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The Constitution and Presidential Leadership

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THE CONSTITUTION AND PRESIDENTIAL LEADERSHIP

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This has been the year in which Americans have joyously marked the bicentennial of our Constitution. It has been a grand celebration, but I must confess that I have reflected once or twice during this festive time that we are prepared to do almost anything for our sacred document—except to read it.

For the indication is that many of us have only the dimmest idea what is in it. A poll taken in February of this year by the Hearst Corporation reports that seven out of ten Americans believe that the Constitution declares that "all men are created equal"—an ennobling sentiment but not to be found in the Constitution. Nearly half of those polled think it contains the phrase "from each according to his ability, to each according to his need"—a result that would have considerably gratified Karl Marx. Sixty-four percent think the Constitution establishes English as our national language. Forty-nine percent, almost half, think that the President has the authority to suspend the Constitution in times of national emergency. Some of our recent Presidents seem to be part of that forty-nine percent.

If this poll can be trusted—and I am always skeptical when 1,004 Americans are polled, and the pollsters tell us that this is what 240 million Americans think—then we must conclude that we have not done right by our Constitution. For the American Constitution, whether or not it is, as Gladstone famously said, "the most wonderful work ever struck off at a given time by the brain and purpose of man,"[1] is beyond all question an extraordinary achievement. It is not a perfect document, as Justice Thurgood Marshall powerfully pointed out the other day.[2] "We the People" in the Constitution's preamble turns out to mean in the text: "We the white adult males." Women and slaves were beyond the fringe. Yet one of the wonders of the Constitution is that it provides the means for its own improvement. Amendment and judicial interpretation have corrected many of its flaws and extended its basic principles.

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1. Gladstone, *Kin Beyond Sea*, N. AM. REV., Sept.-Oct. 1878, at 185.

2. T. Marshall, Remarks at the Annual Seminar of the San Francisco Patent and Trademark Law Association in Maui, Hawaii (May 6, 1987) (available at the *Maryland Law Review*).

What a document it is! It was drawn up two hundred years ago by fifty-five men for less than four million people—hardly half the population of New York City today—living in thirteen small states straggled along the Atlantic seaboard. It has survived with minimal changes (twenty-six amendments, only sixteen since 1791) while the United States has grown into a continental, industrial, and now global power, with forty times the land area and sixty times the population of 1787. It is the oldest written constitution in continuous operation in the world—a very considerable accomplishment, when one reflects that Brazil, for example, has had eight constitutions in its 165 years of independence and is now drafting its ninth, and that even so politically mature a nation as France has had four constitutions in the last century.

Why has the American Constitution so marvelously endured? Its longevity is a tribute to the wisdom of the men who drafted it during that hot Philadelphia summer so long ago. They were men well read in the history of classical republics; men experienced in colonial assemblies and state governments; practical men prepared to make concessions and compromises to form a more perfect union; visionary men who took the long view and believed that they were writing not for the hour but for the ages (as Madison told the convention on June 26, 1787: "In framing a system which we wish to last for ages, we should not lose sight of the changes which ages will produce");[3] skeptical men with no illusions about human nature (Lord Bryce described the Constitution in *The American Commonwealth* as "based on the theology of Calvin and the philosophy of Hobbes . . . the work of men who believed in original sin, and were resolved to leave open for transgressors no door which they could possibly shut");[4] men determined to end the confusions of the Articles of Confederation by establishing a strong central government with a strong Presidency and equally determined to make sure that power could not be abused and that the strong central government and the strong Presidency would remain forever accountable to the people.

To strengthen accountability they devised a system based on the separation of powers. The separation of powers means the distribution of the powers of the national government among three distinct and coordinate branches—the executive, the legislative, and the judiciary. The theory of the framers was that each branch would

3. DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES 280 (C. Tansill ed. 1927).

4. 1 J. BRYCE, THE AMERICAN COMMONWEALTH 299 (1888).

serve as a check on the other two, thereby assuring the accountability of government and the liberties of the people. This system of "checks and balances" was designed, in the words of Justice Brandeis, "not to promote efficiency but to preclude the exercise of arbitrary power."[5]

This separation of powers was the idea that Hamilton placed first in his list of those "wholly new discoveries" in the "science of politics" that might enable the risky American experiment to escape the melancholy fate that had overtaken the republics of antiquity.[6] The separation of powers was a novelty in constitutionalism in 1787. For that matter, it is still something of a novelty today. Foreigners find the whole concept hard to grasp. When I visited Beijing a short while ago, a cabinet minister said to me that he utterly failed to understand the American system—"the system of three governments."

Even those reared under a parliamentary system are baffled. The parliamentary system is characteristically based not on the separation but on the fusion of powers. Thus, in Great Britain Parliament creates the Executive (in the sense that the Prime Minister and the Cabinet are drawn from Parliament) and exercises the final judicial power. The framers rejected this model. They turned down the proposal that Congress choose the President, providing rather for election by the people through an electoral college. They established an independent federal judiciary holding office for life.

