1971

A Comment on Separation of Power

Philip B. Kurland

OCCASIONAL PAPERS

FROM THE LAW SCHOOL

THE UNIVERSITY OF CHICAGO

NO. 1

1971

Occasional Papers

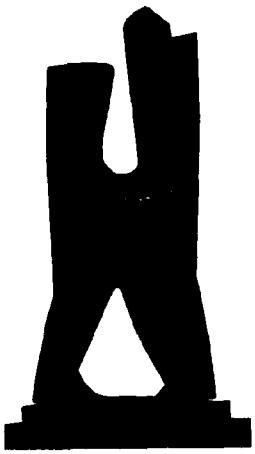
from

THE LAW SCHOOL

THE UNIVERSITY OF CHICAGO

A Comment on Separation of Power

By PHILIP B. KURLAND



A Comment on Separation of Power

By Philip B. Kurland*

I am flattered by the invitation to appear before the Committee to express my views on the subjects with which these hearings are concerned. I am, however, fully appreciative of the fact that when the invitation to speak was issued to me the Supreme Court had not yet been called upon to express an authoritative opinion on the constitutional problems of the injunctions against the *New York Times* and *Washington Post*. For purposes of advising you of the law of the Constitution, my own views, whether in agreement or disagreement with the Court, are irrelevant.

I would point out, however, that there was agreement among the litigants in the cases about the appropriate general principle. That is, both sides assumed that an injunction could not issue to prevent publication of the documents unless such publication would be injurious to the national security. There was apparent agreement, too, that such threat to the national security would be a basis for injunction. The contest was essentially over two questions. First, what the standard for injury to the national security should be. Here there were considerable variations in suggested verbal formulae, with the words substantial, imminent, clear, etc., being offered. It seems evident, however, that no concatenation of words can afford a precise measure against which the facts could be placed in order to make a determination. There is no litmus paper test for danger to national security.

**This paper is based upon the statement by Philip B. Kurland, Professor of Law, The University of Chicago, before the United States House of Representatives' Committee on Government Operations, June 30, 1971.*

This first question, therefore, gave rise to the second. Who shall determine whether the proposed publication does or does not offend the standard of national security? The newspapers seemed to be satisfied that their own judgment was adequate to the purpose. Those on the other side thought that a decision reflected in the stamp on the document should be decisive. On this score, I would invoke the words of Mr. Justice Frankfurter, in another situation where conflicts between two constitutional commands had to be resolved. In *Pennekamp v. Florida,* 328 U.S. 331 (1946), he said:

> "A free press is vital to a democratic society because its freedom gives it power. Power in a democracy implies responsibility in its exercise. No institution in a democracy, either governmental or private, can have the limits of power which enforce responsibility determined by the limited power itself. In plain English, freedom carries with it responsibility even for the press; freedom of the press is not a freedom from responsibility for its exercise. . . ."

The answer must be that the decision is for the courts to make. And inasmuch as the Government is seeking to invoke the authority of the judiciary in these cases, it would seem clear that the burden of persuasion should be on it to show the danger to the national security by clear and convincing evidence, evidence sufficiently clear and convincing to overcome the long-standing, fundamental proposition over which there is no disagreement, that the press ought to be free from prior restraint.

I shall, if I may, return briefly to the subject of the case of *New York Times v. United States* in a few minutes but from a different perspective.

The invitation issued to me called for me to make some observations also on the subject of

the press privilege not to reveal the sources of its information. To me, the freedom of the press to conceal information is of a different dimension from its right to reveal information. The argument asserted by the press here is identical with the claim of the government that it, too, has a right to secrecy to implement the other functions that it must carry out. Both claim, therefore, that their right to conceal information is ancillary to other constitutional rights or powers.

My own view is that there is no constitutional privilege of confidential communication between the publisher of news and his source of news. The only testimonial privilege specified by the Constitution is the privilege against self-incrimination, which is not available to corporations. All other confidential communications privileges rest either on common-law origins or statutory provisions.

That is not to say that in particular circumstances the right to silence may not flow from a constitutional provision. Thus, the Court has ruled that a membership list of the NAACP need not be revealed to state authorities where the resulting injury to members was clear and the benefit to the state was obscure. So, too, the right to conceal news sources might be protected, where the reason for compelling their revelation is not persuasive. The difficulty in striking a balance is not small. And again, as in the first situation, the question of who is to make the decision becomes the important one. The issue can arise in several settings. First, there may be an order to produce sources of information in a judicial proceeding. Second, the information may be sought by a legislative body – the present contest between CBS and the Congress is an example. Third, the data may be demanded by an executive or administrative agency. It would seem, in each instance, that in order to secure the information de-

manded or – in the last two cases – injunction against the demand, the authority of the judicial branch will have to be invoked. And so, in a lawful society, the resolution of the problems will likely be in that branch.

