



### HOW CAN YOU REPRESENT THOSE PEOPLE?

EDITED BY ABBE SMITH AND MONROE H. FREEDMAN

Palgrave Macmillan, New York, NY, 2013. 228 pages, \$95.00 (cloth), \$30.00 (paper).

Reviewed by Jon M. Sands

It is “the question.” We expect it. It occurs at social gatherings, on social media, at family reunions. It is asked soon after the exchange of names, when the chitchat turns to what we do. It is also asked seriously, in interviews, sometimes “off the record,” or in classes we teach. We ask it of ourselves, if we are honest, in the darkness, real or figurative or both: “How can you represent the guilty?”

We all have our pat answer, depending on the asker, setting, and length of time. We also have the extended soliloquy explaining to our closest friends how we keep doing this. And we bare our souls to our colleagues when we discuss it. We think about “the question” every workday, with every visit to lockup, every court appearance, every client interview, and every verdict or sentence or judgment. We do it because. ...

*How Can You Represent Those People?* is a collection of 15 essays, each of which answers “the question.” Abbe Smith and Monroe H. Freedman, both decorated veterans of defense battles, gather other notables to weigh in with their responses. Some essays are uplifting and noble, others are angry and despairing. Some essayists view their work as a calling, others as penance; some report while still engaged in the trenches of practice, others reminisce from the ivory tower of academe. One contributor is an apostate from the prosecution side. Some essays focus on the long view, some on particular cases, one is from outside the country. Some engage in personal biography; others are about the profession. Some essayists see criminal defense as a preordained calling; others reveal the fortuity of finding the mission. Some see it as a blessing, some as a curse.

A representative essay is by Abbe Smith (whom I know personally). She admits that she is drawn to people in trouble. Smith recognizes, as do other essayists, that she has an anti-authority streak. She wants to stand up to the authorities on behalf of an underdog, al-

ways poor and usually a member of a minority group. Her work has built-in drama with life-changing stakes. Smith tells stories of her cases to illustrate her passion and to answer “the question.” She does not sugarcoat. She starts her essay with the tale of a suburban bad seed, Ronnie, who killed a neighbor who refused to give him her car (and almost killed her five-year-old daughter as well). Then she moves on to Delores, who serially smothered four of her infants; and to James, who was an enforcer for a drug gang and murdered a drug addict who failed to alert a gang member that the police were around the corner. Smith describes the cases, their backgrounds, the choices that propelled the criminals to do acts they now regret, and any mitigation for their acts. She refuses to define her clients solely by the worst acts of their lives, and she speaks of the human capacity to transform oneself. Not every story is heartbreakingly sad. Smith recounts funny and all-too-real stories of the “you can’t make this up” variety. She says that she likes guilty people: Ms. Cooper, for example, who is embarrassed that she consented to a sex act for a meal solely because she was hungry; and Mr. Johnson, accused of shoplifting, who insisted on a trial even though all the evidence was against him (the video didn’t help). His crime was impulsive and stupid, and he wanted to argue its stupidity, until a field trip of grade school children piled into the courtroom on the day of trial and Johnson did not want to be a bad example. As Smith writes: “My clients aren’t wicked, but damaged, deprived, or in distress. The reasons for their criminal conduct are both complex and simple: growing up in abusive or neglectful homes, falling prey to drugs or alcohol or gangs, being young and impetuous and lacking judgment and resources, having cognitive or mental health problems, losing control in a moment of rage, making bad choices in a bad moment.”

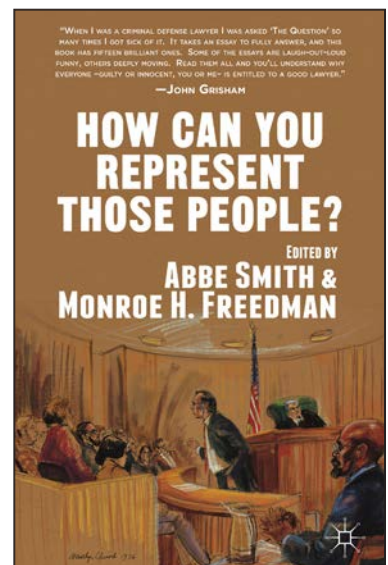
Several essayists feel that, “there but for the grace of God,” they could be in their client’s shoes. Angela Davis, for example, grew up in the segregated South, where her experiences with racial prejudice propelled her into civil rights and then criminal justice. She recognized that her fortunes, as an African-American with a stable family, gave her an advantage so many others lacked. She considered being a prosecutor, but defending those who have no power or influence seemed to

her more desirable than holding a position of power and authority. She became a public defender because she wanted her clients treated with respect and dignity, even when the deck, and life, were stacked against them.

David A. Singleton represents sex offenders. This class of offenders is considered the worst of the worst, facing long sentences, lifetime supervision, even civil commitment and registration as a sex offender. Hated by the community, scorned, they are also subject to assault and violence in confinement. Singleton explains a difficult question he faced as head of a struggling nonprofit law office. Ohio had a statute that banned sex offenders from living within 1,000 feet of a school, and the statute applied retroactively to people who had committed a sex offense before its effective date. The question was whether to challenge the statute and risk his law office’s losing funding—in effect, risk committing organizational suicide. He pursued the case, the Ohio Supreme Court held that the residency restriction did not apply retroactively, and Singleton’s office did not lose funding, but “grew in both stature and size.”

