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From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist.(Essay)

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Body

I'm honored to be at the American Enterprise Institute with friends and scholars I've known for many years. This organization has been a place of learning and thinking, and I applaud it for its many continuing contributions to public debate and discourse.

I'm honored to speak at a lecture named for Walter Berns. I was fortunate to become friends with Walter after I was appointed as a judge on the DC Circuit in 2006. As many of you know, Walter was a great storyteller, he possessed a keen sense of poker odds, and he loved the Constitution.

He had the belief, considered naive in some circles, that the meaning of the Constitution is related to the actual words of the Constitution. To use the title of one of his books, he took the Constitution seriously. Walter exuded wisdom and seriousness of purpose. He wrote and taught well. He was a patriot and a great American. I miss him, and we all miss him in these turbulent times. I'm honored to be here at the Berns Lecture.

We're here to celebrate Constitution Day, so I'll start with a few words about the Constitution itself. The Constitution was signed by the delegates at Philadelphia on September 17, 1787-230 years ago yesterday. The Framers believed that in order to protect individual liberty, power should not be concentrated in one person or one institution.

To preserve liberty, they created a system of federalism with dual national and state sovereigns. And, furthermore, within the new national government, they separated the legislative, executive, and judicial powers. As William Rehnquist later stated, the framers devised two critical innovations for the new national government: a president who is independent of and not selected by the legislative branch and a judiciary that is independent of both the legislative and executive branches.

It is sometimes said that the Constitution is a document of majestic generalities. I view it differently. As I see it, the Constitution is primarily a document of majestic specificity, and those specific words have meaning. Absent constitutional amendment, those words continue to bind us as judges, legislators, and executive officials.

And if I can be so bold as to suggest an initial homework assignment from my talk today, it is this: In the next few days, block out 30 minutes of time and read the text of the Constitution word for word. I guarantee you'll come away with a renewed appreciation for the Constitution and for its majestic specificity.

We revere the Constitution in this country, and we should. We also, however, must remember its flaws. And its greatest flaw was the tolerance of slavery. That flaw cannot be airbrushed out of the picture when we celebrate the

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Constitution. It was not until the 1860s, after the Civil War, that this original sin was corrected in part, at least on paper, by ratification of the 13th, 14th, and 15th Amendments to the Constitution.

But that example illustrates a broader point as well. When we think about the Constitution and we focus on the specific words of the Constitution, we ought to not be seduced into thinking that it was perfect and that it remains perfect. The Framers did not think that the Constitution was perfect. And they knew, moreover, that it might need to be changed as times and circumstances and policy views changed.

And so they provided for a very specific amendment process in Article V of the Constitution. The first 10 amendments, as we all know, came very quickly after the new Congress met in 1789. And those amendments were ratified in 1791. The 11th and 12th Amendments followed soon thereafter, and that process has continued.

Indeed, the amendments have altered fundamental details of our constitutional structure. The 12th Amendment changed how presidents and vice presidents are elected. The 22nd Amendment changed how long presidents can serve. The 17th Amendment altered how the Senate is selected, changing it from a body selected by state legislatures to a body directly elected by the people. The 13th, 14th, and 15th Amendments altered the autonomy of the states and created new constitutional rights and protections for individuals against states.

Many think we could use a few more constitutional amendments: term limits for Supreme Court justices, term limits for members of Congress, an equal rights amendment, a balanced budget amendment, abolition of the death penalty. Different people have different views. But here, as elsewhere, the Constitution already focused on the specific question that lies at the foundation of this and so many other constitutional disputes: Who decides?

In this instance, the question is this: Who decides when it is time to change the Constitution? Who decides when it is time to create a new constitutional right or to eliminate an existing constitutional right or to alter the structure of the national government? The Constitution quite specifically tells us that the people decide through their elected representatives. An amendment requires the approval of two-thirds of both houses of Congress as well as three-quarters of the states.

But the amendment process is slowed in part because it is so difficult to garner the congressional and state consensus needed to pass constitutional amendments. Because it is so hard, and because it is not easy even to pass federal legislation, pressure is often put on the courts and the Supreme Court in particular to update the Constitution to reflect the times.

In the views of some, the Constitution is a living document, and the Court must ensure that the Constitution adapts to meet the changing times. For those of us who believe that the judges are confined to interpreting and applying the Constitution and laws as they are written and not as we might wish they were written, we too believe in a Constitution that lives and endures and in statutes that live and endure. But we believe that changes to the Constitution and laws are to be made by the people through the amendment process and, where appropriate, through the legislative process--not by the courts snatching that constitutional or legislative authority for themselves.

That brings me to my primary topic today: William Hubbs Rehnquist. William Rehnquist served on the Supreme Court for 33 years, from 1972 until his death in September 2005. Appointed by President Richard Nixon, he was an extraordinary associate justice from 1972 to 1986. Then in 1986, President Ronald Reagan appointed William Rehnquist as the 16th chief justice of the United States. He served with distinction in that role for 19 more years. If he were still alive today, the chief would be 92 years old.

William Rehnquist died on Saturday, September 3, 2005. I remember it vividly. At the time, I was working as staff secretary to President George W Bush. Hurricane Katrina had hit earlier that week. I was distressed about how the week had unfolded for the people of New Orleans and the Gulf Coast, for the country, and for the president himself. I sat late that Saturday night on my couch at home with my then-two-week-old daughter, Margaret, on my shoulder and a college football game on TV. I got a call on my cell from Dan Bartlett, who was communications director for the president. He said simply, "Rehnquist just died; the president wants to meet tomorrow morning." I was profoundly sad, but I had no time to dwell on it.

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As staff secretary, I was responsible for hustling into the White House right away, contacting the president, immediately getting out a presidential written statement, and working with the speech-writers to help prepare the president's remarks for the following morning, which he delivered from the White House at 10:00 a.m. that Sunday morning.

At that time, John Roberts was the pending nominee for the vacancy created by Sandra Day O'Connor's retirement earlier that summer. Roberts had been a Rehnquist clerk and would be a pallbearer at his funeral. When all of us met with the president in the Oval Office on Sunday morning, it did not take long for the president to settle on nominating John Roberts for the Rehnquist vacancy; he decided that he would worry about the O'Connor vacancy after Roberts was confirmed. The president then publicly announced John Roberts' nomination early on Monday morning before we all took off for another trip to New Orleans and the Gulf Coast.

The enormity of it all--Katrina, Rehnquist, Roberts--still hits me when I think about it in retrospect. But my focus today is Rehnquist. And I've chosen to speak about William Rehnquist for three reasons.

First of all, he and Walter Berns were friends, and they shared a tremendous appreciation for the Constitution and for each other. So it is appropriate, I believe, to remember William Rehnquist at the Berns Lecture.

Second, it pains me that many young lawyers and law students, even Federalist Society types, have little or no sense of the jurisprudence and importance of William Rehnquist to modern constitutional law.

They do not know about his role in turning the Supreme Court away from its 1960s Warren Court approach, where the Court in some cases had seemed to be simply enshrining its policy views into the Constitution, or so the critics charged. During Rehnquist's tenure, the Supreme Court unquestionably changed and became more of an institution of law, where its power is to interpret and to apply the law as written, informed by historical practice, not by its own personal and policy predilections.

When Rehnquist died, Linda Greenhouse of the New York Times, who would probably not describe herself as an especially big fan of conservatives, said that Rehnquist had "one of the most consequential" tenures in Supreme Court history. She said that Rehnquist's tenure was marked by "a steady hand, a focus and commitment that never wavered, and the muscular use of the power of judicial review." (1) Well said by Linda Greenhouse.

And it is incumbent on us, I believe, to remind ourselves of the importance of Rehnquist and to teach the younger generations to appreciate that legacy as well.

Third, I want to speak about William Rehnquist because he was my first judicial hero. He was not my last judicial hero. But in the fall of 1987, as I started my first year of law school at Yale Law School and as the Bork hearings unfolded that fall, Justice Antonin Scalia had been on the Court for only a year and not yet written any important opinions as a justice. Justice Clarence Thomas was not even a lower court judge yet. My future boss and future mentor, Justice Anthony Kennedy, was still a Ninth Circuit judge. And that fall, in the confines of my constitutional law classroom and in other classrooms and other classes later in my law school career, I became exposed to the landmarks of American constitutional law.

In case after case after case during law school, I noticed something. After I read the assigned reading, I would constantly make notes to myself: Agree with Rehnquist majority opinion. Agree with Rehnquist dissent. Agree with Rehnquist analysis. Rehnquist makes a good point here. Rehnquist destroys the majority's reasoning here.

At that time, in 1987, Rehnquist had been on the Court for 15 years, almost all of it as an associate justice. And his opinions made a lot of sense to me. In class after class, I stood with Rehnquist. That often meant in the Yale Law School environment of the time that I stood alone. Some things don't change.

For a total of 33 years, William Rehnquist righted the ship of constitutional jurisprudence. To be sure, I do not agree with all of his opinions. No two people would agree with each other in all cases. *Morrison v. Olson* in 1988 comes quickly to mind as a Rehnquist opinion I still have some trouble with, and there are others as well. I must also

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confess that I don't fully understand why he put gold stripes on the sleeves of his judicial robes in his later years as chief justice, but we all have our quirks, I suppose.

Rehnquist moreover would be the first to say that he did not achieve full success on all the issues he cared about. But it is undeniable, I believe, that he brought about a massive change in constitutional law and how we think about the Constitution.

To begin with, Justice Rehnquist was a judge who contributed to the public debate not only through his judicial opinions but also through his books and articles.

He wrote four very readable books: one about the Supreme Court, one about impeachment (which became helpful a little later in his career), one about civil liberties in wartime (which also became helpful), and one about the election of 1876. When asked why he liked to write books, he said that it was very nice to be able to write something that you don't have to get four other people to agree with.

My Rehnquist story begins with an extraordinarily important law review article Justice Rehnquist wrote in 1976 in the Texas Law Review. It's titled "The Notion of a Living Constitution." (2) In that article, Justice Rehnquist sought to alter the debate about the proper role of judges, especially on the Supreme Court, in response to the Warren Court's jurisprudence and to the changing times and the changing mores of the people.

Rehnquist noted with his characteristically understated wit that a living Constitution was surely better than a dead Constitution. He added that only a necrophile would disagree. In response to the straw-man argument often raised by opponents of originalism, Rehnquist first noted, importantly, that the principles of the Constitution apply to new activities.

In his words, "Merely because a particular activity may not have existed when the Constitution was adopted, or because the framers could not have conceived of a particular method of transacting affairs, cannot mean that general language in the Constitution may not be applied to such a course of conduct." (3)

Consistent with Rehnquist's point there, the Fourth Amendment today applies to searches of cars, even though cars did not exist at the time of the Founding, the First Amendment applies to speech on the internet, and so on. Put simply, Rehnquist believed that the constitutional principles do not change absent amendment. But the principles may and indeed must be applied to new developments and activities unforeseen by the framers.

The straw man dispensed with, Rehnquist then addressed what he described as a quite different living Constitution philosophy, which then was being espoused in certain circles. Under that version of the living Constitution, as Rehnquist described it, non-elected members of the federal judiciary may address themselves to a social problem simply because other branches of government have failed or refused to do so. These same judges, responsible to no constituency whatever, are claimed as the voice and conscience of contemporary society, Rehnquist wrote.

Rehnquist set forth what he saw as three serious difficulties with this vision of the living Constitution. First, it misconceives the nature of the Constitution, which was designed to enable the popularly elected branches of government, not the judicial branch, to keep the country abreast of the times. Second, that vision ignores, Rehnquist said, the Supreme Court's disastrous experiences in the past, in cases such as Dred Scott, when the Court embraced contemporary, fashionable notions of what a living Constitution should contain. Third, he said, however socially desirable the policy goals sought to be advanced might be, advancing them through a freewheeling, nonelected judiciary is quite unacceptable in a democratic society.

In short, Rehnquist stated, the Constitution does not put the popular branches "in the position of a television quiz show contestant so that when a given period of time has elapsed and a problem remains unsolved by them, the federal judiciary may press a buzzer and take its turn at fashioning a solution." (4)

It's important to emphasize that Rehnquist's notion of the Constitution was not one where courts simply deferred to legislative choices. One early critic of Rehnquist in 1976 wrote that Rehnquist's vision of the Constitution meant that

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in cases involving conflicts between the government and individuals, the government would win. (5) That was wrong. That was not Rehnquist's philosophy or the point of his article.

His point was that it was not for a judge to add to or subtract from the individual rights or structural protections of the Constitution based on the judge's own views.

I read Rehnquist's Texas Law Review article when I was a first-year law student, and it's impossible to overstate its significance to me and how I first came to understand the role of a judge in our constitutional system. The article stood then as a lonely voice against the vision of the Supreme Court that was being promoted by most Supreme Court justices and by virtually all law professors at the time.

In my view, Rehnquist's article is one of the most important legal articles of all time. It is short and straightforward, and if I can be so bold as to give you a second reading assignment from this lecture, it is to read Rehnquist's article titled "The Notion of a Living Constitution."

Of course, he was not only a scholar. He was a jurist. He put his views not only into law reviews and books but also into the United States Reports. I can't possibly touch on all or even most of his enormous body of judicial work, but I'm going to briefly summarize five areas of Rehnquist's jurisprudence where he applied his principles and where he had a massive and enduring impact on American law: criminal procedure, religion, federalism, unenumerated rights, and administrative law.

The first topic is criminal procedure, including the death penalty. When I clerked for Justice Kennedy in 1993-94, the Kennedy clerks as a group had lunches with each of the other justices at some point during the year. When we had our lunch with Chief Justice Rehnquist, one of my Kennedy co-clerks (and it wasn't Neil Gorsuch) somewhat boldly asked the chief justice what kinds of cases he liked the most. And without missing a beat, the chief said cases involving the rights of criminal defendants.

In a 1985 New York Times interview, (6) Rehnquist said that one of the achievements during his first 13 years on the Court had been to call a halt to the number of sweeping rulings of the Warren Court. In the field of criminal procedure, Rehnquist fervently believed that the Supreme Court had taken a wrong turn in the 1960s and 1970s, and nowhere was he more forceful on this point than in the Fourth Amendment context, especially in cases involving violent crime and drugs. He led the charge in rebalancing Fourth Amendment law to respect the rights of the people and victims of violent crime as well as of criminal defendants. He wrote the 1983 opinion in *Illinois v. Gates*, still cited often today, that made the probable cause standard more flexible and commonsensical. He wrote opinions expanding the category of special needs searches, those that could be done without a warrant or individualized suspicion--for example, the 1990 case of *Michigan v. Sitz* upholding drunk-driving roadblocks.

Perhaps his most vehement objection to Warren Court Fourth Amendment law concerned the exclusionary rule by which courts would exclude probative evidence from criminal trials because the police had erred in how they obtained the evidence. At the time Rehnquist took his seat on the Court in 1972, *Mapp v. Ohio*, which had extended the exclusionary rule to states, was only 10 years old. But Rehnquist was obviously not sold on it. In his 1979 separate opinion in *California v. Minjares*, Rehnquist called for the overruling of *Mapp*. He disagreed with the idea that, in his words, "'the criminal is to go free' solely because of a good-faith error in judgment on the part of the arresting officers." (7) This judge-created rule in Rehnquist's view was beyond the four corners of the Fourth Amendment's text and imposed tremendous costs on society.

He advocated for other remedies for police mistakes or misconduct, but he believed that freeing obviously guilty violent criminals was not a proper remedy and, in any event, was surely not a remedy required by the Constitution. Rehnquist of course did not succeed in calling for the overruling of the exclusionary rule, and not many people today call for doing so, given its firmly entrenched position in American law.

But it would be a mistake to call his exclusionary rule project a failure. On the contrary, Rehnquist dramatically changed the law of the exclusionary rule. Led by Rehnquist, the Supreme Court created many needed exceptions to the exclusionary rule that endure to this day. Probably the most notable is the 1984 decision of *United States v.*

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Leon, where the Court held that exclusion would rarely be appropriate if an officer conducted a search with a warrant in good faith. And there were many others.

The same basic story occurred with *Miranda v. Arizona*. Justice Rehnquist was for years the most vehement critic of *Miranda*, and he wrote numerous opinions limiting its application. For example, in *New York v. Quarles* in 1984, Rehnquist wrote for the Court that there was a public-safety exception to *Miranda* so that *Miranda* warnings need not be given in situations where the officers sought information to protect the public from harm.

To this day, as with the exclusionary rule, courts apply *Miranda* based on many precedents that Rehnquist authored. Those precedents and cases authored by Rehnquist have ensured that *Miranda* is applied in (Rehnquist would say) a more commonsensical way that is closer to the proper constitutional meaning and that avoids the extremes of the Warren Court holdings.

The story is similar with respect to the death penalty. Just a few days after Rehnquist took his seat on the Supreme Court in January 1972, the Court heard argument in a series of cases, known by the lead case *Furman v. Georgia*, about the constitutionality of the death penalty. The Court that June ultimately struck down by a five-to-four decision all of the death penalty laws in the United States. Rehnquist dissented, joined by Chief Justice Warren Burger and Justices Harry Blackmun and Lewis Powell. Burger wrote the main dissent, but Rehnquist's dissent also packed a punch.

A mere five and a half pages in the US Reports deftly summarize the fundamental problems he saw in the core of the Court's holding. As he explained, the decision "brings into sharp relief the fundamental question of the role of judicial review in a democratic society." (8) He continued, "The most expansive reading of the leading constitutional cases does not remotely suggest that this Court has been granted a roving commission, either by the Founding Fathers or by the framers of the Fourteenth Amendment, to strike down laws that are based upon notions of policy or morality suddenly found unacceptable by a majority of this Court." (9) The Court's ruling, Rehnquist stated, was "not an act of judgment, but rather an act of will." (10)

But the story did not end there. In the wake of *Furman*, many states enacted new capital punishment statutes. In 1976, the Court turned around and upheld many of them. To this day, the death penalty remains constitutional. Many judges and justices no doubt have policy or moral concerns about the death penalty. But Rehnquist's call for the Court to remember its proper and limited role in the constitutional scheme has so far proved enduring in the death penalty context.

In short, today's constitutional jurisprudence in the field of criminal procedure and the death penalty has Rehnquist's fingerprints all over it. Those are the cases that Rehnquist cared about most. That was his mission primarily, and it is fair to say that he had a dramatic and enduring effect on the course of constitutional law in those areas.

The second topic is religion. When Justice Rehnquist joined the Supreme Court in January 1972, the Court was in the midst of erecting a strict wall of separation between church and state. Religious institutions could not receive funds from government, even pursuant to neutral government benefits programs. William Rehnquist was instrumental in reversing that trend. He persuasively criticized the wall metaphor as "based on bad history" and "useless as a guide to judging." (11) Rehnquist said that the true meaning of the Establishment Clause can be seen only in its history.

To be sure, his views of the Establishment Clause did not always prevail. He dissented in a 1985 case, *Wallace v. Jaffree*, which struck down a moment of silence law. He asked, reasonably enough, how a law that allowed students a moment of silence could be deemed an establishment of religion. He was in dissent in several other cases involving prayer in public schools, such as *Lee v. Weisman* and *Santa Fe Independent School District v. Doe*, involving prayer at graduation ceremonies and before football games.

Of course, all of those cases involved prayer in the public school setting. And it is fair to say that a majority of the Court throughout his tenure and to this day has sought to cordon off public schools from state-sponsored religious prayer. But Rehnquist had much more success in ensuring that religious schools and religious institutions could participate as equals in society and in state benefits programs, receiving funding or benefits from the state so long

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as the funding was pursuant to a neutral program that, among other things, included religious and nonreligious institutions alike.

In the critical 1983 case of *Mueller v. Allen*, he wrote the opinion for a five-to-four Court upholding a Minnesota program that allowed taxpayers to deduct expenses for the education of their children at private schools, including parochial schools. In 1993, again in an opinion written by Rehnquist in the *Zobrest v. Catalina Foothills School District* case, the Court reinforced that *Mueller* holding. And then in 2002, the Court in *Zelman v. Simmons-Harris* (again, a majority opinion by Rehnquist) upheld an Ohio school voucher program that allowed vouchers for students who attended private schools, including religious schools.

In the Establishment Clause context, Rehnquist was central in changing the jurisprudence and convincing the Court that the wall metaphor was wrong as a matter of law and history. And that Rehnquist legacy continues, as we see in recent cases such as *Town of Greece v. Galloway*, which upheld the practice of prayer for local government meetings. And without the line of Rehnquist cases beginning with *Mueller v. Allen*, we never would have seen last term's seven-to-two decision in *Trinity Lutheran Church of Columbia v. Comer*. In that case, only two justices found an Establishment Clause problem in a state program that provided funds to schools, including religious schools, for playgrounds. There again, the Rehnquist legacy was at work.

Third is federalism. Justice Rehnquist led a federalism revolution in a variety of areas--including federal commandeering of state officials and state sovereign immunity. I'm not going to speak more about those two issues today, but I will focus on federalism in terms of Congress' power to regulate interstate commerce.

As of the early 1990s, it was widely assumed that there was no real limit to the scope of the authority Congress could exercise under the Commerce and Necessary and Proper Clauses. Although other clauses may impose limits on the scope of congressional power, few expected that the Court would ever rely on a lack of Commerce Clause authority as the basis for invalidating a federal law. That was certainly what I was taught at Yale Law School. But it was not just in New Haven. It was widely believed that no such limits existed.

Enter the case of *United States v. Lopez* in 1995. The case involved the federal Gun Free School Zones Act of 1990. That law made it a crime to possess a firearm within 1,000 feet of a school. The defendant who was convicted of violating that law raised a seemingly *Hail Mary* argument that the law exceeded Congress' authority under the Commerce Clause. And in an unexpected five-to-four decision written by Chief Justice Rehnquist, the Supreme Court agreed with the defendant's position.

Laws like this, the Court said, should be and were being passed by the states. They could not be passed by the federal government. In the chief's opinion, he stated:

We start with first principles. The Constitution creates a Federal Government of enumerated powers. As James Madison wrote: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." (12)

Rehnquist then described the arc of the Court's Commerce Clause jurisprudence, which had expanded the clause significantly over the years. But he said there still had to be outer limits. And he noted that all the precedents involved regulation of economic activity where the activity substantially affected interstate commerce.

The government's theory was that possession of a firearm may result in violent crime, which may in turn affect the economy. Rehnquist was having none of it. Under that theory, he explained, federal regulation of family law and local educational curriculum could be justified on the ground that such activities affected the national economy. And he stated, "if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate." (13) Congress, Rehnquist emphasized, does not have "a general police power." (14) He concluded that the activity being regulated had to be commercial in nature, and he stated that possession of a gun in a local school zone is in no sense an economic activity.

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Five years later, Rehnquist again wrote the majority opinion of the Court in *United States v. Morrison*, holding that a 1994 statute creating a federal civil cause of action against gender-motivated violence likewise exceeded Congress' Commerce Clause power. He repeated, Congress' Commerce Clause authority extends to regulation of economic activity, not to noneconomic conduct such as traditional violent crimes. Regulation of that kind was limited to the states.

Those two decisions were critically important in putting the brakes on the Commerce Clause and in preventing Congress from assuming a general police power. After Rehnquist had left the Court, in the health care case in 2012, although it is not often the first thing discussed about that case, we do remember that a five-justice majority said that the Commerce Clause did not give Congress authority to require citizens to purchase a good or service.

Congress' Commerce Clause power undoubtedly remains very broad, but there are limits. Congress does not have a general police power, and William Rehnquist is largely responsible for that important feature of modern constitutional law.

Fourth is the Court's power to recognize unenumerated rights. A few months after he joined the Court in 1972, Justice Rehnquist faced an oral argument about the constitutionality of a state law prohibiting abortion in the case of *Roe v. Wade*. Rehnquist, along with Justice Byron White, ultimately dissented from the Court's seven-two holding recognizing a constitutional right to abortion.

Rehnquist's dissenting opinion did not suggest that the Constitution protected no rights other than those enumerated in the text of the Bill of Rights. But he stated that under the Court's precedents, any such unenumerated right had to be rooted in the traditions and conscience of our people. Given the prevalence of abortion regulations both historically and at the time, Rehnquist said he could not reach such a conclusion about abortion. He explained that a law prohibiting an abortion even where the mother's life was in jeopardy would violate the Constitution. But otherwise he stated the states had the power to legislate with regard to this matter.

In later cases, Rehnquist reiterated his view that unenumerated rights could be recognized by the courts only if the asserted right was rooted in the nation's history and tradition. The 1997 case of *Washington v. Glucksberg* involved an asserted right to assisted suicide. For a five-to-four majority this time, Rehnquist wrote the opinion for the Court saying that the unenumerated rights and liberties protected by the due process clause are those rights that are deeply rooted in the nation's history and tradition. And he rejected the claim that assisted suicide qualified as such a fundamental right.

Of course, even a first-year law student could tell you that the *Glucksberg* approach to unenumerated rights was not consistent with the approach of the abortion cases such as *Roe v. Wade* in 1973--as well as the 1992 decision reaffirming *Roe*, known as *Planned Parenthood v. Casey*.

What to make of that? In this context, it is fair to say that Justice Rehnquist was not successful in convincing a majority of the justices in the context of abortion either in *Roe* itself or in the later cases such as *Casey*, in the latter case perhaps because of *stare decisis*. But he was successful in stemming the general tide of freewheeling judicial creation of unenumerated rights that were not rooted in the nation's history and tradition. The *Glucksberg* case stands to this day as an important precedent, limiting the Court's role in the realm of social policy and helping to ensure that the Court operates more as a court of law and less as an institution of social policy.

Fifth and last is administrative law. Here, too, I can't possibly cover all of his many significant contributions. For example, in *Vermont Yankee Nuclear Power Corporation v. NRDC* in 1978, he wrote a textualist and important opinion for the Court. The Court should not be making up new procedural requirements for agencies to meet, beyond those requirements specified in the Administrative Procedure Act.

But the case I want to focus on in this context is Justice Rehnquist's separate opinion in the 1980 case of *Industrial Union Department v. American Petroleum Institute*, popularly known as the "Benzene Case." In that case, the statute gave the secretary of labor expansive authority to promulgate standards to regulate harmful substances such as benzene. In a separate opinion, Justice Rehnquist, speaking for only himself, would have held that the act was an unconstitutional delegation of legislative power to the executive branch.

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He operated within the confines of precedent. And the precedent did allow some delegation of rule-making authority to agencies. Rehnquist did not suggest that agencies lacked any power to issue binding rules. But applying the precedents, Rehnquist argued that Congress may not delegate important choices of social policy to agencies. He summarized the point this way: "It is the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people. When fundamental policy decisions underlying important legislation about to be enacted are to be made, the buck stops with Congress and the President" in the legislative process. (15)

Rehnquist's opinion on the nondelegation issue has not become the law, but it nonetheless has had a major impact in laying the foundation for the Court's modern major rules doctrine, sometimes referred to as the major questions doctrine. In the 2000 decision in *FDA v. Brown & Williamson*, the Supreme Court, with Rehnquist in the majority, adopted a principle of statutory interpretation under which Congress may not delegate authority to agencies to issue major rules unless Congress clearly says as much. In Professor Abbe Gluck's words, *Brown & Williamson* applied "a presumption of nondelegation in the face of statutory ambiguity over major policy questions or questions of major political or economic significance." (16)

In recent years, the Supreme Court has applied that major rules doctrine in an important Environmental Protection Agency case written by Justice Scalia. And lower courts, including this judge, continue to apply that doctrine in significant ways. The major rules or major questions doctrine is critical to limiting the ability of agencies to make major policy decisions that belong to Congress, at least unless Congress clearly delegates that authority. Rehnquist is ultimately responsible for that rule.

In sum, few justices in history have had as much impact as William Rehnquist. He did so by dint of his personality and the force of his intellect. He was a humble man. He was not flashy. The 1970s book *The Brethren* by Bob Woodward and Scott Armstrong was highly critical of many justices for being too arrogant or too aloof or too lazy or not up to the job. The book was unsparing and caused a sensation in the country. More than any time since then, the individual justices themselves were the talk of the country.

But that negativity did not extend to Rehnquist. Although the book was arguably critical of his jurisprudence as being too conservative, at least in the eyes of the book's sources or authors, Rehnquist was referred to with the following descriptions sprinkled throughout the book: easygoing, good-natured, thoughtful, diligent, a crisp intellect, a solid conservative, well-reasoned, sophisticated analysis, a clever tactician, very casual, friendly toward clerks, a team player, remarkably unstuffy, and affable. Pretty good for a book critical of virtually everyone on the Supreme Court. But that reflected the man.

He loved to play tennis with his clerks. He played once a week with his clerks. He only hired three clerks because he wanted to have a set doubles game every week. Asked if he hired clerks based on their athletic ability, he said, "Of course not. It's only one of several factors."

He wrote clever lines. Here's one lengthy passage from a 1977 case:

Those who valiantly but vainly defended the heights of Bunker Hill in 1775 made it possible that men such as James Madison might later sit in the first Congress and draft the Bill of Rights to the Constitution. The post-Civil War Congresses which drafted the Civil War Amendments to the Constitution could not have accomplished their task without the blood of brave men on both sides which was shed at Shiloh, Gettysburg, and Cold Harbor. If those responsible for these Amendments, by feats of valor or efforts of draftsmanship, could have lived to know that their efforts had enshrined in the Constitution the right of commercial vendors of contraceptives to peddle them to unmarried minors through such means as window displays and vending machines located in the men's room of truck stops, notwithstanding the considered judgment of the New York Legislature to the contrary, it is not difficult to imagine their reaction. (17)

Rehnquist was at the helm of major national events. He presided over the impeachment trial of President Bill Clinton. Of his experience presiding over that trial, he later said he did nothing of note and did it very well. He presided over and kept the Court intact after perhaps the single most controversial episode in modern Supreme Court history, *Bush v. Gore*. In that case, he wrote a concurring opinion joined by Justices Scalia and Thomas that

From the Bench: The Constitutional Statesmanship of Chief Justice William Rehnquist.(Essay)

was based on the precise text and history of Article Two, and that was more persuasive to many than the per curiam majority opinion.

Despite suffering badly from cancer, he valiantly made his way to the inauguration stand in 2005 to administer the oath to President George W. Bush. He led the Court and the federal judiciary with a firm hand on the wheel, but without seizing the spotlight. One senses that his former clerk John Roberts is following the Rehnquist model and seeking to lead the Court and the judiciary with that same firm but humble touch.

Despite his affability, Rehnquist was efficient. He hated wasted time. He bristled at logistical messes. The year I clerked at the Court, I was put in charge of organizing a baseball game outing to Camden Yards with the Rehnquist, Scalia, and Kennedy clerks. The Washington Nationals did not exist yet, so we were off to Baltimore. But not just the clerks. The chief justice decided he wanted to go as well, along with Justice Kennedy. I bought all the game tickets; I arranged the train transportation to Baltimore from Union Station. At the time, there was a direct train to the stadium.

It seemed simple, but I was scared that some screwup would occur. 'What was I doing in charge of the chief justice?' I thought to myself. Happily, the whole day went off without a hitch, although I can't say I enjoyed any of it until we were all safely back in DC and went our own ways.

But I do remember when the chief said to me as we left Union Station at the end of the day that the trip had been enjoyable and very well organized. Maybe it was just a throwaway line, but I was excited. From the chief, that was the highest praise. It was as if Walter Berns had told you that you were an excellent constitutional scholar. It doesn't get any better than that.

For those who saw him only in oral argument, Rehnquist could seem tough and gruff at times. When I argued an attorney-client privilege case in the Supreme Court in 1998, Rehnquist quickly asked me if anyone supported the position I was advocating. I quickly cited two academic commentators, Mueller and Kirkpatrick. Without missing a beat, Rehnquist with evident disdain said, 'Who are they?' When I explained that they had written a treatise on evidence, Justice John Paul Stevens unhelpfully chimed in, 'We usually rely on Wigmore.'

Later in the argument, Justice Stephen Breyer returned to the theme and asked whether anyone supported another position I was advocating in the case. And I said: 'With hesitation at raising their names again,' and I then paused and turned my head to look at the chief justice. He smiled and laughed. And then I proceeded to repeat that Professors Mueller and Kirkpatrick supported that position, too.

The bar for humor at the Supreme Court is admittedly pretty low, but I was nonetheless pleased that I somehow cleared it that day and did so without irritating the chief justice. Indeed, in the official transcript of the oral argument, which I double-checked this morning just to make sure I was not imagining things, the transcript says, "Laughter." Thank God.

That moment made it a little easier for me when Chief Justice Rehnquist wrote the majority opinion rejecting my position in the case. But, by the way, he cited Mueller and Kirkpatrick.

As we celebrate Constitution Day, I am honored to have been able to say a few words about my first judicial hero, William Rehnquist. Working on these remarks has been a labor of love and a sign of my deep appreciation and respect for Walter Berns and for William Rehnquist, two constitutional statesmen.

Notes

(1.) Linda Greenhouse, 'William H. Rehnquist, Chief Justice of Supreme Court, Is Dead at 80,' New York Times, September 4, 2005, <http://www.nytimes.com/2005/09/04/politics/william-h-rehnquist-chief-justice-of-supreme-court-is-dead-at-80.html>.

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- (2.) William H. Rehnquist, "The Notion of a Living Constitution," Harvard Journal of Law & Public Policy 29, no. 2 (Spring 2006): 401-15, http://www.law.harvard.edu/students/orgs/jlpp/V0129_N02_Rehnquist.pdf. Reprinted from Texas Law Review 54 (1976): 693.
- (3.) Rehnquist, "The Notion of a Living Constitution," 402.
- (4.) Ibid, 408.
- (5.) David L. Shapiro, "Mr. Justice Rehnquist: A Preliminary View," Harvard Law Review 90, no. 2 (December 1976): 293-357
- (6.) John A. Jenkins, "The Partisan," New York Times, March 3, 1985, <http://www.nytimes.com/1985/03/03/magazine/the-partisan.html>.
- (7.) California v. Minjares, 443 U.S. 916, 918-19 (1979) (Rehnquist, J. dissenting from denial of stay).
- (8.) Furman v. Georgia, 408 U.S. 238, 466 (1972) (Rehnquist, J., dissenting).
- (9.) Ibid, 467
- (10.) Ibid, 468.
- (11.) Wallace v. Jaffree, 472 U.S. 38, 107 (1985) (Rehnquist, J. dissenting).
- (12.) United States v. Lopez, 514 U.S. 549, 552 (1995) (parenthetical references omitted).
- (13.) Ibid, 564
- 14 Ibid, 567
- (15.) Industrial Union Department, v. American Petroleum Institute, 448 U.S. 607, 687 (1980) (Rehnquist, J. concurring).
- (16.) Abbe R. Cluck and Lisa Schultz Bressman, "Statutory Interpretation from the Inside--An Empirical Study of Congressional Drafting, Delegation, and the Canons, Part I," Stanford Law Review 65, no. 5 (June 2013): 1003, http://www.stanfordlawreview.org/wp-content/uploads/sites/3/2013/06/Gluck_Bressman_65_Stan._L._Rev._901.pdf.
- (17.) Carey v. Population Services International, 431 U.S. 678, 717 (1977) (Rehnquist, J. dissenting).

