A Constitutional Faith

By ANTHONY LEWIS*

In February, 1798, Thomas Jefferson wrote his friend James Madison that "a great ball" was to be given in Philadelphia on the twenty-second: Washington's birthday. Jefferson, the man of democratic manners, said this "very indelicate" idea aroused "uneasy sensations"; but he consoled himself with the thought that the birthday being celebrated was that not "of the President, but of the General."[1] Once someone suggested to Jefferson that the nation mark *his* birthday. "The only birthday I recognize," he replied, "is that of my country's liberties."[2]

We have been engaged in celebrating the two-hundredth anniversary of the birth of our country's liberties. Sometimes it seems a suffocating business, this bicentennial, drained of feeling by repetition and cheapened by commerce. But it has meaning for us still, if we can find it. The question is whether we understand what it is we are celebrating. Not temporal power, surely—not the unexampled wealth of this country. We celebrate a victory of ideas and of principles of government. Can we identify them? Do we really share a faith with the extraordinary group of people who created the United States of America?

It is necessary to recognize, at the start, that we commemorate much more than the events of July, 1776. There was no United States then, or even after the Revolution succeeded. There was a collection of states, acting together with difficulty in war and ineffectually in peace, under the Articles of Confederation. If the genius of the founders had run out there, it is hard to imagine what would be said in a bicentennial speech, or indeed whether there would be any. We are a nation today because the delegates to the Philadelphia Convention of 1787 wrote a document beginning, "We the People of the

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1. 3 MEMOIR, CORRESPONDENCE AND MISCELLANIES, FROM THE PAPERS OF THOMAS JEFFERSON 372-73 (2d ed. T. Randolph ed. 1830).

2. W. CURTIS, THE TRUE THOMAS JEFFERSON 159 (1901).

United States . . . ." If birthdays are a celebration of survival, as they tend to become with age, then we really are celebrating what has made it possible for America to last two centuries in freedom. That is the Constitution.

The relationship between the Declaration of Independence and the Constitution has been a subject of much dispute in history. Earlier in this century there was a fashion for debunking the Constitution, for treating its framers as reactionary conspirators out to preserve their property.[3] The Declaration was seen as a flame of revolutionary purity, democracy, and egalitarianism, snuffed out in 1787. That particular historical fashion seems to be passing, perhaps because recent history makes it hard to maintain the image of the Constitution as a reactionary device.

The two documents have to be seen as responses to the necessities of two different times. In 1776 the need was to establish independence and liberty as legitimate ends and to rouse a disparate people to war against colonial masters. There was no occasion then to ponder the means of preserving freedom under civil government. The Declaration, conceived to legitimize revolution, in fact mentioned only recurring rebellion as a remedy for tyranny.[4] The time to consider the means of maintaining civil order with liberty came with the Constitution. Lord Acton summed it up well in considering the influence of American history on France. He said, "What the French took from the Americans was their theory of revolution, not their theory of government—their cutting, not their sewing."[5]

We have exceptional insight into the minds of those who did the sewing in 1787 because three supporters of the new Constitution—Alexander Hamilton, James Madison, and John Jay—explained its purposes in a brilliant work of advocacy, *The Federalist*. If there is one passage from *The Federalist* that best lays out the premises of the American Constitution, it may be Madison's statement in *Federalist No. 51*:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government

3. *See* Diamond, *The Declaration and the Constitution: Liberty, Democracy, and the Founders*, 41 THE PUBLIC INTEREST 39 (Fall 1975), *citing especially* C. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913).

4. "[W]henever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it. . . ." DECLARATION OF INDEPENDENCE, para. 2, cl. 2.

5. J. ACTON, ESSAYS IN THE INTERPRETATION OF HISTORY 389 (W. McNeill ed. 1967) [hereinafter cited as ACTON].

> which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.[6]

The Federalist papers are the more remarkable if one considers the external realities when they were written. Here was a sprawling land, much of it untamed, where it took seven days for Virginia to hear the news that New Hampshire had provided the needed ninth state vote for ratification of the Constitution.[7] Indians and foreign nations threatened physical danger, and the burden of war debts threatened financial ruin. It sounds today like the setting for a totalitarian movement. But in those circumstances Hamilton and Madison and Jay put their faith in reason. They believed that men were creatures rational enough to govern themselves. They believed that institutions could overcome the defects of human nature and keep men in freedom. And perhaps most amazing to us in these more cynical times, they believed that men could be persuaded to these views by philosophical argument.

