

## ARTICLES

### “A Republic . . . If You Can Keep It.”

*by* HANS A. LINDE\*

For the 200th birthday of the Constitution, a generous government provided more than cakes, candles, and overtime work for the academic Constitution industry. Beyond all the historical pageantry, the three branches thoughtfully joined to stage two entirely realistic and serious contemporary dramas.

First, the executive branch, impersonated by two directors and one assistant of the National Security Council, secretly sold arms to the government of Iran, an action that no participant could have believed to have the approval of the Congress or the public, and then diverted funds from the sale to give weapons to insurgents seeking to overthrow the government of Nicaragua. Congress had refused the President's request for such funds, and the scheme was designed to circumvent congressional opposition.

Second, Justice Lewis Powell retired, giving the President the opportunity to nominate Judge Robert Bork, and setting the stage for another show focused on his constitutional views and on the Senate's role in confirming judges. The Bork show, like much of the Bicentennial, featured individual rights prematurely, because in 1787 it was the state constitutions that placed declarations of rights ahead of the structures of government, as they still do today, while Congress did not submit a national Bill of Rights until 1789. Between the two years lay the fight for ratification. So it seems timely, in a Biddle lecture for 1988, to talk about the institutions whose basic form was accepted 200 years ago, and what, in the light of recent experience, we might ask of them if we were to ratify them now for another century.

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\* Justice, Supreme Court of Oregon. This Commentary was delivered at Harvard Law School on October 17, 1988, as the Seventh Biennial Francis Biddle Lecture. The text has not been expanded or changed to include events after that date.

## I.

I take my title from Benjamin Franklin's answer to a lady who asked him whether the Convention had produced a republic or a monarchy: "A Republic . . . if you can keep it."<sup>1</sup> Republican institutions were designed to preserve liberty, not only for the nation but in each state.<sup>2</sup> As a judge, I shall have something to say about the judicial role in that task. But we shall not lose sight of three elementary points. First, the Constitution is a system of politics, not only of law. Changes such as the displacement of party organizations by television campaigns alter the political constitution without any change in the law.

Second, some ordinary legislation changes the political constitution more than some constitutional amendments do. Examples are congressional reorganization and budgeting laws, the so-called legislative veto, the spread of primary elections, and the public financing of presidential campaigns.

Third, public officials are bound to abide by the laws and the constitution, as they swear to do, whether or not a court tells them so. Courts, however, are routinely called upon to tell officials what they may or may not do, normally without protest by the officials.

The political constitution invites constantly shifting anxieties. Woodrow Wilson saw a dominance of congressional government. Arthur Schlesinger, Jr., decried an imperial presidency. Robert Jackson during the New Deal and conservatives during the 1960s struggled with judicial supremacy. Common Cause sees us governed by political action committees. A Committee on the Constitutional System headed by Lloyd Cutler, C. Douglas Dillon, and Senator Nancy Kassebaum in 1987 deplored the lost capacity of political parties to combine an administration with a majority in the Congress.<sup>3</sup> Federalism is routinely pronounced dead and then resuscitated. A few of these anxieties for the republic actually involve constitutional law.

The issues of Biddle's time, 50 years ago, were structural issues of

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1. Papers of Dr. James McHenry on the Federal Convention of 1787, *reprinted in UNITED STATES GOVERNMENT PRINTING OFFICE, DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES* 952 (1927). As so reprinted, McHenry's notes read as follows (with punctuation as in the original):

"A lady asked Dr. Franklin Well Doctor what have we got a republic or a monarchy. A republic replied the Doctor if you can keep it."

2. U.S. CONST., art. IV, § 4.

3. Cutler, *To Form a Government*, in *REFORMING AMERICAN GOVERNMENT* (D. Robinson ed. 1985). See also Acayo, *Is it Broke? Should We Fix It?*, *TIME*, July 6, 1987, at 54.

government, as they had been since *Marbury*, *Gibbons*, and *McCulloch*.<sup>4</sup> Supreme Court doctrines of interstate commerce and taxation that hobbled both state and federal powers drove Roosevelt in 1937 to push the unsuccessful Court-packing plan. Without being packed, the Court rapidly broadened congressional power over commerce, sustained use of the taxing power to provide social security and to induce state unemployment programs, and began to dismantle tax immunities and to enhance the states' regulatory and common law powers.<sup>5</sup> Senator Hugo Black was appointed to the court in 1937, followed in short order by the appointments of Stanley Reed, Felix Frankfurter, Frank Murphy, William O. Douglas, and Robert H. Jackson, all executive branch men, none previously a judge. They were chosen for their views on the government's agenda, not on individual rights. Civil liberties decisions flourished as a side effect.<sup>6</sup>

The Court's social reforms in the name of equality, fair procedure, religious diversity, and personal "privacy" lay far over the horizon. They were not the central agenda of the Roosevelt judges or of the president who appointed them. State and federal powers posed the issues about which Frankfurter, in his first year on the Court, wrote that "the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it[.]"<sup>7</sup> and about which then Solicitor General Jackson said in 1939: "We are really back to the Constitution."<sup>8</sup> But state and federal powers were not the only structural issues. In 1935, the Court had told Roosevelt that he could not replace a Federal Trade

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4. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1,6 (1824); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

5. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding Wagner Act); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937) (upholding unemployment benefits); *Helvering v. Davis*, 301 U.S. 619 (1937) (upholding old-age benefits); *Helvering v. Gerhardt*, 304 U.S. 405 (1938) (allowing IRS taxation of income of N.Y. Port Authority employees); *South Carolina State Highway Dept. v. Barnwell Brothers, Inc.*, 303 U.S. 177 (1938) (upholding state power to regulate size of trucks); *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) (ruling that common law is state, not federal, law).

6. *DeJonge v. State of Oregon*, 299 U.S. 353 (1937) (First Amendment restrains state pursuit of radicals); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) (state which provides in-state legal education for whites must do same for blacks); *Hague v. CIO*, 307 U.S. 496 (1939) (First Amendment protects speakers at labor rallies); *Schneider v. State*, 308 U.S. 147 (1939) (state cannot restrict door-to-door canvassing where government purpose can be achieved through less restrictive means); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (First Amendment protects Jehovah's Witness whose message, while angering some, posed no "clear and present danger").

7. *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., concurring).

8. Jackson, *Back to the Constitution*, 25 A.B.A.J. 745 (1939).

Commissioner at will;<sup>9</sup> in 1938 the President swallowed his constitutional objections and let Congress subject his authority over executive reorganization to disapproval by a majority vote in both houses—a legislative veto.<sup>10</sup>

These were domestic issues. But also, in 1937 and 1938, Japan invaded China, Mussolini and Hitler helped install Franco in Spain, and Hitler took over Austria and dismantled Czechoslovakia. One opinion by Justice Sutherland, once a member of the Senate Foreign Relations Committee, had sustained Roosevelt's prohibition of arms sales to Bolivia and Paraguay under the Neutrality Act of 1934 with elaborate dicta about a "delicate, plenary and exclusive power of the President" in international relations.<sup>11</sup> Another Sutherland opinion affirmed the President's power by an executive agreement to take over private assets in a New York bank that had been confiscated from its owners by the Soviet government.<sup>12</sup> The beginning of World War II in 1939 ended 20 years of isolationism and altered the constitutional landscape for two generations.

The war brought issues of presidential power, such as the sale of destroyers to Great Britain, a dozen seizures of private facilities, and the forced relocation or detention of civilians solely because of their Japanese descent, which faced first Jackson and then Biddle as Attorney General. The war was declared by Congress, but it did not end with a return to peace-time "normalcy," as Harding had proclaimed in 1921. Instead it left the nation with large military forces stationed in conquered and divided countries, new alliances and international organizations, the facts and the fears of Soviet expansion and Maoist revolution, a radically new atomic weapon and an obsession with its secrecy, and a large catalogue of emergency legislation, and with an executive establishment to match, including a new Central Intelligence Agency that soon went beyond collecting and analyzing intelligence. It also left us with a vague but ominous concept called national security.

But the landscape of 1938 also included the indelible images of totalitarianism. Justice Jackson invoked these images explicitly when, in the middle of war, the Supreme Court held that public schools could not impose patriotism by a compulsory flag salute.<sup>13</sup> The Court would not again be insensitive to religious diversity. Judges who had lived through

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9. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

10. L. FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 164-166 (1985).

11. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

12. *United States v. Belmont*, 301 U.S. 324 (1937).

13. In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 641 (1943), referring to the compelled unanimity sought by "our present totalitarian enemies," Jackson

the decade of the Gestapo, the burning of “degenerate” books, and the Nuremberg racial laws could not remain indifferent to police abuses, censorship, or legal racism in the United States. The Court faltered in the intersection between political radicalism and national security. But even here, the court at least sought for safeguards of legal authorization and procedure.<sup>14</sup>

This briefly summarizes the constitutional lawyer’s world of Biddle’s era, the era of redefining constitutional power. It ended 15 years after it began, with the “Steel Seizure” case in 1952.<sup>15</sup> Its end coincided with the election of General Eisenhower, halting McCarthyism when it had outlived its political usefulness to his party, along with Senator John Bricker’s proposed amendment to limit the force of international agreements,<sup>16</sup> and with the appointment of a new Chief Justice, Earl Warren. So much for ancient history.

We can now fast-forward the tape twenty-five years. A more recent generation has not thought of power as the heart of constitutional law. For a quarter century, the Court’s attention turned to the protection of individual rights, particularly against the power of the state and local governments that regulate most aspects of daily life. The Court dismantled racial segregation.<sup>17</sup> It elaborated the Bill of Rights and due process by reforming state criminal procedures,<sup>18</sup> restricting defamation and obscenity laws,<sup>19</sup> opening the streets to public controversies,<sup>20</sup> and adding a new substantive right of “privacy.”<sup>21</sup> It extended equality to categories beyond race and to structural reform of legislative districts<sup>22</sup> and access to the ballot.<sup>23</sup>

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wrote: “Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unity of the graveyard.”

14. *See* *Kent v. Dulles*, 357 U.S. 116 (1958) (passport may not be denied for refusal to submit affidavit concerning membership in Communist Party); *Greene v. McElroy*, 360 U.S. 474 (1959) (Dept. of Defense not authorized to revoke security clearance without due process); *Watkins v. United States*, 354 U.S. 178 (1957) (House of Representatives Committee on Un-American Activities not authorized to investigate private activity for sole purpose of exposing that activity, but only for a legislative purpose).

15. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

16. S.J. RES. 1, 83rd Cong., 1st Sess., 99 CONG. REC. 6777-78 (1953).

17. *Brown v. Board of Education*, 347 U.S. 483 (1954).

18. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

19. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966); *Miller v. California*, 413 U.S. 15 (1973).

20. *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972).

21. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

22. *Baker v. Carr*, 369 U.S. 186 (1962).

23. *Reynolds v. Sims*, 377 U.S. 533 (1964).

Thus, a generation learned to identify constitutional law with the judicial protection of individual rights. A hornbook published, with spectacularly bad timing, in 1939, devoted four pages each to equal protection and to freedom of speech and press.<sup>24</sup> One scholar recently observed that three-quarters of the material in his 1100-page casebook deals with civil rights and civil liberties cases, after removing the crucial guarantees of the Fourth, Fifth, Sixth and Eighth Amendments to a separate course in criminal procedure.<sup>25</sup>

The Court's doctrines met academic criticism as well as political opposition. They spawned a deluge of theories of interpretation, or noninterpretation, theories of language and original intent and moral philosophy, none of which we shall pursue here. But the Senate's defeat of Judge Bork's nomination, the second of our two Bicentennial dramas, accurately recorded even stronger opposition to undoing the Warren Court's accomplishments for liberty and equality.

## II.

Meanwhile, however, events outside the courthouse reminded us that the Bill of Rights was not the first or the only guarantee of liberty. The republic was meant to guarantee it. And the republic was in serious trouble.

Fearing Soviet subversion abroad, presidents used the CIA to emulate it, secretly conspiring (to quote what the Smith Act<sup>26</sup> forbids domestically) to overthrow by force and violence governments in Iran, Guatemala, and elsewhere.<sup>27</sup> To prevent unification of Vietnam under Communist rule, presidents escalated that effort into a long and bloody military campaign without asking the American people to go to war. Congress could evade explicit responsibility, and the Supreme Court, by denying certiorari, told lower courts not to get involved.<sup>28</sup> President Nixon secretly extended the non-war to Cambodia. After his 1972 reelection campaign, hubris in the White House turned to paranoia and led to the constitutional crisis we call Watergate.

Few constitutional conflicts are crises, and a crisis need not involve any real dispute about constitutional law. Watergate was a genuine cri-

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24. H. ROTTSCHAEFER, *AMERICAN CONSTITUTIONAL LAW* 551-555, 756-760 (1939).

25. Tushnet, *Constitutional Scholarship: What Next?*, 5 *CONST. COMMENTARY* 17, 30 (1988).

26. 18 U.S.C. §§ 2385 (1982).

27. *A Secret Arms Network's Ever Expanding Cast*, *U.S. NEWS & WORLD REP.*, Nov. 16, 1987, at 30.

28. *Mora v. McNamara*, *cert. denied*, 389 U.S. 934 (1967).

sis, as the Iran-Contra affair was not, because Watergate posed a threat to the nation's governing institutions that was not resolved by normal political or judicial means. It was resolved only by Nixon's imminent impeachment, followed by the first resignation of a president from office. But the crisis was not merely personal. Professor Philip Kurland wrote about Watergate and the Constitution: "The primary evil revealed by the events of Watergate was the presidency: not the man, but the office. It was and is bloated with unrestrained power, available for use for good or evil, with little or no accountability for the use to which it is put."<sup>29</sup> The cause, he wrote, was the failure to limit authority, "the result of a long denial of institutional values in favor of temporary political expediency. . . [,]" the failure of the Congress and of the Supreme Court to restrain delegated power and its concentration in the Executive Office of the President.<sup>30</sup> Department heads might act with simple venality, as in the days of Teapot Dome; the corruption of power must, and did, lie closer to the center.

Nixon did not appreciate the republic, yet the republic owes him some debts. By resigning, he broke the spell of an elective four-year kingship terminable only by death. It became unsurprising for President Reagan to promise to quit if his health were impaired, as Woodrow Wilson had not done. Nixon's resignation (following that of his Vice President, Spiro Agnew) rid the political constitution of the dangerous anachronism of actually trying an impeached President before the Senate. Nixon's excesses aroused Congress to repeal the Tonkin Gulf Resolution<sup>31</sup> and to pass a War Powers Resolution over his veto,<sup>32</sup> to impose new controls on impoundment of appropriated funds and on emergency powers.<sup>33</sup> The Supreme Court rebuffed Nixon's attempt to enjoin the *New York Times* and the *Washington Post* from publishing the Pentagon Papers.<sup>34</sup>

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29. P. KURLAND, *WATERGATE AND THE CONSTITUTION* 153 (1978).

30. *Id.* at 5.

31. Act of Jan. 12, 1970, Pub. L. No. 91-672, 1970 U.S. CODE CONG. & ADMIN. NEWS (84 Stat.) 2053 *repealed by* Act of Dec. 17, 1973, P.L. 93-189, § 26(4), 87 Stat. 731.

32. Act of Nov. 3, 1973, Pub. L. No. 93-148, 1973 U.S. CODE CONG. & ADMIN. NEWS (87 Stat.) 555 (codified at 50 U.S.C. § 1541).

33. Act of Sept. 14, 1976, Pub. L. No. 94-412, 1976 U.S. CODE CONG. & ADMIN. NEWS (90 Stat.) 1255 (modifying emergency powers), codified at 50 U.S.C. §§ 1601, 1621, 1622, 1631, 1641, 1651; Act of July 12, 1974, Pub. L. No. 93-344, 1974 U.S. CODE CONG. & ADMIN. NEWS (88 Stat.) 332 (1974) (controlling impoundment of appropriated funds), originally codified at 31 U.S.C. §§ 1400-1407, now codified at U.S.C. §§ 681-688. *See also* Franck, *After the Fall: The New Procedural Framework for Congressional Control Over the War Power*, 71 AM. J. INT'L L. 605 (1977).

34. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

Nixon dramatized the Senate's investigatory power, embodied by Senator Sam Ervin. By overblown claims of executive privilege, Nixon discredited this doctrine to the point that President Reagan did not press it in the Iran-Contra hearings. Finally, by forcing the discharge of the Justice Department's own special prosecutor, Archibald Cox, over the resignation of its two top officials, Nixon brought on the passage of the Independent Counsel Law.<sup>35</sup>

Did last year's Iran-Contra show prove that our republican institutions triumphed at Watergate? Not quite. First, the Watergate crisis lasted too long, a year and a half, during which White House attention was distracted from the effects of the 1973 Middle East war, inflationary oil prices, SALT negotiations, and the Cyprus conflict between two NATO allies.

Second, Watergate misdirected the pursuit of accountability into the images of criminal law. It featured the search for the "smoking gun." It ended with White House officials going to prison and the President receiving a pardon from his successor. Congress made prosecution of crimes the centerpiece of the Independent Counsel's task. Thus, President Reagan could claim that no laws were broken in the Iran-Contra affair, and his attorney general could claim to be vindicated because he was not indicted.

Third, it was not Congress as an abstraction that asserted its prerogatives and insisted on holding the White House accountable. It was a Congress of political beings in which both houses contained a majority opposed to the President's party. We do not know what a Congress under Republican control would have done with the same allegations of wrongdoing by Nixon's or Reagan's men. I do not speak of individual members but of the political institution. We do know that such defense as there was came from the Presidents' partisans. If partisanship did not drive Congress to act, at least partisanship did not inhibit it. But if accountability depends on adversary leadership of the two branches, is political stalemate too high a price to pay?

Some experienced people think so. In the 50 years since 1938, the House of Representatives has been under Democratic leadership for forty-six years, and the Senate for forty,<sup>36</sup> while Republicans have occupied the White House sixteen of the last twenty years. Political scientists routinely mourn the demise of party government and propose ways to revive it. James Sundquist observes that divided leadership prevented

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35. 28 U.S.C. §§ 591-599 (1988).

36. UNITED STATES DEPARTMENT OF COMMERCE, 1988 STATISTICAL ABSTRACT OF THE UNITED STATES 242 (Table No. 404).



any effective domestic initiatives under Eisenhower or Nixon, or under Reagan after his first two years.<sup>37</sup> It led to sixty-three vetoes in Ford's twenty-nine month presidency and thwarted his foreign policy, and it let Reagan blame the Congress for unprecedented deficits.<sup>38</sup> James Reston writes that until we elect presidents and congressional majorities of the same party, we cannot have an effective foreign policy.<sup>39</sup>

Lloyd Cutler, while President Carter's White House Counsel and later, called for new ways to form a government, in the European sense, that could at least enact a budget and follow through on its international agreements.<sup>40</sup> But even changes that Congress could make without constitutional amendment are unlikely to be made.<sup>41</sup> Instead, after each failure, we continue to look to the next election rather than to institutional change to resolve the conflict. We shall continue to face the dilemma of whether we need a majority in Congress of the President's party to get effective government or a majority of the opposing party to keep the administration honest—a dilemma, that is, unless other institutions can safeguard the republic.

### III.

The first line of defense is the government's own lawyers. Legal counsel occupy high positions in all executive departments, including

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37. J. SUNDQUIST, *CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT* 76-78 (1986).

38. *Id.*

39. *The Oregonian*, Sept. 14, 1988, at C8, col. 3.

40. Cutler, *Party Government Under the American Constitution*, 134 U. PA. L. REV. 25, 32-35 (1985); Cutler, *To Form a Government*, 59 FOREIGN AFF. 126 (1980).

41. The Committee on the Constitutional System that Cutler co-chaired with Douglas Dillon and Sen. Nancy Kassebaum published a number of proposals, such as changing election dates and allowing members of Congress to serve in the Cabinet. Cutler, *To Form A Government*, in *REFORMING AMERICAN GOVERNMENT* 11-13 (D. Robinson ed. 1985). Of those that would require a constitutional amendment, a longer term for Representatives may be worth the effort, Cabinet service by members of Congress is not. A member of Congress who becomes Secretary of the Treasury, like Kentucky's Fred Vinson (appointed by Truman), or Secretary of Defense, like Wisconsin's Melvin Laird (appointed by Nixon), still would have to deal with respective congressional committees as the President's agent, not as a member of Congress, and his duty to attend to national priorities over those of his constituents might well cost him re-election at home.

If Congress were determined to change its institutional relations with the executive, statutes and political custom would suffice to centralize domestic policy, including the all-important tax and budgetary functions, under a Super Secretary who, by custom, must have served with distinction in the Congress and would resign if repudiated by both Houses on the budget or another major issue.