Singleton explains how he can represent those people:

So now I talk about how my faith has emboldened me to serve people others might reject. I think advocacy on behalf of people in the criminal justice system is the kind of work that Jesus would embrace. But, to me, faith is much broader than any set of religious



teachings. It is about doing what's right even when others think you are wrong. Faith is what helps you persevere when you have doubts about whether you can succeed. ... Although there were times during the residency restriction litigation that I thought we could never win, we kept going because it was the right thing to do.

Paul Butler is the apostate in the volume. A former prosecutor, he answers the question, "how can you prosecute those people?" He explains that discrimination propelled him to become a prosecutor. He thought that, from the inside, he could end the racial profiling and the over-enforcement of the law that was occurring. He wanted to be fair and just and to lock up the bad actors that preyed upon the weak and the elderly in the African-American community. He chose to become a prosecutor to represent his community. That job is every bit as important as representing defendants. Yet, one becomes part of a system, a system that continues to discriminate. Butler, who became controversial for arguing that jury nullification might be a permissible response to overly harsh mandatory drug sentences, realized that his efforts alone could not change the system. He could help some individuals, but the criminal justice system is too enormous, with too many blunt instruments of policy, for him or anyone to effect systematic changes. He does have some optimism. Changes are slowly coming, and he cites initiatives in certain communities and police departments to reconcile with minority neighborhoods and to be more sensitive. I am certain he would approve of the Obama administration's recent clemency initiative and support for rolling back some drug sentences.

"Those people" are not limited to this country. Alice Woolley takes a more international approach, arguing that a willingness to defend the criminally accused transcends the common law legal tradition and is essential for any government that respects law and any society that values human dignity. In choosing to represent criminal defendants, she is affirming humanity and dignity.

One can also see that attitude in the lawyers who defend the prisoners at Guantánamo Bay. Several such lawyers told me that they are there both to represent clients the country condemns and as witnesses to a process they view as flawed and preordained. They seek to require the government to have to prove each prisoner's guilt. In so doing,

they help sound constitutional reveille at Guantánamo, using Gideon's somewhat battered and muffled trumpet.

Diversity marks the essays, and the editors are to be commended for recruiting as writers so many women, minorities, divergent views, different types of lawyers, and former public defenders. Some of the former public defenders cast their essays as lamentations for when they worked in offices, carrying backbreaking caseloads, and representing too many clients. Most of these public defenders have become professors, with the rest heading organizations or in private practice. Must the fate of being a public defender be a short career? Can one answer "the question" only for a brief time in the present tense, before lapsing into a remembrance of cases past? Perhaps only those who have moved on, or moved up, have the time to catch their breath and, in an essay, reflect on "the question."

These essays are all short and interesting, but should not be read in a sustained sitting. They tend to strike similar chords, so it is wise to put the book down and pick it up for short reads. This will cause the essays to stand out better. All of them are personal to a surprising degree. One cannot answer "the question" without revealing something of oneself. Each contributor highlights specific cases and uses them as illustrations of his or her calling. Each responds differently, but for me, those who picked the little case, rather than the notorious one, struck a more responsive chord. Indeed, those who discussed their losses found a most sympathetic audience in me. It is easy to rally to the large case or the celebrity defendant; let me hear from the public defenders working with the indigent.

If one could read only one essay in this book, I would pick Barbara Babcock's, for a variety of reasons. She served as a public defender when women were not well represented in the field. She first tried to answer "the question" more than 30 years ago, addressing why she and others did what they did in an influential law review article titled "Defending the Guilty." Hindsight provides advantages in answering "the question." Babcock has written other works on public defenders, notably on Clara Foltz, the first advocate for a public defender system. (See my review of Babcock's book on Foltz in the December 2013 issue of *The Federal Lawyer*). In her essay in *How Can You Represent Those People?*, Babcock constructs a framework of possible answers to "the question":

*The Garbage Collector's Answer.* Yes, it is dirty work, but someone must do it. ...

*The Constitutionalist's Answer.* It is noble work [to pursue the Sixth Amendment's promise of effective representation].

*The Civil Libertarian's Answer.* The criminally accused are the representatives of us all. When their rights are eroded, the camel's nose is under and the tent may collapse on anyone. ...

*The Legal Positivist's Answer.* ... A finding of guilt is not necessarily the truth, but instead is a legal conclusion arrived at after the role of the defense lawyer has been fully played.

*The Philosopher's Answer.* There is a difference between legal and moral guilt; the defense lawyer should not let her apprehension of moral guilt interfere with the analysis of legal guilt. ...

*The Oddsmaker's Answer.* It is better ten guilty people go free than that one innocent is convicted. ...

*The Political Activist's Answer.* Most people who commit crimes are themselves the victims of injustice. ...

*The Social Worker's Answer.* ... Those accused of crime, as the most visible representatives of the disadvantaged underclass in America, will actually be helped by having a defender, regardless of the actual outcome of their cases. ...

*The Humanitarian's Answer.* The criminally accused are men and women in great need, and lawyers should come to their aid. ...

*The Egotist's Answer.* Defending criminal cases is more interesting than the routine and repetitive work done by most lawyers, even those engaged in what passes for litigation in civil practice.

