

Books

Beyond Impeachment: Madison's Auxiliary Precautions

Donald L. Robinson

In one of the most arresting passages in *The Imperial Presidency*, Arthur M. Schlesinger, Jr. relates an analogy drawn by British historian Hugh Trevor-Roper between the Watergate affair and the ship-money dispute of 1635-40, which led to the execution of King Charles I in 1649. Both episodes seemed trivial in themselves. One began with the refusal of a wealthy landowner to pay a tax traditionally levied by English kings. The other arose from a "caper" by seven unknown men into the headquarters of a political party, a place almost comically unlikely to conceal anything of importance.

Despite their apparent triviality, however, both incidents assumed large significance because they were recognized by contemporaries as symbolic of grave and deeply rooted disorders. Both occurred amidst a long train of similar abuses. Both were part of a pattern of executive power gone haywire. In both cases the issue was firmly joined on both sides. The chief executives refused to recant and confide in other authorities, and in both cases the opposing parties pressed their defiance. There seemed to be no way for the people to avoid a choice, whether to trust their chief executive or to support those who were defying him.

What struck me most about this analogy was the prospect it held out for America. The removal and execution of the King was not the end of the conflict in England. There ensued a Civil War, which lasted for a decade and ended in a constitutional revolution, or, rather, a series of constitutional revolutions. In fact, constitutional instability continued in England for nearly a half century after John Hampden refused to pay ship-money.

There is little question that England came out of the seventeenth century stronger and more stable than it had been in 1600. But to a citizen in 1650 or 1665 it might have seemed that England, which had achieved such glory under Queen Elizabeth, was squandering its chance for several generations of peace and hegemony by foolish and costly internal bickering.

It is possible, I suppose, to push Trevor-Roper's analogy too far. Perhaps our troubles are more super-

ficial than England's were. Perhaps it would be easier for us to bring runaway power under control and to erect guards against future abuses. Americans are traditionally optimistic about such matters. It is symptomatic of this hopefulness that we refer to our present troubles as "the Watergate affair," thus reducing the problem to manageable proportions. Recently, however, many have begun to suspect that Watergate is just the tip of the iceberg. Two recent books help to put the struggle into perspective.

The Presidency Reappraised, edited by Rexford G. Tugwell and Thomas E. Cronin (Praeger; 320 pp.; \$8.95/\$3.95), includes contributions by some of the leading President-watchers (George Reedy, Daniel Patrick Moynihan, A.A. Berle, Rexford Tugwell himself) and some outstanding scholars of the Presidency (C. Herman Pritchett, Louis Fisher, J. David Barber and Arthur Schlesinger, among others). The book's format, presenting essays that average about twenty pages in length, is more conducive to suggestion than sustained demonstration. The suggestions, however, are often provocative and worthy of reflection. Thus Barber argues that the last three Presidents (Kennedy, Johnson and Nixon) have been experienced by the public at large primarily as disappointments. He goes on to suggest that the American people, who look to the Presidency for "reassurance, action, and legitimacy," are currently "hungry for a hero . . . Soon," he concludes, "they will find one. A good deal is riding on the question whether they will find a demagogue or a democrat as they search out a way to link their passions to their government."

These essays were presented originally at The Center for the Study of Democratic Institutions in Santa Barbara, California, which has spent a good deal of time lately on the question of constitutional reform. The most disappointing thing about the present collection is that it fails by and large to relate the "reappraisal" of the Presidency to the constitutional questions so frequently debated around The Center's dialogue table. Those who look to The Center for stimulating and daring thought will be disappointed by this inadequate and inconclusive treatment of the question of reform in the constitutional setting of the Presidency.

Schlesinger's book, *The Imperial Presidency* (Houghton Mifflin; 505 pp.; \$10.00), is a weightier offering. Here the talents and labors of the leading contemporary historians of Presidencies are brought gracefully to bear upon the controversies swirling around the office, and the result, on almost every page, is illumination and classification.