About Brett Kavanaugh

Brett Kavanaugh is a judge on the US Court of Appeals for the DC Circuit. He was nominated to the Court by President George W. Bush and confirmed by the Senate in 2006. Before his judicial appointment, Judge Kavanaugh served in the White House for President Bush for more than five years. From 2003 to 2006, he was assistant to the president and staff secretary, and from 2001 to 2003, he was associate counsel and then senior associate counsel to the president. Judge Kavanaugh was a partner at Kirkland & Ellis in Washington, DC, from 1997 to 1998 and again from 1999 to 2001. From 1994 to 1997 and for a period in 1998, Judge Kavanaugh was associate counsel in the Office of Independent Counsel Kenneth W. Starr. In 1993-94, Judge Kavanaugh served as a law clerk to Justice Anthony M. Kennedy of the US Supreme Court. He previously clerked for Judge Walter Stapleton of the US Court of Appeals for the Third Circuit and for Judge Alex Kozinski of the US Court of Appeals for the Ninth Circuit. Since becoming a judge, Judge Kavanaugh has taught full-term courses on separation of powers at Harvard Law School, as well as courses at Georgetown University Law Center and Yale Law School.

Congress and the President in Wartime

By **Brett M. Kavanaugh** Wednesday, November 29, 2017, 3:00 PM

PDF VERSION

A review of David Barron's *Waging War: The Clash Between Presidents and Congress, 1776 to ISIS* (Simon & Schuster, 2016).

Perhaps the single most important question in American constitutional law is whether the president has authority to take the nation into a foreign war without congressional approval—that is, without either a congressional authorization for the use of force or a congressional declaration of war. A second and related question is whether Congress has authority to regulate the president's conduct of war—for example, to regulate activities such as surveillance, interrogation, detention, and the use of military commissions.

As we recently passed the 16th anniversary of the September 11 attacks on our nation, I found myself engrossed in Judge David Barron's book, "Waging War," which tackles those questions.

Barron is a distinguished judge on the First Circuit and a respected professor at Harvard Law School. During the Clinton and Obama administrations, he served in the Office of Legal Counsel in the Department of Justice. So Barron has the advantage of having confronted in practice the questions he has studied as a scholar.

Barron's book will no doubt become an essential resource for executive officials, legislative officials, and judges who wrestle with separation-of-powers problems in the national security arena. The book is essential because Barron supplies chapter after chapter of history of how presidents, Congresses, and courts have handled war powers issues—from the Revolutionary War to the present.

When Barron was first contemplating a book about the president's war powers, he says that he mentioned his proposed topic to his father—himself a law professor—who responded, "I guess you will need to figure out what every president did" (p. 539). That was wise advice. Why? To borrow James Madison's words, historical practice can help settle the meaning of the Constitution, especially when the constitutional text is unclear or vague. *See* Letter to Spencer Roane (Sept. 2, 1819), in 8 Writings of James Madison 450 (G. Hunt ed. 1908). The Supreme Court has stated many times that historical practice informs our understanding of what the Constitution means, particularly in separation-of-powers and national security cases. *See, e.g., Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2091 (2015); *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981). It is therefore crucial for presidents and their advisers, legislators and their advisers, and justices and judges to know the historical practice in detail.

What does Barron's survey of historical practice show us about those two major questions of war powers law?

First, Barron argues that, with rare exception, presidents from the founding to the present have led the nation into large-scale foreign wars only when they have obtained congressional authorization.

Commentators and the media sometimes say that presidents have often led the nation into war unilaterally and that presidents lawfully may do so. But Barron says that those assertions about the Constitution and historical practice are wrong.

Barron starts with the original understanding of the Constitution on this point. He explains that the framers themselves "leaned hard in Congress's favor when it came to making the crucial decision between war and peace" (p. 22). The text of Article I of the Constitution grants Congress numerous war powers, including the power to declare war. The text of Article II makes the president the commander in chief, thereby ensuring civilian control of the military, among other things. But Article II does not afford the president, at least expressly, any other unilateral war powers. Barron points out that even Alexander Hamilton, who generally favored a strong executive, emphasized in "Federalist 69" that the president lacked the power to unilaterally take the nation into war.

As Barron describes it, that founding understanding has been followed throughout American history: Congress has authorized almost every substantial foreign war waged by the United States. Those wars include: the Quasi-War against France in the late 1700s, the War of 1812 against Great Britain, the Mexican-American War in the 1840s, the Spanish-American War in the 1890s, World War I, World War II, the Vietnam War (through the Gulf of Tonkin Resolution), the Persian Gulf War, the war against al-Qaeda and related terrorist groups beginning in 2001, and the war against Iraq beginning in 2003.

After painstakingly reviewing the text and original understanding of the Constitution, as well as longstanding historical practice, Barron concludes that Congress must authorize or declare war and that presidents do not have unilateral authority to take the nation into war. Barron recounts and concurs with Madison's statement in the run-up to the War of 1812 against Great Britain: Whether to go to war is a question "which the Constitution wisely confides to the Legislative Department of the Government" (p. 85).

To be sure, it is possible that some presidents throughout our history have sought congressional authorizations or declarations of war for political reasons rather than perceived constitutional obligation. After all, as a matter of politics and prudence, it makes sense for presidents to seek congressional buy-in for what may be a difficult and costly war. In Barron's view, however, what ultimately matters for purposes of assessing the historical practice and the Constitution is what presidents have done, not the underlying motivations for why they might have done it.

The significant exception to the history is the Korean War. But Barron leaves little doubt that he thinks the Korean War was an unconstitutional exception to the firmly rooted constitutional understanding and historical practice. The subsequent major wars—Vietnam, the Persian Gulf War, the war against al-Qaeda, and the war against Iraq—all were congressionally authorized. Those subsequent examples underscore, in Barron's view, that Korea was a one-off anomaly, not a precursor to a changed understanding of the Constitution's allocation of war powers.

As Barron points out, presidents have the exclusive, preclusive authority (and duty) to repel attacks on the United States and on U.S. persons and property, even without specific congressional authorization. *See, e.g., The Prize Cases*, 67 U.S. 635 (1863). But that is different from the question of whether presidents may unilaterally initiate a war with a foreign country. On that latter question, Barron argues, the answer is no.

What about smaller-scale and temporary uses of U.S. military force abroad? Barron suggests that historical practice has developed in such a way as to allow presidents to take such actions in certain circumstances. But Barron says that those examples of relatively minor military activities do not alter the basic constitutional framework in which Congress must authorize any significant U.S. war in a foreign country. At most, Barron seems to suggest, those examples constitute a limited historical exception to the basic constitutional rule.

How does the War Powers Resolution of 1973 factor into Barron's analysis? The most important provision of the War Powers Resolution forbids presidents from engaging in hostilities in foreign countries for more than 90 days without congressional authorization. Commentators and the media sometimes suggest that most presidents believe the War Powers Resolution to be unconstitutional. But Barron says that this common account of the presidents' supposed views is not in fact correct, at least as to the War Powers Resolution's most important provision, the 90-day provision. Barron contends that no president has definitively stated that this particular provision is unconstitutional. And in practice, almost every president has complied with the 90-day requirement. I say "almost" because there is a question about President Barack Obama and Libya. Of course, President Obama did not claim that this provision of the War Powers Resolution was unconstitutional under Article II. Rather, he said that the nation's activities in Libya did not constitute hostilities for purposes of the War Powers Resolution, although many observers thought that characterization to be a stretch.

Interestingly, the War Powers Resolution in practice may have green-lighted presidents to take military action for up to 90 days without any additional, specific congressional authorization. Although the War Powers Resolution itself disclaims that possibility, it appears to have become a perhaps-unanticipated result of the War Powers Resolution as it has played out in the real world.

In any event, based on historical practice and the War Powers Resolution, Barron says that Congress and the various presidents seem to have reached a "tacit pact" that tolerates "small-scale, short-term commitments of troops" without congressional authorization but requires "full congressional backing" for "[l]arger and more enduring commitments of force" (pp. 388–89).

Although Barron's historical study is comprehensive, a few important issues warrant further consideration in the future. For example, Barron treats both congressional authorizations and declarations as satisfying the Constitution's requirement that Congress make the crucial decision between war and peace. He could perhaps do more in the future to explain the relationship between a congressional authorization for the president to use force and a congressional declaration of war. Both must be signed by the president (or, unlikely as it may be, passed over the president's veto). The difference between an authorization and a declaration appears to boil down to a question of delegation. When Congress *authorizes* the president to use force, the question of whether and when to initiate hostilities has been delegated to the president, subject to whatever constraints the authorization specifies. When Congress *declares* war against a foreign nation, the nation is immediately in a state of war, which can matter for purposes of certain domestic and international laws. But from the perspective of the Constitution, Barron concludes that both mechanisms satisfy the Article I requirement that Congress make the crucial decision whether to take the nation into war.

Another question that warrants further consideration is the role of the federal courts, and ultimately the Supreme Court, in policing the constitutional and statutory lines restraining the president, assuming Barron is correct about where the lines are drawn. Barron does not fully address that separate question. On the one hand, cases from *Youngstown* to *Boumediene* to *Zivotofsky I* suggest that courts perform their

usual role even in the national security context, so long as a plaintiff has standing. On the other hand, on the ultimate question of whether a particular war is lawful, would the Supreme Court decide that a proposed or ongoing presidential use of force is unlawful and approve a declaratory judgment or injunction? Unclear.

In short, Barron advances an important originalist and historical-practice case that presidents constitutionally must obtain—and ordinarily have obtained—congressional authorization to take the nation into any substantial foreign war.

Second, Barron argues that, from the founding to the present, Congress has regulated the president’s conduct of war, on matters such as surveillance, detention, interrogation, military commissions, and other incidents of war.

Barron here builds on two landmark Harvard Law Review articles that he co-authored with Professor Marty Lederman. Those articles argued that Congress possesses the constitutional power to regulate the president’s wartime activities, including surveillance, detention, interrogation, and the use of military commissions, and that presidents do not have much (if any) authority to disregard statutes regulating the conduct of war.

In his book, Barron more fully examines the history of congressional regulation of those activities, as well as presidential responses. With respect to those activities, Barron explains, presidents are “mired in a swamp of statutes” (p. xii). And Barron demonstrates that presidents have complied with those statutes in most circumstances. Today, for example, think about the Foreign Intelligence Surveillance Act, the Military Commissions Act, the War Crimes Act, the Non-Detention Act, the anti-torture statutes. The list goes on. Congress has regulated many aspects of war and national security activities. To be sure, presidents may argue as a matter of policy against certain kinds of legislation. And they may read legislation as favorably as they can in certain cases (a practice that is hardly limited to war-related statutes). But presidents usually do not claim a general Article II power to ignore congressional statutes regulating wartime activities.

Barron starts from the beginning. Indeed, he starts before the beginning. Even before the Constitution, Barron explains, George Washington complied with regulation of his wartime activities by the Continental Congress (although it could be argued that the Continental Congress was simultaneously the executive and legislative authority of the newly united states). Throughout the war, Washington remained committed to the principle that Congress was supreme, even when he disagreed with Congress’s decisions.

Barron argues that Washington’s understanding of Congress as supreme on questions about the conduct of war was shared by the framers who allocated the war powers at Philadelphia in 1787. Article I grants Congress the power not only to declare war, but also to “raise and support Armies,” “provide and maintain a Navy,” “make Rules concerning Captures on Land and Water,” “make Rules for the Government and Regulation of the land and naval Forces,” and, of course, “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers.”

Just a decade after the Constitution took effect, President John Adams “accepted a stunning degree of congressional control” over the war with France (p. 38). And Adams was not an isolated example. The early history of the country, Barron explains, “produced little precedent to suggest the president—by dint of his title, commander in chief—enjoyed an exclusive, uncontrollable power to determine the conduct of war. The Constitution did not by terms secure it. The delegates to the Constitutional Convention did not seem to endorse it. Congress had passed laws ... that were predicated on the assumption that the Constitution was not intended to enshrine it. The Supreme Court issued rulings rejecting it. Presidents conducted themselves as if they did not have it” (p. 99).

That said, during Franklin Roosevelt’s and Harry Truman’s administrations, debate erupted anew over the allocation of war powers. Some advisers—such as Henry Stimson and Dean Acheson—apparently believed that presidents need not comply with legislation regulating the conduct of war. Stimson, for example, “urged Roosevelt to reject a proposed statutory limitation on his right to deploy military convoys in the Atlantic Ocean” (p. 245). And Acheson argued that Congress could not “impose limitations” on Truman’s activities with respect to Korea (p. 305). Such legislation, those advisers argued, infringed on the president’s commander-in-chief power, which they thought gave the president the exclusive, preclusive authority both to take the nation into war *and* to decide how to wage it. Other advisers, however, strongly counseled against that reading of Article II, arguing that it would render the president equivalent to a king. And ultimately, Roosevelt and Truman did not endorse it.

To be sure, Presidents Roosevelt and Truman—like presidents before and after them—sometimes read statutes not to mean what the statutes seemingly said. But those presidents did not directly advance a general Article II power to ignore statutes regulating their conduct of war.

One of the advisers who counseled caution to Roosevelt was Attorney General Robert Jackson, who would of course later serve on the Supreme Court. In that latter capacity, Jackson would author the single most influential tract on national security separation-of-powers law.

In the famous *Youngstown* case decided in 1952, Justice Jackson’s concurring opinion established the framework that has become paramount in national security separation-of-powers law. Many people pay homage to the Jackson opinion in *Youngstown*. But fewer people really understand what it says.

Jackson articulated three categories of presidential wartime action. In category one, presidents are acting with congressional authorization. In category two, presidents are acting with neither congressional authorization nor in the face of a congressional prohibition. In category three, presidents are acting in the face of a congressional prohibition.

The Jackson framework raises two fundamental issues.

First, how do we determine which category a president's action falls in? It is often assumed that it is easy to tell whether a presidential action falls into category one, two, or three. But it is not easy. It is a question of statutory interpretation that poses all the difficulties that statutory interpretation questions generally pose.

For example, in *Youngstown* itself, Jackson said that Truman's action—seizure of private steel mills in the United States—fell into category three. No specific congressional statute prohibited what Truman did (as Jackson acknowledged). But Jackson concluded that a phalanx of related statutes and failed congressional proposals together reflected a congressional intent to disallow Truman's action. In dissent, Chief Justice Fred Vinson did not directly take issue with Jackson's tripartite framework. Rather, because no statute expressly prohibited what Truman had done, Vinson thought that Truman's action fell into what would be category one or two, not category three. In Vinson's view, Truman's action was therefore permissible; at the same time, Vinson said that Congress still had authority to enact future legislation to prohibit Truman's action (and thereby move the case to category three). But Congress had not yet acted to disallow Truman's action, Vinson argued. For its part, Justice Hugo Black's majority opinion treated Truman's seizure as, in essence, a category two case. But Black made clear that the president has no authority in category two—at least when taking action against U.S. citizens in the United States.

The bottom line, as *Youngstown* itself illustrates, is that ordinary but difficult debates over statutory interpretation can rear their heads when courts try to sort a presidential action into one of the three Jackson categories.

Second, what happens in each category? In category one, presidents act with the greatest power they can have in the war powers arena. Their authority is “at its maximum” because it includes all that they have in their own right “plus all that Congress can delegate.” 343 U.S. 579, 635 (1952) (Jackson, J., concurring). As the Supreme Court later made clear in *Hamdi v. Rumsfeld*, when Congress authorizes war, that authorization includes an authorization for presidential activity such as surveillance, detention, interrogation, and the use of military commissions, among other incidents of war—unless Congress has enacted other legislation restricting those activities. But even in category one, a president may still lose if an action violates some other constitutional constraint. For example, if Congress enacts a statute that a president later implements, but it turns out that the statute violates the First Amendment or the habeas corpus clause, then the president will lose even though the president is acting in category one. That is a lesson of *Boumediene v. Bush*, where the Supreme Court concluded that a provision of the Military Commissions Act of 2006 was unconstitutional. Other than that, however, presidents win in category one.

In category two, presidents operate in a “zone of twilight,” and the outcome depends on what Jackson stylishly but very unhelpfully called “contemporary imponderables.” 343 U.S. at 637 (Jackson, J., concurring). Here, as elsewhere in constitutional law, historical practice is likely to fill the void.

In category three, presidents are operating at the “lowest ebb” of their power and “what is at stake is the equilibrium established by our constitutional system.” *Id.* at 637–38. In that category, presidents usually lose, as Jackson explained, and as later Supreme Court cases such as *Hamdan v. Rumsfeld* demonstrated. But not always. The problem is that Jackson was not precise about when the president could prevail in category three. That question has bedeviled us ever since *Youngstown*. But Barron argues that the general guideposts appear clear as of now. In Supreme Court law, it seems settled that presidents possess exclusive, preclusive power to supervise, direct, and remove subordinate officers in the national security realm, and also possess exclusive, preclusive power to direct specific troop movements, as the court recently repeated in *Hamdan v. Rumsfeld*. Congress may not interfere with those presidential powers.

But beyond that, Barron says that presidents do not have exclusive, preclusive power to disregard congressional statutes regulating wartime activities such as surveillance, detention, interrogation, and the use of military commissions. The bulk of Barron's book is, in effect, an all-out effort to show that his position on that point is consistent with—even dictated by—the grand sweep of American history. Barron says that this approach has been followed throughout most of American history, including (after some initial DOJ opinions that suggested to the contrary) by the George W. Bush administration in the wake of September 11, 2001, as Barron details beginning on page 422 of his book. By taking us through numerous historical examples of the many statutes Congress has passed regulating those kinds of wartime activities and of how presidents have complied with those statutes, Barron explains that the situations where a president may win in category three are rare indeed.

In short, Barron advances a forceful originalist and historical-practice case that presidents must and do comply with congressional regulation of wartime activities such as surveillance, detention, interrogation, and the use of military commissions.

As to both the initiation of war and the conduct of war, Barron contends that Congress—not the president—possesses the ultimate authority. In support of his conclusion, Barron presents a full-throated argument about the historical practice. He also sets forth an important originalist argument about the Constitution’s allocation of war powers, although some of course may disagree with him on the original meaning.

Barron does not directly address the normative question of whether this allocation of power is the best structure for defending America and preserving liberty. But he leaves little doubt that he thinks this system of shared and separated powers is far superior to a system where a president has unilateral, exclusive, preclusive power to decide whether to go to war and how to conduct war.

Some academic scholarship is far removed from the real world and is irrelevant to judges deciding cases. But some academic scholarship is quite helpful to courts and lawyers. In my 11 years as a judge, David Barron’s articles have been extraordinarily valuable to me as I have thought about national security law and addressed a variety of challenging national security cases.

Barron’s book is similarly essential reading. Those inside and outside of government who confront questions of national security law in general and national security separation-of-powers questions in particular would be wise to make themselves aware of Barron’s important scholarship, even when (actually, especially when) they might be skeptical of or disagree with Barron’s analysis or conclusions. In my office, Barron’s book will occupy a permanent place on the bookshelf next to my desk, along with my dog-eared copies of his prior articles.

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Topics: Book Reviews, Executive Power, AUMF

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Federal Courts, Practice and Procedure

Symposium: Justice Scalia and the Federal Courts

Brett M. Kavanaugh^a

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KEYNOTE ADDRESS: TWO CHALLENGES FOR THE JUDGE AS UMPIRE: STATUTORY AMBIGUITY AND CONSTITUTIONAL EXCEPTIONS

I am honored to be back at Notre Dame Law School. This is one of the very best law schools in the United States. I love coming here. I thank the *Law Review* for hosting this symposium in honor of Justice Scalia. I am grateful to Professor Barrett for the generous introduction and for her outstanding scholarship and teaching at this law school. She is an inspiration to her students and an inspiration to me. I thank my many friends on the faculty for being here. I want to single out my longtime friend and colleague Bill Kelley. We have worked together on many challenging assignments in the past. He is a special person and a great teacher, scholar, and lawyer. I am proud to be his friend.

I am Catholic. This university holds a special place in the hearts and minds of most American Catholics, and it represents the best of the Catholic educational tradition. That tradition is one that emphasizes service--caring for the poor, the neglected, the vulnerable. It lives out the Gospel of Matthew and teaches that your most important duty is to take care of the least of your brothers and sisters. At the same time, this university's tradition is one of inclusiveness, of welcoming people of all faiths and beliefs. And the tradition is one of teaching and learning, always probing and studying and thinking about how to make our country and our world a better place.

***1908** When I received the invitation to be here, I will admit that I glanced at the schedules for both the women's and men's basketball teams and hoped I might be able to catch a game. Alas, no home games this week. I recall that my very first trip to Notre Dame was almost exactly thirty years ago to the day to watch Notre Dame play against then-number-one North Carolina in men's basketball. I was here with a bunch of my Georgetown Prep high school friends who went to Notre Dame. Notre Dame upset North Carolina, and it was a raucous scene and a wild weekend. Fortunately, there was no social media back then.

Just a couple of nights ago, Neil Gorsuch was nominated to the Supreme Court. Neil and I actually went to high school together at Georgetown Prep. I was two years ahead of him. And then we clerked together the same year for Justice Kennedy and got to know each other very well. We worked together in the Bush Administration, and we both became judges in 2006. We serve together now on the Appellate Rules Committee of the Judicial Conference, and were coauthors along with Bryan Garner and several other judges of a book on precedent. Don't try to read that book all at once is my only piece of advice. So I know Neil Gorsuch well and have known him seemingly forever. He is a good friend. He is kind, funny, hard working, and brilliant. He's a great writer and independent. With his smarts, his character, and his understanding of life and law, I firmly believe he will be one of the great Justices in Supreme Court history, like a Jackson or a Scalia. Watching him the other night, I felt immensely and overwhelmingly proud of him. And proud of Georgetown Prep, I might add.

Neil was of course nominated to replace Justice Scalia, for whom we are gathered here. I do not want to overstate my relationship with Justice Scalia. But I loved the guy. For starters, he was always so funny when I saw him at dinners or legal events or anywhere. He had a magnificent wit and put everyone at ease. But beyond that, Justice Scalia was and remains a judicial hero and role model to many throughout America. He thought carefully about his principles, he articulated those principles, and he stood up for those principles. As a judge, he did not buckle to political or academic pressure from the right or the left. He was fiercely independent.

For many decades, moreover, he tirelessly and at substantial financial sacrifice devoted himself to public service, teaching, and lecturing. We all benefited from that. If you asked him to do something, he said yes if there was any way he could possibly do it. He was anywhere and everywhere, from the Red Mass, to far-flung legal conferences around the world, to classes at law schools, to the annual Friendly Sons dinner on St. Patrick's Day (and you might be aware, he was not Irish). He wanted to give back. He was a great example for public servants and teachers.

He loved his wife and family. He was a man of faith. And he really was a man for others. He inspired me to try to do more and to do better in all *1909 facets of my life, and I hope he inspires all of us to do the same. I miss him personally and professionally.

What did Justice Scalia stand for as a judge? It's not complicated, but it is profound. The judge's job is to interpret the law, not to make the law or make policy. So read the words of the statute as written. Read the text of the Constitution as written, mindful of history and tradition. The Constitution is a document of majestic specificity defining governmental structure, individual rights, and the role of a judge. Remember that the structural provisions of the Constitution--the separation of powers and federalism--are not mere matters of etiquette or architecture, but are essential to protecting individual liberty. Justice Scalia's memorable dissent in *Morrison v. Olson* is of course the best example of that.² Remember that courts have a critical role, when a party has standing, in enforcing those separation of powers and federalism limits. For judges, Justice Scalia would say, don't make up new constitutional rights that are not in the text of the Constitution. But don't shy away from enforcing constitutional rights that are in the text of the Constitution. Changing the Constitution is necessary at times, but it is to be done by the people through the amendment process. Changing policy within constitutional bounds is for the legislatures.

That's about it. Simple but profound. And it made a lot of converts.

But more work remains. I want to touch on two aspects of Justice Scalia's jurisprudence and the Court's jurisprudence: statutory interpretation and constitutional interpretation. And I am going to explain how uncertainty in certain aspects of statutory and constitutional interpretation is affecting the Court, and the vision of the Court that the American people hold.

Justice Scalia described the rule of law as a law of rules. He believed in clear rules that would lead to predictable results and constrain judicial discretion. As John Manning has said, one of the defining features of the Scalia jurisprudence is to set forth rules and principles that were not balancing tests that could be used by judges to make it up as they go along.³ In Justice Scalia's book *A Matter of Interpretation*, he explained that federal judges are not common-law judges and should not be making policy-laden judgments.⁴ Along the same lines, Chief Justice Roberts has famously articulated the vision of the judge as umpire, which captures the same basic point in a catchy sports metaphor.

I believe very deeply in those visions of the rule of law as a law of rules, and of the judge as umpire. By that, I mean a neutral, impartial judiciary that decides cases based on settled principles without regard to policy preferences or political allegiances or which party is on which side in a particular case. When we watch a Notre Dame-Michigan game, we do not ask whether *1910 the referees are Irish fans or Wolverines fans. Yet when we watch the Supreme Court, too many Americans think the decision is pre-baked based on the party of the President who appointed the Justices or the policy

preferences of the Justices. That bothers me, and I have been thinking about the causes of that, and whether there are at least some modest cures for that.

Let me talk first about statutes.⁵ Statutory interpretation has improved dramatically over the last generation, thanks largely to Justice Scalia. Justice Scalia brought about a massive and enduring change in statutory interpretation. Text matters. The text of a law is the law. As Justice Kagan recently stated, “we’re all textualists now.”⁶ When the text is clear, the Court says, follow the text unless the text is absurd or unless the text is overridden by some clear statement canon of interpretation. That is a neutral principle: It is not pro-business or pro-labor, pro-manufacturer or pro-environment, pro-plaintiff or pro-defendant. And Justice Scalia is largely to thank for that.

But statutory interpretation is still troublingly imprecise and uncertain in many cases.

Here’s my biggest problem. Several substantive canons of statutory interpretation, such as constitutional avoidance, legislative history, and *Chevron*, depend on an initial determination of whether the text is clear or ambiguous. But how do courts know when a statute is clear or ambiguous? In other words, how much clarity is sufficient to call a statute clear and end the case? Quite simply, there is no good or predictable way for judges to do this. Judges go back and forth. One judge will say it is clear. Another judge will say, “No, it’s ambiguous.” Neither judge can convince the other. Why not? The answer is that there is no right answer.

There are two separate problems here.

First, how much clarity is enough? Sixty-forty? Eighty-twenty? Who knows.

Second, let’s imagine we can agree on eighty-twenty. How do we apply that? How do we know whether and when a statute is eighty percent clear?

The simple and troubling truth is that there is no definitive guide for determining whether statutory language is clear or ambiguous. As Professor Ward Farnsworth has written, judgments about ambiguity are dangerous “because they are easily biased by strong policy preferences.”⁷

Does this really matter in the real world of judicial decisionmaking? Yes. I am here to tell you that it matters in a huge way in many cases of critical importance to the Nation. And it matters in a way that threatens the vision of the judge as umpire.

***1911** Consider the constitutional avoidance canon, which was at issue in cases such as *Wisconsin Right to Life* and perhaps most famously *NFIB v. Sebelius*.⁸ In *NFIB*, the whole issue of whether the Affordable Care Act’s individual mandate would survive came down to the constitutional avoidance doctrine. Was the statute’s reference to a penalty sufficiently ambiguous that it could be considered a tax and therefore avoid unconstitutionality under the Taxing Clause? The four dissenters said that the statute was not ambiguous. Chief Justice Roberts said that the statute was ambiguous. And on that question, the fate of the individual mandate and the healthcare law was decided.

Or consider legislative history. Now, some judges never or rarely use legislative history in part because it is akin to picking out your friends at a party.⁹ But many judges use legislative history, although they hasten to add that they use it only when a statute is ambiguous. That, indeed, is what the Supreme Court typically says as well. But think about the problem this causes. All it takes to pick out your friends--that is, to interpret the statute in a way that leads to a better policy outcome--is to find the statute ambiguous. That creates a huge incentive for judges to find statutes ambiguous. If there is no coherent way to determine whether a statute is clear or ambiguous, that is a problem for the goal of neutral statutory interpretation.

Third, consider the *Chevron* doctrine. We see this doctrine all the time on my court with cases involving the huge agencies: EPA, the FCC, the SEC, and the like. *Chevron* tells us that we must defer to an agency's reasonable interpretation of a statute if the statute is ambiguous.⁰ To begin with, the *Chevron* doctrine encourages agency aggressiveness on a large scale. Under the guise of ambiguity, agencies can stretch the meaning of statutes enacted by Congress to accommodate their preferred policy outcomes. I saw this firsthand when I worked in the White House, and I see it now from the other side as a judge. But think about what this means in real cases in courts. Say you have a really important agency rule that is being challenged before a three-judge panel. The question is whether the agency rule is authorized under the implementing statute. One judge says that the statute is clear and the agency loses. Two other judges say that the statute is ambiguous, so they defer to the agency even though they may agree with the first judge on what is the best reading of the statute. The result is that the agency wins, even though none of the three judges thought that the agency had the better reading of the statute.

The legality of a major agency rule may--and in my experience on many occasions does--turn not on whether the judges think the agency's interpretation of the statute is the best interpretation, but rather on whether the *1912 statute is ambiguous. That is true even though there is no real objective guide for determining whether a statute is ambiguous.

I should note, parenthetically, that there is a separate concern about *Chevron* as famously expressed by Judge Gorsuch. He said the doctrine is flawed ab initio because the Administrative Procedure Act says that courts should decide questions of law in administrative law cases of this sort. But that's not my issue for today. My issue today is the ambiguity trigger.

So what's the solution to the ambiguity trigger for these various canons? I am not entirely sure, to be candid. I suppose some snarky people might say that Congress should not write ambiguous statutes. But the limits of language are such that that is an impossible goal to achieve in all cases, to state the obvious. We cannot eliminate all ambiguity in statutes.

But we can stop using ambiguity as the trigger for applying these canons of statutory interpretation. In my view, judges should strive to find the best reading of the statute, based on the words, context, and appropriate semantic canons of construction. To be sure, judges may deviate from the best reading if there are any applicable plain statement rules--such as the presumption against extraterritoriality or the presumption that statutes do not eliminate mens rea requirements. Judges may also apply the absurdity canon. But otherwise, courts should go with the best reading of the statute.

For example, instead of applying the constitutional avoidance canon in its current form, courts would determine the best reading of the statute. If that reading is unconstitutional, then the court would say as much and ordinarily sever that provision of the law from the remainder of the statute.

As to legislative history, it would be used primarily to help identify absurdities but otherwise would play a relatively limited role. It bears mention that legislative history already plays a relatively limited role in statutory interpretation. As Justice Kagan stated two years ago, legislative history is usually icing on a cake already frosted.²

For *Chevron*, courts would simply determine the best reading of the statute. Courts would no longer defer to agency interpretations of statutes. This would help keep agencies within statutory bounds and help prevent a runaway executive branch that exploits ambiguities in governing statutes to pursue its broad policy aims, even in situations where Congress has not enacted legislation embodying those policies.

All of that said, *Chevron* makes sense in certain circumstances, usually when it merges with the *State Farm* doctrine.³ For example, Congress might assign an agency to prevent utilities from charging "unreasonable" rates. In such a case, what counts as "unreasonable" amounts to a policy decision. So courts should be hesitant to second-guess that decision. In that circumstance, Congress has assigned the decision to an executive branch agency *1913 that makes the policy

decision. So the courts should stay out of it for the most part. But *Chevron* has not been limited to those kinds of cases. As of now, *Chevron* is the default rule for all statutes and all agencies.

To sum up on statutes, as of now, determinations of ambiguity dominate statutory interpretation in a way that few people realize. Indeed, even judges seem unaware at times of how fundamental an issue this is. The problem is that there is no objective or determinate way to figure out whether something is ambiguous. This is a major problem for the Scalia vision of constraining the discretion of judges and for the corresponding Roberts vision of the judge as umpire. We have a culture of searching for ambiguity instead of a culture of searching for the best reading of the law. By eliminating that threshold ambiguity trigger in the ways I have described, we can transform from a culture of ambiguity to a culture of law.

Let me turn now to the Constitution.

There is often a debate about originalism versus living constitutionalism. Justice Scalia famously promoted originalism. Originalism is akin to textualism, but it takes account of the fact that the meaning of a word might have changed from the time of enactment to today. When that has occurred, the meaning at the time of enactment controls. But the debate over originalism matters mostly when we are talking about interpreting a provision of the Constitution for the first time. That's not where most big constitutional controversies are erupting at the Supreme Court these days.

Rather, a big debate at the Supreme Court--and the area most in need of help in living up to the vision of judge as umpire--is how to analyze and define implicit *exceptions* to constitutional rights when the Court applies its preexisting precedents that have already interpreted various constitutional provisions.

Two terminology caveats at the outset.

First, don't get hung up on the word "exceptions." Whether you call them exceptions to a right or the contours of a right is irrelevant to my point.

Second, don't get sidetracked by what you think about the underlying right. You may think the Supreme Court erred when it held that the Second Amendment protects an individual right to gun ownership or when it held that the Fourteenth Amendment protects an individual right to abortion. Don't let that sidetrack you from the analysis to follow.

How do we determine the exceptions to constitutional rights?

One possibility, of course, would be that there are no exceptions to constitutional rights unless those exceptions are specified in the constitutional text. That absolutist view was sometimes associated with Justice Hugo Black and the First Amendment.

But that approach does not really work in the wake of incorporation. Let me explain that point.

Take the First Amendment's protection of freedom of speech. As ratified in 1791, the First Amendment applied only against the federal government. The First Amendment, and the Bill of Rights more generally, did not protect liberty against state governments. The Bill of Rights thus preserved ***1914** and even enhanced states' rights to regulate. Therefore, the states could regulate speech and ban libel. Because the states could regulate speech, the federal government did not need to do so. As a result, from 1791 to at least 1868, the First Amendment could have been absolute as applied against the federal government.

After 1868, of course, the Fourteenth Amendment was in place. That Amendment incorporated many of the rights in the Bill of Rights against the state governments as well as against the federal government. ⁴

So one might ask: After incorporation, why not still say that the First Amendment, for example, is absolute against the state governments as well as against the federal government?

