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Lessons of the *Iran-contra* Affair

Are they being taught?

The issues I am going to talk about today vary from the very straightforward to the somewhat complicated. One thing ties them together—my dismay at how little the fundamental constitutional issues of the *Iran-contra* affair seem to have been brought to the surface, either by the hearings, or by the commentary in the press, or even by the schools that led us to this affair in the first place.

I want to talk about three issues which represent the failure of civics education in this country. The three questions are: 1) what is wrong with pursuing secret private funding for what are called special operations—that is, covert action operations; 2) what is wrong with pursuing a secret policy, such as our overtures to Iran; and 3) doesn't the doctrine of plausible denial to some extent require that the president be shielded from being implicated in covert operations?

On each of these issues Admiral Poin-dexter and Lt. Colonel North were admirably forthcoming. I am inclined to think this is because they sincerely saw nothing wrong. And they didn't think that any fair-minded, non-politically motivated person would either.

Private Funding

Imagine you are the governor of a state in a time of budget deficits or declining revenues. You decide that you have to trim the budget. Perhaps you might cut back on less central activities first. Perhaps the museum might not be fully funded or the ballet. But you don't want

that activity to stop all together. So you might organize with your friends and supporters some kind of private support for that activity. Maybe you could cut back the government funding to half of what it was and pick up the other half from a charity ball, or some kind of foundation contribution. If that works you can continue the project, and you save the taxpayers' money to boot.

What is the problem with this? What is wrong with it when, instead of doing it to save a museum, you are trying to save the *contras*, or to save the lives of Americans who are held hostage overseas? The answer lies with Article I of the Constitution.

Article I is the trunk and torso of the Constitution. We could do without the Bill of Rights. I would hate to see that happen, but it could be done. There is nothing prohibited in the Bill of Rights that isn't really prohibited by the system of limited government that the unamended text puts in place. This is why Madison initially opposed the Bill of Rights, though he ultimately ended up drafting it.

We could do without Article III. We would still have courts. We might not have federal courts, but we would have state courts. They would be enforcing the Constitution. They would have judicial review.

We could even do without Article II. We might not have a sole magistrate, a single president, but we would have something like the governors of the various states that created the Constitution.

What we couldn't do without is Article I. You can see, as you flip through the Constitution, where the most pages are. And that is evident to any foreign visitor who reads the Constitution for the first time. Article I sets up the relationship between the states and the federal government, and between the people and the government at large. Within Article I, the appropriations power is the beating heart of that trunk and torso.

That is why if, like Justice Holmes, you were to die and leave your estate to the United States, the country could not accept that money without first having a statute allowing it to do so. Because if you could bypass the appropriations power you would thereby bypass the electoral legitimacy that comes up every two years, when the people who are spending your money have to come back and account for it. And if you did that, then you would have bypassed Article I altogether. No gift—not even a foreign country's gift of a trinket to the president—can be accepted. And no money can be spent for any item, no matter how trivial, without a statute. That is because the relationship that Article I sets up is the most fundamental constitutional relationship we have.

We are sometimes told that the framers set up a system of a separation of powers, relying, among others, on Montesquieu. This is a deeply misleading portrait. Montesquieu really did write about separation of powers, and that is not the system we have. We have a linked system of powers where none of the branches can

Q & A: Iran-contra

These questions were directed to Professor Bobbitt by a panel after his speech at the LRE Leadership Seminar in Fort Worth in November of 1987. Panel members included Harvey Prokop, San Diego City Schools; Nancy Brown, Mississippi State Dept. of Education; and Howard Kaplan, ABA/YEFC.

Q. In a recent article in *Foreign Policy*, Kenneth Sharp, in talking about the Iran-contra affair, said that the affair pointed to a deeper problem for constitutional democracy. One source of this problem was not merely bad people or bad laws, but the chronic tension between America's democratic domestic political system and its non-democratic national security system. You say that our system does not permit secret policies, and you distinguish between secret policies and secret operations. Is there a tension between a domestic system, which is largely constitutional and operates in a constitutional framework, and a national security system whose relationship to that constitutional system is much more problematic?