Faith in reason and in institutions is the secret of liberty that the framers tried to leave us. They recognized, as *The Federalist* put it, that republican government was subject to "mortal diseases," namely, "instability, injustice and confusion."[8] But they thought there was "a republican remedy" in "the extent and proper structure" of the new federal government.[9] It was in that structure—in institutions—that Americans were to find Madison's "auxiliary precautions" for their liberty.

The idea of writing into the very foundations of a government protections against future abuses was not new in 1787. The theme can be found in a document of 1776 that helped to inspire the language of the Declaration of Independence—the Virginia Declaration of Rights, in good part the work of Jefferson's great libertarian friend, George Mason.[10] It was adopted on June 12, 1776 and immediately published. The Declaration begins with the statement that "all men are by nature equally free and independent, and have certain inherent rights . . . , namely, the enjoyment of life and liberty, with the means

6. THE FEDERALIST No. 51, at 323 (H. Lodge ed. 1888) [hereinafter cited as THE FEDERALIST].

7. *See* H. MILLER, GEORGE MASON: GENTLEMAN REVOLUTIONARY 297 (1975).

8. THE FEDERALIST No. 10, *supra* note 6, at 51-52 (J. Madison).

9. *Id.* at 60.

10. R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 1776-1791, at 33 (1955) [hereinafter cited as RUTLAND].

of acquiring and possessing property, and pursuing and obtaining happiness and safety."[11] It is not hard to see there the germ of Jefferson's bold assertion in the Declaration of Independence that "all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness."[12]

The Virginia Declaration says, too, that a majority of the community has the "unalienable right" to change or abolish a wrongful government.[13] But it goes on, as the Continental Congress did not, to list some means of preventing abuses. It says the "legislative and executive powers of the state should be separate and distinct from the judiciary . . . ."[14] In language like that of the Sixth Amendment, it says that those accused of a crime have the right to know the charge, to be confronted by witnesses, and to be tried by a local jury.[15] It adds that no man should "be deprived of his liberty except by the law of the land"[16]—language that looks ahead to that mystical phrase, "due process of law." It condemns excessive bail,[17] general search warrants,[18] and cruel and unusual punishments.[19] It calls for freedom of the press[20] and the free exercise of religion.[21]

It is easy to understand why the author of the Virginia Declaration of Rights opposed ratification of the Constitution in 1788—because it contained no "bill of rights."[22] George Mason lived to see the adoption of the first ten amendments, and he was reassured. But I think the authors of *The Federalist* were right when they argued—Madison directly against Mason, in the Virginia ratifying convention—that the original Constitution contained in the very nature of the government it created safeguards as important as any in a bill of rights.

What are the "auxiliary precautions" that the Constitution provides against tyranny? First, there is the pervasive theme that the federal government has only limited powers—those granted it by the Constitution. That concept may seem a faded one in an age when so much

11. *Id.* at 231, para. 1.
12. DECLARATION OF INDEPENDENCE, para. 2, cl. 1.
13. RUTLAND, *supra* note 10, at 231, para. 3.
14. *Id.* at para. 5.
15. *Id.* at 232, para. 8.
16. *Id.*
17. *Id.* at para. 9.
18. *Id.* at para. 10.
19. *Id.* at para. 9.
20. *Id.* at para. 12.
21. *Id.* at 233, para. 16.
22. *Id.* at 115-17.

power is concentrated in Washington. But I think it has affected attitudes in a way that still has significance. In our system, any exercise of official power has to be founded on some authority. Of course that theory can be, and has been, bent out of recognition. But the habit of mind is there, and it matters. A park service officer who posts a rule about campfires and a president who orders a quarantine of Cuba[23] both must be ready to cite a legal basis for their actions. That may not seem like much of a safeguard considering the ingenuity of lawyers, but we can see that it matters if we compare attitudes in other countries, even democratic ones. Very often the presumption there is the opposite: that an official has authority for what he does unless someone proves the contrary. The attitude carries over, for example, into what I think is the wider discretion exercised by British officials, high and low, in their use of power.[24]

Second, and closely related, there is the federal system—the division of power between the states and the federal government. Again, we know how much more centralized this country has become, but some values of federalism persist. The existence of independent systems of law, of state governments, of diverse taxes and social legislation —all this is different from almost any other country on earth. Lord Acton, who made abuse of power his special study, said federalism was "the one immortal tribute of America to political science."[25]

