

Ceaser: Comment on Schlesinger

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COMMENT

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Professor Schlesinger began by expressing his concern about the frivolous character of many previous bicentennial programs. From the tenor of his speech, he must evidently believe that their dignity is enhanced by turning them into forums for attacks on the President of the United States.

Professor Schlesinger did, of course, oblige us in the first part of his paper with an excursion into constitutional theory. But his heart seemed to lay elsewhere, and he only warmed to his subject when, midway through his speech, he got around to Reagan-bashing—or, to use his more delicate language, “crippling” the President. President Reagan, we learn, has conducted a foreign policy of “international recklessness and deceit.” A few other mild descriptions follow: “incoherent, incompetent, duplicitous, and dedicated to rash mindless policies.” This flourish might be dismissed as an exuberant emanation of a very mature partisanship except for the fact that Professor Schlesinger does finally return to the plane of the Constitution. The climax to which his crescendo builds is the charge that President Reagan willfully violated the laws and the Constitution. Professor Schlesinger does not utter the “I” word—impeachment—but his analysis would hardly discourage others from pursuing that course.

Certainly no one could object to a discussion of contemporary issues at a bicentennial conference when, as is the case today, those issues have a bearing on fundamental constitutional questions. But I believe we would be better served if we regard these questions as open to inquiry rather than as neatly settled. Instead of focusing only on whether this administration violated a list of some eight or ten laws, we should also be asking whether the very existence of some of these laws violates the Constitution by delimiting far too narrowly the proper degree of executive discretion in the conduct of foreign affairs. By violating the Constitution, incidentally, I do not only have in mind instances in which something is brought up before a court and declared unconstitutional. This represents an all too legalistic understanding of the Constitution. The most impor-

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tant constitutional questions may never reach, and usually should not reach, the courts. Constitutional questions are fundamentally questions of the correct division of power according to the Constitution, and the most controversial of these issues often have been settled, and should be settled, by political means, in and through the presentation of constitutional arguments that are decided ultimately by the American people.

When Professor Schlesinger prepared his address a few weeks ago, just as the Iran-Contra Committee hearings were beginning, he may have believed that his understanding of the Constitution was riding a wave of popularity so strong and irresistible that it could be taken for granted. Everyone agreed, or seemed to agree, that we were seeing a reaction to the excess of Presidential power, and that the purpose of the entire exercise, apart from humbling the President, was to confirm a view of the Constitution to the effect that we had an evil Executive flouting the duly passed laws of Congress. But the context has changed. The testimonies of Colonel North and Admiral Poindexter before the select committees reminded the Nation of a different view of the nature of our system of government and its allocation of fundamental powers. From the mire of shredded documents, concealments, bad judgments, and possible profiteering, and from the muck of narrow partisanship, character assassination, and pompous moralism, has somehow emerged an important constitutional question. It is a question not on this or that legislative provision or executive action, but on the way foreign policy will be conducted in the future. And it has emerged, finally, in a way that counts—not as a matter restricted to technicalities or legalisms to be decided by a few experts, but as a broad debate about the nature of our system of government to be decided before the American people. The debate about the meaning of our Constitution, far from being over, has just begun, and no one yet can know its final resolution.

If we are to engage in this debate in a spirit that does justice to its importance, we must clear away certain aspects of conventional wisdom that pass today as incontrovertible fact. Take, for example, the standard history of institutional relations of the past two decades offered by Professor Schlesinger. In his view, we had an imperial Presidency in the 1970s which was then brought to its knees by a reaction in the wake of Watergate. That reaction held sway until 1980, when it was reversed under President Reagan. Since then we have seen the reconstitution of another imperial Presidency. And now, of course, it is time to roll up our sleeves and once again

join forces with Professor Schlesinger to deflate these imperial pretensions.

This view, I would submit, is more fantasy than history. If it is true that President Reagan has been (or was) more adept at exercising power than his predecessors, this hardly justifies the conclusion that the underlying power structure has dramatically swung back in favor of the President. The history of institutional relations, as I view it, does not show that the era of congressional power in foreign affairs was reversed in 1980. Congress has continued to hold its own, retreating in some areas while advancing in others. The Bolland Amendment, after all, was passed *before*, not after, the Iran-Contra affair. Whatever else one might want to say about the Iran-Contra affair, it is clear that those who attempted to carry out the administration's policy were operating under very strict congressional constraints. Otherwise, they wouldn't have had to expend so much creative energy in trying to get around them. I find it difficult to believe we have an imperial Presidency when, for good or ill, it is so difficult—and, under Professor Schlesinger's analysis, technically illegal—for a President of the United States to swap arms with a few revolutionary "pragmatists."

We will also not be able to confront the current debate if we attempt to draw our conclusions about the proper degree of constitutional authority from the wisdom of its exercise in any specific case. A constitutional debate is a debate about the wisdom of certain capacities judged in light of whether they are important or necessary. It is not a debate about whether such capacities have been used well or poorly in one case. Clearly, if we were to condemn a power because it can be used incompetently, we would never grant any capacity at all. The first major Presidential decision I can recall as a child, President Kennedy's ill-fated Bay of Pigs invasion, stands as one of the more incompetent decisions of modern times, a conclusion that I believe can easily be drawn from a reading of Professor Schlesinger's history of the Kennedy administration. It does not necessarily follow, however, that it would have been wise to cripple President Kennedy for the duration of his administration. Nor do I recall Professor Schlesinger ever recommending that we do so.