The short answer is that taking that absolutist approach would be all but impossible. No exceptions would mean no libel laws and no defamation laws. Threats and incitements would be protected under the First Amendment. Traditional state restrictions on speech could be wiped away if the rights were absolute and incorporated such that they applied against both federal and state governments. And no one was prepared to do that, and no Justice has ever advocated such an approach, as far as I know. Indeed, even Justice Scalia--the foremost textualist and originalist--did not hold that view. No one--and I mean no one, not even Justice Black--articulates that view of the First Amendment.

So what does that mean? It means that there are exceptions to constitutional rights. But how do we determine what the exceptions are? And there it is. That's the battleground. That's the difficulty. That's the threat to the rule of law as a law of rules. That's the threat to the judge as umpire.

No one doubts that there is an expansive right to free speech protected against both federal and state governments. But what regulations of speech are still permissible?

Eventually, when faced with that question in the 1950s and thereafter, the Supreme Court came to adopt various tiers of scrutiny: strict scrutiny, intermediate scrutiny, and rational basis review. These tests were used and continue to be used to decide whether a law may be upheld even though it affects or infringes the individual right in question. Depending on which test is employed, the Court asks whether the regulation serves a compelling governmental interest or an important governmental interest or a legitimate governmental interest. And then the Court asks whether the regulation is necessary or narrowly tailored or substantially related or reasonably tailored to that interest.

If nothing else, I want to underscore that the compelling interest/important interest/strict scrutiny/intermediate scrutiny formulations are rather indeterminate. Those verbal formulations require judges to balance a ***1915** variety of hard-to-measure factors. On one hand, judges must evaluate the strength of the government's interest in the regulation. On the other hand, judges must evaluate how big a burden the regulation places on the relevant right. But those verbal formulations offer little principled guidance for making either determination, much less for weighing the two sides against one another. Those formulations are sometimes empty of real, determinate, objective meaning. At most, they are a mood-setter, but they don't tell us in the end whether to uphold a state ban on semiautomatic rifles or a particular state regulation of doctors who perform abortions or a law that proscribes or limits expenditures in support of political candidates.

Yet those formulations are ubiquitous in constitutional law. We see them in First Amendment cases, Second Amendment cases, Fourteenth Amendment abortion cases, Fourteenth Amendment affirmative action cases, and in several other areas. Indeed, some statutes have borrowed this terminology--most notably, the Religious Freedom Restoration Act.⁵ These are some of the most disputed and controversial areas in law, yet we do not have objective guideposts that can give us neutral ways to decide these cases.

It's sometimes as if you were asked to umpire a baseball game, and you asked the Commissioner of Baseball whether the bottom of the strike zone was at the knees or at the hips, and you were told that it was up to you.

These verbal formulations are challenging because judges have no objective way of deciding whether an interest is "compelling" or "important" without making a judgment about the desirability of that interest. Nor do they have an objective way of deciding whether legislation is sufficiently tailored to that interest without making a judgment about how well the legislation aligns with the state's goals. These verbal formulations therefore do not constrain or guide judges in meaningful or predictable ways. They put judges in the position of making judgment calls that inevitably seem rooted in policy, not law.

What is really going on with these tests, it appears, is old-fashioned common-law judging. This may be unavoidable, as I will explain. But we should be under no illusions that this is not what's happening when those tests are being applied.

To be sure, the hallmark of common-law judging is that legal tests, however difficult to apply in the abstract, acquire meaning as courts apply them with greater frequency. Precedent develops over time, and precedent allows judges to develop the meaning of phrases like “compelling interest” or “narrowly tailored” in particular areas. Nonetheless, across much of constitutional law, the Supreme Court's precedents do not necessarily lead to *1916 predictable results. Why? In part because judges do not all look at the same factors when deciding the scope of constitutional exceptions.

What factors is the Court really looking at when it uses these tests and decides the scope of constitutional exceptions? What is informing the Court's common-law judging in these areas? It seems that there are at least three factors that the Justices are examining. But not all the Justices are looking at the same factors in individual cases or across cases.

Some Justices place heavy reliance on history and tradition, sometimes leavened with contemporary practice, when assessing exceptions to constitutional rights. If a claimed exception to a constitutional right has an historical pedigree or is very common--think libel laws or obscenity laws--then the regulation will be upheld. But otherwise, no exceptions. Justice Scalia relied very heavily on history and tradition when determining whether a particular regulation could be upheld even though it affected a constitutional right. You see that quite clearly in Part III of his *Heller* opinion,⁶ and you see it in many of his First Amendment free speech opinions over the years, such as *Republican Party of Minnesota v. White*.⁷

Some Justices tilt toward liberty at least in some cases, meaning that they will be very reluctant to recognize an exception to a constitutional right unless it is absolutely essential. Justice Kennedy often relies on liberty as a guide in cases of claimed constitutional exceptions. (To be clear, I am referring here to liberty in the sense of freedom from government regulation.)

Some Justices tilt toward judicial restraint or deference, meaning that they often will be very reluctant to overturn the legislature's regulation if it is reasonable. In determining whether the regulation is reasonable, they will evaluate whether the benefits outweigh the costs. Justice Breyer is perhaps the Justice most associated with this approach. He often relies on restraint and deference as guides in cases of claimed constitutional exceptions.

Let's look at a few examples. In discussing examples, let me be clear and state the obvious: I am necessarily speaking generally, and each one of these areas of the law has lots of nuances. I am simplifying for analysis purposes--and no doubt oversimplifying.

Take the First Amendment and campaign finance. You have the right to free speech, and that includes of course the right to advocate for a particular candidate or policy. But we have exceptions to the First Amendment for libel, defamation, threats, obscenity, and the like. Should there be an exception for campaign finance regulation?

The Court generally allows regulation of campaign contributions. But the Court generally does not allow regulation of campaign expenditures. The case articulating that divide was of course the 1976 decision in *Buckley v. Valeo*.⁸

*1917 In recent years, the big expenditures case is *Citizens United*.⁹ That case applied the compelling governmental interest test. And perhaps not surprisingly, we see Justice Kennedy writing the majority opinion tilting toward liberty and the dissent emphasizing deference to the reasonable judgment of the legislature.²⁰

Who's right? Well, that depends on what test you think the Court should apply to assess constitutional exceptions, and then how you would apply that test to this particular issue. But I am not surprised there is such disagreement on this issue, because the test employed--compelling interest--is inherently a common-law test. And common-law tests almost by definition call on judges to assess whether they think the law is important enough to uphold in light of the larger values at stake.

Consider next the Fourteenth Amendment and abortion. The Supreme Court said in *Roe v. Wade* that there was a right to abortion in certain circumstances.²² But that has raised a follow-on issue that has come up again and again in the years since *Roe*. What regulations of abortion are permissible? Informed consent, waiting periods, partial-birth bans, doctor licensing, parental notice, and the like. What is the answer--and more importantly for present purposes, what is the nature of the test we should use to figure out the answer?

Since 1992, the Court has settled on an undue burden test.²² That test is very much a common-law kind of test. Does the law burden the woman's right? And if so, is that burden "undue"? The word "undue" calls for a classic assessment of the pros and cons of the regulation in question. And not surprisingly, that is how Justice Breyer articulated the test in the most recent abortion case, *Whole Woman's Health*.²³

Consider also the Fourteenth Amendment and affirmative action. The Court has recognized a basic equal protection right not to be treated differently by the government on account of your race. But there is a longstanding exception for affirmative action, at least in the realm of higher education. But how do we determine whether a particular affirmative action program passes muster or not? We see the Court battling over strict scrutiny or intermediate scrutiny--and then battling over exactly what constitutes a compelling enough interest for purposes of strict scrutiny. In *Bakke* and post-*Bakke* cases, the Court found that ensuring diversity is a compelling interest but remedying the effects of past societal racial discrimination is not a compelling interest.²⁴ In those cases, the Court also battles over whether the affirmative action program is narrowly tailored to promote the state's interest in *1918 ensuring diversity. On what basis is the Court making those decisions? Is there something in the text of the Constitution that tells us one is good enough and the other is not good enough? Not really. Again, this is common-law judging to define the contours of the exception to the constitutional right.

The last area I will mention is the Second Amendment and guns. *Heller* says you have an individual right to possess certain guns.²⁵ And for present purposes, just take that as a given even if you happen to disagree with *Heller* on that point. The battleground issue now is what exceptions are there to that right.

Interestingly, Part III of Justice Scalia's majority opinion in *Heller* pre-identified a number of exceptions based on history and tradition. He noted for the Court that dangerous and unusual weapons such as machine guns (that is, fully automatic as opposed to semiautomatic guns) had been banned for a long time. He noted that guns had been banned in public buildings.²⁶ Again, Justice Scalia (as I read him) seemed to rely on history and tradition to define the category of permitted exceptions.

Justice Breyer by contrast wrote a separate opinion to say that exceptions to the right should be determined on the basis of reasonableness.²⁷ This was another example of Justice Breyer's common-law approach with an emphasis on judicial restraint and deference to the legislature.

The litigation in the lower courts since *Heller* has centered on which gun regulations are constitutional and which gun regulations are unconstitutional.²⁸ Not surprisingly, this has played out as a battle over whether strict scrutiny or intermediate scrutiny applies. Must the regulations serve a compelling interest or merely an important interest? As I have

stated, I view much of that debate as a smokescreen that is disguising basic common-law balancing and deciding what is reasonable versus what is unreasonable, what is important versus what is not as important.

And in this context in particular, I view *Heller* as having already told us that the content of exceptions to the Second Amendment right is not to be assessed based on strict scrutiny or intermediate scrutiny. Rather, the exceptions are to be assessed by reference to history and tradition. I wrote an opinion to that effect, although I am the first to acknowledge that most other lower-court judges have disagreed.²⁹ The issue has not returned yet to the Supreme Court. To be determined.

In all of these examples, what I want to emphasize is that the exceptions here are ultimately a product of common-law-like judging, with different Justices *1919 emphasizing different factors: history and tradition, liberty, and judicial restraint and deference to the legislature being three critical factors that compete for primacy of place in different areas of the Supreme Court's jurisprudence articulating exceptions to constitutional rights.

So where are we in terms of constitutional decisionmaking on these major cases? Many controversial decisions in constitutional law are about the exceptions. We analyze those cases under the rubric of tests such as compelling or important interests, or strict or intermediate scrutiny, or undue burden, which are often question begging. My concern is that these vague and amorphous tests can at times be antithetical to impartial judging and to the vision of the judge as umpire. We see various factors fight for dominance in these cases: history, liberty, and restraint/deference being three of the most prominent. But there are no guideposts for which factors apply in which cases. No wonder those cases end up being 5-4 and dividing along lines that seem predictable to the public.

At the moment, I do not have a solution to this concern. Requiring judges to focus on history and tradition, as Justice Scalia suggested, might establish a much clearer strike zone for these “exceptions” cases. But regardless of what the solution may be, I think we should square up to the problem.

* * *

In sum, Justice Scalia believed in the rule of law as a law of rules. Chief Justice Roberts similarly wants judges to be umpires, which ordinarily entails judges applying a settled legal principle to a particular set of facts.

I agree with that vision of the judiciary. But there are two major impediments in current jurisprudence to achieving that vision of the judge as umpire. The first is the ambiguity trigger in statutory interpretation. The second is the amorphous tests employed in cases involving claimed constitutional exceptions.

I do not have all the answers to those problems. But we should identify and study these issues. Inspired by Justice Scalia's longstanding efforts to improve the law, we all must continue to pursue the ideal of a neutral, impartial judiciary. Thank you.

Footnotes

a1 United States Circuit Judge, United States Court of Appeals for the District of Columbia Circuit. This is based on remarks delivered at Notre Dame Law School on February 3, 2017.

1 BRYAN A. GARNER ET AL., *THE LAW OF JUDICIAL PRECEDENT* (2016).

2 *See Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

3 *See John F. Manning, Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747 (2017).

- 4 ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann ed., 1997).
- 5 I wrote at length to explain this point about statutory interpretation in my review of Chief Judge Katzmman's book. Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).
- 6 *The Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes* at 8:28, HARV. L. TODAY (Nov. 17, 2015), <http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation>.
- 7 Ward Farnsworth et al., *Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation*, 2 J. LEGAL ANALYSIS 257, 290 (2010).
- 8 NFIB v. Sebelius, 567 U.S. 519 (2012); Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449 (2007).
- 9 See Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment) ("Judge Harold Leventhal used to describe the use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends.).
- 10 See Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).
- 11 See Gutierrez Brizuela v. Lynch, 834 F.3d 1142, 1149 58 (10th Cir. 2016) (Gorsuch, J., concurring).
- 12 Yates v. United States, 135 S. Ct. 1074, 1093 (2015) (Kagan, J., dissenting).
- 13 See Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).
- 14 See McDonald v. City of Chi., 561 U.S. 742, 763 (2010) ("While total incorporation] was never adopted, the Court eventually moved in that direction by initiating what has been called a process of 'selective incorporation, i.e., the Court began to hold that the Due Process Clause fully incorporates particular rights contained in the first eight Amendments. (citations omitted)).
- 15 See Religious Freedom Restoration Act of 1993, Pub. L. No. 103 141, 107 Stat. 1488 (codified as amended at 42 U.S.C. §§ 2000bb 2000bb 4 (2012)); see also 42 U.S.C. § 2000bb 1(b) ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.).
- 16 See District of Columbia v. Heller, 554 U.S. 570, 626 28 (2008).
- 17 536 U.S. 765 (2002).
- 18 424 U.S. 1 (1976) (per curiam).
- 19 Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).
- 20 Compare *id.* at 349 62, and *id.* at 371 72, with *id.* at 394 96 (Stevens, J., dissenting).
- 21 See Roe v. Wade, 410 U.S. 113 (1973).
- 22 See Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (plurality opinion).
- 23 See Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).
- 24 See Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); see also, e.g., Fisher v. Univ. of Tex. at Austin (*Fisher II*), 136 S. Ct. 2198 (2016); Fisher v. Univ. of Tex. at Austin (*Fisher I*), 133 S. Ct. 2411 (2013); Grutter v. Bollinger, 539 U.S. 306 (2003).
- 25 See District of Columbia v. Heller, 554 U.S. 570 (2008).
- 26 See *id.* at 626 28.

27 *See id.* at 689 91 (Breyer, J., dissenting).

28 *See, e.g.,* Kolbe v. Hogan, 849 F.3d 114 (4th Cir. 2017) (en banc); Horsley v. Trame, 808 F.3d 1126 (7th Cir. 2015); United States v. Bryant, 711 F.3d 364 (2d Cir. 2013); United States v. Marzzarella, 614 F.3d 85 (3d Cir. 2010).

29 *See* Heller v. District of Columbia, 670 F.3d 1244, 1271 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

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ONE GOVERNMENT, THREE BRANCHES, FIVE CONTROVERSIES:

Separation of Powers Under Presidents Bush and Obama

By Hon. Brett M. Kavanaugh

Brett Kavanaugh began by showing his credentials when it comes to Marquette basketball. He grew up in the Washington, D.C., area, but he said, “I loved Al McGuire.” Recalling the semifinal game in the NCAA tournament in 1977, he asked the capacity audience in Eckstein Hall’s Appellate Courtroom, “Does anyone know who scored the winning hoop in that game?”

Several people called out the answer: Jerome Whitehead.

“Got it,” Kavanaugh said. “I knew it; I knew it. Just checking my crowd. Who threw the pass?”

From the audience: Butch Lee.

“There we go. All right,” said Kavanaugh to the first respondent. “He’s my guy.”

It was an engaging way to start the E. Harold Hallows Lecture at Marquette Law School on March 3, 2015.

Then Kavanaugh showed his knowledge on the subject of his lecture: separation of powers in the federal government and, in particular, during the tenure in office of President George W. Bush and of President Barack Obama. Kavanaugh is a former high-ranking official in the former’s White House. He is now a judge on the United States Court of Appeals for the D.C. Circuit. As the country marks another presidential transition, we provide here an edited version of Kavanaugh’s Hallows Lecture, together with comments by Akhil Amar and Paul Clement.

E. Harold Hallows was a prominent Milwaukee attorney and an extraordinary justice on the Wisconsin Supreme Court. He taught—and taught well—at this law school. When he took the bench on May 1, 1958, he said the following words that are worth repeating today: “Individual freedom under law and equality before our courts distinguish our system of government and our whole way of American life. The whole complex of our social order is erected upon a framework of law and justice.” Justice Hallows vowed that he would, as a judge, “zealously rededicate” himself “to those divinely inspired ideals and principles.” And he concluded: “May I be worthy of the past and equal to the opportunities of the future.”

What a great line: “May I be worthy of the past and equal to the opportunities of the future.” A perfect motto for judges, attorneys, and law students. May we all be worthy of the example set by Chief Justice Hallows.

I’ve been a judge on the D.C. Circuit for more than eight years. And as Dean Joseph Kearney pointed out in introducing me, I did not arrive to the D.C. Circuit as a blank slate. People sometimes ask what prior legal experience has been most useful for me as a judge. And I say, “I certainly draw on all of them,” but I also say that my five-and-a-half years at the White House and especially my three years as staff secretary for President George W. Bush were the most interesting and informative for me.

My job in the White House counsel’s office and as staff secretary gave me, I think, a keen perspective on our system of separated powers. And that’s what I’m going to talk about today. I participated in the process of putting together legislation. I helped out, whether the subject was terrorism insurance or Medicare prescription-drug coverage. I spent a good deal of time on Capitol Hill, sometimes in the middle of the night, working on legislation—it’s not a pure or pristine process, just in case you weren’t aware of that. ▶▶

I worked on drafting and revising executive orders, as well as disputes over executive branch records. I saw regulatory agencies screw up. I saw how regulatory agencies try to comply with congressional mandates. I saw how agencies try to avoid congressional mandates. I saw the relationship between agencies and the White House and the president. I saw the good and the bad sides of a president's trying to run for reelection and to raise money while still being president. I was involved in the process for lots of presidential speeches. I traveled almost everywhere with the president for about three years.

I mostly recall the massive decisions that had to be made on short notice. Hurricane Katrina—one of the worst weeks of the Bush Presidency—I remember it so

well. I remember sitting on my couch that Saturday night and getting a call from Communications Director Dan Bartlett saying, “Chief Justice Rehnquist died. The president wants to meet tomorrow morning at 7:00 to discuss whom to nominate for chief justice and to announce it before we go back to New Orleans on Monday.” And

The job of president is extraordinarily difficult. Every decision seems to be a choice between really bad and worse.

I sat on my couch trying to absorb all that—from Katrina to the chief justice—and the enormity of the decisions that had to be made so quickly.

And from that White House service, you learn how the presidency operates in a way that I don't think people on the outside fully appreciate. I've said often, and I'll say again, we respect and revere the job of president of this country, and I think we know how hard a job it is. But even then I think we dramatically underestimate how difficult the job is, as compared to being a judge or a member of Congress, or even a justice. The job of president is extraordinarily difficult. Every decision seems to be a choice between really bad and worse. And you have to simultaneously think about the law, the policy, the politics, the international repercussions, the legislative relations, and the communications. And it's just you. It's just one person who's responsible for it all.

So my White House service gives me great respect, and gives all of us who worked there great respect, for

the presidency. As a judge, however, I think it's also given me some perspective—perspective that might be thought to be counterintuitive. For starters, it really helps refine what I'll call one's “BS detector” for determining when the executive branch might be exaggerating, or not fully describing how things might actually work, or overstating the problems that might actually be created under a proposed legal interpretation.

Prior White House experience also helps, I think, when judges need to show some backbone and fortitude, in those cases when the independent judiciary must stand up to the president and not be intimidated by the mystique of the presidency. I think of Justice Robert Jackson, of course, as the role model for all of us executive branch lawyers turned judges. We all walk in the long shadow of Justice Jackson.

So at the heart of my White House experience and my time on the D.C. Circuit has been the separation of powers, including the relationship between the executive and legislative branches and the role of the judiciary in policing that relationship. And, today, I want to discuss five central aspects of that system of separation of powers: war powers, the Senate confirmation process for judges, prosecutorial discretion, statutory interpretation, and independent agencies. Now each topic could occupy a book, indeed a whole shelf in the library. But on each issue, I just want to give a brief assessment on where we have been in the Bush and Obama years, where we stand now, and what may lie ahead.

One of my key thoughts is that our system of government works best when the rules of the road are set ahead of time, rather than thrashed out in the middle of a crisis or controversy. In some areas, we're doing okay. In other areas—not so much.

War powers

Let me begin with war powers. The day most seared into my memory at the White House is September 11, 2001. The uncertainty, the fear, the anxiety, running out West Executive Drive as the Secret Service agents yelled, “Run! Run! Everyone, run!” The Secret Service, at that point, thought that Flight 93 was headed toward the White House or Capitol. It was only a few years ago, but the communications were so primitive. No such thing as an iPhone, no one had Blackberries, no cameras on phones. Even our cell phones, primitive as they were, didn't work amidst the chaos that day.

And then the next day, that's what I really remember so well: going into the White House the next day,

September 12, 2001. Going into the West Wing for our daily counsel's office staff meeting at 8:10 a.m. Everything had changed for the country, for the president, for all of us.

For President Bush, I often say, every day for the rest of his presidency was September 12, 2001. The calendar never flipped for him. The core mission was, "This will not happen again." President Barack Obama no doubt feels that same pressure and shares that same goal: "This will not happen again."

On the legal side, this new war presented a variety of issues for the country to deal with. We're still dealing with those issues today, and we'll be dealing with them a long time into the future. This was a new kind of war. And what does "new kind of war" mean?

Three things: First, there are not the traditional battlefields. American airports, Paris newsrooms, Madrid trains, London buses, Bali nightclubs—those were, and are, the battlefields. Second, the enemy does not wear uniforms or identify itself. The enemy hides and plots in secret, seeking to make surprise attacks on the United States and its allies. And third, the enemy openly attacks civilians. This is not just a soldier-on-soldier war.

This new kind of war has meant that the United States has had to adapt in its approach to surveillance, targeted killings, interrogation, detention, and war crimes trials, among many other issues. And I think as we look back over the Bush and Obama years, there are several themes that we can discern in terms of our structure of government, our separation of powers system.

First, it's clear, as we look back now, that both Congress and the president have important roles to play in wartime. The president does not operate in a law-free zone when he or she conducts war. As Professor Jack Goldsmith has pointed out, throughout our history Congress has heavily regulated the president's exercise of war, whether it be the Non-Detention Act, the Foreign Intelligence Surveillance Act, the War Crimes Act, the Anti-Torture Act—the list goes on. And, importantly, Congress has continued to do so since September 11, 2001, with laws such as the Patriot Act, the Detainee Treatment Act, and the Military Commissions Act. Congress is involved.

Second, for the most part, presidents must and do follow the statutes regulating the war effort. There are occasional attempts by presidents to claim an exclusive power to conduct some national security action, even in the face of a congressional prohibition. But those



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assertions of presidential power are rare, and are successful even more rarely, except in certainly narrowly cabined and historically accepted circumstances. This is Youngstown category three, to borrow Justice Jackson's famous framework. And that's a bad place for a president to be in wartime.

Third, in cases where someone has standing—a detainee, a torture victim, someone who has been surveilled—the courts will be involved in policing the executive's use of wartime authority. The Supreme Court has made that clear, in cases such as *Hamdi*, *Hamdan*, and *Boumediene*. But that, too, is not new. That has been the American system for a long time. To take only the most prominent example, the Supreme Court played a key role in the *Youngstown* case, ruling unlawful President Harry Truman's seizure of the steel mills to assist the war effort.

So, in cases arising out of this different kind of war, what exactly is a court's role? Well, we should not expect courts to relax old statutory rules that constrain the executive. We saw that in the Supreme Court's *Hamdan* case and other cases. At the same time, just because it's a new war, we should not expect the courts to unilaterally create new rules in order to constrain the executive. Rather, for new rules, it is up to Congress to act as necessary to update the laws applicable to this new kind of warfare. And Congress has done so on many occasions.

Fourth, as we look back, I think one issue looms in significance well above all others. There has been a lot of noise over the last 13 years about a lot of different war powers issues, and about the power of the president, the power of Congress, and the role of the courts. But one issue that looms particularly large is the question ►►



whether the president can order U.S. troops to wage war in a foreign country without congressional approval. The Constitution gives Congress the power to declare war, and the War Powers Resolution requires congressional authorization within 90 days of hostilities, except in cases of self-defense and similar emergencies.

But with regard to larger ground conflicts, most notably the Persian Gulf War, the war against Al-Qaeda that began in 2001, and the Iraq war that began in 2003, modern presidents have sought advance approval from Congress before acting. Indeed, the only major ground war in American history that was congressionally undeclared or unauthorized was the Korean War.

When we look back on the war powers precedents set by the Bush administration, it's important to note that the war against Al-Qaeda and the war against Iraq were both congressionally authorized. In the wake of September 11, Congress overwhelmingly passed the Authorization for Use of Military Force that is still the primary legal basis today for the president's exercise of wartime authority against Al-Qaeda and now apparently ISIS as well. And Congress also overwhelmingly authorized the war in Iraq, by a vote in the Senate of 77–23 and a similarly overwhelming vote in the House.

Those precedents loom large. It will be difficult going forward, decades, generations, for a president to take the nation into a lengthy ground war without congressional authorization. One can imagine what many in Congress would say to the president: “George W. Bush got congressional authorization, and so must you.”

So in sum, on war powers issues, my first topic, there will always be heated debate, as there should be—and is today. But the basic framework in which the president, Congress, and the courts all play defined

roles on national security issues has stood the test and adapted reasonably well to this new kind of war. It was not at all obvious in the wake of the September 11 attacks that the legal system would hold, but it has done pretty well, in my estimation. The rules of the road are generally known and generally followed, and for that we can all be grateful.

Judicial appointments

Next I want to discuss—a controversial issue—the Senate confirmation of judges. Now, some history on that: At the start of the Bush administration, the president had some trouble filling judicial vacancies on the courts of appeals in the Democratic-controlled Senate. The Republicans took over the Senate in the fall 2002 elections, and with the Republican Senate there was a sense that President Bush would be able to quickly fill those lower court vacancies.

In 2003, however, the Democrats in the Senate chose to use the filibuster rules of the Senate and require 60 votes rather than 51 votes for certain court of appeals nominees. (I'm going to try to describe this all as neutrally as possible.) On the one hand, there had not been a tradition before then of requiring 60 votes for confirmation of lower court judges, or even Supreme Court justices. Justice Clarence Thomas was confirmed by a vote of 52–48; lots of lower court judges have been confirmed by a majority but without 60 votes.

At the same time, the Senate rules did provide a clear mechanism under which 41 senators could block consideration of just about anything. This is commonly termed—I'm sure you've all heard the term—a filibuster, although that's really a misnomer because it's really just a vote. No one has to talk himself to death on

the Senate floor for a filibuster. It's just a vote for or against "cloture," for those who want to sound versed in Washington speak (which I don't recommend for anyone who wants to maintain friends).

In 2003 and 2004, 10 federal judicial nominees were blocked because of the 60-vote requirement. Those nominees included people such as Miguel Estrada, who had been nominated to the D.C. Circuit. Each apparently had the support of a majority of the Senate, but none of them had the support of 60 senators.

In the 2004 election, President Bush was reelected, and the Republican majority in the Senate increased to 55 members. But 55 is still not 60. So frustration began to build on the Republican side. In 2005, Senate Republicans threatened to change the Senate rules to prohibit a minority of senators from blocking confirmation of federal judges and instead to allow confirmation by a majority vote. This was dubbed the "nuclear option" in some quarters, and it was dubbed the "constitutional option" in other quarters. You can guess which side used which term at that time. In any event, the matter came to a head in May 2005, and then a compromise of sorts was reached. A so-called gang—and I don't know why they're always called that in the Senate—but a "gang of 14" senators reached an agreement under which judicial nominees would be confirmed by majority vote, except in "extraordinary circumstances."

So the deal worked for several years, and the blockade was lifted to a large degree. Of course, the term "extraordinary circumstances" was bound to create problems down the road. And it did.

In 2009, President Obama took office and had the rare historical circumstance of 60 Democrats in the Senate for two years, so in that time he did not need any Republicans to obtain 60 votes. But that did not last: In the 2010 elections, the Democrats retained control of the Senate but no longer had 60 votes. So that meant a choice for the Republicans in the Senate. Would they now turn around and require 60 votes for Obama nominees to the courts of appeals, as the Democrats had done in the Bush years? And the answer is that the Republicans did require 60 votes for nominees such as Goodwin Liu to the Ninth Circuit and Caitlin Halligan to the D.C. Circuit.

This time around, the roles were reversed. Frustration began to build on the Democratic side. And not surprisingly, in 2013 after the next presidential election, the pressure came to a head—just as it had eight years earlier in 2005. This time, however, no gang of 14 stopped the nuclear/constitutional option (depending on

your choice of term). Rather, this time, the majority of the Senate established a Senate precedent to make clear that judicial nominees to the federal courts of appeals and federal district courts would require only a majority in order to be confirmed. Now, notably, the Senate did not set any rules for Supreme Court nominees. So it is not entirely certain going forward whether a Supreme Court nominee will need 51 votes or 60 votes.

What can we expect in the future, having seen this history of Senate confirmation of judges and the rule changes? Most people expect that the 51-vote requirement is probably here to stay for lower courts. But there is cause for concern and debate for the Supreme Court confirmation process because the rules of the road are not clear. And in the separation of powers arena, when the rules of the road are not clear, trouble often ensues.

We can look back on the Supreme Court confirmation process for the past 25 years before today and see that it's been relatively smooth. For the last six vacancies since 1993, the president has nominated a justice at a time when the president's party controlled the Senate and when, at least in crude political terms, the appointment was not expected to cause a major shift in the Supreme Court.

Those are optimal conditions for a relatively smooth process. And indeed Justices Ruth Bader Ginsburg, Stephen Breyer, John Roberts, Samuel Alito, Sonia Sotomayor, and Elena Kagan all had such processes. Each process had bumps along the way, but in the grand scheme of things, they were pretty smooth.

Looking forward over the next generation, what if a president has to nominate someone when the Senate is controlled by the other party? We have not had that since 1991, some 24 years ago when the political process in this country was quite a bit different than it is now. Or suppose we have a nomination that's expected to cause a shift in the direction of the Supreme Court? We haven't had that since 1991 either. ▶▶

... in the separation of powers arena, when the rules of the road are not clear, trouble often ensues.

* As noted on p. 9, Judge Kavanaugh delivered this Hallows Lecture in 2015, before the Supreme Court vacancy created by the death of Justice Antonin Scalia on February 13, 2016. — Ed.

And critically, and to connect it back up to the nuclear and constitutional option, what number of votes will be enough? Will a minority of 41 senators be able to block the nomination by invoking the 60-vote cloture requirement? And if so, will the president and the majority of the Senate simply accept that result and not try to change the rules? Suppose that a nominee has 57 or 58 or 59 votes but can't quite get to 60. Does the president withdraw the nominee and try again with someone else?

In a country such as ours, it's rather amazing that there is such uncertainty about such an important issue. And again to stick with my theme, it always seems to me that it's good to try to agree on the rules of the road ahead of time. When you're in the Rawlsian position, you don't know who will be president, and you don't know who will control the Senate. I've said this for many, many years in speaking about lower court nominations. And now, apparently, we do have a settled majority-vote rule for lower courts, but not yet for the Supreme Court. It's not my place; I wouldn't dare say whether the rule should be 51 or 60 votes, and I didn't do that for lower court nominations either. But I think I can appropriately say, because I see trouble on the horizon, that it would be best if the ground rules, whatever they turn out to be, are agreed upon ahead of time, if at all possible.

Executive branch treatment of statutes

The third is another controversial topic. (I didn't pick any easy ones for the discussion today.) I've been teaching separation of powers at Harvard Law School for eight years. Every year, I tell my students that there's this one issue that's really hard and really controversial: In what circumstances can the president decline to follow or enforce a statute passed by Congress? I give them the history, and I say, "The president clearly has some authority to decline to follow or enforce a statute passed by Congress."

But it's about the most controversial thing a president can do. I warn all of them: If you are ever in the executive branch, and you find yourself saying, "We don't need to follow that statute," or "We don't need to enforce that statute," you'd better know what you're doing legally, you'd better have a thick skin politically, and you'd better hope you don't have a Senate confirmation process in the near future.

Now both President Bush and President Obama have faced very loud criticism that they were nullifying the law or disregarding the law as enacted by Congress. I think back to President Bush's era: It mostly took the form of criticism in the war powers arena. The president



sometimes would issue signing statements. These became very controversial. The statements said that the president would not follow certain statutes that, in his view, would unduly infringe on his constitutionally bestowed commander-in-chief powers. In President Obama's case, he, too, has faced criticism for such signing statements and for supposed disregard of statutes regulating the executive branch.

And recently, as we know, he's been criticized for his reliance on the doctrine of prosecutorial discretion, in which he says he's not going to enforce certain laws in certain ways. Now I'm not going to purport to solve this problem today (nor would it be proper for me to do so), but I'm going to give you a framework in which to think about these issues. And I think the first thing to do is to distinguish between the executive branch's following a law that regulates the executive branch and the executive branch's enforcing a law that regulates private entities. Let me explain that.

Some statutes regulate the executive branch: The Freedom of Information Act, the Anti-Torture Act, the War Crimes Act, the Foreign Intelligence Surveillance Act—the list goes on. These are laws passed by Congress telling the executive branch that the executive branch has to do something or has to refrain from doing something. As to laws that regulate the executive branch, it's generally accepted that the president has a duty to follow those laws, unless the president has a constitutional objection—a big “unless.” If there's a reasonable constitutional objection, then the president may decline to follow the law unless and until a final court order tells him otherwise.

There's a pending Supreme Court case with exactly that scenario: the *Zivotofsky* case, where both President Bush and President Obama have refused to follow a statute requiring that U.S. passports be stamped “Israel” for any interested U.S. citizens who were born in Jerusalem.*

Now, this question about presidential power is always controversial, but it's generally settled that presidents have such a power. We've had debates about whether particular constitutional objections are permissible. But the basic framework is understood. Presidents have the duty to follow the law that regulates the executive branch unless they have a constitutional objection, in which case they can decline to follow the law unless and until a final court order.

* *Zivotofsky v. Kerry* was subsequently decided, on June 8, 2015, with a divided Supreme Court holding that the president's sole power to recognize foreign states meant that the statute was unconstitutional. — Ed.

So that's the executive branch's declining to follow laws that regulate it.

Of course, most federal laws do not regulate the executive branch. Rather, they regulate private individuals and entities. They might prevent polluting the rivers, or insider trading, or bank robbery, or cocaine dealing. Those laws are backed by sanctions, either criminal or civil, such that people must pay or serve time if they violate the laws. So here's the question: Does the executive branch have the duty to enforce every such law against every known violator of the law?