Babcock then offers her own answer: It "is an amalgam in roughly equal parts of the social worker's, the humanitarian's, and the egotist's reason." Like Babcock, each of us who does this work must select a mix of reasons, in whatever percentage, and do so honestly. That is our answer to "the question."

The final author's answer that I'll quote powerfully—and movingly—expresses a feeling that I believe all public defenders share. It is by long-time public defender Robin Steinberg:

If personal reasons guided me to the work, and clients drew me in, what keeps me waking up and raring to go some 30 years later, is stunningly simple: unfairness. I hate unfairness and always have. It makes my blood boil. It is ironic that someone who hates unfairness as much as I do would work in the profession most steeped in it. Or perhaps it is inevitable.

Unfairness pervades our criminal justice system. We take the poorest, saddest, and most vulnerable people in our society and put them in cages. Once they are there, we offer few services, little education, and next to no assistance for a successful reentry into the outside world. The American criminal justice system applies unfair rules, in unfair ways, to those every other system in our society have already failed. The hardest thing about being a public defender is the relentless, pervasive, and institutionalized unfairness. ...

Whatever the unique confluence of circumstance and Constitution that got me here, I am lucky to have found a job in which, every day, I get to stand next to a client facing down the terrifying power of the criminal justice machine. That machine is going to have to go through me to get to them. That I can spend my breath and fury and anger in defense of a person facing those odds and and who—maybe, just maybe—will get the kind of second chance that all of us deserve, is a miraculous gift.

And that is why, even after 30 years as a public defender, I know I am truly one of the lucky ones. I have a job where I can fight against unfairness every day, and where I arrive each morning with a mission. Being a public defender is not so much a job, but the place where I am truly and finally home.

How can I defend “those people?”

How can I not defend those people? ☺

*Jon M. Sands is the federal public defender for the District of Arizona.*

## THE FORGOTTEN PRESIDENTS: THEIR UNTOLD CONSTITUTIONAL LEGACY

BY MICHAEL J. GERHARDT

Oxford University Press, New York, NY, 2013. 313 pages, \$34.95.

### Reviewed by Louis Fisher

In *The Forgotten Presidents: Their Untold Constitutional Legacy*, Michael Gerhardt, a professor of constitutional law at the University of North Carolina, provides a refreshing review of 12 lesser-known Presidents. He probes deeply into the conflicts these men faced with their cabinets, members of Congress, courts, political parties, interest groups, and the general public. Many struggled in the midst of economic crises that would have challenged any occupant of the White House. Along the way, they helped shape important constitutional doctrines, especially the scope of presidential power and the relationship between the executive and legislative branches. Even when their successes in office were modest, their judicial nominations had a far-reaching impact on national policy.

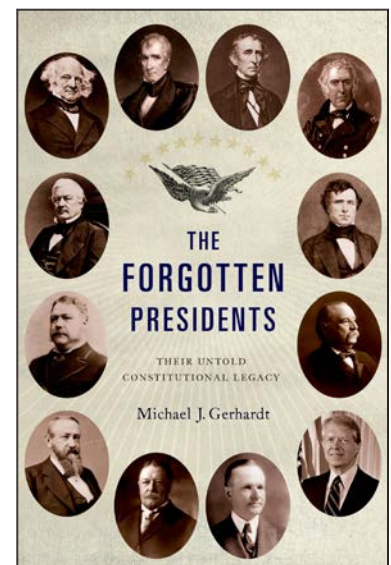
Because Grover Cleveland served two non-consecutive terms, *The Forgotten Presidents* has 13 chapters on 13 presidential administrations. Some of the Presidents it covers are relatively obscure, in part because they served for brief periods. William Henry Harrison died after one month in office. Zachary Taylor, who one day ate some fruit, developed gastroenteritis and never recovered. His death came after 16 months in office. Other Presidents in this study served full or nearly full terms but are little remembered: Martin Van Buren, John Tyler, Millard Fillmore, Franklin Pierce, Chester Arthur, Benjamin Harrison, and Calvin Coolidge. That covers nine of the 12 Presidents.

Three of the names are more significant: Grover Cleveland, William Howard Taft, and Jimmy Carter. In deciding whom to select for the book, Gerhardt considered various measures. One was how often a President is mentioned in textbooks and appears in library collections. The results, placed in the book's appendix, put eight of the initial nine I identified among the bottom 12. Coolidge is 13th from the bottom, Cleveland 14th, Taft 16th, and Carter 23rd. A second criterion that Gerhardt used for his selec-

tions was a President's composite score on public familiarity. Gerhardt notes that the public is unfamiliar with most Presidents, but, of the initial nine I identified, eight are among the bottom 12. Just above the bottom 12 are Cleveland, Van Buren, and Taft. Carter, as one might expect from how recently he served, is much more familiar to the public: in 17th place out of 39 Presidents. Although Gerhardt includes Calvin Coolidge in the book, he does not include Warren Harding, who served from March 4, 1921 to August 2, 1923, when he died of pneumonia. Located among the bottom 12 in both charts, he would have been a good candidate for the book.