Third, there is the separation of powers among the three branches of the federal government. We live daily with the conflicts that resulted from that structure: the congressional struggles for executive information, the presidential threats of veto, the judicial negatives. These struggles may seem inconvenient, and they would be quite unthinkable in Britain or France or most other countries. But the framers intended conflict. The natural tendency of anyone in government to be jealous of his own power, they thought, would produce resistance when someone else overreached. The purpose, as Justice Brandeis said, was "not to promote efficiency but to preclude the exercise of arbitrary power . . . , not to avoid friction, but, by means of

23. *See* A. CHAYES, THE CUBAN MISSILE CRISIS 285-97 (1974).

24. An indication of the British attitude was the recent judgment of the Lord Chief Justice that the Crown could invoke judicial power to restrain publication of a late minister's diaries—diaries containing no security matters but assertedly violating cabinet confidences—in the absence of any statute protecting such confidences and indeed in the teeth of evidence that the cabinet had considered and rejected a proposed rule to that effect. *See Attorney General v. Cape*, The Times (London), Oct. 2, 1975, at 8, col. 1.

25. ACTON, *supra* note 5, at 393.

the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."[26]

From all of these structural devices—the limited grant of authority, the division between the federal government and state governments, the separation of powers—and from the specific guarantees of individual rights added in the first eight amendments and the fourteenth, there follows one fundamental truth about our Constitution: It gives us the most legalized system of government on earth. In 1835 de Tocqueville wrote: "There is hardly a political question in the United States which does not sooner or later turn into a judicial one."[27] Today we look to judges to decide how students may dress in school, to regulate conditions of life in prisons, and to decide what limits there may be on campaign contributions and expenditures in national elections—examples chosen at random and all, I suspect, quite beyond the business of judges outside the United States.

As the American Constitution has worked in practice, its most striking contribution to political theory has been the doctrine of judicial review: the power of courts to hold unconstitutional—unlawful—acts of Congress, the president, state legislatures, and public officials. We are so used to the idea that we take it for granted. But it is really an extraordinary notion that judges should have the last word in a democracy, overruling the acts of elected representatives and officials. There was a time, that same debunking period earlier in this century, when it was said that Chief Justice Marshall imposed judicial review on his country by an act of usurpation in *Marbury v. Madison*.[28] The truth, as usual, is less dramatic. A number of states were familiar with the practice, and at least some delegates at the convention of 1787 expected judges to enforce the Constitution over enacted law.[29] Hamilton, in *Federalist No. 78*,[30] laid out the reasoning that Marshall followed fifteen years later in *Marbury*. Jefferson, who turned out to be no admirer of judges, wrote Madison from Paris in 1789 that one good reason for adding a Bill of Rights to the new Constitution was "the legal check which it puts into the hands of the judiciary."[31] So there was certainly some expectation that courts would measure the

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

27. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 248 (J. Mayer & M. Lerner eds. 1966).

28. 5 U.S. (1 Cranch) 137 (1803).

29. *See* H.M. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 9-11 (1973).

30. THE FEDERALIST NO. 78, *supra* note 6, at 482-91.

31. 14 THE PAPERS OF THOMAS JEFFERSON 659 (J. Boyd ed. 1950).

actions of government against the Constitution, treating the latter as higher law. But surely no one then imagined the extent of the power that would be exercised by judges or the degree of our reliance on the practice.

The importance of judicial review as it has developed can be illustrated by one great case, *Youngstown Sheet & Tube Co. v. Sawyer*.[32] In 1952, President Truman, facing a crippling steel strike during the Korean War, ordered his Secretary of Commerce, Charles Sawyer, to seize and operate the steel mills. The companies sued, and a majority of the Supreme Court held the president's action invalid because he had exceeded his powers. What is so interesting about the decision is that it was based not on any of the specific guarantees in the Bill of Rights, such as freedom of speech or press or religion, but on the structural doctrines of the original Constitution. As some of the justices saw it, President Truman had violated the separation of powers; he had tried to exercise *legislative* power, Justice Black said.[33] Others saw it as a question of authority and found that the president had exercised more power than could reasonably be inferred from any statute or even from silent acquiescence by Congress. Congress had spoken in the labor field, and it had not approved seizure powers.[34] Justice Frankfurter warned that the founders of our country "had no illusion that our people enjoyed biological or psychological or sociological immunities from the hazards of concentrated power."[35] "Today," Justice Douglas said, "a kindly President uses the seizure power to effect a wage increase and to keep the steel furnaces in production."[36] But tomorrow another president might use it for other purposes.

