

## WHO'S IN CHARGE HERE? *by Samuel Francis*

America, in case you haven't noticed, is lost in the throes of celebrating the writing of its Constitution, which is now two centuries old. The somewhat labored efforts to fix public attention on the historic document are largely the work of former Chief Justice Warren Burger and his own private bureaucracy in the Commission on the Bicentennial of the U.S. Constitution, as well as the legal profession, the mass media, and the usual contingent of do-gooding schoolteachers who have temporarily suspended their instruction in the intricacies of sexuality and collective guilt over what we did to the Indians, blacks, women, and buffaloes and are now passionately handing out trivia quizzes on the color of James Madison's socks.

But the national rapture over our fundamental law does not match the fevers manufactured a few years ago when we observed the centennials of the War Between the States and the American War for Independence. War, wrote Thomas Hardy, makes ripping good history, but it also makes for historic rip-offs every hundred years or so, when we pine for the return of bloodshed fraught with moral import. Some-

how the sober deliberations of the Framers in the Philadelphia Convention just don't stir the glands like Gettysburg and Bunker Hill, and the attempts of public officials to instruct us in the minutiae of the Framers' debates come off rather like the efforts of earnest mothers who insist on reading their children old-fashioned fairy tales when the urchins would much prefer the Saturday morning cartoons.

Among the year's festivities have been some rather glum proceedings in the U.S. Congress having to do with the Constitution and its proper interpretation. The recently concluded necktie party that passed as the Senate Judiciary Committee's hearings on Judge Robert Bork dealt tangentially with this matter, but more expansively on the character and personality of the jurist who was unwise enough to allow his name to come under the purview of the committee. Although it did not appear in the hearing record, information revealed by one of the lesser lights of Washington journalism, *The City Paper*, helped set the tone of the inquiry. Its reporters managed to procure a list of video films that Judge Bork had rented, and proceeded to regale their readers with the titles. They seemed to be mainly Alfred Hitchcock films of the 1940's, and some disappointment was expressed that the nominee was not a fan of "Story of

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O" or "Ilse, She-Wolf of the S.S." The District of Columbia City Council quickly developed legislation to forbid video stores from releasing information on the films their patrons rent, and given the probable tastes of Mayor Marion Barry and the several members of his administration who have been jailed for corruption since he entered office, the legislation was probably wise.

The other main celebration of the Constitution by the Congress was the now largely forgotten Iran-Contra hearings, which raised to stardom Oliver North, Daniel Inouye, Fawn Hall, and other luminaries who today seem as distant as Halley's Comet, and which immersed itself in the metaphysics of something known as the Boland Amendments and the mystery of why Col. North purchased his snow tires. The distinguished chairman of the joint committee, hailing from sun-drenched Hawaii, could not have been expected to understand the purpose of such paraphernalia, though one would have thought that living in the vicinity of Washington for some 28 years would have served to inform him. My own guess as to the motives of the combat officer-turned-bagman—sadly disproved by subsequent events—was that he planned to necklace two members of the committee when he finally appeared before it.

Yet for all its irrelevance, the joint committee did broach a subject of some significance for the republic. The attentive citizen could discern, well-disguised by the protracted caterwauling emitted by the senators, congressmen, and their flying squadrons of counsels and investigators, the kernel of a constitutional crisis centering on the problem of who—the President or the Congress—is properly in charge of American foreign policy. The debate was duly joined in the national media, and if the hearings themselves were not very helpful in answering the question, a good deal was learned from those writers who offered their own views to public scrutiny.

In general, the ideological breakdown of those who expressed themselves on whether the Congress or the President should have authority over a foreign policy that seems to consist of the systematic violation or evasion of treaty commitments, the incremental massacre and abduction of U.S. citizens and soldiers, the abandonment of allies, the gradual surrender of power and territory, and the higher bribery known as foreign aid was that conservatives almost universally supported the claims of the presidency, while liberals equally unanimously upheld the rights of Congress. Defenders of Mr. Reagan and his Central American policies held that the Boland Amendments, which sought to restrict or curtail U.S. funding of the Nicaraguan anti-Communist guerrillas, were unconstitutional invasions by the Congress into what they made out was a unilateral presidential prerogative of designing and implementing foreign policy. Liberals, on the other hand, firmly upheld the legality and propriety of the amendments as well as of other congressional measures, such as the War Powers Act of 1973, that constrain the ability of the President to carry out a policy without congressional permission. The most articulate of the progressive set murmured darkly about "another Vietnam" and drew grim pictures of a White House, National Security Council, and CIA once more out of control, stampeding about the world in intrigues with ayatollahs, shady arms merchants, professional assassins, and

miscellaneous desperadoes of the international demimonde.