A. Well, it shouldn't be problematic. Nobody has any authority in this government—whether he is a sergeant in Vietnam or a diplomat in Beirut—unless that authority comes from law. We aren't supporting banditry abroad just because we've left the territorial waters. There may be a tension between the demands of an international security system and law. There is also a tension between maintaining your tax affairs and law. Zoning and law creates a terrible tension between how you use private property. Law is fabricated just so it can maintain and mediate these tensions.

The American government has done a rather good job over a long period of time in creating laws, customs, conventions, and legal cooperation by which this tension is resolved. For example, in the field of intelligence, most persons in the CIA would say that having their activities ratified protects them rather than exposes them. There is a complicated and interlocking system of executive orders and statutes that are workable and practical. If we don't have law, then we don't deserve our security.

Q. It is not unusual for presidents throughout our history to operate secret policies even though the direction of those policies was rather well known, as in the case of Roosevelt's assistance to Britain before our entrance to World War II. Do we not in the Iran part of the Iran-contra affair have a situation where the government is pursuing a secret policy which has not had public discussion, public support, or even governmental advocacy in any public forum? Isn't it almost as much of an about-face as Ribbentrop and Molotov signing the 1939 pact between the Nazis and the Soviet Union?

A. Yes. That is an excellent distinction to draw. The president's policy in Central America was no secret. That he was arranging for the *contras* to be funded was not a secret. Ransoming hostages was.

Let me give you an example of how this plays out in law. I read the sentencing transcript of some arms merchants who were convicted in the southern district of New York and given very stiff sentences. The transcript quotes the presiding judge, who says, in effect, "How can you sell arms

to Iran at a time when we have an embargo on this? You are the lowest scum of the earth. Capital punishment is too good for you. The Secretary of State has declared Iran to be a terrorist nation. We are organizing an embargo all across Europe, and you are going behind our backs."

They really put these guys away. That happens when a secret policy is being maintained at complete cross purposes with the overt policy. I don't think anybody dreamed that we were ransoming hostages, and not just ransoming them with Iran, but ransoming them wherever we could find a kidnapper who was willing to deal.

Q. You seem to not recommend any wholesale changes in the national security system. For instance, no Senate approval or confirmation of the national security advisor. Is that a fair assessment? Is there a need for specific changes in the institutional mechanisms of our security system?

A. I think you are going to get some changes, and that is a shame. We don't need them. But when trust breaks down among the actors, they try to restrict their counterparts more closely by regulation or by statute. So I am afraid we probably will get some changes in the War Powers Act. We are probably going to get some changes in the Intelligence Oversight Act, which I am really sorry to see. I don't think you will get a confirmed national security adviser. Everybody realizes that is a dumb idea. The president will use whomever he wants as his national security adviser. President Wilson used Colonel House, but he never held an appointment. If the Congress required that Henry Kissinger be confirmed, he would have just

act to make a lawful event without the cooperation of the other.

This is a system that is not cynical, but it certainly takes a skeptical view of human nature. It doesn't say that we are perfectible, that we are going to get any better than we were in the last part of the 18th century. And so it thinks that the way to get our attention as citizens is to make our representatives come back to

us frequently for fresh legitimacy when they have spent our money. It doesn't assume that we are patriots. It doesn't think that we are virtuous citizens. It assumes that Americans are now what they have always been—basically a non-political people, interested in their families, their homes, their businesses, their churches, their local communities.

Now a system like that is completely

evaded when money for government operations is spent from a private source. It would be handy to be able to short circuit the process. I know. I served in an administration that could scarcely get anything through Congress. And nothing would have been better than to have found contributors who would have helped us over some of those rough patches. When you care so passionately about something that

resigned his job. The president would appoint some nonentity like me as national security adviser to go testify every week. And Kissinger would retain the role. Because the role is wholly a matter of the president's confidence and access to the president's thinking. If you can say, "I speak for the president," because you're Bobby Kennedy and you are his brother or because you are his closest political adviser, that is really what counts.

Q. There is an old saying in international relations that only two things are unforgivable—to fail and to get caught failing. Would you care to comment on the international impact of this entire affair?

A. The principal impact in some countries has not been that we did it, but that we did it so badly. But I think there are other countries—non-European countries—that were shocked that we would deal with Iran, whom they feel poses a security threat to them. It made our word disintegrate.

For diplomacy there is a third rule. And that is, you better be trusted by the people on whom you rely. Because they are dealing with the security of their own states. You won't be able to fool them twice.