Why include Carter but not Gerald Ford? Ford is well below Carter in both charts. Gerhardt acknowledges that Carter “is not as forgotten as many other presidents whom I did not include.” His public familiarity “has a lot to do with his being a more recent president, with his still being alive, and with his being an unusually active ex-president.” Gerhardt notes that Carter “rates near the middle rather than the bottom of public familiarity with his presidency.” But, again, why exclude Ford? As Gerhardt notes, constitutional scholars pay attention to Ford “because the story of Watergate cannot be told without him.”

*The Forgotten Presidents* explores a number of important constitutional themes, including some of contemporary interest. I have selected several for this book review: the extent of presidential control over subordinates in the executive branch (called the “Unitary Executive” today), the availability of an implied (but limited) power of the President to remove executive branch



employees, and whether the President possesses not only enumerated and implied powers but also “inherent” powers. That issue is a central concern today.

Gerhardt states that Van Buren’s first executive order established the maximum number of hours that federal employees could be required to work. Congress failed to pass legislation blocking his initiative, “which reinforced the president’s unilateral authority to direct the activities and working conditions of executive branch personnel.” On another occasion, however, after his postmaster general refused to comply with a writ of mandamus, Van Buren took the case to the Supreme Court, which, in *Kendall v. United States* (1838), held that executive officers must comply with judicial process. Gerhardt says that Van Buren’s decision “to fully litigate the matter proved disastrous for the unitary theory of the executive.”

The theory of a unitary executive was punctured at the start by Congress, the Supreme Court, and opinions issued by attorneys general. In 1789, after Congress recognized the implied power of the President to remove department heads unwilling or unable to carry out the law, Congress limited the President’s control over the office of the comptroller in the Treasury Department. Lawmakers considered the comptroller as less of an executive officer than as someone expected to carry out judicial duties in deciding the legality of expenditures and claims against the United States. James Madison told his colleagues in the House of Representatives that the President lacked any authority to interfere with the comptroller, who did not serve at the pleasure of the President. The President’s removal power was thus limited from the early years of the republic.

In *Marbury v. Madison* (1803), Chief Justice John Marshall identified two types of executive duties: those of a political nature (with which courts would not interfere) and those of a legal nature in carrying out statutory policy. The latter Marshall called “ministerial.” When Congress assigned a statutory duty to an executive officer, the officer looked not to the President for guidance but only to the law. Presidents lacked constitutional authority to intercede and attempt to control those efforts to implement statutory policy.

That understanding was regularly reinforced by opinions from attorneys gen-

eral. In 1823, Attorney General William Wirt advised President James Monroe that the latter had no business interfering with the work of auditors and comptrollers in the Treasury Department. Although the Constitution requires the President to “take Care that the Laws be faithfully executed,” he is not expected to execute each law by himself. Wirt said it could never have been the intention of the framers, in assigning this general power to the President, that “he should in person execute the laws himself,” a demand he called “an impossibility.” If auditors and comptrollers discharge their duties faithfully, then the President “has no authority to interfere.”

In subsequent years, Wirt frequently instructed Monroe that any involvement by the President in the settlement of accounts “would, in my opinion, be illegal.” Other attorneys general reached the same conclusion. John Mason, for example, advised President James Polk in 1846 that the Constitution “assigns to Congress the power of designating the duties of particular subordinate officers.” The President’s power of removal does not include “the power of correcting, by his own official, act, the errors of judgment of incompetent or unfaithful subordinates.” Those who wanted to appeal a decision of an executive officer charged with a ministerial act, such as the denial of a claim, had to apply to Congress for relief.

Attorneys general in the 1850s gave the same legal advice to Presidents Millard Fillmore and Franklin Pierce. Gerhardt suggests that “Tyler’s strong defense of presidential prerogatives effectively endorsed the so-called unitary theory of the executive (the notion that the president controls, or should control, the exercise of all executive power or that all executive power is consolidated in the president). ...” But Presidents have never exercised total control over subordinates in the executive branch.

Gerhardt discusses the important Supreme Court decision of *Myers v. United States* (1926), written by Chief Justice Taft. It gives broad support to presidential removal powers, but Gerhardt does not mention language in the decision that clearly limits the President’s power over subordinates: “Of course, there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer’s interpretation of

his statutory duty in a particular instance. Then there may be duties of a quasijudicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control.”

The Office of Independent Counsel, created during the Carter years, was upheld by the Supreme Court in *Morrison v. Olson* (1988). According to Gerhardt, the dissent by Justice Antonin Scalia “forcefully argued that the statute deprived the president of his constitutional entitlement to control the exercise of all executive power. His dissent is the most elaborate defense of the unitary theory of the executive.” Gerhardt continues: “As he explained, the theory posits that the Constitution vests all executive power in the president for two reasons: First, this arrangement ensures the exercise of executive power is under the control of a politically accountable official—the president. Second, it ensures uniformity in the exercise of executive power because one person will be in charge of its enforcement.”

Scalia’s dissent is powerfully argued, but his purpose was not to promote the unitary executive model. He did not claim that the President may exercise exclusive power over all enforcement actions in the executive branch. That would overturn precedents from 1789 forward. Instead, Scalia focused not on a broad enforcement and implementation power but more specifically on the executive powers to investigate and prosecute. He asked two key questions: “(1) Is the conduct of a criminal prosecution (and of an investigation to decide whether to prosecute) the exercise of purely executive power? (2) Does the statute deprive the President of the United States of exclusive control over the exercise of that power?” To Scalia, the Court answered both questions in the affirmative. He insisted that “governmental investigation and prosecution of crimes is a quintessentially executive function.” That position is far removed from a presidential power to control every employee in the executive branch, including those who carry out ministerial and adjudicatory duties. Throughout his dissent, Scalia focuses on two executive functions: investigation and prosecution.

