

ADDRESS

EROSION OF THE PRESIDENT'S POWER IN FOREIGN AFFAIRS

ERWIN A. GLIKES,* INTRODUCTION

I am honored to introduce this afternoon's speaker and especially honored to have the privilege of introducing him to this group, which, of any gathering imaginable in America today, will best understand the interesting publishing experience about which I would like to say a few words today.

Let me begin by sharing some good news with you: You will find on tomorrow's *New York Times Book Review* Bestseller List that Judge Robert H. Bork's *The Tempting of America* has jumped from the #12 position (where it was last week) to #4, *nationally*. We also have learned that it will be #4 again next Sunday.

The Free Press has now printed and sold 170,000 copies—and more are on the way. In reaching that sale thus far, some records were broken—records of a very interesting sort. When Judge Bork visited book shops across the country, in Florida, Atlanta, Kansas City, Dallas, Chicago, Los Angeles, and elsewhere—bookstore managers called me afterwards, in true astonishment, to report that they had *never* seen such excited and book-hungry crowds in their stores. The average sale during one of Judge Bork's visits was between 300 and 400 copies: usually *all* the copies the store had ordered in preparation for the Judge's visit. One store recalled that it was their largest crowd since Bob Hope had visited the store some years ago.

It has been a wonderful experience—and it is not over yet—but the hoped for success of this book is only half of the story. The publication of *The Tempting of America* did *not* begin in a very promising way.

It took some hard pushing to get this first printing into certain book stores. Certain booksellers, who recently had been eager to prove their devotion to the first amendment by championing Salman Rushdie's *The Satanic Verses*, initially refused to take *any* copies of Judge Bork's book at all. In my talks with book review editors and salespeople about the

* President, The Free Press.

important themes in Judge Bork's book, I sometimes came away with the distinct feeling that they believed that the separation of powers doctrine, that judges should decide cases before them and legislators should write laws, was an outrageous idea that Robert Bork had made up. The two major book clubs, whose selections are regarded by many in publishing and bookselling as an early sign of the likely success of a new book, turned it down flat—even as alternates—after the briefest of reviews. And then, a few days before the book's publication date, NBC's *Today Show* suddenly and inexplicably cancelled a long-scheduled appearance by Judge Bork to be interviewed about the book on that program watched by millions.

At that point—in early November—the Judge and I frequently talked on the phone about these disappointments: he was, sincerely and characteristically, worried about me and *The Free Press*. We consoled each other with brave good cheer—which lasted until our deep mutual sighs at the end of our phone conversation told all. I did all I could to hide a sinking fear that this very good man and brilliant writer and thinker was about to be treated badly and most unjustly—once again.

But that is not what happened. In retrospect, it is now clear that that early experience was yet another one of those misleading media and university cultural phenomena: analogous to the refrains one heard in 1980 and 1984: “How in the world did Ronald Reagan win?—No one *I* know voted for him!”

Like Ronald Reagan in 1980 and afterwards, this will be a book with a legacy and a future. Thanks to *The Tempting of America*, the coherence and legitimacy of the original understanding of constitutional thought and judging is on the record again, and on the national intellectual agenda, with unmistakable clarity and authority.

I have a private fantasy about what accounts for that astonishing clarity and authority: while Bob Bork was writing this book—while I watched his mind at work, and listened and learned from him—I could not help imagining him participating in profound debate, drafting, arguing, and revising in the company of a distinguished group of eighteenth century American gentlemen in Philadelphia two hundred years ago, Americans reasoning their way toward the invention of a quite imperfect system of government which would centuries later prove to be one for which the whole world longs, and is willing to die to achieve. In our time, in truth, Robert Bork *is*, once again, for us, an American founder, now reminding us, the American people, to preserve and sustain that

glorious vision of man and civilization which still exists for our guidance in the Constitution of the United States.

I am proud to introduce our friend and teacher, Judge Robert Bork.

ROBERT H. BORK*

It is enormously enjoyable to be once more among the friends of the Federalist Society. There is no more important movement in American law today than this Society, which understands and battles for the idea that law is something more than politics. That is an idea we have been in danger of losing, and you are helping to bring it back.

The subject of the book I have just published is the separation of powers: in that case, the tendency of the judiciary to invade the province of the legislature. But today I want to talk briefly about the health of the constitutional separation of powers in another area.