Most people instinctively recognize that the answer to that question must be “No.” But how do we draw the line? Can the executive branch decline to enforce a law only because of resource constraints, the idea that there's not enough money to have enough prosecutors and investigators to enforce every law against every person? Can a president decide not to enforce a law because of his or her own constitutional objections to the law? And most critically, can the president decide to not enforce the law because of policy objections to the law? That's the question of prosecutorial discretion.

And how do we answer that question? What does history tell us; what does the text

of the Constitution tell us about that? We know that the president has the duty to take care that the laws be faithfully executed. But the Take Care Clause has not traditionally been read to mandate executive prosecution of all violators of all laws. After all, when the president declines to enforce some draconian law, that decision is often applauded as enhancing liberty and as a check against overcriminalization or overregulation by Congress.

The leading historical example, and the one that stands the test of time, is President Thomas Jefferson and the Sedition Act. After he became president in 1801, President Jefferson decided that he would no longer pursue prosecutions against violators of the Sedition Act, against those who spoke ill of the government. That's a settled and respected executive branch precedent that suggests that the Take Care Clause encompasses some degree of prosecutorial discretion. The Take Care Clause, in other words, does not prohibit prosecutorial discretion. ►►

In what circumstances can the president decline to follow or enforce a statute passed by Congress?

In this regard, consider the interaction of the power of prosecutorial discretion and the pardon power. The president has the absolute discretion to pardon individuals at any time after commission of the illegal act. It arguably follows, some would say, that the president has the corresponding power not to prosecute those individuals in the first place. The theory is, what sense does it make to force the executive to prosecute someone, only then to be able to turn around and pardon everyone? That does not seem to make a lot of sense. As Akhil Amar has written, the greater power

to pardon arguably encompasses the lesser power to decline to prosecute in the first place.

Of course, some say that prosecutorial discretion cannot be used based on policy disagreement but can be used based on resource constraints. Query whether that is a real or phony distinction. The executive branch can almost always cite resource allocation or resource constraints in choosing to prosecute certain offenses rather than others, even if the choice is rooted in policy.

The executive branch can almost always cite resource allocation or resource constraints in choosing to prosecute certain offenses rather than others, even if the choice is rooted in policy.

As we've seen in recent years, recent months, this is far from settled, either legally or politically. And that uncertainty has real costs. Take the current shutdown crisis that has been going on for the last week. What does that stem from? That stems from disagreement over the scope of the president's prosecutorial discretion in the immigration context.

So what's the answer? I will admit that I used to think that I had a good answer to this issue of prosecutorial discretion: that the president's power of prosecutorial discretion was broad and matched the power to pardon. But I will confess that I'm not certain about the entire issue as I sit here today. And I know I'm not alone in my uncertainty. In any event, on this issue, like the others that I've talked about, it's better to have the rules of the road set in advance before the crisis of a particular episode in which the president asserts this power. Put simply, prosecutorial discretion is an issue that

warrants sustained study by scholars, executive branch lawyers, and Congress to see if we can come to greater consensus about the scope of the president's power of prosecutorial discretion.

Statutory interpretation

Let me turn next to statutory interpretation, another issue that is front and center in Washington this week. Tomorrow there is a big health care case being argued in the Supreme Court. And at its core, it's about how to interpret statutes.* If you sat in the D.C. Circuit courtroom for a week or two and you listened to case after case after case (as I do not advise for anyone who wants to stay sane), you would hear judge after judge, from across the supposed ideological spectrum, asking counsel about the precise wording of the statute: "What does the text of the statute say, counsel?" And if you listen to Supreme Court oral arguments, you consistently hear, "What does the text of the statute say?" from all of the justices across the spectrum. And that's in large part, of course, due to the influence of Justice Antonin Scalia on statutory interpretation over the last generation. That influence has been enormous. Enormous. Text is primary.

But to say that text is primary still leaves a host of questions about how best to interpret the text. There are a number of canons of interpretation that judges employ to help them interpret statutory texts: semantic canons, such as the canon against surplusage or the *ejusdem generis* canon; substantive canons that sometimes actually cause us to depart from the best reading of the ordinary text, such as the constitutional-avoidance canon or the presumption against extraterritorial application; and related principles such as the *Chevron* doctrine, which tells courts facing certain sorts of ambiguous statutes to defer to an agency's reasonable reading of the statute.

These canons are hugely important. Text is primary, but how do we interpret the text? Consider *Yates v. United States*—the so-called fish case, decided just last week. If you want to read a fun case in the Supreme Court, you will see Justice Ginsburg for the plurality, and Justice Kagan in dissent, really battling over how to apply the canons of construction to a seemingly straightforward statute. ►►

* The case was *King v. Burwell*, and the Court would go on to decide, on June 25, 2015, by a five-to-four vote, that the Affordable Care Act, which authorized tax credits to individuals receiving insurance through "an Exchange established by the State," also thereby included exchanges established by the federal government. — Ed.

The problem here, as elsewhere, is that we do not have consensus about how to apply the canons. The gap has been filled well by Justice Scalia and Bryan Garner in their book, *Reading Law*, which really should be on the shelf of every judge and lawyer. They identify and explain 57 different canons of construction, which gives you a sense of the magnitude of the task here. Of course, their view about how some of those canons should be applied was bound to be contested, and has been. For example, Professor Bill Eskridge and Professor Abbe Gluck have written pieces.

What is the outlook going forward on the issue of statutory interpretation? We've made such progress in bringing people together about the importance of statutory text. Justice Scalia has really instigated that progress. But the academy and the bench and the bar, I think, have an opening and a responsibility to take us to the next level of consensus—to study these canons, to crystalize them, and to reach an agreement about how they should be applied. There's more work to be done—a lot of work.

We've made such progress in bringing people together about the importance of statutory text. . . . But . . .

disagreement. We can avoid situations where things are fought out in the crucible of a particular case, and that helps people of this country grow even more confident in the rule of law and in our judges as umpires, not just politicians in robes.

I don't want to sound like Yogi Berra, who said that if you just moved first base, there would be no more close plays. That doesn't work, as you know. What I'm saying is that you reduce the number of close plays by achieving better consensus on the rules of statutory interpretation—on the canons, which are really the next step in this generation-long project on statutory interpretation.



Independent agencies

The last subject—independent agencies such as the FCC, SEC, and FTC. This is my life: the alphabet soup of federal agencies. There are two types of agencies. There are executive agencies that work for the president: e.g., the Defense Department, the Justice Department, and the State Department. There are independent agencies whose leaders are removable only for cause, and they don't directly report to the president. They're not controlled by the president. They are unaccountable to Congress or the president.

The big issue: What are independent agencies? How do those independent agencies fit within the constitutional structure? Here's the answer: uneasily. Within the constitutional structure, if you think about the first 15 words of Article II of the Constitution, "[t]he executive power shall be vested in a President of the United States of America." But it's pretty settled law that independent agencies are constitutional. In a case called *Humphrey's Executor v. United States* (1935), the Supreme Court upheld independent agencies as constitutional, at least so long as the agencies did not perform core executive functions. President Franklin Roosevelt was incensed about the court decision. It's one of the things (probably the primary thing) that led him to propose the court-packing plan, which as you all know didn't go well. But that's how important he thought it was to the structure of government.

Yet *Humphrey's Executor* remains the law. Independent agencies since the time of *Humphrey's Executor* continue to exist and continue to exercise important power. What are the ramifications? What are the rules of the road for independent agencies? I'll tell you, from working in the White House, I know that the

president's White House staff is very uneasy about what, if any, role they have in independent-agency decisions. They tend to be hands-off on independent-agency decisions. What does that mean, then?

That means that massive social and economic policy decisions are made not by Congress, and not by the president, and not even by an agency that is accountable to the president, but by an independent agency. The most recent example (I'm not going to comment on the merits of it, but just offer it as an example of a massive decision made by an agency) is the FCC's net-neutrality proposal—an independent agency's making a big decision for our country.

Where is the Supreme Court on independent agencies? There was a case a few years ago called *Free Enterprise Fund v. Public Company Accounting Oversight Board* (2010), in which the Court clearly cabined and refused to extend *Humphrey's Executor*, but didn't question the *Humphrey's Executor* precedent itself. In that case, the chief justice did say that Congress cannot reduce the president to a "cajoler-in-chief" and that "[t]he buck stops with the President." But that said, *Humphrey's Executor* continues to exist. To my mind, the rules of the road on independent agencies are clear, but they are still cause for thinking about the accountability of independent agencies in our structure.

Conclusion

So that's my brief overview of five major separation of powers issues in the Bush and Obama administrations and what lies ahead. One of the things I've taken away from my years in the White House and as a judge, and one of the things that frustrate me and make me think we can do better as a system of separated powers, is to try to think about things ahead of time. Trying to settle controversies before they arise. Our system of government seems so often to be reactive, to make rules in crisis situations rather than systemically thinking about how we can prevent the crises. How can we make the rule of law more stable, and how can we increase confidence in judges as impartial arbiters of the rule of law? Whether it's war powers, or the Senate confirmation process, or prosecutorial discretion, or statutory interpretation, or independent agencies, the system works best when the rules of the road are set ahead of time.

Or to put it in terms of the memorable January 2015 playoff game between the Green Bay Packers and the Dallas Cowboys, it's better when the rules governing a

catch are set forth before Dez Bryant falls to the ground. Because the rule was set, that was it. No catch. (Right?) If we can do it in the NFL, we can do it here as well. It'll ensure the like treatment of like cases and give the people of the country better confidence in our system.

I've talked about controversial issues today and some difficult topics. But I do want to emphasize that what unites us as a country is so much greater than what divides us—despite the controversies that we see in Washington today, and that we'll see in Washington tomorrow.

And I think about the difficulty of the job of president, as I've mentioned before, and particularly in times of wartime. I'll just close with this story. Before his 2004 speech at the nominating convention in New York City, President Bush was doing a last run-through in the hotel room that afternoon of the speech. I was there, with Mike Gerson, John McConnell, Dan Bartlett, and others. The speech was pretty well set and locked down, as you would hope on the day of the speech, and he was doing just a last practice run to make sure it was all exactly as he wanted it. We were reading along on our paper drafts as he was reading it out loud.

Anyway, toward the end of the speech, there was a passage that read as follows: "I've held the children of the fallen who are told their dad or mom is a hero, but would rather just have their dad or mom. I've met with parents and wives and husbands who have received a folded flag and said a final goodbye to a soldier they loved." And as President Bush finished reading that sentence in that hotel room, with just a few of us there in our gym clothes, there was a pause. After a few seconds we looked up, and President Bush had stopped because he was choking up.

And of course, President Bush being President Bush, he caught himself after a few seconds and said, "Don't worry; I'll be okay tonight." But in that moment, in that moment and so many others, I think of the enormity of the responsibility that the president carries. I think of the role of our military in our society, defending our freedom. I think of how, when I was in Dallas just a few years ago, all five living presidents stood on the stage at the opening of the Bush Library. I think how lucky we are to live in a country with a system of checks and balances and separated powers. And for its flaws, and for its holes, and for its inability to solve every problem in advance, that system does so well in protecting our liberties and protecting our freedoms.

What unites us as Americans is far greater than what divides us. ■

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Book Review

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FIXING STATUTORY INTERPRETATION JUDGING STATUTES. BY ROBERT A. KATZMANN. NEW YORK, N.Y.: OXFORD UNIVERSITY PRESS. 2014. PP. XI, 171. \$24.95

Statutory interpretation has improved dramatically over the last generation, thanks to the extraordinary influence of Justice Scalia. Statutory text matters much more than it once did. If the text is sufficiently clear, the text usually controls.² The text of the law is the law. As Justice Kagan recently stated, “we’re all textualists now.”³ By emphasizing the centrality of the words of the statute, Justice Scalia brought about a massive and enduring change in American law.

But more work remains. As Justice Scalia’s separate opinions in recent years suggest, certain aspects of statutory interpretation are still troubling.⁴ In my view, one primary problem stands out. Several substantive principles of interpretation -- such as constitutional avoidance, use of legislative history, and *Chevron* -- depend on an initial determination of whether a text is clear or ambiguous. But judges often cannot make that initial clarity versus ambiguity decision in a settled, principled, or evenhanded way.

The upshot is that judges sometimes decide (or appear to decide) high-profile and important statutory cases not by using settled, agreed-upon rules of the road, but instead by selectively picking from among *2119 a wealth of canons of construction.⁵ Those decisions leave the bar and the public understandably skeptical that courts are really acting as neutral, impartial umpires in certain statutory interpretation cases.⁶

The need for better rules of the road is underscored by a recent book written by Robert Katzmann, the very distinguished Chief Judge of the Second Circuit. I know Chief Judge Katzmann from our service together on the Judicial Branch Committee of the Judicial Conference, where he served for many years as Chairman by appointment of the Chief Justice. Chief Judge Katzmann is one of America’s finest judges and a true role model for me and many others, both in how he approaches his job and in how he seeks to improve the system of justice.

His new book *Judging Statutes* is a pleasure to read. It is succinct and educational. Chief Judge Katzmann’s goal is to show that various tools of statutory interpretation, especially legislative history, can enhance judges’ understanding of statutory meaning and allow them “to be faithful to the work of the people’s representatives memorialized in statutory language” (p. 105).

As would be natural with any two judges on a topic of this kind, I agree with some parts of Chief Judge Katzmann’s book and not with others. But even where I disagree, I have learned a great deal.

Every judge, lawyer, law professor, and law student who interprets statutes -- which is to say every judge, lawyer, law professor, and law student -- should read this book carefully. To paraphrase Justice Frankfurter: read the book, read the book, read the book.⁷

***2120** *Judging Statutes* has caused me to think even more deeply about statutory interpretation and about what judges should be trying to achieve when we confront statutory cases. For me, one overarching goal is to make judging a neutral, impartial process in all cases -- not just statutory interpretation cases. Like cases should be treated alike by judges of all ideological and philosophical stripes, regardless of the subject matter and regardless of the identity of the parties to the case.

To be sure, some may conceive of judging more as a partisan or policymaking exercise in which judges should or necessarily must bring their policy and philosophical predilections to bear on the text at hand.

I disagree with that vision of the federal judge in our constitutional system. The American rule of law, as I see it, depends on neutral, impartial judges who say what the law is, not what the law should be.⁸ Judges are umpires, or at least should always strive to be umpires. In a perfect world, at least as I envision it, the outcomes of legal disputes would not often vary based solely on the backgrounds, political affiliations, or policy views of judges.

In my view, this goal is not merely personal preference but a constitutional mandate in a separation of powers system. Article I assigns Congress, along with the President, the power to make laws.⁹ Article III grants the courts the “judicial Power”¹⁰ to interpret those laws in individual “Cases” and “Controversies.” When courts apply doctrines that allow them to rewrite the laws (in effect), they are encroaching on the legislature's Article I power.

But the vision of the judge as umpire raises a natural question: how can we move toward that ideal in our judicial system, where judges come from many different backgrounds and may have a variety of strong ideological, political, and policy predispositions?

To be candid, it is probably not possible in *all* cases, depending on the nature of the legal inquiry. After all, on occasion the relevant constitutional or statutory provision may actually *require* the judge to consider policy and perform a common law-like function.²

***2121** But in most statutory cases, the issue is one of interpretation.³ To assist the interpretive process, judges over time have devised many semantic and substantive canons of construction -- what we might refer to collectively as the interpretive rules of the road. To make judges more neutral and impartial in statutory interpretation cases, we should carefully examine the interpretive rules of the road and try to settle as many of them *in advance* as we can. Doing so would make the rules more predictable in application. In other words, if we could achieve more agreement ahead of time on the rules of the road, there would be many fewer disputed calls in actual cases. That in turn would be enormously beneficial to the neutral and impartial rule of law, and to the ideal and reality of a principled, nonpartisan judiciary.

With that objective in mind, I will advance one overarching argument in this Book Review. A number of canons of statutory interpretation depend on an initial evaluation of whether the statutory text is clear or ambiguous. But because it is so difficult to make those clarity versus ambiguity determinations in a coherent, evenhanded way, courts should reduce the number of canons of construction that depend on an initial finding of ambiguity. Instead, courts should seek the *best reading* of the statute by interpreting the words of the statute, taking account of the context of the whole statute, and applying the agreed-upon semantic canons. Once they have discerned the best reading of the text in that way, they can depart from that baseline if required to do so by any relevant substantive canons -- for example, the absurdity doctrine.

To be clear, I fully appreciate that disputed calls will always arise in statutory interpretation. Figuring out the best reading of the statute is not always an easy task. I am not a modern-day Yogi Berra, who once purportedly said that there would be no more close calls if we just moved first base.

But the current situation in statutory interpretation, as I see it, is more akin to a situation where umpires can, at least on some pitches, largely define their own strike zones. My solution is to define the strike zone in advance much more precisely so that each umpire is operating within the same guidelines. If we do that, we will need to worry less about who the umpire is when the next pitch is thrown.

That's just too hard, some might argue. Statutory interpretation is an inherently complex process, they say. It's all politics anyway, others contend. I have heard the excuses. I'm not buying it. In my view, it is a mistake to think that the current mess in statutory interpretation is somehow the natural and unalterable order of things. Put simply, we ^{*2122} can do better in the realm of statutory interpretation. And for the sake of the neutral and impartial rule of law, we must do better.

I. THE KATZMANN THESIS AND SOME RESPONSES

In *Judging Statutes*, Chief Judge Katzmann's basic themes are straightforward: courts should understand Congress better, should interpret statutory text in light of Congress's purpose in enacting the particular statute, and, in particular, should rely on committee reports and other legislative history to try to divine Congress's purpose (pp. 9-10).

A. *Understanding Congress Better and the Role of Committee Reports*

Chief Judge Katzmann stands on very firm ground when he suggests that “[h]aving a basic understanding of legislative lawmaking can only better prepare judges to undertake their interpretive responsibilities” (p. 22). For judges to unpack a statute in a particular case, it is important to understand how the law came together. Oftentimes, for example, courts will confront a statute that has been amended multiple times over multiple years. Or a particular phrase in a statute may have been added in conference. As I see it, by understanding the legislative process, judges will better appreciate that legislation is a compromise with many competing purposes and cross-currents, that there will be redundancies, and that Congress may not always be consistent in its choice of terminology, among other things.

Chief Judge Katzmann describes the lawmaking process in some detail (pp. 11-22). He rightly explains that the central problem confronting Members of Congress is too much “pressure -- such as the pressures of the permanent campaign for reelection, raising funds, balancing work in Washington and time in the district, balancing committee and floor work in an environment of increasing polarization, and balancing work and family responsibilities” (p. 17). ⁴ That pressure is “now more intense than in the past” (p. 17). Those demands “reduce opportunities for reflection and deliberation” (p. 18). As Chief Judge Katzmann points out, Members cannot possibly read every word of every bill, much less understand all the effects of each bill (p. 18).

To mitigate this problem, Members rely heavily on congressional committees (p. 19). Those committees are staffed by numerous aides who assist the Members in their work. Legislators and their staffs educate themselves about bills by reading the materials produced by the committees that drafted and approved the proposed legislation (p. 19).

^{*2123} Chief Judge Katzmann's point here is that Congress usually operates on a kind of internal delegation system. In essence, the job of drafting legislation is often farmed out to subgroups of Congress. Those subgroups draft the precise language. The Members who vote on the bill do not read the end product, but instead often rely on the committee reports, or on their staffs who in turn rely on the committee reports (pp. 19-20). ⁵

Chief Judge Katzmman's larger interpretive point is that judges who understand this process better should and will recognize the importance of committee reports in the actual legislative process (p. 22). Chief Judge Katzmman refers often to the concept of "authoritative" legislative history (pp. 29, 38, 54, 75, 85, 102-03), by which he primarily means the committee reports that form the basis on which other Members determine how to vote on a bill. Although Chief Judge Katzmman acknowledges that "[l]egislative history is not the law" (p. 38), he says that committee reports are often "authoritative" guides to understanding the meaning of the law. If Members vote based on what is in the committee reports rather than what is in the text, he wonders, aren't judges required to pay attention to the committee reports as well (p. 22)?

Chief Judge Katzmman asks a good and appropriate question. Of course, a good and appropriate response, as Professor John Manning has persuasively explained, is that the committee report is not an authoritative guide to determining the meaning of a law under our Constitution.⁶ Instead, the statute's text as passed by Congress and signed by the President (or passed by two-thirds of both Houses over the President's veto) is the law. Congress could easily include the relevant committee report (or key portions thereof) as a background section of the statute on which Congress is voting. In other words, if there is some key point in the committee report, there is an easy solution to make sure it is "authoritative": vote on it when voting on the statute. As Justice Kagan recently said of committee reports: "It's not what Congress passed, right? If they want to pass a committee report, they can go pass a committee report. They can incorporate a committee report into the legislation if they want to. You know, they didn't do that."⁷ Chief Judge Katzmman never addresses that possibility, *2124 which, to my mind, leaves something of a hole in his concept of "authoritative" legislative history.⁸

Moreover, as many courts have noted over the years, committee reports are not necessarily reliable guides to the meaning of the text. That is especially true when the statutory text represents a compromise among competing interests, as it so often does. Committee reports often may represent an effort by one side to shape future interpretation of the text by judges and executive branch officials, rather than simply a neutral and dispassionate guide to the intended meaning of the terms in the statutory text.⁹

There are at least two possible explanations for why Congress does not vote on committee reports. First, Congress might not vote on committee reports (or even on key parts of committee reports) because Congress thinks a vote is unnecessary.²⁰ But if courts tell Congress that voting on those reports is necessary, or at least necessary if Congress wants those reports to be considered authoritative by courts, then Congress could readily decide whether and when to vote on those reports.² Easy enough. That approach would satisfy the camps of both Justice Scalia and Chief Judge Katzmman, a win-win if ever there was one. Alternatively, Congress may not vote on the reports because it might not approve the reports if they came up for a vote.²² Of course, that possibility just proves the point for opponents of using committee reports in the interpretation of statutes.²³ It is hard to consider something "authoritative" if it was not voted on and may actually have been voted *down* if it had been voted on.²⁴

The bottom line is this: if Congress could -- but chooses not to -- include certain committee reports (or important parts thereof) in the statute, on what legal basis can a court treat the unvoted-on legislative history as "authoritative"?

***2125 B. The President**

In his description of the legislative process, Chief Judge Katzmman does not talk much about a critical player: the President.²⁵ The President and his or her staff play an essential role in the legislative process. Indeed, the President is the "Legislator in Chief" in some ways -- given that no legislation can pass without the President's approval, unless two-thirds of both Houses override a veto.²⁶ Moreover, the President often jumpstarts the legislative process on a particular subject through speeches or meetings with congressional leaders. The Framers envisioned the President playing such a

role when they required that “[h]e shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient.”²⁷ A newly elected President will seek to shape the legislative agenda to advance his or her campaign proposals.²⁸ And Presidents use the State of the Union address -- and the bully pulpit more generally -- to push for legislation to address particular problems.

Lawyers, academics, and judges too often treat legislation as a one-body process (“the Congress”) or a two-body process (“the House and Senate”). But formally and functionally, it is actually a three-body process: the House, the Senate, and the President. Any theory of statutory interpretation that seeks to account for the realities of the legislative process -- as Chief Judge Katzmann's does -- must likewise take full account of the realities of the President's role in the legislative process.²⁹

Given that the President and the White House staff are not necessarily aware of the committee reports, and given that Members of Congress in one House may not be aware of reports from the other House, I think it is difficult to call those reports “authoritative” in any *2126 formal or functional sense. Chief Judge Katzmann seems to realize this problem because he suggests forwarding committee reports to the President before the President signs the bill (p. 102). But is a President supposed to veto a bill because of some comment made by one committee of one House? And if the President does not exercise the veto power, does that make a comment by one committee of one House an authoritative guide to the statutory text?

C. How Committee Reports Signal Agencies

After examining the lawmaking process, Chief Judge Katzmann describes how executive and independent agencies interpret enacted statutes (pp. 23-28). Agencies must interpret statutes, both in order to issue rules and in order to determine whether to bring an enforcement action against someone who may have violated the law.

In this realm, as Chief Judge Katzmann points out, committee reports can be particularly important signals to the agencies. Members of Congress have many tools at their disposal to put pressure on agency officials. Those tools include appropriations, oversight hearings, confirmation hearings, and even phone calls and letters from Members to agency officials (pp. 24-25). The committee reports likewise serve as a signal to agency officials about how to exercise their rulemaking and enforcement discretion (p. 26).

Chief Judge Katzmann's observation here is extremely important and too often overlooked. Committee reports may and do legitimately influence agency conduct in exercising the discretion granted to them by the statutory text. Indeed, to the extent a statute grants discretion to an agency -- and Members of Congress want to influence how that discretion is exercised (as they are permitted to do) -- committee reports are actually a far more transparent tool than some of the alternatives, such as phone calls to agency officials threatening to cut appropriations if discretion is not exercised in a certain way. Suppose, for example, that a statute grants an agency that oversees mergers the discretion to adopt rules that ensure fair competition. A committee report that identifies the level of permissible concentration in an industry is more transparent than a later phone call from the committee chair to the agency head in which the committee chair says a particular merger is problematic. (Of course, an agency should feel free legally, albeit perhaps not politically, to ignore both kinds of signals.) Anyone who says *courts* should pay less attention to committee reports must nonetheless acknowledge that committee reports may serve an important and legitimate purpose for the executive and independent agencies that must implement the statutes and exercise any discretion granted them by statute.

That reality, no doubt, is one reason why Congress keeps producing committee reports even as courts have relied less and less on legislative *2127 history over time. Agencies rely on those reports in the same way they might rely on other informal signals from Congress. So Congress has an appropriate reason and an incentive to keep producing the reports.

D. Courts and Legislative History

After analyzing agencies' reliance on legislative history, Chief Judge Katzmman turns to judicial interpretation of statutes (pp. 29-54). This chapter is the meat of the book. Chief Judge Katzmman's overriding point is that courts should use legislative history -- in particular, committee reports -- to interpret statutes (p. 31).

Chief Judge Katzmman correctly acknowledges that “[l]egislative history is not the law” (p. 38). But he adds that legislative history “can help us understand what the law means” (p. 38).

To understand Chief Judge Katzmman's point, it is important at the outset to appreciate that there are two primary uses of legislative history:

- (1) Use legislative history to resolve ambiguities in the text.
- (2) Use legislative history to override the clear text when following the text would contradict Congress's apparent intent. This proposition is also known as the *Holy Trinity*³⁰ principle.

Chief Judge Katzmman quite clearly advocates for the first use of legislative history, saying that judges should use legislative history whenever they are faced with an ambiguous text. Many judges nominally agree with that proposition, although Justice Scalia did not. But there are real debates over how quickly one should find ambiguity -- much more on that point later -- and whether legislative history ever really changes the outcome the judge otherwise would have reached.³

The second use of legislative history is far more controversial. It reflects a kind of broad “mistake canon” associated with the old 1892 *Holy Trinity* case. In *Holy Trinity*, as Chief Judge Katzmman explains (p. 32), the Supreme Court departed from the clear text of an immigration statute based on the legislative history and “spirit” of the law.³² Importantly, *Holy Trinity* used legislative history not simply to determine the meaning of an *ambiguous* text, but instead to override the meaning of otherwise *clear* text on the theory that the text must reflect ***2128** a mistake.³³ The basic idea is that the Court did not think Congress meant what it said -- that the text was in part a mistake.

Even though *Holy Trinity* has never expressly been overruled, its mode of using legislative history to override clear text is rarely used in modern Supreme Court decisions.³⁴ The modern rule, as the Supreme Court has repeated often, is that clear text controls even in the face of contrary legislative history.

Does Chief Judge Katzmman agree? It's not entirely clear. Chief Judge Katzmman says that “[w]hen a statute is unambiguous, resorting to legislative history is *generally* not necessary; in that circumstance, the inquiry ordinarily ends” (p. 48).³⁵ But the word “generally” may be an important caveat. And when Chief Judge Katzmman describes several cases he's decided, he seems to indicate that legislative history may be used to override the meaning of *clear* statutory language, and not just to interpret ambiguous statutory language.³⁶ And that's *Holy Trinity* in a nutshell.

If he were advancing a return to *Holy Trinity*, then Chief Judge Katzmman would be mounting a critique of the heart of textualism. As the Supreme Court now says, when the text is clear, judicial inquiry is at an end. In what some have described as “the bad old days” before Justice Scalia,³⁷ that was not the rule.³⁸

But perhaps I am reading too much into what Chief Judge Katzmann says. He may simply be making the narrower (and less controversial) claim that legislative history should be used to resolve ambiguities.

***2129** In any event, after finishing with legislative history, Chief Judge Katzmann turns to the canons of statutory construction (pp. 50-54). Chief Judge Katzmann says that many canons may “fail to reflect the reality of the legislative process” (p. 52). I agree. But his solution is not to try to fix the canons (as I would do³⁹). Instead, Chief Judge Katzmann offers canon failure as another reason to use legislative history. But I am not sure that his proposed solution follows from the problem. If the problem is the canons, then we should revise the canons.

E. Case Examples

After setting out his doctrinal framework, Chief Judge Katzmann walks us through a few cases that he has decided on the Second Circuit, and that the Supreme Court subsequently reviewed (pp. 55-91). This chapter is an especially illuminating part of *Judging Statutes*. I appreciate Chief Judge Katzmann's willingness to elucidate his own thinking in such a candid and educational way.

Chief Judge Katzmann begins the section with an important statement:

Most judges, in my experience, are neither wholly textualists nor wholly purposivists (that is, seekers of purpose). Purposivists tend not to go beyond the words of an unambiguous statute; at times, textualists look to purposes and extratextual sources such as dictionaries. What sets the two apart is a difference in emphasis and the tools they employ to find meaning. (p. 55)

This passage is important, and I have two reactions to it. First, in my view, another critical difference between textualists and purposivists is that, for a variety of reasons, textualists tend to find language to be clear rather than ambiguous more readily than purposivists do. One need look no further than the statements of the archetypal textualist, Justice Scalia, for confirmation of this point.⁴⁰ As a result, textualists tend to resort less often to ambiguity-dependent canons and tools of construction such as constitutional avoidance, legislative history, and *Chevron*. Second, textualists look to legislative history only infrequently, and even then only to resolve cases of true statutory ambiguity. They never use legislative history to depart from ***2130** otherwise clear statutory text (the *Holy Trinity* approach⁴), whereas some purposivists sometimes seem to do so, at least subtly.

Chief Judge Katzmann then proceeds through three cases as examples of his jurisprudence and theory.

In *Raila v. United States*,⁴² the plaintiff slipped on a package that a postal worker had left at her door.⁴³ The plaintiff filed suit against the United States under the Federal Tort Claims Act.⁴⁴ But that statute exempted “[a]ny claim arising out of the ... negligent transmission of letters or postal matter.”⁴⁵

Writing for his Second Circuit panel, Chief Judge Katzmann explained that the statute was ambiguous as applied to the facts.⁴⁶ Relying primarily on its assessment of the broad statutory purposes -- including the purpose of allowing plaintiffs to recover when injured by federal officials except in certain circumstances -- the court held that the plaintiff's claim was not exempt and did not involve the transmission of letters.⁴⁷

By a 7-1 vote, with Justice Kennedy writing, the Supreme Court agreed with the Second Circuit's conclusion, but the Supreme Court relied on more textualist and canon-based reasoning.⁴⁸ The Supreme Court reasoned that the phrase

“negligent transmission of letters or postal matter” in its ordinary meaning refers to mail that fails to arrive, arrives late, arrives at the wrong address, or is damaged.⁴⁹

As I see it, this case, while interesting, does not show us too much. The Supreme Court did not need to (and did not) go much beyond what was the best reading of the statutory text.⁵⁰ And given that negligent transmission of the mail is not usually understood as tripping someone with the mail, that was the beginning and end of it for the Supreme Court.

The second case, *United States v. Gayle*,⁵¹ concerned a provision of the Gun Control Act of 1968⁵² that prohibited the possession of firearms *2131 by anyone who had been “convicted in any court of, a crime punishable by imprisonment for a term exceeding one year.”⁵³ The controversy there involved people who had been convicted in a foreign court rather than an American court.⁵⁴ Were they covered by this statute?⁵⁵

The Second Circuit concluded that “in any court” did not include foreign courts.⁵⁶ According to Chief Judge Katzmann, the phrase “in any court” was “ambiguous” (p. 74).⁵⁷ The panel therefore turned to the legislative history and concluded that the Senate Report “unmistakably contemplated felonies, for purposes of the Gun Control Act, to include only convictions in federal and state courts” of the United States.⁵⁸

The Supreme Court came to the same conclusion by a 5-3 vote, with an opinion written by Justice Breyer.⁵⁹ Importantly, however, the Supreme Court never said that the phrase “in any court” was ambiguous.⁶⁰ Instead, the Court relied partly on a variation of a substantive canon of construction: the presumption against extraterritorial application.⁶¹ The Court concluded that domestically oriented statutes should apply only domestically in the absence of contrary signals from Congress.⁶²

Justice Thomas, joined by Justices Scalia and Kennedy, dissented.⁶³ He would have held that “any court” means “any court.”⁶⁴ He said that the presumption against extraterritoriality had no application in this context.⁶⁵ In response to the Court's use of legislative history, Justice Thomas also explained that he read the provision's drafting history -- in which the original draft that specified any felony conviction in *2132 a “Federal” or “State” court was replaced by the phrase “any court” -- to confirm his reading of the text.⁶⁶

In terms of the statutory text alone, Justice Thomas's dissent for himself and Justices Scalia and Kennedy is more persuasive than the majority opinion of the Supreme Court. That said, the majority opinion did illustrate how substantive canons of interpretation -- there, the presumption against extraterritoriality -- can play an important role in statutory interpretation by sometimes overriding the best interpretation of even clear text. Importantly, none of the eight Justices said the phrase “in any court” was ambiguous.

The last case discussed by Chief Judge Katzmann, *Murphy v. Arlington Central School District Board of Education*,⁶⁷ is perhaps the most important and intriguing of the three in order to understand his point of view. The relevant statute -- the Individuals with Disabilities Education Act⁶⁸ (IDEA) -- allowed the court to award “reasonable attorneys' fees as part of the costs” to prevailing plaintiffs.⁶⁹ The question was whether this statute allowed the award of the costs of expert witnesses and consultants.⁷⁰ Importantly, the legislative history (in particular, a committee report) suggested that the answer to that question was yes, even though the statutory language supplied no indication that the statute meant to cover the costs of expert witnesses and consultants. In essence, this was a classic *Holy Trinity* case. What Congress said in the statutory text did not appear to square with what Congress meant to say, at least if the committee report could be said to authoritatively reflect Congress's intent.

