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Kurland: Commen on Schlesinger

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COMMENT

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After reading Professor Schlesinger's paper, I thought I should be able to come here this evening and fulfill a long-standing ambition to deliver a talk short enough to satisfy even the most discriminating audience. It was to be one word in length, and the word would have been "Amen." I quickly realized that the sponsors of this symposium would not accept so gracious an act of generosity on my part. And so I proceed to my remarks which are entitled "Comments Consequent upon If Not All Relevant to Professor Schlesinger's Address on 'The Constitution and Presidential Leadership.'"

Celebrations of the bicentennial continue apace and with much variety. There are the Disneyland shows, the big ships, and the souvenirs bearing the imprimatur of the National Bicentennial Commission. Overdressed actors and underinformed television commentators encapsulate the events of 1787 with little imagination and less verisimilitude. And there are the sobersided efforts at understanding what the Constitution meant to the founders and what it means or should mean today. Obviously, fun and games entice more attention from the public than do seminars and lectures. I should not like to ask even this audience where it would be right now if it had a choice between Disneyland and College Park. Nevertheless, after extensive study of the period of the founding, I am convinced that the Constitution was premised on the existence of a concerned and informed citizenry, a citizenry of interested, intelligent individuals and not the mob so much derided by Hamilton.

Thus, I would go beyond Professor Schlesinger's suggestion that you all read the Constitution. I think the time has long since come for the people to play their role in making the Constitution a reality and not merely a symbol. I would assure you that the Constitution is not safely left to the care of judges and lawyers, legislators, and executives. The Constitution was made by "We the People" for "We the People." It is the people, not the government, that it was intended to protect. It was the government, not the people, that it was intended to restrain.

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The primary problem in keeping our Constitution may well be that which was expressed by Judge Learned Hand in 1942 in the midst of Hitler's war against civilization. His warning is no less necessary today. He said then:

> As the social group grows too large for mutual contact and appraisal, life quickly begins to lose its flavor and significance. Among multitudes relations must become standardized; to standardize is to generalize, and to generalize is to ignore all those authentic features which mark, and which indeed alone create, an individual. Not only is there no compensation for our losses, but most of our positive ills have directly resulted from great size. With it has indeed come the magic of modern communication and quick transport; but out of these has come the sinister apparatus of mass suggestion and mass production. Such devices, always tending more and more to reduce us to a common model, subject us—our hard-won immunity now gone—to epidemics of hallowed catchwords and formula. The herd is regaining its ancient and evil primacy; civilization is being reversed, for it has consisted of exactly the opposite process of individualization.[1]

Liberty was the watchword of the Convention of 1787—the liberty of the individual in society. The object of the Convention was to erect a structure of government that would, to the extent possible, protect and not invade the liberties of the people within its domain. For these men, government was not an end in itself. To paraphrase Holmes, it was not a good but merely a necessity. For the most part, the founders were not covetous of power. They had come to view government as the antithesis of freedom for its citizens. There were some then, and more since, for whom the purpose of union was empire—but not empire at the price of liberty. It was on July 4, 1861, that Lincoln asked the question in a message to Congress: "Must a government of necessity, be too strong for the liberties of its own people, or too weak to maintain its own existence?"[2] The founders thought they anticipated that question with a negative answer in the form of the American Constitution. How well they succeeded is still a moot question.

It was a far cry from the sealed chambers of the 1787 Conven-

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1. L. HAND, THE SPIRIT OF LIBERTY 170-71 (3d ed. 1960).

2. Message from Abraham Lincoln to Congress in Special Session (July 4, 1861), *reprinted in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN, 1860-1861, at 426 (R. Basler ed. 1953) (emphasis in original).

tion in Philadelphia which gave birth to the Constitution to the televised Iran-Contra hearings in the Capitol that have so diverted your attention and mine in recent weeks. But the two events are not unconnected, as Professor Schlesinger has so cogently demonstrated. In both, representatives of the people have been desperately concerned about protecting the people's liberties by assuring the people's right to govern themselves, or, to use a phrase common at the earlier time, to assure a "government of laws and not of men"—government run according to pre-established rules and not by individual fiat. The essence of constitutional democracy—the essence of the Constitution itself—is the rule of law.