Perhaps in no area is the separation of powers more threatened than in the conduct of foreign affairs and, more specifically, in the use of American force abroad. In recent years, Congress has become increasingly active and has tried to control the President's actions with respect to force, to a degree and in a detail that cannot produce and has not produced, vigorous or coherent policy. A prime example of that, of course, has been the vacillating and contradictory policy the United States followed with respect to the Contras in Nicaragua.

More generally, there is the desire of Congress to make or to invoke law with respect to the use of American troops abroad. No nation is more devoted to the rule of law than is the United States, but there are areas of life, and the international use of armed force seems to be one of them, in which the entire notion of law—law conceived as a body of legal principles declared in advance to control decisions to be made in the future—where that conception of law is out of place. The pretense that there is such law and that it has been constantly violated, has debilitating effects upon our foreign policy, on the vigor of the Presidency, and the rightful place of the President in our system of government.

Two examples come to mind: one is international law about the use of force, and the other is domestic law, that is, the War Powers Act. These two bodies of "law" arise from different sources, but they are alike in that they are not law in any recognizable sense. They are not enforceable.

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Their main use is as a rhetorical weapon for those who oppose a Presidential action but for political reasons are afraid to criticize it on substantive grounds. Instead they claim that the action the President has taken, the invasion of Grenada, the support of the Contras, the attempt to rescue our hostages in Iran, the incursion in Panama, the bombing of Libya—the list goes on and on—they criticize these actions, not as imprudent, not as immoral, but as violations of law.

This turns the debate from its proper focus—whether the action served our national interest and whether it was moral—to a debate about whether the President is a law violator. Legalisms displace moral discussion, the President's position is weakened, and Congress' position is enhanced.

Senator Moynihan is the leading advocate in Congress of the view that there is a known body of international law that the President must obey. For that reason, he said that our invasion in Grenada was illegal. Yet, his own statements about international law are fatal to the notion that it is a known body of doctrine and, therefore, condemns our actions in Grenada or, more recently, in Panama.

Thus, Senator Moynihan has written:

Manifestly, we cannot hold the rest of the world to a good many of the propositions relating to their internal conduct that we wrote into covenants and charters and declarations with such earnestness in the first half of this century. An ancient doctrine (going back at least to Grotius) is *rebus sic stantibus*, which denotes a 'tacit condition, said to attach to all treaties, that they shall cease to be obligatory as soon as the state of facts and conditions upon which they were founded has substantially changed.' (*Black's Law Dictionary*). For all that Chapter II of the charter of the Organization of the American States requires of members 'the effective exercises of representative democracy,' this is not going to be the political norm of this hemisphere or this world during the foreseeable future. It had once looked that way; it no longer does. Circumstances have changed. What has not changed—what the United States must strive to make clear has not changed—is the first rule of international law: *Pacta sunt servanda*, agreements must be kept.¹

That immediately discloses the inconsistency within international law that prevents it from being law. If the condition upon which the United States agreed to the OAS charter—that the members would be democracies—has changed, why does not *rebus sic stantibus* relieve us of the obli-

1. D. MOYNIHAN, *LOYALTIES* (1984) at 78.

gation to keep the rest of the agreement? Moynihan's argument lacks coherence. That is why it is wrong, indeed meaningless, to say that the invasion of Grenada, or of Panama, is a clear violation of international law.

In both cases, the United States restored democracy and freedom and removed a dictatorship. That was in our national interest and, so long as we think that freedom and democracy are better than tyranny, it was also a highly moral action. That should be good enough.

The major difficulty of international law is that it converts what are essentially problems of international morality into arguments about law that are largely drained of morality.

I once listened to a professor of international law defend our invasion of Grenada, and it seemed to me that his argument was tortured and omitted some of the most important considerations. I asked him whether three factors that most Americans thought relevant counted in international law: first, the Grenadian government consisted of a minority that seized control by violence and maintained it by terror; second, it was a Marxist/Leninist regime and represented a further advance in this hemisphere of a power that threatens freedom and democracy throughout the world; and finally, the people of Grenada were ecstatic at being relieved of tyranny and the ever-present threat of violence.

The expert in international law replied, sadly, that none of those considerations had any weight in international law. Nor could they. International law has to be law acceptable to nations with very different political moralities, which means it rests on an assumption of moral equivalence. We should never accept such an assumption.

Much the same thing could be said of President Bush's forcible removal of General Noriega. It was certainly in our national interest, and over ninety percent of the Panamanian people welcomed the President's action. Yet, prominent Americans denounced it as a violation of international law. Insofar as their statements have any effect, the invocation of "law" in that case once more weakened the powers of the Presidency.