The Second Circuit acknowledged that the text of the statute did not encompass these expert witness fees.⁷ But the court nonetheless read the legislative history and the larger purposes of the statute to contemplate fee awards for expert witnesses and consultants.⁷² As the Second Circuit noted, the committee report stated that the conferees intended the term “reasonable attorneys’ fees as part of the costs” to encompass expert witness fees.⁷³

The Supreme Court reversed, concluding that the phrase “reasonable attorneys’ fees as part of the costs” did not encompass expert witness fees.⁷⁴ The decision was 6-3 and written by Justice *2133 Alito.⁷⁵ The Court expressly rejected the notion that legislative history could defeat an unambiguous text.⁷⁶ In doing so, the Court once again rejected the *Holy Trinity* principle.⁷⁷ The Court also noted that the IDEA was enacted under the Spending Clause, meaning that States would be required to pay only if the Act provided “clear notice” that expert witness fees were covered, which the Act did not.⁷⁸

In dissent, Justice Breyer adopted a *Holy Trinity*-style approach. He criticized the majority’s refusal to prioritize the legislative history over the text in this instance. “By disregarding a clear statement in a legislative Report,” he wrote, “the majority opinion has reached a result that no Member of Congress expected or overtly desired.”⁷⁹

F. Improving Congress’s Drafting of Statutes

In the final pages of his book, Chief Judge Katzmman promotes ideas for improving mutual understanding between the legislature and the courts (pp. 92-103). Although he correctly says that it would be “fanciful” to think that Congress could do away entirely with ambiguity in laws, he points out that there are nevertheless several ways Congress could help clarify legislative meaning (p. 93).

First, Chief Judge Katzmman suggests that “legislators and their staffs should make greater use of the skilled legislative drafters in their offices of legislative counsel” (p. 93). These offices could maintain a checklist of common issues, including statutes of limitations, private rights of action, preemption, and effective dates (p. 93). I agree fully with this excellent suggestion.

Chief Judge Katzmman also suggests that Congress formally adopt a series of default rules that become effective when the legislative branch has not dealt with a particular issue in a statute (p. 94). For example, Congress could enact a default statute of limitations (p. 94). Again, this is a great idea.⁸⁰

Chief Judge Katzmman also says that Congress should be more ready and willing to fix statutes when mistakes become apparent in later court cases (pp. 94-102). Again, I agree, although I am always quick to stress that it is much harder to enact statutes than it is to block them. For a court to say that Congress can fix a statute if it does not like the result is *not* a neutral principle in our separation of *2134 powers scheme because it is very difficult for Congress to correct a mistaken statutory decision.⁸ The backdrop of possible congressional correction is not a good reason for courts to do anything but their level best to decide the case correctly in the first place.

Chief Judge Katzmman also argues for making legislative history more reliable (pp. 102-03). For example, he asks that the floor managers of a bill indicate which legislative reports count as authoritative (p. 102). To my mind, however, this suggestion quite elegantly reveals one of the concerns with legislative history. Legislative history is not authoritative -- at least in a formal sense -- because Congress does not vote on it. Allowing the floor managers (a tiny fraction of the Members of Congress necessary to pass the law) to designate particular documents as “authoritative” does not solve that problem. As I mentioned earlier, there’s an easy solution to that problem: put the key committee or conference reports

(or at least the key provisions of them) into the statute itself and have the Members of Congress vote on it.⁸² Then it would be both formally and functionally authoritative. In my view, implementing that proposal would be more effective and far more acceptable to all judges than what Chief Judge Katzmman proposes here.

II. MY THESIS: ELIMINATING OR REDUCING THRESHOLD DETERMINATIONS OF CLARITY VERSUS AMBIGUITYs

Chief Judge Katzmman's book should trigger more introspection and debate about statutory interpretation by judges, scholars, and practitioners. It has certainly done so for me. Chief Judge Katzmman has pushed me to think even more deeply about some of these issues than I had before. Of course, he is not to blame for where my thinking has led me.

Chief Judge Katzmman's discussion of using legislative history to resolve ambiguities triggers my first big question: how do we determine whether the text of a statute is clear or ambiguous?

A. Judges Have Trouble Determining Whether a Statute Is Clear or Ambiguous

In recent years, the Supreme Court has often repeated a critical principle: when the text of the statute is clear, the court does not resort *2135 to legislative history.⁸³ Likewise, when the text of the statute is clear, a court should not turn to other principles of statutory interpretation such as the constitutional avoidance canon or *Chevron* deference. Chief Judge Katzmman himself notes this point many times.⁸⁴

Under the structure of our Constitution, Congress and the President -- not the courts -- together possess the authority and responsibility to legislate.⁸⁵ As a result, clear statutes are to be followed. Statutory texts are not just common law principles or aspirations to be shaped and applied as judges think reasonable.⁸⁶ This tenet -- adhere to the text -- is neutral as a matter of politics and policy. The statutory text may be pro-business or pro-labor, pro-development or pro-environment, pro-bank or pro-consumer. Regardless, judges should follow clear text where it leads.

At the same time, when the text of the statute is ambiguous rather than clear, judges may resort to a variety of canons of construction. These ambiguity-dependent canons include: (1) in cases of textual ambiguity, avoid interpretations raising constitutional questions; (2) rely on the legislative history to resolve textual ambiguity; and (3) in cases of textual ambiguity, defer to an executive agency's reasonable interpretation of a statute, also known as *Chevron* deference.⁸⁷

All of these canons, however, depend on a problematic threshold dichotomy.⁸⁸ Courts may resort to the canons only if the statute is not *2136 clear but rather is ambiguous.⁸⁹ But how do courts know when a statute is clear or ambiguous? In other words, how much clarity is sufficient to call a statute clear and end the case there without triggering the ambiguity-dependent canons?

Unfortunately, there is often no good or predictable way for judges to determine whether statutory text contains "enough" ambiguity to cross the line beyond which courts may resort to the constitutional avoidance canon, legislative history, or *Chevron* deference. In my experience, judges will often go back and forth arguing over this point. One judge will say that the statute is clear, and that should be the end of it. The other judge will respond that the text is ambiguous, meaning that one or another canon of construction should be employed to decide the case. Neither judge can convince the other.⁹⁰ That's because there is no right answer.

It turns out that there are at least two separate problems facing those disagreeing judges.⁹

***2137** First, judges must decide how much clarity is needed to call a statute clear.⁹² If the statute is 60-40 in one direction, is that enough to call it clear? How about 80-20? Who knows?

Second, let's imagine that we could agree on an 80-20 clarity threshold. In other words, suppose that judges may call a text "clear" only if it is 80-20 or more clear in one direction. Even if we say that 80-20 is the necessary level of clear, how do we then apply that 80-20 formula to particular statutory text? Again, who knows? Determining the level of ambiguity in a given piece of statutory language is often not possible in any rational way.⁹³ One judge's clarity is another judge's ambiguity. It is difficult for judges (or anyone else) to perform that kind of task in a neutral, impartial, and predictable fashion.⁹⁴

I tend to be a judge who finds clarity more readily than some of my colleagues but perhaps a little less readily than others.⁹⁵ In practice, I probably apply something approaching a 65-35 rule. In other words, if the interpretation is at least 65-35 clear, then I will call it clear and reject reliance on ambiguity-dependent canons. I think a few of my colleagues apply more of a 90-10 rule, at least in certain cases. Only if the proffered interpretation is at least 90-10 clear will they call it clear.⁹⁶ By contrast, I have other colleagues who appear to apply a 55-***2138** 45 rule. If the statute is at least 55-45 clear, that's good enough to call it clear.⁹⁷

Who is right in that debate? Who knows? No case or canon of interpretation says that my 65-35 approach or my colleagues' 90-10 or 55-45 approach is the correct one (or even a better one). Of course, even if my colleagues and I could agree on 65-35, for example, as the appropriate trigger, we would still have to figure out whether the text in question surmounts that 65-35 threshold. And that itself is a difficult task for different judges to conduct neutrally, impartially, and predictably.

The simple and troubling truth is that no definitive guide exists for determining whether statutory language is clear or ambiguous. In a considerable understatement, the Supreme Court itself has admitted that "there is no errorless test for identifying or recognizing 'plain' or 'unambiguous' language."⁹⁸ Professor Ward Farnsworth has elaborated persuasively on that point, arguing that "[t]here are no rules or clear agreements among judges about just how to decide whether a text is ambiguous."⁹⁹ As he puts it:

For making that determination, no theory helps; it is simply a judgment about the clarity of the English and whether it is reasonable to read it more than one way. It may be that the holders of some theories are more likely to answer that question one way rather than another, but the theories themselves are incapable of generating answers.⁰⁰

That conceptual problem opens the door to a more practical concern. "[J]udgments about ambiguity ... are dangerous," Farnsworth concludes, "because they are easily biased by strong policy preferences that the makers of the judgments hold."⁰ Because judgments about ***2139** clarity versus ambiguity turn on little more than a judge's instincts, it is harder for judges to ensure that they are separating their policy views from what the law requires of them.⁰² And it's not simply a matter of judges trying hard enough: policy preferences can seep into ambiguity determinations in subconscious ways.⁰³ As a practical matter, judges don't make the clarity versus ambiguity determination behind a veil of ignorance; statutory interpretation issues are all briefed at the same stage of the proceeding, so a judge who decides to open the ambiguity door already knows what he or she will find behind it.

Unfortunately, moreover, the clarity versus ambiguity question plays right into what many consider to be the worst of our professional training. As lawyers, we are indoctrinated from the first days of law school to find ambiguity in even the

clearest of pronouncements. It is no accident that the most popular law school exam preparation book is titled *Getting to Maybe*.⁰⁴ When we practice law, we look for the ambiguity when defending a criminal defendant, a corporate client, an agency, or even a President. What may look clear to everyone else, lawyers argue, is actually not so clear. Maybe it is good that we do this as lawyers (although I am not so sure because I think it leads some lawyers to green-light clients to do things that they should not do). But it is one reason that many people hate lawyers.⁰⁵ And it can be pernicious when we bring that instinct onto the bench and employ it to make statutory interpretation much more difficult and unpredictable than it can and should be.⁰⁶

The problem of difficult clarity versus ambiguity determinations would not be quite as significant if the issue affected cases only on the margins. But the outcome of many cases turns on the initial -- and *2140 often incoherent -- dichotomy between ambiguity and clarity. As Farnsworth correctly notes: "Determinations of ambiguity are the linchpin of statutory interpretation."⁰⁷

As a result, there can be serious incentives and pressures -- often subconscious -- for judges to find textual ambiguity or clarity in certain cases.⁰⁸ For example, a judge may find that the answer provided by the legislative history accords better with the judge's sense of reason, justice, or policy. In that situation, the judge is subtly incentivized to categorize the statute as ambiguous in order to create more room to reach a result in line with what the judge thinks is a better, more reasonable policy outcome. Conversely, the judge may conclude that the interpretation offered by an agency does not accord with the judge's sense of reason, justice, or policy. In that case, the judge may avoid *Chevron* deference simply by finding a sufficient degree of clarity in the statute at the outset. (Once again, keep in mind that no one has told courts, or could meaningfully tell courts, how much clarity is enough to call a text clear rather than ambiguous for these purposes.)

Moreover, once judges make the key move of finding text ambiguous, then they can take full advantage of the large shed of ambiguity-dependent tools and canons. And because there is no neutral method to evaluate whether a text is clear or ambiguous, that initial move is a surprisingly easy one for judges to make.⁰⁹ As Farnsworth explains, "[t]he 'magic wand of ipse dixit' is the standard tool for deciding such matters."⁰

A number of important Supreme Court decisions have implicated the clarity versus ambiguity problem. For example, consider some of the cases that have turned on the constitutional avoidance canon in the recent past: the *NFIB* healthcare case,¹ the *NAMUDNO* voting rights case,² and the *Wisconsin Right to Life* campaign finance *2141 case.³ Those were hugely significant cases, each of which turned to a significant extent on an initial question of whether the relevant statute was clear or ambiguous. If the statute was ambiguous, then the Court could resort to the constitutional avoidance canon. If the statute was clear, then there would be no warrant for using the constitutional avoidance canon. All of these cases were extraordinarily important, and all were decided on the basis of a necessarily difficult evaluation of whether the text was clear or ambiguous.

Or consider the cases that have turned on *Chevron* deference. As Justice Scalia explained twenty-five years ago: "How clear is clear? It is here, if *Chevron* is not abandoned, that the future battles over acceptance of agency interpretations of law will be fought."⁴ And, in fact, the Court has skirmished over exactly this terrain numerous times in the last twenty-five years, including in cases such as *Michigan v. EPA*,⁵ *Scialabba v. Cuellar de Osorio*,⁶ *EPA v. EME Homer City Generation, L.P.*,⁷ *Massachusetts v. EPA*,⁸ *FDA v. Brown & Williamson Tobacco Corp.*,⁹ *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,²⁰ and *MCI Telecommunications Corp. v. AT&T Co.*²

A good example of the importance of the threshold ambiguity determination is *MCI*. There, the Court considered two provisions of the Communications Act of 1934.²² The first provision -- section 203(a) -- required communications common carriers to file tariff schedules with the Federal Communications Commission (FCC).²³ The second provision

-- section 203(b) -- granted the FCC the power to “modify” any requirement of the first provision.²⁴ The question before the Supreme Court was deceptively simple: does the power to “modify” any requirement of the first provision include the power “to make tariff filing optional for all nondominant long-distance carriers,” as the FCC claimed?²⁵

In trying to answer this question, the Court divided over whether the statute was ambiguous. Led by Justice Scalia, the majority stated *2142 that it had “not the slightest doubt” that the statute did not allow the FCC to make tariff filing optional for a broad category of common carriers.²⁶ In dissent, Justice Stevens disagreed vehemently.²⁷ In his view, the statute “plainly confer[red] at least some discretion to modify the general rule that carriers file tariffs.”²⁸ By casting aside the traditional “ample leeway” extended to the agency, he argued, the majority had seized on “a rigid literalism that deprives the FCC of the flexibility Congress meant it to have.”²⁹

In that case, eight Justices came to two different answers about *whether* the statute was clear or ambiguous. That outcome will hardly reassure those who wish to keep the clarity versus ambiguity question as part of statutory interpretation. And *MCI* represents only one of many cases in which the Supreme Court has wrestled with determinations of ambiguity, to say nothing of the vast number of cases confronting the lower courts.

All of these cases came down to what turns out to be an entirely personal question, one subject to a certain sort of *ipse dixit*: is the language clear, or is it ambiguous? No wonder people suspect that judges' personal views are infecting these kinds of cases. We have set up a system where that suspicion is almost inevitable because the reality is almost inevitable.

Of course, in characterizing some of these decisions as examples of the problem, I am not in any way suggesting that the judges who authored them acted in an improper or political manner. To the contrary: most judges apply the doctrine as faithfully as possible. But too much of current statutory interpretation revolves around personally instinctive assessments of clarity versus ambiguity, as these cases amply show. It is difficult to make these assessments in a neutral, evenhanded way, or for different judges to reach the same assessments consistently. And even if judges could make threshold findings of ambiguity in a neutral way, they still would have trouble convincing the public that they were acting impartially. It is all but impossible to communicate clarity versus ambiguity determinations in a reasoned and accountable way -- especially when those determinations lead directly *2143 to the results in controversial cases.³⁰ Perhaps unsurprisingly, then, over time a number of Supreme Court Justices have expressed frustration with the difficulty -- and arbitrariness -- of the threshold inquiry.³

This kind of decisionmaking threatens to undermine the stability of the law and the neutrality (actual and perceived) of the judiciary.³² After nearly a decade on the bench, I have a firm sense that the clarity versus ambiguity determination -- is the statute clear or ambiguous? -- is too often a barrier to the ideal that statutory interpretation should be neutral, impartial, and predictable among judges of different partisan backgrounds and ideological predilections.

My point here should not be misunderstood. Statutes will always have many ambiguities. That is the nature of language, including Congress's language. We cannot eliminate or avoid ambiguities, or wish them away. Chief Judge Katzmann puts it well: “it is unreasonable to expect Congress to anticipate all interpretive questions that *2144 may present themselves in the future,” particularly when Congress operates under strict “time pressures” (p. 47).

But even though ambiguity is unavoidable as a practical matter, perhaps we can avoid attaching serious interpretive consequences to binary ambiguity determinations that are so hard to make in a neutral, impartial way. Instead of injecting the ambiguity problem into the heart of statutory interpretation, we can consider whether to sideline that threshold inquiry as much as possible.

B. Judges Should Determine the Best Reading of the Statute, Not Whether It Is Clear or Ambiguous

What is the solution? To be perfectly candid, I'm not sure at this point. But to start, perhaps we can try to examine ways to reduce reliance on the question of clarity versus ambiguity in the enterprise of statutory interpretation without sacrificing some of the rules of statutory interpretation that have helped structure the task. Here's one idea: judges should strive to find the best reading of the statute. They should not be diverted by an arbitrary initial inquiry into whether the statute can be characterized as clear or ambiguous. In other words, we can try to make sure that judges do not -- or at least only rarely -- have to ask whether a statute is clear or ambiguous in the course of interpreting it.

Instead, statutory interpretation could proceed in a two-step process. First, courts could determine the best reading of the text of the statute by interpreting the words of the statute, taking account of the context of the whole statute, and applying any other appropriate semantic canons of construction.³³ Second, once judges have arrived at the best reading of the text, they can apply -- openly and honestly -- any substantive canons (such as plain statement rules or the absurdity doctrine) that may justify departure from the text.³⁴ Under this two-step approach, few if any statutory interpretation cases would turn on an initial finding of clarity versus ambiguity in the way that they do now.

How do judges determine the "best reading" of a statutory text under the first step of my proposed approach? Courts should try to read statutes as ordinary users of the English language might read and understand them. That inquiry is informed by both the words of the statute and conventional understandings of how words are generally used by English speakers. Thus, the "best reading" of a statutory text *2145 depends on (1) the words themselves, (2) the context of the whole statute, and (3) any other applicable semantic canons, which at the end of the day are simply a fancy way of referring to the general rules by which we understand the English language.

To be sure, determining the best reading of the statute is not always easy. But we have tools to perform the task and communicate it to the parties and public in our opinions. Why layer on a whole separate inquiry -- is the statute clear or ambiguous? -- that does not help uncover the best reading and that is inherently difficult to resolve in a neutral, impartial, and predictable way?³⁵

But given that several existing canons depend on a threshold determination of ambiguity, wouldn't this proposed approach work a significant change in certain aspects of statutory interpretation? Not necessarily. It depends on which canons we end up discarding. Importantly, moreover, this is not an all-or-nothing proposal: we could refashion some ambiguity-dependent canons but not others depending on the values at stake with particular canons.³⁶

Let's take a look at a few of those canons.

1. The Constitutional Avoidance Canon. -- Under the constitutional avoidance canon, judges must interpret ambiguous statutes so as to avoid a serious constitutional question, or actual unconstitutionality, that would arise if the ambiguity were resolved in one direction rather than the other.³⁷ For the canon to be triggered, however, there must be ambiguity in the statute.³⁸

The canon is based on a theory of judicial restraint. Under this theory, courts should avoid wading into difficult constitutional questions or holding statutes unconstitutional if they can reasonably avoid doing so. That reluctance is said to have the additional effect of showing respect for Congress by assuming that it would not have wanted to legislate across a constitutional line.

*2146 Of course, one initial problem with this doctrine is that Congress may have wanted to legislate right up to the constitutional line but didn't know where it was and trusted the courts to make sure Congress did not unintentionally

cross the line.³⁹ So constitutional avoidance can sometimes look more like judicial abdication -- a failure to confront the constitutional question raised by the statute as written -- than judicial restraint. Another problem is that the doctrine can be invoked when there are mere *questions* of unconstitutionality rather than actual unconstitutionality.⁴⁰ As a result, the doctrine gives judges enormous discretion to push statutes in one direction so as to avoid even coming within a penumbra of the constitutional line.

Over the years, for these and other reasons, many critics have advocated scaling back the constitutional avoidance canon, at least as applied to cases involving constitutional questions as opposed to actual unconstitutionality.⁴¹ For instance, Judge Easterbrook has described “the canon of construing statutes to avoid constitutional doubt” as “wholly illegitimate.”⁴² Noting that constitutional “doubt is pervasive,” he explains that the constitutional avoidance canon “acts as a roving commission to rewrite statutes to taste.”⁴³ As a result, the canon “is simultaneously unfaithful to the statutory text and an affront to *both* of the political branches.”⁴⁴ Likewise, Judge Posner criticizes the canon for “creat[ing] a judge-made constitutional ‘penumbra’ that has much the same prohibitory effect as the judge-made (or at least judge-amplified) Constitution itself.”⁴⁵ Along with the many other critics of the constitutional avoidance canon, Judges Easterbrook and Posner have made strong cases in my view.

Apart from (or in addition to) those reasons, I would consider jettisoning the constitutional avoidance canon for a different reason: the trigger for the canon -- clear or ambiguous? -- is so uncertain.

That flaw was famously highlighted in *NFIB v. Sebelius*.⁴⁶ In analyzing that case, it is perhaps important to underscore something *2147 that seems to be overlooked by almost all observers, even those who should know better. The Chief Justice *agreed* with the four dissenters (Justices Scalia, Kennedy, Thomas, and Alito) on all of the key constitutional and statutory issues raised about the individual mandate. Those five Justices agreed about the scope of the Commerce and Necessary and Proper Clauses.⁴⁷ They agreed about the scope of the Taxing Clause.⁴⁸ And they agreed that the individual mandate provision was best read to impose a legal mandate rather than a tax.⁴⁹ In short, they agreed that the individual mandate, best read, could *not* be sustained as constitutional under the Commerce, Necessary and Proper, and Taxing Clauses.

What they disagreed on with respect to the individual mandate -- and, amazingly, *all* that they disagreed on -- was how to apply the constitutional avoidance canon. In particular, they disagreed about whether the individual mandate provision was sufficiently ambiguous that the Court should resort to the constitutional avoidance canon.⁵⁰

Consider that for a moment. For all that has been written about the *NFIB* case (and in particular about Chief Justice Roberts's role), the decision on the individual mandate turned not on the proper interpretation of the Constitution and not on the best interpretation of the statute. It turned entirely on how much room judges have to find ambiguity when invoking the constitutional avoidance canon. In my view, this is an odd state of affairs. A case of extraordinary magnitude boils down to whether a key provision is clear or ambiguous, even though we have no idea how much ambiguity is enough to begin with, nor how to ascertain what level of ambiguity exists in a particular statute.

My point here is not to debate whether the Chief Justice or the four dissenters had the better argument about the clarity or ambiguity of the statutory provision in question. My point is that such a question arguably should not be part of the inquiry because -- despite the best efforts of conscientious judges -- it is not answerable in a neutral, impartial, *2148 or predictable way. A case of this magnitude should not turn on such a question, but that is what the canon of constitutional avoidance required, which is why those five Justices were all compelled to confront and analyze it. (The other four Justices -- Justices Ginsburg, Breyer, Sotomayor, and Kagan -- would have upheld the provision under the Commerce Clause; they had no occasion to delve into the Taxing Clause and the constitutional avoidance canon.)

If the constitutional avoidance canon were jettisoned, judges could instead determine the best reading of the statute based on the words of the statute, the context, and the agreed-upon canons of interpretation. If that reading turned out to be unconstitutional, then judges could say as much and determine the appropriate remedy by applying proper severability principles.

Of course, severability principles are their own separate mess. As currently framed, severability doctrine requires the judge to sever the offending provision from the statute, to strike down the entire statute, or to perform some other surgery. In deciding among this menu of options, the court must in part assess what Congress would have wanted and whether the statute would be workable without the offending provision.⁵

But how can the court determine what Congress would have wanted? For instance, in the *NFIB* case, the dissenters tried to determine whether Congress would have enacted the health care law without the provisions the dissenters deemed unconstitutional.⁵² They said no. But how can we know? Is that really what then-Speaker of the House Nancy Pelosi, then-Senate Majority Leader Harry Reid, President Barack Obama, and all the Members of Congress who voted *for* the bill, would have wanted? Is this even the right question to be asking?

Courts can reform principles of severability as well. For instance, courts might institute a new default rule: sever an offending provision from the statute to the narrowest extent possible unless Congress has indicated otherwise in the text of the statute.⁵³ This default rule has the benefit of stopping judges from trying to guess what Congress would have wanted, an inherently suspect exercise.⁵⁴ And it has the additional benefit of telling Congress what to expect.

Regarding *NFIB*, some contend that at least the narrowest version of the severability principle could have led to the same bottom line (eliminating the legal mandate but keeping the tax penalties on those *2149 who fail to have insurance).⁵⁵ Others disagree with that notion. I take no position here on how severability could have been applied in that case, which is an extraordinarily difficult question in its own right.

In any event, for all the reasons mentioned above, it may be worth trading off increased reliance on severability principles in exchange for decreased reliance on clarity versus ambiguity determinations in invoking the constitutional avoidance doctrine.

2. *Legislative History*. -- A second ambiguity-dependent “canon” is the principle -- on which Chief Judge Katzmann focuses his book -- that we construe ambiguous statutes in light of the statute's legislative history.⁵⁶

As I discussed earlier, many have criticized the use of legislative history on formal and functional grounds. As a formal matter, committee reports and floor statements are not the law enacted by Congress. And as a functional matter, committee reports and floor statements too often reflect an effort by a subgroup in Congress -- or, worse, outside of it -- to affect how the statute will subsequently be interpreted and implemented, in ways that Congress and the President may not have intended. Moreover, legislative history is often conflicting because of different floor statements, reports, and the like. From the courts' perspective, using legislative history can therefore be like “looking over a crowd and picking out your friends.”⁵⁷

I find yet another major problem with legislative history: the clarity versus ambiguity trigger for resorting to legislative history means that the decision whether to resort to legislative history is often indeterminate. The indeterminacy of the trigger greatly exacerbates the problems with the use of legislative history. As a judge, if all you need to “pick out your friends” -- that is, to pick out the result that you find most reasonable -- is a finding of ambiguity, and if there is no set or principled way to determine clarity versus ambiguity, then some judges are going to be more likely to find ambiguity

in certain cases. That's pretty obvious as a matter of both common sense and human psychology. If judges are given a gray area with no guideposts about how to decide in that gray area (how to decide clarity versus ambiguity), *2150 we should expect that they will end up with what they deem the most reasonable policy outcome.

In a world without initial determinations of ambiguity, judges would instead decide on the best reading of the statute.⁵⁸ In that world, legislative history would be largely limited to helping answer the question of whether the literal reading of the statute produces an absurdity, as discussed below.⁵⁹ Most importantly, in that world we would not make statutory interpretation depend so heavily on the difficult assessment of whether the text is clear or ambiguous.

3. *Chevron Deference*. -- Under *Chevron*, courts uphold an agency's reading of a statute -- even if not the best reading -- so long as the statute is ambiguous and the agency's reading is at least reasonable.⁶⁰ This statutory interpretation principle is probably the one I encounter most as a judge on the D.C. Circuit.

Chevron has been criticized for many reasons. To begin with, it has no basis in the Administrative Procedure Act.⁶¹ So *Chevron* itself is an atextual invention by courts. In many ways, *Chevron* is nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch. Moreover, the question of when to apply *Chevron* has become its own separate difficulty, as exemplified in cases such as *Mead*,⁶² *City of Arlington*,⁶³ and *King v. Burwell*.⁶⁴

In that regard, it is important to understand how *Chevron* affects the Executive Branch. From my more than five years of experience at the White House, I can confidently say that *Chevron* encourages the Executive Branch (whichever party controls it) to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints. My colleague Judge Tatel has lamented that agencies in both Republican and Democratic administrations too often pursue policy at the expense of law.⁶⁵ He makes a good point. As I see it, however, that will always happen because Presidents run for office on policy agendas and it is often difficult to get those agendas through Congress. So it is no surprise that Presidents and agencies often will do whatever they can within existing statutes. And with *Chevron* in the mix, that inherent aggressiveness is amped up significantly. I think some academics fail to fully grasp the reality of how this works. We must recognize how much *Chevron* invites an extremely aggressive executive branch philosophy of pushing the legal envelope (a philosophy that, I should note, seems present in the administrations of both political parties). After all, an executive branch decisionmaker might theorize, "If we can just convince a court that the statutory provision is ambiguous, then our interpretation of the statute should pass muster as reasonable. And we can achieve an important policy goal if our interpretation of the statute is accepted. And isn't just about every statute ambiguous in some fashion or another? Let's go for it." Executive branch agencies often think they can take a particular action unless it is *clearly forbidden*.

Stated simply, we should not unduly blame the executive branch agencies for doing what our doctrine has encouraged them to do.

But when the Executive Branch chooses a weak (but defensible) interpretation of a statute, and when the courts defer, we have a situation where every relevant actor may agree that the agency's legal interpretation is not the best, yet that interpretation carries the force of law. Amazing.

Perhaps in response to all of these criticisms, the Supreme Court itself has been reining in *Chevron* in the last few years. In one of its most significant recent pronouncements, *King v. Burwell*, the Court said that *Chevron* does not apply in cases involving "question[s] of deep 'economic and political significance.'" ⁶⁶ And *Chevron* does not apply at all unless "Congress delegated authority to the agency generally to make rules carrying the force of law, and ... the agency interpretation claiming deference was promulgated in the exercise of that authority." ⁶⁷ These cases suggest some serious concern at the *2152 Supreme Court about the reach of *Chevron*. ⁶⁸ And *King v. Burwell* in particular

raises two significant questions that the Supreme Court will presumably have to confront soon: First, how major must the questions be for *Chevron* not to apply? Second, if *Chevron* is inappropriate for cases involving major questions, why is it still appropriate for cases involving less major but still important questions?

All of that said, *Chevron* makes a lot of sense in certain circumstances. It affords agencies discretion over how to exercise authority delegated to them by Congress. For example, Congress might assign an agency to issue rules to prevent companies from dumping “unreasonable” levels of certain pollutants. In such a case, what rises to the level of “unreasonable” is a policy decision. So courts should be leery of second-guessing that decision. The theory is that Congress delegates the decision to an executive branch agency that makes the policy decision, and that the courts should stay out of it for the most part. That all makes a great deal of sense and, in some ways, represents the proper conjunction of the *Chevron* and *State Farm* doctrines.⁶⁹

But *Chevron* has not been limited to those kinds of cases.⁷⁰ It can also apply whenever a statute is ambiguous. In a case where a statute is deemed ambiguous, a court will defer to an agency's authoritative reading, at least so long as the agency's reading is reasonable.⁷¹

From the judge's vantage point, the fundamental problem once again is that different judges have wildly different conceptions of whether a particular statute is clear or ambiguous. The key move from step one (if clear) to step two (if ambiguous) of *Chevron* is not determinate because it depends on the threshold clarity versus ambiguity determination.⁷² As Justice Scalia pointed out, that determination “is the chink in *Chevron*'s armor -- the ambiguity that prevents it from being an absolutely clear guide to future judicial decisions.”⁷³

***2153** I see that problem all the time in my many agency cases, and it has significant practical consequences. In certain major *Chevron* cases, different judges will reach different results even though they may actually *agree* on what is the best reading of the statutory text. I have been involved in cases where that has happened.

Think about that for a moment. Consider, for example, a high-profile case involving a major agency rule that rests on the agency's interpretation of a statute. Suppose the judges agree that the agency's reading of the statute is not the best. But one judge believes that the statute is ambiguous, so that judge would nonetheless uphold the agency's interpretation even though it is not the best interpretation. The other two judges say that the statute is sufficiently clear, so those judges strike down the agency's interpretation. That simple threshold determination of clarity versus ambiguity may affect billions of dollars, the individual rights of millions of citizens, and the fate of clean air rules, securities regulations, labor laws, or the like. And yet there is no particularly principled guide for making that clarity versus ambiguity decision, and no good way for judges to find neutral principles on which to debate and decide that question.⁷⁴

This state of affairs is unsettling. As I stated above, my goal is to help make statutory interpretation a more neutral, impartial process where like cases are treated alike by judges of all ideological stripes, regardless of the issue and regardless of the identity of the parties in the case. That objective is hard to achieve -- at least in many cases -- if the threshold trigger for *Chevron* deference to the agency is ambiguity.⁷⁵

What's the solution?

To begin with, courts should still defer to agencies in cases involving statutes using broad and open-ended terms like “reasonable,” “appropriate,” “feasible,” or “practicable.” In those cases, courts should say that the agency may choose among reasonable options allowed by ***2154** the text of the statute.⁷⁶ In those circumstances, courts should be careful not to unduly second-guess the agency's choice of regulation.⁷⁷ Courts should defer to the agency, just as they do when conducting deferential arbitrary and capricious review under the related reasoned decisionmaking principle of

State Farm.⁷⁸ This very important principle sometimes gets lost: a judge can engage in appropriately rigorous scrutiny of an agency's statutory interpretation and simultaneously be very deferential to an agency's policy choices within the discretion granted to it by the statute.⁷⁹

But in cases where an agency is instead interpreting a specific statutory term or phrase, courts should determine whether the agency's interpretation is the best reading of the statutory text. Judges are trained to do that, and it can be done in a neutral and impartial manner in most cases.

In short, the problem with certain applications of *Chevron*, as I see it, is that the doctrine is so indeterminate -- and thus can be antithetical to the neutral, impartial rule of law -- because of the initial clarity versus ambiguity decision. Here too, we need to consider eliminating that inquiry as the threshold trigger.

4. Some Ambiguity-Dependent Principles of Interpretation Should Be Applied as Plain Statement Rules. -- The clarity versus ambiguity issue also arises with several substantive canons of interpretation that are now framed as presumptions. For example, we presume that statutes do not apply extraterritorially.⁸⁰ We presume that statutes do not effectuate implied repeals of other statutes.⁸¹ We presume that statutes ***2155** do not eliminate mens rea requirements.⁸² And we presume that statutes do not apply retroactively.⁸³

Some of these presumptions implicitly rest on an initial finding of ambiguity. In essence, if the statutory text is ambiguous, then courts should interpret the statute not to apply extraterritorially, not to effectuate an implied repeal, not to eliminate a mens rea requirement, or not to apply retroactively, for example.

Other presumptions are framed as plain statement rules that apply even when a statute is otherwise clear.⁸⁴ For example, we will presume that a statute does not directly alter the federal-state balance unless Congress expressly states as much.⁸⁵

Whereas ambiguity-dependent presumptions can be overcome by clear text, presumptions framed as plain statement rules require something more: they demand language directly stating Congress's intent to wade into the area encompassed by the plain statement rule.⁸⁶ As a result, plain statement rules do not turn on a finding of clarity versus ambiguity; rather, they turn on whether the statute includes an express statement overcoming the default rule against a certain reading.