The system of accountability thus depends on the maintenance of a balance among the three separate and coordinate branches of government. The framers were well aware of what Madison called the "impossibility and inexpediency" of a rigid separation of powers into three watertight compartments. Madison devoted two of *The Federalist Papers* to showing that the Constitution envisaged "a partial mixture of powers."[7] Hamilton described the situation with regard to vital powers as one of "joint possession."[8] In our own day, Professor Neustadt has accurately described the constitutional plan as one of "separated institutions *sharing* powers."[9] As Justice Jackson put it in his great concurring opinion in the Steel Seizure Case: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers

5. Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

6. THE FEDERALIST No. 9, at 51 (A. Hamilton) (J. Cooke ed. 1961).

7. THE FEDERALIST No. 47, at 328; No. 48, at 338 (J. Madison) (J. Cooke ed. 1961).

8. THE FEDERALIST No. 75, at 506 (A. Hamilton) (J. Cooke ed. 1961).

9. R. NEUSTADT, PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP 101 (rev. ed. 1976) (footnote omitted).

into a workable government. It enjoins upon its branches not separateness but interdependence, not autonomy but reciprocity."[10]

Nevertheless, a system of divided powers, designed for the restraint of power rather than for efficiency in its application, does create problems. Today high-minded and capable citizens wonder whether the time has not come for a fresh look at the Constitution. Why, after all, should anyone expect that a document drawn up for a small, rural society remote from world power conflicts would be a perfect fit two centuries later for a mighty imperial power? However effective the Constitution may have been in addressing our problems during the relatively placid nineteenth century, it no longer—so the contention runs—meets our needs in the dark and bloody twentieth century.

So in recent years we have seen a campaign for constitutional reform. Some reformers concentrate on particular issues: a single six-year term for the President; direct election of the President; four-year terms for the House and eight-year terms for the Senate; members of Congress serving in the Cabinet; an item veto; an annually balanced budget; prohibition of abortion; and so on. But the gravamen of the case against the Constitution of 1787 lies in an indictment of the distinctive feature of the American polity—the separation of powers.

Let me quote the formulation offered by the Committee on the Constitutional System, a group of able persons experienced in government, politics, and academia, co-chaired by three distinguished Americans—Senator Nancy Landon Kassebaum of Kansas; Douglas Dillon, the former Secretary of the Treasury; and Lloyd Cutler, a former counsel to the President. The Committee puts the problem in these terms: "The checks and balances inspired by the experience of the eighteenth century have led repeatedly, in the twentieth century, to governmental stalemate and deadlock, to an incapacity to make quick and sharp decisions in the face of urgent problems."[11]

This situation, it is argued, is devastating enough in domestic policy, where it prevents concerted action by the executive and legislative branches to deal with the budget deficit, the trade deficit, the public debt, and other agonizing questions. And, as some continue

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10. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

11. COMMITTEE ON THE CONSTITUTIONAL SYSTEM, AFTER TWO CENTURIES: OUR EIGHTEENTH CENTURY CONSTITUTIONAL SYSTEM IN TODAY'S COMPLEX WORLD 3 (Feb. 1, 1983) (Basic Policy Statement).

the indictment, it is disastrous in foreign policy. We are engaged in a global struggle with an unscrupulous adversary free to act without regard to internal opinion or international law. Can we let the Constitution tie our hands and thereby imperil the safety and survival of the Republic? Does not national security require the concentration of authority in the hands of the President, since he has the best information and alone can act with the necessary secrecy and dispatch? Can we afford congressional meddling with the conduct of foreign affairs? Can we afford 535 Secretaries of State? Does not indeed the very existence of this obsolete system of checks and balances force Presidents into circumvention and illegality, as we have seen in recent months, in their patriotic desire to protect the Republic?

A British observer recently summed up the case.

> The Iranian arms sale fiasco and its impact on "Contra" forces on the borders of Nicaragua have made it clear yet again that the American constitutional system is an obstacle to the conduct of a successful Western security policy. More particularly, it deprives U.S. administrations of most of those unconventional tools which great powers have always had to use in a cruel world . . . . It is this self-inflicted American inhibition, and not the Soviet menace alone, that now threatens to engulf us all in some future disaster . . . . The sober fact seems to be that the American system, with duality (or worse) built into the conduct of foreign policy, is unequal to the demands the modern world makes on a world power.[12]

The conclusion is evident. We should retreat from the separation of powers and invest more unconstrained authority in the Executive.

I sometimes wonder, however, whether American constitutional reformers yearning after the parliamentary model really appreciate how that model works. In practice, the fusion of governmental powers means a quite extraordinary concentration of power in the Executive. The British Prime Minister appoints people to office without parliamentary confirmation, makes foreign policy without parliamentary participation, declares war without parliamentary authorization, concludes treaties without parliamentary ratification, sets the budget without parliamentary consultation, and withholds information without parliamentary recourse—essentially inheriting the prerogatives that once belonged to absolute monarchy. "The

12. G. Urban, ENCOUNTER, Apr. 1987.

government controls Parliament," as a leading Tory lawyer, Lord Hailsham, put it, "and not Parliament the government . . . . We live under an elective dictatorship, absolute in theory, if hitherto thought tolerable in practice."[13] Nor under the British system does a Supreme Court exist to check executive or legislative abuse.

