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IN PRAISE OF DIVIDED GOVERNMENT

RICHARD A. EPSTEIN*

After Lloyd Cutler's defense of a system of unified government, I think that it is best to get right down to business. When it comes to this particular discussion, there really is a deep and fundamental gulf between us, geographical and intellectual, which accounts in large measure for the different perspectives that we bring to the problem of separation of powers. I come from my adopted home on the South Side of Chicago. Lloyd Cutler comes from the pulse and power of Washington. The intellectual differences follow from the geographical difference, for we have in fact very different senses of what it means for government to "work." In my view, you measure the success or failure of government, not by the volume of legislation that it generates, but by whatever increment of good it adds to human welfare, *or* as is typically the case, by the relatively small level of harm it inflicts upon social institutions. The correct way to look at things is with the strong presumption that the more legislation you have, the worse that government works.

That presumption influences the way one looks at the procedural and structural questions of separation of powers. It is not possible to decide on the abstract merits of separation wholly devoid of the legislation that is produced. In any serious inquiry, you have to examine the legislation that comes through first in periods of divided, and then in periods of unified government. You have to decide which legislative outcomes you prefer on the merits, and why, and then you must select that particular set of institutions that leads to the outcomes that you defend on independent, substantive grounds. Procedure is a means of getting the right substance. It is not an end in itself.

When I think of the important periods of unified government, I think of the New Deal and of the Great Society. In my view these are fitting indictments of the principle of unified government because the legislation that they enacted has been enormously destructive and detrimental to human welfare. That is a political judgment, and an outspoken judgment, even if made by a law professor—one, I might add, whose views are likely to disqualify him permanently from any responsible position of

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political power in Washington. But there is something to be said for having some of us reside permanently outside the corridors of power, if only because we shall be a little less reluctant to speak our minds. So I want to criticize as an academic, the way that Lloyd has analyzed the data, in order to show that his conclusions are, in my judgment, backwards.

Start with his argument that people do not know the consequences of their voting behavior. Really, he thinks, they do prefer to have a unified government, but then find that divided government is a surprise consequence of their voting choices. Yet it is a mistake to assume that there are any surprise, or random consequences from voting behavior. If random outcomes were the norm, then you would expect to see unified government about half of the time and divided government the other half of the time. The fact that you observe (at least since 1950) a consistent set of outcomes—here with divided government—suggests that this is what people in general want. There is a good theoretical reason to see why they might want it.

The explanation runs as follows. Overall there are consistent pressures by a majority of the electorate for a small government. That choice can be expressed by taking the Presidential candidate who, all other things being equal, is going to keep the overall size of government small. In recent years that translates into a Republican President, and even the one exception, Jimmy Carter, was to a large extent an outsider who ran against Washington in his successful 1976 campaign. Nonetheless, these same self-interested voters are often concerned with having the largest possible share of that smaller pie come in the direction of their district. Even if Republicans and Democrats were equally adroit at milking Washington for local purposes, the Democrats would have a slight advantage in local elections because the voters that elect them into office can still keep the overall size of government down by choosing a Republican President. There are, of course, many other factors at work—the advantages of incumbency in winning elections, and of seniority in aiding in “constituent” service—but even when these are taken into account, I think that this dual strategy—keep the pie small, but my slice large—gives some explanation why divided government is the preferred electoral outcome today. We can expect to see Republican Presidents and Democratic Congresses for some time to come.

Now the interesting question raised by Lloyd’s data is this: Why is the trend toward divided government more pronounced in the years after

1950 than it is in the years before 1950? In order to understand the difference, I do not think it is sufficient to look to a mere change in the tastes of American voters. I think, as always, that it is necessary to go back to structural fundamentals. Separation of powers is simply one of a wide range of techniques that was adopted by the framers in order to limit the scope and size of government. In order to understand how the full mosaic works, two other pieces have to be added to the puzzle. One of these concerns the scope of federal power, and the other concerns the level of protection of individual rights to economic liberty and property that are accorded under the Constitution.