As Justice Frankfurter announced in one case in 1947:

> Law alone saves a society from being rent by internecine strife or ruled by mere brute power however disguised. . . . The conception of a government of laws dominated the thoughts of those who founded the Nation and designed its Constitution, although they knew as well as the belittlers of the conception that laws have to be made, interpreted, and enforced by men.[3]

In another case, this time in 1958, where expediency was given by a state as a reason for overriding the law, Frankfurter noted:

> To yield to such a claim would be to enthrone official lawlessness, and lawlessness if not checked is the precursor of anarchy. On the few tragic occasions in the history of the Nation, North and South, when law was forcibly resisted or systematically evaded, it has signalled the breakdown of constitutional processes of government on which ultimately rest the liberties of all. . . . For those in authority thus to defy the law of the land is profoundly subversive not only of our constitutional system but of the presuppositions of a democratic society.[4]

In the time remaining to me, I should like to take you through an elementary exercise in a reading of the Constitution insofar as it informs us about the allocation of powers within the national government. I propose to offer to you what the Nixon administration used to call "strict construction" and what the Reagan administration has more recently labelled "original intent." In essence, this is supposed to require interpreting the Constitution by reading its words in the historical context in which they were written.

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3. United States v. United Mine Workers, 330 U.S. 258, 308 (1947).

4. Cooper v. Aaron, 358 U.S. 1, 22 (1958).

Assuming that the Constitution establishes a government of laws—and there is more than ample evidence that the founders totally rejected and abominated the notion of the royal prerogative in any branch—article six makes clear what that rule of law was to be. It provides in terms: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."[5]

The first article of the Constitution establishes the base for the new order of government. It provides for a representative assembly to be chosen at frequent intervals, through which the sovereign voice of the people would establish the policies to control government behavior. More than any government antecedent to it, this representative assembly would be based on a widely disseminated elective franchise classless in nature. Almost all of the substantive powers of the national government were conferred on Congress by the eighth section of the first article. Although the government purported to be one of limited powers, to the extent that the specified powers were to be augmented, it was to the congressional branch and only to that branch that the authority for such supplementation was given. Article I, section 8, clause 18 provides: "The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[6]

"The executive Power" was "vested in a President of the United States."[7] After great debate and controversy, the notion of a multiple executive was rejected in favor of a single President, the better to assure responsibility. The Constitution did not provide for a Presidency; it provided for a President. The powers of the President set out in the Constitution were relatively few, however important. It was expected that most of his authority would be that which would be assigned him by duly enacted statutes. The President was charged by the Constitution with the duty to "take Care that the Laws be faithfully executed."[8] He was granted the role of the Commander-in-Chief of the armed forces, and he was to "receive Ambassadors and other public Ministers."[9] And after much debate he

5. U.S. CONST. art. VI, cl. 2.
6. *Id.* at art. I, § 8, cl. 18.
7. *Id.* at art. II, § 1, cl. 1.
8. *Id.* at § 3.
9. *Id.*

was given the power to issue pardons.[10] Otherwise, his powers were to be exercised only in conjunction with Congress or a branch of it. His legislative authority was confined to a conditional veto, subject to being overridden by a two-thirds vote in each House of Congress.[11] He could make treaties with foreign nations, but only with the advice and consent of two-thirds of the Senate.[12] He could nominate ambassadors and officers of the government and the judges thereof, but only with the advice and consent of the Senate.[13]

Contrary to contemporary notions, there is no provision for *a* "foreign affairs power" or *a* "war power" in the Constitution. The foreign affairs power of the President obviously included treatymaking, but that required a two-thirds concurrence by the Senate; it included the appointment of ambassadors, but only with the advice and consent of the Senate; it included receiving ambassadors, which power was the President's alone and in this may be found the authority to recognize foreign governments.[14] But it was for Congress to regulate commerce with foreign nations.[15]

