The Case for the Strong Executive

Under some circumstances, the rule of law must yield to the need for energy.

BY HARVEY C. MANSFIELD

Wednesday, May 2, 2007 12:01 a.m. EDT

Complaints against the "imperial presidency" are back in vogue. With a view to President Bush, the late Arthur M. Schlesinger Jr. expanded and reissued the book of the same name he wrote against Richard Nixon, and Bush critics have taken up the phrase in a chorus. In response John Yoo and Richard Posner (and others) have defended the war powers of the president.

This is not the first time that a strong executive has been attacked and defended, and it will not be the last. Our Constitution, as long as it continues, will suffer this debate--I would say, give rise to it, preside over and encourage it. Though I want to defend the strong executive, I mainly intend to step back from that defense to show why the debate between the strong executive and its adversary, the rule of law, is necessary, good and--under the Constitution--never-ending.

In other circumstances I could see myself defending the rule of law. Americans are fortunate to have a Constitution that accommodates different circumstances. Its flexibility keeps it in its original form and spirit a "living constitution," ready for change, and open to new necessities and opportunities. The "living constitution" conceived by the Progressives actually makes it a prisoner of ongoing events and perceived trends. To explain the constitutional debate between the strong executive and the rule of law I will concentrate on its sources in political philosophy and, for greater clarity, ignore the constitutional law
emerging from it.

The case for a strong executive should begin from a study, on this occasion a quick survey, of the American republic. The American republic was the first to have a strong executive that was intended to be republican as well as strong, and the success, or long life, of America's Constitution qualifies it as a possible model for other countries. Modern political science beginning from Machiavelli abandoned the best regime featured by classical political science because the best regime was utopian or imaginary. Modern political scientists wanted a practical solution, and by the time of Locke, followed by Montesquieu, they learned to substitute a model regime for the best regime; and this was the government of England. The model regime would not be applicable everywhere, no doubt, because it was not intended to be a lowest common denominator. But it would show what could be done in the best circumstances.

The American Founders had the ambition to make America the model regime, taking over from England. This is why they showed surprising respect for English government, the regime they had just rebelled against. America would not only make a republic for itself, but teach the world how to make a successful republic and thus improve republicanism and save the reputation of republics. For previous republics had suffered disastrous failure, alternating between anarchy and tyranny, seeming to force the conclusion that orderly government could come only from monarchy, the enemy of republics. Previous republics had put their faith in the rule of law as the best way to foil one-man rule. The rule of law would keep power in the hands of many, or at least a few, which was safer than in the hands of one. As the way to ensure the rule of law, Locke and Montesquieu fixed on the separation of powers. They were too realistic to put their faith in any sort of higher law; the rule of law would be maintained by a legislative process of institutions that both cooperated and competed.

Now the rule of law has two defects, each of which suggests the need for one-man rule. The first is that law is always imperfect by being universal, thus an average solution even in the best case, that is inferior to the living intelligence of a wise man on the spot, who can judge particular circumstances. This defect is discussed by Aristotle in the well-known passage in his "Politics" where he considers "whether it is more advantageous to be ruled by the best man or the best laws."

The other defect is that the law does not know how to make itself obeyed. Law assumes obedience, and as such seems oblivious to resistance to the law by the "governed," as if it were enough to require criminals to turn themselves in. No, the law must be "enforced," as we say. There must be police, and the rulers over the police must use energy (Alexander Hamilton's term) in addition to reason. It is a delusion to believe that governments can have energy without ever resorting to the use of force.

The best source of energy turns out to be the same as the best source of reason--one man. One man, or, to use Machiavelli's expression, uno solo, will be the greatest source of energy if he regards it as necessary to maintaining his own rule. Such a person will have the greatest incentive to be watchful, and to be both cruel and merciful in correct contrast and proportion. We are talking about Machiavelli's prince, the man whom in apparently unguarded moments he called a tyrant.