I believe that there is an important equilibrium among these three separate components to constitutional theory. Let us start with separation of powers, which includes the entire system of checks and balances. The model for that structure is largely derived from large private bodies, whether corporate, charitable, or religious. The organizers of these private, voluntary organizations have always understood that if you make life too easy for persons who hold positions of fiduciary responsibility, they will steal you blind. So while every organization needs some chief executive officer, his powers have to be confined by a board of directors and other social actors in order to prevent looting and other more genteel forms of misconduct.

The need for these kinds of checks and balances is, if anything, more pressing because political institutions are not organized around consenting individuals, but are composed of strange bedfellows who have little in common with each other. You do not pick your fellow citizens in politics; they are forced upon you by the bonds of political union, and there is no obvious way to dissolve the political bonds that hold you together, short of revolution. This peculiar configuration of "shareholders" in the joint political venture is subject to greater tensions than the ordinary private, voluntary association, so that the set of institutional safeguards that must be put in place is likely to be complicated and elaborate.

It is for that reason that our Constitution made it so difficult to pass any new legislation. The various rules of separation of powers—two houses, the veto, the override—represent a highly intelligent effort to create some "filter" through which public-regarding legislation is more likely to pass because there will be less political opposition. In contrast, factional legislation will more likely be trapped by the political filter because determined opposition to the legislation will likely be able to block

its passage at one particular juncture. Separation of powers and the system of checks and balances thus work as a crude filter which is more likely to block partisan legislation than social legislation. To give a simple example, you are more likely to get a statute of frauds or a statute of limitations—both acceptable interferences with the common law set of liberties, at least if well constructed—than some bitterly divisive system of transfer payments to farmers, loggers or real estate developers.

The descriptive question, however, is this: How reliable and robust will the cost barrier created by the system of checks and balances remain over time? Here the assessment is mixed. One good feature about the structural limitations of a system of divided power is that the constitutional provisions that create them are relatively impervious to judicial misconstruction. Twenty-five years (the minimum age to serve in the House of Representatives) means twenty-five man years, not dog years. A two-thirds vote of each house to override a Presidential veto means two-thirds, not sixty percent and not seventy-five percent. As the Constitution is pummelled over time, these structural clauses are far less likely to be bent out of shape than the takings or the commerce clause. The constantly shifting composition of the various key positions—Presidency, House and Senate—make it more difficult for any political faction to line up its ducks in a row. The structural limitations, therefore, continue to bite today.

Nonetheless, we should expect, alas, that their effectiveness will erode slowly but steadily over time. The reason is that the benefits that are obtainable from forming the winning coalition are not constant over time. They are in large measure a function of the other two variables—the scope of congressional power and the protection the courts afford to individual economic liberties or property rights. And it is here that the lamentable constitutional blunders of the 1937 New Deal Court cut most deeply. The broad construction accorded to the commerce power thus increased dramatically the range of activities over which Congress could legislate. The greater the scope of its legislation, the greater the wealth and opportunities it could transfer by factional decisions. While the congressional plate previously had been fairly limited, after 1937 it became perpetually full. It follows, therefore, that the wheeling and dealing in Congress will necessarily increase because there are more objects over which wheeling and dealing can take place.

Are there any side constraints against wheeling and dealing? Some were in place when there was a semblance of a strong contracts clause, or

of solid protection of economic liberties under the due process clause. Parties who lost to factional intrigue had some prospect of obtaining relief in court, and the mere threat of a successful suit would reduce the likelihood that any factional legislation would pass. In this corner as well, the threat of judicial invalidation is far weaker because of the jejune protection afforded economic liberties today, even against retroactive invalidation.