The marvelous thing about Supreme Court decisions is that the principles established in one case may be applied in another to utterly different facts. The *Steel Seizure Case*, when it was decided, was regarded by some as a victory for conservative property interests. But twenty years later its principle, that a president must point to specific authority in law for his exercise of power, was an important factor in the Supreme Court's refusal to enjoin newspaper publication of the Pentagon Papers[37]—an action for which there would have been no

32. 343 U.S. 579 (1952).

33. *Id.* at 587-88.

34. *Id.* at 603 (Frankfurter, J., concurring); *id.* at 639 (Jackson, J., concurring).

35. *Id.* at 593 (Frankfurter, J., concurring).

36. *Id.* at 633 (Douglas, J., concurring).

37. New York Times Co. v. United States, 403 U.S. 713 (1971). See especially the concurring opinions of Justice Douglas, *id.* at 720; Justice White, *id.* at 730, 740; and Justice Marshall, *id.* at 740, 742.

statutory basis. And the *Steel Seizure Case* played a part in the willingness of the courts to join issue with President Nixon over the White House tapes, and in the ultimate rejection of his claim that presidents are immune from judicial process.[38]

Courts in our system have power so great that it is a proper subject for our concern. Judges, like others, can abuse their authority. And it can be unhealthy—undemocratic, as Justice Frankfurter used to warn[39]—when those frustrated by the political process go to the courts for needed social reforms. Against those concerns must be weighed the real benefits from the *process* of constitutional adjudication. The Supreme Court provides a reassuringly open forum, less moved by money or position than any other institution of government. Moreover, it is concerned with principle. The other branches are entitled to act on the basis of expediency, even without explanation. The Court must give reasons for what it does—reasons that appeal to the intellect and the ethical sense of the country. The Court introduces a moral element into our political life. It listens to the despised and the rejected—minorities, the politically unorthodox, prisoners—when no one else will.

Other free countries depend on unwritten understandings to avoid abuse of official power. The example always given is Britain, where judges must enforce as law whatever Parliament enacts and where very large and undefined power is delegated to the prime minister as executive. Once, when I lived in England, I complained to a friend about a law that seemed to me grossly arbitrary. He replied: "You don't understand. You Americans take pride in being a country of laws, not men. This is a country of men, not laws." In short, the British rely on a tradition of decency in public service. But even the British are not so sure any longer that tradition is enough of a safeguard; there is talk of bringing in some kind of entrenched bill of rights.[40]

Given the volume of official brutality in the world today, it is not surprising that people elsewhere should look with envy at the independent power of American courts to protect basic human rights. The feeling struck me with particular force on a recent visit to South Africa, a country where the official mechanisms of inhumanity have been constructed with a devilish ingenuity.[41] In a way, the worst thing about South Africa, to an American visitor, is the subservience of law to the

38. United States v. Nixon, 418 U.S. 683, 703 (1974).
39. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).
40. *See* M. ZANDER, A BILL OF RIGHTS? (1975).
41. *See* van Niekerk, *The Mirage of Liberty*, 3 HUMAN RIGHTS 283 (Fall 1973).

cruelest policies of the state. There are superb and courageous lawyers, but they operate within a system where judges carry out the most draconian statutes, where it is the law that blacks shall have separate and unequal public facilities,[42] where the law labels dissent "terrorism."[43]

In any event, whatever the merits or drawbacks of judicial review, we are stuck with our reliance on law and the courts. It is too late to change. No one would seriously suggest now that we could safely depend on the humanity and restraint of presidents or congressmen or state legislators or prosecutors. And the habit of mind is too deep; without even knowing that we are doing so, Americans think politically in terms of legal assumptions. That sometimes makes us hard for others to understand. Watergate, for example, mystified sophisticated French and English editors. Not appreciating the importance of law in the American psyche, they were bewildered at the fuss made over what seemed to them rather ordinary illegality. The force of the legal tradition was especially striking when President Nixon dismissed the Special Prosecutor, Archibald Cox. In Europe an executive would surely be free to dismiss someone he had appointed to such an office. But here there is doctrine—developed by the Supreme Court from the whole American view of authority—that rulers are bound by the rules they themselves make unless and until the rules are lawfully changed.[44] There had been a formal undertaking, backed by rules, to have an independent prosecutor. The violation of those rules contributed to the extraordinary public protest when Mr. Cox was fired—protest that created the conditions for the eventual fall of the president.