The American Founders heeded both criticisms of the rule of law when they created the presidency. The president would be the source of energy in government, that is, in the administration of government, energy being a neutral term that might include Aristotle's discretionary virtue and Machiavelli's tyranny--in which only partisans could discern the difference. The founders of course accepted the principle of the rule of law, as being required by the republican genius of the American people. Under this principle, the wise man or prince becomes and is called an "executive," one who carries out the will and instruction of others, of the legislature that makes the law, of the people who instruct or inspire the legislature. In this weak sense, the dictionary definition of "executive," the executive forbears to rule in his own name as one man. This means that neither one-man wisdom nor tyranny is admitted into the Constitution as such; if there is need for either, the need is subordinated to, or if you will,
covered over by, the republican principle of the rule of law.

Yet the executive subordinated to the rule of law is in danger of being subordinate to the legislature. This was the fault in previous republics. When the separation of powers was invented in 17th-century England, the purpose was to keep the executive subordinate; but the trouble was the weakness of a subordinate executive. He could not do his job, or he could do his job only by overthrowing or cowing the legislature, as Oliver Cromwell had done. John Locke took the task in hand, and made a strong executive in a manner that was adopted by the American Founders.

Locke was a careful writer, so careful that he did not care if he appeared to be a confused writer. In his "Second Treatise of Government" he announces the supremacy of the legislature, which was the slogan of the parliamentary side in the English Civil War, as the principle that should govern a well-made constitution. But as the argument proceeds, Locke gradually "fortifies" (to use James Madison's term) the executive. Locke adds other related powers to the subordinate power of executing the laws: the federative power dealing with foreign affairs, which he presents as conceptually distinct from the power of executing laws but naturally allied; the veto, a legislative function; the power to convene the legislature and to correct its representation should it become corrupt; and above all, the prerogative, defined as "the power of doing public good without a rule." Without a rule! Even more: "sometimes too against the direct letter of the law." This is the very opposite of law and the rule of law—-and "prerogative" was the slogan of the king's party in the same war.

Thus Locke combined the extraconstitutional with the constitutional in a contradiction; besides saying that the legislature is "the supreme power" of the commonwealth, he speaks of "the supreme executive power." Locke, one could say, was acting as a good citizen, bringing peace to his country by giving both sides in the Civil War a place in the constitution. In doing so he ensured that the war would continue, but it would be peaceful because he also ensured that, there being reason and force on both sides, neither side could win conclusively.

The American Constitution adopted this fine idea and improved it. The American Founders helped to settle Locke's deliberate confusion of supremacy by writing it into a document and ratifying it by the people rather than merely scattering it in the treatise of a philosopher. By being formalized the Constitution could become a law itself, but a law above ordinary law and thus a law above the rule of law in the ordinary sense of laws passed by the legislature. Thus some notion of prerogative—though the word "prerogative" was much too royal for American sensibilities—could be pronounced legal inasmuch as it was constitutional. This strong sense of executive power would be opposed, within the Constitution, to the rule of law in the usual, old-republican meaning, as represented by the two rule-of-law powers in the Constitution, the Congress which makes law and the judiciary which judges by the law.

The American Constitution signifies that it has fortified the executive by vesting the president with "the executive power," complete and undiluted in Article II, as opposed to the Congress in Article I, which receives only certain delegated and enumerated legislative powers. The president takes an oath "to execute the Office of President" of which only one function is to "take care that the laws be faithfully executed." In addition, he is commander-in-chief of the military, makes treaties (with the Senate), and receives ambassadors. He has the power of pardon, a power with more than a whiff of prerogative for the sake of a public good that cannot be achieved, indeed that is endangered, by executing the laws. In the Federalist, as already noted, the executive represents the need for energy in government, energy to complement the need for stability, satisfied mainly in the Senate and the judiciary.