There is, therefore, a radical shift in the constitutional equilibrium. The gains from partisan activities in Congress are much more substantial today than they were in 1950. The barriers to partisan activities—namely separation of powers—are surely no stronger and may well be a tad weaker, if only because the communication and coordination necessary for faction building come at a lower cost. Because the effectiveness of the formal constraints against legislation have not been buttressed, while the gains from overcoming these limitations have been magnified, we should expect to see what we have seen: a massive increase in legislative action, with its untold and pointless redistributive slant. The barriers against factional legislation created by a system of checks and balances have been largely offset by the erosion of the limitations on congressional power, individual liberties and property rights in the economic sphere. There is more reason to spend the resources to overcome the structural impediments to legislation.

Well, then, what do people do when they start to observe this cycle of behavior? At one level the response is egotistic: “It is just wonderful to watch the legislative wheels turn when I am on the receiving end. The game is great to play when the goodies come in *my* direction.” But if we play this game a large number of times, winning a fair share of the rounds is not enough. If there are a thousand rolls of the dice and I win 10 on each of 500 rolls but lose 20 on the other 500 rolls, then I am worse off to the tune of 5000. That is exactly what happens when a faction controls, because the political gains to the winners are always smaller than the losses sustained by the losers; the winning political actors ignore the costs that their actions impose on others. So looking at this melee, voters have a greater preference for divided government as a way to slow down the political juggernaut. It is exactly the right response to take, although it may be of relatively limited effectiveness, given the enormous structural problems that we face with an overstuffed government in Washington.

But how do we know this? Again it is very hard to be definitive on the

subject without looking at some substantive themes. Let me point to a couple examples of the follies that persist even with so-called divided government. First, there are many issues in which there is some loose political consensus that cuts across political lines. At this point separation of powers, checks and balances, will fail, and one often sees very bad legislation. My favorite candidate of the day for silly, destructive, and pernicious legislation—as I have said I am not running for public office in Washington—is the Age Discrimination in Employment Act. When that statute passes by a unanimous vote in the House and the Senate, then the faith in separation of powers is dashed by the political fads of the time, against which there is no constitutional safeguard. But all is not lost, for when one considers another piece of silly and pernicious legislation—an increase in the minimum wage—then even a little bit of grit in the White House will reduce the size of the increase by the threat of the veto. So separation of powers does make a difference, at least some of the time, and by keeping out undesirable legislation continues to discharge some part of its original constitutional function.

There is one more point I should like to address before closing. What do we make of the deficits of the Reagan years? Here it seems to me that you have to be careful to understand what you are measuring. Lloyd Cutler has expressed a deep concern with the deficit. I for one do not see any economic argument that says that a three percent deficit per year is not sustainable over the long haul. Lloyd and I must have talked to different economists for we have radically different understandings as to what ails us as a nation in the current state of affairs. In my view his arguments about the deficit confuse two key variables. Variable number one is the size of the deficit, to which he attaches excessive weight. Variable number two is the total size of government expenditures, whether financed by taxes, borrowing or, for that matter, inflation. In my view this second variable is the critical one: The right question to ask is what is the total level of government expenditures relative to the optimal level?

Today with the enormous size of government, we can be confident that a huge fraction of government expenditures impose social costs, taxes or borrowings, that are far greater than the total benefits they generate. While I am not a supporter of no government, in the current state of affairs, the first order of business for a responsible President is to limit the total size of government expenditures, for which a President will receive solid political support. If you as President increase the level of effective taxes, that step will do little to reduce the deficit. It will instead be an

open invitation for Congress to increase its expenditure levels so that when the dust settles the deficit remains more or less at the same level it was before the tax increase. Accordingly, the way to understand the deficit in the present setting is as a political maneuver by the executive branch to keep the total level of spending down, a required maneuver given that the other structural restraints on congressional power have been dismantled or overrun.

The bottom line, therefore, is that separation of powers, checks and balances, should be treated as a means to an end. The only way that this end can be rightly understood is with a healthy dose of public choice theory, which should animate your coming and your going in public life. When most outputs of Congress are redistributive, then the best way to make government work is to see that its wheels grind slowly so that as little harm as possible is done. And that spells a great appreciation for the now neglected virtues of separation of powers.

