

Our constitutional order based on open society

LONDON — Law has always pervaded American life. Lawyers dominate our politics and interpret our Constitution. Even the American revolution was cast in the form of a return to legality — a revolt against a lawless king.

Not surprisingly, therefore, Americans have a more conscious concern than other peoples with constitutional order. They insist

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that the great decisions of public policy not only win political approval but accord with deeper national understandings, moral and historical.

A sense that something has gone wrong in this natural order, this deeper rhythm, must play a significant part in the present American mood. When polls show a shattering loss of national optimism, it is not just that we are in a war whose results distress the public but that we got there by irregular means — unnatural means, in the Shakespearean sense.

All this is in the background of the First Amendment cases just decided by the Supreme Court. When the self-congratulatory editorials have been forgotten, along with the hostility openly displayed toward the newspapers by two members of the court, the opinions in *New York Times v. United States* will be read for their view of the American political understanding.

For the clash within the court was not over the meaning of the First Amendment in some verbal sense. It was over the allocation of power in our democracy.

A majority of the court agreed that certain defense and diplomatic information ought to be kept confidential, and that publication of some of the documents involved in these cases would create risks to the national interest. But only for Chief Justice Burger, Justice Harlan and Justice Blackmun did it follow that the President had the power to prevent publication.

The dissenters' view of executive power was set out in Justice Harlan's opinion. It was a strikingly expansive view.

Absolute power

Justice Harlan said that the President, because of his constitutional primacy in foreign affairs, has absolute power to keep any matter affecting foreign or security policy secret. Further, even without the support of congressional legislation, he can call on the courts to enforce his decisions by injunction. Finally, the courts in Justice Harlan's view would have virtually no reviewing function: If the head of a cabinet department had declared the national security to be jeopardized by some proposed publication, the only judicial review would be to make sure that the material at issue was within the "com-

pass of the President's foreign relations power."

Anyone would hesitate to say this of a judge as thoughtful and as concerned with history as John Marshall Harlan, but that conception of executive power is difficult to square with American premises. To say that the President has primacy in foreign affairs is one thing; it is another to say that he has absolute legal power to exclude the public from the formation of policy.

Of course no government can conduct its diplomatic relations on the basis of opinion polls. But it is surely the American constitutional understanding that a President must seek broad public support for his policies: otherwise there would be no purpose in the Constitution's requirements for ratification of treaties by the Senate and declaration of war by Congress.

As it happens, we have just had a test of presidential power in foreign affairs unrestrained by the normal process of public consultation — a practical, not a legal test. That was the process by which President Johnson expanded the American involvement in Vietnam into full-scale war.

Put to one side the question of how far planning for an enlarged war had gone in 1964. It is beyond doubt that in 1965, when he had decided in favor of massive bombing and troop involvement, Johnson deliberately concealed the true measure of those decisions from the public. He pretended for months that American policy was not really changing, and he never brought to view the real debate about U.S. interests that underlay the decision for war.

A calculated failure

That way of carrying out the President's foreign affairs responsibility has been found constitutionally wrong, in the profoundest sense, by the American people. Their distress now, their distrust in the world of political leaders, stems to a great degree from President Johnson's calculated failure to take them into his confidence on the ultimate issue of war.

Our constitutional order is not one of centralized power. It is a system of divided governmental authority checked by an open society. There are terrible risks, but after Vietnam it is not at all clear that the alternative is less risky.

"You are now in the position of making demands on the First Amendment," Chief Justice Burger told counsel for *The Washington Post* in the argument of these cases. But the framers of the amendment wrote it into the Constitution for the benefit not of the press but of the country. They created the system they did, as Brandeis said, not because it was efficient but because they feared power.