

Greene: Comment on Schlesinger

Linda S. Greene

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COMMENT

LINDA S. GREENE*

Those who desired that there be meaningful discussion of the Presidency in our constitutional system this bicentennial year certainly could not have anticipated the assistance they would be offered by the President and the Congress. Congress and the President not only provided some funds for bicentennial festivities, but they also provided controversy for our constitutional celebration as well.

The Iran-Contra controversy, the Persian Gulf reflagging, the ABM-SDI debate, the independent counsel controversy, even the recent nomination of Judge Bork to replace Justice Powell on the Court—these are a few controversies which seem to have been crafted in Hollywood for constitutional celebration and released just for this occasion. Each one grabs our attention and demands that we think about the role and power of the President.

And this is all to the good. For the bicentennial celebration should be so much more than firecrackers and flags. We must take this opportunity to review the recurrent constitutional controversies and gain a deeper understanding of what must be done to reach and exceed our constitutional aspirations.

Certainly, a discussion of the Presidency is timely. I can understand the sentiments of those who want to see the Presidency strengthened.

In this day of international satellite coverage, we are very much aware of the foibles and tyrannies that characterize so many of our chief executives around the world. The technology we possess not only exposes the President to immediate domestic scrutiny, but to international scrutiny as well. Those who would like to strengthen the Presidency—and silence those who criticize him—point to the tough problems we face and the need for a strong Chief Executive to tackle them. Surely, they say, the world will not respect a President who is being criticized at home and who must consult and bicker with his Congress rather than take decisive action.

We have a lot of pride; we prefer not to send our figurative

* Counsel, Subcommittee on Administrative Policy and Procedure, United States Senate Committee on the Judiciary. B.A., California State University at Long Beach, 1970; J.D., University of California at Berkeley, 1974.

emperor out into the world naked, but rather clothed in the unequivocal support of his government. These are natural and sensible concerns in a nuclear age, but, as the vain emperor must have learned, there is more to being a head of state than new clothes and appearances.

We should not ignore what the framers wanted when they crafted this Presidency during the summer of 1787. They lived in the age of monarchs, so they understood at least one model of government. And before the ratification of the Constitution, under the Articles of Confederation, executive functions had been carried out under the close supervision of the United States Congress. The Articles' arrangement provided complete accountability and was acceptable in the context of a government which ceded little authority to the central government.

But when the framers adopted the Constitution under which we now live, they dramatically increased the powers of the central government. The inclusion of a President in the three-branch system presented a special challenge. The framers wanted a President who would be independent *and* accountable. If too weak, he would be, they feared, the object of legislative tyranny. If too strong, he might be tempted by monarchy. The short of it is that they arrived at an arrangement, which, through structure and an enumeration of powers, sought to accomplish these two goals.

How did they do it? First, we have a Presidency that is a separate branch of government elected by the people.¹ The structure, therefore, provides for a separate institution and a national constituency. Second, we have a President who has an enumerated list of powers that are his to exercise,² and a specific term that can be shortened only by impeachment,³ disability, or death.⁴ These arrangements give the President a measure of independence.

But the President is accountable through a variety of other constitutional arrangements. Impeachment is a possibility,⁵ however remote. There is an obligation to faithfully execute the laws⁶ and the possibility of judicial review should the President overlook his legal obligations and restrictions. Congress possesses the power to

1. U.S. CONST. art. II, § 1.

2. *Id.* at § 2.

3. *Id.* at § 4.

4. *Id.* at § 1.

5. *Id.* at § 4.

6. *Id.* at § 6.

fund the government,⁷ as well as the bulk of legislative powers under the Constitution.⁸ In addition, the Congress possesses broad powers to make all laws necessary to carry into effect their own powers and “all other Powers vested by this Constitution in the government of the United States, or in any Department or Officer thereof.”⁹ Congress thus possesses and exercises the power to breathe life into the government—including the Presidency—and to fund it in a meaningful way. In a worst-case scenario, Congress could bring an errant President to his knees.

So, under our constitutional system the President is independent to a degree. But he cannot operate in an extra- or unconstitutional manner without the cooperation of the Congress and the acquiescence of the courts. The President needs the cooperation of the Congress to authorize and fund his initiatives.¹⁰ Congress and the President need the cooperation of the courts to enforce their legislation. The courts need the cooperation of the President and Congress to fund their operations and enforce their judgments.

We should understand the phrase “checks and balances” as a shorthand for the structural arrangement that encourages each branch to jealously guard incursions into its own authority. Our belief in “checks and balances” is a belief in the idea that each branch will be encouraged to moderate excessive claims of power due to the necessity of cooperation and the reality of interdependence.

Those who want a “strong” Presidency complain about this necessity for cooperation and this reality of interdependence. They say that the President under our constitutional system is straitjacketed, unable to meet the challenges of the modern international order.