Scalia does say, at the end of his dissent: “The purpose of the separation and

equilibration of powers in general, and of the unitary Executive in particular, was not merely to assure effective government but to preserve individual freedom.” This reference to “unitary Executive” contradicts his previous focus on two executive duties with which Congress should not interfere: investigation and prosecution. He did not, and could not, instruct Presidents to personally carry out every law and direct executive officials how to carry out ministerial and adjudicatory duties.

On 11 occasions, Gerhardt refers to “inherent” powers exercised by Presidents, Congress, and federal judges. I don’t think any such power exists. The three branches have a range of “implied” powers. These must be reasonably drawn from enumerated powers. Because a President has an enumerated power to carry out the laws, he has an implied power to remove an executive official unable or willing to implement statutory policy. Congress, with its enumerated power to legislate, has an implied power to investigate, to issue subpoenas for documents and testimony, and to hold in contempt those who refuse to comply. Implied powers can be checked. The implied power of Congress to seek information can be checked by an implied power of the President to withhold documents. Depending on circumstances, either branch can prevail.

The claim of “inherent” power is entirely different. It is said to reside entirely in a person holding an office. If it resides exclusively in that person, then theoretically it cannot be checked by other branches. Presidents have invoked inherent powers on four occasions and have lost every time: Harry Truman with his steel seizure in 1952 (invalidated by the Supreme Court in *Youngstown*), Richard Nixon claiming he could refuse to spend appropriated funds (the impoundment attempt blocked both by federal courts and congressional legislation), Nixon asserting the right to order warrantless surveillance of domestic operations (again nullified by judicial and congressional actions), and George W. Bush saying he could unilaterally create military tribunals without congressional authority (struck down by the Supreme Court in *Hamdan v. Rumsfeld*).

Gerhardt refers to a decision by President Van Buren that he had “the inherent authority” to order an investigation into possible criminal conduct within

the Treasury Department. Van Buren, however, acted on the basis of an implied power to ensure that the laws were being effectively carried out. In *In re Neagle* (1890), the Supreme Court upheld the right of the U.S. attorney general to appoint a U.S. marshal to accompany a Supreme Court justice as a bodyguard. The marshal shot and killed a man, California officials arrested the marshal, and the United States sought his release by a writ of habeas corpus. The Supreme Court held that the state was obligated to obey the writ even though no federal statute empowered the attorney general to provide judges with bodyguards. But this was not an “inherent” presidential power, as Gerhardt states. The Court spoke of an implied power: an obligation “fairly and properly inferrible” from the Constitution. Five years later, in *In re Debs*, the Supreme Court supported the authority of President Cleveland to send in federal troops to prevent striking workers from obstructing federal mail service. The authority was not “inherent” in presidential power, as Gerhardt claims. Cleveland acted under the implied power of the national government to protect its enumerated interests over interstate commerce and the transportation of mail. Gerhardt describes the right to remove executive officials as “inherent.” It is implied. The right of congressional committees to issue subpoenas is also implied, not “inherent.” Likewise, Jimmy Carter exercised implied, not “inherent,” powers.

President Taft relied on a mix of enumerated and implied powers, as Gerhardt correctly states, but Taft was not a “strict constructionist” who believed that a President “only had the authority to do something if the Constitution or Congress authorized it.” Gerhardt quotes Taft as saying said that Lincoln “always pointed out the source of the authority which in his opinion justified his acts.” That does not mean Lincoln always acted under the law. When Congress returned to session on July 4, 1861, Lincoln (to his credit) acknowledged that the emergency measures he took at the start of the Civil War relied not only on his Article II powers but on Congress’ Article I powers as well. For that reason, he needed Congress to retroactively authorize what he had done. Congress passed that legislation. In Taft’s view, Lincoln’s “claim of right to suspend the writ of habeas corpus ... was well founded.”

This book has a wealth of information

that will benefit readers. Unfortunately, it has an unusual number of technical errors. First names, last names, and courts cases are spelled wrong. A congressman referred to as “Preston” is actually Preston S. Brooks. Footnotes do not match. Note 66 on page 20 turns out to be note 67 on page 256. That happens with great frequency. A reference to the *Congressional Record* has a page number but no year or volume number. The publisher is making corrections in the second printing. ☉

*Louis Fisher is scholar in residence at The Constitution Project. From 1970 to 2010, he served at the Library of Congress as senior specialist in separation of powers at the Congressional Research Service and as a specialist in constitutional law at the Law Library. He is the author of more than 20 books, including The Law of the Executive Branch: Presidential Power (Oxford University Press, 2014). His personal web page can be found at [loufisher.org](http://loufisher.org).*

## **THE PRESIDENT AS COMMANDER IN CHIEF: AN ESSAY IN CONSTITUTIONAL VISION**

BY H. JEFFERSON POWELL

Carolina Academic Press, Durham, NC, 2014. 238 pages, \$35.00.