Again, I should like briefly to return to this issue in some later remarks.

A more amorphous subject assigned to me is the question of the executive privilege to conceal information from the public, from the legislature, and from the courts. As to the public, Title 5, sec. 552 of the United States Code, grants a judicial remedy to compel disclosure by executive departments and agencies, with certain exceptions stated in that section and referred to in the preceding one. The provisions of sec. 552 place the burden of justifying the refusal of publication on the government agency in question. The exceptions are rather ill-defined. The ones particularly of interest in light of the present controversy between the government and the newspapers are those that provide: "This section does not apply to matters that are – (1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy; . . . (3) specifically exempted from disclosure by statute; . . ." The problem of who has standing to maintain such an action is one that is yet to be clearly determined. I respectfully refer you to Congressmen Reid and Morse for greater expertise in this area.

The statute to which I just referred specifically states that it is not relevant to the right or power of Congress to secure information from the executive and administrative agencies. The precedents in the tug-of-wars between Congress and the President over Congress's right to see what the President would conceal are not judicial ones. Heretofore the one or the other has prevailed according to the

willingness of the one or the other to assert greater political strength. Where Congress is prepared to use its power over the purse or the power to refuse passage of legislation, it can succeed in securing the information that it wants. So, too, where the public sentiment is clearly with it, it may be expected to secure the information that it wants. Where public opinion is on the side of the President, or where his political clout is greater than that which Congress is prepared to exercise, his concealment of the documents will be successful.

So far as the executive privilege against judicially compelled revelations, we do have a judicial declaration from the Supreme Court to guide us. In *United States v. Reynolds*, 345 U.S. 1 (1953), the Court pointed out in a footnote: "While claim of executive power to suppress documents is based more immediately upon R.S. § 161 . . . [5 U.S.C. § 22], the roots go much deeper. It is said that R.S. § 161 is only a legislative recognition of an inherent executive power which is protected in the constitutional system of separation of power." Nevertheless, the Court went on to hold that the determination of the availability of the privilege to the Government in litigation must be decided by the courts.

The Court said:

> "Judicial experience with the privilege which protects military and state secrets has been limited in this country. English experience has been more extensive, but still relatively slight compared with other evidentiary privileges. Nevertheless, the principles which control the application of the privilege emerge quite clearly from the applicable precedents. The privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be a formal

claim of privilege, lodged by the head of the department which has control over the matter, after actual personal consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect. The latter requirement is the only one which presents real difficutly. . . .

"Regardless of how it is articulated, some . . . formula of compromise must be applied here. Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeojardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers."

Perhaps, before unwarranted conclusions are drawn from the *Reynolds* case to that of the *New York Times v. United States,* it should be noted that in *Reynolds* it was the individual and not the government that invoked the assistance of the court, and that the prerogatives protected by the First Amendment were not involved in that litigation.

If you will allow me, I should like to suggest that the problems on which this Committee's attention is now focused, important as they

are, are but symptons of a more serious disease. There are, to my mind, more fundamental constitutional questions that underlie those being considered.

The essential scheme of the national Constitution was the limitation of governmental power. It sought to accomplish this end by three means. The first was a division of power between the national government and the States, a federal system in which the national government was to have limited and specified powers. For all practical purposes, federalism in this country is a thing of the past. Whether by reason of necessity or desirability or irresponsibility, the national government now has plenary governmental authority. That is to say, there is no area of governmental operations that cannot be rationalized as coming within the national sphere, whether by reason of the power over commerce or some other amorphous grant of authority.

The second major principle of limitation on authority that inheres in the constitutional scheme is that of separation of powers. It does not suffice to reject this proposition to point out that a clean, clear line among the three branches was never intended and has never been effectuated. Certainly that is true. But the essence of the scheme remains, that by dividing governmental authority among three branches there was to be not only separation of powers but a system of checks and balances. Here, too, we are in danger of losing the constitutional protection sought to be afforded. Since 1933, the executive branch of the government has secured and exercised more and more power, in part by seizing it, in part by the failure of the legislative branch to assert itself. We have reached the stage where an astute foreign observer, Louis Heren, can validly assert:

"I do believe that the modern American Presidency makes sense as a political system

only when it is seen to be a latter-day version of a British medieval monarchy, and I commend this approach to its loyal American subjects. Thus armed, they will be less bothered by the frustrations that usually attend the conventional method of measuring the incumbent against the constitutional yardstick.

