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THE QUESTION'S NOT CLEAR, BUT PARTY GOVERNMENT IS NOT THE ANSWER

ERWIN CHEMERINSKY*

The celebration of the Constitution's bicentennial was little more than a birthday party without the candles. Cartoons featured Porky and Petunia Pig discussing the first amendment, and every television network had commercials featuring celebrities telling anecdotes about the Constitution's framers. Copies of the Constitution were inserted in cereal boxes and reprinted on restaurant placemats. More substantively, many new books about constitutional history and law were published. These works, however, generally accepted the wisdom of the current Constitution and, at most, suggested alternative ways to interpret and understand it.¹

The most dramatic proposals for change in the Constitution came from the Committee on the Constitutional System, co-chaired by Lloyd Cutler. The Committee, and Mr. Cutler here today, endorse strengthening party government in the United States. They contend that legislation should be adopted and the Constitution amended as necessary to assure that the President and Congress will be of the same political party.²

These proposals are thought-provoking and force a reconsideration of the values of separation of powers in the context of the American political system. Yet, I am convinced that Mr. Cutler's

* Professor of Law, University of Southern California Law Center. I want to thank Penny Alexander for her excellent research assistance and Marcy Strauss for several helpful and thought-provoking discussions on this topic.

1. Among the books published coincident with the Bicentennial were R. BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987); E. CHEMERINSKY, *INTERPRETING THE CONSTITUTION* (1987); A. COX, *THE COURT AND THE CONSTITUTION* (1987); M. KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF* (1986). For a review of Berger, Chemerinsky, and Cox, as well as a listing of other books recently published on the Constitution, see *Commemorating the Bicentennial of the Constitution* (Book Notes), 101 HARV. L. REV. 849-912 (1988).

2. For Mr. Cutler's views, see Cutler, *Now Is the Time for All Good Men* . . . , 30 WM. & MARY L. REV. 387 (1989) [hereinafter Cutler, *Now Is the Time*]; Cutler, *Party Government Under the American Constitution*, 134 U. PA. L. REV. 25 (1985) [hereinafter Cutler, *Party Government*]. This Comment considers the arguments and proposals advanced by Mr. Cutler in both of these essays.

proposals would solve little and, in fact, would be extremely undesirable. The recommendations would strengthen the power of the Presidency at a time when the growth in executive authority already poses a grave threat to the system of checks and balances.

In this comment, I address three questions. First, is there a problem in the American political system that party government could solve? Second, would assuring party government through Mr. Cutler's proposals be desirable? Finally, what would be the future of separation of powers if Mr. Cutler's proposals were adopted?

I. IS THERE A PROBLEM IN THE AMERICAN POLITICAL SYSTEM THAT PARTY GOVERNMENT COULD SOLVE?

Mr. Cutler proposes many changes that individually and especially cumulatively would radically alter the American system of government. These suggestions include holding congressional elections after the President is chosen, increasing the likelihood of electing Senators and Representatives of the same political party as the President,³ allowing party caucuses in Congress to bind all members of their party to vote in a certain manner,⁴ changing the term of office for members of the House of Representatives,⁵ and permitting members of Congress to hold Cabinet positions.⁶ Ultimately, the goal is to maximize the likelihood that one political party controls the Presidency and both Houses of Congress.⁷

To justify such major proposals, Mr. Cutler has a heavy burden of proof to demonstrate that serious problems exist in the American system that party government would solve. He clearly fails to meet this burden.

Mr. Cutler identifies three problems that party government might remedy: the budget deficit;⁸ the lack of a coherent legislative program, especially in the area of foreign policy;⁹ and general pub-

3. Cutler, *Now Is the Time*, *supra* note 2, at 400.

4. Cutler, *Party Government*, *supra* note 2, at 39.

5. Cutler, *Now Is the Time*, *supra* note 2, at 401.

6. Cutler, *Party Government*, *supra* note 2, at 40-41.

7. *See* Cutler, *Now Is the Time*, *supra* note 2, at 400-01.

8. *Id.* at 390-91.

9. *Id.* at 391-92.

lic dissatisfaction with American government.¹⁰ Yet can any of these problems be tied to a lack of party government?