Reviewers have noted that Schlesinger's judgments

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are not evenhanded. Indeed, they are not. He is soft on FDR and JFK, benign toward Eisenhower, tough on Truman and Johnson and malicious toward Nixon. But these differences are not unrelated to the thesis of his book: that the proper functioning of the American constitutional system, especially under modern conditions, depends upon a relationship of respect between President and Congress. The spectrum of his judgments roughly coincides, it seems to me, with the spectrum of Presidential attitudes toward the legitimacy of Congressional involvement, particularly in the making of foreign and defense policy.

The argument of Schlesinger's book is that the separation and balancing of powers under the Constitution is fundamental to the Framers' design, and that it worked pretty well until recently. Two chapters expound the intentions of the Framers, and two others trace the pendulum-swings between executive and legislative dominance over policy-making during the first century and a half under the Constitution. This historical analysis establishes the setting for the core of the book: an account of the emergence of "The Imperial Presidency," beginning with the Second World War.

Against the background of his painstaking historical account, Schlesinger contends that Nixon's Presidency is not an aberration, but the culmination of trends unfolding at least since 1950. These trends have their roots and precedents in the nineteenth century, even in the Presidency of George Washington.

In light of Schlesinger's learning, it is indeed difficult to claim that anything Nixon has done is absolutely unprecedented, more difficult, even, than Schlesinger himself seems ready to acknowledge. Take the bombing of Cambodia in 1970, for example. Schlesinger notes that William Rehnquist, who wrote the brief which attempted to justify the raids, could not "cite any previous occasion when a President ordered a massive attack on a neutral country to protect troops in a third country." How about an un-massive attack? And was the Cambodian regime of Lon Nol really neutral? Unworthy of American aid, yes; but neutral?

Earlier in the book, Schlesinger cites a recent analysis of the familiar lists of American military engagements abroad (150 of them, or 197, or 204), many undertaken without a declaration of war or other explicit Congressional authorization. He notes that most of the conflicts cited on these lists were raids on "nongovernmental groups," undertaken to protect American citizens. Often they had no *Presidential* authorization, either, but were merely brief, local actions, mounted by hot-tempered lieutenants along our southern borders, or by commodores on the high seas. Barry Goldwater, who likes to traffic

in such lists, once claimed that of the 192 "undeclared wars" he found in our nation's history "nearly half involved actual fighting." Against such a motley background there is precedent for almost any kind of military activity.

Or take the case of domestic surveillance. In a formal Decision Memorandum in July, 1970, President Nixon instructed the intelligence community (including the CIA, which, according to Allen Dulles, was expressly prohibited by the law which established it from engaging in internal security functions) to counter domestic subversion by using techniques which were "clearly illegal," according to T.C. Huston, the White House man assigned to the interagency committee that recommended the plan. Of this decision by President Nixon, Schlesinger writes, "No President in peacetime had ever requested and approved such a scheme of lawless action."

But was the nation really at peace in the spring and summer of 1970? One can argue that the Indochinese war was illegal and immoral. One can argue that there was no need under the circumstances for such a scheme as Nixon authorized. But one cannot call Nixon's plans unprecedented on grounds that the nation was at peace. The new techniques were frightening, but the principle of domestic surveillance during wartime was not new in 1970.

None of this is meant as an apology for what Nixon did. It is intended to reinforce Schlesinger's own point, that "Nixon's Presidency was not an aberration but a culmination." Schlesinger suggests that Nixon's "inner mix of vulnerability and ambition impelled him to push the historic logic to its extremity." The glib psychologizing and historical metaphysics in this statement may be a little silly. The important thing to recognize is that the trends toward an "imperial" Presidency have been running ever since modern technology overwhelmed our isolation, compelled us to retain a "standing army," and presented us with a domestic economy and social organization that demand continuous regulation by a flexible, quickly responsive public authority. These are the important compulsions that are driving us, and all the civilized world with us, toward executive government.