So I ask you then to focus on the real constitutional question here. Whether you happen to think that the President's decision in the Iran-Contra affair was ill-conceived is not the issue. What is at issue is whether you believe that a President should possess the power to make a decision of this kind, and whether you conceive that the existence of this power is not just a matter of congressional

discretion, but a question on which the Constitution itself may offer some guidance.

Let us then turn to the constitutional questions at issue. Professor Schlesinger's view of our constitutional allocation of powers can be summed up, I believe, under two main theses. First, Professor Schlesinger argues that the framers' objective in the allocation of powers under the Constitution was to maintain liberty. He describes the framers' intent as that of a search to keep liberty while willingly sacrificing efficiency in policymaking. Second, Professor Schlesinger regards the allocation of powers among the institutions not as reflecting any coherent theory of the nature of different powers, but as a mixing and blending of all powers to ensure against despotism. He cites Professor Neustadt's claim that ours is a government of "separated institutions sharing power." I hope I do not distort Professor Schlesinger's interpretation if I say that in his understanding the framers' doctrine of separation of powers is about the same thing as their doctrine of checks and balances.

This interpretation of the Constitution, I believe, is partial and overstated, to the point that it obscures our understanding of the intentions of the framers and conceals much that is important about our system of government. A more complete view, in my judgment, will emerge from considering the following propositions.

First, the framers' objective in their allocation of power among the institutions was not only to ensure liberty but to promote efficiency. They warned against a concentration of power in one institution, particularly the legislature, not just because of the danger of legislative despotism, but because of a concern for legislative incompetence, especially in the conduct of matters relating to foreign policy and national security. Accordingly, the framers' objective with respect to the Presidency was to create an instrumentality that could operate with unity, energy, and secrecy in foreign affairs. Of course, liberty was on the minds of the framers but so, too, were energy and security. The "story" of the founding is not just one of creating a government for a free people, but of creating a government strong enough to maintain freedom.

Second, the allocation of powers among the institutions was not haphazard. I would like to suggest the heretical idea that the doctrine of separation of powers rests on a doctrine about the nature of different powers. While there were disagreements about the exact nature of each power, the leading founders believed that there was such a thing as an executive power, a legislative power, and a judicial power. In understanding our Constitution, we should not be so

sophisticated as to ignore that the framers began by housing each power largely in a different institution. The executive power, vested in the President, was understood as a broad power to act with discretion for the security of the Nation, especially in the conduct of foreign affairs. It was a grant of power given to the President.

Third, the framers did not vest all of each power exclusively in three distinct branches. They shared or divided some of the powers among two or more branches. They did so for reasons that they explained. No reasonable case had ever been made for vesting all of the power exclusively in each branch. Sharing in some cases can improve government, and sharing paradoxically provides an important means for each branch to protect its independence against possible encroachments by the others.

Thus, it is perfectly correct to say that the President does not possess the exclusive control of the executive power. No one disputes this point. The Congress, for example, declares war, and the Senate must ratify treaties. But the fact that the Constitution provides for the sharing of certain powers in no way negates the fact that it also vests a general power in each branch. The "executive power," as article II of the Constitution tells us, is vested in the President. It is reasonable to conclude that the President has a constitutional claim to all of the executive power not expressly distributed elsewhere by the Constitution. Since Professor Schlesinger cited Alexander Hamilton in explaining that under the Constitution the President is not accorded "the sole disposal" of the conduct of foreign affairs, it is appropriate here to cite Hamilton's general rule for interpreting constitutional powers: "The general doctrine of our Constitution then is, that the *executive power* of the nation is vested in the President; subject only to the *exceptions* and *qualifications*, which are expressed in the instrument."**

The meaning of this analysis in the most general terms is that while it is not *false* to say we have a government of "separated institutions sharing power," neither should we regard this statement as the deepest truth about our system. We have a government of separated institutions, each one endowed with a separate fundamental power, after which some of the powers are explicitly mixed and shared. That formulation may not be as felicitous as Professor Neustadt's, but I believe it is more accurate.

In a more practical sense, where does this allocation of power

** Hamilton, *First Letter of Pacificus*, in R. HIRSCHFIELD, *THE POWER OF THE PRESIDENCY* 55 (2d ed. 1968) (emphasis in original).

leave us in the conduct of foreign policy? Let me set aside any idea that it points to a total compartmentalization of the conduct of foreign policy. Even if we had an absolutely rigorous separation of powers in the Constitution, which we do not, it would still not follow that the Executive could act on his own. The essence of the separation of powers is that some powers, even when different, conflict. British monarchs could declare a war, but they might eventually need Parliament to fund it. A power is something to be claimed, asserted, and, if need be, used against the powers of another institution.

What is most striking in constitutional debates today is the bizarre argument that because the Constitution entails conflict in the conduct of foreign affairs, the President should not employ his strongest weapon in that conflict. To be sure, a President will want congressional support in all areas where he can have it, and it would be foolish for him to court conflict where he can win consent. But there are occasions when the President may want to use his executive power nakedly, in the absence of or contrary to congressional will. The President obviously runs a risk here, for he takes on an institution that has weapons of its own to employ in a struggle. A President may lose and may pay a tremendous political price. But to grant this is not to deny that he has a power, that he should protect that power, and that he may exercise it, even at his own peril.

Finally, I would like to express my agreement with Professor Schlesinger on his defense of the Constitution against those who would seek to replace it with a parliamentary system. Yet I believe that while his defense of the principle of separation of powers is right, it is right for the wrong reasons. Over the long run our system with its strong President has an advantage over a parliamentary system in foreign affairs, because it allows not for less but for greater vigor and efficiency with regard to the most vital instances of the exercise of discretionary power. This argument, however, is for another day.