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WHY PARTIES AND POWERS BOTH MATTER: A SEPARATIONIST RESPONSE TO LEVINSON AND PILDES

*Richard A. Epstein**

Replying to Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

In their provocative and instructive article, *Separation of Parties, Not Powers*,¹ Professors Daryl Levinson and Richard Pildes argue that the traditional principle of separation of powers now, if not throughout our history, takes a back seat to the critical role of powerful and united political parties. They argue that parties, not powers, matter, or more precisely: “The success of American democracy overwhelmed the Madisonian conception of separation of powers almost from the outset, preempting the political dynamics that were supposed to provide each branch with a ‘will of its own’ that would propel departmental ‘[a]mbition . . . to counteract ambition.’”² Accordingly, they write, “[f]ew aspects of the founding generation’s political theory are now more clearly anachronistic than their vision of legislative-executive separation of powers.”³ Accepting this proposition, they claim, yields greater realism in understanding the divide between legislative and executive power, especially on national security issues.

It is futile to argue that political parties do not influence relations between the legislative and executive branches. Clearly, political alliances, both formal and informal, matter. The greater the political cohesion, the less critical separation of powers becomes, and conversely, the more divided the government, the more political structures matter. But parties do not operate outside the framework of Constitutional structures, and these play important roles in determining the fate of legislation, treaties, nominations and Congressional hearings. I shall begin by offering a brief account of separation of powers and then of the closely related but distinct notion of checks and balances. Next, I shall explain how the division of power between the President and the

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¹ Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

² *Id.* at 2313 (quoting THE FEDERALIST NO. 51, at 321–22 (James Madison) (Clinton Rossiter ed., 1961)).

³ *Id.*

Congress influences political outcomes in general. Third, I shall look at specific interactions between the President and the Congress in two contexts: first, the treaty power in its various manifestations and, second, the inherent power of the President as Commander-in-Chief in several cases arising during the Korean War and the War on Terrorism. My basic thesis is that the conventional tools of constitutional interpretation lead, without any detour into political realism, to a conclusion that Professors Levinson and Pildes defend by much unnecessary labor: the Congress sets the rules, which the President and only the President implements. Let us take the questions in order.

I. UNDERSTANDING SEPARATION OF POWERS

The one-two combination of separation of powers and checks and balances is commonly justified as an effective way to allow for strong government while simultaneously curbing the risk of tyrannical power: “Ambition must be made to counteract ambition.”⁴ The appeal to these two principles derives from the presumption that government action is in error until proved to be good. The procedural hurdles in the path of new legislation mean Congress passes fewer laws, which leaves the President with fewer laws to execute. Accordingly, the principle of separation of powers assigns certain discrete functions to each of our three branches of government. Article I gives Congress “[a]ll legislative Powers,”⁵ Article II gives the President “[t]he executive Power,”⁶ and Article III gives the Courts “[t]he judicial Power.”⁷ The emphasis is on basic structures, not marginal cases.

This basic constitutional allocation of powers could fail if some needed power is not assigned to any branch of government at the federal level. Thus, the Articles of Confederation fell short on federal power over taxation and foreign affairs. Or the system could break down if more than two branches of government are empowered to perform the same function. The gaps may matter more in basic design, but the overlaps are genuine sources of operational trouble.

Next, the distinct principle of checks and balances may authorize one branch of government to exert an explicit check on the exercise of a power assigned to a second branch. “Plenary” powers are not subject to explicit checks by other branches; the only limitation comes in the definition of the power itself. The pardon power, for example, covers only “Offenses against the United States, except in Cases of Im-

⁴ THE FEDERALIST NO. 51 (James Madison), *supra* note 2, at 322.

⁵ U.S. CONST. art. I, § 1. These words are followed by “herein granted,” which does not compromise the sharp delineation in the text but reinforces the notion of limited and enumerated powers.

⁶ *Id.* art. II, § 1, cl. 1.