But no such move toward the French form of cohabitation between a President and a legislative majority is likely. It might fit Reagan's presidential style, or Eisenhower's. It would be inconceivable for Truman, Kennedy, Johnson, or Nixon.

those concerned with national security. An early response to the Iran-Contra episode was to upgrade the position of the legal adviser to the National Security Council.<sup>42</sup> Lawyers and judges have headed the State Department, the FBI and the CIA. The Justice Department has the important Office of Legal Counsel, a position once held by Chief Justice Rehnquist and Justice Antonin Scalia. The American government is not noted for a shortage of lawyers. But whatever advice these lawyers give within government, they cannot veto nor do they publicly contradict political decisions.

Government lawyers drafted Truman's order seizing the steel mills and Nixon's lawsuits to censor the *New York Times* and the *Washington Post*. This year, we witnessed a spirited debate between Judge Abraham Sofaer, the State Department's highly qualified Legal Adviser, and Senator Sam Nunn over a question of constitutional importance: whether undisclosed negotiating records or official statements to the Senate should govern the interpretation of the Anti-Ballistic Missile Treaty.<sup>43</sup> Judge Sofaer may have been correct in arguing that the answer depends on whether one speaks of the treaty's international or its domestic effect, but the State Department's position was dictated by the President's determination to proceed with the Star Wars program. Earlier State Department Legal Advisers have found self-defense in every use of force. Professor Chayes, Legal Adviser during the Kennedy Administration, would not today make the argument for the General Assembly's power to impose peacekeeping expenses on members of the United Nations that he made when the United States did not expect to find itself in the minority position once held by the Soviet bloc. In fact, Ambassador (and former Justice) Arthur Goldberg backed away from the American position soon after the International Court of Justice accepted it.<sup>44</sup>

After the Iran-Contra affair, as after Watergate, some looked to the Attorney General as a potential guardian. During the Iran-Contra hearings, Senator William Cohen deplored that recent Attorneys General

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42. National Security Decision Directive 266 (Mar. 31, 1987), reprinted in H.R. DOC. NO. 58, 100th Cong., 1st Sess. 7 (1987). See Fisher, *How to Avoid Iran-Contras* (Review Essay), 76 CALIF. L. REV. 939, 953 (1988).

43. Compare Sofaer, *The ABM Treaty and the Strategic Defense Initiative*, 99 HARV. L. REV. 1972 (1986), and Sofaer, *A Treaty Interpretation and the Separation of Powers* (Remarks to the American Law Institute on May 19, 1988) (available in Hastings Law Library) with Nunn, *Arms Control in the Last Year of the Reagan Administration*, reprinted in 134 CONG. REC. S2567-70 (daily ed. March 18, 1988) (remarks of Sen. Nunn on INF Treaty). See also BUNN & PANOFSKY, *ARMS CONTROL, COMPLIANCE, AND THE LAW*, (Working Paper of the Center for International Security and Arms Control, Stanford University, May 1988).

44. See Linde, Book Review, 19 STAN. L. REV. 1382, 1391-92 (1967) (reviewing *THE STRATEGY OF WORLD ORDER* (R. Falk and S. Mendlovitz, eds. 1966)).

have appeared in the roles of chief law enforcement officer, member of the National Security Council, and adviser to the President and often his close personal or political associate, rather than as the "institutional protector of justice in America."<sup>45</sup> The President of the American Bar Association asked last year's presidential candidates to commit themselves to a nonpolitical Attorney General.<sup>46</sup> But as Justice Jackson observed in his "Steel Seizure" concurrence, the Attorney General is expected to defend the views of the administration as long as he remains in it, even though he might reject those views as a judge.<sup>47</sup> President Nixon's former Attorney General, Richard Kleindienst, maintains that unless the office is radically changed, a president is entitled to an Attorney General who carries out his policies in the Department of Justice. "Otherwise, political elections would mean nothing."<sup>48</sup>

Justice Scalia, dissenting from the decision to uphold the Independent Counsel law, seems to argue that the Constitution compels Kleindienst's view because the President must "take care that the laws be faithfully executed."<sup>49</sup> A look at the state constitutions shows otherwise. In all but three, governors are told to take care that laws are faithfully executed, yet forty-two states elect their attorneys general,<sup>50</sup> and commonly prosecutors, too, are independently elected.<sup>51</sup> The task of prosecution is easily separated from that of giving official legal advice. A president, like a governor, might displace a prosecutor who is not enforcing the law; the problem, rather, arises when the President does not want a prosecution to go forward. For the first thirty years, Congress thought of the Attorney General as its lawyer as well as the President's, and ob-

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45. *MacNeil-Lehrer NewsHour: Iran-Contra Hearings—Meese: Too Close to Counsel/Hitting the Ceiling* (PBS television broadcast July 29, 1985). Transcript # 3088, at 10-11 [hereinafter *MacNeil-Lehrer NewsHour*].

46. Hengstler, *MacCrate: End Cronyism*, A.B.A.J., Oct. 1, 1988, at 1443. The Solicitor General, within limits, can play an independent, nonpolitical role at least in constitutional litigation. See L. CAPLAN, *THE TENTH JUSTICE* (1987). The potential role of an independent attorney general and its limits were illustrated in Israel in 1986, when the attorney general ordered an investigation into the killing of captured Palestinians by security agents. The Israeli government promptly replaced the attorney general, and the replacement quickly pardoned the agents. See Friedman, *Israel's Leadership Problem*, N. Y. Times, Oct. 12, 1986, at 22, col. 1.

On the role of department lawyers in the relocation of Japanese-Americans, see Wechsler, *Some Issues for the Lawyer*, in *INTEGRITY AND COMPROMISE: PROBLEMS OF PUBLIC AND PRIVATE CONSCIENCE*, 117 (R.M. MacIver ed. 1957).

47. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952).

48. *MacNeil-Lehrer NewsHour*, *supra* n. 45, at 26.

49. *Morrison v. Olson*, 108 S.Ct. 2597, 2637 (1988).

50. NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, *REPORT ON THE OFFICE OF ATTORNEY GENERAL* 63 (Table 1.41) (1971).

51. *Id.* at 106-07 (Table 2.13).

tained his opinion on the drafting and constitutionality of bills.<sup>52</sup> But recently, the Attorney General has declined to apply acts of Congress that the administration considers unconstitutional, leaving it to special counsel to defend Congress's actions.<sup>53</sup>

Independent election gives a state's attorney general the public stature to give formal opinions to the legislature and local governments and to be a plausible watchdog of constitutional government, or it might if the office were nonpartisan and precluded a subsequent candidacy for governor. But even an elected attorney general's legal views are fallible, or at least not final when tested in court. And of course we are not going to have popular election of an Attorney General of the United States, as one Senator proposed after Watergate. In short, even the executive's ablest and most honorable lawyer cannot be the final judge of the executive's acts.

Congress as a whole is in a much stronger position. It can amend the laws, abolish offices that it deems to be misused, and in theory use the ultimate power of impeachment. Congress, too, has lawyers as able and as devoted to the republic as any in the executive branch. Congress can delegate to its committees the important power to investigate, to report, and to recommend.<sup>54</sup> But it cannot delegate to a committee authoritative judgment of the executive's acts, nor is Congress the final judge of its own acts, even in its internal decisions.<sup>55</sup> In Congress, as in the executive, constitutional claims are arguments for or against the policy of the moment.<sup>56</sup>

There have been many suggestions for councils and committees

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52. L. HUSTON, A.S. MILLER, S. KRISLOV & R.G. DIXON, JR., *ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES* 6 (1968).

53. Brand, *Battle Among the Branches: The Two Hundred Year War*, 65 N.C.L. REV. 901, 902 (1987).

54. Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57, 102 (1986). Dean Brest writes that one can imagine special committees charged with reporting on constitutional issues after hearing arguments, but he cautions that committees could not replicate or replace the courts.

55. *Powell v. McCormack*, 395 U.S. 486 (1969) (congressional denial of seat to elected representative is justiciable controversy).

56. Judge Abner Mikva, who as an Illinois representative was untypically aware of congressional responsibility for constitutional judgments, was amused when he was asked to recuse himself in the Independent Counsel case on grounds that he must have concluded that the law was constitutional when he voted for it: "Members of Congress believe that's what courts are for." Greenhouse, *What's a Lawmaker to Do About the Constitution?*, N. Y. Times, June 3, 1988, at B6, col 3. The same article quoted Rep. William Dannemeyer: "[I]f we happen to be opposed to something, we'll look for respectable reasons to oppose it. The Constitution is a reason. That's politics." *Id.* But cf. Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C.L. REV. 707, 728 (1985) (arguing that Congress has the duty and ample resources to perform its own effective constitutional analysis).

within the White House, the Congress, or both,<sup>57</sup> with or without powers to decide as well as to review and to report, echoes of councils that existed in some of the original state constitutions and were proposed by Madison and Hamilton but rejected at the Convention.<sup>58</sup> None of these watchdogs is quite the right breed. The best council of legal experts would be neither infallible nor final, in Justice Jackson's phrase, and it would likely find itself picking and choosing among generalities in Supreme Court opinions that would not constrain the Court itself. A body whose assignment is to guard the Constitution would pontificate about the Constitution even when on ordinary law would suffice, as it usually does. Legal experts alone could not guard the Constitution if the question is compliance in fact rather than doubt about the law. That would require that the body have subpoena power and authority to proceed on its own initiative—a stronger version of the Civil Rights Commission, reaching issues beyond that commission's agenda and constituency.<sup>59</sup> Ad hoc bodies like the Tower Commission and the special Iran-Contra and Watergate committees offer prestige and visibility but sacrifice continuity. A permanent watchdog, on the other hand, needs something to do and is likely to chase mice when no bigger game is at hand.

We are looking, then, for something with these characteristics: (1) It must be a permanent institution, with authority beyond that of its changing members; (2) it must be nonpartisan and independent of Congress and the President, and seen to be so; (3) it must explain its conclusions publicly, not advise in secret; (4) it must have some fact-finding procedures if facts are decisive; (5) it must maintain a long view, beyond the exigencies of the immediate case; and (6) it must have enough other work so that a constitutional case is the exception rather than its *raison d'être*.