"It works quite well for us," Sir Oliver Wright, the recent British ambassador to the United States, has written of the parliamentary system. He added: "I doubt it would for you. I'm glad you didn't try. For the parliamentary system of government gives . . . astonishing power to the executive." This is all right for a medium-sized nation like Britain. "But give the executive of a superpower . . . powers of that magnitude, and we all should be in trouble."[14]

American advocates of the parliamentary model reply that there is an ultimate check under the British system—one that would serve a useful purpose over here. For in Britain the Executive has automatic legislative support for his policies *only* so long as those policies command the confidence of a majority in the House of Commons. The parliamentary system thus appears to offer a quick and efficient solution when a government commits crimes or blunders or, in one way or another, falls on its face. "If the United States were a parliamentary democracy," as a writer recently argued in *New Republic*, "the Reagan government would have already collapsed in a 'no confidence' vote."[15]

But this assumption also betrays, I fear, an optimistic reading of the British experience. The last time a vote of confidence overthrew a government commanding majority support in the House of Commons was over a century ago—in 1885. It is conceivable that something like the Iran-Contra mess might have forced out a British prime minister through behind-the-scenes sleight-of-hand. This is what happened when Harold Macmillan replaced Anthony Eden after the Suez fiasco in 1956. But that does not mean that Parliament and the people would know what had been going on. Details of Suez are still leaking out a generation later. I remember one British MP saying to me at the time of Watergate: "Don't think a Watergate couldn't happen here. You just wouldn't hear about it."[16]

The defects of the British system as a means of guaranteeing accountability are on full display today. Last year Mrs. Thatcher

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13. Hailsham, *Elective Dictatorship*, LISTENER, Oct. 21, 1976, at 496.

14. Wright, *The British View*, AM. HERITAGE, May-June 1987, at 92.

15. Kaus, *No Confidence*, NEW REPUBLIC, Mar. 23, 1987, at 15.

16. W. Wyatt, TURN AGAIN, WESTMINSTER (1973). The quoted sentiment is from the author's inscription in my copy of the book.

made a misbegotten effort to prevent the publication in Australia of *Spycatcher*, the book by Peter Wright, a former officer of MI5, the British counter-intelligence agency. The trial brought attention to Peter Wright's statement that in the 1970s an MI5 group had engaged in a conspiracy to overthrow Harold Wilson's Labour government. The MI5 gang evidently got into its head that the Prime Minister might be a Soviet mole and launched a campaign to drive him out of Downing Street. The book, though published in Australia and now in the United States, is still suppressed in Great Britain, with Mrs. Thatcher's ukase ratified by Britain's highest court, the law committee of the House of Lords.

Peter Wright's allegations led to a demand in Parliament for an investigation to establish the facts. Mrs. Thatcher quickly and definitively quashed the whole idea. "If it was the United States," as Merlyn Rees, a former Home Secretary, cried in frustration, "there would be a proper investigation. There would be hell to pay."[17] Indeed there would. If an FBI or CIA group had been exposed as trying to overthrow an American administration, one can imagine the fury in Congress. There *are* advantages to the separation of powers.

Such incidents explain why in Britain constitutional reformers are calling for movement toward the separation of powers. Ironically, these calls come at just the time that American constitutional reformers want to move toward the British model.

At any rate, let us concentrate on the harm allegedly wrought in the United States by the separation of powers. After all, we have had the checks and balances since the founding of the Republic. Has it really been such a damaging thing? The existence of an independent Congress and of an independent Supreme Court has not prevented competent Presidents in the past from acting with decision and dispatch. The separation of powers did not disable Washington or Jefferson or Jackson or Lincoln or Wilson or Truman or the two Roosevelts. Why is it so much more harmful today?

It cannot be persuasively argued that our problems are so much worse than those that assailed our ancestors. Troubles impending always seem worse than troubles surmounted, but this does not prove that they really are. Nuclear weapons excepted, the problems of the 1980s are modest compared to the problems that confronted Washington's generation in achieving independence and fashioning a free state, or to the problems that confronted Lincoln's generation

17. *The Independent* (London), Mar. 17, 1987.

in bringing the Republic through the glare of civil war, or to the problems that confronted Franklin Roosevelt's generation in conquering the worst depression and winning the greatest war in American history.

Of course, the separation of powers is a perennial irritation for Presidents. Theodore Roosevelt, when President, once clenched his fist and said to his young kinsman, Franklin D. Roosevelt: "Sometimes I wish I could be President and Congress too." FDR added thirty years later, when he was in the White House himself: "I suppose if the truth were told, he is not the only President that has had that idea."[18] But our best Presidents have persevered in the job of winning consent for their policies. On the whole they have succeeded where they deserved to succeed.

Presidential leadership has historically been the great means of overcoming the problems created by the separation of powers—Presidential leadership, accompanied by the development of political parties that supply the connective tissue between the executive and legislative branches. The Presidents who operated the system successfully in the past knew what they thought should be done and were able to persuade Congress to give their policies a try. The problem today is not that our leaders have marvelous policies which they are prevented from carrying out by structural gridlock in the system. The problem is that they cannot persuade Congress and the Nation that their policies are wise.

Efficient enactment of a bad program is a doubtful triumph. A system in which a rubber-stamp legislature delivers whatever the Executive requests is only as good as the Executive and his requests. If the United States had had a parliamentary system in 1937, Congress would have given FDR his court-packing plan. If we had a parliamentary system today, Congress would long since have outlawed abortion and affirmative action and legalized school prayer.

A century ago Lord Bryce reported the English view that the separation of powers made it impossible for the American system of government to settle major issues. Bryce also reported the rejoinder that American political leaders made to this criticism. Congress, they told Bryce, had forborne to settle such issues not because of defects in the structure of the system

> but because the division of opinion in the country regarding them has been faithfully reflected in Congress. The

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18. The Public Papers and Addresses of Franklin D. Roosevelt (S. Rosenmann comp. 1941).

