all limits; he is still subject to both constitutional and political restraints.

A rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive. There remains the constitutional remedy of impeachment. In addition, there are formal and informal checks on Presidential action. . . . The President is subjected to constant scrutiny by the press. Vigilant oversight by Congress also may serve to deter Presidential abuses of office. . . . Other incentives to avoid misconduct may include a desire to earn reelection, the need to maintain prestige as an element of Presidential influence, and a President's traditional concern for his historical stature.⁷

In sum, Justice Powell is suggesting, first, that the executive power, in significant respects, is beyond the reach of the law. As Powell says in his opinion: "The President occupies a unique position in the constitutional scheme."⁸ Unique because among his duties are the conduct of foreign affairs, which is "a realm in which . . . '[i]t would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret'. . . ."⁹ Unique also because his duties include "management of the Executive Branch—a task for which 'imperative reasons requir[e] an unrestricted power [in the President] to remove the most important of his subordinates in their most important duties.'"¹⁰

⁶ 457 U.S. 731 (1982).

⁷ *Id.* at 757.

⁸ *Id.* at 749.

⁹ *Id.* at 750 (quoting *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948)).

¹⁰ *Id.* (quoting *Myers v. United States*, 272 U.S. 52, 134 (1926)).

Secondly, however, Powell emphasizes that legal checks are not the only variety of restraint our Constitution relies on. Indeed, with regard to the presidency, in which "there exists the greatest public interest in providing . . . 'the maximum ability to deal *fearlessly and impartially* with' the duties of [that] office,"¹¹ reliance on legal constraints is misplaced. Here we rely on extra-legal constraints, what may be called political constraints. And here we see most clearly the limits of the rule of law as established—or as modified—by the Constitution.

The legal limits on the executive power are hard to find. To be sure, the president, in order to appoint to office or to make a treaty, needs the consent of the Senate. And with regard to treaties, he must have an extraordinary majority of the Senate for a treaty to have the force of law. But these checks on presidential power are not legal in character and were not intended to be used in a legal manner. Vested as they are in only one house of a bicameral legislature, it is clear that, whatever oversight these checks allow the Senate, they are not legal in character. When performing its duties with regard to appointments and treaties, the Senate is not performing a legislative function and, like the president in other matters, cannot be bound by the law. When acting in these capacities, the Senate exercises a political discretion—and more often than not defers to the president's political judgment even in matters as important as the appointment of a new chief justice of the United States. And contrary to the argument that the Senate has not lived up to constitutional expectations and has not held its own in what is perceived to be a continuing struggle for power with the president, one can argue that the Senate has behaved in accordance with the expectations of the Constitution. For under the Constitution, appointments and treaties are entrusted to the president's discretion, to which the Senate most often defers.

But surely someone might object to this argument by pointing to section 4 of article II, which says that "[t]he President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."¹²

¹¹ *Id.* at 752 (quoting *Ferri v. Ackerman*, 444 U.S. 193, 203 (1979) (emphasis added)).

¹² U.S. CONST. art. II, § 4.

Does this section not indicate, my imaginary adversary might ask, that in the final analysis the checks on presidential power are indeed more legal than political? When the president oversteps the bounds of his constitutional office, he is subject to removal from office by means of this impeachment process.

At first reading, one well could conclude that the impeachment process does confirm the view that there are—or were in the minds of the Constitution's framers—distinct legal limits to the executive power, legal limits enforced by the legislature. While the president operates within these limits as policed by the legislature, he is free to do as he thinks best. But once he transgresses these limits, he is subject to being removed from office after impeachment by the House and conviction by the Senate. Indeed, that one reasonably can interpret the impeachment process in this way is confirmed by the fact that during the constitutional convention Gouverneur Morris so interpreted it—and opposed it until his understanding of the process was changed and he was convinced that such a process would not subordinate the president to Congress. Originally, Morris opposed impeachment because he feared that it would so subordinate the executive, that it would allow Congress to control the executive and to deprive it of what Morris deemed its necessary and proper independence. As Morris said:

The Executive is also impeachable. This is a dangerous part of the plan. It will hold him in such dependence that he will be no check on the legislature, will not be a firm guardian of the people and of the public interest. He will be a tool of a faction, of some leading demagogue in the Legislature.¹³

Morris was persuaded to support this provision and the idea of impeachment when he was persuaded that it would serve as a “NATIONAL INQUEST into the conduct of public men,”¹⁴ to use Hamilton's language from the *Federalist*. Morris came to see that such a proceeding was necessary because of the scope of the president's responsibilities and in order to punish those guilty of offenses that “are of a nature which may with peculiar propriety

¹³ 2 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION* 53 (1966).

