

The Constitution and the Liberal Arts*

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The celebration of the 200th anniversary of our Constitution has coincided with three controversial events which themselves invite a national seminar on the Constitution. They are the debate over the nomination of Judge Robert Bork to the Supreme Court, the conflict over American policy in the Persian Gulf and the Iran-Contra matter, specifically, the public hearings. Each is important to you as citizens of a democracy and to those who are students of the liberal arts. The American Constitution is the oldest enduring constitution in the world. It is the shortest ever written, and it is also the most copied constitution in all of human history. What is most unique about it is its continuing relevance to public policy and our private lives. In a real and direct sense, what the Constitution says and how its words are interpreted affect each of your lives every day.

The Iran-Contra matter involves many things, not least of which is the dispute over power in a democracy. Lost amid the details of Swiss bank accounts and secret operations in Central America is a conflict that goes to the heart of that question. How is power exercised in a democracy? The hearing focused on the problem of conducting secret operations by government in an otherwise open society. There is, of course, no disputing the fact that there are some times and some circumstances when some government activities are properly conducted in secret, or, in the current jargon, covertly. The problem arises when our society seeks to resolve the inevitable tension between a democratic political system, where openness and truth are valued, and covert operations where secrecy and deception are frequently required.

The two main participants in the investigations, Adm. John Poindexter and Col. Oliver North expressed the view that in the dangerous world in which we live the president must have unrestricted authority to conduct covert operations. Their faith in this president would invest the presidency itself with unlimited power to commit American resources, personnel, and policy to secret actions in foreign lands. But such a process in my view is fundamentally inconsistent with democracy. The essence of self-government is information. If Americans cannot know what their government is doing, they cannot assent to it if they agree, and they cannot try to change it if they disagree. Despite the authority and trust that all presidents have, the American people demand to

know what their Chief Executive is doing. Our institutions of the free press, a separately elected legislative branch, and independent judiciary, and the authority of fifty separate states all represent counter-veiling centers of power and authority. That is consistent with the grand scheme of the Constitution.

There is much talk these days about original intent. Clearly, the ultimate original intent was to prevent any individual, any institution, any branch of government from accumulating total power. The men who wrote the Constitution had lived under the tyranny of the British king, and as they wrote the Constitution, their foremost objective was to prevent that absolutism from ever occurring again. The real original intent is to prevent anyone, however well intentioned, however wise, from accumulating total power. The Constitution divides power, it disperses power, it diffuses power, and it does so for that fundamental purpose with respect to which it has been a spectacular success.

Now, when the secret sale of weapons to Iran first became known, the American people wanted an accounting, first and foremost, in the form of information. They wanted basically to know what had been done in their name. They did so through a free press, through hearings held by the legislative branch, and through the criminal investigation which is now in the process of determining whether laws were broken. That is a fundamental exercise of sovereignty--a demand for information, because without information self-government is impossible. It was a clear twentieth-century demonstration of an ancient distinction between one concept of authority, which gives the ruler the right to do as he pleases, and another which, in our democracy, holds him accountable for the exercise of power that is only temporarily and conditionally granted to him.

Another major debate now raging is over American policy in the Persian Gulf. Perhaps no power is more carefully divided in the Constitution than the power to engage in war. The Constitution makes the president the Commander-in-Chief of the armed forces. He has the exclusive authority to direct the armed forces. But the same Constitution grants to Congress the exclusive authority to declare war. It is so basic that many Americans tend to forget and need from time to time to be reminded that the president has no legal authority to commit this nation to war--none whatsoever. Now, the founding fathers divided these powers deliberately because they wanted to be able to have an effective defense, but they also wanted to insure that the weighty decision of war was not possessed by the president alone.

Within our lifetimes the Congressional power to declare war has been seriously eroded. Presidents have committed Americans to undeclared wars in Korea and in Vietnam. Everybody knows they were wars (we refer to them as the Korean War and the Vietnam War), but in neither case was war ever formally declared by Congress. To correct that in 1973 the War Powers Act became law. It was an attempt to restore the balance between the president and Congress in

war-making authority as the Constitution requires. Under that act when the president sends American armed forces into a situation involving hostilities, or where hostilities are imminent, the Act is applicable. It requires the president to submit a report to Congress within a certain period of time.

President Reagan refuses to obey this law, based on his view that it is not Constitutional and that hostilities are not occurring in the Persian Gulf within the meaning of the law. But all Americans know that the United States was actively involved in hostilities in the Persian Gulf. You have read that we had an American attack on Iranian facilities in the Gulf. That attack was wholly justified. It was a measured and limited response to an Iranian missile attack on an American flagged tanker. It was not the first act of hostility in the Gulf. We are all familiar with the prior retaliation against Iranian patrol boats. Since May of 1988, Americans have died and a U.S. warship has been severely damaged, four Iranian vessels have been sunk, and an unknown number of Iranians killed.

There are very serious questions where the War Powers Act extends Congress beyond the limits established in the Constitution. That is where it goes too far the other way and encroaches on the president's power. I share some of those concerns. I think the act should be changed. But, because it is the law, binding until the Supreme Court deems otherwise, the president must obey it. If he questions its constitutionality and wisdom, he has every right to do so. But he must either openly challenge the constitutionality of the law, or he must obey it. He cannot, in my judgment, in our democracy, simply decide for himself not to obey the law.