With the ambiguity-dependent presumptions, it is again problematic to let the clarity versus ambiguity determination resolve the fate of a ***2156** case. But what's the solution here? Some of the presumptions are already fashioned as plain statement rules. In my view, the solution to the clarity versus ambiguity conundrum in this context is either to apply the presumption in question as a plain statement rule, or to eliminate it entirely. In other words, if some constitutional or quasi-constitutional value is sufficiently important that we will presume that Congress did not mean to abrogate that value, then we should require Congress to speak directly to that issue in order to overcome it -- whether it be extraterritorial application, repeal of a prior statute, mens rea, or retroactive application, among many others.

A separate problem is determining which constitutional or quasi-constitutional values justify a presumption or plain statement rule. That topic is hotly disputed but is beyond the scope of this Book Review.⁸⁷

Putting aside transition questions,⁸⁸ this change would be easy to accomplish and would lead to far more predictability in the application of these presumptions in particular cases. It would also promote the kind of mutual understanding

between courts and Congress that Chief Judge Katzmman rightly encourages. Indeed, the Supreme Court has seemingly been moving toward a plain-statement-like understanding of many of these presumptions already.⁸⁹

C. Off-Ramps from the Text: The “Mistake” and Absurdity Canons

What if a statute as written would produce an objectively absurd outcome? Or what if a statute as written says something that we are nearly certain that Congress did not mean -- in other words, that the statutory text reflects a mistake?

To start, it's important to distinguish between the absurdity doctrine and the idea of a mistake.

The absurdity doctrine counsels that a statute should not be interpreted to produce an objectively absurd result.⁹⁰ At least in the abstract, this is a sound principle, although the alleged absurdity must ***2157** surmount a high bar to be truly absurd.⁹ After all, one person's reasonableness may be another person's absurdity. Or one person may think that an idea is bad but not absurd whereas another person may think it absurd. Interestingly, in determining whether a statute produces an absurd result, even Justice Scalia agreed that judges may look to legislative history.⁹² Why? Legislative history may defeat an absurdity argument by demonstrating that some Members of Congress actually meant to legislate the result that the judge otherwise may think is absurd. And if Congress meant to legislate the result, that result cannot be absurd.

The mistake notion is more uncertain. It rests on a communications phenomenon that all of us confront on a daily basis. Someone might tell you, “you said X.” And you might reply, “that's not what I meant.” Or your child might say: “You asked me to do X, but I assumed you meant Y, so I did Y.” These kinds of “mistakes” or divergences between what someone says and what someone means happen all the time. So too with Congress.

But is there a “mistake” principle in statutory interpretation? Do courts have the power to correct Congress's “mistakes”? The answer is yes, but only up to a limited point -- that limited point being drafting errors, sometimes known as scrivener's errors.⁹³ All agree that those kinds of mistakes may be corrected by a court. Justice Scalia recently described the doctrine in this way: “Only when it is patently obvious to a reasonable reader that a drafting mistake has occurred may a court correct the mistake.”⁹⁴

***2158** But beyond technical drafting mistakes, there appears to be no broader mistake canon, where the courts can conclude that Congress did not mean to say what it said. That's what *Holy Trinity* allowed but what the Supreme Court now rejects.⁹⁵

So what happens then when courts confront statutory text that is not what they think Congress meant to say but where the mistake is not akin to a drafting error? One answer -- the answer that appears to correspond to current doctrine -- is that courts may merely identify the apparent mistake, and then it is up to Congress to correct it. After all, Congress routinely passes technical corrections bills after it passes any major legislation.⁹⁶

Of course, this discussion brings us right to *King v. Burwell*, one of the most interesting statutory interpretation cases in recent years. The question presented was whether tax credits available to people who purchased health insurance on exchanges “established by the State” also were available to those who purchased insurance on exchanges established by the Federal Government, even though the statute did not say as much.⁹⁷ Some said that the Members of Congress who voted for the bill meant (or would have meant, had they noticed it) to include federally established exchanges in the relevant provision. Under this theory, in other words, Congress did not say in the statute what at least those who voted for and signed the Patient Protection and Affordable Care Act⁹⁸ likely meant to say.⁹⁹ But in resolving the case, the

Supreme Court decided against *explicitly* using a kind of mistake canon -- perhaps because doing so would resurrect a form of the now-disfavored *Holy Trinity* doctrine.

But the Court nonetheless ruled for the Government and seemed *implicitly* to employ a mistake canon. The Court reasoned: “Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a ***2159** way that is consistent with the former, and avoids the latter.”²⁰⁰ The Court appeared to suggest that the overall plan and context of the law showed that the words in question did not *mean* what they *said*. The Court stated: “But when read in context, ‘with a view to [its] place in the overall statutory scheme,’ the meaning of the phrase ‘established by the State’ is not so clear.”²⁰ The Court used the term “ambiguous” to describe the law, but I think the Court was describing more of a mistake rather than ambiguity in any traditional sense.

It's not my place here to say whether *King v. Burwell* was right or wrong in its outcome. That's not relevant for present purposes and beyond the scope of this Book Review. But I think the question of whether it was right or wrong depends on what one thinks about a mistake canon -- that is, a narrower form of *Holy Trinity* -- that does not allow resort to legislative history but does allow courts to look at the overall Act and adopt what they conclude Congress *meant* rather than what Congress *said*.²⁰²

In the wake of *King*, a separate issue going forward for statutory interpretation and an issue more central to my focus in this Book Review is that the *King v. Burwell* Court's calling the “established by the State” language ambiguous -- rather than directly addressing the appropriate role of the Court in dealing with Congress's apparent mistakes -- may have broader repercussions. As I have explained, many canons depend on a finding of clarity versus ambiguity. That threshold inquiry is already indeterminate. Because the phrase “established by the State” was deemed ambiguous, one can imagine that some judges may find fewer statutes “clear” because the statutory language in question is no less ambiguous than the phrase “established by the State” was in *King*. We will see.

III. REVISING THE PROBLEMATIC SEMANTIC CANONS

There is another set of canons of interpretation that judges apply when interpreting statutes. These are known as semantic canons. These canons help judges determine the best reading of the statutory text.

Semantic canons are generally designed to reflect the meaning that people, including Members of Congress, ordinarily intend to communicate ***2160** with their choice of words.²⁰³ But some semantic canons do not accomplish this mission very well, and some require judges to make difficult policy judgments that they are ill-equipped to make. It seems to me that we ought to shed semantic canons that fall into these categories. There is much to be written on this topic, but to keep this Book Review from turning (even more) into a book of its own, I will sketch out just a few preliminary thoughts.

A. The *Ejusdem Generis* Canon

The *ejusdem generis* canon tells us to interpret a general term at the end of a series of specific terms to be of like character as the specific terms.²⁰⁴ So when a statute says “no dogs, cats, or other animals allowed in the park,” we are told that we should read “other animals” to mean “other animals like dogs and cats.”

That does not make a whole lot of sense to me. Why not read “other animals” to mean “other animals”? It seems to me that we have to be wary of adding implicit limitations to statutes that the statutes' drafters did not see fit to add.²⁰⁵ If legislators want to keep out animals like dogs and cats, then they should enact a statute that states “no dogs, cats, or other *similar* animals allowed in the park.” That's easy enough going forward, at least putting aside the not-so-easy question of transition rules in how we are to interpret statutes passed before any shift in interpretive methods.²⁰⁶

The more fundamental problem with ejusdem generis, for present purposes, is that it requires judges to come up with their own sense of the connective tissue that binds the terms in the statute.²⁰⁷ Judges *2161 must first determine what characteristic makes “dogs” and “cats” similar, and then apply that characteristic as an implied limitation on “other animals.” This is a very indeterminate task for judges. Justice Kagan highlighted this problem in her brilliant dissent in *Yates v. United States*,²⁰⁸ a case involving an obstruction of justice statute where the majority relied on the ejusdem generis canon.²⁰⁹ As she noted in that case: “[Ejusdem generis] require [s] identifying a common trait that links all the words in a statutory phrase.”²¹⁰ Commenting on the case, she explained:

The canon says you need a common denominator. But what is that common denominator? Is the common denominator things that preserve information? Or in the context of an evidence tampering statute, is the common denominator things that provide information to an investigator, things that tell an investigator, say something to an investigator about what the crime is?²¹¹

Justice Kagan illustrates well the problem with the canon. Judges should not be in the position of trying to devise the connective tissue or common denominator. I would consider tossing the ejusdem generis canon into the pile of fancy-sounding canons that warrant little weight in modern statutory interpretation.

B. The Anti-redundancy Canon

Judges say that we should not interpret statutes to be redundant.²¹² But humans speak redundantly all the time, and it turns out that Congress may do so as well.²¹³ Congress might do so inadvertently. Or Congress might do so intentionally in order to, in Shakespeare’s words, *2162 make “double sure.”²¹⁴ Either way, statutes often have redundancies, whether unintended or intended.

The anti-redundancy canon nonetheless tells us to bend the statute to avoid redundancies, at least to the extent we reasonably can. But if one statute says “No dogs in the park” and another one says “No animals in the park,” I believe we should generally assume that the drafter wanted no animals in the park and *really* wanted to make sure that there were no dogs in the park. The anti-redundancy canon instead would have judges try to find some meaning of “animals” that excludes dogs and thereby avoids the redundancy. Such an exercise is little more than policymaking and, in my view, often quite wrongheaded.

We need to be much more cautious when invoking the anti-redundancy canon. Our North Star should always be determining the best reading of the actual words of the statute.

C. The Consistent Usage Canon

Third, and relatedly, judges are told to presume that Congress uses terms consistently: where Congress uses the same term twice, it should be interpreted to mean the same thing, and where Congress uses different terms, they should be interpreted to mean different things.²¹⁵

Superficially, that presumption seems commonsensical, and in the right context it is well advised. But in certain cases, judges turn this commonsense observation about human language into an ironclad rule. Those judges will never allow the same word to mean different things in different places in a statute, no matter how much the context suggests otherwise.

Of course, that rigidity is inappropriate -- in documents as complex and sprawling as statutes, oftentimes authors will use the same term to mean different things in different places.

Similarly, if two different terms are normally synonyms, requiring them to be interpreted differently makes little sense. For example, sometimes people say “street” and sometimes they say “road,” as in “he lives down the street, but she lives at the other end of the road.” Those different words were not intended to communicate any different meaning. For that reason, I would caution against unnaturally reading synonyms to have different meanings. When judges hew too closely to this presumption, they may ditch the best reading of a statute and instead improperly invent one of their own.

*2163 CONCLUSION

Suppose that courts decided to try the suggestions made in this Book Review. Where would that leave us? Likely with the following two-step approach:

First, find the best reading of the statute by interpreting the words of the statute, taking account of the context of the whole statute, and applying any appropriate semantic canons.

Second, apply any applicable plain statement rules, and ensure that the interpretation is not absurd.

Would this two-step process lead every set of judges to reach the same answer in every case? Of course not. But I believe it would produce a more stable and predictable body of statutory jurisprudence than we have now. It would sideline the clarity versus ambiguity determination that is so critical now, but also so indeterminate. This new approach would enhance the rule of law and the appearance of neutral, evenhanded justice.

Regardless of whether you go down that road and whatever your views on statutory interpretation, please read Chief Judge Katzmman's book *Judging Statutes*. And after reading it, do not stop thinking. Instead, use it as a springboard to start reflecting more deeply on the state of statutory interpretation. In my view, we have made enormous progress, thanks largely to Justice Scalia. But as he himself explained so well, the current state of affairs is still not always a pretty picture. I have sketched out some thoughts here to provoke discussion. Some of these may be good ideas; others may be not as good. I am not wedded to any of them at this point. But I am confident that we can do better in interpreting statutes. Prompted by Justice Scalia's brilliant life and career, and by Chief Judge Katzmman's excellent book, we should all strive to do better. That much is clear.

Footnotes

a1 Judge, United States Court of Appeals for the District of Columbia Circuit.

1 See e.g., Justice Elena Kagan, The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes at 8:09 (Nov. 17, 2015), <http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation> <http://perma.cc/3BCF-FEFR>] (explaining that “the primary reason Justice Scalia will “go down as one of the most important, most historic figures in the Court is that he “taught everybody how to do statutory interpretation differently”). For an early description of the “new textualism,” see William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

2 See Kagan, *supra* note 1, at 8:28 (“I think we're all textualists now in a way that just was not remotely true when Justice Scalia joined the bench.”).

3 *Id.* For an excellent discussion of the distinction between textualists and purposivists, see John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70 (2006).

- 4 The Court often still divides in statutory interpretation cases. *See* *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015) (Scalia, J., dissenting); *Bond v. United States*, 134 S. Ct. 2077, 2094 (2014) (Scalia, J., concurring in the judgment); *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1610 (2014) (Scalia, J., dissenting); *see also* *Yates v. United States*, 135 S. Ct. 1074, 1090 (2015) (Kagan, J., dissenting).
- 5 This criticism has been prevalent at least since Professor Karl Llewellyn's famous discussion of “dueling canons” in Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950). But my proposed solutions are largely new, as far as I know.
- 6 *See, e.g.*, Richard A. Posner, Response, *Comment on Professor Gluck's “Imperfect Statutes, Imperfect Courts*, 129 HARV. L. REV. F. 11, 11 (2015) (“I daresay that some judges (and Justices) some of the time actually use these statutory interpretation approaches and these tools (other than as window dressing), and that more think they are using them but aren't really. But I think that most of the time statutory interpretation is better described as creation or completion than as interpretation and that politics and consequences are the major drivers of the outcome.). In many *constitutional* cases, much of the public and bar has long since moved from skepticism to disbelief that judges act as neutral, impartial umpires. I do not agree with that view, but I understand it. That, however, is a topic for another day. Today is about *statutory* interpretation, and about how judges can counter that skepticism.
- 7 *Cf.* HENRY J. FRIENDLY, BENCHMARKS 202 (1967) (recounting how Justice Frankfurter's three rules of statutory interpretation were to “(1) read the statute; (2) read the statute; (3) read the statute!). And while you are at it, read the recent book by Justice Scalia and Professor Bryan Garner as well. *See* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW* (2012). And read the prodigious academic work of Professors John Manning, Bill Eskridge, and Abbe Gluck, among many others. Then you will have a multifaceted picture of some of the problems and difficulties of statutory interpretation today, and benefit from the thoughts of some of our most brilliant analysts and theorists of statutory interpretation.
- 8 THE FEDERALIST NO. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (“The judiciary ... may truly be said to have neither FORCE nor WILL but merely judgment).
- 9 U.S. CONST. art. I, § 7.
- 10 *Id.* art. III, § 1.
- 11 *Id.* art. III, § 2.
- 12 To take one example, we should not expect all judges to agree on whether a particular kind of search is “reasonable” under the Fourth Amendment. U.S. CONST. amend. IV; *see, e.g.*, *Riley v. California*, 134 S. Ct. 2473 (2014). Or what evidentiary privileges should be recognized “in the light of reason and experience. FED. R. EVID. 501; *see, e.g.*, *Swidler & Berlin v. United States*, 524 U.S. 399 (1998). Or whether attorney's fees are in “the interest of justice. 15 U.S.C. § 2072(a) (2012). Or what constitutes a “restraint of trade. 15 U.S.C. § 1 (2012). Cases such as those, where the judicial inquiry requires determination of what is reasonable or appropriate, are less a matter of pure interpretation than of common law like judging.
- 13 *See* ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 13–14 (Amy Gutmann ed., 1997).
- 14 Internal footnote omitted.
- 15 In my view, Congress may not constitutionally disclaim responsibility for the precise statutory text. Even if subgroups of Congress draft the language, the final language is the law. That is true even when Members of Congress vote on the law without reading the law (as they often do).
- 16 *See* John F. Manning, *Why Does Congress Vote on Some Texts but Not Others?*, 51 TULSA L. REV. 559 (2016) (reviewing ROBERT KATZMANN, *JUDGING STATUTES* (2014)).
- 17 Kagan, *supra* note 1, at 32:10.
- 18 Later in the book, Chief Judge Katzmman sidesteps this issue: “When Congress passes a law, it can be said to incorporate the materials that it, or at least the law's principal sponsors (and others who worked to secure enactment), deem useful in

interpreting the law (p. 48). But the passive voice reveals the problem with this assertion. It “can be said by whom? Congress has not said so, even though it easily could.

19 See, e.g., *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568–69 (2005); *Blanchard v. Bergeron*, 489 U.S. 87, 98–99 (1989) (Scalia, J., concurring in part and concurring in the judgment); see also Eskridge, *supra* note 1, at 684–90; Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833 (1998).

20 See Manning, *supra* note 16, at 566–67.

21 Indeed, as Manning points out, this potential explanation seems even odder given the rise of textualism in the last three decades. He rightly emphasizes “Congress’s continued failure to put legislative history to a vote three decades into a textualist campaign that has put legislative history on uncertain footing in the Supreme Court. *Id.* at 562.

22 See *id.* at 562, 567–68.

23 See *id.* at 568–70.

24 *Id.* at 568–69.

25 The relevant chapter is revealingly titled “Congress and the Lawmaking Process” (p. 11).

26 See U.S. CONST. art. I, § 7, cl. 2.

27 *Id.* art. II, § 3.

28 For example, the No Child Left Behind Act and the Patient Protection and Affordable Care Act each addressed a central priority of Presidents George W. Bush and Barack Obama, respectively—and each was passed in the first fifteen months of their respective administrations.

29 It is also true, as those of us who have been involved in the legislative process could explain, that interest groups and other affected parties play a role in the legislative process by, for example, originating language and signing off on language. Will the Chamber of Commerce go for this? What do the unions think? Is the NRA okay with this? What does the Brady Campaign say? Is NRDC good with this version? Has Pharma blessed this? Will Heritage score this bill? What does CAP say? To live in the world of legislative process—at either end of Pennsylvania Avenue—is to live with these questions. This action, which is absolutely critical to the reality of the legislative process, is rarely reflected in committee reports. Or sometimes it may be reflected in a skewed way, as when a lobbyist manages to land in a committee report some language that the lobbyist could not get into the actual statutory text. See, e.g., *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

30 *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892).

31 See Kagan, *supra* note 1, at 25:06 (describing most treatments of legislative history at the Supreme Court as “icing on a cake already frosted”); see also *Yates v. United States*, 135 S. Ct. 1074, 1093 (2015) (Kagan, J., dissenting) (“And legislative history, for those who care about it, puts extra icing on a cake already frosted.”).

32 See *Holy Trinity*, 143 U.S. at 461.

33 See *id.* at 458–59, 463–65.

34 See, e.g., *Allapattah*, 545 U.S. at 568 (“As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature’s understanding of otherwise ambiguous terms.”); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (“As in any case of statutory construction, our analysis begins with ‘the language of the statute. And where the statutory language provides a clear answer, it ends there as well. (quoting *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992)). For an argument that the Roberts Court is resurrecting *Holy Trinity*, see Richard M. Re, *The New Holy Trinity*, 18 GREEN BAG 2d 407 (2015).

35 Emphasis has been added.

- 36 *See infra* section I.E, pp. 2129–33.
- 37 Paul Clement, Opinion, *Arguing Before Justice Scalia*, N.Y. TIMES (Feb. 17, 2016), <http://www.nytimes.com/2016/02/17/opinion/arguing-before-justice-scalia.html> (“A few years back, during oral argument, Justice Antonin Scalia asked me when I thought ‘the bad old days’—when the Supreme Court routinely looked beyond the text of statutes—had ended? I said, ‘The bad old days ended when you got on the court, Mr. Justice Scalia.’ D); *see also* Transcript of Oral Argument at 46, CBOCS West, Inc. v. Humphries, 553 U.S. 442 (2008) (No. 06–1431).
- 38 Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) (“We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. *Absent a clearly expressed legislative intention to the contrary*, that language must ordinarily be regarded as conclusive. (emphasis added)).
- 39 *See infra* Part III, pp. 2159–62.
- 40 *See, e.g.*, Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (“In my experience, there is a fairly close correlation between the degree to which a person is (for want of a better word) a ‘strict constructionist’ of statutes, and the degree to which that person favors *Chevron* and is willing to give it broad scope. The reason is obvious. One who finds *more* often (as I do) that the meaning of a statute is apparent from its text and from its relationship with other laws, thereby finds *less* often that the triggering requirement for *Chevron* deference exists.); *see also* Kagan, *supra* note 1, at 56:54 (noting differences between her and Justice Scalia over “the quickness with which we find ambiguity”).
- 41 *See* Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892) (“It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.).
- 42 355 F.3d 118 (2d Cir. 2004).
- 43 *Id.* at 119.
- 44 28 U.S.C. §§ 1346(b), 2671–80 (2012).
- 45 *Id.* § 2680(b).
- 46 *Raila*, 355 F.3d at 120 (“The meaning of the words ‘negligent transmission’ is not self-evident.).
- 47 *Id.* at 121–23.
- 48 *See* Dolan v. U.S. Postal Serv., 546 U.S. 481, 486 (2006).
- 49 *See id.* at 486–87, 489.
- 50 The Supreme Court also applied the *noscitur a sociis* semantic canon. *See id.* at 486–87. It does not appear that the canon did much independent work in that case, however.
- 51 342 F.3d 89 (2d Cir. 2003).
- 52 Pub. L. No. 90–618, 82 Stat. 1213 (codified as amended in scattered sections of 18 and 26 U.S.C.).
- 53 18 U.S.C. § 922(g)(1) (2000).
- 54 *Gayle*, 342 F.3d at 90.
- 55 Of course, in a case like this, the Government should have to prove that the defendant *knew* that he was ineligible to possess firearms—for example, by notice provided to him by the Government. *See* United States v. Burwell, 690 F.3d 500, 529 (D.C. Cir. 2012) (en banc) (Kavanaugh, J., dissenting) (“The presumption of *mens rea* applies to each element of the offense.); *see also* United States v. Moore, 612 F.3d 698, 704 (D.C. Cir. 2010) (Kavanaugh, J., concurring).
- 56 *See Gayle*, 342 F.3d at 90.

- 57 *See also id.* at 90, 92–93. The Second Circuit also noted that certain federal and state offenses were excluded from the list of predicate offenses. The Second Circuit thought it odd that Congress would exclude federal and state offenses, but not foreign offenses of the same character. *Id.* at 93.
- 58 *Id.* at 94.
- 59 *See* *Small v. United States*, 544 U.S. 385, 387 (2005). Chief Justice Rehnquist took no part in the decision.
- 60 *See Small*, 544 U.S. 385.
- 61 *See id.* at 388–91.
- 62 *See id.* at 390–91.
- 63 *Id.* at 394 (Thomas, J., dissenting).
- 64 *Id.* at 395.
- 65 *Id.* at 399–401.
- 66 *Id.* at 406–07.
- 67 402 F.3d 332 (2d. Cir. 2005), *rev'd*, 548 U.S. 291 (2006).
- 68 20 U.S.C. §§ 1400–1482 (2012).
- 69 *Id.* § 1415(i)(3)(B).
- 70 *Murphy*, 402 F.3d at 333.
- 71 *See id.* at 336.
- 72 *See id.* at 336–38.
- 73 *See id.* at 336–37 (citing H.R. REP. NO. 99–687, at 5 (1986) (Conf. Rep.)).
- 74 *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 293–94 (2006).
- 75 *Id.* at 293. Justice Alito wrote for a five Justice majority, and Justice Ginsburg concurred in part and concurred in the judgment. *Id.*
- 76 *Id.* at 296–97, 304.
- 77 *See id.*; *see also infra* notes 190–195 and accompanying text.
- 78 *See Murphy*, 548 U.S. at 295–98.
- 79 *See id.* at 324 (Breyer, J., dissenting).
- 80 *Cf.* Gregory E. Maggs, *Reducing the Costs of Statutory Ambiguity: Alternative Approaches and the Federal Courts Study Committee*, 29 HARV. J. ON LEGIS. 123, 158–60 (1992). *See generally* EINER ELHAUGE, *STATUTORY DEFAULT RULES* (2008).
- 81 As Judge Easterbrook nicely put it before he took the bench: “There are a hundred ways in which a bill can die even though there is no opposition to it. Frank H. Easterbrook, *Statutes Domains*, 50 U. CHI. L. REV. 533, 538 (1983).
- 82 *See supra* notes 16–24 and accompanying text. *See generally* Manning, *supra* note 16.
- 83 *See, e.g., Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (“Where the statutory language provides a clear answer, our analysis] ends there”).

84 As Chief Judge Katzmman recognizes, in most cases “the interpretive problem arises because the statute is ambiguous” (p. 30). For if the statute is unambiguous, then “the inquiry for a court generally ends with an examination of the words of the statute” (p. 29). But, Chief Judge Katzmman continues, “w]hen the text is ambiguous, a court is to provide the meaning that the legislature intended. In that circumstance, the judge gleans the purpose and policy underlying the legislation and deduces the outcome most consistent with those purposes” (pp. 31–32). In doing so, he argues, the court should rely on legislative history, particularly “authoritative” committee reports (p. 38).

85 See, e.g., Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415 (1989).

86 See *id.*

87 A number of other canons also depend on a threshold finding of ambiguity, such as the rule of lenity and the *Charming Betsy* canon. I do not address all such canons in this Book Review. In any event, as I say in the text, each ambiguity dependent canon should be independently evaluated. I am not proposing a one size fits all solution.

88 Chief Judge Katzmman does not address this threshold dichotomy, even though he highlights its significance. He frames the choice judges face in interpreting statutes in this way: “Should the judge confine herself to the text even when the language is ambiguous? Should the judge, in seeking to make sense of an ambiguity or vagueness, go behind the text of the statute to legislative materials, and if so, to which ones?” (p. 3). Buried in this question, however, is the critical threshold question of whether the statute is ambiguous in the first place.

Chief Judge Katzmman does not directly engage this question. In fact, few do, at least in any detailed way. Professor Ward Farnsworth probably has done so best. See Ward Farnsworth et al., *Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation*, 2 J. LEGAL ANALYSIS 257 (2010); see also Re, *supra* note 34; Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. 791 (2010); Lawrence M. Solan, *Pernicious Ambiguity in Contracts and Statutes*, 79 CHI. KENT L. REV. 859 (2004); Note, “How Clear Is Clear in *Chevron*’s Step One?”, 118 HARV. L. REV. 1687 (2005); cf. JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 171 (2d ed. 2013) (“Another concern here is just how one defines or determines ‘ambiguity’ in the statute’s semantic meaning.”); Susannah Landes Foster, Note, *When Clarity Means Ambiguity: An Examination of Statutory Interpretation at the Environmental Protection Agency*, 96 GEO. L.J. 1347, 1362 (2008) (“A fair question is how agencies should figure out when Congress has been clear.”).

89 See Solan, *supra* note 88, at 861 (“Part of the problem is that the law has only two ways to characterize the clarity of a legal text: It is either plain or it is ambiguous. The determination is important. Whether the text is a statute, a contract, or an insurance policy, once a court finds the language to be plain, it will typically refrain from engaging in a variety of contextually based interpretive practices.”); see also *id.* at 862.

90 See Farnsworth et al., *supra* note 88, at 276.

91 Of course, this analysis makes two assumptions.

First, it assumes that judges can agree on the meaning of “clarity” and “ambiguity” in the first place. But as a number of scholars have pointed out, there are many and conflicting definitions of these two terms. See, e.g., WILLIAM D. POPKIN, *A DICTIONARY OF STATUTORY INTERPRETATION* 11 (2007) (observing that “‘[a]mbiguity’ is ambiguous,” and then providing three different definitions); Farnsworth et al., *supra* note 88, at 258 (distinguishing between external and internal judgments about ambiguity); Slocum, *supra* note 88, at 799–802; Sanford Schane, *Ambiguity and Misunderstanding in the Law*, 25 T. JEFFERSON L. REV. 167, 171–72 (2002) (distinguishing between lexical ambiguity and syntactic ambiguity); see also Solan, *supra* note 88, at 859 (“The problem, perhaps ironically, is that the concept of *ambiguity* is itself perniciously ambiguous.”). To complicate things even further, different definitions of ambiguity can lead to different outcomes. See Farnsworth et al., *supra* note 88, at 271 (“Different ways of asking about ambiguity produce different conclusions about its existence.”).

Second, it assumes that the line dividing ambiguity from clarity remains the same across (and within) all doctrines. In other words, this analysis assumes that the level of ambiguity necessary for moving to step two of *Chevron* is the same level of ambiguity required before a court may consult legislative history. But who knows whether that’s true? In fact, in some cases, the Supreme Court has implied a different clarity versus ambiguity threshold for certain doctrines. See, e.g., *Chapman v. United States*, 500 U.S. 453, 463 (1991) (describing the rule of lenity as triggered by “grievous ambiguity” (quoting *Huddleston v. United States*, 415 U.S. 814, 831 (1974))). Some scholars have even suggested tailoring the clarity versus ambiguity threshold

not only to doctrines, but also to individual cases within a single doctrine. *See, e.g.*, Note, *supra* 88, at 1699 703 (suggesting that *Chevron's* step one inquiry could be calibrated based on the type of delegation and agency at issue).

92 *See* Slocum, *supra* note 88, at 808 (noting “the lack of consensus regarding the probabilistic threshold an interpretation must meet in order to render a statutory provision unambiguous”); Note, *supra* 88, at 1698; *see also* Kagan, *supra* note 1, at 58:20 (“Some people think things are clear in circumstances in which other people think there's still a lot of question marks.”).

93 *See* Farnsworth et al., *supra* note 88, at 276 (noting that there are no legal standards for ambiguity, and there is “no way to falsify a judge's claim one way or the other”).

94 *See id.* (“[I]mpressionistic judgments are doing important work.”).

95 For an example of conflicting thresholds at work, *see Northeast Hospital Corp. v. Sebelius*, 657 F.3d 1 (D.C. Cir. 2011). In that case, the majority found the Medicare statute ambiguous as to whether a hospital patient who “receives Medicare benefits under Medicare Part C for a particular ‘patient day’ is ... also ‘entitled for that same ‘patient day’ to Medicare benefits under Medicare Part A.” *Id.* at 18 (Kavanaugh, J., concurring in the judgment); *see also id.* at 11 (majority opinion). The majority admitted the difficulties in the agency's position, but chose to defer to the agency under *Chevron* because it was “faced with two inconsistent sets of statutory provisions.” *Id.* at 11. In contrast, I found the statute clear and declined to defer to the agency. *Id.* at 18 (Kavanaugh, J., concurring in the judgment).

96 Judge Silberman explains that:

[E]ven assuming one is scrupulously honest in reading a statute thoroughly and looking carefully at its linguistic structure, legitimate ambiguities, which give room for differing good faith interpretations, more often than not appear in our cases. If a case is resolved at the first step of *Chevron*, one must assume a situation where either a petitioner has brought a particularly weak case to the court of appeals, or the agency is sailing directly against a focused legislative wind. Neither eventuality occurs very often. Litigation is expensive for private parties and agencies are rarely so cavalier in interpreting their statutes. Laurence H. Silberman, *Chevron: The Intersection of Law & Policy*, 58 GEO. WASH. L. REV. 821, 826 (1990).

97 Justice Scalia self identified into this camp. *See* Scalia, *supra* note 40, at 521.

98 *United States v. Turkette*, 452 U.S. 576, 580 (1981).

99 Farnsworth et al., *supra* note 88, at 273; *see also id.* at 275 (“[T]here is ‘no errorless test (indeed, there is no strictly legal test at all) for deciding whether a text is clear. Again, there are theories that say what to do *when* a statute is ambiguous, but there are no theories that help determine *whether* a statute is ambiguous, as by offering metrics for measuring its clarity or standards that the clarity must meet.”).

100 *Id.* at 274 (emphasis omitted) (footnote omitted); *see also* Slocum, *supra* note 88, at 795 (“[T]he selection of interpretive tools to provide contextual evidence of ambiguity, the persuasive force to give each interpretive tool, and the point at which the interpretive tools are deemed not to signal a correct meaning are, among other related issues, entirely matters of judicial judgment.”).

101 Farnsworth et al., *supra* note 88, at 290; *see also id.* at 271 (“[S]imple judgments of ambiguity create a substantial risk of bias from policy preferences that the makers of the judgments hold. When respondents are asked how ambiguous a statute seems or whether two proposed readings of it are plausible, their judgments about the answers tend to follow the strength of their preferences about the outcome as a matter of policy: the more strongly they prefer one reading over the other, the more likely they are to say that the statute is unambiguous or that only one reading of the text is plausible.”).

102 *See id.* at 276 (“Perhaps this is not surprising; in the absence of any legal test to guide one's thought process about clarity, one's own strong views about policy might be a natural or at any rate an inevitable place to go for guidance.”).

103 *See, e.g.*, Dan M. Kahan, *The Supreme Court, 2010 Term: Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 19 26 (2011). In his study, Farnsworth found that judgments about ambiguity were not affected by policy preferences when respondents were asked “whether ordinary readers of English would be likely to agree on the best reading of the statute in that case.” Farnsworth et al., *supra* note 88, at 272. But as noted

earlier, courts have not distinguished doctrinally between different definitions of ambiguity in a way that might prevent policy preferences from influencing ambiguity determinations. *See supra* note 91.

- 104 RICHARD MICHAEL FISCHL & JEREMY PAUL, GETTING TO MAYBE (1999).
- 105 *Cf.* WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH act. 4, sc. 2, l. 71 (Roger Warren ed., Oxford University Press 2002) (1591) (“The first thing we do, let's kill all the lawyers. ”).
- 106 *See* Silberman, *supra* note 96, at 826 (“ V]irtually any phrase can be rendered ambiguous if a judge tries hard enough. ”); *cf.* CLARK M. NEILY III, TERMS OF ENGAGEMENT 115 (2013) (noting critically that “lawyers are trained to find ambiguity in *anything* ”).
- 107 Farnsworth et al., *supra* note 88, at 257.
- 108 *See id.* at 281 (“ H]ow a statute gets interpreted in the end, or *who* does the interpreting, will often depend on *whether* it is found ambiguous at the outset. ”); *see also* Solan, *supra* note 88, at 865 (“ C]ourts themselves may not be sincere when they hold that the language of a statute is clear. For example, a judge may believe that language is susceptible to a number of interpretations, but say it is clear anyway in order to avoid triggering an interpretive doctrine that would lead to a result that she considers unjust in a particular case. When interpretive doctrine pushes judges toward putting more rhetorical weight on the language than they may feel is just in a particular case, it would not be surprising to find that they write insincerely about language in order to reach a result they believe is fair. (footnote omitted)).
- 109 *See* Slocum, *supra* note 88, at 809 (arguing that the concept of “statutory ambiguity” is “an inherently subjective interpretation that is highly amenable to judicial manipulation ”).
- 110 Farnsworth et al., *supra* note 88, at 276 (quoting *United States v. Yermian*, 468 U.S. 63, 77 (1984) (Rehnquist, J., dissenting)).
- 111 *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).
- 112 *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).
- 113 *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007).
- 114 *See* Scalia, *supra* note 40, at 520 21.
- 115 135 S. Ct. 2699 (2015).
- 116 134 S. Ct. 2191 (2014).
- 117 134 S. Ct. 1584 (2014).
- 118 549 U.S. 497 (2007).
- 119 529 U.S. 120 (2000).
- 120 515 U.S. 687 (1995).
- 121 512 U.S. 218 (1994).
- 122 Pub. L. No. 73 416, 48 Stat. 1064 (1934) (codified as amended in scattered sections of 47 U.S.C.).
- 123 47 U.S.C. § 203(a) (1988).
- 124 *Id.* § 203(b)(2).
- 125 *MCI*, 512 U.S. at 220.
- 126 *Id.* at 228.