⁷ *Id.* art. III, § 1.

peachment.”⁸ Accordingly, the Congress can neither deny nor burden the presidential pardon power.⁹

Frequently, the powers assigned to one branch of government are subject to explicit checks by a second. The President has the right to veto legislation, no questions asked. But his veto may be overridden by a vote of two thirds of the members of each house.¹⁰ Similarly, the President has the checked power “by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”¹¹

The hard-edged constitutional division between the Congress and the Executive arises because Congress is the deliberative body, while a single President can carry out its laws with energy and dispatch. Muddy the categories and it undermines the original design. The Progressives welcomed that fusion because they believed the basic structure was a “grievous mistake”¹² given their basic tenet that government expertise acts as a force for good in the administrative state.¹³ I cannot talk about the rise of the administrative state but will address the ongoing tension between the President and the Congress.

II. POLITICAL SCIENCE AND LEGAL REALISM

Empirically, we can all agree that widespread consensus between the various branches will either eliminate or obscure the role of separation of powers. Indeed, perfect agreement on substance implies (as the Framers surely understood) that any proposed action will sail through. But let some disagreement arise, and then constitutional structures will surely influence both the quantity and type of government actions. To understand how those pressures work, it is *not* sufficient to observe the legislation or treaties that survive the process, for the anticipated opposition to or support for these measures *within parties* will determine which actions are initially proposed. By way of analogy, the strategic selection of disputes for litigation warns us not to draw any inference about shifts in legal rules simply because (in the simplest model) litigated cases come out fifty percent for each side. Any perceived change in the legal rules will alter the mix of litigation

⁸ *Id.* art. II, § 2, cl. 1.

⁹ See *United States v. Klein*, 80 U.S. 128 (1871) (striking down a federal statute that rendered evidence of pardon inadmissible to establish claimant’s right to certain property).

¹⁰ U.S. CONST. art. I, § 7, cl. 2.

¹¹ *Id.* art. II, § 2, cl. 2.

¹² WOODROW WILSON, CONGRESSIONAL GOVERNMENT 284 (Transaction Publishers 2002) (1885).

¹³ See, e.g., JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 11–12 (1938) (rejecting separation of powers when the government is concerned “with the stability of an industry”). On the risks of government-induced “stability,” see RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION 94–98 (2006).

without changing that ratio. Cases that once lay at the cusp now become easy one way or the other. The constant rate of success through thick and thin shows how the parties respond to changes in legal rules, *not* that the rules themselves are correct.

By analogy, Professors Levinson and Pildes have too much faith that party unity renders structural obstacles unimportant. More likely, the basic pattern of interaction reflects these strategic realities. Even when the President and his party control both houses of Congress and take views that differ from the opposition's, the divisions of sentiment between the President and members of his own party will influence his legislative agenda, his treaty negotiations, and the nominees he sends to the Senate. So even if (nearly) all Republicans favor lower minimum wages than Democrats, the President still has to broker differences of opinion within his party in deciding just how far to push before risking defection from the ranks. Political actors bargain in the shadow of the future outcomes dictated in part by our basic constitutional structures. The success of any particular proposal may reflect not the whip hand of some unified party, but rather a pre-legislative deal that resolves differences before they go to either house of Congress. More than Professors Levinson and Pildes acknowledge, the same calculations are at work for more complex legislation and will sometimes determine a measure's success or failure.

III. CONCRETE APPLICATIONS

A. *Treaties, Nominations, and Executive Privilege*

These political constraints surely matter in the context of the treaty power. For example, on its face the power keeps the House of Representatives out of the mix. In addition, the Supreme Court has held that the President has the exclusive authority to carry on diplomacy and to negotiate treaties with foreign nations.¹⁴ The President's role with treaties is a lot more powerful than with legislation, where he holds the veto power but not the exclusive power of initiation. Yet the ability of the Senate to check the President will surely influence presidential negotiations, lest the treaty be voted down.

We must also consider the vexed law of congressional-executive agreements, which includes such major agreements as the GATT, NAFTA, and the SALT I arms treaty.¹⁵ These agreements, in the guise of ordinary legislation, bring the House of Representatives back into the ratification process. The President still has the sole power of

¹⁴ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20 (1936).