Schlesinger slights the domestic side of this development, but the ascendancy of the Presidency over Congress has been apparent here too. Not only do Presidents frame the budgets and draft most important legislation. They create new agencies (Environmental Protection Agency, Council on Environmental Quality, Cost of Living Council, Federal Energy Office) by executive order and manipulate the allocation of funds to suit policy preferences and political needs. These habits, like those of Presidential dominance in the foreign and security fields, have been growing for many years. Nixon's behavior here has differed in degree, perhaps, but not significantly in kind, from that of his predecessors.

Having analyzed the marks of the runaway Presidency, Schlesinger turns to a consideration of remedies. He canvasses and analyzes various proposals, from the legislative program of Senator Ervin to the constitutional revisions proposed by Thomas Finletter and Barbara Tuchman, among others. But he rejects them all.

Above all, he argues, we must be careful not to weaken the Presidency, for a strong President is "necessary to hold a spinning and distracted society together, necessary to make the separation of powers work." The effective means of controlling the Presidency lies "less in law than in politics." What we need is a "restoration of comity" between President and Congress. Presidents must subject themselves to "the discipline of consent," and "the great institutions—Congress, the courts, the executive establishment, the press, the universities, public opinion—[must] reclaim their own dignity, and meet their own responsibilities."

This is a disappointing conclusion to an otherwise strong book. Schlesinger's line of reasoning is fundamentally un-Madisonian, and thus out of keeping with the central constitutional tradition in this country. He cites James Madison's mistrust of "parchment barriers," that is, written guarantees against the abuse of rights. But the alternative to such guarantees is not exhortation. As the *Fifty-First Federalist* makes clear, Madison believed that "ambition must be made to counteract ambition." Those holding important positions in the constitutional scheme must be supplied with the "constitutional means and personal motives" to defend themselves against "encroachments" by the other branches.

Madison goes on to relate these principles to the Constitution of 1787. "In republican government," he writes, "the legislative authority necessarily predominates." (That, by the way, is a provocative assertion in our context.) To counteract the expected legislative ascendancy, the Framers divided Congress into two "houses," and fortified the executive with a qualified veto. With these provisions it was not necessary to exhort the legislature to show decent respect for the executive; constitutional ground-rules would compel it to do so.

In March, 1789, Thomas Jefferson wrote Madison a letter with which the recipient probably agreed. "The tyranny of the legislature is really the danger most to be feared, and will continue to be so for many years to come," wrote Jefferson. "The tyranny of the executive power will come in its turn, but at a more distant period." If, through changed circumstances, the balances did shift in the direction Jefferson indicated, and if the shift seemed durable, certainly Madison would have seen the need to consider alterations in the constitutional machinery.

The fundamental principle of our constitutional tradition, as Schlesinger frequently reminds us, is that power must be shared. This principle is deeply

imbued in most American politicians, and it has induced most Presidents, most of the time, even since the advent of the Imperial Presidency, to show respect for Congress and the courts. But Madison would have been the first to insist that we must not depend on the voluntary compliance of Presidents. The consultation of Presidents with their fellow politicians in Congress must not be condescending, and it must not be voluntary. It must be compelled, by structure and circumstances. Again, in the words of Madison's *Fifty-First Federalist*, "The great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachment of the others."

According to Schlesinger, the Constitution will survive the challenge of the "Imperial" Presidency only if it embodies "the spirit of the American people." He concludes his book with a quotation from Walt Whitman: "There is no week nor day nor hour when tyranny may not enter upon this country, if the people lose their supreme confidence in themselves. . . . The only bar against it is a large resolute breed of men." But Madison's teaching is sounder: "A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."

Congress is no longer fit to provide these "auxiliary precautions." As presently constituted, Congress is incapable of leading this nation in foreign relations and national security, of regulating the economy and controlling national growth. To resume its responsibilities in these areas, it would be necessary to reform Congress radically—not to revise its procedures, or abolish the seniority system, or adopt a legislative budget, but alter its composition and revise its constituency. For example, there may be merit in Tugwell's suggestion to elect one hundred Congressmen-at-large on slates with Presidential candidates and, to select committee chairmen exclusively from these national members. Or perhaps we should reconsider Woodrow Wilson's proposal that Cabinet members be drawn from Congress and made liable to answer questions there on the Administration's policies. Wilson's proposal would require only a slight constitutional revision, but would bring about substantial political changes.