- 127 Justice Stevens was joined by Justices Blackmun and Souter. Justice O'Connor took no part in the consideration or decision of the case.
- 128 *MCI*, 512 U.S. at 239 (Stevens, J., dissenting).
- 129 *Id.* at 235. Although Justice Stevens did not describe the statute as “ambiguous,” he stated that the agency was entitled to deference under *Chevron*. *Id.* at 245. That implies that he found the statute ambiguous; otherwise, deference under step two of *Chevron* would not have been warranted.
- 130 As Farnsworth illustrates colorfully: “If one person says that both proposed readings of a statute seem plausible, and a colleague disagrees, finding one reading too strained, what is there to do about it but for each to stamp his foot? Farnsworth et al., *supra* note 88, at 276.
- 131 See, e.g., *United States v. Hansen*, 772 F.2d 940, 948 (D.C. Cir. 1985) (Scalia, J.) (“The rule of lenity] provides little more than atmospherics, since it leaves open the crucial question—almost invariably present—of how much ambiguousness constitutes an ambiguity.”); *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 572 (2005) (Stevens, J., dissenting) (“Because ambiguity is apparently in the eye of the beholder, I remain convinced that it is unwise to treat the ambiguity *vel non* of a statute as determinative of whether legislative history is consulted.”); *United States v. Yermian*, 468 U.S. 63, 77–78 (1984) (Rehnquist, J., dissenting) (“Although ‘there is no errorless test for identifying or recognizing ‘plain’ or ‘unambiguous’ language in a statute, the Court’s reasoning here amounts to little more than simply pointing to the ambiguous phrases and proclaiming them clear. In my view, it is quite impossible to tell which phrases the terms ‘knowingly and willfully’ modify, and the magic wand of *ipse dixit* does nothing to resolve that ambiguity. (first quoting *United States v. Turkette*, 452 U.S. 576, 580 (1981)); Kagan, *supra* note 1, at 56:25 (noting disagreements between the Justices about the presence or absence of ambiguity); Scalia, *supra* note 40, at 520–21.
- 132 See Ethan J. Leib & Michael Serota, *The Costs of Consensus in Statutory Construction*, 120 YALE L.J. ONLINE 47, 59 (2010) (“Without guidance to help judges understand the threshold inquiry into ambiguity that is supposed to constrain them, the benefits of curbing judicial discretion vanish. Detached from the help of any extrinsic aids, textual analysis and debating whether something is ambiguous may promote even more unbridled judicial decision by intuition.”); cf. Antonin Scalia, Essay, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1182 (1989) (“We should recognize that, at the point where an appellate judge says that the remaining issue must be decided on the basis of the totality of the circumstances, or by a balancing of all the factors involved, he begins to resemble a finder of fact more than a determiner of law. To reach such a stage is, in a way, a regrettable concession of defeat—an acknowledgment that we have passed the point where ‘law,’ properly speaking, has any further application. And to reiterate the unfortunate practical consequences of reaching such a pass when there still remains a good deal of judgment to be applied: equality of treatment is difficult to demonstrate and, in a multi-tiered judicial system, impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired.”). Although Justice Scalia was condemning judicial tests based on balancing or a totality of the circumstances, his criticism applies even more strongly to judicial tests based on nothing more than a judge’s unguided intuition.
- 133 For more on the semantic canons of construction, see *infra* Part III, pp. 2159–62.
- 134 The plain statement and absurdity rules tell us that the best reading of the statutory text does not control in certain circumstances. But those rules, as I envision them, do not require that judges make an initial determination of clarity versus ambiguity. See *infra* section II.B.4, pp. 2154–56; section II.C, pp. 2156–59.
- 135 See Slocum, *supra* note 88, at 837 (“Ultimately, though, the ambiguity elevating aspect of *Chevron* places unnecessary emphasis on a purely subjective and discretionary standard and is incongruent with the realities of statutory interpretation.”).
- 136 To take one example, I do not have a firm idea about how to handle the rule of lenity. Of course, the Supreme Court seems to be very uncertain about the rule of lenity, too. Compare, e.g., *Abramski v. United States*, 134 S. Ct. 2259, 2272 n.10 (2014) (refusing to apply the rule of lenity because any statutory ambiguity was resolved by “context, structure, history, and purpose”), with, e.g., *id.* at 2280–82 (Scalia, J., dissenting) (criticizing “the majority’s miserly approach,” *id.* at 2281).

- 137 See *Gomez v. United States*, 490 U.S. 858, 864 (1989) (“It is our settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question. ”); see also SCALIA & GARNER, *supra* note 7, at 247–51.
- 138 For a discussion, see MANNING & STEPHENSON, *supra* note 88, at 257–59 (setting out two competing approaches to the idea of statutory “ambiguity” in the context of the avoidance canon).
- 139 See Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 815–16 (1983).
- 140 See *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 481 (1989) (Kennedy, J., concurring in the judgment) (“The fact that a particular application of the clear terms of a statute might be unconstitutional does not provide us with a justification for ignoring the plain meaning of the statute. ”).
- 141 See, e.g., Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2127–29 (2015); FRIENDLY, *supra* note 7, at 209–12; Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401, 1405–06 (2002); Posner, *supra* note 139, at 815–16.
- 142 Easterbrook, *supra* note 141, at 1405.
- 143 *Id.*
- 144 *Id.* at 1406.
- 145 Posner, *supra* note 139, at 816.
- 146 132 S. Ct. 2566 (2012).
- 147 See *id.* at 2593 (opinion of Roberts, C.J.) (rejecting the Commerce Clause and Necessary and Proper Clause arguments and citing the dissent in accord).
- 148 Compare *id.* at 2600 (majority opinion) (“Congress’s authority under the taxing power is limited to requiring an individual to pay money into the Federal Treasury, no more. ”), with *id.* at 2651 (joint dissent) (describing the difference between taxes and penalties).
- 149 Compare *id.* at 2600 (opinion of Roberts, C.J.) (“The statute reads more naturally as a command to buy insurance than as a tax ”), with *id.* at 2652 (joint dissent) (“So the question is, quite simply, whether the exaction here is imposed for violation of the law. It unquestionably is. ”).
- 150 Compare *id.* at 2594 (opinion of Roberts, C.J.) (holding it was “fairly possible” to interpret the individual mandate as a tax (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932))), with *id.* at 2651 (joint dissent) (arguing that “there is simply no way, ‘without doing violence to the fair meaning of the words used,’ of interpreting the individual mandate as a tax (quoting *Grenada Cty. Supervisors v. Brogden*, 112 U.S. 261, 269 (1884))).
- 151 See *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987).
- 152 See *NFIB*, 132 S. Ct. at 2668–76 (joint dissent).
- 153 This is what the Supreme Court did in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010). See *id.* at 508–10.
- 154 See generally John F. Manning, Essay, *Inside Congress’s Mind*, 115 COLUM. L. REV. 1911 (2015).
- 155 For an exploration of this argument, see Joseph Fishkin, *Sever Everything but the Exhortation*, BALKINIZATION (Apr. 1, 2012, 4:33 AM), <http://balkin.blogspot.com/2012/04/sever-everything-but-exhortation.html> <http://perma.cc/2QLW-QHFG>.
- 156 See *supra* section I.D, pp. 2127–29. Of course, some textualists follow Justice Scalia’s example and do not accept legislative history even when interpreting ambiguous statutes.

- 157 Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005) (quoting Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983), in turn borrowing Judge Leventhal's "memorable phrase").
- 158 Under the "best reading" inquiry, the question is only how the words would be read by an ordinary user of the English language. That's why textualists rely on dictionaries. Dictionaries may not provide authoritative, binding interpretations of the language of a statute, but they do tell courts something about how the ordinary user of the English language might understand that statutory language. In contrast, legislative history explains only what some Members of Congress *intended* to say, as opposed to what they actually said in the statutory text.
- 159 There may be other uses of legislative history that might not depend on an initial finding of ambiguity, such as providing evidence of the ordinary usage of a term, or showing the problem Congress was attempting to address. Even if there are other uses, we should try to sideline the threshold clarity versus ambiguity determination to the extent we can.
- 160 See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984).
- 161 Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.). In fact, if anything, *Chevron* seems to flout the language of the Act. The Act makes clear that "the reviewing court—not the agency—"shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706 (2012).
- 162 *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001).
- 163 *City of Arlington v. FCC*, 133 S. Ct. 1863, 1866 (2013).
- 164 135 S. Ct. 2480, 2488-89 (2015).
- 165 David S. Tatel, *The Administrative Process and the Rule of Environmental Law*, 34 HARV. ENVTL. L. REV. 1, 2 (2010) ("In both Republican and Democratic administrations, I have too often seen agencies failing to display the kind of careful and lawyerly attention one would expect from those required to obey federal statutes and to follow principles of administrative law. In such cases, it looks for all the world like agencies choose their policy first and then later seek to defend its legality.").
- 166 See *King*, 135 S. Ct. at 2489 (quoting *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014)).
- 167 *Mead*, 533 U.S. at 226-27.
- 168 See also, e.g., *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (raising "serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes—under *Chevron*"); *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1211-12 (2015) (Scalia, J., concurring in the judgment) (stressing the conflict between *Chevron* deference and the APA and raising the possibility of "uproot[ing] *Chevron*, *id.* at 1212); *Christensen v. Harris County*, 529 U.S. 576, 596-97 (2000) (Breyer, J., dissenting) (advocating for application of *Chevron* on a case-by-case basis within the broader *Skidmore* framework).
- 169 Cf. *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 248 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part).
- 170 See *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).
- 171 *Id.*
- 172 See Slocum, *supra* note 88, at 794 ("Under *Chevron*, the concept of ambiguity is therefore central to whether an agency's interpretation of a statute that it administers will receive judicial deference, but the determination of ambiguity by the judiciary is entirely standardless and discretionary."). Step one also suffers from reliance on legislative history to determine whether there is an ambiguity in the first instance. See *Chevron*, 467 U.S. at 843 n.9, 851-53; *supra* section II.B.2, pp. 2149-50.
- 173 See Scalia, *supra* note 40, at 520.

- 174 See *Slocum*, *supra* note 88, at 795 (“Thus, the *Chevron* doctrine’s reliance on explicit ambiguity conclusions to determine whether an agency’s interpretation will receive deference has elevated the importance of a concept that is subjective, discretionary, typically addressed through conclusory statements, and, not surprisingly, a source of considerable disagreement among members of the Court.).
- 175 Indeed, it seems that courts have allowed this problem to arise in far more cases than the *Chevron* Court itself intended. After all, footnote 9 of *Chevron* told us explicitly that we should employ all the “traditional tools of statutory construction” to resolve any statutory ambiguity *before* we defer to an agency. *Chevron*, 467 U.S. at 843 n.9. Of course, when we employ those tools of interpretation, we often resolve the ambiguity and thereby get an answer. So in those cases, we would not have to defer to the agency at all. Therefore, if we took *Chevron* footnote 9 at face value, fewer cases would get to *Chevron* step two in the first place.
- 176 See *Silberman*, *supra* note 96, at 825 (“Finding a specific congressional intent is particularly unlikely if the agency is applying statutory language that calls for an administrative judgment, such as what is “feasible” or “probable.).
- 177 Excessive delegation may be another problem (at least for some) in these examples. But that issue is beyond the scope of this Book Review.
- 178 See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); see also *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 248 (D.C. Cir. 2008) (Kavanaugh, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“Application of the beefed up arbitrary and capricious test is inevitably if not inherently unpredictable so much so that, on occasion, the courts’ arbitrary and capricious review itself appears arbitrary and capricious.).
- 179 Of course, agencies must still make *reasonable* choices. See, e.g., *Michigan v. EPA*, 135 S. Ct. 2699 (2015) (holding that EPA interpreted the Clean Air Act unreasonably when it deemed cost irrelevant to the decision to regulate power plants).
- 180 *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010) (“ Unless there is the affirmative intention of the Congress clearly expressed to give a statute extraterritorial effect, ‘we must presume it is primarily concerned with domestic conditions. (quoting *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991)); *Arabian Am. Oil Co.*, 499 U.S. at 248 (“It is a longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States. (quoting *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949)); see also *SCALIA & GARNER*, *supra* note 7, at 268 72.
- 181 *J.E.M. Ag Supply, Inc. v. Pioneer Hi Bred Int’l, Inc.*, 534 U.S. 124, 142 (2001) (“The rarity with which the Court has discovered implied repeals is due to the relatively stringent standard for such findings, namely, that there be an irreconcilable conflict between the two federal statutes at issue. (alteration in original) (quoting *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 381 (1996)); see also *SCALIA & GARNER*, *supra* note 7, at 327 33.
- 182 *Staples v. United States*, 511 U.S. 600, 606 (1994) (“ We have stated that offenses that require no *mens rea* generally are disfavored, and have suggested that some indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime. (citation omitted)).
- 183 *U.S. Fid. & Guar. Co. v. United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 314 (1908) (“The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise satisfied.); see also *SCALIA & GARNER*, *supra* note 7, at 261 65.
- 184 See John F. Manning, Essay, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 406 07 (2010) (defining clear statement rules as rules insisting “that Congress speak with unusual clarity when it wishes to effect a result that, although constitutional, would disturb a constitutionally inspired value, *id.* at 407). Plain statement rules are also sometimes known as clear statement rules.
- 185 See *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (“ If Congress intends to alter the ‘usual constitutional balance between the States and the Federal Government, it must make its intention to do so ‘unmistakably clear in the language of the statute. (alteration in original) (quoting *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 65 (1989)).

- 186 See William N. Eskridge, Jr. & Philip P. Frickey, *Quasi Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 611 12 (1992) (noting that the Court's "super strong clear statement rules relating to federalism "can be rebutted only through text that is both "unambiguous and "targeted at the specific problem, *id.* at 612). For a good overview of some prominent plain statement rules, see Thomas W. Merrill, *Rescuing Federalism After Raich: The Case for Clear Statement Rules*, 9 LEWIS & CLARK L. REV. 823, 825 (2005); see also Manning, *supra* note 184, at 406 17.
- 187 For example, I am on record as rejecting the so called *Charming Betsy* presumption. See *Al Bihani v. Obama*, 619 F.3d 1, 32 36 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc).
- 188 Perhaps courts could adopt this change only for statutes enacted after the date on which the court announces the shift to a plain statement rule.
- 189 See, e.g., *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 278 (2010) (Stevens, J., concurring in the judgment) (accusing the majority of seeking "to transform the presumption against extraterritoriality] from a flexible rule of thumb into something more like a clear statement rule).
- 190 See *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202 03 (1819) (Marshall, C.J.) (" If, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.).
- 191 See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003).
- 192 See SCALIA & GARNER, *supra* note 7, at 388 (" L]egislative history can be consulted to refute attempted application of the absurdity doctrine to establish that it is indeed thinkable that a particular word or phrase should mean precisely what it says. For to establish thinkability (so to speak), just as to establish linguistic usage, one does not have to make the implausible leap of attributing the quoted statement to the entire legislature. It suffices that a single presumably rational legislator, or a single presumably rational committee, viewed the allegedly absurd result with equanimity.); see also *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 527 28 (1989) (Scalia, J., concurring in the judgment).
- 193 A scrivener's error is "an obvious mistake in the transcription of the legislature's policies into words. MANNING & STEPHENSON, *supra* note 88, at 93. It applies "where on the very face of the statute it is clear to the reader that a mistake of expression (rather than of legislative wisdom) has been made. Antonin Scalia, *Common Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION 3, 20 (Amy Gutmann ed., 1997). The scrivener's error doctrine is used to correct spelling errors, wrongly numbered cross references, and the like rather than to rewrite substantive law because it fails to align with perceived congressional intent. See MANNING & STEPHENSON, *supra* note 88, at 93 101.
- 194 *King v. Burwell*, 135 S. Ct. 2480, 2504 05 (2015) (Scalia, J., dissenting); see also *id.* at 2505 (describing the doctrine as applying to "misprint s], "slip s] of the pen, and "technical mistake s] in transcribing a statute rather than "substantive mistake s] in designing ... the law).
- 195 See *supra* note 34 and accompanying text. Of course, the idea of "congressional intent is inherently problematic to begin with. See generally Manning, *supra* note 154.
- 196 See, e.g., New Mexico Navajo Water Settlement Technical Corrections Act, Pub. L. No. 114 57, 129 Stat. 528 (2015) (making technical corrections to the Navajo water rights settlement in New Mexico); Office of Compliance Administrative and Technical Corrections Act of 2015, Pub. L. No. 114 6, 129 Stat. 81 (making administrative and technical corrections to the Congressional Accountability Act of 1995); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103 416, 108 Stat. 4305 (making technical corrections to the Immigration and Nationality Act).
- 197 *King*, 135 S. Ct. at 2487.
- 198 Pub. L. No. 111 148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 and 42 U.S.C.).

- 199 For an account of “where the four words at issue came from, see Abbe R. Gluck, *The Supreme Court, 2014 Term Comment: Imperfect Statutes, Imperfect Courts: Understanding Congress’s Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 76–79 (2015).
- 200 *King*, 135 S. Ct. at 2496.
- 201 *Id.* at 2490 (alteration in original) (first quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), then quoting 26 U.S.C. §§ 36B(b) (c) (2012)).
- 202 *Cf. id.* at 2504–05 (Scalia, J., dissenting) (“Only when it is patently obvious to a reasonable reader that a drafting mistake has occurred may a court correct the mistake T]he Court does not pretend that there is any such indication of a drafting error on the face of the statute[.]”; *Re, supra* note 34, at 413–15).
- 203 See MANNING & STEPHENSON, *supra* note 88, at 202 (“Some of these canons are ‘semantic (or ‘linguistic or ‘syntactic): They are generalizations about how the English language is conventionally used and understood, which judges may use to ‘decode statutory terms. The use of semantic canons can therefore be understood simply as a form of textual analysis.); *cf.* Kagan, *supra* note 1, at 35:42 (“I think of semantic canons] usually as guides to reading language sensibly ... Rather than go and memorize fifty canons, it’s helpful to have an intuitive feel for how language works and how the people who write things think that language works. And the canons are often just ways of formalizing those intuitions, those correct intuitions, about how people use language.).
- 204 See SCALIA & GARNER, *supra* note 7, at 199 (“Where general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned (*ejusdem generis*).).
- 205 *Cf. id.* (explaining how the “principle of *ejusdem generis* ... implies the addition of *similar* after the word *other*).
- 206 Critics have attacked the *ejusdem generis* canon from many different perspectives. See, e.g., EDWARD BEAL, *CARDINAL RULES OF LEGAL INTERPRETATION* 65–66 (A.E. Randall ed., 3d ed. 1924); REED DICKERSON, *THE INTERPRETATION AND APPLICATION OF STATUTES* 233–34 (1975); Llewellyn, *supra* note 5, at 405.
- 207 *Cf.* SCALIA & GARNER, *supra* note 7, at 207 (“What sets *ejusdem generis* apart from the other canons and makes it unpopular with many commentators is its indeterminacy. The doctrine does not specify that the court must identify the genus that is at the lowest possible level of generality. The court has broad latitude in determining how much or how little is embraced by the general term.).
- 208 135 S. Ct. 1074 (2015).
- 209 See *id.* at 1086–87.
- 210 *Id.* at 1097 (Kagan, J., dissenting).
- 211 Kagan, *supra* note 1, at 46:17.
- 212 See SCALIA & GARNER, *supra* note 7, at 174 (“If possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.); see also *id.* at 174–79.
- 213 See Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 933–36 (2013). Despite supporting the canon, Justice Scalia and Professor Garner admit this commonsensical point. They write that the canon “cannot always be dispositive because (as with most canons) the underlying proposition is not *invariably* true. Sometimes drafters *do* repeat themselves and *do* include words that add nothing of substance, either out of a flawed sense of style or to engage in the ill conceived but lamentably common belt and suspenders approach. SCALIA & GARNER, *supra* note 7, at 176–77.
- 214 WILLIAM SHAKESPEARE, *MACBETH* act 4, sc. 1, l. 105 (Stephen Orgel ed., Penguin Books 2000) (1623).

215 *See SCALIA & GARNER, supra* note 7, at 170 (“A word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning. ”).

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Essay

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THE JUDGE AS UMPIRE: TEN PRINCIPLES

Thank you, Dean Attridge, for that generous introduction. Dan is a wonderful man. We worked together at Kirkland & Ellis, and I am honored to be with him today.

It is a particular honor to be with all of you at Catholic University and this distinguished law school. This school is rightly proud of its Catholic heritage. In line with the Gospel of Matthew, one of the stated missions of this law school is to care for the poor, the neglected, and the vulnerable. This university and this law school stand for those principles and do it very well.

For my part, I am a product of Catholic boys schools in this area. I attended Mater Dei and Georgetown Prep. Georgetown Prep's motto was to be "men for others." I have tried to live that creed. I am proud to say that three Georgetown Prep classmates of mine--Mike Bidwill, Don Urgo, and Phil Merkle-- happen to be 1990 graduates of this law school. They remain very good friends of mine, and they well reflect the values and excellence of both Georgetown Prep and this law school. You may recognize Mike Bidwill's name. He is the President of the Arizona Cardinals football team. I am pretty sure he is on the Dean's speed dial. Yet he is the same humble, generous, friendly guy he was when he was fourteen years old.

Of course, you don't forget your time in Catholic schools: The voices of your teachers and coaches still ring in your ears even decades later. Father Byrne was my Latin professor. He would tell us, in his inimitable voice, "Be prepared, be prepared, you can't go wrong as you go along if you are prepared." He had a lot of one-liners, and more than a few Latinisms. If you went up to any of my classmates and asked about Father Byrne, they probably could not translate the *Aeneid* but they would quickly recall his lessons in preparation. He could pound his fist on the desk pretty well too. And Mr. Fegan, our football coach--I can still hear him telling us to do things better, to do things the right way at all times, to stay tough in the midst of adversity. On a steamy hot August day with two-a-day practices, he would yell: "No day to die, Blue." I can hear it clearly even now. So to the teachers, professors, and educators at this school, I offer this reminder: your lessons are heard, not just in the classroom, but years later as they influence the graduates of this distinguished law school and distinguished university. I thank all of you who are teaching this future generation of lawyers and leaders.

^{*684} We are here at a lecture series named for a Pope. The Pope for most of my adult life was Pope John Paul II. When I worked at the White House, one of the great highlights of my Staff Secretary job was traveling around the world and the country with President Bush. I traveled to the Vatican in 2004, when President Bush met with the Pope and awarded him the Presidential Medal of Freedom, which is the highest civilian honor of the United States.² Usually the ceremony takes place at the White House--the President hosts many distinguished Americans or world leaders--and he puts a medal around the recipient's neck and gives a speech about all of their contributions to the United States. You have probably seen those ceremonies on television. In this instance, President Bush said, "We are going to be at the Vatican. I am not going to stand up at the Vatican and put a medal around the Pope's neck. How are we going to accomplish this?" I said,

"It is all under control, Sir." Which, it wasn't. That is what you say. And then you make it under control. So we had to scramble. We found this nice box. It was a box with the Presidential Seal, and it really looked good. And the medal was placed nicely in the box. At the ceremony, the President had the box on a little table, and he was speaking about the Pope. And then the President was fiddling with the box. I thought, "*Oh, no. The box is not going to open!*" It lasted all of one second, but it felt like a lifetime. Check it out on YouTube.³ And then the President read the citation to the crowd and handed the box with the medal to the Pope. The Pope was pretty frail then, and he held it up. I was sweating and all I could think was, "*The medal. What if the medal falls out of the box? What if the medal falls out of the box?*" In that moment, it was sheer panic. Again, check it out on YouTube.⁴ But it all worked out. It was a great ceremony, and the Pope concluded it by saying "God Bless America."⁵

I will always remember what the President said that day because I found it so moving.

A devoted servant of God, His Holiness Pope John Paul II has championed the cause of the poor, the weak, the hungry, and the outcast. He has defended the unique dignity of every life, and the goodness of all life. Through his faith and moral conviction, he has given courage to others to be not afraid in overcoming injustice and oppression. His principled stand for peace and freedom has inspired millions and helped to topple Communism and tyranny. The United *685 States honors this son of Poland who became the Bishop of Rome and a hero of our time.⁶

That really stands out as a special memory from my time at the White House. As the product of Catholic education, to be there in the presence of both the Pope and the President of the United States, and for the medal to actually stay in the box--well, you can't get any better than that.

I could tell war stories about my White House experiences all day long, but I am here today to talk about judging. I have been doing that for almost nine years now, on the U.S. Court of Appeals for the D.C. Circuit. And I want to discuss the notion of judges as umpires. Chief Justice John Roberts conveyed that image at his confirmation hearing. He was asked, "What kind of a Justice would you be Judge Roberts?"⁷ And he gave this great description of being an umpire: umpires call balls and strikes. They do not favor one team or the other. And umpires should stay out of the way when possible. No one ever went to the game to see the umpire.⁸

What a great way to capture a key principle in a very simple explanation. But that notion, that a judge is just an umpire, has been criticized. Some say, "Judges are just politicians in robes." Or, "Judges are advocates; they're partisans." Or "Judges are policymakers." Or "Judges are not mere robots." The varying objections reflect, in my view, a misapprehension of what a judge does and should do--and also a bit of a misapprehension of what an umpire does and should do.

At its core, in our separation of powers system, to be an umpire as a judge means to follow the law and not to make or re-make the law--and to be impartial in how we go about doing that. That has to be our goal. We can talk about the limits to achieving that goal, that objective. But in a system of even-handed justice, in a system dedicated to the rule of law, that must be our aspiration.

For those of us who want to be judges as umpires, how do we do it? What are the attributes that we are seeking to achieve? I will go through ten of them. I will say right away: I know I fall short, I know all of us fall short at times. To paraphrase the current Pope, Pope Francis, I too am a sinner. But I am always striving to do better and to meet the ideal.

First, and most obviously, a good judge, like a good umpire, cannot act as a partisan. Judges often come from backgrounds in politics or policy. Indeed, we want judges in our judicial system who have different backgrounds, including in government. That is a difference between our system and judicial systems in other parts of the world. We come from the private practice of law, we come *686 from public defender's offices, we come from the executive branch, and we come from the legislative branch, among other prior service. For those who come from the Executive Branch, the model, of course, is Justice Robert Jackson, who had been Attorney General. Similarly, Chief Justice Roberts worked for President Reagan and Justice Elena Kagan worked for President Clinton; Justice Stephen Breyer was a Senate staffer working for Senator Kennedy for many years.

But federal judges have to check any prior political allegiances at the door. You have to shed them. We can no longer contribute money to political campaigns. We do not participate in partisan campaigns. We do not support or endorse candidates. We do not attend political rallies. Some judges do not even vote, on the theory that to vote is a solemn expression (at least to yourself) of your political or policy affiliation and beliefs. For example, when Justice John Harlan was on the Supreme Court, he reportedly chose not to vote.⁹ I am no Justice Harlan, I will be the first to emphasize, but after a short time as a judge, I ultimately chose to follow his lead about voting. So it is very important at the outset for a judge who wants to be an umpire to avoid any semblance of that partisanship, of that political background. If you are playing the Yankees, you don't want the umpires to show up wearing pinstripes. So too with judges. That is the first, probably most fundamental thing for a judge who wants to be an umpire.

Second, to be a good judge and a good umpire, you also have to follow the established rules and the established principles. A good umpire should not be making up the strike zone as he or she goes along. Judges likewise should not make up the rules as they go along. We see this in statutory interpretation, for example. A good judge sticks to the established text and canons of construction that help guide us in interpreting ambiguous text. Justice Antonin Scalia has had a profound influence on statutory interpretation. One of the things he has helped to do is to narrow the areas of disagreement about how to interpret statutes. Every judge now seems to start with the text of the statute. If you came to our court and sat in our courtroom for a week--and I do not advise that for anyone who wants to stay sane--you would hear every judge asking, "What does the text of the statute say? How does the text of the statute support your position?" That has been a big change in statutory interpretation, and it has helped establish better and clearer rules of the road.

Following established rules includes stare decisis: we follow the cases that have been decided. We operate in a system built on Supreme Court precedent. As lower court judges, we must adhere to absolute vertical stare decisis, meaning we follow what the Supreme Court says. And to be a good lower court judge, you must follow the Supreme Court precedent in letter and in spirit. We should not try to wriggle out of what the Supreme Court said, or to twist what the Supreme Court said, or to push the law in a particular direction, but to follow *687 what the Supreme Court said in both letter and spirit. Horizontal stare decisis has some flexibility, as it must. Vertical stare decisis is absolute.

Third, to be a good judge and a good umpire, you have to strive for consistency not just with precedent, but from day to day. You often hear this in sports, too.¹⁰ "We just want consistency. Call it the same for both teams." You will see a basketball player get a charge call, and you will see the coach yelling and pointing down to the other end of the court. The coach is saying to the referee, "Call that down at the other end of the court as well." Or in baseball, when the outside corner is called a strike. "Call it the same for us," a manager will yell from the dugout. And so, too, for judges. I think it is important to be consistent within the game and across games, following precedent. We must strive to be consistent in how we're deciding cases, how we're confronting issues, whether it be constitutional interpretation or statutory interpretation--consistency is a great virtue. Consistency is another check. I decided a case yesterday on this basis, but today the parties are in different positions. Am I going to rely on that same principle today? The answer has to be "yes." Judges have to be consistent in how we decide things, even though the parties may be flipped.

Fourth, to be a good judge and a good umpire, you have to understand your proper role in the game: to apply the rules and not to re-make the rules based on your own policy views. At his confirmation hearing, Chief Justice Roberts

memorably referred to being a modest judge. What does this mean? We must recognize that we do not make the policy ourselves. It is not our job to make the policy choices that belong to the political branches.² We have to recognize and operate within our more limited role. It is an important role, and it can be a decisive role on crucial matters affecting our system of government.³ But it is a more limited role. We are not the ones designing the rules and making the policy choices in the first instance.⁴ We do not design our own strike zones.

***688** Fifth, at the same time, to be a good judge and a good umpire you have to possess some backbone. An umpire or referee has to keep control of the game, and be able to make tough calls against the star players or the home team. As a judge, you must, when appropriate, stand up to the political branches and say some action is unconstitutional or otherwise unlawful. Whether it was *Marbury*,⁵ or *Youngstown*,⁶ or *Brown*,⁷ or *Nixon*,⁸ some of the greatest moments in American judicial history have been when judges stood up to the other branches, were not cowed, and enforced the law.⁹ That takes backbone, or what some call judicial engagement. To be a good judge and a good umpire, you have to possess strong backbone.

Sixth, to be a good judge and a good umpire, you have to tune out the crowd noise. There is a lot of crowd noise directed at the umpires and referees in sports. So, too, with judges. There is a lot of criticism of judges' decisions in the media, in law reviews, and on blogs. Sometimes, there is even "working the ref" before the game is played, with blog posts and opinion commentaries.²⁰ Politicians sometimes do this, journalists do this, and professors do this.² And you see this of course in sports. Coach Mike Krzyzewski, a legendary basketball coach, is pretty good at working the ref during the game.²² Nothing wrong with that for the coaches or advocates. But as judges, we have to tune out the Coach K's of the legal-political world who are trying to work the judges. We cannot be buffaloed, influenced, or pressured into worrying too much about transient popularity when we are trying to decide a case based on a long-term principle that controls a particular case. One of the most important duties of a judge as umpire is to stand up for the unpopular party who has the correct position on an issue of law in a particular case. To stand up for the unpopular position, we need ***689** to be able to tune out the crowd noise. At the same time, we cannot tune it out so much that we are not willing to learn from our mistakes or to learn from informed commentary. So there is a balance there: tune out the crowd noise, but remember that we are not perfect--far from it--and that we have to learn over time from those who, in good faith, critique and analyze our decisions.

Seventh, to be a good judge and a good umpire, you must have an open mind. You cannot decide cases based on preconceived notions, but must discipline yourself to work through each dispute based on the law, the precedents, and the facts. And you must be willing to change your mind. Judges have to say: "Well, I didn't look at it that way a few years ago, but now it looks different to me." Sometimes people think that it is weak to change your mind. I disagree. It requires strength, not weakness, to be able to say you were wrong before. We need that willingness to be humble about it and to change our minds.

Relatedly, to be a good judge and a good umpire, we must keep learning. We do not know it all. Sometimes in a courtroom, it may appear that the judge thinks he or she knows it all. Judges have to remember we do not know it all. We have to constantly learn. We should draw from the law reviews and the treatises that professors have worked on for years to study a problem that we may have a couple of days to focus on. We should study the briefs and precedents carefully and challenge our instincts or prior inclinations. We are not the font of all wisdom.

Eighth, to be a good judge and a good umpire, it is critical to have the proper demeanor. We must walk in the shoes of the other judges, the lawyers, and the parties. It is important to understand them, to keep our emotions in check, and be calm amidst the storm. To put it in the vernacular: to be a good umpire and a good judge, don't be a jerk.

That's true in the courtroom, and it is also true when issuing judgments and opinions. A good judge and good umpire must demonstrate civility. Judges must show that we are trying to make the decisions impartially and dispassionately based on the law and not based on our emotions. Sometimes you hear coaches complain about umpires or referees, "The umpires think they are bigger than the game."²³ Judges cannot act like we are bigger than the game. There is a danger of arrogance for umpires and also for judges. The danger grows the longer you are on the bench. As one of my colleagues puts it, "As you get older as a judge, you get more like yourself." Some umpires and referees are like that, too. We have to guard against that arrogance, against that pernicious and vain idea that you know better than others. You may be final, but you are surely not infallible.

Ninth, to be a good judge and a good umpire, especially on an appellate court, you need collegiality--to work well with and to learn from your colleagues. We *690 are collective bodies. I cannot do much of anything alone. We work in panels of three, so we have to work together with the other judges to try to produce the best decision. This group decision-making helps reduce errors; it helps check subtle biases that might creep into a particular case. You see baseball umpires or football referees sometimes huddle in what in football is called a "zebra conference"--when they get together to talk about whether they made the right call. On appellate courts such as mine, we have a zebra conference on every play. That is what we do--we get together and work together in panels. And to do that well, we have to work well with others. That does not mean sacrificing or compromising your core principles to the views of the group. Not at all. Judges can issue dissenting opinions, and we should do so on important cases. We should not fold. But we can and should be civil and cordial to our colleagues.