So, too, was the war power a conglomerate. It was left to Congress "[t]o declare War"; "[t]o raise and support Armies"; "[t]o provide and maintain a Navy"; "[t]o make Rules for the Government and Regulation of the land and naval Forces"; and "[t]o provide for the calling forth of the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions."[16]

There is no provision for any Privy Council or Cabinet. So far as provision was made for the Chief Executive to receive advice, the Constitution says that "he may require the Opinion in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices."[17] To the degree that the President was to have a voice in legislative policymaking, the Constitution provides: "He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient."[18] Whether and how to utilize such infor-

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10. *Id.* at § 2, cl. 1.
11. *Id.* at art. I, § 7, cl. 2.
12. *Id.* at art. II, § 2, cl. 2.
13. *Id.*
14. *Id.*
15. *Id.* at art. I, § 8, cl. 3.
16. *Id.* at cls. 11-15.
17. *Id.* at art. II, § 2, cl. 1.
18. *Id.* at § 3.

mation or to deal with such recommendations were left to the discretion of Congress.

To return then to the Iran-Contra hearings, it should be clear that there is no constitutional authority for the White House staff or even the Cabinet to immunize the President from the responsibility of his office. The founders insisted on a singular Presidency in order to assure a responsible Presidency. Surely, he may delegate ministerial tasks of his office, but he cannot delegate responsibility for the performance of his duties. Even clearer is the fact that there is no way under the Constitution that a Lieutenant Colonel of the Marines and a Rear Admiral of the Navy—not to speak of a retired Air Force General and a disreputable dealer in munitions—with or without the *nihil obstat* of the President, the Secretary of State, the Secretary of Defense, and the Attorney General, can undertake to exercise powers of the United States in contradiction of the duly enacted laws of the United States. To speak of a "higher law" than the Constitution in these circumstances is not only to betray the oath sworn by all concerned to "preserve, protect and defend the Constitution,"[19] it is to give aid and comfort to all enemies of constitutional government.

It has been suggested that there is a parallel to be seen between the Watergate hearings and the Iran-Contra hearings. One connection between Watergate and the Iran-Contra debacle is apparent in the revelations that followed Watergate, made by the Rockefeller Commission, of which Ronald Reagan was a member. As Erwin Griswold and Ernest Gellhorn reported in *The New York Times*:

> The agonizing details that have surfaced in the Iran-Contra hearings could have been lifted from the transcript of hearings about the C.I.A. activity 12 years ago.
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> For those hearings also demonstrated how officials operating under the mantle of national security defined for themselves how the national interest should best be served and how an excessive concern for secrecy could corrupt the integrity and objectivity of the intelligence process.[20]

The Final Report of the Watergate Committee itself recommended the development of controls on the intelligence community so that it be made responsible to appropriate officials outside their

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19. *Id.* at § 1, cl. 7.

20. N.Y. Times, July 21, 1987, at A25, col. 2 (Op-Ed section). Griswold was a member of the Rockefeller Commission, and Gellhorn was its senior counsel.

own domain.[21] That was what was then recommended by the Rockefeller Commission and the Senate Committee on Intelligence.[22] The resulting limitations enacted by Congress[23] were the ones that the National Security Council decided to evade in the Iran-Contra episode. "Parchment barriers," as Madison termed them in 1787, are not enough. As Griswold and Gellhorn concluded: "There is no magic formula that can cure policy excesses or assure that no effort will be made to circumvent the law. Personal integrity and a commitment to democratic processes have no substitutes."[24]

For me the constitutional problem in the Iran-Contra fiasco is essentially not different from the Watergate fiasco. At bottom, the evil is the attempted exercise of governmental authority by White House staff operating under the pervasive but mistaken premise that the rules do not apply to them. The fact is that, in both instances, the bloated White House staff arrogated power unto itself that neither the Constitution nor the Congress had granted even to the President. The White House staff acted as an extra-constitutional office of government, paying no heed to constitutional limitations.