Given the partisan complexion of the Iran-Contra controversy, this breakdown was not surprising. Conservatives understandably defended the propriety of Mr. Reagan or his lieutenants seeking to preserve a semblance of freedom in Central America from a Congress that refuses to recognize the nature of a "peoples' democracy" guided by commissars imported from Havana and Moscow, while liberals, whatever ideals remain in their jaded hearts, understandably sought to weaken their most powerful and successful foe to occupy the White House in this century.

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What is perhaps more surprising about this breakdown is that it represents a complete reversal of the positions assumed by liberals and conservatives on the issue of congressional-presidential powers in foreign policy in the 1950's and 60's. When, in September 1983, the U.S. Senate debated the War Powers Act and its applicability to Mr. Reagan's deployment of U.S. Marines in Lebanon, Sen. Barry Goldwater, defending the President's power to dispatch troops without congressional permission, was reduced to the ignominy of citing Dean Acheson, Harry Truman, and Franklin Roosevelt as authorities for his view that "once the military forces are established and equipped, it is for the President alone to decide how to deploy and use those forces." Sen. Goldwater, in the later parts of his career, never tired of excoriating the Rev. Jerry Falwell, Sen. Jesse Helms, and kindred souls among his colleagues in the Senate, and other figures of the "New Right" for their alleged deviations from conservative orthodoxy as defined by himself, although in the principal statement of that orthodoxy in 1960 he lamented that "The Achesons and Larsons have had their way. . . . Inside the federal government both the executive and judicial branches have roamed far outside their constitutional boundary lines," and he had correctly pointed out the intentions of the Framers in "dispersing public authority among several levels and branches of government in the hope that each seat of authority, jealous of its own prerogatives, would have a natural incentive to resist aggression by others." As late as 1978, Sen. Goldwater's name appeared as the author of a learned study published by The Heritage Foundation that argued against the legality of President Carter's claim to the right of abrogating the Mutual Defense Treaty with the Republic of China.

Yet it is not necessary to cite "Mr. Conservative" in his dotage to show that American conservatives seem to have experienced an animadversion. Walter Berns, distinguished neo-conservative writer and disciple of Leo Strauss, writing in the *Washington Times* on June 3, 1987, expressed the view that "The Framers . . . knew, what some members of Congress today seem unwilling to admit, that much as one might like to do everything by or by means of law, the conduct of foreign affairs especially cannot be subjected to

the rules of law." He defended this proposition with reference to John Locke's precepts on the "power to act according to discretion for the public good, without the prescription of law and sometimes against it," and by citing Abraham Lincoln's multifarious wartime violations of law and Constitution, which show that "Somewhere in the interstices of the Constitution, apparently—the alternative is to regard Lincoln as some sort of usurper or dictator—the president is vested with a power that, in some circumstances, resembles or approximates Locke's prerogative." Dr. Berns made much of the ruling of Justice George Sutherland in *U.S. v. Curtiss Wright Export Corporation*, a New Deal-era decision that recognized in the President the "sole organ of the federal government in the field of international relations" and which has become the classic Supreme Court case on the subject of presidential power in foreign policy.

Perhaps an even more aggressive statement of the doctrine of presidential supremacy in foreign affairs was offered by Dennis Teti, a staff member of the Iran-Contra committee itself, in the Fall 1987 issue of *Policy Review*. While acknowledging that "Congress has a genuine but subordinate role to play in the formulation of foreign policy," Mr. Teti argued: "A close look at the Constitution shows that, while the executive branch does not possess the entirety of foreign policy power, it has most of it. Under Article II, 'executive power' is lodged in the president. By definition the executive power comprehends the conduct of foreign policy. The Framers found it unnecessary to define the term, but the inclusion of foreign policy under executive power is discussed at length in John Locke's *Two Treatises of Government*, a fundamental source for the Founders."