¹⁴ *THE FEDERALIST* No. 65, at 397 (A. Hamilton) (C. Rossiter ed. 1961) (emphasis in original).

be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself."¹⁵

By this view, the impeachment process is more political than legal. The use of this process as conceived by the framers would "agitate the passions of the whole community, and . . . divide it into parties more or less friendly or inimical to the accused."¹⁶ In fact, Publius argued that this process is always in danger of becoming merely partisan, exciting "all [the] animosities, partialities, influence, and interest"¹⁷ of pre-existing factions, even to the point that "the decision will be regulated more by the comparative strength of parties than by the real demonstrations of innocence or guilt."¹⁸ Impeachment and trial of a president for high crimes and high misdemeanors is more a political than a legal affair; it is a process reserved for what may be called "political crimes" rather than for ordinary or statutory crimes. Impeachment and trial are the ultimate checks on a president—and as such they reveal the political character of that powerful office.

There are other parts of article II that could be used to support the argument that the presidency essentially is not subjected to legal limits by the Constitution. For example, one could refer to the first sentence of article II, which says that "[t]he executive Power shall be vested in a President of the United States of America."¹⁹ This language should be contrasted with the language of the first sentence of article I, which says that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States. . . ."²⁰ Article II then vests all the executive power in the president, not merely those executive powers enumerated in article II. For one example of such a power being vested without being enumerated in article II, one need only look as far as the first Congress which concluded that the removal power was vested in the president alone by virtue of the Constitution and, therefore, beyond the reach of the law or the legislature.

¹⁵ *Id.* at 396 (emphasis in original).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 397.

¹⁹ U.S. CONST. art. II, § 1.

²⁰ *Id.* at art. I, § 1.

Again, the president is the commander-in-chief of the nation's armed forces and, as Justice Jackson reminds us in *Korematsu v. United States*,²¹ “[n]o court can require such a commander . . . to act as a reasonable man; he may be unreasonably cautious and exacting. Perhaps he should be.”²² Thus, one of the most deeply-rooted legal standards, reasonableness, is inadequate for assessing how well the president performs his role as commander-in-chief. In this role, the president is beyond the reach of the courts and even of the law. To ask the commander-in-chief to act only in a legal manner or in accord with legal norms would be to impose an inappropriate and potentially dangerous standard on the president, and one not required by the Constitution.

Also, I have not mentioned the president's pardoning power, which Hamilton denominates “prerogative” in the *Federalist*. Of course, this power puts the president above the law since it allows him to suspend the laws in order to meet those “critical moments” when “[t]he loss of a week, a day, an hour, may sometimes be fatal,” and which, “if suffered to pass unimproved, it may never be possible afterwards to recall.”²³ Again, it seems clear that the Constitution entrusts responsibilities to the president that are more than legal and that should not, therefore, be constrained by the law.

Indeed, even the president's responsibility to “take Care that the Laws be faithfully executed . . .”²⁴ is affected by the political character of the office. As early as *Marbury v. Madison*,²⁵ the Supreme Court drew a distinction between “executive” and “ministerial” duties, with the former being entrusted to the discretion of the president and only the latter being enforceable in a court of law. In the performance of his executive duties, the president is free to use his discretion, and he is not bound by the will of the legislature nor is he bound by the rule of the courts.

But where does this leave us? Obviously, since it was my intention to do so, I have undermined the centrality of “the rule of law” for understanding the Constitution. Insofar as I have

²¹ 323 U.S. 214 (1944).

²² *Id.* at 244 (Jackson, J., dissenting).

²³ THE FEDERALIST No. 74 *supra* note 14, at 449.

²⁴ U.S. CONST. art. II, § 3.

²⁵ 5 U.S. (1 Cranch) 137 (1803).

fulfilled my intention, we are likely to feel less secure, less certain; we may even feel like we are afloat on an unchartered sea and subject to the absolute discretion of the person whom we have chosen captain.

In response to this, my first inclination is to say: Congratulations, for you are experiencing the feeling that affected many of the Anti-Federalists when the Constitution was proposed for ratification. Again and again, the Anti-Federalists criticized the ambiguity of the Constitution, its failure to establish clear and constitutional limits on the tenure of office, its failure to delineate clearly the powers of the president, and its failure to establish firm limits on the scope of the judicial power. They sensed, I think, that the Constitution was in fact breaking with the past, with tradition, and that in large part this break modified the "rule of law."