Well, there is some truth to this claim under our Constitution. The courts have placed some limitations on the exercise of Presidential power, but these limitations are neither extensive nor crippling but rather consistent with the idea of a limited constitutional government. The President cannot usurp a power which belongs solely to another branch,¹¹ and the President cannot act against the will of Congress when Congress has expressed that will in legislation.¹² The President has some flexibility to act when there is a long

7. *Id.* at art. I, § 7.

8. *Id.* at § 8, cl. 18.

9. *Id.*

10. *Id.*

11. See *Knote v. United States*, 95 U.S. 149, 154 (1877).

12. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).

and unbroken history of congressional acquiescence in particular Presidential conduct.¹³ The President, however, cannot define and extend his powers so expansively as to undercut the other branches, and he must respect the decisions of the Supreme Court.¹⁴

So there are some limitations, but they are so broadly conceived that they leave a great deal of room for an activist President. More importantly, they are sensible limitations given the separation arrangements we have chosen. It is tough to make the case that a reasonably popular President who respects the legislative process can't do his job under our system.

Moreover, there are a few bonuses that go along with being President. The President oversees a budget of billions, commands a powerful army, presides over the execution of thousands of laws, many of which afford him a great deal of discretion to fill in details which Congress cannot. This discretion is especially marked in the arena of foreign policy, where Congress rarely enjoins and requires, but rather urges, senses, and permits.

Although Congress clearly has the power to make the laws, the President is the beneficiary of an extremely broad doctrine of delegation.¹⁵ Congress must often legislate broadly for a number of reasons. A problem may be so complex that Congress can agree on a broadly conceived plan to solve it, but not on the details of the solution. Or, due to disagreements among members, it is often impossible to achieve the required congressional consensus if sponsors insist on details troublesome to some members. Whether Congress legislates broadly or specifically, there is always detail to be fleshed out, implementation to be achieved.

The President has the duty to execute the laws.¹⁶ This duty is also an extremely broad power because of the kind of statutes Congress passes, oftentimes ambiguous or vague. Congress, in essence, gives to the President policymaking authority. Those who complain that the President is weak do not mention this duty and power.

There are times, difficult times, when the President wants to do something that Congress will not authorize, or when the Congress wants to do something that the President will veto. These are messy times, especially when the President or his representatives have as-

13. *Id.* at 610-11 (Frankfurter, J., concurring). See also *Dames & Moore v. Regan*, 453 U.S. 654, 688 (1981).

14. See, e.g., *United States v. Nixon*, 418 U.S. 683, 703-05 (1974).

15. See *American Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490 (1982); *Yakus v. United States*, 321 U.S. 414, 424-25 (1944).

16. U.S. CONST. art. II, § 1, cl. 1.

sured domestic or foreign interests that there would be “no congressional problem.”

The reality is that when a President feels so strongly about something that he vetoes the legislation, the President usually gets his way. In our country’s history, there have been only 1,404 vetoes (excluding pocket vetoes where the President always gets his way) and only 102 overrides.¹⁷

Surely, this record speaks of strength, not weakness. There’s certainly one group of public servants who think the Presidency is a reasonably attractive job.¹⁸ Unless someone drops out of the Presidential campaign soon, there will be barely enough room on any stage for a Presidential debate. There must be some reason why all these folks want to be President. A sane man or woman would not spend millions to occupy an office which embodies no power.

I do admit that it is certainly more difficult to make and carry out a policy when there are 535 people who must be consulted and a pesty press, besides. Professor Schlesinger argues that delay may produce better policies and so there is some benefit despite the inconvenience.

I agree that the policies which are born of legislative give-and-take are better, but not in any objective sense of the word better. They are better in the constitutional sense. Better because they are less likely to transgress constitutional limitations. Better because the supporters have garnered a consensus, fifty-one percent or two-thirds; thus, their implementation is less likely to divide and weaken the Nation and thereby jeopardize the constitutional enterprise.

The need for consensus certainly would appear all the more obvious in the foreign affairs arena where external commitments in a nuclear age have the potential to eliminate the entire constitutional enterprise. Yet it is in this context that the argument is most strident for independent authority.

There is a great deal of folklore about a constitution which gives the President the sole authority to make foreign policy. But there is little constitutional substance to such an idea—just look at your Constitution—and the few cases on the foreign affairs powers of the Presidency don’t lend the claim of sole authority much support.

The favorite case of the sole-authority proponents is *United*

17. U.S. GOV’T PRINTING OFFICE, PRESIDENTIAL VETOES, 1789-1976, at ix (1978 & Supp. 1977-1984 (1987)).

18. See Wash. Post, Apr. 13, 1987, at A3, col. 1; *id.*, Apr. 21, 1987, at A19, col. 1.

*States v. Curtiss-Wright Export Corp.*¹⁹ That case, however, involved an exercise of Presidential authority pursuant to a grant of congressional power, not an exercise of sole authority. Likewise, the Steel Seizure Case, *Youngstown Sheet & Tube Co. v. Sawyer*,²⁰ does not help the sole-authority advocates since it disapproved a plant seizure undertaken to shore up the Korean War effort. Finally, a more recent case, *Dames & Moore v. Regan*,²¹ approved President Carter's seizure of Iranian assets, but on the theory that Congress had authorized and acquiesced in the specific action, not because the President has sole authority.

