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THE COMMITTEE ON THE CONSTITUTIONAL SYSTEM PROPOSALS: COHERENCE AND DOMINANCE

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I have been a fellow traveler of the Committee on the Constitutional System virtually since its inception; indeed, I believe I was present when Mr. Cutler first made the speech at the University of Texas that became, "To Form a Government."¹ During all this time I have never been able to quite free myself from the conviction that his concerns were absolutely right and fundamental to our era. Nor have I been able to persuade myself that the reforms that he recommends justify a departure from the framers' conception. I suppose this is why I was selected to give a critical view of his proposals and his talk.²

These proposals have been thoroughly debated; there is now a rich literature on them. Jim Sundquist has written an important book on the subject,³ and even the Committee's recommendations are in a small pamphlet that is often excerpted in constitutional law casebooks.⁴ The authors of the CCS Report understand all of the main objections. In fact, a good summary of the predominant opposition can be found in a paragraph from one of the CCS authors who writes:

[T]here are many thoughtful citizens who think that our present condition of divided government and the resulting hodgepodge of national policies is preferable to the consequences of a return to party government and party cohesion. They accept the hodgepodge as the best available consensus that can be achieved among the diverse interest groups that make up so huge and variegated a nation. They see the consensus as conceding enough

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1. See Cutler, *To Form a Government*, 59 FOREIGN AFF. 126 (1980).
2. Cutler, *Now Is the Time for All Good Men . . .*, 30 WM. & MARY L. REV. 387 (1989).
3. J. SUNDQUIST, *CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT* (1986).
4. COMM. ON THE CONSTITUTIONAL SYS., *A BICENTENNIAL ANALYSIS OF THE AMERICAN POLITICAL STRUCTURE* (1987).

to each group to avoid the degree of divisiveness that would impair the national unity.⁵

I think I endorse these words. They are a fair summary. So rather than add to this by restating these conclusions, I want to offer a different perspective altogether. Like someone talking to a group of friends, I want to try an idea, see how it comports with our constitutional sense. I want you to indulge in this thought experiment with me.

Mr. Cutler assumes, and I imagine that most of us assume, that the President initiates governance through a legislative agenda that represents the popular will as given to him in his electoral mandate; but, owing in part to a decline in party loyalty when the executive and legislative branches are held by the same party, and in part to the persistence of partisanship when government is divided, the Congress then proceeds to thwart the mandated agenda. The President can't deliver his program and the result is no legislation, no government, and a thwarting of the popular will.⁶ That is what offends efficiency, accuracy, and popular sovereignty.

I dispute every element of this picture. Assume with me, for a minute, that the Constitution makes Congress, not the President, the initiator of legislation and it is the Congress who possess a mandate directly from the people. Assume that it is the President who is elected either to channel that flow from Congress or to thwart and check Congress. This picture accords better, I think, with the framers' scheme and also with the constitutional vision. Certainly if you gave a Constitution to someone from another society who had never read it and asked him to simply flip through the pages, he would have no trouble identifying who was the initiator of the government's agenda. Real power lies in article I, after which article II is almost an afterthought.

Not only is the Constitution faithful to this scheme, but this description better accords with reality than the customary picture that we have of the President leading Congress. It is tempting to think of the President as the agenda setter and proposer. Franklin

5. Cutler, *Party Government Under the American Constitution*, 134 U. PA. L. REV. 25, 32 (1985).

6. *Cf.* Cutler, *supra* note 2, at 390 (budget deficit results from deadlock between Congress and President).

Roosevelt, Lyndon Johnson, and Ronald Reagan have all had extensive legislative programs. But consider just for a moment the Johnson and the Reagan experience from the perspective that I have urged.

Consider Johnson, the parliamentarian for twenty-eight years, a man who released the very energies of Congress that he had galvanized when he was a member of Congress. Recall, for example, the 1957 Civil Rights Act⁷ which perhaps was the most important statutory achievement of that period and did not come from the White House. It was his parliamentary leadership that accounted for his success, even when he was in the White House. By the same token, I am inclined to think that Kennedy, like Nixon, was not elected for his precise policy views, but rather for a vague agenda. Certainly, I think Reagan was not elected to enact his rather eccentric platform but rather to check Congress. There was a mood in the country that Congress had gone too far; that it was taking over more and more of the responsibilities traditionally exercised by state governments. The President, as David Stockman learned, was not the initiator of the process. This is nothing new. The National Bank was not Washington's idea. The Missouri Compromise was not Polk's idea. The vision we currently have is distorted by the few charismatic and powerful Presidents who governed at a time of intense crisis in this century. They by no means represent the typical flow.