Aside from the utility of such views in contemporary policy disputes, however, there is little merit in them from the perspective of traditional constitutional theory. Contrary to Mr. Teti's assertion of the implicit powers of the executive branch in foreign policy, the text of the Constitution rather clearly grants to the Congress expansive powers in this area as well as in defense matters and only restricted responsibilities to the President. Article I, section 8 states that "the Congress shall have power to . . . provide for the common defense and general welfare of the United States . . . to borrow money on the credit of the United States . . . to regulate commerce with foreign nations . . . to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations . . . to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water . . . to raise and support armies . . . to provide and maintain a navy . . . to make rules for the government and regulation of the land and naval forces . . . to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions . . . [and] to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

The same article also forbids to the states any powers in foreign policy, and the next article governs the very limited foreign policy prerogatives granted to the President. These consist only of being the Commander in Chief of the Army

and Navy, the power "by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators concur," and the power to "nominate, and by and with the advice and consent of the Senate . . . [to] appoint ambassadors, other public ministers and consuls." It may be noted that Alexander Hamilton in *Federalist No. 69* considered the power of receiving ambassadors to be "more a matter of dignity than authority" and "without consequence in the administration of the government." The very carefully expressed congressional limitations on the foreign policy powers of the President and the specific authorization of extensive foreign policy powers for the Congress suggest almost conclusively that the Framers had no intention of permitting the executive branch to carry out a foreign policy that contravened the wishes of the Congress or at least of the Senate, and that they intended the Congress to take a major role in the conduct of international relations and national defense.

The argument that Locke's view of executive powers is in some way germane to the meaning of the Constitution is not only without merit but borders on absurdity. Whatever Locke may have thought about executive power or the conduct of foreign policy, it was not, according to constitutional historian Forrest McDonald, from his *Two Treatises on Government* that the Framers derived their view of executive power, but from Sir William Blackstone. "Experience," writes McDonald, "was not an adequate guide, for their experience with colonial and state governors was largely irrelevant to the task presently at hand. Hume was silent on the subject, Montesquieu muddled, Locke too general. That left Blackstone's description of the royal prerogative as the only readily available account of what had traditionally been regarded as the executive power in a mixed form of government." The English jurist did indeed acknowledge that the executive power, lodged under the British constitution in the crown, included the conduct of foreign relations and of war, including the right to declare war and make treaties without preliminary consent. Obviously, the Framers did not provide the American presidency with such powers, nor with the absolute veto of the British king, which also belonged to the executive power in Blackstone's view.

Dr. Berns's belief that "the conduct of foreign affairs especially cannot be subjected to the rules of law" has merit, though it is not a constitutional argument and might give pause to other nations contemplating making treaties with the United States. Conservatives also might pause to consider the implications of foreign policy powers, lodged exclusively in the chief executive and exempt from the constraints of law, as they would be exercised by a President Jesse Jackson or Michael Dukakis. Nevertheless, the question does not really concern the application of legalism to foreign policy but rather the determination of which branch of government is legally responsible for the conduct of foreign relations. To deal with Nicaragua as though it were bound by the rights and obligations of U.S. law is indeed an absurdity, but to determine who in the U.S. government is ultimately responsible for defining U.S. policy toward Nicaragua is an essential question that must be settled by law in a state pretending to the title of a constitutional republic.

Nor is the appeal to Justice Sutherland's opinion in *U.S. v. Curtiss Wright Export Corporation* a sound basis for the doctrine of executive supremacy. Raoul Berger, after a three-page scrutiny of the decision in his *Executive Privilege*, considers that "the mischievous and demonstrably wrong dicta of Justice Sutherland deserve no further credence," though he devotes another six pages to its pulverization. The late Alexander Bickel similarly held that Justice Sutherland's "grandiose conception never had any warrant in the Constitution, is wrong in theory and unworkable in practice."

Conservatives today may perhaps be excused for allowing their commitment to Mr. Reagan and his support for anti-Communist forces in Central America to get the better of their constitutional judgment, but their abandonment of a strong, legitimate congressional role in foreign policy is of more than antiquarian interest. Conservative reversal on this issue in fact represents a major redefinition of the terms of public discourse in American political culture.

Historian George H. Nash noted, in the 1950's and 1960's, "the growing conservative tendency to rely on the one branch of government which had proved immune to radical assault: the Congress." Conservative political leaders like Robert Taft, Richard Nixon, Joseph McCarthy, and John W. Bricker all insisted that Congress had a right and a duty to contribute to, investigate, and oversee presidential conduct of foreign policy, and their practice found theoretical justification in the writings of Frank Meyer, Willmoore Kendall, James Burnham, and Russell Kirk, among others.

