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The Constitution and American Sovereignty

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"Would we be far wrong," President Lincoln asked in a special message to Congress in 1861, "if we defined [sovereignty] as a political community without a political superior?" Maybe that's not exhaustive, but it comes on good authority. And notice that for Lincoln, sovereignty is a political or legal concept. It's not about power. Lincoln didn't say that the sovereign is the one with the most troops. He was making a point about rightful authority.

By contrast, sovereignty wasn't an issue in the ancient world. Cicero notes that the ancient Romans had the same word for "stranger" as for "enemy." In the ancient world, people didn't interact with foreigners enough to think about their relation to them except insofar as it meant war. Nor was sovereignty an issue in medieval Europe, since the defining character of that period was overlapping authority and a lot of confusion about which authority had primary claims. No one had to think about defining national boundaries. This became an issue only in the modern era, when interaction between different peoples increased.

The first important writer to address sovereignty was Jean Bodin, a French jurist of the late 16th century. In his work, *Six Books of the Republic*, Bodin set out an understanding of sovereignty whereby the King of France represented an independent political authority rather than owing allegiance to the Holy Roman Emperor or to the

Pope. In the course of developing this argument, Bodin also advocated religious toleration and insisted that a monarch can neither seize property except by law nor raise taxes except by the consent of a representative body. He was in favor of free trade, and he insisted on the monarch's general obligation to respect the law of nature and the law of God. His main practical point was that the government must be strong enough to protect the people's rights, yet restrained enough not to do more than that. Subsequently, I might add, Bodin wrote a book about witchcraft—which he very much opposed. Witches are people who think they can make an end run around the laws of nature and of God using magical spells, and Bodin saw them as a menace.

It was not until the 17th century that the word "sovereignty" became common. This was also when people first came to think of representative assemblies as legislatures. Indeed, the word "legislature" is itself a 17th century term reflecting the modern emphasis on law as an act of governing will rather than impersonal custom. It is therefore related to the modern notion of government by consent. Significantly, it was also in this same era that professional armies came into being. Before the 17th century, for instance, there was no such thing as standard military uniforms. Uniforms indicate that soldiers have a distinct status and serve distinct governments. They reflect a kind of seriousness about defense.

The 17th century is also the period when people began thinking in a systematic way about what we now call international law or the law of nations—a law governing the relation of sovereign nations. The American Declaration of Independence refers to such a law in its first sentence: "When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them . . . ." The Declaration assumes here that nations have rights, just as individuals do.

The Sovereign Constitution

Returning to Lincoln, his understanding was that in an important sense American sovereignty rested in the Constitution. Article 7 of the Constitution declares that it will go into effect when it is ratified by nine states, for those nine states. And once ratified—once the people of those states have entered into the "more perfect Union" described in its Preamble—the Constitution is irrevocable. Unlike a treaty, it represents a commitment that cannot be renegotiated. Thus it describes itself unambiguously as "the supreme Law of the Land"—even making a point of adding, "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Constitution

Imprimis (im-pri-mis), [Latin]: in the first place

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provides for treaties, and even specifies that treaties will be "the supreme Law of the Land"; that is, that they will be binding on the states. But from 1787 on, it has been recognized that for a treaty to be valid, it must be consistent with the Constitution—that the Constitution is a higher authority than treaties. And what is it that allows us to judge whether a treaty is consistent with the Constitution? Alexander Hamilton explained this in a pamphlet early on: "A treaty cannot change the frame of the government." And he gave a very logical reason: It is the Constitution that authorizes us to make treaties. If a treaty violates the Constitution, it would be like an agent betraying his principal or authority. And as I said, there has been a consensus on this in the past that few ever questioned.

Let me give you an example of how the issue has arisen. In 1919, the United States participated in a conference to establish the International Labour Organization (ILO). The original plan was that the members of the ILO would vote on labor standards, following which the member nations would automatically adopt those standards. But the American delegation insisted that it couldn't go along with that, because it would be contrary to the Constitution. Specifically, it would be delegating the treaty-making power to an international body, and thus surrendering America's sovereignty as derived from the Constitution. Instead, the Americans insisted they would decide upon these standards unilaterally as they were proposed by the ILO. In the 90 years since joining this organization, I think the U.S. has adopted three of them.

Today there is no longer a consensus regarding this principle of non-delegation, and it has become a contentious issue. For instance, two years ago in the D.C. Court of Appeals, the National Resources Defense Council (NRDC), an environmental group, sued the Environmental Protection Agency (EPA), claiming that it should update its standards for a chemical that is thought to be depleting the ozone layer. There is a treaty setting this standard, and the EPA was in conformity with the treaty. But the NRDC pointed out that Congress had instructed the EPA to conform with the Montreal Protocol and its subsequent elaborations. In other words, various international conferences had called for stricter emission standards for this chemical, and Congress had told the EPA to accept these new standards as a matter of course. The response to this by the D.C. Court of Appeals was to say, in effect, that it couldn't believe Congress had meant to do that, since Congress cannot delegate its constitutional power and responsibility to legislate for the American people to an international body. This decision wasn't appealed, so we don't yet have a Supreme Court comment on the issue.

The delegation of judicial power is another open question today. There's no doubt that the U.S. can agree to arbitrations of disputes with foreign countries, as we did as early as the 1790s with the Jay Treaty. But it's another thing altogether to say that the rights of American citizens in the U.S. can be determined by foreign courts. This would seem to be a delegation of the judicial power, which Article 3 of the Constitution says "shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." This became an issue last year in the case of *Medellin v. Texas*, which considered an International Court of Justice ruling that Texas could not execute a convicted murderer, because he had not been given the chance to consult the Mexican consulate before his trial, as he had the right to do under an international treaty. The Supreme Court, after much hand-wringing, concluded that it didn't think the Senate had intended to give the International Court of Justice the power to decide these

questions of American law as applied by American courts. I would go further and say that no matter what the Senate intended, this is not a power which can be delegated under the Constitution. But it is no longer clear that a majority on the Supreme Court would agree.

