

LIMITED GOVERNMENT AND SPREADING DEMOCRACY: TWO FRONTS

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I was thinking, when the Republicans lost the Senate, it reminded me of 1986, twenty years ago, when I first came to Washington to work for Bill Bennett. I watched them lose the Senate in 1986 and did not realize at the time that the main effect would be that Bob Bork would be defeated in 1987. You know, Scalia had been confirmed in 1986 by a Republican Senate. Rehnquist had been promoted. His promotion to Chief Justice had been confirmed and ratified by a Republican Senate. The Democratic Senate defeated Bob Bork, and I would hate to see history repeat itself, having had Roberts and Alito confirmed by a Republican Senate in 2005. It would be a shame. This president, like Ronald Reagan, whatever his other flaws on matters of judicial appointments, has been pretty good. He tried to do the right thing and take good advice most of the time—a couple of mid-course corrections we will pass over in silence. But one should not give up. I myself know nothing; I have no inside knowledge. Justice Stevens could well step down at the end of the term in 2007. We could have a very similar sort of situation to the Bork nomination. But I would not give up. Justice Thomas was confirmed by a Democratic Senate in October of 1991, something I worked on a little bit, when I was Dan Quayle's Chief of Staff, with Lee Lieberman and Mike Luttig and many others who have been associated with the Federalist Society. I know you guys do not get directly involved in political matters. But as an individual matter, I think it would be very important to be engaged now, more than ever. The next two years are awfully important for the constitutionalist cause on the lower courts, on the Supreme Court, and at the state level, and obviously what happens after 2008 is important as well. This is the moment: we can make a fundamental difference in the history of the country, or slide back again.

You know, I do not think there are, but we will stipulate that there are, tensions between liberty and democracy. Every intelligent person has understood that. There are tensions between elections and limited government, and they tend to go together much more often than not. I would nonetheless point out that elections are a very important part of preserving

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liberty; self-government is a very important part of liberty. So, one should not overdo the hostility between these two elements. As a practical matter, it cannot just be an accident or a fluke that the strongest advocates of restoring constitutional government in the United States have also been on the whole the strongest advocates of strong U.S. foreign policy, which has included fighting for American principles abroad and, where possible, promoting American democracy abroad.

Presidents Reagan and Bush are certainly the two presidents most associated with that point of view and also the two presidents who have done the most at home for the sake of restoring constitutional government. Generally speaking, if you care a lot about liberty, constitutional law, constitutional democracy, or constitutional self-government, you will care a lot about strengthening, restoring, or correcting it at home. And you will do what you can to defend and promote it abroad. This is not as much a tension as people sometimes make it seem. I would say, again as a practical matter, an inward-looking focus entirely on our own liberties—a defensive attempt to simply preserve our constitutional order and let everyone else fend for themselves, or let them take five centuries to develop all the appropriate social structures before they can be ready for constitutional self-government—will not work. It will not strengthen constitutional government here at home. And I think there is a lot of historical evidence supporting that. Judge Randolph recently referred to the sensible advice about change: before you change others, change yourself.¹

We were a deeply flawed republic in 1939 and 1941, segregation being the most obvious black mark. This was the America of *Plessy v. Ferguson*.² It was the United States of *Korematsu*,³ for that matter. It was the United States of the court-packing plan.⁴ But it did not make our efforts to go abroad and defeat the Germans and the Japanese any less legitimate because FDR tried to monkey with the court or because part of our constitutional law was based on a deeply flawed understanding of the Fourteenth Amendment, which we have since repudiated. You cannot wait to fix everything at home before trying to defend yourself and defend your friends abroad.

It is true that we were attacked on December 7, 1941. We did not choose that war. We only went to war when attacked. But is that something that we are proud of—that we waited until December 7, 1941? Would it not have been healthier to be more engaged in Europe in the 1930s? Would it not have been healthier to stop the slaughter of World War II earlier, if we could have?

¹ A. Raymond Randolph, *Spreading Democracy*, 102 NW. U. L. REV. 431, 432 (2008).