Economists disagree over the extent to which the budget deficit actually poses a threat to the country or the economy.¹¹ Accepting Mr. Cutler's assumption that it is a critical problem, the question is: what caused it? The current deficit has its origins in the Vietnam War policies of President Lyndon Johnson, a Democrat who governed with a Democratic Congress. The deficit grew during the administrations of Presidents Nixon, Ford, and Carter — two Republican Presidents and one Democrat, all of whom served with Democratic Congresses. Mr. Cutler is correct that the deficit grew most dramatically and rapidly during Ronald Reagan's presidency. I strongly disagree, however, with his assessment that this growth can be tied to a difference in party between Congress and the Executive. One must remember that Republicans did control the United States Senate for the first six years of President Reagan's tenure.

More importantly, I believe the increased deficit is the result of President Reagan's desire to raise defense spending substantially while concurrently lowering taxes. Spending on social programs was slashed repeatedly.¹² Additional cuts in social spending could not provide significant further reductions in the deficit. The only solution was an increase in taxes. Yet although America has one of the lowest tax rates among Western nations,¹³ President Reagan adamantly opposed any tax increases. Even if Republicans had controlled both houses of Congress for the last eight years, the deficit would not likely be much different. The President would have vetoed any tax hikes and not much more could have been cut from social spending. In fact, despite the absence of party government, Congress adopted the Gramm-Rudman-Hollings deficit reduction

10. *See id.* at 392-93.

11. *See* R. EISNER, *HOW REAL IS THE FEDERAL DEFICIT?* (1986) (arguing that the budget deficit poses a much less serious problem than is commonly thought).

12. *See generally* A. RIVLIN, *ECONOMIC CHOICES* 1984, at 11 (1984) (since 1980, budgets of social programs have been reduced substantially).

13. *See* J. PECHMAN, *FEDERAL TAX POLICY* 1 (5th ed. 1987) "Despite the large amount of money collected . . . U.S. taxes are by no means the heaviest in the world. Most advanced European countries impose relatively higher taxes." *Id.* (citation omitted).

bill¹⁴—a powerful counterexample to Mr. Cutler's general picture of government paralysis when the President and Congress are of different political parties.

Second, Mr. Cutler identifies the lack of a coherent legislative program as resulting from the absence of party government.¹⁵ He speaks of a "hodgepodge of inconsistent national decisions"¹⁶ and bemoans the rejection of treaties and the general failure of Presidents to enact most of their legislative proposals.¹⁷ Again, I question Mr. Cutler's causal analysis. The lack of a coherent legislative program reflects the general lack of consensus in this country as to what the problems are and what their solutions should be. Mr. Cutler exalts political parties, yet I challenge anyone to read a party platform and see it as other than a "hodgepodge of national policies."¹⁸

Moreover, Mr. Cutler assumes that enabling a President to enact more of his or her proposals is necessarily desirable. In other words, Mr. Cutler assumes that action, almost regardless of its content, is better than inaction. I strongly disagree. Conservatives might wish that party government had existed for the last eight years so that Congress would have enacted parts of the Reagan agenda, such as proposed constitutional amendments allowing school prayer and banning abortion, defeat of the extension of the Voting Rights Act and the enactment of the Civil Rights Restoration Act, further increases in military spending and more aid to the contras. As someone of a different political persuasion, however, I am thankful that party government did not exist during the Reagan presidency.

My point is not to argue the merits of any of these particular proposals, but rather to question Mr. Cutler's assumption that it is *per se* desirable for Presidents to enact a large percentage of their proposals. In a country with deep ideological divisions and no con-

14. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038 (codified at 2 U.S.C.A. §§ 901-908 (West Supp. 1988)). See also *Bowsher v. Synar*, 478 U.S. 714 (1986) (declaring unconstitutional a portion of this Act providing for automatic deficit reductions administered by the Comptroller General of the United States).

15. Cutler, *Now Is the Time*, *supra* note 2, at 391.

16. *Id.* at 395.