¹⁵ *See, e.g.*, CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW* 416–17 (2003).

initiation, but instead of needing the consent of two-thirds of the Senators present, he now only needs to secure a majority of both houses for the agreement to become law. Resort to these agreements has triggered an interbranch dispute, which tellingly has not broken along party lines: the President defends the device that Senators from both parties attack.¹⁶ When, moreover, congressional-executive agreements prove too cumbersome, the President often acts on his own initiative, free of any congressional check at all, in negotiating postal conventions, for example, as “compacts,” not treaties.¹⁷ Deciding what kinds of agreements need what kinds of process matters precisely because the choice of route will determine whether trade or environmental treaties become law. Structure obviously matters.

The constitutional structure also plays a critical role in understanding the contours of an executive privilege that all Presidents since George Washington have claimed — to keep from the Senate all the papers created or received in connection with negotiations with a foreign government.¹⁸ The President wants to keep his sources confidential in order to encourage their candor. The Congress (which leaks like a sieve) wants the information to exercise due diligence. Under the privilege, the President has no duty to turn over confidential information to the Senate; the Senate can still withhold its consent, no questions asked, until the President discloses more information. The executive privilege does not give the President a safe harbor, but it does set the stage for a complex bargaining game.

Similar jockeying between the President and the Senate over confidential information frequently raises its head in connection with Supreme Court nominations, as with the recent nominations of John Roberts and Samuel Alito. Once again, the rules matter, for an imperfect privilege gives the President a lot more scope to bargain, even with his own party, than any unambiguous duty to disclose. But on any view, the configuration of the respective powers of the President and Congress matters even in an age of party discipline.

B. Unilateral or Inherent Executive Power

The separation of powers has also taken center stage in the recent firestorm over whether President Bush violated the Foreign Intelligence Surveillance Act¹⁹ (FISA) by ordering domestic wiretaps without

¹⁶ See, e.g., Memorandum from Walter Dellinger, Assistant Attorney General, to Michael Kantor, U.S. Trade Representative (July 29, 1994), *in id.* at 414; Letter from Senators Joseph Biden and Jesse Helms to Secretary of State Colin Powell (Mar. 15, 2002), *in id.* at 415.

¹⁷ See *United States v. Belmont*, 301 U.S. 324, 330–31 (1937).

¹⁸ See *Curtiss-Wright*, 299 U.S. at 320–21 (quoting and discussing Washington’s statements about secrecy in negotiations); see also THE FEDERALIST NO. 64 (John Jay), *supra* note 2.

¹⁹ 50 U.S.C.A. §§ 1801–1871 (West 2003 & Supp. 2005).

the prior approval of a special court created by the Act.²⁰ Oddly, Professors Levinson and Pildes skirt this issue, on which the President has invoked two arguments to justify his position. First, he claims that the Authorization for Use of Military Force Act²¹ (AUMF), which allows the President to use “all necessary and appropriate force” against “nations, organizations, or persons” involved in the attacks of September 11, 2001,²² authorizes the wiretaps. That difficult position presupposes that the general language of the AUMF can repeal FISA by implication, even though the two acts can both be enforced consistently with each other. In *Hamdi v. Rumsfeld*,²³ the Supreme Court allowed a limited implied repealer for the Nondetention Act of 1971,²⁴ which provides that no United States citizen shall “be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”²⁵ I shall not speculate as to whether an implied repealer for battlefield decisions carries over to presidential actions far removed from the front. But even if the President could ignore FISA on this ground, the principle of separation of powers is fully respected. Congress could have authorized the wiretaps pursuant to its unquestioned powers, so the President does not have to act alone under his “inherent” powers. By the same token, however, Congress could ban the wiretaps by clear language even before the Supreme Court decides the issue.

In my view, the President does not have that inherent power for textual and structural reasons that I shall only briefly summarize here.²⁶ Recall that any initial allocation of powers has to be internally consistent. Note that the Constitution explicitly provides that Congress shall have the power “[t]o make Rules for the Government and Regulation of the land and naval Forces.”²⁷ That is the same territory that the President claims by virtue of his power as Commander-in-Chief. Yet the text of Article II only holds that “[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into actual Service of the United States.”²⁸ The Constitution confers on the President no

²⁰ See *id.* § 1803(a) (West 2003).