The same sort of objections can be made to the War Powers Act, which is said to be domestic law. It is not law, in any exact sense, but it does purport to control the President's employment of military force. It is widely known that the War Powers Act has turned out to be ineffective. Presidents recognize the necessity to disregard key aspects of it, for both policy and constitutional reasons. In particular, the last several Presidents have declined to file reports, as the Act says they should, of

the introduction of U.S. armed forces into hostilities, under the section that triggers the sixty-day clock that is the Act's main enforcement mechanism.

The President is supposed to pull the troops out at the end of sixty days, unless Congress has approved his action. So, by refusing to file, Presidents prevent the sixty-day clock from starting to run. Now, Congress could require a President to withdraw troops by passing a concurrent resolution under another section of the Act, but Congress is reluctant to do that.

The Act was designed to control the President without requiring any action by Congress. In that way, Congress avoids the responsibility that goes with taking action. Congress has always had the power to constrain the President's use of military force through its appropriations power, but it has been reluctant to do so in the past, and it is hardly surprising that it is also reluctant to pass concurrent resolutions that would require the President to withdraw. These types of Presidential use of force abroad without congressional approval, except approval through the appropriations process, have a long history, going back to President Jefferson's unilateral retaliatory attack on the Barbary Pirates. The need for Presidents to have that power, particularly in the modern age, should be obvious to almost anyone. In this respect, the War Powers Act is ineffective because it seeks to involve Congress in something it is institutionally incapable of handling: swift responses with military force to attacks on American citizens or American interests abroad.

The fact that the Act is bound to be ineffective against a President determined to enmesh us in a war is particularly well illustrated by the fact that the President must have unilateral authority, as everybody concedes, to use our nuclear arsenal, if necessary, on a few minutes notice. If Congress and the American people are willing to entrust that kind of power to one man, it seems hard to see a danger that can be effectively guarded against by the War Powers Act, when Congress does have the power of the purse to control actions there.

In addition to being ineffective, the War Powers Act has also proved to be unwise because it has adverse foreign policy effects. That is what President Nixon said when he vetoed the Act. He warned that the Act would send an unclear signal to our allies and would suggest that we were unreliable, since we would find it hard under the Act to act quickly in a crisis.

Undoubtedly, the mere existence of this Act has complicated the ef-

forts of the executive branch attempting to respond to Communist infiltration in Central America. The attempts of some members of Congress to invoke the Act to force, for example, President Reagan to withdraw our armed forces from Lebanon and the Persian Gulf, also suggest how threatening the Act can be to the lives of American servicemen in the field. The existence of the Act and the debate in Congress about whether to invoke the Act must have emboldened enemy forces in both of those instances. It may also be noteworthy that in the fifteen years the Act has been in effect, our foreign policy has been less bi-partisan than it once was.

Whatever the policy arguments are in favor of repealing the War Powers Act, they are dwarfed by the constitutional arguments. First, the Act purports to define separation of powers in this area by statute. That cannot be done. Wherever the line lies between Congress' constitutional authority to declare war and the President's constitutional authority as Commander-in-Chief and main actor in our foreign policy, that constitutional line cannot be determined or shifted by a mere statute. Thus, the sixty-day limit on whatever inherent authority the President has to deploy troops without a declaration of war has to be unconstitutional. Either the President has such inherent authority, in which case Congress cannot limit his use of it, or he lacks it, and Congress cannot delegate its war-making power to the President for a period of sixty days. The one result that the Constitution surely does not allow is the one that is prescribed by the statute.

The Act has innumerable defects. It purports to list, for example, all of the occasions upon which the President may use force abroad without first getting a declaration of war from Congress. A declaration of war is something that we have wanted to avoid in many instances in which Congress actually approved of Presidential use of force. A declaration of war may trigger treaty obligations and may also have undesirable impacts internationally. Moreover, the list of circumstances, which are said to be exclusive, in which the President can unilaterally use force, does not allow for the use of force in a whole range of situations in which it has traditionally been allowed, including rescues and protection from terrorist attack.

Aside from its policy failings, the Act seems clearly unconstitutional. President Nixon said as much in his veto message and President Bush has agreed. When the War Powers Act was presented to him, it might have been better if President Nixon had not vetoed it. The overridden

veto made what is essentially a legal nullity look like a real law. He should have sent the Act back to Congress with a message saying, "Thank you very much for your essay on your understanding of my constitutional powers. When I have time, I will send you an essay on my understanding of my constitutional powers."

There is, of course, a need for consultation between Congress and the President on any use of force overseas. It is also clear that Congress can have the last word. It can end the use of force simply by withholding appropriations.