Ultimately, there may be no better response to the Anti-Federalists than to say: "So be it—and choose your captain wisely." But there is more, and there is even some ground for solace in our search for constitutional government. The president is checked not merely by politics but also by the Constitution. As William Howard Taft wrote in his book, *Our Chief Magistrate and His Powers*:²⁶ "The Constitution does give the President wide discretion and great power, and it ought to do so. It calls from him activity and energy to see that within his proper sphere he does what his great responsibilities and opportunities require."²⁷

For Taft, among all our presidents the preeminent constitutionalist, the president does possess great power and wide discretion. But neither this power nor this discretion is unlimited. For Taft, there is a distinct presidential sphere of activity and, although it is difficult to find legal limits to presidential power, one can define and limit that power by thinking in terms of presidential responsibility.

What is the president responsible for under the Constitution? Preeminently for preserving the peace. As Taft argued:

The President is made Commander-in-Chief of the army and the navy . . . evidently for the purpose of enabling him to

²⁶ W. TAFT, *OUR CHIEF MAGISTRATE AND HIS POWERS* (1916).

²⁷ *Id.* at 140-41.

defend the country against invasion, to suppress insurrection and to take care that the laws be faithfully executed. In other words, he is *to maintain the peace of the United States*.²⁸

Or as Hamilton wrote under the pseudonym "Pacificus" in his debate with Madison over Washington's Proclamation of Neutrality: "In this distribution of authority, the wisdom of our Constitution is manifested. It is the province and duty of the executive [power] to preserve to the nation the blessings of peace. The Legislature alone can interrupt them by placing the nation in a state of war."²⁹

By this view, the president is responsible for preserving to *this* nation—not to the world—the blessings of peace. His responsibility is not making the world safe for democracy, to mention one alternative understanding of presidential responsibility. He may have to defend this nation and its citizens—and he may act unilaterally and secretly should he determine such action is necessary—but he may not wage war on his own authority, even if it is "a war to end all wars." Or to use two illustrations that come to mind, he may act unilaterally to get Soviet missiles out of Cuba, but he may not wage war unilaterally in distant places for extended periods of time against ambiguous threats to the national security.

Although I would not grant it readily, eventually I would grant that the solace we find in the Taft-Hamilton understanding of presidential power is not great enough. As Taft quite candidly admitted, the presidency is the seat of greatness in our constitutional order. He sensed that this greatness is not best measured in legal terms or in terms of the president's capacity to "take Care that the Laws be faithfully executed."³⁰ This is, as Taft argued, an important executive responsibility; ultimately, it is not at the heart of the president's constitutional responsibilities. At the heart of those responsibilities are what Chief Justice John Marshall called "executive" or political duties: the responsibility of assessing and, if necessary, repairing the State of the union;

²⁸ *Id.* at 128-29 (emphasis in the original).

²⁹ 4 THE WORKS OF ALEXANDER HAMILTON 443 (H. Lodge ed. 1904).

³⁰ U.S. CONST. art. II, § 3.

the responsibility for proposing and helping Congress formulate comprehensive political reforms such as the Square Deal, the New Deal, the New Frontier, the Great Society, or the New Federalism; and finally, the responsibility of defending this nation and ensuring that its security goes uncompromised—including the responsibility, again, of advancing bold new initiatives, even controversial initiatives, that in the president's judgment will enhance our security.

It was because Taft sensed the character of the presidential office that he admired his predecessor so greatly. But it just might be that this admiration points to the ultimate shortcoming of Taft's understanding of presidential power. For our political history illustrates—or so it could be argued—that preserving the peace and security of *this* nation is neither a sufficient guide for our foreign policy nor a sufficient measure of our worth as a nation. A "fortress America," one turned inward and away from the world, may indeed be secure, but it might well be a security that lacks nobility. Taft's admiration of Roosevelt reflects the appeal of the noble, of the great-souled man. As we have learned from Aristotle, it is by the dimensions of a person's—and a nation's—soul that one measures human and political greatness. With this thought we have, I think, reached the limits of constitutional government and we are beginning to sail seas charted only rarely, and only some time ago. The solace we seek still escapes us, even given what Hamilton rightly calls "the wisdom of our Constitution." This is not intended to belittle that wisdom but merely to indicate that it may require supplementation at sources not taught in any law school and, perhaps, not teachable at all.