As Alexander Bickel wrote just before his untimely death:

> Consent will not long be yielded to faceless officials, or to mere servants of one man, who themselves have no "connexion with the interests of the people." In opposing [George III's] cant of "not men, but measures," Burke therefore resisted rule by non-party ministers who lacked the confidence of the Commons. By the same token we may today oppose excessive White House staff-government by private men whom Congress never sees. It was not for nothing that the American Constitution provided for "executive Departments" and for Senate confirmation of the appointments of great officers of state.[25]

Indeed, we know from many sources, including the writings of James Wilson, one of the principal framers, that the authors of the Constitution intentionally rejected the system of royal counselors who ran much of the government of England and who were the primary instrumentalities for effecting what historians have labelled "the corruption of the Constitution." James Wilson told us:

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21. FINAL REPORT OF THE SELECT COMM. ON PRESIDENTIAL CAMPAIGN ACTIVITIES, S. REP. No. 981, 93d Cong., 2d Sess. (1974).

22. S. REP. No. 775, 94th Cong., 2d Sess. (1976).

23. Pub. L. No. 93-148, 87 Stat. 555 (1973).

24. N.Y. Times, July 21, 1987, at A25, col. 3 (Op-Ed section).

25. A. BICKEL, THE MORALITY OF CONSENT 18 (1976).

> The British throne is surrounded by counselors. With regard to their authority, a profound and mysterious silence is observed. One effect, we know, they produce; and we conceive it to be a very pernicious one. Between power and responsibility, they interpose an impenetrable barrier. Who possesses the executive power? The king. When its baneful emanations fly over the land; who are responsible for the mischief? His ministers. Amidst their multitude, and the secrecy, with which business, especially that of a perilous kind, is transacted, it will be often difficult to select the culprits; still more so, punish them. The criminality will be diffused and blended with so much variety and intricacy, that it will be almost impossible to ascertain to how many it extends, and what particular share should be assigned to each. . . .
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> In the United States, our first executive magistrate is not obnubilated behind the mysterious obscurity of counsellors. Power is communicated to him with liberality, though with ascertained limitations. To him the provident or improvident use of it is to be ascribed. For the first, he will have and deserve undivided applause. For the last, he will be subjected to censure; if necessary, to punishment. He is the dignified, but accountable magistrate of a free and great people.[26]

No one would deny the President the staff required to provide him with the information and advice he needs to carry out his burdensome tasks. Indeed, none would refuse to leave to a more felicitous pen than his own the drafting of his messages to the Congress and to the people. But the President, under the Constitution, is expected to do more than to read aloud the scripts prepared by other minds and other pens. The responsibility for Presidential actions and decisions must rest with the President. To use a phrase much bandied about at the Iran-Contra hearings, the buck must not only stop at the President's desk, it is his duty to see that it gets there. That is what being President means. The Constitution did not provide for election of the President by the people so that he might appoint surrogates to do his job while he hides behind a veil of ignorance. And certainly the Constitution does not authorize the President to delegate powers to subordinates which were constitutionally denied even to him by Congress.

If the Constitution too tightly confines our government officials, the remedy is not to ignore it or to wage guerilla warfare

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26. 1 THE WORKS OF JAMES WILSON 318-19 (R. McCloskey ed. 1967).

against it, but lawfully to change it. The Constitution was intended to be a tight fit. That it has been loosened by abuse is not reason to relax it further. George Washington, in his last testament to the Nation in 1796, spoke sentiments we should do well to remember. He said:

> It is important . . . that the habits of thinking in a free Country should inspire caution in those entrusted with its administration, to confine themselves within their respective Constitutional spheres; avoiding in the exercise of the Powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all departments in one, and thus to create whatever the form of government, a real despotism. . . . If in the opinion of the People, the distribution or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way in which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield.[27]

As I said at the very outset of this talk: "Amen!"

27. Farewell Address by President George Washington (Sept. 19, 1796), *reprinted in* 1 THE FOUNDERS' CONSTITUTION 681, 683-84 (P. Kurland & R. Lerner ed. 1987).