Nevertheless, members of Congress and Presidents believe the myth of sole Presidential authority. The myth retains its life because enormous popular support for a Presidential action that arguably transgresses law may make it difficult for the congressional opposition to mobilize. In cases like this, *e.g.*, Grenada, members of Congress will side with the President, and those who question the wisdom and constitutionality of the action come to sound like voices crying in the wilderness. The result is that there is no majority to challenge the legitimacy of the Presidential action, to sharply pose the question of Presidential authority.

The courts have not rendered many decisions which would help to clarify Presidential and congressional foreign policy authority, and they have often avoided these issues on a number of grounds. Consequently, Congress and the President are left to their competing claims, and in the absence of forceful congressional action the myth of sole authority lingers and lives.

In addition, legislation like the War Powers Resolution,²² though significant, may not be specific enough to foreclose all possibilities of unilateral Presidential action. For example, the War Powers Resolution says that "nothing in this resolution is intended to alter the constitutional authority of . . . the President."²³ After President Carter attempted to rescue the hostages, he said that this phrase meant that Congress had acknowledged unilateral Presidential authority to rescue American hostages.²⁴ Unless Congress amends the legislation to remove discretion in areas where the Pres-

19. 299 U.S. 304 (1936).

20. 343 U.S. 579 (1952).

21. 453 U.S. 654 (1981).

22. 50 U.S.C. §§ 1541-1548 (1982 & Supp. III 1985).

23. *Id.* at § 1547(d)(1).

24. COMMUNICATION FROM THE PRESIDENT OF THE UNITED STATES, H.R. DOC. NO. 303, 96th Cong., 2d Sess. (1980).

ident may encroach on congressional authority, the President may have both the argument of independent authority as well as the argument of congressional acquiescence in that authority.

But if one looks closely, one will find that Congress has been steadily chipping away at the myth of sole authority. There are, in fact, statutes which regulate foreign affairs and foreign commerce, some more deferentially than others. Certainly, the Iran-Contra hearings and their review of the law applicable to those transactions show that Congress has not accepted the myth, even where secrecy—one of the most frequently offered arguments for sole authority—is relevant. The ABM-SDI dispute certainly raises questions about the myth of sole authority.²⁵ Further, the recent override of President Reagan's veto of the South African sanctions bill²⁶ and the Senate debate on the reflagging of Kuwaiti tankers²⁷ should have burst the myth with some force.

But myths die hard. As Justice Jackson said in the Steel Seizure Case: "We may say that the power to legislate belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers."²⁸ Congress has begun to heed Justice Jackson's admonition in the arena of foreign policy. And our foreign policy and our constitutional system will be the stronger for it.

CONCLUSION

From what I have said, you can see that I do agree with Professor Schlesinger that the separation of powers, the three-branch arrangement, is one of the good features of our constitutional system. A parliamentary-prime minister arrangement might be more tidy, but I'm not sure that such a system would produce more effective—meaning accountable—government. Some thirty years ago Justice Jackson answered the argument that the country would suffer if the Court rejected assertions of inherent Presidential authority. He said:

Executive power has the advantage of concentration in a single head in whose choice the whole Nation has a part, making him the focus of public hopes and expectations. In

25. See S. Res. 167, 100th Cong., 1st Sess., 133 CONG. REC. S3140-45 (daily ed. Mar. 12, 1987). Senate Resolution 167 later became the subject of hearings.

26. The Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086 (1986) was vetoed on Sept. 26, 1986; the veto was later overridden.

27. 133 CONG. REC. S9124-36 (daily ed. July 1, 1987).

28. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

drama, magnitude and finality his decisions so far overshadow any others that almost alone he fills the public eye and ear. No other personality in public life can begin to compete with him in access to the public mind through modern methods of communications. By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.

Moreover, rise of the party system has made a significant extraconstitutional supplement to real executive power. . . . Party loyalties and interests . . . extend his effective control into branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution. . . . I cannot be brought to believe that this country will suffer if the Court refuses further to aggrandize the Presidential office. . . .²⁹

I, like Justice Jackson, also refuse to believe that this country will suffer unless we defer more to our President, unless we write him a blank check on our constitutional account. His powers are both great and flexible, but there are limitations. The major limitation on Presidential power is the one we cannot reject and be true to our ideal of limited government—that he remain a President under the law, not above it.

In the midst of the firecrackers and flags, we should not forget what we have to celebrate in the American Presidency. We should celebrate the fact that we have not seriously embraced the idea of the imperial Presidency. More importantly, we should celebrate the fact that we, unlike so many other nations, have managed to have our President and our Constitution too.

29. *Id.* at 653-54.