> majority has not been strong enough to get its way; and this has happened . . . because no distinct impulse or mandate towards any particular settlement of these questions has been received from the country. It is not for Congress to go faster than the people. When the country knows and speaks its mind, Congress will not fail to act.[19]

The question in short is not failure of structure but failure of consensus. When the country is not agreed as to what should be done, then the delay, debate, and further consideration and persuasion enjoined by the separation of powers are likely to produce better policies in the end. What is the great advantage in "making quick and sharp decisions in the face of urgent problems" if the decisions are also hasty, ill-advised, and dumb? A competent President with a sensible policy (or even, as with the Reagan tax bill of 1981, a less than sensible policy) has the resources under the present Constitution to get his way.

The separation of powers is deplored most in the area of foreign policy. Yet here, above all, it is the indispensable engine of consent; and consent is never more indispensable than on questions of peace and war. The framers saw foreign policy not as the exclusive possession of the President, but as a power shared with Congress; indeed, they saw Congress as the senior partner. For they gave Congress not only the exclusive appropriations power[20]—itself a potent instrument of control—but the exclusive power to declare war, to raise and support armies, to provide and maintain a navy, to make rules for the government and regulation of the armed services and to grant letters of marque and reprisal[21]—this last provision representing the eighteenth century equivalent of retaliatory strikes and enabling Congress to authorize limited as well as formal war. The constitutional convention had no stronger champion of executive energy than Alexander Hamilton. But it was Hamilton who wrote in *The Federalist* No. 75:

> The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind as those which concern its intercourse with the rest of the world to the sole disposal of . . . a President of the United States.[22]

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19. 1 J. BRYCE, *supra* note 4, at 147-48.
20. *See* U.S. CONST. art. I, § 8, cl. 12.
21. *Id.* at cls. 11 & 13.
22. THE FEDERALIST No. 75, at 505-06 (A. Hamilton) (J. Cooke ed. 1961).

Congressional criticism alerts a President to flaws in his policies. Congressional support strengthens his hand and increases his authority. And of course it is a delusion—sedulously encouraged by Presidents—that they are necessarily wise or even better informed than Congress. Which body made more sense about the Vietnam War twenty years ago—the National Security Council or the Senate Foreign Relations Committee? Which body makes more sense about Iran and Nicaragua today?

Still, is there not a genuine need for executive secrecy? Of course there is: weapons systems and deployments; negotiating plans and positions; and intelligence methods and sources are among the fields where secrecy is indispensable. But secrecy is also a source of power, a guarantee of the abuse of power, and a convenient means of covering up the embarrassments, blunders, follies, and crimes of the ruling regime. In a democracy the presumption must always be against executive secrecy, even if that presumption cannot always control.

Still, what about the argument that in our own dangerous age the United States for protection and survival must use "those unconventional tools which great powers have always had to use in a cruel world"—especially 'covert action,' the effort through clandestine means to change policies and regimes in other countries? Now as one who served as an intelligence officer in the Office of Strategic Services during World War II, I am well aware that covert action has its uses. I am also well aware of the limitations of covert action, especially in peacetime, and of the problems it creates for democratic government. For covert action is at best a marginal instrument of policy. Its importance in the conduct of foreign affairs is greatly overrated. Moreover, the very term is a misnomer. Covert action is often easy to detect, always hard to control, and in its nature illegal and immune to normal procedures of accountability. Founded as it is on law-breaking, deception, and lies, covert action imports bad habits into a democratic polity.

In January 1961 President Eisenhower's Board of Consultants on Foreign Intelligence Activities, after a review of the CIA record, told the President, "We have been unable to conclude that, on balance, all of the covert action programs undertaken by the CIA up to this time have been worth the risk or the great expenditure of manpower, money and other resources involved."[23] Nothing the CIA

23. BOARD OF CONSULTANTS ON FOREIGN INTELLIGENCE ACTIVITIES, REPORT TO PRESI-

has done in the quarter-century since gives reason to alter this considered verdict.

I would advise a skeptical attitude toward covert action. As Congressman Lee Hamilton has wisely said: "The U.S. government should not carry out any covert action that a fully-informed American public would not support. While occasionally necessary, it should not be the preferred tool of foreign policy."[24] Covert action has become a means by which Presidents escape the constitutional system of accountability. This is unacceptable. In my view, covert action should be reserved for only the most acute and demonstrable national emergencies. It should never be a routine instrument of foreign policy.

I am interested to note that this thought belatedly dawned upon Robert C. McFarlane, the former National Security Adviser, as he prepared for the Iran-Contra hearings. "It was clearly unwise," McFarlane told Congress, "to rely on covert activity as the core of our policy . . . . You must have the American people and the U.S. Congress solidly behind you. Yet it is virtually impossible, almost as a matter of definition, to rally public support behind a policy that you can't even talk about."[25]

Presidents should regard the requirement of congressional collaboration in foreign affairs not as a burden from which to be delivered but as an opportunity to be embraced in order to give their policies a solid basis in consent. As our wisest diplomat of the century, Averell Harriman, once put it: "No foreign policy will stick unless the American people are behind it. And unless Congress understands it, the American people aren't going to understand it."[26]

The separation of powers has caused its share of problems, but in the main it has worked well enough. It has ensured discussion when no consensus exists for action and permitted action when a majority is convinced that the proposed action is right. In other words, if the Executive has a persuasive policy, he doesn't require more authority than he enjoys under the existing Constitution. If the Executive's remedy is not persuasive, he shouldn't be given the authority to put his policies into immediate effect.