Energy and stability are necessary in every form of government, but in their previous, sorry history, republics had failed to meet these necessities. Republican government cannot survive, as we would say, by ideology alone. The republican genius is dominant in America, where there has never been much support for anything like an ancien régime, but support for republicanism is not enough to make a viable republic. The republican spirit can actually cause trouble for republics if it makes people think that to be republican it is enough merely to oppose monarchy. Such an attitude tempts a republican people to republicanize everything so as to make government resemble a monarchy as little as possible.
Although the Federalist made a point of distinguishing a republic from a democracy (by which it meant a so-called pure, nonrepresentative democracy), the urge today to democratize everything has similar bad effects. To counter this reactionary republican (or democratic, in today's language) belief characteristic of shortsighted partisans, the Federalist made a point of holding the new, the novel, American republic to the test of good government as opposed merely to that of republican government.

The test of good government was what was necessary to all government. Necessity was put to the fore. In the first papers of the Federalist, necessity took the form of calling attention to the present crisis in America, caused by the incompetence of the republic established by the Articles of Confederation. The crisis was both foreign and domestic, and it was a crisis because it was urgent. The face of necessity, the manner in which it first appears and is most impressive, is urgency--in Machiavelli's words, *la necessità che non da tempo* (the necessity that allows no time). And what must be the character of a government's response to an urgent crisis? Energy. And where do we find energy in the government? In the executive. Actually, the Federalist introduces the need for energy in government considerably before it associates energy with the executive. To soothe republican partisans, the strong executive must be introduced by stages. One should not believe that a strong executive is needed only for quick action in emergencies, though that is the function mentioned first. A strong executive is requisite to oppose majority faction produced by temporary delusions in the people. For the Federalist, a strong executive must exercise his strength especially against the people, not showing them "servile pliancy." Tocqueville shared this view. Today we think that a strong president is one who leads the people, that is, one who takes them where they want to go, like Andrew Jackson. But Tocqueville contemptuously regarded Jackson as weak for having been "the slave of the majority." Again according to the Federalist, the American president will likely have the virtue of responsibility, a new political virtue, now heard so often that it seems to be the only virtue, but first expounded in that work.

"Responsibility" is not mere responsiveness to the people; it means doing what the people would want done if they were apprised of the circumstances. Responsibility requires "personal firmness" in one's character, and it enables those who love fame--"the ruling passion of the noblest minds"--to undertake "extensive and arduous enterprises."

Only a strong president can be a great president. Americans are a republican people but they admire their great presidents. Those great presidents--I dare not give a complete list--are not only those who excelled in the emergency of war but those, like Washington, Lincoln and Franklin Roosevelt, who also deliberately planned and executed enterprises for shaping or reshaping the entire politics of their country.

This admiration for presidents extends beyond politics into society, in which Americans, as republicans, tolerate, and appreciate, an amazing amount of one-man rule. The CEO (chief executive officer) is found at the summit of every corporation including universities. I suspect that appreciation for private executives in democratic society was taught by the success of the Constitution's invention of a strong executive in republican politics.

The case for a strong executive begins from urgent necessity and extends to necessity in the sense of efficacy and even greatness. It is necessary not merely to respond to circumstances but also in a comprehensive way to seek to anticipate and form them. "Necessary to" the survival of a society expands to become "necessary for" the good life there, and indeed we look for signs in the way a government acts in emergencies for what it thinks to be good after the emergency has passed. A free government should show its respect for freedom even when it has to take it away. Yet despite the expansion inherent in necessity, the distinction between urgent crises and quiet times remains. Machiavelli called the latter *tempi pacifici,* and he thought that governments could not take them for granted. What works for quiet times is not appropriate in stormy times. John Locke and the American Founders showed a similar understanding to Machiavelli's when they argued for and fashioned a strong executive.

In our time, however, an opinion has sprung up in liberal circles particularly that civil liberties must always be kept intact regardless of circumstances. This opinion assumes that civil liberties have the status of natural liberties, and are inalienable. This means that the Constitution has
the status of what was called in the 17th-century natural public law; it is an order as natural as
the state of nature from which it emerges. In this view liberty has just one set of laws and
institutions that must be kept inviolate, lest it be lost.

But Locke was a wiser liberal. His institutions were "constituted," less by creation than by
modification of existing institutions in England, but not deduced as invariable consequences of
disorder in the state of nature. He retained the difference, and so did the Americans, between
natural liberties, inalienable but insecure, and civil liberties, more secure but changeable.
Because civil liberties are subject to circumstances, a free constitution needs an institution
responsive to circumstances, an executive able to be strong when necessary.

