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IN LUKEWARM DEFENSE OF CHARLES FRIED*

*Burt Neuborne***

Charles Fried, the current Solicitor General, took a beating in the press this summer. I think he got something of a bum rap.

For as long as I can recall, the Solicitor General has been a silent partner in the Supreme Court's jurisprudence. Despite occasional disagreements about the outcome of a particular case, Solicitors General of every political stripe have tended to mirror the Supreme Court's institutional views about the role of law in our society and the special responsibility and expertise of the judiciary "to say what the law is." Even when a Solicitor General disagreed with a particular Supreme Court interpretation of the Constitution, the Court's view was treated as authoritative.

Solicitors General functioning under such a regime were almost never called upon to dissent publicly from a Supreme Court decision. Once the Court spoke, the Solicitor General's duty was to interpret and apply the Court's precedent in an even-handed and intellectually principled way. The task of the Solicitor General's office was to provide the executive branch and the Supreme Court with technically excellent advice about the meaning and logical application of constitutional law as the Supreme Court had declared it to be. Since, historically, the Solicitor General's office performed that demanding task extremely well, the office enjoyed great prestige and exercised substantial influence with the Court. The Solicitor General's briefs were vested with special credibility both because they were technically excellent and because the Solicitor General's mission was seen as neutrally charting the logical consequences of the Supreme Court's constitutional pronouncements.

As long as the executive branch shared the fundamental assumption that the Supreme Court has a special responsibility and expertise to serve as authoritative interpreter of the Constitution, the Solicitor General and the Supreme Court remained on the same institutional wavelength. Except for a puff of defiance from the Nixon White House on the eve of the Watergate tapes case, the executive branch has, until quite recently, refrained from challenging the legitimacy of the widely held assumption

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that the Supreme Court's word on the meaning of the Constitution is authoritative. When Ed Meese became Attorney General, though, something fundamental changed in the Executive's relationship with the Supreme Court. Meese challenged the legitimacy of the Supreme Court's institutional claim to act as ultimate arbiter of the meaning of the Constitution for the other two branches. In its place, he urged a system in which the Executive's views about the meaning of the Constitution are as valid in the Executive's sphere as the judiciary's views are in Court. Even after the Supreme Court has spoken on the meaning of the Constitution, Meese argues that the Executive is empowered to continue implementing its contrary view, as long as the Executive ultimately complies with court orders in specific cases.

As Charles Fried has learned, the Solicitor General's role in a government organized under Meese's principle of executive autonomy is a good deal more complex and controversial than it was in the good old days when the Supreme Court was viewed as the Constitution's authoritative voice. In the old days, the Solicitor General's job was to figure out what the Supreme Court had said and to craft a principled, intellectually coherent legal position that was consistent with the Court's precedent. Under current groundrules, though, the Solicitor General must initially decide whether the autonomous executive agrees with the Supreme Court's precedent before deciding what kind of brief to write.

If the Executive agrees with Supreme Court precedent, a traditional brief can be crafted. If, however, the powers that be in the executive branch decide that the Supreme Court was wrong in past cases, the Solicitor General becomes the Court's adversary. Instead of the Supreme Court's silent partner, the Solicitor General becomes the point man for the Executive, challenging the Court's interpretation and urging it to recant. That is the difficult role Charles Fried has played on constitutional issues ranging from abortion to affirmative action to the relationship between church and state.

I believe that Meese's conception of an autonomous executive branch that rejects the primacy of the Supreme Court as interpreter of the Constitution is appalling. It's hard enough to ask the majority to abide by a Supreme Court decision protecting individual rights against the majority; when you add an executive branch that eggs the majority on by rejecting the authoritative nature of the Court's interpretation, it becomes well-nigh impossible. It also becomes well-nigh impossible to be an effective Solicitor General. Not even a first-class legal mind like Charles Fried's can take on the schizophrenic role of writing confrontational briefs in politically charged cases before the Court, while attempt-

ing to function as the Court's friend in others. Under the pressure of the politically charged confrontational briefs, the Solicitor General's traditional posture as a neutral expositor of Supreme Court doctrine evaporates. In place of its old silent partner, the Court is confronted with a strident adversary pitching the Executive's politically charged view of what the Constitution ought to mean.

I make no secret of my distress at the shift in the Solicitor General's role. I believe that the Supreme Court should be regarded by the executive branch as the authoritative interpreter of the Constitution. I believe that the Solicitor General's traditional role as the Supreme Court's friend is infinitely preferable to its current role as point man for the executive branch. It is, however, grossly unfair to impugn either the character or the good faith of the current Solicitor General. It is important to separate disagreements over policy from assaults on character and competence. It's too easy to let passion turn an adversary into an enemy.

As ACLU Legal Director during the most controversial period of Fried's tenure, I am not unfamiliar with his work. Three things should be said about it.

First, the Solicitor General's briefs under Fried have continued to maintain a high level of technical competence. Even when he is confronting the Court, he does so with technical—if not tactical—excellence.

Second, it is wrong to accuse Fried of tailoring his briefs to curry favor with his superiors. He really does believe those things he writes. Much of what Fried says to the Court in his confrontational posture has been a staple of a strain of academic criticism of the Court for years. From *Brown v. Board of Education* on, some academics have argued that the Court is wrong in seeking to give real bite to the Constitution's protection of the weak.¹ Fried is simply the latest academic to make the argument. What differentiates him from his predecessors is his status as Solicitor General; not the sincerity of his beliefs.

Finally, Fried's beliefs about the role of the Solicitor General and the wisdom of some Supreme Court precedents are not without intellectual foundation. I think he's wrong; but I readily concede that powerful arguments exist on Fried's side of the fence. The Supreme Court can be mistaken. Witness *Dred Scott*. One should be concerned about the tension between judicial protection of individual rights and democratic political theory. Witness *Lochner*. It is a tension that the Supreme Court has, quite properly I believe, resolved in favor of effective protec-

1. In fairness to Charles Fried, he has consistently defended *Brown v. Board of Education* as correctly decided.

tion of the individual. But decent people can disagree about the proper role of courts in a democracy and just because someone believes that the Supreme Court was wrong and says so is not a basis for impugning his or her integrity.

Thus, while I reserve the right to criticize Fried about his tactics; his conception of the Solicitor General's role; and the positions he takes in his briefs, I continue to respect him as a lawyer and a scholar and would gladly serve—and argue—with him on a law school faculty.