

## LAW AS A TOOL



*H. Jefferson Powell*

*What is the proper attitude for the president to take toward a judgment of the Supreme Court on a constitutional issue with which he disagrees? Toward a duly enacted act of the national legislature which he thinks is beyond its constitutional powers? H. Jefferson Powell examines these questions in this essay, beginning with a decision by President Madison to follow such a judgment by the Court and obey the act of Congress requiring him to do so. Madison thus established a practice of respect for the judgment of the other branches that has had continued life in the executive branch until almost the present day. The lawyer for the president and the president himself have been obliged, in the course of their daily work, repeatedly to confront, as an ethical and not merely political matter, the nature and force of the obligation to respect the judgments of the other branches, at least where they were rationally defensible. In this sense there has long been in the executive branch an internalized ethic of obedience to the law.*

*There are many signs that this attitude is changing for the worse. Lawyers for the executive branch are coming to regard acts of Congress simply as obstacles to be overcome through specious reasoning, or tools to be employed by similarly insincere argument to confirm whatever the executive branch wants to achieve. As Powell argues, this movement toward the view of law merely as a tool or instrument subverts an essential ingredient in the idea of free government.*

The intuition that brought the contributors to this volume together was—and I quote eloquent words that no one will be surprised to know were crafted by Jim White—a shared sense that “our public world has been changing under our feet faster than we can see or understand it, especially with respect to the fundamental character of law and democracy,” and that the changes, “some of them distressing, show up everywhere.” In my own area of teaching, scholarship, and public service—American public law—I

have that sense very strongly, but when I began preparing this discussion, I found it surprisingly difficult to say what, in my own experience as teacher, scholar, and executive branch lawyer, actually justifies me in claiming to feel a sea change going on in public life. Much of what seems amiss in the public life of the United States—and perhaps in the Western world more generally—is hardly new.

Members of Congress engaging in partisan bickering and petty self-aggrandizement while neglecting the business of the Republic—this is a good account of Congress during the Gilded Age of the late nineteenth century. Supreme Court justices suspected of ideological bias or personal animus—you may recall that Thomas Jefferson described the opinions of John Marshall's Court as "huddled up in conclave . . . delivered . . . with the silent acquiescence of lazy or timid associates, by a crafty chief judge, who sophisticates the law to his own mind, by the turn of his own reasoning."<sup>1</sup> Obfuscation or dishonesty on the part of the executive branch—in the early 1920s, Justice Department corruption reached such depths that a House of his own party considered the impeachment of Attorney General Henry Daugherty. Rank and rampant partisanship—the Jacksonians' attacks on President John Quincy Adams and the anti-Jacksonian onslaught against Old Hickory himself cannot be topped for vulgar, defamatory content. The public sphere in any reasonably free and open society is going to seem, much and perhaps most of the time, in rather bad shape, on the brink of some disaster or the other. There has never been a golden age, for law or democracy, and nostalgia for what never existed may not be a useful tool in social criticism.

So, if the intuitive premise of the present collection has any validity, we must be able to trace it not only to the surface pathologies of our society, important as they unquestionably are, but beneath them. Or to put it bluntly and personally, if I have anything useful to say in this setting, it cannot simply be to retail my personal views on recent and current events, views that, I am sorry to say, often seem even to me distressingly predictable. In preparing this analysis, therefore, I have asked myself, again and again, what about American public law in the present day seems different to me at a fundamental level from my perceptions of American law in the past eras that I study and teach. I think I may have an answer, but to explain it, I need to start quite some time ago, with a date I have long thought deeply important, at least as a symbol, in American constitutional history: April 13, 1809.

On that date, James Madison, president for just over one month at that point, wrote a letter. Madison was responding to a letter he had received from Simon Snyder, governor of Pennsylvania and a major figure in Madison's Republican Party, a letter that has to have caused Madison some heartburn. Snyder, along with a great many other Pennsylvania Republicans, was up in arms—literally, in the case of some state militiamen—over a decision of the federal Supreme Court styled *United States v. Peters*. The details of the case need not detain us; what is important for present purposes is Snyder's request. The governor and the Republican majority in the state legislature were of the view that the Supreme Court's decision was not only erroneous but unconstitutional, "a usurpation of power and jurisdiction," in the legislature's words—indeed, just the sort of federal overreaching that the Republican Party had come to national power by resisting. A decade before, James Madison had been a leader in the fight against Federalist usurpation in Congress and the executive; it was a "pleasing idea," Snyder purred, that the executive branch of the national government was now in the hands of a chief magistrate who would uphold the Constitution's limits on federal authority with respect to the judiciary and Congress. Unmistakably, if tactfully, Governor Snyder was urging President Madison to nullify the Supreme Court's decision by refusing to enforce it.

I want us to be clear about how plausible Snyder's request was. First, Madison emphatically believed in the legitimacy and the duty of constitutional interpretation by actors besides the federal courts. On the national stage, he was perhaps the most prominent defender of the role of Congress and of the state legislatures in addressing constitutional issues, while almost his last act as president, in March 1817, was to veto a bill simply because he thought it unconstitutional, though he strongly approved of its policy. For Madison, the president was independently responsible for interpreting the Constitution and for upholding the instrument in its true or best interpretation.<sup>2</sup> Second, Madison was no stranger to the idea of the executive ignoring Supreme Court process: as secretary of state, Madison had snubbed the Court in *Marbury v. Madison*, disdaining even to have counsel put in an appearance on his behalf; more recently, Attorney General Caesar Rodney had publicly rejected an opinion by Justice William Johnson in which Johnson insisted that the executive was obliged to enforce judicial orders.<sup>3</sup> Rodney made his statement in the waning days of the previous administration, to be sure, but he remained as attorney general under Madison. Third, Snyder's constitutional argument was, at a mini-