DENT EISENHOWER (Jan. 5, 1961), *quoted in* A. SCHLESINGER, ROBERT KENNEDY AND HIS TIMES 457-58 (1978).

24. Hamilton, *The Trouble with Covert Action*, Wash. Post, Aug. 17, 1986.

25. *McFarlane Under Oath: He Charts a Plunge Into Paralysis*, N.Y. Times, May 12, 1987, at A12, col. 1.

26. *Executive Privilege: The Withholding of Information by the Executive: Hearings Before the Subcomm. on Separation of Powers of the Senate Judiciary Comm.*, 92d Cong., 1st Sess. 360 (1971).

But the greatest importance of the separation of powers lies precisely in the old theory of the founding fathers—to preclude the exercise of arbitrary power. The separation of powers is the vital means of self-correction in our system. It is the means of protection against the resurgence of the "imperial Presidency." It is the ultimate guarantee of the system of accountability.

We Americans go back and forth on the question of Presidential power. Only a few years ago our concern was over the weakness of the Presidency. The impression arose of a beleaguered and impotent fellow sitting forlornly in the Oval Office; assailed by unprecedentedly intractable problems; paralyzed by the constitutional separation of powers; hemmed in by congressional and bureaucratic constraints; pushed one way or another by exigent special interest groups; and seduced, betrayed, and abandoned by the mass media. The once mighty American Presidency appeared tied down, like Gulliver, by a web of debilitating statutory and political bonds. Pundits predicted an age of one-term Presidents. In 1980 ex-President Ford said to general applause: "We have not an imperial presidency but an imperilled presidency."[27]

By the late 1980s concern shifted back from the fear of Presidential weakness to the abuse of Presidential power. President Reagan quickly demonstrated in his first term that the Presidency was far from an impotent or insolvent office. Contrary to the predictions of the late 1970s, he won easy re-election to a second term. The congressional reclamation of power after Watergate turned out to be largely make-believe. The War Powers Resolution[28] had no effect in restraining Presidents from sending troops into combat, whether in Lebanon or in Grenada or in Libya or in the Persian Gulf. Reagan brought the CIA back from its season of disgrace, made it once again the President's private army, and sent it off, without congressional approval—indeed in contravention of laws passed by Congress—to overthrow the government of Nicaragua.

In order to escape the CIA's nominal obligation to report its dark deeds to congressional oversight committees, Reagan converted the National Security Council, heretofore a policy-coordination body, into an operating agency and permitted it to indulge in the now notorious Iran-Contra flimflam. Having placed the integrity and credibility of the United States in the hands of Middle Eastern confidence men, the administration made exposure inevitable.

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27. Ford, *Imperiled, Not Imperial*, TIME, Nov. 10, 1980, at 30.
28. 50 U.S.C. §§ 1541-1548 (1982 & Supp. III 1985).

When the inevitable exposure began, the administration took refuge in a bluster of incomplete, misleading and, on occasion, false accounts of what its members had wrought. In the meantime, the scheme violated not only elementary standards of intelligence and responsibility in the conduct of foreign affairs but very likely also the Export Administration Act;[29] the Arms Export Control Act;[30] the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986;[31] the National Security Act,[32] including the Hughes-Ryan Amendment[33] and the Boland Amendment;[34] the Neutrality Act;[35] and, with the destruction of documents, the Official Records Act[36] and the Presidential Records Act.[37]

The issue raised here is hardly complicated. The issue is this: is the President of the United States above the laws and the Constitution? On inauguration day every President solemnly swears that he "will faithfully execute the Office of the President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."[38] The Constitution further and explicitly commands that the President shall "take care that the Laws be faithfully executed."[39]

The report by the Tower Commission leaves little doubt that the Presidential oath and the constitutional command have been violated by the Reagan administration. The report reads:

> Throughout the Iran initiative, significant questions of law do not appear to have been adequately addressed . . . . There appears to have been . . . little attention, let alone systematic analysis, devoted to how Presidential actions would comply with U.S. law.[40]

In the only known White House legal analysis of the Boland Amendment, the job was assigned to a lawyer who had failed his bar exami-

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29. 7 U.S.C. § 1732; 22 U.S.C. §§ 2778, 3108; 26 U.S.C. § 993; 42 U.S.C. §§ 6212, 6274; 50 U.S.C. App. §§ 2401-2413 (1982 & Supp. III 1985).

30. 22 U.S.C. §§ 2382, 2392, 2394, 2403, 2751-2796c (1982 & Supp. III 1985).

31. Pub. L. No. 99-399, 100 Stat. 853 (1986) (codified at scattered sections of 2, 5, 10, 18, 22, 36, 37, 38, 42, 46, and 50 U.S.C. (Supp. III 1985)).

32. 50 U.S.C. §§ 401-432 (1982 & Supp. III 1985).

33. *Id.* at § 413.

34. Pub. L. No. 97-377, § 793, 96 Stat. 1865 (1982) (Boland Amendment).

35. 22 U.S.C. §§ 441-465 (1982).