17. Cutler, *Party Government*, *supra* note 2, at 28-33.

18. *Id.* at 29.

sensus as to either the nature of problems or their solutions, the best government may be one of “muddling”—a government that acts by compromises, often incrementally rather than dramatically. Although rapid solutions to serious problems are not usually enacted in such a system, neither are programs with disastrous consequences. In fact, a large body of research has demonstrated that change inherently poses more risks and dangers than inaction.¹⁹ Moreover, the result is a particularly stable system of government. No group wins or loses all of the time. As a result, no group need feel completely disenfranchised and better off working to overthrow the system of government. This stability is probably the most notable and desirable feature of the American system; it has provided democratic rule with orderly transfers of power for a longer period of time than any other government in the history of the world.

Mr. Cutler points to foreign policy as an area especially characterized by a lack of consensus.²⁰ He describes congressional opposition to presidential use of troops and arm sales agreements.²¹ Again, however, I believe this lack of consensus reflects divisions in the country, and that achieving coherence artificially through party government would be undesirable. Ever since George Washington’s “Farewell Address,” when he proclaimed that the United States should have no entangling alliances, an isolationist foreign policy has enjoyed strong support in this country. The senseless and tragic Vietnam War reinforced this sentiment. Even with party government, many in the President’s party can be expected to challenge aggressive uses of American troops. After all, Democrats in Congress led the opposition to President Lyndon Johnson’s misguided Vietnam policy.

Moreover, Mr. Cutler again assumes that greater congressional support for an aggressive military policy would be desirable. Despite the lack of party government, however, major treaties limiting nuclear arsenals were approved during the Reagan administration. The effect of the split between the President and Congress

19. See, e.g., A. Wildavsky, *Incrementalism* (1972) (reviewing the literature defending incremental approaches to governance).

20. Cutler, *Now Is the Time*, *supra* note 2, at 391-92.

21. *Id.*

has been to prevent greater United States involvement in Central America and perhaps in the Persian Gulf. I regard this result as strong evidence of the desirability of the current system.

Finally, I question whether party government would solve the lack of cohesion in legislative policies that Mr. Cutler criticizes. Enormous ideological divisions exist within the parties. Conservatives, moderates, and liberals exist in both parties. Mr. Cutler's proposals to overcome these differences—such as allowing party caucuses to bind all members to vote the party line, with dissenters being punished by losing their roles as committee chairs²²—pose a substantial threat to democratic values. Under Mr. Cutler's proposal, a representative wishing to vote the views of his or her constituency could be prevented from doing so by a vote of sixty percent of the caucus members.²³ Consensus in the party would be artificially achieved at the expense of the representative process.

Furthermore, countries with party government generally do not exhibit more legislative coherence than the United States. In many countries with parliamentary systems which insure that the legislature and the executive will be of the same political party, small factions exercise disproportionate control over the governmental process. For example, in Italy and Israel, neither of the major political parties occupies sufficient seats in the respective legislatures to choose the heads of the governments. The result is that relatively minor political parties determine the outcomes, based on their choices in forming coalitions.²⁴ These alliances are inherently unstable and, at the very least, fail to promote the type of coherent legislative plans that Mr. Cutler endorses.

Finally, Mr. Cutler supports his proposals for change by pointing to the "national disappointment in the ineffectiveness of Congress and of the national government as a whole."²⁵ The nature of this disappointment seems questionable in light of the statistics Mr. Cutler presents regarding the high rate of incumbent reelection.²⁶ If the public was dissatisfied greatly with the work of the govern-

22. Cutler, *Party Government*, *supra* note 2, at 29.

23. *Id.*

24. See D. OLSON, *THE LEGISLATIVE PROCESS: A COMPARATIVE APPROACH* 161 (1980).

25. Cutler, *Party Government*, *supra* note 2, at 27.

26. Cutler, *Now Is the Time*, *supra* note 2, at 394-95. Also, if reelection of incumbents is a problem (and it might be an advantage in terms of stability in government) it most likely

ment, people likely would take a "throw the rascals out" attitude. Yet in 1984, the voting public reelected a President by a landslide and reelected ninety-five percent of the incumbent members of Congress. In 1988, voters retained the same political party in control of the White House and again reelected almost all incumbent members of Congress.