² *Plessy v. Ferguson*, 163 U.S. 537 (1896).

³ *Korematsu v. United States*, 323 U.S. 214 (1944).

⁴ See generally MARIAN C. MCKENNA, *FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937* (2002).

I do not know any political philosophy. I got a degree in it from Harvard, which suggests that I probably have negative knowledge about it. But still, I know a little bit about these arguments. Of course, at a theoretical level there are tensions and problems, and they should not be minimized. But at a practical level, on the whole, strong support for liberty at home goes with a strong support for liberty abroad. It has become very fashionable to denigrate elections. Oh, how silly people are. Don't they know that democracy is about winning elections? Yes, most Americans know that. I know that. George Bush knows that. In Iraq, the problem was not elections. The elections went incredibly well. The elections showed, actually, that the Iraqi people liked the chance to vote. They voted pretty responsibly. They voted according to ethnic and sectarian lines, but not for the most radical exponents of the different ethnic factions. And of course, we voted for decades, and still do in some ways, along various religious and ethnic lines. I come from a voting group, Jewish Americans, that had the great distinction—I saw in the exit poll a week ago—of voting eighty-eight to twelve Democratic, one point behind African Americans. This is deeply upsetting to a lot of my liberal Jewish friends, that we did not quite pass Black Americans in their totally monolithic devotion to the Democratic Party. It is actually embarrassing and makes you wonder about human progress. Anyway, we vote on these lines. The Iraqis voted on these lines. The elections were not the problem in Iraq. If anything, it was kind of a fancy version, if I could say this, of the kind of point of view Mr. Palmer expressed.⁵ We have learned that elections do not solve everything. We waited too long to get to elections, many observers of Iraq now think. We talked ourselves into the notion that they were not ready. We spent a year and a half in occupation before letting them vote. In fact, the vote was the best thing that happened in Iraq, and arguably the fundamental problems in Iraq were a lack of water, the failure to have sufficient troops, and the failure to crush the insurgency early and crush the sectarian militias early. Leaving that aside, it probably would not have been better to go to elections earlier. I would not minimize the importance of the elections. A lot of liberties have come to the world because of an insistence on elections—I am thinking of Asia and Central Europe. And a lot of liberties have been crushed at the same time that elections were canceled, abrogated, or in the case of Iran, severely limited.

So again, there is no automatic conjoining of elections and democracy, democracy and liberty, elections and other freedoms, elections and limited government. But, on the whole, we can advance both of these causes together—and we should—because having the right to select one's rulers is an important part of liberty and an important part of freedom.

⁵ See Tom G. Palmer, *Democracy and the Contest for Liberty*, 102 NW. U. L. REV. 443, 444 (2008).

If I could just respond quickly to Mr. Palmer somewhat—to his ridicule of the president for the War on Terror.⁶ The President was being polite. He did not call it the war on Islamic Jihadism. Perhaps he should have from the beginning. I do not know that we would have paid much of a price for that. People understood what he was talking about. We are at war with Islamic Jihadism. And saying we are not does not change the fact that we are.

Just to provoke a little more, what is Trotsky? I actually was never a Trotskyite, and my father was not after Agent 19. I have never even really read Trotsky. But I believe one of his famous lines to someone who wanted to stay out of politics was, “You know, Comrade, you may not be interested in war, but war is interested in you.”⁷ Some people at Cato, many of whom are friends of mine, seem more interested in farm subsidies than in Jihad. But you know, even if you are not interested in the Jihadists, they are interested in you. We should not kid ourselves: if we have to retreat and withdraw from Iraq, we will have very bad consequences and we will pay a big price. But I do not think it need happen. I am very much for trying to prevent that from happening.

I propose a division of labor. Some of us will focus on winning the war against Islamic Jihadism and some of us will focus on confirming the Supreme Court justices and lower court judges and trying to restore constitutional government in America. If we can agree to focus on those two things but still support each other, I am happy to help Cato in their attempt to cut farm subsidies.

⁶ *Id.* at 448.

⁷ MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS 29 (3d. ed. 2000) (quoting Leon Trotsky).