36. 28 U.S.C. § 1732 (1982).

37. 44 U.S.C. §§ 101 note, 2107-2108, 2201-2207 (1982 & Supp. III 1985).

38. U.S. CONST. art. II, § 1, cl. 7.

39. *Id.* at § 3.

40. *Report of the President's Special Review Board* at IV-9 (1987) [hereinafter *Tower Commission Report*].

nation four times and who immediately pronounced Colonel North's activities legal.[41] The White House never asked the Department of Justice for an opinion on the constitutionality or scope of the Boland Amendment.[42]

An especially pernicious device, unknown to the Constitution and very far indeed from the original intent about which the Attorney General lectures us so often, is the so-called Intelligence Finding. This device has its statutory base in the Hughes-Ryan Amendment of 1974[43] and the Intelligence Oversight Act.[44] The legislation empowers the President to order a covert action if he finds the action "important to the national security of the United States."[45] The law further requires, however, "a report to the Congress . . . concerning any finding or determination under any section of this chapter."[46]

But in the celebrated Finding of January 17, 1986, the President "found" that selling arms to Iran was important to the national security and found also that the Finding should be kept secret from the congressional intelligence committees that the law obligated him to inform. The Tower Commission reproduces the Finding, which included this arresting sentence: "I . . . direct the Director of Central Intelligence to refrain from reporting this Finding to the Congress."[47]

This is not a government of laws. It is a government of decrees—and secret decrees at that. Still worse, President Reagan kept the Finding secret not only from Congress but from his own Secretaries of State and Defense. Worst of all, the Finding was presented to him under cover of a memorandum from Admiral Poindexter explaining what it was all about; but as the President himself confessed, without, it must be said, great shame, "though he was briefed on the contents of the memorandum . . . he did not read it."[48] This is an old Hollywood habit. When a well-known film producer, who was contemplating a film based on Henry James's *The*

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41. N.Y. Times, June 9, 1987, at A1, col. 2.

42. *Meese Tells Panel He Had No Reason to Press Inquiry*, N.Y. Times, July 29, 1987, at A1, col. 2.

43. 50 U.S.C. § 413 (1982).

44. National Security Act § 501(a), 50 U.S.C. § 413(b) (1982).

45. 22 U.S.C. § 2422(a) (1982).

46. *Id.* at § 2414(a). *But see* Cooper, *Comment*, 47 MD. L. REV. 84, 87-88 (1987) (questioning Professor Schlesinger's invocation of this statute).

47. *Tower Commission Report*, *supra* note 40, at B-60.

48. *Id.* at B-65.

Wings of a Dove, was asked whether he had read the book, he answered, "Well, not personally."

Such abuse of the Intelligence Finding offers a negligent or unscrupulous President a way of secretly and unilaterally violating the law. As employed by President Reagan this device is a blow to the system of accountability and to the balance of the Constitution.

President Reagan tried in August 1986 to deal with the problem by an announcement of new procedures he promised to follow when informing Congress about covert operations. This is not enough. Congress should enact the bill, already proposed by Representative Louis Stokes, Chairman of the House Select Intelligence Committee, which would require that all Presidential Findings be put in writing and be sent within forty-eight hours to the statutory members of the National Security Council and to the chairmen of the intelligence committees. The bill should also contain a provision, not in the bill at present, imposing criminal penalties in case of violation. Similar penalties should be imposed for executive violations of the Hughes-Ryan Amendment, the Boland Amendment, and the other laws listed earlier. One reason why the Administration has violated these laws with impunity is that violation incurs no punishment.

The euphoria induced by the large margin of re-election victory in 1984 seems to have loosened the Presidential grasp on reality. Reagan and his White House staff evidently supposed that the election sweep empowered them to do whatever they thought necessary for the safety of the Republic without regard to obligations imposed by the Constitution or by the statute book. They considered secrecy an all-embracing Presidential entitlement, even when its purpose was to escape the accountability that is the essence of the constitutional system. The Reagan Presidency has upset the constitutional balance between Presidential power and Presidential accountability.

This subversion of the democratic process has provoked the movement we see today to restore the constitutional balance. The reaction against executive usurpation is already, as it did after Watergate, provoking a counter-reaction. We are beginning to hear again that the Presidency itself is in danger. We are told once more that too zealous an inquiry into executive abuses will cripple the Presidential office. The prospect of a fifth consecutive failed Presidency is leading some to conclude that the fatal flaw lies not in the individuals occupying the office but in the office itself. I beg you not to be unduly impressed by these gloomy apprehensions.

When an administration's conduct of foreign affairs is incoher-

ent, incompetent, duplicitous, and dedicated to rash and mindless policies, what is so terrible about a crippled Presidency? Surely a crippled Presidency is far better for the Nation (and the world) than an unrepentant and unchastened one. Would we really be better off today if Admiral Poindexter and Colonel North were still running our foreign policy? Would we be better off if we continued to conduct our foreign policy on the principle that a patriotic end justifies unconstitutional means—that, so long as a government official claims patriotic motives, he can lie, cheat, and evade law and Constitution at will? One is uncomfortably reminded of President Reagan's observation at his first press conference: "[T]he only morality they recognize is what will further their cause, meaning they reserve unto themselves the right to commit any crime; to lie; to cheat, in order to obtain that (and that is moral, not immoral)."[49] Only President Reagan was talking about the Soviet Union, not about his own subordinates.