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57. Professor Arthur S. Miller, for example, proposed a "council of state" within the President's office, to be overseen by a special joint committee of Congress. A. Miller, *A Proposal for a Council of State in the Office of the Presidency: Exegesis on Wormuth and Firmage's To Chain the Dog of War*, 1987 UTAH L. REV. 335 (1987). See also W. Miller, *A Congressional Committee on National Security: The Perspective from the Hill*, in THE FIRST USE OF NUCLEAR WEAPONS (Raven-Hansen ed. 1987); Manning, *The Congress, the Executive and Intermestic Affairs: Three Proposals*, 55 FOREIGN AFF. 306 (1977); Banks, *First Use of Nuclear Weapons: The Constitutional Role of a Congressional Leadership Committee*, 13 J. LEGIS. 1 (1986); Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1326-35 (1988).

58. 1 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 21, 97-98, 110-111, 139-40 (1911). See also L. LEVY & D. MAHONEY, THE FRAMING AND RATIFICATION OF THE CONSTITUTION 162, 225-30 (1987).

59. Comment, *The Rise and Fall of the United States Commission on Civil Rights*, 22 HARV. C.R.-C.L. L. REV. 449 (1987).

## IV.

We do not have to search far for a body that meets these criteria. It is a court. State courts routinely decide disputes about the institutional conduct of government. Other democracies recently have turned to this way of safeguarding their institutions. The United States Supreme Court has often decided disputes about the relative power of the other branches. Observers who anxiously watch the vital signs of the Warren revolution under the 14th Amendment may overlook the extent to which most civil rights cases now involve only laws that can be and have been amended,<sup>60</sup> while the Supreme Court's interest has returned to structural issues.<sup>61</sup>

One such decision was crucial to the Watergate crisis: denying President Nixon's defense of executive privilege against turning over the incriminating White House tapes.<sup>62</sup> Other cases were less dramatic. The Court denied a taxpayer standing to sue for the publication of CIA expenditures under article I, section 9, of the Constitution.<sup>63</sup> The Court began and then abandoned a venture to exempt state employees from the reach of the federal commerce power.<sup>64</sup> Renewed lamentations over the grave of federalism turned to wails this year when the Court denied tax immunity for interest on state bonds.<sup>65</sup> The Court allowed one questionable step of enormous consequence to the political constitution when it ruled that Congress could subsidize the presidential campaigns of large parties more than small ones.<sup>66</sup> But the Court disapproved the structure of the Federal Election Commission, because it included and was selected by members of Congress, which may not itself execute the laws or appoint those who do.<sup>67</sup>

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60. See, e.g., *Runyon v. McCrary*, 427 U.S. 160 (1976) (42 U.S.C. § 1981 reaches private acts of discrimination); *Grove City College v. Bell*, 465 U.S. 555 (1984) (college's noncompliance with Title IX results in program-specific, not institution-wide, sanctions. Overturned by Pub. L. 100-259 (1988)); *AFL-CIO v. City of Cleveland*, 478 U.S. 501 (1986) (Title VII affirmative action plan may benefit individuals who are not direct victims of prior discrimination); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (Title VII prohibits sexual harassment on the job).

61. Brand, *Battle Among the Branches: The Two Hundred Year War*, 65 N.C.L. REV. 901, 902 (1987).

62. *United States v. Nixon*, 418 U.S. 683 (1974).

63. *United States v. Richardson*, 418 US 166 (1974).

64. *National League of Cities v. Usery*, 426 U.S. 833 (1976) (*rev'd*, *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1984)).

65. *South Carolina v. Baker*, 108 S. Ct. 1355 (1988), *reh'g denied*, 108 S.Ct. 2837 (1988); Hawkins, *An Ode to the 10th Amendment (May Federalism Rest in Peace)*, GOVERNING, July 1988, at 74. See also WORKING GROUP ON FEDERALISM, THE STATUS OF FEDERALISM IN AMERICA (1986)(suggesting measures to revitalize federalism).

66. *Buckley v. Valeo*, 424 U.S. 1 (1976).

67. *Id.* at 139-140.

Similarly, the Court disqualified the Comptroller General from the budgetary forecasts that force spending reductions under the Gramm-Rudman-Hollings law.<sup>68</sup> Although the Comptroller General is appointed by the President, he can be removed on the initiative of Congress, and his primary responsibilities are to Congress, not to the President.<sup>69</sup> But the Court sustained the Independent Counsel law, which gives a special panel of judges the task to appoint special prosecutors<sup>70</sup>, over the objections of the Department of Justice and of Justice Scalia that the law invaded the President's domain.<sup>71</sup>

The most important of the new structural decisions, *INS v. Chadha*<sup>72</sup>, denied Congress the "legislative veto" as a device for letting a committee, one house, or Congress as a whole control executive actions by anything less than a new law. This action is legislative if Congress is to do it at all, and legislative action must be presented to the President for approval or disapproval, not the other way around.<sup>73</sup> To Justice White's argument that the Court had needlessly destroyed a "useful political invention," Chief Justice Burger answered that "even useful 'political inventions' are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised."<sup>74</sup>

The issues of power in these cases do not involve the lawmaking power of the government as a whole, but rather its allocation between the branches, as did the older cases about the President's power to remove a postmaster or a Federal Trade Commissioner.<sup>75</sup> The novel question in the new cases was who would represent the constitutional claims of the Congress. Mr. Chadha and the Attorney General both opposed the legislative veto, but the Supreme Court retained jurisdiction because the Sen-

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68. *Bowsher v. Synar*, 478 U.S. 714 (1986). The Gramm-Rudman-Hollings Act's formal name is the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99-177, 99 Stat. 1038, 2 U.S.C. §§ 901 et seq. (1988).

69. *Id.* at 737-46 (Stevens and Marshall, JJ., concurring).

70. *Morrison v. Olson*, 108 S.Ct. 2597, 2622 (1988).

71. *Id.* at 2628-29.

72. 462 U.S. 919 (1983).

73. For example, the Alaska Supreme Court has stated that the legislature "may not grant itself the power to act as an agency." *State v. A.L.I.V.E. Voluntary*, 606 P.2d 769, 778 (Alaska 1980). See also Levinson, *The Decline of the Legislative Veto*, 17 *PUBLIUS* 115 (1987).

74. *INS v. Chadha*, 462 U.S. at 945. For criticism of *Chadha* by one experienced student of interaction between the Congress and the executive, see L. FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 178-183 (1985). See also L. FISHER, *CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS* 224-229 (1988), describing informal post-*Chadha* adjustment.

75. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935); *Myers v. United States*, 272 U.S. 52 (1926); and see *supra* notes 9 and 10 and accompanying text.

ate was permitted to defend the use of that device.<sup>76</sup> Earlier, the Court of Appeals had let Senator Ted Kennedy attack a presidential pocket veto on grounds that it diminished his vote.<sup>77</sup> But most suits by members of Congress have been rejected on grounds of standing, ripeness, nonjusticiable subject matter, or equitable discretion.<sup>78</sup> The Supreme Court turned away Senator Goldwater's attack on President Carter's termination of the Taiwan defense treaty without prior consent of the Senate.<sup>79</sup> Four justices called the issue a "political question" because it involved foreign relations and because the Constitution is silent on the Senate's role.<sup>80</sup> Justice Powell disagreed, but he thought the suit premature because Congress had not formally challenged the President's action.<sup>81</sup> When Congress provided that a member might challenge the Gramm-Rudman-Hollings Act, the Court bypassed this provision and found that another party had standing.<sup>82</sup>

If the courts decline to hear legal disputes between legislators and the executive branch, the reasons are important, and they have been controversial. Some judges and justices believe that congressional standing is limited by the "separation of powers." More often, divergent ideas of standing and justiciability have been lumped together under the general heading "case or controversy," which in turn is said to be "founded in concern about the proper—and properly limited—role of the courts in a democratic society."<sup>83</sup>

Why is a legal dispute between government institutions not a "case or controversy" unless some third party is involved? It is not that the stakes for the litigant are greater than for the institutions whose power is in question, or for other segments of the nation. Vastly more is at stake in the power of Congress to place agencies beyond the President's control than the salary of a Federal Trade Commissioner. The consequences of denying Congress an ongoing role in decisions that it has delegated to the executive dwarf the issue of staying a deportation order, important as that may have been to Mr. Chadha. Why do courts violate the separa-

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76. *Chadha*, 462 U.S. at 931.

77. *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974).

78. See McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241, 243-44 (1981).

79. *Goldwater v. Carter*, 444 U.S. 996, 997, *vacating* 617 F.2d 697 (D.C. Cir. 1979).

80. 444 U.S. at 1002.

81. *Id.* at 997-98.

82. *Bowsher v. Synar*, 478 U.S. 714, 721 (1986).

83. *Warth v. Seldin*, 422 U.S. 490, 498 (1975), *quoted in* *Allen v. Wright*, 468 U.S. 737, 750 (1984). See Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983); Dessem, *Congressional Standing to Sue: Whose Vote is This, Anyway?*, 62 NOTRE DAME L. REV. 1 (1986).



tion of powers if they decide such issues in legal proceedings between Congress and the President, but not if they decide the same issue in an action for the commissioner's salary?

"Separation of powers" generally is expressly stated, not merely implied, in state constitutions, without any effect on justiciability of genuine legal disputes between the branches.<sup>84</sup> The idea that adjudication of legal disputes directly between parts of the government is improper in a "democratic society" should raise some eyebrows. The Supreme Court's political generalizations beyond the Constitution tend to be parochial. Many democratic societies, in fact, have paid the Supreme Court the compliment of turning to courts to safeguard their constitutions; and they do so in direct proceedings. Austria, Italy, and the German Federal Republic all assign to courts the task of securing democratic institutions as much as that of protecting human rights. In France, the Conseil Constitutionnel was created specifically to decide disputes between the parliament and General De Gaulle's presidency, and only after 1971 began to review statutes for compliance with substantive rights.<sup>85</sup> The Italian court may decide conflicts between the chief organs of the state.<sup>86</sup> Similarly, the European Community relies on its court to settle legal issues between its political organs.<sup>87</sup> These democratic societies concluded that a judicial umpire is not improper but rather essential in a system of separated pow-

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84. An illustrative provision is Oregon's Article III:

Section 1. Separation of Powers. The powers of the Government shall be divided into three separate departments, the Legislature, the Executive, including the administrative, and the Judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided.

85. See generally Beardley, *Constitutional Review in France*, 1975 SUP. CT. REV. 189 (1975); Neuborne, *Judicial Review and Separation of Powers in France and the United States*, 57 N.Y.U. L. REV. 363 (1982).