Moreover, the national disappointment in government stems largely from the events of the last twenty years and has nothing to do with the absence of party government. The terribly unpopular and divisive Vietnam War, and the scandals of Watergate and the more recent Iran-contra affair, have eroded confidence in government. These events, however, would have had a demoralizing effect regardless of the political parties of office-holders.

I do not mean to paint a picture that there is nothing wrong with the American system of government. Quite the contrary, I, too, share Mr. Cutler's concerns about whether our government will deal adequately with the problems confronting this society. We live in the richest nation in the history of the world and yet as many as three million people live without a home,²⁷ 31.3 million people live without health insurance,²⁸ and one out of five children—mostly black and Hispanic—live below the poverty line.²⁹ The world faces potentially catastrophic environmental problems, but I do not see party government as the answer. Party government existed between 1976 and 1980, but no solutions were found. Nor do I believe we would be better off in any of these areas if Republicans had controlled Congress for the last eight years. Many problems exist, but the absence of party government is not their cause.

stems from the fund raising and name recognition advantages incumbents possess rather than anything to do with the absence of party government.

27. COMMITTEE ON GOV'T OPERATIONS, HOMELESS FAMILIES: A NEGLECTED CRISIS, H.R. REP. No. 982, 99th Cong., 2d Sess. 7 (1986) (estimates of the homeless population in 1984 ranged from 350,000 to 3 million).

28. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1988, at 92 (1987).

29. *See id.* at 435 (21% of all children under 16, 43.8% of black children under 16, and 38.4% of Hispanic children under 16 lived below the poverty line in 1986).

II. WOULD PARTY GOVERNMENT BE DESIRABLE?

I believe that Mr. Cutler's proposals would change the nature of American government in a very undesirable way. The two most significant disadvantages of his proposals would be an erosion of democratic governance and a substantial reduction in congressional checks on executive power.

In most countries with party government, people elect representatives who then choose the head of state. Under Mr. Cutler's proposal, people would select a President first and then be encouraged to vote for Senators and Representatives of the same political party.³⁰ Additionally, Mr. Cutler proposes altering election laws to allow people to vote a straight party ticket for federal offices.³¹ Mr. Cutler hopes that this change will strengthen the President's coat-tails and increase the chances of one political party controlling the federal government.³² Unlike parliamentary systems where the choice of individual representatives controls the selection of the chief executive, Mr. Cutler would have the selection of the President determine the composition of the legislature.

This result is extremely undesirable because it would lessen the chance for people to have representatives who reflect their particular views. Undoubtedly, differences exist among election districts for the House of Representatives in terms of ideology of the voters and the issues that are of particular concern. This divergence reflects factors such as the racial composition of the district, income levels, geography (e.g., north versus south, rural versus urban), and occupational variations (e.g., agricultural versus industrial). I believe it very important for districts to be able to elect representatives who reflect the voters' views. The Cutler proposals lessen the selection of members of Congress based on ideology or interests and instead maximize election based on correspondence with the President's party affiliation.

30. Cutler, *Now Is the Time*, *supra* note 2, at 400. Of course, if people believe that having Senators and Representatives of a different political party than the President is desirable—for example, to maximize the checking function—then, Mr. Cutler's proposal would be counter-productive. After electing the President, voters might intentionally choose a Congress of a different political party.

31. *Id.* at 401.

32. *Id.*

The election of a President, however, is little more than a choice for a general direction or vision for the country. The Democrats' retention of control of at least one house of Congress during the Nixon and Reagan landslides reflects that people do differentiate among candidates based on who will best serve the needs of that particular area. In a nation of over 250 million people, democratic values cannot be achieved simply by electing one office-holder at the federal level. Promoting the evaluation of candidates in smaller districts is essential for democratic governance.