Something like this is extremely costly to those relationships. It then requires you the next time to really go over the top to prove to them that you are not lying to them this time, and that you are not misleading them. And that leads you to make security commitments that probably are not always in your interest, or certainly put you at greater risk than you ought to be.

Q. Could you elaborate on "plausible deniability"? How can we as teachers deal with students disillusioned with government?

A. I think you have to put plausible deniability in the context of international affairs, and the relationships among states that are relatively new. The state system is relatively new. It replaced the personal relationships that princes and kings had. So what you have to show is that when plausible deniability protects the person rather than the state, you are regressing.

The states continue to carry on intrigue and secret diplomacy because states' interests conflict. But *within* the state, you are supposed to have a relationship of trust that makes your representative somehow more believable than somebody else's representative.

I always thought when I was a kid growing up that this was our biggest card. You've listened to Castro or Khrushchev say something absurd about the Americans—"The Americans are poisoning people in Africa by the millions. They have a secret nuclear facility underneath the Arctic. They are going to blow up the polar ice caps"—that sort of nonsense. It was amusing nonsense because it was so absurd. When you sacrifice that and you make these weird things actually possible, you really have lost an awful lot. It is hard to get back to that.

I would think your students would be very skeptical. If you said, "Look, the president says we don't assassinate people," they would say, "Oh, don't be so naive."

Q. I want to ask you a question about the War Powers Act. In the face of this controversy, is it constitutional? If it is, how is it enforced?

A. First, two parallels. One is about

marriage contracts, such as "If you'll do the dishes, I'll take out the garbage. If you will take care of the dog, I'll take care of the cat." These contracts seem to me really vulgar and a terrible debasement of the relationship.

I think the same thing happens in the War Powers Act. You shouldn't need a law to formalize the relationship, to require the president to inform the leadership of Congress before he introduces troops into an arena where hostilities are imminent. You shouldn't have to be told to do that by law. Now we know the law can't be enforced. Holmes said, "Hard cases make bad law." That is also true in politics. Difficult political trauma puts battles on the books. There is a section of the War Powers Act that is unconstitutional, the legislative veto section. The rest of it is certainly constitutionally problematic because it in some ways attempts to insinuate the Congress into the commander's role of where troops can go. The president is the commander in chief. He can order troops to go to Antarctica if he chooses. I do not think that Congress can say that he must pull them back. But Congress can clearly say that he can't fund them. And they can force him to withdraw by that mechanism.

Q. Can he do that in the absence of a declaration of war?

A. I imagine. It doesn't say he is commander in chief only for wartime purposes. The text says he is commander in chief, period. I don't think that a declaration of war is to be equated with the introduction of troops and hostilities.

I may be wrong about this, but I doubt we will get a case on it. I don't think the courts will decide it.

you know it is in not just the best interest, but the interest of the very survival of the country's security, it is very tempting to go around the frustrating, time-consuming, irritating process that we have. But at the same time, it is fundamentally wrong. There is nothing more constitutionally basic than that. When I add that the funds that were spent were solicited from foreign governments, I tell you

something that I think would have really shocked the framers.

On Secrecy

What is wrong with secret policies? Obviously, we need secret operations sometimes to carry out national policies. But our policies themselves can't be secret. This goes back to a fundamental constitutional compact, which makes us so un-

usual as a constitutional system.

Unlike other systems, ours doesn't identify the state with the sovereign. Here the people are sovereign, and the state is just an instrument of the people. As a lawyer, I analogize this to the trustees of a trust agreement. The trustees are not identical with the settlor who sets up the trust. The government can carry out, like the trustees can carry out, only those spe-

cific duties that are delegated to it by the settlor.

This often baffles foreign students when they are studying our system. I taught a course on the Bill of Rights this summer in Salzburg, Austria. I spent about 10 days there with European officials. They were a highly intelligent and extremely professional group. They had the most difficulty accepting the separation between the state on the one hand, and the sovereign the other. Now this separation causes us endless problems in international law, as, for example, when a president signs a treaty that it is not ratified.

Nevertheless, this is the system that we have. The acts of state are not legitimate simply because they are acts of state. There are legitimated through what often—this time of year—seems like an endless series of debates, elections, and speeches. This goes on in all sorts of elections, even some not for national office. Nothing is more fundamental than this scene, which is reenacted every two years.