The problem with the War Powers Act is that it is an intolerably clumsy mechanism for accomplishing the coordination of the constitutional powers and responsibilities of the branches. In fact, the Act hinders cooperation by introducing confrontation and recrimination into many situations.

The fact is that Presidential use or support of force abroad will succeed when the public approves and fail when it disapproves. Law has little to do with the outcome. The War Powers Act was no more helpful in facilitating the successful cooperation between the branches that made our policy work in Afghanistan than it was responsible for restraining President Reagan in Nicaragua. The Act, paradoxically, has its main effect when the use of force is popular. People who do not like the action, or who are merely political enemies of the President, can avoid the risks of criticism on the merits. They can instead claim, that whatever the merits, the President has violated clear law. By painting Presidents as chronic law violators, such critics gradually weaken the moral authority of the office and build the case for more congressional control of the details of foreign policy and the use of force. That represents an erosion of the constitutional scheme of the separation of powers.

Newspaper reports say that President Bush is looking for a case in which he can reassert Presidential powers through a court ruling. If that is true, I hope he rethinks the matter. In the first place, the courts are not a reliable ally of the President even when the President is right, as was shown in the independent counsel case.

In the second place, if Congress should not move into the President's area of constitutional authority, surely the courts should not be brought into an area in which they are far less skilled and in which their authority is far less legitimate than either the President's or Congress'. Courts cannot write a body of law to control future actions by the President any

more than the Congress can, and the courts are a less appropriate institution to make that attempt than Congress is.

I end by saying to this group, a group devoted to the rule of law, that there are areas of life in which law laid down in advance does more harm than good. In the area under discussion, law laid down in advance represents an invasion of the necessary powers and discretion of the President to use force and to deploy troops abroad in circumstances that cannot be foreseen and involving considerations that cannot be weighed beforehand. To introduce "law" into such an area is to damage the separation of powers. Debates about foreign policy and the use of force ought to be conducted, not in legalisms, but in terms of national interest, of prudence, and of our vision of morality. If we do not think that a republican form of government and individual liberty are superior to autocratic or tyrannical regimes, and, therefore, that morality justifies actions such as Grenada and Panama, then we have entered a state of moral relativism that is quite dangerous to the United States and to our friends around the world.

QUESTIONS AND ANSWERS

QUESTION: Judge Bork, while I am in general accord with many of your frustrations about international law as prescribed by scholars and the charlatans and dictators of the international community, would you have the same views about deeming as equivalent, our international morality and what we would consider international law? If the United States were not the ascendant power in the world, and if we were not in a position to dictate terms and situations and project our power so well, would we be so comfortable saying that one's morality is one's law? If Libya were in a position to say that this is our morality, and our invasion is okay in international law, would you have the same view?

BORK: I would have the same view, but I would be very unhappy. The fact is that the invocation of international law does not seem to stop anybody. Insofar as it has an effect, it has an adverse effect upon western democracies, where the charge of violating international law is freely made and believed by many people. I think it lowers our morale to the degree that we are not sure whether or not these charges of law violation have substance.

Dictatorial nations do not have that problem. They are rarely charged

internally with violations of international law, except when it serves their purpose to be so charged. International law, therefore, seems to be utterly ineffective, except as a propaganda weapon. For that reason—in this area, the use of force—I think we ought to think about what is really at stake, which is our national interest, the interest of our allies and the interest of the local population, as in Panama and in Grenada, so that we can ask ourselves whether what we are doing morally is justified.

We can certainly justify almost any action legally. We can also attack it legally. International law is so indeterminate that there is never any firm answer in any case.

QUESTION: Judge Bork, I have one problem. There seems to be an inconsistency in what is being said today. It seems you are saying that the Congress can use the appropriations clause to restrict the President's use of military power. In a panel before this, Professor Miller of Chicago said, it was a lamentable use of the appropriations clause by the Congress to restrict the President's use of military power. What is your response?

Second, was the Congress correct in the Boland Amendments, or was it not? Was the Congress right about Iran-Contra, or was it not?

BORK: Well, when I say use the appropriations process, at least that requires Congress to step up and make a decision about what it wants, and what it does not want. That is all right. Congress may use it wisely or unwisely, but that is law and the acceptance of responsibility.

My objection is in trying to lay down in the War Powers Act a whole series of conditions for future and unknown events which turns out to be utterly inappropriate when unexpected events occur. I also object to a Congress which, by laying down those rules, can then excuse itself from making decisions when the need arises.