²¹ Pub. L. No. 107-40, 115 Stat. 224 (2001).

²² *Id.* § 2(a).

²³ 124 S. Ct. 2633 (2004).

²⁴ Pub. L. No. 92-128, 85 Stat. 347 (1971) (amending 18 U.S.C. § 4001(a) (2000)).

²⁵ 18 U.S.C. § 4001(a) (2000).

²⁶ For a fuller account, see Richard A. Epstein, *Executive Power, the Commander in Chief, and the Militia Clause*, 34 HOFSTRA L. REV. 317 (2005); Richard A. Epstein, Opinion, *Executive Power on Steroids*, WALL ST. J., Feb. 13, 2006, at A16; and *Opinion Duel: Domestic Eavesdropping*, Jan. 31, 2006, <http://www.opinionduel.com/debate/?q=NDc=>, in which I debated David Rivkin, who held decidedly different views.

²⁷ U.S. CONST. art. I, § 8, cl. 14.

²⁸ *Id.* art. II, § 2, cl. 1.

explicit power to offset the explicit grant of power to Congress. Nor need we build inconsistency in from the beginning, because the Commander-in-Chief position has real clout without putting the President on a collision course with Congress. Because the President has an entrenched position, the Congress cannot remove him from office, save by impeachment; nor can it give any authority over the military to anyone but the President; nor can it, under the guise of making rules, issue any order to military personnel; nor can it interfere with the President's ability to appoint or remove any military officer for, as the expression goes, good reason, bad reason, or no reason at all. The Constitution also allows the President (like any other military officer) to respond to a sudden attack or emergency without having to wait for a belated authorization from Congress.

The claims for inherent presidential power ignore this constitutional distribution of functions. By claiming exclusive powers, the President insists that he can act unilaterally no matter what the constellation of political forces in Congress. Congress cannot rein him in by further legislation since the matter is strictly off-limits. Couched in the terms that Professors Levinson and Pildes like to use, we have here a proposed solution to the separation-of-powers question, which radically alters, to say the least, the bargaining power between the President and the Congress.

Nor is the problem easily solved, for even if the President makes some concessions to a stubborn Congress, that deal is in vain. The President and the Congress cannot agree to any redefinition of their respective constitutional responsibilities, any more than they can agree to accept a one-house veto of administrative action.²⁹ So the bargaining becomes quite convoluted because Congress only has the appropriation power to limit the President, and even that power is of uncertain value. No wonder this entire incident has given rise to a renewed interest in the doctrine of checks and balances and the formation of a broad Coalition to Defend Checks and Balances in response to the current presidential claims.³⁰ The matter has already spilled over to Senate hearings and more recently to Senator Russell Feingold of Wisconsin and his proposal to censure the President for his actions.³¹ No one can dismiss checks and balances as a nonstarter just because we live in an age of greater party discipline.

My uneasiness with Professors Levinson and Pildes does not stop with their political science, but also extends to their doctrinal analysis.

²⁹ See *INS v. Chadha*, 462 U.S. 919 (1983).

³⁰ See The Constitution Project, Statement of the Coalition to Defend Checks and Balances (Feb. 27, 2006), http://www.constitutionproject.org/pdf/Separation_of_Powers_Statement_03_16_2006.pdf.

³¹ See S. Res. 398, 109th Cong. (2006).