Or consider the Spanish judges who want to arrest American politicians if they venture into Europe, in order to try them for war crimes. This is preposterous. It is akin to piracy. And not only has our government not protested this nonsense, but it has contributed to building up an international atmosphere in which this sort of thing seems plausible—an atmosphere where the old idea of a jury of one's peers and the idea of Americans having rights under the Constitution give way to the notion of some hazy international standard of conduct that everyone in the world can somehow agree upon and then enforce on strangers.

The Loss of Sovereignty

It is important to think about these issues regarding sovereignty today, because it is possible to lose sovereignty rather quickly. Consider the European Union. The process that led to what we see today in the EU began when six countries in 1957 signed a treaty agreeing that they would cooperate on certain economic matters. They established a court in Luxembourg—the European Court of Justice—which was to interpret disputes about the treaty. To make its interpretations authoritative, the Court decreed in the early 1960s that if the treaty came into conflict with previous acts of national parliaments, the treaty would take precedence. Shortly thereafter it declared that the treaty would also take precedence over subsequent statutes. And in the 1970s it said that even in case of conflicts between the treaty and *national constitutions*, the treaty would take precedence. Of course, judges can say whatever they want. What is more remarkable is that all the nations in the EU have more or less grudgingly accepted this idea that a treaty is superior to their constitutions, so that today whatever regulations are cranked out by the European Commission—which is, not to put too fine a point on it, a bureaucracy—supersede both parliamentary statutes and national constitutions. And when there was eventually a lot of clamor about protection of basic rights, the court in Luxembourg proclaimed that it would synthesize all the different rights in all the different countries and take care of that as well.

So on the one hand the European Union has constitutional sovereignty, but on the other it doesn't have a constitution. When its bureaucrats recently attempted to write a constitution and get it adopted, a number of countries voted it down in referendums. Apart from lacking a constitution, the EU doesn't have an army or a police force or any means of exercising common control of its borders. In effect, it claims political superiority over member states but declines to be responsible for their defense. Indeed, I think inherent in this whole enterprise of transcending nation-states through the use of international institutions is the idea that defense is not so important.

All of this has happened in Europe in a very short period, and is the reason we should be concerned about the loss in our own country of a consensus regarding constitutional sovereignty. Think of the Kyoto Protocol on global warming, which many of our leading politicians now say we should have ratified. Doing so would have delegated the authority over huge areas of important public policy to international authorities. It would have been a clear delegation of the treaty-making power. Nevertheless, the Obama administration is aiming to negotiate a new treaty along those lines.

Of even more urgent concern is the increasing sense that human rights law transcends the laws of particular countries, even those pertaining to national defense. Of course, the idea that there should be standards that all countries respect when engaged in armed conflict is fair enough. But who is going to set the standards? And who is going to enforce

them—especially against terrorists who refuse to act like uniformed professional soldiers? What we once called the "law of war" is now commonly referred to as "international humanitarian law." Many today say that we need to follow this law as it is defined by the International Red Cross. But who makes up this organization in Geneva, Switzerland, and what gives them the authority to supersede national statutes and constitutions? Currently the International Red Cross thinks it is a violation of humanitarian standards for the U.S. to hold prisoners in Guantanamo Bay—not on the basis of any claim that these prisoners are mistreated, but based on the argument that they cannot be held indefinitely and should be put on trial in ordinary criminal courts. Even the Obama administration is not yet willing to conform to this particular standard of so-called international law, believing that holding these prisoners is vital to national defense and that the right to self-defense is morally compelling.

* * *

Where does this trend away from the sovereignty of national constitutions lead? I do not think the danger is a world tyranny. I think that idea is fantastical. Rather what it will lead to, I think, is an undermining of the idea that national governments can protect people, with the result that people will start looking for defense elsewhere. We saw this in an extreme way in Iraq when it collapsed into chaos before the surge, and people looked for protection to various ethnic or sectarian militias. A similar phenomenon can be seen today in Europe with the formation of various separatist movements. We're even hearing loud claims for *Scottish* independence. And it's not surprising, because to the extent that Britain has surrendered its sovereignty, Britain doesn't count for as much as it used to. So why not have your own Scotland? Why not have your own Wales? Why not have your own Catalonia in Spain? And of course the greatest example of this devolution in Europe is the movement toward Muslim separatism. While this is certainly driven to a large extent by trends in Islam, it also reflects the fact that it doesn't mean as much to be British or to be French any more. These governments are cheerfully giving away their authority to the EU. So why should immigrants or children of immigrants take them seriously?

At the end of *The Federalist Papers*, Alexander Hamilton writes: "A nation, without a national government, is, in my view, an awful spectacle." His point was that if you do not have a national government, you can't expect to remain a nation. If we are really open to the idea of allowing more and more of our policy to be made for us at international gatherings, the U.S. government not only has less capacity, it has less moral authority. And if it has less moral authority, it has more difficulty saying to immigrants and the children of immigrants that we're all Americans. What is left, really, to being an American if we are all simply part of some abstract humanity? People who expect to retain the benefits of sovereignty—benefits like defense and protection of rights—without constitutional discipline, or without retaining responsibility for their own legal system, are really putting all their faith in words or in the idea that as long as we say nice things about humanity, everyone will feel better and we'll all be safe. You could even say they are hanging a lot on incantations or on some kind of witchcraft. And as I mentioned earlier, the first theorist to write about sovereignty understood witchcraft as a fundamental threat to lawful authority and so finally to liberty and property and all the other rights of individuals. ■