In the eighteenth century, when the Constitution was written, no president could deploy American forces overseas because no American forces existed beyond the mainland and the immediately surrounding sea, and because no way existed of moving troops or weapons fast enough to avoid a debate. Today, with constant communications, airplanes, military bases dispersed throughout the world, and, of course, nuclear tipped missiles, the need for instant decisions by the commander-in-chief has made the deliberative decision of war a far more difficult question.

The liberal arts are considered a peaceful pursuit. But through an understanding of the philosophical and practical underpinnings of war today, the study of the liberal arts may be the only way to enlighten us as to how we best proceed in the future. There are in the field of arms control few useful precedents. Seventeenth century Japan, which knew how to manufacture and use firearms, deliberately gave up its modernization and development when it closed its doors to the outside world. This is the only known example of a nation intentionally not developing a weapon to which it had access. Does it have any relevance for us today, or is it an isolated experience from which nothing can be learned?

After the First World War the nations meeting at the Washington Conference reached what may be termed the world's first arms control agreement. The first Five-Power Naval Limitations Treaty limited naval firepower on the world's oceans in an effort to prevent a recurrence of the naval rivalry that was thought to have destabilized Europe to the point of war. It did not end war. But is there anything we can learn from that experience? After the Second World War the victorious nations, led by the United States, held the Nuremberg Trials in which the waging of aggressive war was for the first time declared a criminal act. That did not prevent genocide in Cambodia, but it was, nevertheless, a step forward. The more we learn about these historical realities, the better equipped we will be to determine our future.

Today's debates over the Persian Gulf and the War Powers Act are really preludes to a broader debate, which I think may hold a key to a future more free of arms conflict than in the past. There is a significant role for the liberal arts in that debate for it is through liberal arts studies that we find and express the principles and traditions which are essential to national continuity. That is illustrated in the debate over Judge Bork. In that debate specific concerns have arisen about his opposition to the way in which racial discrimination has been challenged in our society as well as his claim that individual privacy is not a Constitutionally protected right of American citizens. But at the foundation of the debate is a difference between Judge Bork's view of the Constitution and the view of those who oppose his confirmation. Judge Bork says he adheres to an "original intent" approach to the Constitution. He says that judges should interpret the law and that other than the written text of the Constitution nothing else exists to which a judge may look for guidance. There is a real question as to whether he has adhered to this formulation in practice. There are differing views on that and some political controversy arising from those differences, but that is a subject for another time. For students of the liberal arts, as well as all citizens of our nation, the more relevant question is whether there exists such a clear line of original intent as Judge Bork sought to draw.

The underlying and primary beliefs of the founding generation of Americans are spelled out in the Declaration of Independence, which explicitly recognizes the truths which they and we regard as self-evident--that all men are created equal and endowed with certain inalienable rights. Judge Bork did not acknowledge the importance of the Declaration and focused his attention alone on the actual written words of the Constitution. By contrast, the other view is that human rights existed prior to the Constitution or any other written law. The function of law, the function of judges, is to determine where the laws respect those rights and in each case what is the proper balance between the needs of society and the rights of the individual. In short, one view which I would call a profoundly conservative view, holds that rights are inherent in the people, and their government derives whatever legitimacy it has from the people, not the other way around. Judge Bork's view, as he has often expressed it, is that rights are something that governments grant and that what can be granted can also be withheld or granted only conditionally.

In any event, as most of us recognize, the framers reached compromises in writing the Constitution. Those who ratified it sought the inclusion of a Bill of Rights as a condition of their acceptance, and none, including some of the principal authors, ever fully agreed on the scope and meaning of each clause. The current debate, interestingly enough, is but a recent manifestation of a very ancient contest between two schools of thought. It was expressed as long ago as ancient Greek drama and has really been replayed over all recorded history.

One of the great Greek dramas is illustrative. It is one of Sophocles' plays, *Antigone*. Antigone's brother joins in an attack on the city of Thebes and is killed. The ruler of the city, Creon, issues an edict forbidding anyone from burying his remains. Antigone defies him, and she says, "I never thought your edicts had such force that they nullify the laws of heaven, which, though unwritten and not proclaimed can bolster currency that is everlastingly valid and beyond the birth of man." The Greek chorus in that scene uses words that we use a lot today without anyone ever realizing their antiquity. The chorus sings that where might is right, there is no right. The roots of American Constitutional law go back to that insight. It is an insight the Constitution explicitly vindicates. It stands for the proposition that superior force, whether wielded by government or by individuals, does not constitute law. Might does not make right. The written law and the unwritten tradition on which it rests take precedence.

Although they are not thought of in these terms, I believe the Declaration of Independence and the American Constitution are among the greatest works of literature in history. They follow directly the long march of human history to protect the individual against armed force and against superior numbers to vindicate the uniqueness and the essential worth of every individual. It is through a study of the liberal arts that we recognize today's controversy and the distant cries of people long gone and the ancient empires long dead. The fact is that neither our Constitution nor our laws have yet provided us a clear definition of precisely where to draw the line in every case between the needs of society and the rights of all individuals who together comprise that society. It is in that never ending search that we continue the work of the men who wrote the Constitution. Only by keeping alive the liberal arts can we draw on the knowledge of the past necessary to enlighten us to make the decisions of the future.