Moreover, as mentioned earlier, Mr. Cutler's proposal to allow party caucuses to bind members would undermine the representative process.³³ A member of the House or Senate would be prevented from voting the wishes of his or her constituency if sixty percent of the party caucus required compliance with its dictates.³⁴ Democracy is not served, for example, if a Senator from a farm state is forced against his or her will to vote against agricultural interests by the party caucus.³⁵

Second, Mr. Cutler's proposals would undermine the system of checks and balances. Under his suggestions, Congress not only would be of the same political party as the President, but steps would be taken to insure that members voted the party line. By ensuring compliance with the President's wishes, Mr. Cutler offers the possibility of more frequent legislative action and a more coherent legislative program. Yet such a Congress is far less likely to challenge the President than have recent or past Congresses. Would the Congress envisioned by Mr. Cutler have aggressively investigated Watergate or the Iran-contra scandal? Such a result would be unlikely because the effect of the investigations would harm the President's chances for reelection, making it much harder for the representatives of the same political party to be reelected.

33. See *supra* text accompanying notes 22-23.

34. Cutler, *Party Government*, *supra* note 2, at 29.

35. I recognize that I am using the term "democracy" very imprecisely here. I simply mean the ability of people to elect representatives who will generally reflect their views and who will be held accountable through regularly scheduled elections. See, e.g., M. EDELMAN, *DEMOCRATIC THEORIES AND THE CONSTITUTION* (1984); H. MAYO, *AN INTRODUCTION TO DEMOCRATIC THEORY* (1960) (elaborations on the meaning of democracy).

Mr. Cutler offers as a counterexample the fact that the Teapot Dome scandal was exposed during a time of party government.³⁶ That even party government sometimes investigates scandals, however, does not establish that it is as likely to do so as when the President and Congress are of different political parties. Moreover, Mr. Cutler's proposals would make exposure of corruption such as Teapot Dome less likely because he creates incentives that did not exist during the 1920s for representatives to do everything they can to keep their party in the White House.

Congress must evaluate presidential policies independently. For example, I doubt that Democrats in Congress would have been as willing or able to challenge President Johnson's Vietnam War policies if Mr. Cutler's proposals were in force. Also, Congress plays a crucial checking function in evaluating the President's nominees for the Supreme Court. Throughout American history, almost ten percent of designees for the High Court have been rejected by the Senate,³⁷ but I doubt that nominees such as Haynsworth, Carswell, or Bork would have been defeated under Mr. Cutler's system of party government.

Mr. Cutler asserts that "a return to party government would not impair the congressional power to oversee executive performance and curb executive excesses."³⁸ But Mr. Cutler cannot have it both ways. He champions his proposal as promoting accord between the President and Congress by assuring a legislature of the same political party and party discipline to keep members in line with the President's wishes.³⁹ Such a Congress seems quite unlikely to mount substantial challenges to the President.

In fact, commentators have long noted that a tradeoff exists between checks and balances and government efficiency. Justice Brandeis observed:

The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the

36. Cutler, *Now Is the Time*, *supra* note 2, at 399.

37. See L. TRIBE, *GOD SAVE THIS HONORABLE COURT* 142-51 (1985).

38. Cutler, *Party Government*, *supra* note 2, at 36.

39. See Cutler, *Now Is the Time*, *supra* note 2, at 397-98.

distribution of the governmental powers among three departments, to save the people from autocracy.⁴⁰

Mr. Cutler cannot lessen that friction without also reducing checks and balances. Unlike Mr. Cutler, I believe that a system of government with built-in protections against despotic rule is worth the cost of having a less active, less efficient federal government.

Mr. Cutler responds that one should not fear his proposals because the Nation lived with party government for most of its history without significant harms.⁴¹ However, the Nation never lived with the proposals he advances now—such as changing the timing of electing the President and strengthening the power of party leaders in Congress. His proposals would lessen democratic government and checks and balances. Because they are unprecedented, he cannot invoke any prior historical experience to answer these objections.