### **Reviewed by Louis Fisher**

In *The President as Commander in Chief*, Jefferson Powell draws on his many years of teaching at Duke University School of Law and service with the Office of Legal Counsel during the Clinton and Obama administrations to prepare a thoughtful analysis of presidential authority to protect national security. For guidance on how a conscientious President and his advisors should interpret and implement government policy, Powell turns primarily to Robert Jackson, examining his years both at the Justice Department and later on the Supreme Court. As Powell explains in the preface, his central concern in writing the book “is with *how* the president and the president’s legal advisors should think rather than with *what* they conclude.”

Although Powell accepts that politics plays an enormous role in formulating and executing national security policy, he keeps in mind the larger purpose that such policy

should serve: protecting the republic and the constitutional values associated with self-government. This perspective helps avoid narrow institutional arguments, such as over the power of Congress versus that of the President. Instead, Powell believes that the central purpose of constitutional law in debating issues of national security “is to maintain the carefully balanced power structure created by the Constitution.” In pursuit of that objective, lawyers “should write no blank checks (whether to the executive or the legislature) and they should be intensely skeptical of any neat theory of plenary presidential authority or congressional supremacy.” Nor should we “rely on the judiciary to keep the Constitution safe,” for “courts can play only a limited role” in making national security decisions.

Powell faults the political science literature for ignoring normative questions about what public officials should do. He is correct that, beginning in the 1950s, much of the political science profession concentrated on behavioral studies, preferring to hide behind quantitative and mathematical models instead of taking positions and drawing conclusions. Fortunately, however, many political scientists continue to conduct normative studies, including on constitutional law and presidential power. Powell identifies the basic value that guides his work: limited government that may not legitimately act outside the law.

With this framework for constitutional government, Powell examines U.S. actions after the terrorist attacks of Sept. 11, 2001, which led to decisions and policies that “have come to seem mistaken, wrong-headed, imprudent, morally unacceptable,” including justifications for invading Iraq in 2003 that “virtually no one accepts” today. Critiques were directed at executive actions taken at the direction of President George Bush “with no, or only vague and contestable, congressional authorization.” Among the legal errors committed during this period were the Office of Legal Counsel’s “torture memos” upholding a range of brutally coercive interrogation techniques. So defective were those memos that the Office of Legal Counsel later withdrew them and adopted legal standards better grounded in professional analysis.

Much of *The President as Commander in Chief* focuses on Justice Jackson’s concurrence in the Steel Seizure Case: *Youngstown Sheet & Tube Co. v. Sawyer*

(1952). In the district court, Holmes Baldrige of the Justice Department defended President Truman’s decision to seize steel mills to prosecute the war in Korea. Baldrige described presidential power very broadly, so as to include access to “inherent” and “residual” powers that supposedly flow from Article II of the Constitution. As Powell points out, these “high-flying claims” backfired in court, producing a powerful decision by District Judge David Pine that repudiated unlimited views of presidential power. Solicitor General Philip Perlman, during oral argument before the Supreme Court, avoided any mention of inherent presidential power, but public opinion had turned against Truman. The Court, six to three, declared that he lacked statutory authorization for the seizure. The six justices in the majority wrote separate opinions. Much of the attention has focused on Jackson’s concurrence.

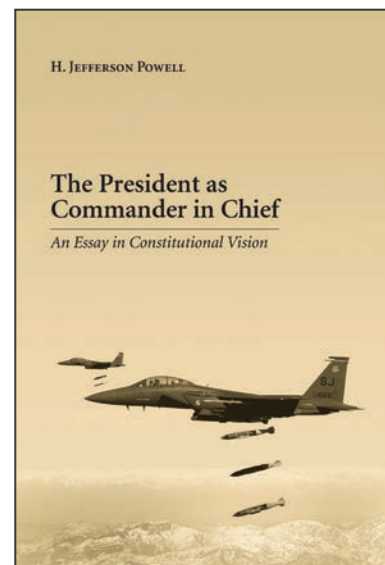
Contrary to earlier Supreme Court decisions, such as *United States v. Curtiss-Wright Export Corp.* (1936), Jackson in *Youngstown* denied that presidential power over foreign policy is plenary or exclusive. He flatly rejected Baldrige’s argument that the President possesses “inherent” powers to meet an emergency. Instead, Jackson emphasized the need to interpret the Constitution to preserve the government’s capacity to function effectively and to preserve the values of a republic, not a monarchy. He said that, although the Constitution “diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.” Jackson reinforced this republican model toward the end of his concurrence: “With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.”

Throughout the book, Powell underscores the principle of free government over claims of unchecked presidential power. Jackson’s concurrence “suggests that preservation of the balanced power structure of the Republic depends on the good-faith effort of officials within all three branches to adhere to that structure.” Toward the end of his life, Jackson was anxious “that too many American were putting too much

confidence in the judiciary as the safeguard of the constitutional system.” Nor, Powell advises, should we place too much confidence in the President: “It is an heroic assumption, one that history does not support, simply to assume that the president’s individual goals and those of the people will always converge, and in any event our Constitution presupposes the possibility of non-convergence by empowering Congress to exercise *its* discretion as to national security means and immediate ends.”