86. The Italian Constitution gives the Italian Constitutional Court authority to decide "conflicts of jurisdiction between the powers of the State." LA COSTITUZIONE DELLA REPUBBLICA ITALIANA [COST.], art. 134, para. 2. "The Court may adjudicate conflicts of competence between the fundamental organs of the state, such as the President of the Republic, Parliament, the Council of Ministers . . ." and the top courts themselves. M. CAPPELLETTI, J. MERRYMAN & J. PERILLO, *THE ITALIAN LEGAL SYSTEM* 78 (1967).

Professor Cappelletti also notes the institution of constitutional review in Cyprus, Turkey, Malta, and Greece:

Indeed, it seems as though no country in Europe, emerging from some form of undemocratic regime or serious domestic strife, could find a better answer to the exigency of reacting against, and possibly preventing the return of, past evils, than to introduce constitutional justice into its new system of government.

Cappelletti, *Repudiating Montesquieu?*, 35 CATH. U. L. REV. 1, 7 (1985).

87. In the Court of the European Communities, the Council may bring proceedings against acts of the executive Commission, and the Commission may bring proceedings against acts of the Council, and perhaps the same applies to the Parliament. See T. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 351, 391-92 (1981).

ers. The British still cling to Parliament as the sole forum for constitutional disputes; but then, the United Kingdom does not call itself a republic.

The difficult problem is not whether the legislature as a body may sue or be sued. It is whether and when a minority may enforce government according to law. In France, since 1974, sixty members of either house of parliament may take an issue to the constitutional council.<sup>88</sup> In the German constitutional court, review may be sought by the state or federal governments, by either house of parliament, or by one-third of its members, and also by the parliamentary parties or by individual members who can show an injury to their rights or duties.<sup>89</sup> In American courts, too, some legislators have asserted minority claims against the majority, and others have sought to hold the executive to account in suits that have legal merit but that the majority does not pursue.<sup>90</sup> Requiring a legislative plaintiff like Senator Goldwater first to seek a legislative remedy differs from permitting his pursuit of a legal remedy to be frustrated by mere inaction.<sup>91</sup> These problems of congressional standing surfaced in the Bork nomination, as we shall see.

## V.

The issues in the Supreme Court's new structural cases were important, but the republic did not depend on the answers.<sup>92</sup> The question put to Benjamin Franklin was not about the form of the republic, but whether we would have a republic or a monarchy.<sup>93</sup> The test would not be whether Congress could select officials. The test would come when a President claimed the power to act without the assent of Congress.

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88. CONST. art. 61. See also Beardsley, *supra* note 85 at 218-19.

89. GRUNDGESETZ [GG] art. 93; HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS DES BUNDESREPUBLIK DEUTCHLAND 250-52 (13th ed. 1982). Parliamentary minorities have standing to sue parliamentary defendants in campaign financing disputes in the European Community Court and in Israel. See Note, *European Economic Community—The Use of Article 173(2) of the EEC Treaty to Contest Actions of the European Parliament*, *Partie Ecologiste 'Les Verts' (The Greens) v. European Parliament*, 18 GA. J. INT'L & COMP. L. 85 (1988); Schmalz, *A Survey of a Selection of Judgments Delivered by the Supreme Court of Israel*, 20 ISRAEL L. REV. 489, 491 (1985).

90. *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir. 1983); *Lowry v. Reagan*, 676 F. Supp 333 (D.D.C. 1987); *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973).

91. McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241, 255 (1981).

92. The Kansas Supreme Court, however, had serious doubts that the legislative veto complied with a republican form of government as Madison understood it. *Vansickle v. Shanahan*, 212 Kan. 426, 511 P.2d 223 (1973).

93. See *supra* note 1.

When we speak of three “equal” branches, let us recall which is first and indispensable. The United States had a Congress before it had a president or federal courts. We could have kept a republic without a president or without federal courts. We could not have a republic without a congress, or with only a powerless assembly. A state with only a governor and judges would fail the test of a republican form of government. The republic is found, beyond periodic elections and the bar against titles of nobility, in clauses that are unknown in constitutional law classes, but that took parliaments centuries to gain from monarchy: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . .”<sup>94</sup> Only Congress can “lay and collect taxes . . .” for the common defense,<sup>95</sup> and no appropriation for the army shall be for more than two years.<sup>96</sup> “[A] regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.”<sup>97</sup> Members of Congress, for what they say in speech or debate, “shall not be questioned in any other Place.”<sup>98</sup>

These clauses anticipated that the risk of monarchy would come, as it always has come, when the executive demands funds and men to fight wars or to govern territory or peoples who do not share in the government, and for this claims the prerogatives of discretion and secrecy. When there is broad national consensus on the goals and the means of foreign policy, Congress gives presidents wide discretion to pursue these goals, and few legal issues arise. But what options are open to Congress when it wants to support the goals of a policy under conditions or priorities different from the administration’s? Then authorization is hedged with restrictions, and disagreements will turn into legal disputes. Examples are the use of foreign assistance and covert operations.

Foreign assistance, the government’s chief economic instrument of foreign policy, includes sales and financing of weapons as well as grants and loans for economic purposes. Congress traditionally left presidents wide discretion over the use of authorized funds. When Congress wished to maintain some control over these uses, it first required reports. Second, it restricted some kinds of assistance to some countries unless the President found that the national interest overrode the restriction. Congress could require detailed findings to be submitted to Congress in advance of the assistance. This was done in imposing human rights

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94. U.S. CONST., art. I, § 9, cl. 7.

95. U.S. CONST., art. I, § 8, cl. 1.

96. U.S. CONST., art. I, § 8, cl. 12.

97. U.S. CONST., art. I, § 9, cl. 9.

98. U.S. CONST., art. I, § 6, cl. 1.

conditions on security assistance.<sup>99</sup> The administration, however, has objectives for security assistance that it considers more important than human rights. Its reports could be expected to gloss over abuses that would disqualify a recipient whom the administration wishes to support, for instance in Central America.<sup>100</sup> What then?

Congress can do what it does in any other field. It can ask questions and demand answers. It can rely on its own sources of information and hear witnesses who contradict the administration's report. It can tighten the standards or disapprove funds for the future, and even withdraw existing authority if it can get the issue on its agenda. If Congress does not trust the administration's objectives, it can reclaim the power to authorize each specific transaction. It cannot, in light of *Buckley* and *Chadha*, reserve to itself or one of its committees the approval or disapproval of a proposed grant of assistance by means short of passing a law.

Complex restrictions can be attacked as "micromanagement," but they cannot be disregarded. They do, however, turn policy disagreements into legal disputes about interpretation and about facts. When Congress itself is divided, administration lawyers will search out every ambiguity for an excuse to avoid a restrictive clause. This is what happened in the "Contra" half of the Iran-Contra Affair, which featured the issue whether the National Security Council was an "agency or entity of the United States involved in intelligence activities" within the meaning of the Boland Amendments.<sup>101</sup> Whatever Congress chooses to do, it can do openly.

The Iran-Contra affair also involved the second example, covert operations. The law calls these "special activities," and they include any action "in support of national security objectives abroad which is planned and executed so that the role of the United States Government is

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99. Meyer, *Congressional Control of Foreign Assistance*, 13 YALE J. INT'L L. 69 (1988). See Franck & Bob, *The Return of Humpty-Dumpty: Foreign Relations Law After the Chadha Case*, 79 AM. J. INT'L L. 912 (1985).

100. See THE WATCH COMMITTEES & LAWYERS COMMITTEE FOR HUMAN RIGHTS, CRITIQUE: REVIEW OF THE DEPARTMENT OF STATE'S COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1987, June 1988, at 1-5 (suggesting that just such a glossing-over occurs); Note, *Military Aid to Guatemala: The Failure of U.S. Human Rights Legislation*, 13 YALE J. INT'L L. 111 (1988).

101. There are two Boland Amendments. Both amended intelligence appropriations measures in efforts to limit CIA intervention in Nicaraguan affairs. Joint Res. of Dec. 21, 1982, Pub. L. No. 97-377, 96 Stat. 1830 (1982). A detailed legislative history of the amendments appears at 133 CONG. REC. H4584-987 (daily ed. June 15, 1987). See also S. REP. NO. 216, H. REP. NO. 433, 100th Cong., 1st Sess. 395-99 (1987) [hereinafter IRAN-CONTRA REPORT]. See also Riesenfeld, *The Powers of Congress and the President in International Relations Revisited*, 75 CALIF. L. REV. 405, 409 (1987).

not apparent or acknowledged publicly.”<sup>102</sup> To this we owe that elegant phrase, “plausible deniability.”

It seems that we want our government to disown its covert acts, but we do not want those acts to be lawless (except where they are performed). In a free republic, we put such things into law, as the Iran-Contra report proudly noted.<sup>103</sup> President Truman’s directive candidly listed “propaganda, economic warfare, preventive direct action, including sabotage, demolition and evacuation measures, subversion against hostile states, including assistance to underground resistance movements, guerrillas and refugee liberation groups, and support of indigenous anti-communist elements,”<sup>104</sup> but I suppose Congress did not care to put these government programs into the United States Code.

To whom is a government accountable for acts that are meant to be disowned? The government can deceive the world only if it deceives its own people. As part of the post-Nixon reforms, covert actions require authorization by the President, the famous “findings.”<sup>105</sup> The President himself must share in a false denial—unless he is not informed, the Poindexter version of “plausible deniability.” But Congress dislikes being lied to, and with its own consent. What could Congress do?

The devices available to control foreign assistance do not work for covert activities. Congress can and does impose restrictions on known activities such as aid to the anti-Sandinista forces, but it cannot openly legislate for specific actions in which the role of the United States is not acknowledged. Appropriations are hidden in agency budgets and known only to a few members. Congress can only tenuously be said to enact unknown terms or restrictions in secret committee minutes. Oversight by the Intelligence committees is also confined by secrecy; only major disasters like the Iran-Contra affair lead to autopsies in public hearings.

The Iran-Contra committees wrote: “The intelligence committees are the surrogates for the public on covert action operations,” but also that “sensitive information remains secure when it is shared with Congress.”<sup>106</sup> They meant shared with the committees. Their response to the affair has been to demand more advance reports and more “consultation” with designated leaders, sometimes only the two top party leaders

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102. National Security Council Directive NSC 10/2 (1948), *quoted in* W. LEARY, *THE CENTRAL INTELLIGENCE AGENCY: HISTORY AND DOCUMENTS* 131-34 (1984); *See* IRAN-CONTRA REPORT, *supra* note 101, at 376.

103. *Id.* at 383.

104. National Security Council Directive NSC 10/2 (1948), *cited and quoted in* IRAN-CONTRA REPORT, *supra* note 101, at 375-76.

105. 22 U.S.C. § 2422 (1982).