The consequences of changing your perspective this way is that it allows you to separate two ideas that the Cutler proposals treat alike. These ideas are *coherence* on the one hand and *dominance* on the other. Some of the proposals, like the party caucus⁸ or four-year incumbency,⁹ go to the issue of coherence. These proposals seek to focus a party's power in Congress and to correct the diffusion of authority in the two houses. Other proposals, those tying the Presidency and the Congress together, try to achieve a kind of dominance.¹⁰ I gather that Mr. Cutler is agnostic about this; he doesn't say the Presidency has to dominate the Con-

7. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified as amended at 28 U.S.C. § 1343, 1861; 42 U.S.C. §§ 1971, 1975-1975(e), 1995 (1982)).

8. Cutler, *supra* note 5, at 39.

9. Cutler, *supra* note 2, at 401-02.

10. *Id.* at 400-02.

gress—something that probably follows if the President can dissolve Congress and possibly results if the tickets are tied together. Mr. Cutler is equally comfortable with having a President dominated by Congress, but what he wants to do is link their fates together and that inevitably leads, I think, to their *mutual* control, if you will.

Now, if you free yourself from the illusion of a popular mandate that is thwarted by Congress, you can see that coherence has positive benefits that do not, in fact, require domination by one leader with an electoral mandate who must set the agenda. The absurd figures for committee and subcommittee chairmanships go to the coherence issue. Moreover, we can see more clearly what is sacrificed by domination. Curiously, Lloyd Cutler who sees so clearly and has been so persuasive in getting others to see that we have a system of shared rather than separated powers is willing to sacrifice the benefits of this sharing.

I want to spend just a short time on what those benefits are. The framers faced a formidable problem of legitimacy. If you do away with a monarchy, how do you ensure that a mere portion of the people's mandate legitimates the actions of the state? One of their solutions was to have three different dimensions of constituency: the constituency of the representatives, the very different constituency of the states, and then the completely different national constituency of the Presidency. This overlapping authority captures a deeply layered endorsement of the people.

If you instead tie these endorsements to just one constituency, so that one group dominates, and it doesn't really matter which group, you lose the fullness of the three dimensions of legitimacy contributing to the full authorization of the government. That's what is sacrificed by domination achieved through dissolution, or through forbidding ticket splitting, because if you can't say "no" to something, then you can't authorize it either. And if you can't authorize it, you can't give it legitimacy. Therefore, one of the things that these proposals do is to multiply not just the number of losers but the significance of losing.

Here's what I mean. I am from Texas; for a long time we were a one-party state. I can't imagine voters ever splitting a ticket in those days. I usually didn't even know who the Republican candidates were! But I can imagine losing an election. (Actually, we

seem to have lost quite a few of them lately). But even when I lost at the national level, I could feel pretty confident of winning in my district. I know the Congressman there. He is a good Democrat. He is not going to be turned out. The Senate races in Texas seem to be up for grabs. So about half the time I win and about half the time I lose.

If you link these three elections together, so that the outcomes are interdependent, I might win some of the time, but when I lost, I would lose all the way down. What holds for me is true for people all across the country. Not just in the number of losers although you can see how that is multiplied, but also in the significance of losing. Think, for example, about the situation of a Labour Party member in Britain—a parliamentary system that I think Mr. Cutler may have some sympathy with.¹¹ Once a national election is lost, they have lost completely. Even now the county councils and the Greater London Council are being abolished.¹² So if you are a member of the Labour Party, there is no one in the government who represents you. You have lost at every level.

I think the solution to a second problem that the framers faced is also sacrificed by this dominance principle; that is, the solution to the problem posed by the decision to make the people, not the state, the sovereign. That decision meant that the main constitutional job of government lay in choosing what the government was going to do, not just how it was going to do it. In our system, because a problem is not tackled by legislation does not mean that it has not been addressed by the sovereign. It may have been allocated to some sector of our national life other than Congress or the Congress may have decided on such an allocation. I think it is interesting that the private and state sectors are very seldom addressed by the Committee for a Constitutional System. But such a diverse allocation also accords with a system of shared powers in which everyone, in these different dimensions, must agree that this is the kind of problem that we want to allocate to the government.¹³

11. See Cutler, *supra* note 2, at 395.

12. B. HOGWOOD, *FROM CRISIS TO COMPLACENCY?* 123, 176-77 (1987).

13. This reminds me of a story that many of you may know. I first heard it from the poet William Meredith, who claims that he was actually watching television when this happened. It was the 1952 New Hampshire primary; it was live, some of the first live nationwide broad-

Perhaps the problem with the budget deficit, for example, is not simply just that we can't organize Congress to cope with it. Although I think the coherence issue is a very important one, I think it is also that the public has not yet been persuaded that the budget is a problem that the Congress can yet appropriately deal with. They see the Congress—and they are encouraged in this view by the President—as more the problem than the solution.