That is how the link is made back to the people. Someone stands up and says, "I am for the president's policy to fight inflation. I think he has kept inflation down. That is why you ought to vote for me." And someone else stands up and says, "That is all rubbish. The president is ruining this country. The economy is in shambles. That is why you ought to vote for me. I will never support his policies." It is the link back to the people when policies are expressed that the Constitution assumes.

If the policy under scrutiny is just a fake, if it is just a sham to cover the real policy that only a very few know, then the whole process is subverted. It really doesn't matter whether the people support Mr. Jones, who supports that president's policy, or Mr. Smith, who is against it, because the whole thing was just a charade. The real policy has never surfaced.

It may be a shame that our system does not permit secret policies. I teach a course in nuclear strategy, so I am not insensitive to the benefits of secret policies. Our system inhibits bold diplomacy; it surrenders initiative.

But that is the system that we have. And it is a system that has served us rather well.

The policy here was not simply an approach to Iran. It was a policy to ransom hostages. It didn't begin with Iran. It didn't begin with arms. It didn't end even in November 1986 with the exposure of the arms trade. And the reason it was secret was not to keep it from our adver-

saries—because we know that the secret services of a number of countries knew about this. The reason it was kept secret was to protect the administration politically. It was an effort to allow it to get the hostages released while pretending that expert diplomacy and smooth dealing had done the trick.

Plausible Denial

From a constitutional point of view, plausible denial is a very old subject. It also involves the identification of a sovereign with the state.

When Phillip of Spain was courting Elizabeth I of England, there were letters between the two of them in which he inquires about, and she denies all knowledge of, Sir Frances Drake and the activity of English buccaneers and privateers. He says, "Who are they, and why are they doing this to my shipping? Why don't you stop them?" She says, "I haven't got any idea who they are, but if I catch them we will certainly treat them badly." The fact is that she knew who they were. The fact also is that he knew that she knew. A further fact is that because of her diplomats in Madrid she knew that he knew that she knew. But the relationships between states had to go on. The possible union of Spain and England was a crucial triangulation of the relationships between England and France, and France and Spain. The buccaneering issue, important as it was to both countries, was not the only issue nor even one of the top two or three.

Plausible denial allows states to continue their formal relationships, and to cooperate in areas where they have mutual interest, while nevertheless allowing them to do some very nasty things privately to each other.

While covert action typically violates international law, and almost always violates the law of the state where it is carried out, most covert actions are not really nasty. They involve supporting a local newspaper, providing a transmitter or radio equipment, or helping unions. They are not violent. They are not paramilitary. They are not things that most of us would disapprove of or would think are highly improper.

The system of plausible denial comes about because the countries where these take place would think that they were highly improper, and it would discredit the elements that we are trying to help in those countries if our covert actions became public.

Plausible denial, as you see, happens

between states. It allows the United States to say, "We are not doing this." And it allows the people whom we are assisting to say, "We are not getting this sort of aid." As a matter of fact, the Continental Congress received covert aid from the French and the Spanish, both of whom denied it. And when Thomas Paine leaked the news of the French aid, he was fired by the Continental Congress. They passed a resolution saying, in effect, "We are not getting any aid from France. The whole story is false."

There is nothing new about plausible denial among states. What is new is plausible denial *within* the government, where one branch will deny its activities either to other branches or even to elements within its own branch.

The intelligence oversight of 1980, on which I worked, and part of which I drafted, never contemplated that the president would simply be shielded altogether and his authority usurped by his subordinates. Or that he, by not signing the proper documents, or signing them and having them destroyed, would evade the knowledge that he, in fact, had.

A Civics Lesson

The lessons of Iran-*contra* have hardly begun to be explored. They are fundamentally constitutional lessons. But, more than that, they represent a failure on the part of our system to educate patriotic, sincere, highly intelligent, energetic persons in the most fundamental arrangements that we have.

Admiral Poindexter, Colonel North, and Bud McFarlane are highly patriotic, genuine human beings, people any of us would be pleased to serve with. But they didn't believe there was anything wrong about overlooking the arrangements our Constitution sets up. It was that willingness to evade the Constitution that we worked on in the hearings. I hope our findings will be taught down the line when this affair becomes part of the schools' curriculum. □

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