

FOREWORD

Politics and Law, Again

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The Cato Institute’s Center for Constitutional Studies is pleased to publish this fifth volume of the *Cato Supreme Court Review*, an annual critique of the Court’s most important decisions from the term just ended, plus a look at the cases ahead—all from a classical Madisonian perspective, grounded in the nation’s first principles, liberty and limited government. We release this volume each year at Cato’s annual Constitution Day conference. And each year in this space I discuss briefly a theme that seemed to emerge from the Court’s term or from the larger setting in which the term unfolded.

A year ago, with the Roberts hearings looming immediately before us and several stormy years of appellate court confirmation hearings just behind us, I focused on *Politics and Law*, arguing that our judicial confirmation hearings had become so “political” because so much of the twentieth century’s constitutional jurisprudence had amounted to politics trumping law. With that politicization of the Constitution—illustrated by several cases that term—we should expect nothing less than politicized confirmation hearings.

In the year since then, much has happened, of course. The ink was hardly dry on last year’s *Review* when Chief Justice Rehnquist died. Judge Roberts was then nominated to be chief justice, and Judge Alito was nominated to fill the O’Connor seat for which Roberts had originally been nominated. Their hearings followed, with some delay in the case of Judge Alito’s. The hearings were long and stormy, unlike most hearings in the past, and they served to illustrate again how politics today so dominates law.

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But a brief lamenting of the advance of politics and retreat of law should not be confused with one arguing that all in our system should be law and little politics. To the contrary, our Constitution is a subtle blend of both politics and law. Thus, there is an important, seemingly opposite variation of today's main problem of turning so much over to politics: it arises when "law" contrary to the Constitution is allowed to trump—in fact, to replace—politics. I say "seemingly" because, in truth, when "law" and the courts that enforce it intrude into areas that were meant to be left to politics, we still have politics trumping law—the politics that creates and enforces that "law." Two of the Court's more important cases this term, involving campaign finance and executive power, illustrate that other side of the modern problem. But first a few lines from last year's Foreword to put the issue in context.

The Constitution contemplates that in a republic like ours, the relation between politics and law is set, for the most part, by law—by the law of the Constitution. Reflecting the will of the founding generation, yet grounded largely in reason, the Constitution was made law through the political act of ratification. As amended by subsequent acts of political will, it authorizes the political branches to act pursuant only to their enumerated powers or to enumerated ends. It further limits the exercise of those powers and the powers of the states either explicitly or by recognizing, with varying degrees of specificity, rights retained by the people. And, by fairly clear implication, made explicit in the *Federalist* and shortly thereafter in *Marbury v. Madison*, the Constitution authorizes the judiciary to declare and enforce that law of authorizations and restraints consistent with the document itself.

Thus, the scope for "politics," in its several significations, is limited. Consistent with constitutional rules and limits, the people may act politically to fill elective offices. And those officers may in turn act politically to fill nonelective offices. But once elected or appointed, those officials may act politically only within the scope and limits set by the Constitution. In particular, not everything in life was meant to be subject to political or governmental determination. In fact, the founding generation wanted most *private* affairs to be beyond the reach of politics, yet under the rule of law. At the same time, they wanted some *public* affairs to be subject mainly to politics, as opposed to comprehensive or rigid legal ordering. And

it falls to the judiciary, the nonpolitical branch, to enforce those distinctions, thereby securing the rule of law.

The aim in all of that is to both constrain and authorize the rule of man—and politics—by the rule of law, the law of the Constitution. The Framers understood that legitimacy begins with politics, with the people. Thus, “We the people . . . do ordain and establish this Constitution.” But once ratification establishes the rule of law, that law regulates politics thereafter. For the arrangement to work, however, judges charged with declaring and enforcing that law must discern the often subtle relationships between politics and law, restraining politics where it was meant to be restrained and allowing it to reign where it was meant to reign.

Our main problem today, of course, is that much of what once was subject mainly to private ordering, through private law, is now ordered politically, through statutory “law.” In everything from marketplace arrangements to retirement security, health care, and on and on, private law has been replaced largely by public law. We all know the source of that change. It came from the Progressive mindset that was institutionalized by the New Deal Court’s constitutional revolution. It was then that we were all thrown into the common pot, so to speak, stirred by government planners. Today we live under voluminous “law” not remotely authorized by the Constitution—the product of mere politics. And we do because the New Deal Court opened constitutional barriers, allowing politics to run roughshod over the Constitution’s law of liberty.