At times, Powell seems to endorse exclusive presidential powers in the field of foreign policy and national security. He states that the initial negotiations of a treaty are “under exclusive presidential control,” but the record is clear that many Presidents have invited both the Senate and the House to participate in treaty negotiations to build legislative support for needed authorizations and appropriations. Both houses of Congress are closely involved in the negotiation of trade agreements under the contemporary fast-track procedure. According to Powell, the President “is under no obligation to put a treaty into effect because it has received the Senate’s advice and consent.” But, under Article VI of the Constitution, all treaties “shall be the supreme Law of the Land,” and Article II, section 3, makes it the President’s duty to “take Care that the Laws be faithfully executed.”

Powell quotes footnote 4 of Jackson’s concurrence in *Youngstown*, in which Jackson stated that the Supreme Court in *Myers v. United States* (1926) affirmed the President’s exercise of an “exclusive power of removal in executive agencies.” *Myers* did no such thing. The Court expressly



recognized two broad limits on presidential removals: (1) statutory duties that are “peculiarly and specifically committed to the discretion of a particular officer” (ministerial duties) and (2) “duties of a *quasi*judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals.” In his dissent in *Myers*, Justice McReynolds reviewed numerous statutes that have limited the President’s power of removal: civil service reforms; laws creating commissions, boards, the Comptroller General, and the Board of Tax Appeals; and the general history of congressional control over postal affairs.

Another broad area that Powell would assign to the President in largely exclusive fashion is the “almost complete discretion to formulate and conduct the foreign policy of the United States.” In his view, this principle is “constitutionally correct.” Such a concession vests the President with an exclusive role in national security policy, as evidenced by President Barack Obama’s decision in 2011 to take military action against Libya for seven months without coming to Congress for authorization. To defend the legality of this initiative, the Obama administration argued that the military operation, which involved the launching of Tomahawk missiles from ships in the Mediterranean, air strikes by military aircraft, and the use of armed drones, did not amount to either “war” or “hostilities.”

Placing all of foreign policy with the President ignores express language in Article I that empowers Congress to lay and collect duties, regulate commerce with foreign nations, establish a uniform rule of naturalization, define and punish piracies and felonies committed on the high seas and offenses against the law of nations, declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water. Powell recognizes that Congress may cut off funds “for virtually anything as a matter of power.” However, without citing any authority, he claims that “the executive branch has long maintained that a congressional attempt to adjust the level of funding it provides as a means of forcing the president’s hand on an issue within executive discretion is unconstitutional.” I am unaware of a presidential power that is not subject to control by the power of the purse.

In Powell’s interpretation of Jackson’s concurrence in *Youngstown*, the “highest-level ‘command function’ is vested in the president and cannot be modified by Congress.” Yet in the Quasi-War against France in 1798, Congress specified that military operations would be confined to naval operations, not on land. President John Adams did not challenge that statutory restriction, but Powell insists that “executive acquiescence in a congressional intrusion into the exercise of the president’s genuinely exclusive command function would be a constitutional error.” Elsewhere in the book, Powell recognizes that a unanimous Supreme Court in *Little v. Barreme* (1804) ruled against a presidential proclamation to seize ships in the Quasi-War because it violated the policy that Congress had established by statute.

Toward the end of the book, Powell presents limits on a President’s exclusive power over foreign policy and national security. Jackson’s concurrence mandates the following: “a workable government in which power is dispersed and balanced, and national security is the shared responsibility of legislative and executive branches that are interdependent even though each makes its decisions autonomously.” For Powell, “Congress’s power to prohibit the initiation of combat, which we infer from its undoubted power to approve hostilities, takes precedence over presidential authority in general.” Yet Powell also states that the President can initiate hostilities on the basis of independent executive authority “up to a certain point if there is no congressional prohibition.” He recognizes that the Korean War initiated by President Truman in June 1950 fits in this category, but he suggests that the “safest course is probably to treat Korea as *sui generis* and not to treat it as supplying appropriate precedent to guide future decisions.”

The Korean War, however, began the unconstitutional process of Presidents’ seeking authority to use military force not from Congress but from the UN Security Council and other outside organizations, including NATO. That precedent emboldened President George H. W. Bush in 1990 to claim that he could use military force against Iraq solely on the basis of a Security Council resolution. Even when he received statutory

authority in January 1991, he continued to insist that the UN resolution provided sufficient authority. Truman’s precedent provided legal arguments for President Clinton’s military actions in Haiti, Bosnia, and Kosovo. Not once did Clinton seek congressional authority for his many military actions. President Obama relied on a Security Council resolution in March 2011 to use military force against Libya, acting with a combination of U.S. and NATO forces. In 2013, when he was unable to obtain UN support for military action against Syria, he still insisted that he possessed independent constitutional authority to send cruise missiles into Syria, even though he reached out for congressional support, which lawmakers refused to grant.