Aside from the constitutional merits of the position, the reason for the conservative defense of Congress lay, as Nash suggests, in the fact that the locally based Congress was in large part "immune" to the political influence of the forces that dominated the executive branch. The latter, increasingly controlled by a new managerial elite that used New Deal liberalism and progressivism as its ideological formula, sought to implement a globalist foreign policy that would complete the interdependence and integration of the United States in a transnational world order in which American national sovereignty and cultural distinctiveness would evaporate. The United Nations, large regional security pacts, international financial and legal institutions, and multilateral treaty regimes on matters ranging from genocide to the law of the sea to arms control provided the framework for this new global order, in which a technically skilled and cosmopolitan-minded elite would displace traditional, local, and national elites.

The transformation of conservative opinion from support for a congressional role in foreign policy to virtually unanimous endorsement of presidential supremacy or even monopoly in foreign affairs thus represents more than a partisan eagerness to defend Mr. Reagan's White House or resist Communist power in Central America. The very ability of conservatives to win and hold the presidency for eight years indicates less their successful challenge to the established elite and its domestic and foreign agenda than their assimilation by the elite itself. Conservative willingness to use the rhetoric and ideas of progressivism in foreign policy—"human rights," the sponsorship of global democracy, defense of an "international economy"—matches the recent conservative reliance on the executive branch in

international relations and helps to reconcile the new conservative program in foreign affairs to the interests and ideology of the dominant elite. Contemporary conservatism offers little serious resistance to further absorption of American sovereignty and civilizational integrity into what neo-conservative Zbigniew Brzezinski calls the "technetronic age," and the number of conservatives who today defend classically nationalist policies such as protectionism and

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The bicentennial of the U.S. Constitution deserves a bit more in the way of celebration than firecrackers, docudramas, and the banalities from right and left of the Iran-Contra hearings. What came out of the Great Convention 200 years ago remains the principal political symbol of a unique and ancient civilization that managerial globalism and social engineering are trying to subvert, and it is doubtful that reliance on the instruments that our technocratic optimates have devised can preserve either the Constitution or the cultural fabric that underlies it. If the new generation of conservatives is serious about wanting to defend either their civilizational inheritance or the political and legal mechanisms by which their civilization has been governed, they might begin by resisting the temptations of partisan convenience and the baubles of power and reputation that their enemies have dangled before them and try to reclaim a way of life and a method of ruling and being ruled that their predecessors once understood.

# THE FEAR OF CRISIS *by John P. Sisk*

In the November 1986 *Encounter*, the Princeton University economist Harold James sets out to tell us "Why We Should Learn to Love a Crisis." His explanation is not quite what we would expect from a champion of a market economy. In that economy, he says, crises serve a necessary function; states should not try to avoid them out of a reluctance to risk since they can be purgative and therapeutic; most importantly small crises may be ideal ways of avoiding major crises.

Professor James stays pretty much within his own discipline, but because he stays there so competently and readably we get the impression that there is much to be said about the relevance of his thesis to the understanding and management of crises generally. Certainly, he will encourage many readers to extrapolate his essay into the worlds of politics and religion. There in more familiar territory they are likely to ask the sort of questions that James's fellow economists may be asking him.

First is the question of scale. It may be that small crises are good for us because they help prevent big crises; but how do we tell them apart when they are happening? Even the layman, for whom economics is, as it was for Carlyle, the dismal science, can see the difference between the

inside trading scandals that periodically rock Wall Street and the stock market crash of the early 1930's—especially when Dow Jones quickly indicates that the economy has received no mortal wound from the former. But when we were going through the Iran arms crisis, was it properly identified as major or minor? Where on a scale ranging from Watergate to the discovery that the government had been using disinformation against Libya should it have been placed? The consequence for the nation depended on that placement, and that placement depended on the extent to which we could or could not see it in a perspective of major events since World War II.

The proper placement of a crisis on a proper scale is, of course, crucial in every walk of life at any time. This is no doubt why the literature of crisis management, however called, is as extensive as it is now, when, as it may seem to us Americans, our complex and information-crammed world condemns us to a crisis-rich environment. However, people in any democratic society have a notorious capacity to turn small crises into big ones, to say nothing of a perverse capacity to become addicted to crises of all dimensions. This is in part because crises are relief from boredom, and boredom in democratic societies, where it is easy for the individual to become alienated from boredom-reducing communal structures, is always an important determinant of political and social history. But even apart from such alienation, life in a democratic society, relative to more

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