But that political activism—the mindset of the Progressive Era planner, endowed with a superior understanding of the public good—did not limit itself to zoning, social welfare, economic regulation, and the like. With the New Deal agenda largely completed by the Great Society in the 1960s, Progressives sought new areas to regulate, and they found ready candidates in the aftermath of the Nixon political scandals and the Vietnam War. The Constitution had left campaign finance, as a form of political speech, to be regulated largely by the First Amendment and “politics,” understood as the give and take of public opinion operating in the political arena. And it had left foreign affairs largely in the hands of the executive branch, subject to the limited foreign affairs powers vested in Congress and, again, to “politics” in the same sense.

For the activists of the 1970s, however, that left too much of “politics.” Much like their forebears in the 1930s who found that

the Constitution had left too much to private ordering, the '70s activists sought to impose "law" on what the Constitution had left mainly to political ordering. Thus, in a political exercise aimed at creating "law" seemingly prohibited by the First Amendment, they enacted the Federal Election Campaign Act of 1971 (FECA), designed to regulate the financing of federal campaigning. Two years later, stretching the Constitution's Necessary and Proper Clause, they passed the War Powers Resolution, a detailed scheme for regulating the executive's use of military force, thus intruding on what until then had been thought to be the inherent power of the executive, restrained only by Congress' limited foreign affairs powers, especially the power of the purse, and politics. A year after that Congress amended FECA, enacting comprehensive regulations of federal campaign financing, including severe limits on contributions and expenditures. And in 1978 Congress enacted the Foreign Intelligence Surveillance Act, a complex scheme for regulating what again had long been thought to be the inherent power of the executive to gather foreign intelligence, restrained again only by Congress' limited foreign affairs powers and politics.

Despite the different eras and domains of that political activism leading to law, the underlying principle and pattern should not go unnoticed. Law is a safeguard against the rule of man, to be sure; but overdone it is itself tyrannical. The social engineers of the '30s sowed the seeds of the modern regulatory and redistributive state under which so many today are suffocating. The same hubris, as F.A. Hayek used that term, drove the activists of the '70s to believe that they too could order and micromanage campaign finance and foreign affairs through comprehensive regulatory schemes, and here too the predictable and predicted results are before us.

In her essay below, Allison Hayward discusses some of those results as she only broaches the monstrous web of regulations that constitute today's campaign finance law. In *Wisconsin Right to Life v. FEC* we find a group that owes its existence, ironically, to the Court's failure in 1973 to let state politics work its course, now asking the Court to exempt it from the law's "electioneering communications" ban so that it may run grassroots lobbying advertisements that mention a candidate's name thirty days before a primary election and sixty days before a general election. The Court rejected the FEC's contention that the plaintiff was barred from making an as-applied

challenge to the ban, then sent the case back for consideration on the merits—now some two years after the plaintiff had originally asked for a preliminary injunction.

In the other campaign finance case this term, *Randall v. Sorrell*, the Court rejected, inter alia, Vermont's draconian contribution and expenditure limits. That it took no fewer than six opinions to do so speaks volumes about this body of "law." Professor Hayward considers whether *Buckley v. Valeo*, the 1976 decision on which *Randall* turned, should be considered a "superprecedent," a term that surfaced prominently during the Roberts hearings. It is a "poor contender" for that title, she concludes, and not without reason. Far from having plumbed the constitutional principles of the matter, *Buckley* set the stage for the legislation, litigation, and confusion that have followed. But without *Buckley*, would not huge contributions be flowing to candidates, corrupting politics in the process? Perhaps, but under our Constitution, that is for politics, not law, to police. A candidate who discloses his contributions and contributors will "compel" others to do the same, enabling the give and take of public opinion—"politics"—to do the work that no legal compulsion can possibly do without turning that compulsion into the legal quagmire and incumbent protection scheme that our campaign finance law has become.