106. IRAN-CONTRA REPORT, *supra* note 101, at 384.

in each House.<sup>107</sup> The Justice Department actually testified that telling Congress of covert actions could infringe not only the president's prerogative but his duty: "A President is *not free* to communicate information to Congress if to do so would impair his ability to execute his own constitutional duties."<sup>108</sup> So the committees draw the battle line, not at the responsibility of Congress to the public, but at the committees' own prerogatives. They complain that they were not informed of the scheme to mine Nicaraguan harbors, although Senator Moynihan says that only Senator Goldwater and he, the chairman and vice-chairman, would be informed anyway.<sup>109</sup> Informed for what purpose? Why should we sleep better if Senator Moynihan and Senator Goldwater, or their successors, have been let in on the secret?

The Tower Commission said that "[c]onsultation with Congress could have been useful to the President . . ." in gauging public reaction and deciding whether to pursue a proposed action.<sup>110</sup> For that purpose, why should not a president be free to choose his own confidants—a Senator Laxalt, for instance? A great constitutional issue is reduced to the right to serve as a test sample. A committee, even the party leadership, is not the Congress. Representative Lee Hamilton, chairman of the House committee investigating the arms sales to Iran, has treated the intelligence committees' assent to a covert action as equivalent to support by the Congress.<sup>111</sup> Former Senator and Secretary of State Muskie fell into the same error when he said that successful covert operations "have enjoyed prior congressional approval."<sup>112</sup> Consultation may assure that the President understands what his agents plan to do. It may lay the foundation for future criticism or lawmaking. But legally, congressional leaders

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107. S. REP. NO. 276, 100th Cong., 2d Sess. 18, 36-7 (1988). Amendments to the National Security Act were drafted to remove ambiguities deliberately inserted in a 1980 compromise with the executive branch. See 134 CONG. REC. S2224-50 (daily ed. March 15, 1988).

108. S. REP. NO. 276, *supra* note 107 at 19-20 (emphasis added) (testimony of Assistant Attorney General Charles J. Cooper).

109. Moynihan, *The Modern Role of Congress in Foreign Affairs*, 9 CARDOZO L. REV. 1489, 1497 (1988).

110. PRESIDENT'S SPECIAL REVIEW BOARD, TOWER COMMISSION REPORT at IV-7 (February 26, 1987).

111. Hamilton, *Toward Effective, Lawful Covert Actions*, Wall St. J., Aug. 24, 1987, at 22, col. 3. Representative Hamilton's argument is inconsistent. He writes that "key elements of accountability are present because appointed and elected officials in both branches of government are *actively involved*," but that "the committees cannot stop the initiation of a covert action," and also that "Congress" has supported covert actions in "90% of the cases." *Id.* (Emphasis added.)

112. Muskie, *The Chains of Liberty: Congress, President, and American Security*, 14 CORNELL L. F., Feb. 1988, at 2, 6. Muskie has contrasted the failure of consultation in the Iran-Contra Affair with the uncontroversial role of congressional "observers" in arms control talks. Muskie, *Congress and National Security*, 28 VA. J. INT'L L. 949-50 (1988).

can neither give nor deny consent on behalf of Congress to a covert action any more than to other executive acts.<sup>113</sup>

Consultation has a price. Leaders who have had their say may be coopted, if not to assent, at least to silence. When their colleagues and the public are deceived, they share in the deception. Members who are fundamentally at odds with a policy of covert actions are likely to be excluded from the committees. The opposition party might be excluded altogether, if the Constitution permits that. A critic of secret actions is better off if he is not briefed. Even then, the critic may be accused of breaching a secret, as Speaker Jim Wright was in September, 1988.<sup>114</sup> Those who have been briefed in turn may feel constrained from contradicting the allegations. And the executive can deflect criticism in the Congress by pointing to its consultation with a few members who cannot speak for others and whose undisclosed views the executive need not accept.

The republic's debates cannot be half secret and half free. Last April, the Senate Ethics Committee criticized Senator David Durenberger, a former chairman of the Senate Intelligence Committee, for certain statements, not because his statements in fact disclosed secret information, but because they appeared to do so, and "such appearance jeopardized the mutual confidence which must exist between the Congress and the Intelligence Community."<sup>115</sup> The difference between the public and its self-described surrogates is that the public need not maintain the confidence of the intelligence community.

In short, the Iran-Contra committees merely restated the contradiction; they did not resolve it. Procedural demands for prenotification of congressional leaders do not take the place of substantive restraints. The real threat behind the demand is not that these leaders will secretly advise against an action but that they may publicly denounce it. Of course,

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113. In 1984, after the mining of Nicaraguan harbors, the Senate Intelligence committee actually entered into a written agreement with CIA Director William Casey. S. REP. No. 665, 98th Cong., 2nd Sess. 4 (1984). In 1988, the committee repeated from its 1984 report: "The Committee is entitled by law to be informed of the President's Finding authorizing such an action in advance of its implementation and to offer its counsel, but does not have the right to approve or disapprove implementation of the finding." S. REP. NO. 276, 100th Cong., 2d Sess. 16 (1988), quoting Sen. Rep. 665, *supra*, at 6. When the Iran-Contra Report states that notification "protects the CIA from charges that its actions are unauthorized," it must mean, unauthorized by the President; the oversight committees cannot render a final legal judgment on authorization. IRAN-CONTRA REPORT, *supra* note 101 at 378.

114. *White House Chides Wright for Comments on C.I.A. Actions*, N.Y. Times, Sept. 22, 1988, at A15, col. 1; *No Classified Data Bared, Says Wright*, The Oregonian, Sept. 23, 1988, at A16, col. 5.

115. Letter from United States Select Committee on Ethics to Senator David Durenberger (April 29, 1988).

members should abide by congressional rules of secrecy, as the Iran-Contra Minority Report emphasized.<sup>116</sup> Still, potential disclosure, at least to other members, is the significant sanction because such a breach of secrecy can be punished only within Congress itself, one of the main safeguards of the republic.<sup>117</sup> This is why prior consultation might have saved presidents the embarrassments of the Bay of Pigs, the mining of the Nicaraguan harbors with its subsequent defiance of the International Court of Justice, and the sale of arms to Iran. Yet some are proposing to "ensure the integrity of the consultative process" by expelling any member who discloses whatever the executive has chosen to classify as a secret.<sup>118</sup> Secret consultation gains nothing for Congress or the public when it divides debate of the nation's acts between the unbriefed majority who can speak freely and a few who refer darkly to secrets that they know but cannot tell. Again, we are left to rely on a political division between executive and congressional leadership, the same division that frustrates effective open policies.

## VI.

This is true also of legal limitations on open policies, such as the human rights conditions attached to foreign assistance, to which the executive at least pays lip service. It is doubly true of the War Powers Resolution,<sup>119</sup> which the executive does not accept. In the War Powers Resolution, Congress, over President Nixon's veto, directed the withdrawal of American forces from actual or imminent hostilities within sixty days unless Congress authorized other action. Presidents have refused to apply this law even in situations like the attack on the American warship in the Persian Gulf, in which thirty-seven sailors were killed,<sup>120</sup>

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116. The minority report, and particularly Representative Cheney, a co-author and former White House chief of staff, have demanded stronger oaths and stiffer penalties against "leaks." IRAN-CONTRA REPORT, *supra*, note 101, at 584-85.

117. U.S. CONST., art. I, § 6, cl.1; *cf.* Gravel v. United States, 408 U.S. 606 (1972) (Senator who read classified documents to public record is protected by speech and debate clause).

118. For example, Section 5(c) of the proposed Use of Force Act, which would require that except in extreme emergencies the President consult with Congress before using force abroad, provides that:

To ensure the integrity of the consultative process, it is the intent of each House of Congress, acting under Article I, section 5, clause 2 of the Constitution, to expel any member who discloses classified information transmitted in connection with such consultation, unless one of the committees specified in this section agrees, by a vote of two-thirds of its full members, to disclose such information.

STAFF OF SENATE COMM. ON FOREIGN RELATIONS, 100TH CONG., 2D SESS., THE USE OF FORCE ACT 4 (Comm. Print 1988).

119. 50 U.S.C. §§ 1541-48 (1973).

120. Cushman, *Iraqi Missile Hits U.S. Navy Frigate in Persian Gulf*, N.Y. Times, May 18, 1987, at 1, col. 6.



and the administration itself defended shooting down a civilian airliner on grounds that another ship was engaged in combat at the time.<sup>121</sup>

Congress can enforce compliance whenever it insists on its institutional powers, but of course, Congress does not act as a monolith. Its purpose and its design are to reflect divergent interests and divergent views of the public interest. The time to worry is when Congress stampedes in a single direction, as in the Tonkin Gulf resolution. Ordinarily, some members will agree with a president's policy on the merits, some others will acquiesce for partisan reasons, and some will think that the violation of law is not worth the cost of confrontation.

The result is what Professor Lawrence Sager calls "underenforced norms."<sup>122</sup> They are underenforced, not because they fail to state a legal rule, but because compliance is left to shifting political judgments. As Professor Gerhard Casper notes, rules for conduct of foreign and defense policies that lack sanctions are not treated as legal restraints.<sup>123</sup> The absence of case law invites self-serving assertions, and the uncertainty favors the branch that takes the initiative. Moreover, when a court calls a straightforward legal issue a "political question," the term invites a flatly political answer and diminishes whatever legal judgment others might bring to bear on it. Understandably, constitutional lawyers have looked for a less political forum. Does use of the courts as this forum create obstacles that Congress cannot overcome?

When the House Judiciary Committee did not impeach President Nixon for usurping congressional power in his secret bombing of Cambodia, because Nixon had given notice "to Congress by informing key Members,"<sup>124</sup> Professor (now Judge) Louis Pollak observed that "the confidential briefing of a few 'key' Representatives and Senators [is not] the 'functional equivalent' of retroactive approval by Congress."<sup>125</sup> Insofar as the dispute concerns the law governing such secret presidential war-making, however, the republic loses if the law must be settled in an impeachment proceeding or not at all. Professor Pollak proposed an amendment to the War Powers Resolution to let Congress bring suit for compliance with a disputed provision.<sup>126</sup> But his proposal assumes an

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121. Johnson, *Scattered U.S. Aides Link Up By Phone on Airliner Incident*, N.Y. Times, July 4, 1988, at 1, col. 6.

122. Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

123. Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463, 466-67 (1976).

124. 120 CONG. REC. 9028, *quoted in* Pollak, *The Constitution as an Experiment*, 123 U. PA. L. REV. 1318, 1336 (1975).