But the American reliance on law and institutional structures to maintain our liberties carries with it a considerable risk: If law fails, if institutions are distorted, then the United States may be left vulnerable, more vulnerable than a society like Britain's that looks to tradition for safety. Watergate is what comes to mind. We congratulated ourselves when it was over, but we also had a prickly feeling of having come close to a corruption of institutions that would not have been easy to undo. But Watergate was the signal of a more profound distortion in the constitutional structure—the lopsided growth of presidential power.

42. RESERVATION OF SEPARATE AMENITIES ACT, Act No. 49, S. AFR. STAT. 328 (1953).

43. TERRORISM ACT, Act No. 83, S. AFR. STAT. 1236 (1967).

44. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 695-96 (1974), *citing* United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954), and Service v. Dulles, 354 U.S. 363 (1957).

What has happened to the presidency in this century shows that even the authors of *The Federalist* lacked perfect insight. In a republican government, Madison said, the legislative branch "necessarily predominates,"[45] and must be watched for its encroachments. The executive was safer, "being restrained within a narrower compass and being more simple in its nature."[46] Hamilton saw "a moral certainty, that the office of President will never fall to the lot of any man who is not in an eminent degree endowed with the requisite qualifications," and a "constant probability" of presidents "preeminent for ability and virtue."[47] He must have been reading Theodore White.[48]

In the last forty years the power of the presidency, if not the virtue of its occupants, has grown beyond the imagination of the framers. The reasons are evident. Presidents were usually creatures of modest authority so long as most problems and most responsibility in this country remained local in character. But since 1933 the American economy has been nationalized. The public looks to Washington for the fundamental economic and social decisions: on prices, interest rates, unemployment, food supplies, welfare arrangements, and an endless number of other matters. Inevitably, people look to the president, the one most visible figure. Similarly, in foreign affairs the pressure is always for presidential action. Cultural and technological change work the same way. When millions move their homes every year, there is less allegiance to states and regions. As political parties and our old intimate social institutions decay, Americans turn to the president for reassurance, for a symbol of community.[49]

One is reminded of that moving passage in Shakespeare's *Henry the Fifth* when the King, walking alone in the English camp the night before Agincourt, reflects unhappily that in his soldiers' thoughts he bears their burdens: "Upon the King! Let us our lives, our souls, our debts, our careful wives, our children and our sins, lay on the King!"[50]

It would take a person of exceptional modesty and clarity of vision to resist the corrupting effects of such attention, and we have been in

45. THE FEDERALIST No. 51, *supra* note 6, at 324.

46. *Id.*, No. 48, at 310.

47. *Id.*, No. 69, at 426-27.

48. T. WHITE, BREACH OF FAITH (1975). For a critical review, see Lewis, *A Case of Mistaken Identity*, NEW YORKER, Aug. 11, 1975, at 81.

49. *See* Cramton, *Lessons of Watergate*, ITHACA JOURNAL, Oct. 17, 1974, at 13, col. 3. ("The President . . . is the one official who is sufficiently visible and universal to attract constant attention . . . and to serve as an emblem of our diminishing sense of community.")

50. W. SHAKESPEARE, HENRY THE FIFTH, Act IV, scene 1, line 230.

rather short supply of such presidents lately. Two recent presidents were so weak in ego, or character, that they mimicked the style of a monarch. Mr. Nixon dressed the White House guards in chocolate-soldier suits until laughter exploded that pretension. He used to refer to himself in the third person or with the royal "we." ("Let others wallow in Watergate, we are going to do our job."[51]) Mr. Johnson, we have learned lately, actually walked down the aisle of Air Force One one night shouting, "I am the king." His press secretary followed, saying that was off the record.[52]

A single example suffices to indicate how presidential power has slipped away from the conception of the framers. In 1973, after the Paris agreement had ended direct American military action in Vietnam, American aircraft were shifted at President Nixon's direction to bomb Cambodia. There was no authority for such a war on Cambodia in any statute, resolution, or treaty. The Tonkin Gulf Resolution,[53] which had offered a form of justification for American action in Vietnam, had been repealed.[54] There were no American troops to protect. The only attempt at a legal justification was offered by the Secretary of Defense, Elliot Richardson. He said that the Cambodian government had asked us to bomb, a fact that could hardly add to the constitutional power of an American president.[55]