Nor does the crippling of a President who does foolish or criminal things mean a crippling of the Presidential office. The reaction against Watergate did not prevent Reagan from having a relatively successful first term, nor would it have handicapped Ford and Carter had they been more competent in the job.

Nor can one conclude from another failed Presidency that there is something basically wrong with the system. The Constitution has never pretended to guarantee against Presidential incompetence, folly, stupidity, or criminality. As the Supreme Court once said in a celebrated decision, the Republic has "no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln."[50]

The Constitution cannot guarantee against such problems. But, through the principle of the separation of powers, it can guarantee that, when a President abuses power, corrective forces exist to redress the constitutional balance. As Senator Sam Ervin remarked during the Watergate days: "One of the great advantages of the three separate branches of government is that it's difficult to corrupt all three at the same time."[51] The press, as a de facto fourth branch, serves as a powerful reinforcement of the corrective process.

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49. *Transcript of President's First News Conference on Foreign and Domestic Topics*, N.Y. Times, Jan. 30, 1981, at A10, col. 2.

50. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 125 (1866).

51. J. BLUM, THE NATIONAL EXPERIENCE 862 (6th ed. 1985).

The issue is not the Rube Goldberg scheme to get the Ayatollah to subsidize the Contras, nor even its Inspector Clouseau mode of execution. The issue is whether the President of the United States is above the Constitution and the laws.

This is not a new issue. The notion that the sovereign can do no wrong has been the premise of many legal systems in earlier times. Our own polity has not always been immune to this dangerous idea. As Richard Nixon once inimitably put it, "[W]hen the President does it, that means that it is not illegal."[52] Emanations from the White House suggest that President Reagan shares this dangerous delusion. Laws passed by Congress, the President's spokesman said on May 14, 1987, cannot limit "the constitutional and historical power of the President to set and implement foreign policy."[53] The Boland Amendment, it is argued, did not apply to the President, and, if it did, it would be unconstitutional.

This administration talks a good deal about what the Attorney General calls the "jurisprudence of original intention."[54] But when it comes to Presidential power in warmaking and in foreign policy generally, it tramples the original intent of the framers underfoot. The framers explicitly rejected the idea that the President owned American foreign policy. As Hamilton emphasized, foreign policy was definitely not committed to the "sole disposal" of the President.[55] The men at Philadelphia, wrote Lincoln, "resolved to so frame the Constitution that *no one man* should hold the power of bringing" the Republic into war.[56] And the basic answer to the idea that the sovereign can do no wrong—to the doctrine of the divine right of Presidents—is an old one, going back in spirit to the Magna Carta. Justice Jackson put it memorably in the Steel Seizure Case: "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 deliberation."[57]

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52. Interview of Richard Nixon by David Frost (May 19, 1977).

53. *Aide Cites Reagan Foreign Policy Power*, N.Y. Times, May 15, 1987, at A13, col. 4.

54. Meese, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L.J. 455, 464 (1986) (reprinting a speech delivered to the American Bar Association in Washington, D.C. on July 9, 1985).

55. THE FEDERALIST No. 75, at 504-06 (A. Hamilton) (J. Cooke ed. 1961).

56. Letter from Abraham Lincoln to William H. Herndon (Feb. 15, 1848), *reprinted in* 1 THE COLLECTED WORKS OF ABRAHAM LINCOLN, 1824-1848, at 451-52 (R. Basler ed. 1953).

57. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 655 (1952) (Jackson, J., concurring).

The present reaction against Reagan's excesses is evidence of the determination of the American people to defend the rule of law. It is an admonition to future Presidents to respect the oath they take at their inauguration to execute the office faithfully and to preserve and protect the Constitution. It is not a failure but a vindication of American democracy.

I remember the English historian Hugh Trevor-Roper explaining Watergate to a British audience by comparing it with the revolt against royal prerogative in seventeenth-century England. When Hampden refused to pay ship money in 1636, the real issue went far beyond ship money to the Crown's claim to absolute power. Foreigners wondered why the English made such a fuss about ship money when an unhampered English foreign policy might have been so effective in Europe. "But the English," Trevor-Roper wrote, "thought first of their own liberties; and who shall say that they were wrong?"[58]

Nor need anyone fear that the recurrent uproar against the imperial Presidency will inflict permanent damage on the office. The American Presidency, I assure you, is indestructible. This is partly so for functional reasons. The separation of powers among three coordinate branches of government creates an inherent tendency toward inertia and stalemate. One of the three branches must take the initiative if the system is to move. The executive branch alone is structurally capable of taking that initiative. The men who framed the Constitution intended that it should do so. "Energy in the executive," Alexander Hamilton wrote in *The Federalist* No. 70, "is a leading character in the definition of good government"[59]—executive energy always *within* the Constitution.

Moreover, the growth of Presidential initiative has resulted less from Presidential rapacity for power than from the necessities of governing an ever more complex society. As the tiny agricultural country turned into the mighty world power, the problems assailing the national polity increased vastly in number, size, and urgency. Most of these problems could not be tackled without vigorous executive leadership. Throughout American history, a strong Presidency has kept the system in motion. The President remains, as Woodrow Wilson once said, "the only national voice" and the Presidency "the vital place of action in the system."[60]

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58. Trevor-Roper, *Nixon—America's Charles I?*, SPECTATOR, Aug. 11, 1973, at 177.
59. THE FEDERALIST No. 70, at 471 (A. Hamilton) (J. Cooke ed. 1961).
60. W. WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 68, 73 (1908).