The Boland Amendments, as I recall many of them were quite vague, produced a vacillating policy with respect to Nicaragua and the Contras. I think they were most unwise, but constitutionally marginally better than the War Powers Act. That is not great praise.

QUESTION: Your Honor, I would like to ask you a question on impoundment, particularly in light of the separation-of-powers jurisprudence since you were Solicitor General. Suppose the Congress enacts a statute over the President's veto appropriating \$5 million for the construction of a consulate in the State of Andropov and, second, mandates that this expenditure be made immediately. Would the President be entitled to forbid

this expenditure as being unconstitutional? And, if he did so, bearing in mind your opinion in the Vander Jagt² case, should that question be justiciable if brought by a member of Congress?

BORK: The question should not be justiciable if brought by a member of Congress. The doctrine of congressional standing is entirely an invention of the D.C. Circuit. The doctrine of congressional standing, whereby congressmen sue the President in courts to fight out the disputes between them, really brings courts to a central position of power and control over the whole scheme of government, something never intended by the framers of the Constitution.

When someone with standing sued, the impoundment weapon of the Presidents did not prove effective. When I was Solicitor General, I took on the impoundment issue because President Nixon was then trying to use impoundment. I devised a complex strategy by which I would not appeal some cases, would appeal others, and would work the impoundment issue to the Supreme Court in stages, giving the Court the easy case first. The easy case got there, and I lost nine to nothing. I think you can give up on impoundment.

Forest McDonald, an outstanding constitutional historian, did suggest that the President may have the power not to expend all funds appropriated not because he has a separate power to impound, but because an appropriation is not a mandate to spend. I have not looked into that argument. But in any event, that kind of dispute should not get into courts unless there is a party with a monetary stake in it to bring it.

QUESTION: Judge Bork, I am intrigued by the few words that you said about President Bush's error in looking for a case in which to test various inherent powers. Of course, it is entirely possible for cases concerning the inherent powers of the President to reach court without the President's connivance, cooperation, or desire.

President Bush may take your advice, and yet a court may one day find itself called upon to decide the constitutionality of the War Powers Resolution or, perhaps more important, the constitutionality of a particular use of force abroad. Assuming that should happen, and assuming that the decision was adverse to the President, would your view that the courts have no

2. *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir.) (Bork, J., concurring), cert. denied, 464 U.S. 823 (1983).

business writing codes in this area suggest that the President should simply ignore that judicial decision?

BORK: No, I do not think so. It may be that it would have been as well if we had developed some understanding of when Presidents can ignore court decisions. But in our legal culture, the answer seems to be never. A man I know once posed a hypothetical. He said, when South Carolina proposed to secede from the Union, suppose a way had been found to get the question of secession into the Supreme Court—there is no issue more quintessentially constitutional than whether a state can leave the Union. And, suppose the decision had gone against the United States, as it might have done with the Court at that time. That was the Court that produced *Dred Scott*.³ I do not think any of us would think that President Lincoln should have been bound by such a decision, and yet I do not know how to generalize that into a principle.

QUESTION: Judge Bork, if I could ask you to return to the question of law versus morality for a moment, using Panama as an example. You mentioned a few times that we agree that the republican form of government is superior to an authoritarian form of government, and you seemed to suggest that that itself was justification for the invasion. I would have thought that most would agree with that principle. But critics of the invasion argue that it is not proper for another sovereign nation to invade another, but rather let the people of Panama work it out themselves.

That question, and the surrounding debate, although sometimes couched in legal terms, is understood by everyone to be essentially a moral question and a question that we have to discuss as such when we are going to use American force. I would just like you to comment on whether it actually is perceived as that.

BORK: If there were no pretense that there is a known body of international law which is real law, then I would have no concern. But, the precise reason that Presidents are attacked on international law grounds is very often because the attacker does not wish to attack on moral grounds an action which has proved very popular. It is a way to avoid the substance of the issue and to intrude legalisms which have nothing to do with the real issue.

QUESTION: I am just curious whether you think that the debate that

3. *Scott v. Sandford*, 60 U.S. (18 How.) 393 (1850).

actually followed the invasion of Panama, in this country at least, in the press and in general conversation, was a legalistic debate or whether people who were raising questions about the invasion were raising fundamentally moral questions about our power and right to invade the country?

BORK: I think a lot of it claimed to be legal. It is a little hard to raise a moral question when the Panamanian people, by well over ninety per cent, were delighted with what we did—unless we do not think that what the people of the country want is of much importance. I *do* think so.