Then came what may have been the most brazen attempt by any president to exceed the bounds of the Constitution. Congress passed a bill forbidding all United States military action in or over Indochina. Mr. Nixon vetoed the bill,[56] and claimed the authority to go right on bombing, as he did. He thus assumed the power to wage a war not only in the absence of congressional approval but in the face of express disapproval. It was as if the Constitution had been amended by presidential fiat to read: "The President shall have the power to wage war unless the Congress, by a two-thirds vote of both Houses, shall order him to desist." That particular issue was resolved when a compromise applied at a later date the prohibition on bombing or other military action in Indochina.[57] But I wonder whether that compromise miti-

51. N.Y. Times, July 21, 1973, at 7, col. 5.

52. H. THOMAS, DATELINE: WHITE HOUSE 52 (1975).

53. Pub. L. No. 88-408, 78 Stat. 384 (1964).

54. Act of Jan. 12, 1971, Pub. L. No. 91-672, § 12, 84 Stat. 2053, 2055.

55. 119 CONG. REC. 16,142 (daily ed. May 17, 1973).

56. 119 CONG. REC. 5486 (daily ed. June 27, 1973).

57. Act of July 1, 1973, Pub. L. No. 93-50, tit. III, § 307, 87 Stat. 99, 129. The section reads: "None of the funds herein appropriated under this Act may be expended to support directly or indirectly combat activities in or over Cambodia, Laos, North

gated the damage to the Constitution. In the spring of 1975 another president bombed Cambodia in retaliation for seizure of an American merchant ship. The law prohibiting the use of such force in Indochina was still on the books, but hardly any member of Congress or of the press mentioned it in discussing the Mayaguez episode.[58] I fear that the habit of shrugging at presidential lawlessness in foreign and military affairs will be hard to break.

The Cambodian episode shows how much we depend on courts to hold us to our principles. The bombing seemed to many flagrantly lawless, perhaps more so than President Truman's steel seizure, but a lawsuit to stop it failed because of traditional judicial reluctance to review anything labeled foreign affairs.[59] It often seems puzzling that a country as devoted to civil liberties at home as the United States can be so involved in inhumanities abroad as the recent record indicates. One reason must be that in foreign matters the courts do not perform their vital function of illuminating the ethical implications of policy.

One other factor in foreign affairs should be mentioned: the greater tendency to do business in secret. Just as this country is more vulnerable to a failure of law or institutions because it relies on them, so I think it is especially vulnerable to the corrupting effects of official secrecy. Comparison with Britain may again be helpful. In a country still governed in good part by an old boy network, where certain things are just not done, secrecy need not nurture abuse of power, although even in England there is growing awareness of danger in secrecy.[60] The United States has no old boy network, no morality of the playing fields. Accountability in our system depends, as so much does, on more formal institutions. Discipline in the London stock exchange is applied by the club itself, ours by a federal commission—and one to which the law requires disclosure. We depend not only on law but on openness. With us, it might be said, there can be no accountability in the dark.

The history of the last dozen years is littered with the terrible

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Vietnam and South Vietnam or off the shores of Cambodia, Laos, North Vietnam and South Vietnam by United States forces, and after Aug. 15, 1973, no other funds heretofore appropriated under any other Act may be expended for such purpose."

58. Even newspapers that had long been critical of the Indochina war suspended their disbelief at the time of the Mayaguez episode. *See, e.g.*, N.Y. Times, May 15, 1975, at 42, col. 1 (city ed.).

59. Holtzman v. Schlesinger, 361 F. Supp. 553 (E.D.N.Y.), *rev'd*, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

60. *See* H. EVANS, THE FREEDOM OF THE PRESS (1974).

results of secrecy. One need mention only Vietnam, the war that America entered by stealth and waged by methods that it concealed from itself. The crimes plotted by the Central Intelligence Agency[61] could only have been nurtured in secrecy; the plans would have withered in shame if exposed to public knowledge. On the domestic side, secrecy was a predicate of the whole collection of abuses called Watergate. Secrecy allowed our most powerful police agency to be headed by a man of whom it would be a kindness to say that he suffered from senile paranoia,[62] a man who used his power to try to destroy law-abiding, even noble citizens of whose ideas he disapproved.