A third reason for the indestructibility of the Presidency lies in the psychology of mass democracy. Here De Tocqueville provides the text. "Our contemporaries," he wrote, "are constantly excited by two conflicting passions: they want to be led, and they wish to remain free . . . . By this system the people shake off their dependency just long enough to select their master and then relapse into it again."[61] Americans have always had considerable ambivalence about the Presidency. One year we denounce Presidential despotism. The next we demand Presidential leadership. While we are quite proficient at cursing out Presidents—a proficiency that helps keep the system in balance—we also have a profound longing to believe in and admire them. Reagan's success in his first term expressed a widespread national desire for a President to succeed, even when he proposed policies that made little sense and to which in many cases, if public opinion polls can be believed, a majority of Americans were opposed.

The Presidency will survive. Its mighty powers lie ready to be mobilized by any leader prepared to operate within the Constitution and to persuade Congress that the course is right. But when Presidents abuse their powers, they can expect retribution, even when it causes a temporary impasse in foreign policy. Americans think first of their own liberties, and who shall say that they are wrong?

Still, a last question must be considered: what leads American Presidents into the imperial temptation? Can we expect reversions to the imperial Presidency in the future? We have already noted that the Constitution cannot insure against wicked men filling the place once occupied by Washington and Lincoln. But what is it in recent times that lures Presidents who are not wicked men into abusing their power? The answer, I judge, lies not in the structure of polity but in the purpose of policy.

For in recent times the United States has been subject to periodic delusions that we Americans have been designated by the Almighty to redeem fallen humanity. The real question is whether a messianic foreign policy is compatible with our Constitution. I think not. When an American President conceives himself as the appointed savior of a world in which mortal danger requires a rapid and incessant deployment of men, weapons, and decisions behind a wall of secrecy, power rushes from Capitol Hill to the White House.

This is not to say that the American Constitution is a mandate for isolationism. It has always sustained the weight of a responsible

61. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA (R. Heffner ed. 1956).

and discriminating internationalism, addressed to the historic interests of the United States, committed only to regions of the world where American intervention is locally sought and can be locally effective. A vainglorious foreign policy, however, aimed at the salvation of the world, relying on secret actions and duplicitous methods, and involving the United States in useless wars and grandiose dreams is something very different.

So long as we have a messianic foreign policy, any President will be tempted to develop capabilities for secrecy, disinformation (*i.e.*, lying), covert action, and armed violence that are incompatible with the Constitution of 1787 and that would undermine and nullify the separation of powers. Our present Constitution will buckle under the weight of an indiscriminate globalism that sees everywhere on earth interests and threats demanding immediate and often concealed American commitment and action. It is hard to reconcile the separation of powers with a foreign policy animated by an indignant ideology and marked by an eagerness to intervene speedily, unilaterally, and secretly in the affairs of other states. This vision of the American role in the world unbalances and overwhelms the American Constitution.

If such a foreign policy is essential to the future of the United States, then the United States must have a new Constitution. But I do not think that we need abandon that noble document. If a messianic foreign policy bursts the limits and destroys the balance of the Constitution, then the wisdom of the framers is even greater than one could have imagined. So vainglorious a foreign policy is hopeless on its merits. It is beyond our wisdom to conceive and beyond our power to execute. It can only bring disaster to the Republic. As President Kennedy said in November 1961:

> [W]e must face the fact that the United States is neither omnipotent nor omniscient—that we are only 6 percent of the world's population—that we cannot impose our will upon the other 94 percent of mankind—that we cannot right every wrong or reverse each adversity—and that therefore there cannot be an American solution to every world problem.[62]

The American Constitution is not a straitjacket. It is a document, as Chief Justice Marshall said, "intended to endure for ages to

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62. Address by President John F. Kennedy at the University of Washington's 100th Anniversary Program in Seattle, Washington (Nov. 16, 1961), *reprinted in* PUB. PAPERS 726 (1962).

come, and consequently, to be adapted to the various *crises* of human affairs."[63] It has proved equal to worse crises than any we face today, and there seems no reason to alter its basic structure now. It provides ample opportunity for Presidents to make their case to Congress and the Nation and to win the consent necessary to put wise policies into effect. The separation of powers no doubt makes for continuing struggle, but in that struggle the advantage will lie with the President so long as he respects the Constitution and the laws and so long as his policies command general assent.

The Constitution, in short, is a challenge to Presidential leadership. It is a test of a President's capacity to persuade Congress and the people that his policies make sense. For ours is a government based on consent, and any President who seeks to attain his purposes through secrecy or deceit defies and undermines the constitutional order. Fortunately, the separation of powers provides the means by which the system can correct its abuses. When a President embarks on reckless policies in defiance of the Constitution and the laws, he can expect precisely what is happening to President Reagan today.

No one at home or abroad should be upset for a moment by the national determination to redress the balance of the Constitution. Americans should feel proud, not apprehensive or apologetic, about the present reaction against Presidential excess. That reaction indeed represents a stirring and momentous vindication of American democracy. We may all rejoice in this bicentennial year at this latest proof of the health and vitality of the American Constitution.

63. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).