The point here is not to analyze these suggestions or list others; it is that we need to recover the Framers' energy and skill in fashioning political institutions that force our practices to conform with our principles. To repeat, the basic principle is that power must be shared. Our institutions must force Presidents to win the free concurrence of other leading politicians before proceeding to implement public policies, and it must provide these other politi-

cians with the "constitutional means and personal motives" to withhold consent until they concur in the policies proposed.

This is the kind of response we must make to the challenge of Presidential autocracy. To produce it will require tremendous political energy, supported by public understanding and a sense of priority for constitutional reform. A realist cannot be sanguine about the prospects for such a response.

Public concern about the runaway Presidency has surfaced only sporadically. There was the Great Debate of 1950-1951, and the resistance to Johnson over the Vietnam war in 1967-1968. There has been growing alarm since Nixon took office, aroused by the bombing in Indochina, the impoundment of appropriated funds, Watergate and domestic surveillance, and other gross abuses of Presidential power. But this concern has not, until recently, been sustained, and it has tended to focus upon specific abuses rather than deep-seated trends, causes and remedies.

From this perspective, the current preoccupation with impeachment is depressing. It is, of course, imperative that the Republic confront Nixon's hubris. He must not escape punishment, and the punishment must fit the offenses.

But even if Richard Nixon is impeached and convicted, we will not have come to grips with the problem of Presidential autocracy. Note that the House Judiciary Committee's impeachment inquiry has narrowed its focus to the Watergate burglary and cover-up, domestic surveillance,

the President's personal finances and four instances of alleged collusion between the Nixon Administration and financial contributors (ITT, the dairy industry, Howard Hughes and Robert Vesco). Thus, for the purposes of impeachment, it has been deemed fruitless to charge the President with having illegally bombed Cambodia in 1969 and 1973, or with the abuse of executive privilege in preventing aides from testifying before Congress, or with the use of the FCC, the Antitrust Division and the IRS for political purposes, or with an illegal attempt to dismantle OEO and to interfere with the implementation of programs duly enacted in laws he had sworn faithfully to execute.

Narrowing of focus of inquiry may be a good tactic in pursuit of impeachment, but it shows that the Presidency itself cannot be brought to heel by impeachment. If, as Walter Lippmann remarked, "Watergate shows how very *vulnerable* our constitutional system is," then the remedy is not just impeachment, but basic constitutional reform. Such reforms will not guarantee just or effective government, but they can restore the principle that no person or faction should exercise power alone.

For almost two hundred years we have prided ourselves on being the world's model democracy. Forms of government have been our noblest export. Now the world badly needs to find a way to combine effective government with true accountability, under modern conditions. For us, and I dare say for the world, a great deal depends on whether we can meet this need.

War: The Camera's Battlefield View of Man's Most Terrible Adventure, From the First Photographer in the Crimea to Vietnam

Text by Albert R. Leventhal

(Playboy Press; 252 pp.; \$16.95)

Is Anyone Taking Any Notice? Photographs and Comments by Donald McCullin

(MIT Press; \$14.95)

Michael Mandelbaum

To the understanding of war the art of photography brings impressive, but flawed, credentials. It repro-

duces the past with utter fidelity, and yet distorts it. The photographer "lets light in, if only for a moment,"

and freezes that moment in eternity. But the moments before and after go unrecorded, passing into oblivion. He shows us exactly how it looked when he aimed his camera and clicked his shutter; how it was, but not, necessarily, why it was. Some subjects don't prompt the question "why?" A skyscraper looming, a couple embracing can be statements by themselves. But not war. War is a complicated tissue of motives and circumstances. Its peculiar horror demands explanation. But its tangled genealogy defies easy understanding or simple judgment. The photographer of war finds himself trapped between understanding and judgment.

Susan Sontag observed that photographers fall into two camps, scientists and moralists. "The scientists," she says, "make an inventory of the world; the moralists concentrate on the hard cases." *War* is