The worst danger of secrecy is that, like lawlessness, it becomes a habit. A pending lawsuit seeks to obtain from the National Security Council the titles of some old study memoranda. The council secretary, Jeanne W. Davis, filed an affidavit opposing the request. Even the knowledge that the government had studied certain issues years ago, she said, could arouse "special-interest groups in the United States [to] mount a lobbying effort. . . . This could interfere seriously with the objective, dispassionate atmosphere in which these issues are analyzed. . . ."[63] In other words, it would be inconvenient to have citizens express a view in public on public issues, even those decided years ago. That in a country with the First Amendment!

But the most insidious effects of secrecy may be on the attitudes of the people. They may, indeed some of them do, come to accept that they should be excluded from a large part of the business of government, a profoundly subversive thought in a system of self-government. Consider two earlier episodes in Cambodia: the secret bombing carried on by President Nixon for more than a year without the knowledge of Congress or even the Secretary of the Air Force, using funds appropriated for aid to Greece and Turkey, and then his sudden and private decision to invade Cambodia. When these acts were criticized in a newspaper, a New York doctor wrote a letter asking, "Since when does the President of the U.S. have to have public discussion when he considers it necessary to bomb or send troops

61. *See* ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS: AN INTERIM REPORT OF THE SENATE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, S. REP. No. 465, 94th Cong., 1st Sess. 1 [hereinafter cited as SENATE REPORT].

62. *See Hearings on S. Res. 21 Before the Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, 94th Cong., 1st Sess., vol. 6, at 198-200 (1975) (testimony of N. Katzenbach).

63. Affidavit of Jeanne W. Davis, Halperin v. National Security Council, No. 75-0675 (D.D.C., filed May 1, 1975).

into a country?" One wonders how such a question would have struck the men who risked their lives, their fortunes, and their sacred honor to make a revolution against George the Third, demanding government with the consent of the governed.

Since 1776 the conditions of life have been transformed, but the meaning of that transformation for our experiment in freedom is not necessarily encouraging. What an Oxford don, Alan Ryan, wrote recently of liberty in his country has meaning for ours. By old standards, he said, "we have surely conquered scarcity," but we feel worse off. "Our knowledge of the natural order, and our controls over it, are quite extraordinary"; but far from making us "feel more like free and rational beings," it makes us "aware of a humiliating dependence on experts . . . and in all too many cases resentful of logic, let alone science." We may have reduced political arbitrariness, "but we have locked ourselves in an iron bureaucratic cage."[64]

We live in an age of juggernauts, of scientific and industrial and military powers so huge and so remote that we wonder whether any government can control them. We have begun to worry about destruction of the life-sustaining environment. We fear atomization in politics and loneliness in private life. In society we sense dangerous divisions —dangerous because those excluded from the benefits of civilization on account of race or poverty are not likely to have much stake in civilized behavior. And as the problems grow larger, the political leaders seem to grow smaller. Or is that only an optical illusion?

In America there is a sense that government grows and expectations of it increase, just as its authority diminishes. The same may be said of society as a whole. We talk about egalitarianism, but we achieve it only with a general cheapening of cultural values; the economic gap grows, between rich and poor countries and individuals. We are far from the optimism of the eighteenth century, or from the unified vision that Americans had then. It is touching, because it is so remote from our experience, to read John Jay's statement that "providence has been pleased to give this one connected country to one united people—a people descended from the same ancestors. . . ."[65] The diversity of our origins today does not make us any less American. But with all the centralization of life, the speed of communication, and the ease of travel, we are less connected as a people.

Perhaps most troubling of all, as we celebrate the birth of our

64. Ryan, *Liberty*, NEW SOCIETY, Nov. 13, 1975, at 359-61.

65. THE FEDERALIST No. 2, *supra* note 6, at 9.

country's liberties, are signs that Americans are straying from the truth written into our fundamental law in 1787—that the only way to preserve the end of liberty is to concern ourselves with the means of political society. Lately we have too often seemed impatient of following the rules, of paying attention to means. We have even, some of us, adopted the doctrine that Brandeis rightly said would "bring terrible retribution":[66] that the end justifies the means.