The lesson for us should be that circumstances are much more important for free government
than we often believe. Civil liberties are for majorities as well as minorities, and no one should
be considered to have rights against society whose exercise would bring society to ruin. The
usual danger in a republic is tyranny of the majority, because the majority is the only legitimate
dominant force. But in time of war the greater danger may be to the majority from a minority,
and the government will be a greater friend than enemy to liberty. Vigilant citizens must be
able to adjust their view of the source of danger, and change front if necessary. "Civil liberties"
belong to all, not only to the less powerful or less esteemed, and the true balance of liberty
and security cannot be taken as given without regard to the threat. Nor is it true that free
societies should be judged solely by what they do in quiet times; they should also be judged by
the efficacy, and the honorableness, of what they do in war in order to return to peace.

The American Constitution is a formal law that establishes an actual contention among its three
separated powers. Its formality represents the rule of law, and the actuality arises from which
branch better promotes the common good in the event, or in the opinion of the people. In quiet
times the rule of law will come to the fore, and the executive can be weak. In stormy times,
the rule of law may seem to require the prudence and force that law, or present law, cannot
supply, and the executive must be strong. In judging the circumstances of a free society, two
parties come to be formed around these two outlooks. These outlooks may not coincide with
party principles because they often depend on which branch a party holds and feels obliged to
defend: Democrats today would be friendlier to executive power if they held the presidency--
and Republicans would discover virtue in the rule of law if they held Congress.

The terms of the disagreement over a strong executive go back to the classic debate between
Hamilton (as Pacificus) and Madison (as Helvidius) in 1793-94. Hamilton argued that the
executive power, representing the whole country with the energy necessary to defend it, cannot
be limited or exhausted. Madison replied that the executive power does not represent the whole
country but is determined by its place in the structure of government, which is executing the
laws. If carrying on war goes beyond executing the laws, that is all the more reason why the
war power should be construed narrowly. Today Republicans and Democrats repeat these
arguments when the former declare that we are at war with terrorists and the latter respond
that the danger is essentially a matter of law enforcement.

As to the contention that a strong executive prompts a policy of imperialism, I would admit the
possibility, and I promise to think carefully and prayerfully about returning Texas to Mexico. In
its best moments, America wants to be a model for the world, but no more. In its less good
moments, America becomes disgusted with the rest of the world for its failure to imitate our
example and follow our advice. I believe that America is more likely to err with isolationism
than with imperialism, and that if America is an empire, it is the first empire that always wants
an exit strategy. I believe too that the difficulties of the war in Iraq arise from having wished to
leave too much to the Iraqis, thus from a sense of inhibition rather than imperial ambition.

Mr. Mansfield is William R. Kenan Professor of Government at Harvard.
<table>
<thead>
<tr>
<th>ADVERTISERS LINKS</th>
<th>WHAT'S THIS?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cross Atlantic Commodities: OTCBB: CXAC</td>
<td></td>
</tr>
<tr>
<td>Publicly traded commodity products.</td>
<td></td>
</tr>
<tr>
<td><a href="http://www.crossatlanticcommodities.com">www.crossatlanticcommodities.com</a></td>
<td></td>
</tr>
<tr>
<td>Scottrade Online Broker</td>
<td></td>
</tr>
<tr>
<td>$7 online trades. Fast, accurate executions. 285+ offices nationwide.</td>
<td></td>
</tr>
<tr>
<td><a href="http://www.scottrade.com">www.scottrade.com</a></td>
<td></td>
</tr>
<tr>
<td>Do You Know the Value of Your Business?</td>
<td></td>
</tr>
<tr>
<td>BizPricer software is private, accurate, easy and inexpensive.</td>
<td></td>
</tr>
<tr>
<td><a href="http://www.businessbookpress.com">www.businessbookpress.com</a></td>
<td></td>
</tr>
</tbody>
</table>