"... the main difference between the modern American President and a medieval monarch is that there has been a steady increase rather than diminution of his power. In comparative historical terms the United States has been moving steadily backward."

The concentration of power in the executive branch may be sought to be justified by the criterion of efficiency. Just so, the criterion of efficiency may justify restraints on the power of the people to learn what is going on in the government. A steady concentration of power even within the executive branch is also a trend to be noted and – I think – deplored. And this committee bears no small responsibility for the proposal to bring the various departments of the executive branch under a handful of cabinet commanders, presumably on the model that Napoleon so successfully used. The Presidential reorganization plan will thus bring more and more power into fewer and fewer hands. (The examples afforded by the Department of Defense and HEW do not suggest to me that departmental conglomeration leads to efficiency.)

That such concentration of power is inconsistent with the original constitutional scheme, I have no doubts. As Professor Andrew McLaughlin once noted:

"If it be asked why people were so unwise – and the question is often asked – as to hamper government by division of authority and by checks and balances, the answer is simple: such was the kind of gov-

ernment the leaders and probably men in general wanted. Who are a free people? Those who live under a government so constitionally checked as to make life, liberty and property secure. That would have been the most explicit answer of the Revolutionary days. . . ."

The third limitation on government authority that was the essence of the Constitution was a list of restraints on the national government included, not only in the Bill of Rights, but in other provisions of the Constitution as well; none so important, however, as those contained in the First Amendment.

I recite these commonplaces to you because I think that they are relevant to the issues before you. Since John Marshall used the "necessary and proper" clause to expand the national authority in the *Bank* case (*McCulloch v. Maryland,* 4 Wheat. 316 (1819)), it has generally been regarded as a device for the allocation of power between the nation and the states. A reading of its provisions suggests that it is at least as relevant to the division of authority within the national government itself. The provision, as you may recall, reads: "The Congress shall have Power . . . 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.*" (Emphasis added.)

It becomes clear to me, therefore, that to the extent that Congress is still a viable institution, it can enact legislation which in effect says that the courts shall not be permitted to enjoin publication by newspapers even of materials purloined from the national government. Congress cannot derogate from the protections afforded by the First Amendment, but it can add

to them. It can legislate the circumstances and conditions under which the press may assert the privilege to conceal its sources of information. It can, I think, even legislate the terms and conditions under which the executive privilege may be asserted for the protection of the national interests. Certainly there are balancing factors to be taken into consideration in the enactment of such legislation. Congress may decide that there are times when an injunction against publication – when permitted by the Constitution – should be proper. Congress may decide that there are situations under which the executive branch should be allowed the confidentiality of communications that most enterprises – even governmental enterprises – need in order to operate successfully.

I think that the real problem is that Congress cannot – because of the way it is organized – or will not, for whatever reason, undertake the duties that are ascribed to it by the Constitution. (I would require all Congressmen to read Wilson's *Congressional Government,* to show them what role Congress once played in our governmental scheme.) After the "crisis" of the Pentagon papers recedes into the past, I expect that Congress will continue to condone Presidential actions that find no warrant in Congressional legislation. We will continue, for example, to see the President wage war without Congressional declaration, to see executive orders substitute for legislation, to see secret executive agreements substitute for treaties, and to see Presidential decisions not to carry out Congressional programs under the label of "impoundment of funds." I suggested several years ago that the failure of Congress proves or will prove the failure of democracy. And I still think that the danger is nothing less than that.

Meanwhile, I would point out, that the

failure of Congress to exercise its powers of supervision over the execution of the laws that it purportedly enacts makes it all the more important that the news media be kept free to do so. For if Congress is less and less concerned about what the executive branch is doing, it behooves the press – in the largest sense of that word – to assume the watchdog function.

I expect that I have more than tried your patience with this tirade. And so without explicit injunction I cease and desist from further imposition on your generosity. I should, however, be happy to answer – or to try to answer – any questions that you may wish to put to me.

Editor: Frank L. Ellsworth

OCCASIONAL PAPERS

FROM

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO
1111 EAST 60TH STREET
CHICAGO, ILLINOIS 60637

Additional copies may be obtained from the Editor at 50¢ each.