On this point, they correctly note that “the courts typically have sought to tie the constitutionality of presidential action to the requirement of congressional authorization.”³² But no political realism is needed to drive that result, which follows in straightforward fashion from the textual provisions cited above. Nor need we treat as the lynchpin of the analysis Justice Jackson’s observation in *Youngstown*³³ that “[p]arty loyalties and interests, sometimes more binding than law, extend [the President’s] effective control into branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution.”³⁴

That is just the way the Constitution envisions the situation will work, with or without political parties. Worthy presidents get broader authorizations than unworthy ones. Nor should anyone be surprised that the President’s responsibilities as Commander-in-Chief expand in times of war or civil unrest. Rather, the rubber only hits the road in cases of conflict, and on that score *Youngstown* is both an easy case and an important precedent. As *Federalist 69* puts it in a widely quoted passage, the President’s position as Commander-in-Chief “would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy.”³⁵ Within our constitutional framework, no other general or admiral could seize the steel mills because he is unhappy with the overall pace of production. The President, as top military commander, stands in no higher position.

At this point, it is best to forget Jackson’s preliminary “realism,” which so attracts Professors Levinson and Pildes.³⁶ My purpose here is not to reject Jackson’s tripartite approach to presidential power.³⁷ Presidential powers are greatest when the President acts pursuant to congressional authorization. But the text of the Constitution tells us that already. The President surely has less power when he acts on his own hook. And the President is sailing in the roughest waters when he puts his own will against Congress’s. Unfortunately, that ordinal ranking does not tell us where to draw the needed lines of demarcation in particular cases. On that issue, the more instructive passages in Jackson’s opinion go directly to particular clause-bound issues. Here is one brief sample that is congruent with the arguments I raised above:

³² Levinson & Pildes, *supra* note 1, at 2348.

³³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

³⁴ *Id.* at 654 (Jackson, J., concurring).

³⁵ THE FEDERALIST NO. 69 (Alexander Hamilton), *supra* note 2, at 418.

³⁶ Levinson & Pildes, *supra* note 1, at 2314–15.

³⁷ *Youngstown*, 343 U.S. at 635–38 (Jackson, J., concurring).

There are indications that the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and its inhabitants. He has no monopoly of “war powers,” whatever they are. While Congress cannot deprive the President of the command of the army and navy, only Congress can provide him an army or navy to command. It is also empowered to make rules for the “Government and Regulation of land and naval Forces,” by which it may to some unknown extent impinge upon even command functions.³⁸

Whatever uncertainties linger, no way can the President on his own hook order Sawyer, his Secretary of Commerce, to seize the steel mills. The particular texts tell us what we need to know. Professors Levinson and Pildes’s realist ambitions are beside the point when they write:

[T]he *Youngstown* framework assumes that Congress will be actively involved in making the difficult policy decisions required during wartime and will provide the oversight of Executive-initiated action that courts feel ill-suited to offer through first-order rights adjudication. *Youngstown* thus embraces the Madisonian expectation that Congress will compete aggressively with the President for power and vigilantly monitor and check presidential decisionmaking. Here again, however, the Madisonian vision founders on the realities of partisan political competition. Especially when government is unified by party, we should not expect Congress to resist executive power in the way that courts and commentators take for granted.³⁹

Quite simply this passage offers the right answer to the wrong question. Of course, Congress is unlikely to interfere with presidential decisions once it has given its general authorization. Why would any Congress, regardless of its political composition, try to micromanage executive behavior? But party discipline is not what the FISA or *Hamdi* disputes are about. These cases ask whether the President has *unilateral* power to conduct all wartime activities independent of the control of Congress. Nothing from the political science literature tells us how to resolve it. The judicial inquiry does not turn on how aggressively or often Congress competes with the President. It turns on whether the President may go it alone when Congress has not and will not give its authorization. The legal answer does not depend on whether the President and Congress are frequently at loggerheads or not. It would be intolerable if the Constitution embraced one distribution of power when the President and Congress are friends and another when they are at odds. We have here a traditional legal dispute that should be solved in the traditional legal fashion. We do not need a realist analysis to conclude that the courts need not make “first-

³⁸ *Id.* at 643–44.

³⁹ Levinson & Pildes, *supra* note 1, at 2349.

order” rights determinations, because the text and structure of the Constitution already tell us that Congress has the whip hand. It seems ironic that Professors Levinson and Pildes take an extensive journey through political science without offering any conclusion that is not already better captured by the traditional modes of constitutional analysis. Today’s question is the simple question of courage: who will stand up to the President?