125. Pollak, *supra* note 124, at 1336.

126. *Id.* at 1338.

“impasse” between a president and Congress as a whole, not only that a minority exhaust its remedies by asking the majority to assert a legal claim, as Senator Goldwater had done.<sup>127</sup> Requiring a suit by Congress as a whole puts a premium on resistance and delay within Congress. It makes inaction the equivalent of consent. It lets the executive branch continue on an unlawful course as long as its supporters in Congress and those who prefer not to confront the issue can avoid a vote. It leaves a minority helpless to preserve the law even though it is right. Others, therefore, would allow a minority to sue under some circumstances, as Representative Elizabeth Holtzman tried to do over Cambodia<sup>128</sup> and many Representatives have attempted over the War Powers Resolution.<sup>129</sup>

In this debate, Judge Bork’s position was uncompromising. When fourteen Republican Representatives sued the Democratic leadership of the House for proportional seats on House committees, the Court of Appeals held that the Representatives had standing to sue and that a court might have to remedy unconstitutional procedures, but it withheld relief on prudential grounds.<sup>130</sup> Judge Bork would have denied that the Congressmen had standing in court. He insisted that the issue was not prudential but jurisdictional.<sup>131</sup> Later he dissented when the court invalidated President Reagan’s attempted pocket veto of human rights restrictions on security assistance to El Salvador at the suit of thirty-three members, even when the leaders of both houses joined as plaintiffs.<sup>132</sup> Bork would not let Congress give the courts jurisdiction over its legal disputes with the executive however it tried; to Bork, a bitter political stalemate, even impeachment, is better than involving the courts.

One wonders at the vehemence of these views. As we know, courts decide institutional issues in cases involving minor private claims. In state courts like Oregon’s, such issues can be raised by taxpayers or in public actions like mandamus or quo warranto as long as there is a genu-

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127. *Goldwater v. Carter*, 444 U.S. 996, 997-98 (1979) (Powell, J., concurring).

128. *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973).

129. *Lowry v. Reagan*, 676 F. Supp. 333 (D. D. C. 1987) (110 House members sued to enforce War Powers Resolution; dismissed on basis of equitable discretion and political question doctrine). Professor John Hart Ely would revise the War Powers Act to let any member of Congress sue for a declaration that actual or imminent hostilities exist. Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379 (1988). This is a desperate solution, which any judge (including this one) would try to avoid, though Ely notes that judges often decide the existence of hostilities in insurance cases, and the court would not decide on the use of military forces but find only that the facts required Congress to decide it.

130. *Vander Jagt v. O’Neill*, 699 F.2d 1166, 1176 (D.C. Cir. 1983).

131. *Id.* at 1176-77 (Bork, J., concurring).

132. *Barnes v. Kline*, 759 F.2d 21, 41 (D.C. Cir. 1985)(Bork, J., dissenting).

ine present dispute between adversary parties.<sup>133</sup> But more directly, many state decisions recognize standing for legislative institutions.<sup>134</sup> The Supreme Court decided such a suit between the American Governor-General of the Philippines and the territorial legislature.<sup>135</sup> All that Mr. Marbury asserted against Secretary of State Madison, and Representative Powell against the House, was a right to a public office.<sup>136</sup>

Article III assigns to the Supreme Court cases and controversies between states, which have governmental, not personal, interests. Issues that the government calls nonjusticiable when it is sued cannot be avoided when the government is the plaintiff, as when it sues to close a PLO observer mission at the United Nations,<sup>137</sup> or to seize property under an executive agreement,<sup>138</sup> or when it courtmartials a serviceman for disobeying what the defendant claims to be an unlawful order.<sup>139</sup> Whatever else keeps a court from deciding some legal disputes, it is not

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133. See, e.g., *Lipscomb v. State Bd. of Higher Ed.*, 305 Or. 472, 753 P.2d 939 (1988) (upholding taxpayer standing to seek orders declaring governor's line item veto invalid); see also, in Delaware, *State ex rel. Oberly v. Troise*, 526 A.2d 898 (Del. 1987) (state quo warranto action allowed, to challenge Governor's commission appointments issued without Senate's consent).

134. See, e.g., *Bradner v. Hammond*, 553 P.2d 1 (Alaska 1976) (legislative officers and legislature as a body challenge limitation on governor's appointment powers); *Legislature of Cal. v. Deukmejian*, 34 Cal.3d 658, 669 P.2d 17, 194 Cal. Rptr. 781 (1983) (legislature challenges proposed special election); *Colorado Gen. Assembly v. Lamm*, 704 P.2d 1371 (Colo. 1985) (state assembly challenges appropriations veto); *Dye v. State ex. rel. Hale*, 507 So.2d 332 (Miss. 1987) (senators challenge constitutionality of senate rules); *Goodover v. Department of Admin.*, 651 P.2d 1005 (Mont. 1982) (senators challenge capitol renovation program); cf. *May v. Cooperman*, 780 F.2d 240 (3d Cir. 1985) (recognizing state legislators' standing as intervenors) *appeal dismissed sub. nom.* *Karcher v. May*, 108 S. Ct. 388 (1987) (legislative officers had left office). See also Dessem, *Congressional Standing to Sue: Whose Vote is This, Anyway?*, 62 NOTRE DAME L. REV. 1, 28 n.170 (1986).

135. *Springer v. Government of the Philippine Islands*, 277 U.S. 189 (1928). See also *Thirteenth Guam Legislature v. Bordallo*, 588 F.2d 265 (9th Cir. 1978) (per curiam) (Guam legislature empowered to override governor's line-item veto); *Government of the Virgin Islands v. Eleventh Legislature of the Virgin Islands*, 536 F.2d 34 (3d Cir. 1976) (Virgin Islands legislature may not override Governor's item veto); Dessem, *supra* note 134, at 28 n.170.

136. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Powell v. McCormack*, 395 U.S. 486 (1969).

137. *United States v. Palestine Liberation Organization*, 695 F. Supp 1456 (S.D.N.Y. 1988).

138. *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Pink*, 315 U.S. 203 (1942). Cf. *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (suspending creditors' claims to Iranian assets pending international arbitration).

139. A. COX, *THE COURT AND THE CONSTITUTION* 347 (1987). ("Sufficient standing to maintain a lawsuit challenging the President's authority might be alleged by a member of the armed forces if ordered to the scene of hostilities conducted by the President without congressional authority for more than sixty days in, for example, Nicaragua. . .").

the separation of powers.<sup>140</sup>

In the trenches of the D.C. Circuit, judges very different from Bork, like Carl McGowan and Abner Mikva, have also resisted direct litigation between legislators and executive officials, partly to compel political compromise, and partly to preserve courts for the task of protecting individual rights.<sup>141</sup> But the questions of remedies and discretion on which they relied can be resolved by statutes, as was done in creating declaratory judgments. Judge Skelly Wright, in his Biddle lecture nine years ago, feared that if the courts did not stay out of institutional disputes, a "political backlash" might strike at the courts' powers in the area that he thought most essential, equal protection under law.<sup>142</sup> The nation would not come to an end, he said, if judges declined to enforce the structural provisions of the Constitution.<sup>143</sup> Judge Wright's fears were misplaced, if the experience of state courts is any guide. Decisions protecting civil rights provoke public anger, not decisions enforcing lawful

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140. See *supra* note 83 and accompanying text. Also, if a legal question would properly be decided when necessary to an adjudication between other parties, it is not nonjusticiable as a "political question." One can describe as a "political question" the issue whether the government should engage in an activity, but not whether the activity is legally authorized or prohibited. Denial of review on that basis implicitly decides the government's claim of legal discretion on the merits. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 96-98, 105-107 (2d ed. 1988); L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 213 (1972); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1 (1959); McCormack, *The Justiciability Myth and the Concept of Law*, 14 *HASTINGS CONST. L.Q.* 595 (1987).

141. See *Gregg v. Barrett*, 771 F.2d 539, 543-46 (D.C. Cir. 1985); McGowan, *Congressmen in Court: The New Plaintiffs*, 15 *GA. L. REV.* 241, 254-55 (1981). Judge Mikva admits that his view of congressional standing is influenced by *McClure v. Carter*, 513 F. Supp. 265 (D. Idaho), *aff'd sub. nom. McClure v. Reagan*, 454 U.S. 1025 (1981), which rejected Senator McClure's standing under a special provision to challenge Mikva's appointment. But could a court escape deciding the issue if raised by any litigant appearing before the challenged judge? See, e.g., *United States v. Woodley*, 751 F.2d 1008 (9th Cir. 1985) (en banc). Cf. *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962) (individual challenge to Article III recognition of retired judges).

142. Wright, *Judicial Review and the Equal Protection Clause*, 15 *HARV. C.R.-C.L. L. REV.* 1 (1979) (4th Francis Biddle Memorial Lecture, Harvard Law School, Oct. 16, 1979).

143. *Id.* at 10. This is also Dean Jesse Choper's view. J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 263 (1980). Professor Peter Quint suggests that, in the absence of legislation, the extent to which courts can control executive self-aggrandizement should depend on whether individual rights are at stake. But since the injured persons may not be Americans, the question remains whether members of Congress or anyone else may protest unlawful action on their behalf. Quint concludes his studies of separation of powers under Nixon and Carter: "The history of this period emphasizes that if executive policymaking authority is to be restricted, these restrictions must be imposed by clear and sustained legislative action, rather than by reliance on executive forbearance or self-limitation by even the most willing and accommodating executive officers." Quint, *The Separation of Powers Under Carter*, 62 *TEX. L. REV.* 785, 891 (1984). See also, Quint, *The Separation of Powers Under Nixon: Reflections on Constitutional Liberties and the Rule of Law*, 1981 *DUKE L.J.* 1 (1981).

government.<sup>144</sup>

There are stronger reasons for caution. Theodore Sorenson, who knows something about White House behavior, wrote after Watergate: "It is precisely because periods of war and emergency are most likely to induce an extension or usurpation of presidential powers that those periods most require the objectivity, calm, and long-range view that the courts are particularly equipped to provide."<sup>145</sup> But will courts provide them? Or will they only bestow legitimacy on executive acts whose lawfulness otherwise would remain debatable?<sup>146</sup> The Supreme Court let the executive relocate and intern Americans because of their ancestry<sup>147</sup> and it took Congress forty-six years to decide that a wrong had been done.<sup>148</sup> The Court often defers to claims invoking "national security," particularly those involving the CIA.<sup>149</sup>

Judge Wright did not express his doubts as a bar to jurisdiction.<sup>150</sup> Judge Bork, who had few doubts, did. The popular controversy over placing Bork on the Supreme Court raged over his views on civil rights, the judicial agenda of the Warren years that Judge Wright wished to preserve. Far less visibly, but equally strongly, the Senate Judiciary Committee rejected Bork's views on the older agenda, the constitution of the republic. The committee's report criticized him for stating that Congress could not limit President Nixon's discretion to bomb Vietnamese in Cambodia or control CIA activities by law, and that the special prosecutor law would be unconstitutional, and generally for exalting the executive over the legislative power.<sup>151</sup> Particularly, the committee rejected Bork's rigid views against congressional standing. It noted that many

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144. The distinction between issues of constitutional government and issues of individual rights does not withstand examination. Compliance with constitutional processes is the predicate for any government action; when an action is *ultra vires*, there is no need to decide whether a properly authorized action would violate a guarantee of individual rights.