Truman’s precedent in Korea violated his public pledge from Potsdam, during Senate debate on the UN Charter, that, before agreeing to use American troops in a UN military action, “it will be my purpose to ask the Congress for appropriate legislation to approve them.” His unilateral action in Korea violated the United Nations Participation Act of 1945, which provided without any ambiguity that presidential agreements to use U.S. troops in a UN action “shall be subject to the approval of the Congress by appropriate Act or joint resolution.” Truman signed that bill without voicing any objections. Truman and subsequent Presidents violated the Constitution and statutory policy when they circumvented Congress. The President and the Senate through the treaty process may not transfer Article I congressional authority to international and regional bodies, whether to the Security Council or to NATO. ©

*Louis Fisher is scholar in residence at the Constitution Project and visiting professor at the William and Mary Law School. From 1970-2010, he served at the Library of Congress as a senior specialist in separation of powers with the Congressional Research Service and specialist in constitutional law with the Law Library. He is the author of more than 20 books, including The Law of the Executive Branch: Presidential Power (Oxford University Press, 2014). His personal web page can be found at [loufisher.org](http://loufisher.org).*

## THE ISLAMIZATION OF THE LAW IN PAKISTAN

BY RUBYA MEHDI

Routledge, Taylor & Francis Group, Abingdon, Oxfordshire, UK, 2013. 329 pages, \$130.00.

### Reviewed by Christopher C. Faille

Routledge has now re-issued this book, first published by Curzon Press in 1994, as part of Routledge's ambitious "Politics of Islam" series. One should not take Rubya Mehdi's book as a commentary on contemporary law in Pakistan—a lot has happened in the last 20 years—but one can still read it with profit as a study of an important trend during the period it covers, roughly from 1977 to 1993.

By way of preface to that period, Mehdi reminds us that what is now Pakistan was part of the British Raj. The British administrators, with encouragement going all the way up to King George I, decided early on that personal status cases (such as inheritance issues) that involved Muslims should be decided according to Islamic law. For this purpose, they had certain classic Islamic texts translated into English, and they treated those translations as legally binding. The translations were faulty and the underlying premise was more so: Mehdi says that the British had codified an "essentialist, static Islam incapable of change from within."

After independence in 1947, a mixed Anglo-Muhammadan law became the state law of the new nation. "All the defects of Anglo-Muhammadan law continued in the new state of Pakistan," she writes.

### Bhutto and Zia

Fast-forward 30 years to the military coup of 1977. This coup, launched because the military was unhappy with Prime Minister Zulfikar Ali Bhutto and his Pakistan People's Party, led to the undisguised military dictatorship of General Muhammad Zia-ul-Haque (and to the execution of Bhutto on trumped-up charges in 1979). Bhutto had served in the manner of a "modern secular politician," and the opposition, the Pakistan National Alliance, had done what it could to make hay of this, accusing the prime minister of un-Islamic behavior.

The issue of Islamization had nothing to do with Zia's coup, which seems to have been motivated by old-fashioned power lust. But Zia did grasp at Islamization as a way of building a base of domestic support.

It may have also helped him gain external support. Militant Islam was then considered in many quarters a valuable fighting faith, one that (though this may be hard to remember in the present climate) was for the most part on the side of the West *vis-à-vis* Soviet Communism. Further, since the government of the United States saw Pakistan as a front-line state in the war against Communism, it soon made clear its support for Zia.

Zia's Islamization measures included compulsory prayers in government offices, the review of educational materials to ensure that they complied with Islamic doctrine, legal enforcement of the month of fasting, and the creation of policy measures designed to implement an "Islamic economy." (For more on the issue of Islamic economics and related legal and policy measures, see my review of *What's Wrong with Islamic Economics* in the October/November 2013 issue of *The Federal Lawyer*.)

This push empowered the ulemas (bodies of Muslim scholars), and it encountered resistance from the bar. Mehdi doesn't see the resistance from the bar as arising from democratic or secular convictions. Rather, she sees it as just a power-struggle with Zia.

### Lawyers, Villages, and Hope

"Lawyers who were trained in the western way ... have lost some power or have had to share power with ulemas. They have had to be re-trained in the Islamic way. Lawyers did not support Islamization of the law wholeheartedly, their stand being

that the Anglo-Muhammadan system was Islamic enough." In general Mehdi does not have a high opinion of the legal profession in Pakistan, which she describes as inadequately trained and in possession of a narrow, ritualistic outlook.

The profession's inadequacies aside, its resistance to Islamization seems to have had some success, because in Mehdi's view the British colonial framework is still very much in place.

For hope for the future of Pakistan, Mehdi looks neither to Islamization as a state-imposed process nor to the organized bar with its colonial habits of mind, but to the villages and to customs that continue beneath the attention of state law. She quotes in this connection anthropologist E. Adamson Hoebel, who has said: "Deeply imbedded in the village and tribal areas of Pakistan is a vast array of local folk systems of law varying from village to village and area to area. This is the folk law of the people, nine-tenths of whom live in the villages and who rarely have contact with government courts, civil or criminal."

Hoebel wrote those words in 1965, and Mehdi saw them as still descriptive of the "pluralistic" legal system of Pakistan 30 years later. It would be good to have an update on that point.

On the whole, I believe this book is a valuable resource. I have focused chiefly on the theoretical framework of the book, but most buyers of the book will presumably be at least as interested in its accounts of the various specific Islamic provisions on the constitutions of Pakistan and the Islamization of both criminal and family law in the post-coup years.

I leave them to their discoveries. ☺

### ADDITIONAL BOOK REVIEWS

In addition to the book reviews in the paper copy of this issue of *The Federal Lawyer*, bonus reviews are included in the online version of the magazine. The following review is available at [www.fed-bar.org/magazine](http://www.fed-bar.org/magazine). ☺

### AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940

BY NICHOLAS R. PARRILLO

Reviewed by Michael Ariens