But if regulating campaign finance through law rather than politics has proven pernicious, regulating foreign affairs through law rather than politics has arguably proven disastrous. To begin, the 1973 War Powers Resolution is today essentially a dead letter. Since its enactment, no president has acknowledged its constitutionality, and all since President Reagan have effectively ignored it, none more so than President Clinton in the Kosovo conflict. By contrast, the 1978 Foreign Intelligence Surveillance Act (FISA) has not been ignored. In fact, it led to the "wall" between foreign and domestic intelligence gathering and to the diminished communications between the agencies charged with each that many who are close to the matter believe contributed to the disaster of 9/11. Since then, of course, the administration has argued both that the authorization to use military force that Congress passed shortly after 9/11 supersedes certain FISA restrictions and that the executive has inherent constitutional authority in any event to engage in foreign intelligence gathering, a contention the FISA Court of Appeals defended in the most definitive

opinion on the statute yet to appear. At this writing, however, a U.S. district court has just ruled otherwise in an opinion so thin (it does not even cite the FISA Court of Appeals opinion) that even many of those who agree with its conclusion are distancing themselves from it.

That brings us to the case that drew the most attention this term, *Hamdan v. Rumsfeld*. This is not the place to delve into its complexities, except to say that here too Congress had acted, but unlike with its war powers or foreign intelligence statutes, which might in principle be adjudicated by the Supreme Court, Congress here had moved to strip the Court of jurisdiction, pursuant to its power under Article III, Section 2, Clause 2 of the Constitution. As John Yoo writes below, "Congress spoke in clear terms, using language that the Court had previously interpreted to immediately terminate jurisdiction over pending and future cases." Writing for a bare majority, and overturning a unanimous panel below, Justice Stevens ignored "an ancient and unbroken line of authority," as Justice Scalia put it in dissent. What followed was an unprecedented intrusion by the Court into an area that had always been reserved to the political branches.

But don't take my word for that, or Professor Yoo's, or Justice Scalia's. Here is a noted critic of the administration, writing in the August 10 issue of *The New York Review of Books*:

The Supreme Court has said in the past that foreign nationals who are outside US borders, like Hamdan, lack any constitutional protections. Hamdan was a member of the enemy forces when he was captured, and courts are especially reluctant to interfere with the military's treatment of "enemy aliens" in wartime. He filed his suit before trial, and courts generally prefer to wait until a trial is completed before assessing its legality. And as recently as World War II, the Supreme Court upheld the use of military tribunals, and ruled that the Geneva Conventions are not enforceable by individuals in US courts but may be enforced only through diplomatic means. . . . [Finally,] [t]he Detainee Treatment Act of 2005 required defendants in military tribunals to undergo their trials before seeking judicial review, and prescribed the D.C. Circuit as the exclusive forum for such review.

Notwithstanding that history of law, the author saw fit to heap effusive praise on the Court for an opinion "equal parts stunning and crucial."

What we have here, then, is not an intrusion by Congress on authority the Constitution vests in the executive, but rather an intrusion by the Court on the shared authority the Constitution vests in the executive and the Congress. And ironically, the Court seemed to be enhancing Congress' power by finding that it needed to authorize the military tribunals at issue, even as it was ignoring, in effect, Congress' express power under the Constitution to limit the Court's jurisdiction. Stunning indeed.

And so here too we have an effort—not by Congress, this time, but by the Court—to introduce a complex web of “law” into an area that the Constitution left to the political branches to manage. And the result, in this area too, is predictable and predicted. Just as Congress, since the post-9/11 NSA surveillance program came to light last December, has been unable to agree yet on any statutory “fix” for the matter, so too it is unclear what, if anything, Congress will do in response to the *Hamdan* decision. That should not surprise. It is in the nature of the matter. As the Framers understood, foreign affairs, involving the often dangerous relationship between the nation and the rest of the world, are ever fluid, requiring the “secrecy, dispatch, and decision” that only the executive can provide, with the assistance or opposition of Congress as constitutionally authorized under its enumerated powers. A rare point of agreement between Jefferson and Hamilton, that insight drew, not surprisingly, from Locke, who understood that foreign, unlike domestic, affairs are “much less capable to be directed by antecedent, standing, positive laws.” Lawyers and judges are essential for liberty under law, but so too is politics, the place for which we ignore at our peril.