III. WHAT WOULD BE THE FUTURE OF SEPARATION OF POWERS UNDER THE CUTLER PROPOSALS?

I believe that one of the gravest problems in the American system of government has been the growth in the powers of the Presidency relative to the other branches of the federal government. Over a decade ago, the historian Arthur Schlesinger wrote of the emergence of the "Imperial Presidency."⁴² In part, the growth in executive power resulted from the development of the huge federal bureaucracy needed to run the regulatory and social welfare programs required in modern society. In part, the President's increased authority stems from the ability to take instantaneous action, especially in military matters, before Congress is able to respond. In part, frequent congressional inaction resulted in an accretion of power to the President.⁴³

As I have written elsewhere, the judiciary also contributed to this growth in executive power by adopting an extremely deferen-

40. *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

41. See Cutler, *Party Government*, *supra* note 2, at 36-37.

42. A. SCHLESINGER, *THE IMPERIAL PRESIDENCY* (1974).

43. See, e.g., Gewirtz, *The Courts, the Congress, and Executive Policy-Making: Notes on Three Doctrines*, 40 *LAW & CONTEMP. PROBS.*, at 46, 79 (1976); Miller, *Separation of Powers: Does it Still Work*, 48 *POL. Q.* 54, 58-59 (1977).

tial approach in cases posing challenges to the President, while at the same time very aggressively reviewing congressional efforts at checking executive authority.⁴⁴ When parties challenge presidential actions as violating separation of powers — such as waging war without congressional declaration or using executive agreements to circumvent the treaty-making power — the Court has in recent years, sided with the President, with one exception.⁴⁵ Either the Court has declared the matter to be nonjusticiable, allowing the President's action to go unreviewed, or it has upheld the conduct.⁴⁶ Even when congressional actions are challenged as infringing upon executive powers, the Court sided with the President, rejecting justiciability challenges and using a very formalistic approach to declare the legislation unconstitutional.⁴⁷

Contrary to Mr. Cutler, then, I believe attention to the system of government should be on restoring meaningful checks to executive power and, especially, to revitalizing judicial review of allegedly unconstitutional presidential conduct.⁴⁸ Mr. Cutler's suggestions not only fail to address this problem but further concentrate power in the President. As explained above, a Congress whose reelection depends on the President's popularity will be loath to challenge

44. See Chemerinsky, *A Paradox Without a Principle: A Comment on the Burger Court's Jurisprudence in Separation of Powers Cases*, 60 S. CAL. L. REV. 1083 (1987) [hereinafter Chemerinsky, *Paradox*]; see also Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. CAL. L. REV. 863 (1983).

45. Chemerinsky, *Paradox*, *supra* note 44, at 1083-84. The single exception to the Supreme Court's deference to the President occurred in *United States v. Nixon*, 418 U.S. 683, 706 (1974) (denying President Nixon's claim of an "absolute, unqualified Presidential privilege of immunity from judicial process").

46. See, e.g., *Goldwater v. Carter*, 444 U.S. 996 (1979) (declaring nonjusticiable a challenge to President Carter's rescission of a United States treaty with Taiwan without Senate consent); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (upholding President Carter's prohibition of the transfer of property interests subject to United States jurisdiction in which the government of Iran held an interest).

47. See, e.g., *Bowsher v. Synar*, 478 U.S. 714 (1986) (declaring unconstitutional a portion of the Gramm-Rudman-Hollings deficit reduction bill); *INS v. Chadha*, 462 U.S. 919 (1983) (declaring unconstitutional legislative vetoes). See Chemerinsky, *Paradox*, *supra* note 44, at 1086-96.

48. Mr. Cutler does endorse amending the Constitution to permit legislative vetoes. Cutler, *Party Government*, *supra* note 2, at 41. However, as part of the same amendment, Mr. Cutler proposes lowering the number of votes needed to ratify a treaty and creating authority for a line item veto—both actions that would strengthen the powers of the President.

him or her.⁴⁹ Also, a Congress of the same party as the President, when the party could enforce conformity in voting, would exacerbate, not solve, the problem of the Imperial Presidency.

IV. CONCLUSION

Justice Frankfurter remarked that “[a] scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority. No doubt a government with distributed authority . . . labors under restrictions from which other governments are free. It has not been our tradition to envy such governments.”⁵⁰ Unlike Mr. Cutler, I do not envy such a government. He is correct that a system that makes it harder for the President to enact legislation exacts a certain price, but I believe a much greater cost attaches to the proposals that Mr. Cutler advocates. This country has serious ills that demand aggressive federal action and important problems exist with the current system of government. But party government is not the answer.

49. *See supra* text accompanying notes 38-39.

50. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 613 (1952) (Frankfurter, J., concurring).