Now apart from this thought experiment about premises, I am also skeptical about the facts, at least the correlations among the facts on which the argument for party government depends. It is true the decline in party loyalty has been accompanied by a rise in divided government, but have these not been merely contemporaneous events? I sometimes doubt whether they have had a close causal interrelation. The fact is simply that the Republicans have captured one electoral dimension—a national dimension. Horace Busby refers to this as the Republicans having an “electoral lock” on the White House.¹⁴ If you go back to all the years since Franklin Roosevelt, with the exception of Lyndon Johnson's election, it does look as though the Republican Party is getting a stronger and stronger hold on the electoral college.¹⁵

Moreover, the difference between the dimensions, the national constituencies as opposed to the state constituencies, as opposed to the representative constituencies is, I think, of greater significance than the fact that each may be held by different parties. Certainly you see this in Texas, where although we long had a one party state this did not diminish the conflict between the governor and the legislature.

cast. CBS had sent a reporter up there; they had a camera show a village scene where it was gently snowing. The reporter was interviewing people as they came down the street. An elderly woman came by; he stopped her and explained that this was CBS live and that today was the day of the New Hampshire Primary. The reporter gave a little talk about the importance of democracy in this country and how nowhere was the franchise more jealously guarded than in New Hampshire. This woman was standing in the snow during all this. Finally he said to her: “Have you voted today?” She didn't hear him and he had to repeat the entire patronizing lecture. He went through the whole speech again, and asked loudly, “Have you voted today?” And she says, “Voted? No. I never vote; it only encourages them.”

14. Barnes, *College Counseling*, THE NEW REPUBLIC, July 18 & 25, 1988, at 13; *Will it be another Republican White House?*, A.B.A. BANKING J., Oct. 1988, at 92 (interview with Horace Busby).

15. Dionne, *Predicting the Electoral Vote: Does G.O.P. Have a 'Lock'?*, N.Y. Times, Oct. 12, 1988, at A1.

As Mr. Cutler noted, the first year of Ronald Reagan's term was spectacularly successful despite divided government.¹⁶ This last year has been spectacularly unsuccessful. But so was Franklin Roosevelt's in 1944; so was Lyndon Johnson's in 1968, and neither of them had to endure divided government. I submit that if Presidents Roosevelt and Johnson can't do it, it can't be done. Having the same party did not save SALT II for Jimmy Carter, and I am inclined to suspect that having divided government would not have prevented Gerald Ford from getting SALT II ratified.

Finally, I am skeptical of the claim that stronger parties are freer from special interests. It seems to me they are simply captured by larger interests. Certainly this seems to be the case in Japan and in Great Britain.

The import of these facts, like the premises, are a matter of speculation. I have given you in this brief time a rather distorted view of the picture. I am not saying really that Congress alone is the sole proposer, or that the President does not have an equally important mandate. I am simply trying to correct, if I can, what I think is the usual picture.

The biggest problem in constitutional law, like the biggest problem in nuclear strategy or microeconomics or for all I know biology, or physical chemistry, is to escape the impress of the usual and ordinary ways of looking at things. Because this enterprise requires intellectual courage and a certain impertinence, I was not surprised to see Mr. Cutler in the vanguard of the reexamination of our constitutional premises at a time when most lawyers were content to wrap themselves in bunting. His approach reminds me of a remark by Grant Gilmore, whom I miss and whose words I love very much: "No lawyer worthy of the name can ever be either truly a conservative or truly a radical: at one and the same time we must devote ourselves to the preservation of tradition, which we do not greatly respect, and to the promotion of change, in which we do not greatly believe."¹⁷

16. Cutler, *supra* note 2, at 399.

17. G. GILMORE, *The Truth About Harvard and Yale*, YALE LAW REP., Winter 1963, at 9.