Lipscomb v. State Bd. of Higher Ed., 305 Or. 472, 478, 753 P.2d 939, 942-43 (1988).

145. T. SORENSON, WATCHMEN IN THE NIGHT 126 (1975).

146. See A. BICKEL, THE LEAST DANGEROUS BRANCH 131 (1962).

147. Korematsu v. United States, 323 U.S. 214 (1944).

148. Wartime Reparations for Japanese Americans, Pub. L. No. 100-83, 102 Stat. 903 (1988) (H.R. 442, which formally apologized for the internment and established a trust fund to pay reparations, was signed by President Reagan on August 10, 1988.). See generally, IRONS, JUSTICE AT WAR: THE INSIDE STORY OF THE JAPANESE AMERICAN INTERNMENT (1983).

149. *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam) (prepublication review of CIA author justified by compelling governmental interests in national security information and appearance of confidentiality); *Webster v. Doe*, 108 S. Ct. 2047 (1988) (Congress grants CIA director unreviewable discretion to terminate employee); *Haig v. Agee*, 453 U.S. 280 (1981) (following *Snepp*).

150. Wright, *supra* note 142, at 9.

151. S. EXEC. REP. NO. 7, 100th Cong., 1st Sess. 58-62 (1987).

important laws do not affect private parties who can go to court, leaving the President who declines to comply subject only to the improbable risk of impeachment. The report concluded:

Reasonable people may differ about the circumstances under which it is appropriate for the federal courts to entertain lawsuits brought by Members of Congress—or the institution itself—to vindicate Congress's constitutional prerogatives. The committee finds alarming, however, Judge Bork's categorical rejection of congressional standing in all instances. As Justice Powell recognized, when Congress and the President reach irreconcilable positions regarding a matter of constitutional law, resolution of that conflict by the courts is fully consistent with the constitutional responsibility of the judicial branch to say what the law is.<sup>152</sup>

## VII.

At the end of our Bicentennial television specials, the Iran-Contra enterprise was discredited, a few people were prosecuted, the National Security Council staff and the CIA were put under new squeaky-clean directors, Judge Bork's judicial career ended, and we once again turned our attention to electing a new president.

The 1988 presidential campaign seemed to be about pledging allegiance to the flag. As some of you perhaps were taught, the allegiance is to the flag and to the republic for which it stands. The pledge says "*and*," not "*or* the Republic," although some patriots like Lt. Col. North think that it calls for a choice.

What have we learned about the republic's institutions, and what might we ask of them in this Bicentennial of ratification? I offer only some modest answers. As in Biddle's day, governmental powers again form the constitutional agenda. The public battles over the constitutional powers of the two branches are political rhetoric phrased as legal claims. Legally, there is little an administration can do if Congress forbids it. This applies abroad as well as at home. Congress, however, must act by laws. It cannot insert its members into administering laws nor make executive acts (other than treaties) contingent on the approval or disapproval of less than the whole Congress.

The genuine issues, then, are twofold. One issue is executive power in the absence of express restraints, executive power implied from broad statutes or from the Constitution. A claim that the President may act if the Congress does not forbid it shifts the executive's burden to show authority to a burden on Congress to withdraw authority. Such a claim

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152. *Id.* at 64.

was rejected in the "Steel Seizure Case."<sup>153</sup>

Congress has increasingly narrowed executive discretion, thereby provoking battles over veto-proof conditions on funding and protests that Congress prevents any consistent policy, but faithfully reflecting the public's division over the uses to which American power is put. Despite the constitutional rhetoric, the power of Congress to impose most conditions is not seriously in doubt. But administration lawyers and supporters argue for an executive prerogative even against congressional action in the use of military force and in covert operations. Can we settle such legal arguments short of stalemate or impeachment?

A theorist could argue that in these matters the Constitution is not law; an American politician could not. Or one could say that the Constitution is law, but that the law leaves open the control over the use of American force abroad; in other words, that either answer to the legal question may be right at any one time.<sup>154</sup> Some may call this desirable flexibility, but it would be sophistry to call it law.

One can say that there is a right answer, but it cannot or should not be settled, at least not by the courts. That view does not appeal only to judges. Better that some matters remain debatable than that they be settled wrongly. But it will not do to say that a legal issue vital to the republic should be decided in some other forum without specifying where.

We need a forum for settling constitutional arguments between Congress and the President short of stalemate or impeachment. And we should put behind us once and for all impeachment and a trial in the Senate as a way to settle uncertain law, rather than alleged refusal to abide by the law. For better or worse, the nation has come to accept courts as the right forum, whatever people may think of a given decision. So perhaps we might ask this of our institutions:

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153. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952). This shift is not peculiar to executive powers in high matters of state. In everyday law enforcement, many courts generally assume that only constitutional guarantees confine police actions without first examining subconstitutional sources of and limits on the officers' authority. *See, e.g., Delaware v. Prouse*, 440 U.S. 648 (1979) (assuming that police have state authority to make discretionary stop to check automobile driver's license and registration, a question of state law). *But see State v. Bridewell*, 306 Or. 231, 759 P.2d 1054 (1988) (rejecting U.S. Supreme Court's assumption that police have "community caretaking function"). *See generally Dix, Fourth Amendment Federalism: The Potential Requirement of State Law Authorization for Law Enforcement Activity*, 14 AM. J. CRIM. L. 1 (1986-7).

154. Edward S. Corwin called the affirmative grant of powers in the Constitution "an invitation to struggle for the privilege of directing American foreign policy." *See CORWIN, THE PRESIDENT'S OFFICE AND POWERS 1787-1957*, at 171 (1957); *see also L. FISHER, CONSTITUTIONAL DIALOGUES* (1988).

(1) Of Congress, that acting on the Senate's views in the Bork nomination, it define by general law or resolution who among the leaders and members of each house may seek a declaratory judgment in a dispute that has not yielded to other specified efforts at settlement. I speak of standing; there also are issues of timing, exhaustion of remedies, and possible mootness. The decision to litigate on behalf of a house of Congress may be made by a special bipartisan committee, subject to action of the house;<sup>155</sup> but standing should extend to minority parties and also to individual members when their individual rights are at issue, much as it does in France or Germany. Indeed, for such claims they need standing even without being granted it by the majority.

(2) Of the courts, that they return to the practice of basing decisions on unconstitutional grounds and defer constitutional rhetoric so as to leave room for legislative action, and particularly that they preserve their constitutional power to serve as the forum of last resort. This means to avoid resting denials of standing on Article III of the Constitution so as to foreclose in advance standing conferred by law or resolution as a legitimate case or controversy. It is no more undemocratic for judges to decide governmental powers if the dispute is directly between the republic's institutions than if the same issue is raised by some private party. That distinction is contradicted in the states and abroad.

(3) Of the executive, we might ask that its lawyers be slower to claim prerogatives against congressional power, and then only if they are prepared to identify a forum whose judgment of the claim the executive will accept. If the executive finds any contemporary variation of the old proposals for a constitutional council any more acceptable than the courts, it should propose one.<sup>156</sup>

But the chief burden of Franklin's answer—a republic, if we can keep it—rests not on the executive or on the courts but on Congress. An executive will not long defy a Congress that acts in the form of law and means it. Congress, not only the executive, decided against full compliance with the constitutional demand to publish an account of the expenditure of all public money.

The problem is that Congress, like anyone else, wants to have it both ways. It hopes that the nation can be a republic at home and act like a monarchy abroad. Congress, too, is caught up in the paranoia of power,

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155. For a description of existing offices and procedures, see Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C.L. REV. 707, 729-30 (1985).

156. Brand, *Battle Among the Branches: The Two Hundred Year War*, 65 N.C.L. REV. 901, 902-03 (1987); Dessem, *Congressional Standing to Sue: Whose Vote is This, Anyway?* 62 NOTRE DAME L. REV. 1, 29 n.170 (1986).



as the Iran-Contra report shows: The more powerful we are, the more our interests are threatened around the world.<sup>157</sup>

As the main threat that has sustained this fear abates, the balance should shift back to the republic. Meanwhile, Congress tries to cover the gap with devices like secret briefings of a few members who cannot participate in the decision and may not share with Congress what they know. What sustains such a device is only the healthy apprehension that a sufficiently indignant member will rely on the congressional privilege to speak against an unacceptable action. If Congress seriously punishes such a member, it will only silence those members whom Congress itself has chosen to be briefed and leave the debate to those who have not been.

In my office hangs a poster published in Denmark in 1941, under the German occupation, on the 700th anniversary of the Danish version of Magna Carta. It begins with these words:

*Ved Lov skal Land bygges . . . . Men ingen Lov er saa god at følge  
some Sandheden: hvor man er i Tvivl om Sandheden; der skal Lov  
finde, hvad Ret er.*

(With law shall a land be built . . . . But no law is so good to follow as the truth; where one is in doubt about the truth, there law shall find what is right.)

As long as Senators and Representatives can use the power of law to find out what the truth is, and even against the wishes of the majority to debate what is right, I think we can take a chance on ratifying the republic for another century. Then in 1989, we can celebrate the Bicentennial of the First Amendment that lets the press report and the rest of us debate what Congress finds.

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157. The United States of America, as a great power with worldwide interests, will continue to have to deal with nations that have different hopes, values, and ambitions. These differences will inevitably lead to conflicts. History reflects that the prospects for peaceful settlement are greater if this country has adequate means for its own defense, including effective intelligence and the means to influence developments abroad.

Organized and structured secret intelligence activities are one of the realities of the world we live in, and this is not likely to change.

IRAN-CONTRA REPORT, *supra* note 101, at 384.