These disturbing signs are not limited to one party or ideology; they cover the political spectrum. Liberals encouraged presidents to make executive agreements instead of treaties, to take warlike actions without a declaration of war, to use executive orders on domestic social issues when legislation presented difficulties.[67] Conservatives were prepared to jettison law and the Constitution itself in the name of fighting subversion or the world communist conspiracy.[68] A committee that advised President Eisenhower in 1954 on covert activities said it might be necessary to use tactics "more ruthless than that employed by the enemy. . . . Hitherto acceptable norms of human conduct do not apply. If the U.S. is to survive, longstanding American concepts of American fair play must be reconsidered."[69] When the Senate report on C.I.A. assassination plots was published, Spiro Agnew said the C.I.A. should keep the option of assassination. He added, "It's typical of Americans to expect themselves to abide by the rules while others don't."[70]

Yes, it is typical, and it is precisely what the founders of the United States had in mind. They thought the liberty of Americans depended on following the rules no matter what others did. They lived in a time of dangers acutely perceived, but that did not lead them to say that the end justified the means. They did not limit the powers of government except during Indian wars. They did not guarantee free speech unless the British burned the White House. They gambled instead on following the rules, whether convenient or not.

Our question is whether the ideals of the eighteenth century fit the crude realities of the twentieth. Can there really still be safety in the vision of Jefferson and Madison, of free men delegating the most limited powers to those who govern in their name? Or is that an

66. Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

67. *See* Cox, *Not in Featherbeds*, HARVARD TODAY 5-6 (Summer 1975).

68. *See* Lewis, *The Supreme Court and Its Critics*, 45 MINN. L. REV. 305, 310 (1961).

69. SENATE REPORT, *supra* note 61, at 258-59.

70. Boston Globe, Nov. 29, 1975, at 6, col. 2.

Arcadian fantasy unsuited to life in a disorderly country, on a bristling planet? Well, if I thought the vision of 1776 and 1787 had become outmoded, I would probably not be here. I think that vision is more meaningful, more important now than ever.

Just think what has happened to this country in the last dozen years. The assassination of a president did grievous damage to our confidence. The two presidents who followed had faults of character so grave that they went to the edge of destroying our sense of political legitimacy. A terrible war sapped belief in our own values. A criminal conspiracy operated at the top of our political system.

Not many countries could go through all that and emerge as intact as the United States did. There is hardly ground for smugness in that record; the poison of doubt introduced into our national life by Vietnam and Watergate will be with us for a long time. But there is reason for pride in our institutions. We survived because of laws, not men; because of the formal structures created in 1787, and the commitment to their enforcement by law. Even Richard Nixon felt obliged to bow, in the end, to law: to the Supreme Court, the branch of government that *The Federalist* said would be "beyond comparison the weakest of the three," having "neither *force* nor *will*, but merely judgment."[71] In the tradition we have forged, judgment was enough.

Regretfully, too few Americans prize as they should our history's one incontestably great achievement, which is constitutionalism. Recently a most sophisticated student of social thought, Daniel Bell of Harvard, looked at the decline of American illusions and wrote: "Of all the gifts bestowed on this country at its founding the one that alone remains as the element of American exceptionalism is the constitutional system."[72] But in our distraction, our zeal for getting and spending, we forget the essential values of our political society. Or worse yet, we are ready to trade them for promises of instant gratification.

We need more faith in self-government, not less; more openness, not more secrets; a deeper commitment to law, not new ways of avoiding its inconveniences. Like human beings generally, we yearn for order. But experience has added weight to the framers' teaching that it must be an order made tolerable by reason and humanity.

When he was 83, Jefferson was invited to Washington for the fiftieth anniversary of the Declaration of Independence: July 4,

71. THE FEDERALIST No. 78, *supra* note 6, at 483-84 (A. Hamilton).

72. Bell, *The End of American Exceptionalism*, 41 THE PUBLIC INTEREST 193 (Fall 1975).

1826. He replied that he was too ill to make the journey, but he offered this still vigorous and confident thought:

> The general spread of the light of science has already laid open to every view the palpable truth, that the mass of mankind was not born with saddles on their backs for a favored few booted and spurred, ready to ride them legitimately by the grace of God.[73]

On the morning of that July 4, Jefferson died at Monticello. A few hours later in Quincy, Massachusetts, his political rival and great friend, John Adams, died. Adams' last words were, "Jefferson still lives."[74] As the man who promised life, liberty, and the pursuit of happiness to those who would fight for ideals, I believe he does.

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73. F. HIRST, LIFE AND LETTERS OF THOMAS JEFFERSON 571-72 (1926).
74. *Id.* at 573.