Tenth, to be a good judge and a good umpire, you have to be clear in explaining why you have made the decision you made. You don't just make the call and move on. We write opinions to justify why we have decided a particular way, how we have come to the conclusion that we have come to. Those opinions are important, and we spend a lot of time carefully crafting those opinions. I was on a panel one time with Justice Scalia at a conference in Europe. Some of the European judges said, "Oh, Justice Scalia you are such a beautiful writer. You must love writing!" Justice Scalia said something to the effect of, "I can't stand writing! It is painful! It hurts!" "But," he said, "I love having written." Yes, indeed. Writing is painful. It hurts. Having heard that from Justice Scalia, I thought, "Oh, thank goodness." Because what that showed for me is that even for the best writers, it is hard work to get the words on the page to explain in clear language why you have decided a particular way. But it is so important. And the writing process is also a discipline to make sure we are deciding things the right way. Sometimes you will hear judges say, "It just wouldn't write." And then you change your mind. We often say that to each other. We voted a particular way, but, "It just wouldn't write." In the National Football League, why do the referees wear microphones? To explain things to the teams and the crowd.²⁴ Ed Hochuli, one of the famous NFL referees, gives multi-part explanations.²⁵ "A, the receiver's toe was out of bounds, and B, the pass was bobbled."²⁶ He will give you this whole explanation. That is good. He is a model for concise judicial decision-making. In baseball, too, the umpires will try to explain the decision, albeit only to the managers and not to the crowd. *691 Sometimes the managers will come out and kick dirt at the umpire. Fortunately, in the courthouse, no one comes up and kicks dirt at us. The lesson is: explain well and hopefully no one will kick dirt on you. The duty of explanation is central to being a good judge and a good umpire.

Of course, for us to be good judges and good umpires, the rule-makers can help by drafting rules that are as clear as possible. And, in the federal system, that means Congress. And that is hard because Congress is a body of 535 people and they have to compromise. And it is hard to write clear laws. When you are in a courtroom or you are in litigation, an advocate might say, "Well, Congress didn't draft this law clearly." For the most part, it is not because someone was incompetent. It is usually because the drafting process is a compromise, which means that sometimes Congress has to kick the can on certain issues, or might have to be ambiguous about something that otherwise would benefit from clarity. But to the extent Congress can be clearer in statutes, Congress should try to do so. Congress can really do a service to the ideal of judges as neutral umpires. Clear laws and clear rules avoid unnecessary courtroom disputes.

The NFL gets this. Consider the Dez Bryant catch in last year's NFL playoff game against the Packers.²⁷ There was all this controversy about, "Was it a catch? Was it not a catch?"²⁸ The NFL rule had been drafted quite clearly to cover that situation: it was not a catch.²⁹ Now, maybe the rules should be changed--just as maybe Congress should change the laws sometimes--but the rule was quite clear. The NFL is actually pretty good about drafting clear rules, anticipating issues, and responding with new rules when issues arise. They just drafted a new rule, for example, in response to the Patriots shuffling their players and confusing the Ravens towards the end of a playoff game.³⁰ That is now illegal in the NFL.³ So they promptly responded to that new situation. Congress can do the same thing. Congress does it sometimes--that is, improve statutes after court decisions reveal issues. But I think Congress could be more responsive when issues of ambiguity arise or when it learns of ambiguity in *692 statutes. Judge Robert A. Katzmann, a great judge who is Chief Judge of the Second Circuit, has done a wonderful job of trying to have the judiciary communicate formally to Congress when flaws become apparent--not partisan flaws, not ideological flaws, but just mistakes or ambiguities in statutes.³²

Having said all of the above, there are areas of the law that sometimes entail discretion. And it is important to acknowledge that sometimes judges must exercise reasoned decision-making within a law that gives judges some discretion over the decision. For example, what is "reasonable" under the Fourth Amendment? There is a body of precedent that helps inform that, but what's "reasonable" under the Fourth Amendment is not a question that can be answered by staring at a code or dictionary. What is a "compelling government interest" under the Religious Freedom Restoration Act?³³ "Compelling government interest" is all the statute says--what are judges supposed to do with that? Rule 501 of the Federal Rules of Evidence directs judges to devise evidentiary privileges in light of "reason and experience." How are we supposed to do that? The Sherman Act prohibits "unreasonable restraints of trade."³⁴ How are we supposed to figure out what are unreasonable restraints of trade? That is not pure interpretation.

In other words, there are areas of law where there is judicial discretion, where it is not purely interpretive, it is not just figuring out what the meaning of a term is. And there will probably always be some discretion in some areas in the law. So I think it is important that if you articulate the vision of judge as umpire, that you also acknowledge that reality, so your vision is not caricatured as being "every case is simply mechanical and robotic for judges." Many cases come down to interpretation of the text of the Constitution, a statute, a rule, or a contract. But not every case comes down to pure interpretation. Even in those cases where there is discretion, however, where judges are assigned what may be described as common-law-like authority, it is important that we do those things that I mentioned: that we try to follow precedent and have a stable body of precedent; that we try to write our decisions in reasoned and clear ways; that we try to be consistent in how we go about deciding like cases alike; and that we do so candidly. This happens in sports as well. Issues arise in games that were not foreseen by the rules or that give discretion to the umpires. And the umpires or the referees have to make a decision on the spot. Judges are not robots, and neither are umpires or referees.

These are just ten of the ways in which judges should strive to be like umpires. It is a great honor to be at this distinguished law school. Thank you for listening and allowing me to explain and defend the vision of the judge as umpire.

Footnotes

f1 Circuit Judge, U.S. Court of Appeals for the D.C. Circuit. J.D., 1990, Yale Law School; B.A., 1987, Yale College. This speech was given as part of the Pope John XXIII Lecture Series at the Catholic University of America, Columbus School of Law on March 30, 2015.

1 Neal Conway, *The Little Saint of Georgetown Prep*, NEALJCONWAY.COM (Revised Nov. 5, 2011), <http://www.nealjconway.com/catholic/frbyrne/frbyrne.html>.

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- 5 *Id.*
- 6 Press Release, Office of the Press Secretary, President Bush Presents Medal of Freedom to Pope (June 4, 2004), http://georgewbushwhitehouse.archives.gov/news/releases/2004/06/20040604_3.html.
- 7 *Confirmation Hearing on the Nomination of John G. Roberts to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 443 (2005) (Sen. Diane Feinstein questioning J. John Roberts).
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- 9 BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN* 148 (1979).
- 10 See, e.g., Tom Pelissero, *NFL Looking at Mixing Up Officiating Crews*, USA TODAY (Nov. 22, 2015, 3:14 PM), <http://www.usatoday.com/story/sports/nfl/2015/11/22/officiating-crews-referees/76221432/> (quoting National Football League Commissioner Roger Goodell as saying, “t]he number one thing you want in officiating is consistency”).
- 11 *Confirmation Hearing on the Nomination of John G. Roberts to be Chief Justice of the United States*, *supra* note 7, at 158 (quoting Chief Justice Roberts during his confirmation hearing as saying, “Like most people, I resist the labels. I have told people, when pressed, that I prefer to be known as a modest judge.”).
- 12 See *id.* (“The role of the judge is limited; the judge is to decide the cases before them; they're not to legislate; they're not to execute the laws,] and that “ courts] are not making policy.]”).
- 13 See *id.* (“I do not] think the courts should have a dominant role in society and stressing society's problems but that “ i]t is their job to say what the law is,] and “it is emphatically the obligation of the courts to step up and say what the Constitution provides, and to strike down either unconstitutional legislation or unconstitutional executive action.]”).
- 14 See *id.* (describing the court's limited role of interpreting the Constitutional legitimacy of legislation enacted and executive decisions made).
- 15 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).
- 16 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).
- 17 *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483 (1954).
- 18 *United States v. Nixon*, 418 U.S. 683 (1974).
- 19 See, e.g., *Confirmation Hearing on the Nomination of John G. Roberts to be Chief Justice of the United States*, *supra* note 7, at 256 (“Judges have to have the courage to make the unpopular decisions when they have to. That sometimes involves striking down acts of Congress. That sometimes involves ruling that acts of th e] executive are unconstitutional. That is a requirement of the judicial oath.”).
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- 21 See, e.g., *id.* (explaining that individuals and organizations frequently attempt to influence court decisions by publishing their own interpretations of issues before the court, including criticizing the aspects of certain cases, and questioning potential biases).

- 22 See, e.g., Chris Good, *In Defense of Duke*, THE ATLANTIC (Apr. 2, 2010), <http://www.theatlantic.com/entertainment/archive/2010/04/in-defense-of-duke/38379/> (“Duke getting all the calls ... is] certainly not Coach K’s fault]. It’s his job to work the refs; it’s his job to try to win.).
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- 28 *Id.*; see also Laces Out: NFL Blog, *Controversy! Did Dez Bryant Get Robbed of an Amazing Catch?*, FOX SPORTS (Jan. 11, 2015, 3:56 PM), <http://www.foxsports.com/nfl/lacesout/dallas-cowboys-green-bay-packers-nfc-playoffs-dez-bryant-catch-overtaken-011115>.
- 29 See Chris Strauss, *The NFL Rules, Not Refs, Are Responsible for the Dez Bryant Catch Controversy*, USA TODAY (Jan. 11, 2015, 5:25 PM), <http://ftw.usatoday.com/2015/01/dez-bryant-nfl-catch-cowboys>; see also John Breech, *NFL Rewrites New Rule and it Might Actually Be More Confusing*, CBS SPORTS (July 24, 2015, 5:05 PM), <http://www.cbssports.com/nfl/eye-on-football/25249589/nfl-rewrites-dez-bryant-rule-and-it-might-actually-be-more-confusing>.
- 30 John Keim, *New Rule Responds to Pats Formation*, ESPN (Mar. 25, 2015), http://espn.go.com/nfl/story/_id/12556985/new-england-patriots-formation-now-ruled-illegal-substitution; Ben Volin, *NFL Passes Rule Aimed at Patriots Ineligible Receiver Tactic*, BOSTON GLOBE (Mar. 25, 2015), <https://www.bostonglobe.com/sports/2015/03/25/nfl-passes-rule-change-aimed-patriots-ineligible-receiver-tactic/uBqPWS5dKYdMYMcIiJ3sKO/story.html> (explaining that the NFL implemented this new rule in March 2015 in response to the Patriots Ravens game).
- 31 See Strauss, *supra* note 29.
- 32 See ROBERT A. KATZMANN, JUDGING STATUTES 101 (2014).
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- 34 15 U.S.C. § 1 (2012).

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OUR ANCHOR FOR 225 YEARS AND COUNTING: THE ENDURING SIGNIFICANCE OF THE PRECISE TEXT OF THE CONSTITUTION

Thank you so much for inviting me to Notre Dame. As a Catholic, I appreciate what this university stands for--a mission of training people, to educate students to help others of all faiths and backgrounds. As a Judge, I appreciate what this esteemed law school has done to train students in the law, to teach them both the fundamentals and the big picture, to teach them what to know and how to think. In the pantheon of great American law schools, this school stands as one of the finest.

I am so grateful to Dean Newton for welcoming me here. I thank Stephanie Maloney and the Law Review for their hard work, wonderful organization, and gracious hospitality. I thank my great friend Professor Bill Kelley for helping to arrange my trip. Bill and I worked together at three different times--first in the Solicitor General's office when he was an Assistant and I was what is now called a Bristow Fellow, second in Judge Starr's independent counsel office in those unpleasant duties, and finally in the White House when I was Staff Secretary and Bill was Deputy White House Counsel. There is no finer public servant and no finer man. I am grateful to Bill for mentoring me and for his loyal friendship over the years.

The topics we have been discussing today with leading thinkers of the legal academy are fascinating and important. What explains constitutional change in the Supreme Court? How do we explain and understand past changes? How do we predict and know when there is to be future change?

When one comes to Notre Dame, whether for a law review symposium or for a football game or for both, your mind is drawn to fundamentals and *1908 history. This is a place that oozes history, and in that vein, I want to take a step back and focus on the text of our Constitution. I want to focus on that text in two dimensions. First, I want to explain how the text of the Constitution creates a structure--a separation of powers--that protects liberty. And in particular, I want to emphasize how that structure tilts toward liberty, how it creates legislative and executive branches with finely specified powers so as to protect individual liberty against oppressive legislation. Second, I want to focus on the role of the Supreme Court in that constitutional structure--and how the Court itself looks to the precise words of the constitutional text both to preserve the separation of powers established by the Constitution and to protect individual liberty. My overriding message will be that one factor matters above all in constitutional interpretation and in understanding the grand sweep of constitutional jurisprudence--and that one factor is the precise wording of the constitutional text. It's not the only factor, but it's the anchor, the magnet, the most important factor that directs and explains much of constitutional law, particularly in the realm of separation of powers.

I. A Separate Legislature and Executive: A Structure That Tilts Toward Liberty

Let's begin with the structure established by the text. The Framers of the Constitution met in Philadelphia in the summer of 1787 because of dissatisfaction with the weak national government established under the Articles of Confederation. Several problems had become apparent. The national government was too weak to defend the territory and security of the United States.² The national government had little ability to raise revenue by way of taxes so as to support the necessary defense efforts.³ And the splintered nature of the country at that time hindered commerce and trade, including foreign trade, and thus hindered prosperity.⁴

A main goal, therefore, was to establish a strong central government able to protect security and promote prosperity.⁵ At the same time, the Framers were keenly aware that the people within this new country consisted of many factions--those with property and those without, creditors and debtors, landed interests and manufacturing interests, and moneyed interests and many lesser interests. As Madison said in Federalist 10, "The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government."⁶ Madison further explained that the Constitution had to "secure the public good and private rights" against "the danger of majority rule while "at the same time to preserve the spirit and the form of popular government."⁷

How to do this? How to create a strong central government without infringing on individual rights? Did the Framers in Philadelphia simply dictate a bill of rights to protect individuals from the majority? No. That was not the first order of business because the Framers understood that a bill of rights without a structure to protect those rights would be largely meaningless. As a practical matter, such a bill of rights would be precatory for individual legislators and executives. The danger to liberty, the Framers knew, was concentration of power. As Madison explained in Federalist 47, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."⁸ Madison explained that tyranny could come from a single executive in whom all powers are concentrated, or from a legislature that assembles all power in its hands, the definition of despotic government. So what is the opposite of concentration of power? Separation of power. Madison explained that "the preservation of liberty" requires that the "three great departments of power should be separate and distinct."⁹

Consistent with Madison's observations, we often remark that the Constitution's separation of powers protects liberty. We say that structure protects liberty.

But what do we mean by that? I think people often say that without really thinking about what it means. Do we know what those high-minded platitudes mean in practice? How exactly does the separation of powers protect liberty?

First we need to know what we mean by liberty. And while there are many different conceptions of liberty, the liberty protected by the separation of powers in the Constitution is primarily freedom from government oppression, in particular from the effects of legislation that would unfairly prohibit or mandate certain action by individual citizens, backed by punishment. There is certainly a conception of positive liberty--of entitlement to certain government benefits or support. And legislatures are equipped under our constitutional structure to provide that kind of benefit. But that is not what we are usually referring to when we say that the separation of powers protects liberty. The separation of powers primarily protects freedom from government action.

So we know what liberty we are referring to. How does the Constitution's structure protect liberty? To answer that question we need to read the text.

In order to protect individual liberty and guard against the whim of majority rule, the Framers first made it very difficult to enact laws. There would be no one person--no king or queen--who could simply declare the "law." Likewise,

there would be no one body of legislators who could enact laws. Rather, the Framers required the concurrence of three separate entities to enact legislation: the House, the Senate, and the President.² They provided, of course, for the possibility of the Legislature's overriding a presidential veto, but only with the concurrence of two-thirds of both houses of Congress.³

In order to enact tax laws, or to prohibit certain activities, or to regulate commerce, the national government would require action by three separate entities. In order to pass, legislation would require consensus and broad support. The system was designed to be difficult. Keep this in mind today. The Framers wanted it to be hard to pass legislation. Legislation that attained broad support was less likely to be oppressive--to unfairly benefit one faction at the expense of another. We can talk about whether we should alter that process by constitutional amendment, but the Constitution as ratified made legislation difficult to pass.

And there was more. Hard as it would be to enact legislation, the Framers were not content to rely on the protections of bicameralism and presentment alone. For laws that regulate private individuals and entities--laws that tell you that you cannot do something or must do something, backed by threat of an executive enforcement action and criminal punishment or civil sanctions--an enforcement entity separate from the Legislature would have to decide to in fact prosecute the violation of that law. This separate enforcement entity would be the President of the United States, as assisted by subordinate officers in the executive branch.⁴ This is what we call the Executive's prosecutorial discretion--the ability to decide whether to prosecute violations and violators of certain laws.⁵

The Executive was simultaneously given an extraordinary and unfettered power to pardon.⁶ Think about that: in one person alone is vested the power to pardon violations of federal law. And you might think, well, that is an enormous power to leave to one person; how does that make sense given that the Framers were so concerned about such a concentration of power? But it's actually consistent with the Framers' design when you keep in mind that the pardon power works only in the direction of liberty--it's a check to decide to protect someone's liberty against enforcement of what the Executive *1911 deems an oppressive law, even if a prior Executive had decided to prosecute the individual for violating the law.

So as an individual citizen, your liberty--your freedom from coercive federal government action--cannot be infringed until legislation is enacted, which requires the concurrence of three entities--and until the Executive makes a separate, independent decision to prosecute violations of those laws. This system of multiple checks makes it even harder for a majority faction to exercise coercive power against individual citizens.

In its design and structure, the Constitution is tilted in the direction of liberty.

Now on this prosecutorial discretion point, some might initially think that the Executive has a duty to prosecute violators of every law, at least if there are resources to do so. Some might say that it's not for the President to decide not to prosecute violators of a law that Congress has duly enacted. In my view, the history and structure of the Constitution do not support that proposition. To be sure, the President has the duty to take care that the laws be faithfully executed. That certainly means that the Executive has to follow and comply with laws regulating the executive branch--at least unless the President deems the law unconstitutional, in which event the President can decline to follow the statute until a final court order says otherwise. In other words, the Executive does have to follow laws regulating the executive branch. But the Take Care Clause has not traditionally been read to mandate executive prosecution of all violators of all federal laws.⁷

Our leading historical example is President Jefferson and the Sedition Act. We all know the rough outlines of the Sedition Act. In 1798, in the throes of the U.S. war against France, Congress supported by President Adams passed a law that said it would be a crime punishable by fine and up to two years imprisonment to "write, print, utter or publish," or

cause it to be done, or assist in “any false, scandalous, and malicious writing against the government of the United States, or either House of Congress, or the President, with intent to defame, or bring either into contempt or disrepute,” among other things.⁸ After he became President in 1801, President Jefferson decided that he would no longer pursue prosecutions against violators of the Sedition Act, against those who spoke ill of the government or high officials in that way. Most accept that Jefferson did not violate the Take Care Clause when he made that decision. The Take Care Clause encompasses at least some degree of prosecutorial discretion; it does not prohibit prosecutorial discretion.⁹

***1912** But you may still have a nagging doubt, as I often do when I think about this issue. Does the President really have the power to decline to prosecute a violator of a law simply because of the President's belief that the law is oppressive? In my view, those nagging doubts largely go away when we consider the implications of the pardon power, and the interaction of the powers of prosecutorial discretion and the pardon power.²⁰ Everyone agrees that the pardon power gives the President absolute, unfettered, unchecked power to pardon every violator of every federal law.² Obviously, there are political checks against doing that, or against using the pardon power in an arbitrary manner.²² But in terms of raw constitutional power, that is the power the President has.

Moreover, it is long settled that the power to pardon includes the power to pardon violations of a law at any time after commission of the act.²³ In other words, a pardon does not need to wait for a conviction.

Now if the President has the absolute discretion to pardon individuals at any time after commission of the illegal act, it necessarily seems to follow that the President has the corresponding power not to prosecute those individuals in the first place. After all, it would not make any sense to require the filing of a criminal indictment followed by a pardon instead of simply allowing the Executive not to file the criminal indictment in the first place. As Akhil Amar has cogently explained, the greater power to pardon encompasses the lesser power to decline to prosecute in the first place.²⁴

At the same time that the Framers tilted toward liberty with the prosecutorial discretion and pardon powers, the Framers also created a check against unilateral executive decisions to restrain someone's physical liberty. In particular, Article I, Section 9 of the Constitution protects the ***1913** right of habeas corpus, which allows executive detention only pursuant to laws passed by Congress, except in certain carefully cabined circumstances.²⁵

So what is the unifying theme between the pardon and prosecutorial discretion powers on the one hand and the habeas corpus right on the other? The former grants unilateral power to the President.²⁶ The latter forbids unilateral power by the President.²⁷ What is the connective tissue? The answer is liberty. The constitutional structure is tilted toward liberty. The President can act unilaterally to protect liberty and free or protect someone from imprisonment; but with limited exceptions, the President cannot act, except pursuant to statute, to infringe liberty and imprison a citizen.

So the text of the Constitution creates a separation between the legislative power and the executive power.²⁸ And to enact legislation, moreover, the Constitution requires the concurrence of three separate entities.²⁹ A primary protection of liberty in our constitutional structure comes from the Framers' decisions on structure, decisions that we see when we read Article I³⁰ and Article II of the Constitution.³ Those checks are central to protecting liberty.

And make no mistake, although resort to the precise constitutional text is sometimes dismissed as anachronistic, that precise constitutional text still controls how Congress and the President operate.³² A President cannot say, well, the Constitution is outdated and has not adapted to the needs of the times, so I am going to ignore Congress and unilaterally decree a new criminal law prohibiting possession of certain semi-automatic rifles. Or I am going to ignore Congress and unilaterally pass a new decree banning forms of abortion. A Senate cannot say that the House of Representatives is too extreme and not representative of the population at large, so we the Senate are going to ignore the House and join

with the President in passing some new tax legislation. The House cannot say that the Senate is outdated and should be bypassed because having two Senators per state regardless of population--giving the same number of votes to Delaware and California--violates the one-person, one-vote principle, so we the House are just going to ignore the Senate and join with the President in passing new environmental laws.

That does not happen--and it cannot lawfully happen. The precise text of the Constitution controls our structure, and we do not ignore the text of *1914 the Constitution simply because it was ratified 225 years ago, or may be outdated, or has not adapted to modern conditions.³³

To be sure, the Constitution is not fixed in stone. There is an amendment process, articulated in Article V.³⁴ And that amendment process is meant to be used. The Twelfth Amendment,³⁵ the Seventeenth Amendment,³⁶ and the Twenty-Second Amendment,³⁷ to take three examples, have worked dramatic changes in our constitutional structure. But the text controls.

Even with all of those structural protections of liberty in place at the time of the Founding, concerns were raised in some quarters about the lack of a bill of rights. So the First Congress and the states decided to add a series of individual rights to the Constitution, what are now the First through Eighth Amendments.³⁸

Even without a bill of rights, of course, the Legislature always has the power to decline to enact legislation for any reason, including that it violates principles that we care about: the freedom of speech,³⁹ or the freedom to keep arms,⁴⁰ or the protection against cruel and unusual punishments,⁴ or *1915 any other value or policy the Legislature deems important.⁴² Now one could assume that future Congresses would always keep these values in mind, or at least have some very good reason to depart from them. But the First Congress wanted to establish some red lines in the constitutional text, over which future Congresses and Presidents could not cross, absent constitutional amendment.

So the Constitution was amended to tilt even further toward liberty.

So what is the significance and practical importance of having all of this written in the constitutional text? That's where the next chapter of our story begins.

II. The Independent Judiciary: A Further Tilt Toward Liberty

The text of the Constitution tilts toward liberty in still another critically important way. Even in cases where a law is passed and the Executive prosecutes individual violators, the Congress and the Executive do not have the last word. Rather, the Constitution creates and empowers an independent Judiciary that has the power (with a jury) in justiciable cases to determine whether someone has in fact violated the law as alleged by the Executive.⁴³ Even more importantly, the Judiciary has the final word to independently determine whether the law itself violates the text of the Constitution in some way, for example, as a violation of habeas corpus⁴⁴ or as exceeding Congress's power under the Commerce Clause.⁴⁵

Check after check after check after check. Bicameralism, presentment, executive discretion, pardon power, and on top of that independent judicial and jury determination of the facts, and independent judicial determination of the constitutionality of the law. Before the coercive power of the state may act upon you as an individual citizen, so many different checkpoints must be passed. Why? To protect individual liberty. To guard against faction, as Madison said.⁴⁶ To protect the minority against the majority, while at the same time creating a system that could function to protect security and enhance prosperity.

So the Constitution's structure protects liberty. The primary protection of individual liberty in our constitutional system comes from the separation of powers in the Constitution: the separation of the power to legislate from the power to enforce from the power to adjudicate.⁴⁷ But it took a critical ***1916** moment early in our constitutional system to cement these principles firmly into the U.S. Reports.

The case was *Marbury v. Madison*.⁴⁸ We all have studied the case in law school, and we all think we know what it means. But in many ways, I think we spend too little time on *Marbury v. Madison* in the academy and in the legal profession. I think every time we re-read the text of the Constitution, which we should do regularly--and I mean word for word--we should also re-read *Marbury v. Madison* at the same time. For that case has profound lessons to this day about the status of the Constitution, how to interpret the Constitution, and the Judiciary's role vis-à-vis other branches in interpreting the Constitution.

From the early days of the Constitution, the courts were called upon to address claims by individuals that their rights were being impeded in violation of the Constitution.⁴⁹ And the judges therefore were called upon to have a method of assessing such claims, of interpreting and applying the Constitution. And from the beginning, the most important aspect of constitutional interpretation was not one's political philosophy, not one's policy views, but rather what were the precise words of the constitutional text.⁵⁰

We all know that *Marbury* stands for the basic proposition that courts may review laws as applied in individual cases to determine whether the laws square with the Constitution: the power of judicial review.⁵¹ But in the course of articulating that principle, Chief Justice Marshall opined on a number of critical points of constitutional interpretation that remain salient to this day.

Recall the basic facts. William Marbury had been nominated by President Adams to be a judge on the local D.C. court, which given D.C.'s unique status in the Constitution was a federal office that at that time carried a fixed term of five years.⁵² Marbury had been confirmed by the Senate, and President Adams had signed his commission. But at the time President Jefferson took office in March 1801, Marbury had not yet received his commission, which had languished in the Secretary of State's office.⁵³ The question was whether delivery of the commission was necessary for Marbury's appointment;⁵⁴ if so, then President Jefferson had no intention of delivering the commission and allowing Marbury to serve as a judge.⁵⁵

***1917** Marbury filed for a writ of mandamus in the Supreme Court.⁵⁶ Chief Justice Marshall wrote the unanimous opinion.⁵⁷ And let's put aside the question of what issues he should have reached, which itself is an interesting topic, but let's look at the issues he did reach and how he analyzed the issues.

Chief Justice Marshall first considered the question of whether Marbury had been validly appointed to his position as a D.C. judge.⁵⁸ How to analyze that question? Marshall began with the precise wording of the Constitution. He quoted Article II, Section 2 of the Constitution: "The president shall nominate, and, by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, and all other officers of the United States, whose appointments are not otherwise provided for."⁵⁹ And he quoted Article II, Section 3, which states that the President "shall commission all the officers of the United States."⁶⁰

Reading that text, Marshall explained that the Constitution creates three separate steps before a principal officer is officially appointed--presidential nomination, Senate confirmation, and then the President's commissioning the

officer.⁶ In other words, just because you are confirmed by the Senate does not make you an officer; the President has one final discretionary step to complete, namely, the commissioning of the officer. At that point, the President could decide not to commission the officer, and the individual would not be appointed, notwithstanding having been nominated and confirmed. Keep that in mind for your future judicial appointment. After the Senate confirms you, make sure the President signs the commission.

But the next issue in *Marbury* concerned when an appointment is complete: when the President signs the commission or when the commission is delivered to the office holder.⁶² President Jefferson's view was that the appointment was not complete until the commission was delivered to the office holder. Should the Supreme Court defer to the President's view on that question? Marshall said no. It was the duty of the courts to say what the law is, and in a justiciable case where an individual claims that the President has acted in a manner contrary to the Constitution, the Court has the final word, not the President.⁶³

This is a critical aspect of *Marbury* that is often overlooked. The Court not only has the power of judicial review of legislation (as we will see); it also has the power to reject the President's interpretation of the Constitution.⁶⁴

***1918** And to analyze the question of when the appointment was complete--at the commission's signing or at delivery--Marshall resorted to ordinary principles of interpretation, using the text, history, and structure of the Constitution, not to mention some common sense--to answer this ambiguity. He concluded ultimately that the appointment was final when the commission was signed, stating:

The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where, by law, the officer is not removable by him. The right to the office is then in the person appointed, and he has the absolute, unconditional, power of accepting or rejecting it.⁶⁵

So from this aspect of *Marbury*, we find two bedrock points: First, the Court will not simply defer to the views of the President on a question of constitutional interpretation.⁶⁶ And second, in resolving questions of constitutional controversy, the Court will look to and heed the actual wording, the precise words, of the Constitutional text and the structure created by that text.⁶⁷ So *Marbury*, the Court reasoned, was entitled to hold the office for a term of five years and was entitled to a writ of mandamus.⁶⁸

But there still were other questions for the *Marbury* Court to resolve, in particular: Was the Supreme Court the appropriate body to issue the writ of mandamus?⁶⁹ A statute--the Judiciary Act of 1789--gave the Supreme Court original jurisdiction over such mandamus actions.⁷⁰ But was that statute consistent with the Constitution?

How did Marshall resolve that question? He went back to the constitutional text and began by quoting Article III of the Constitution: "The supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction."⁷

As Marshall noted, it had been argued that Congress had the authority to add to the original jurisdiction of the Supreme Court because the Constitution did not expressly prohibit Congress from doing so.⁷² But Marshall would have none of that.

If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original *1919 jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and, in this case, a negative or exclusive sense must be given to them or they have no operation at all.⁷³

So Marshall concluded that the statutory grant of jurisdiction was contrary to the Constitution.⁷⁴

One final question remained, however: the provision giving the Supreme Court original jurisdiction over mandamus actions had been enacted by Congress in the famed Judiciary Act of 1789.⁷⁵ Could the Supreme Court in essence declare an act of Congress unconstitutional and decline to follow it?⁷⁶

Marshall said that was “a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest.”⁷⁷

In resolving that question, Marshall made many observations about the nature of the Constitution that bear repeating:

Marshall made clear that the Constitution was not just an aspirational statement of principles, but rather was law.⁷⁸ It was written law that was to be interpreted according to traditional principles for interpreting written law.⁷⁹ At the same time, the Constitution was superior to ordinary legislation.⁸⁰

This original and supreme will organizes the government, and assigns, to different departments, their respective powers. . . .

. . . The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? . . .

. . . The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable . . .

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.⁸

But did the Court have the power to enforce its understanding of the Constitution against a contrary interpretation by the Legislature?

Marshall took the question head on:

***1920** It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions--a written constitution--would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction.⁸²

Marshall then went on to give many examples of how judicial review had to be part and parcel of a constitutional system with a written Constitution, a parade of horrors that could ensue if the written Constitution was unenforceable in court. He noted that the Constitution declared that “no tax or duty shall be laid on articles exported from any state.”⁸³ He hypothesized a tax on “export of cotton, of tobacco, or of flour,” and asked, “Ought judgment to be rendered in such a case? [O]ught the judges to close their eyes on the constitution, and only see the law[?]”⁸⁴ Marshall pointed out that the Constitution provided that “no bill of attainder or ex post facto law shall be passed.”⁸⁵ And he asked: Suppose “such a bill should be passed and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavours to preserve?”⁸⁶

Marshall summed up:

***1921** From these, and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument, as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? . . . How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

. . . .

Why does a judge swear to discharge his duties agreeably [sic] to the constitution of the United States, if that constitution forms no rule for his government? [I]f it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery.⁸⁷

Marshall concluded with a textual and structural point:

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.⁸⁸

So what are the primary lessons of *Marbury v. Madison*?

First, *Marbury* reminds us that the point of the Constitution is to establish a paramount law that will govern and trump ordinary legislation:

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. . . .

This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is ***1922** on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.⁸⁹

Second, on matters of constitutional interpretation--in that case, the question of whether an appointment was final when the commission was signed or delivered⁹⁰--the Judiciary will not defer to the President.⁹ The Judiciary exercises its own independent judgment in a justiciable case involving an individual's right and will enforce its own interpretation of the Constitution in a justiciable case. After *Marbury*, probably the two most significant cases in which the Judiciary stood up to the President were *Youngstown*⁹² and *United States v. Nixon*.⁹³ In both cases, the President asserted a particular interpretation of the Constitution.⁹⁴ In both cases, the stakes were enormously high. In both cases, the Supreme Court stated in essence: we respect the views of the President, but we do not agree with his constitutional interpretation, and we therefore rule against him. He cannot seize the steel mills in the face of a congressional prohibition.⁹⁵ He cannot protect the Watergate tapes under a claim of absolute executive privilege.⁹⁶ Likewise, to President Clinton in *Clinton v. Jones*,⁹⁷ the Court stated, we disagree with you that Article II of the Constitution provides a temporary immunity from private civil suits while in office.

Third, on matters of constitutional interpretation--in that case, the question of whether Congress had appropriately defined the original jurisdiction of the Supreme Court--the Judiciary will not defer to Congress.⁹⁸ The *1923 Judiciary exercises its own independent judgment in a justiciable case. This, too, is a power the courts have exercised to the present day. To the Congress that enacted the Military Commissions Act,⁹⁹ the Court said: we disagree with you about the reach of the habeas corpus writ at Guantanamo.⁰⁰ Similarly, to the Congress that enacted the Affordable Care Act,⁰ the Court said: we disagree with you that the Commerce,⁰² Necessary and Proper,⁰³ or Tax Clauses⁰⁴ support a mandate to purchase a product or service. However, the Court ultimately did conclude that the statute could be read simply to impose only a tax incentive and not a legal mandate.⁰⁵ In the same case, the Court said: we disagree with you, Congress, that the federal government may coerce the states into losing their existing Medicaid funding if they fail to expand as directed in the Affordable Care Act.⁰⁶

Fourth, in exercising its own independent judgment when analyzing the Constitution, the Court will focus intently on the precise words of the constitutional text. The Marbury Court did not ask what the best way to do things was. It did not seek to find the best policy. It might be, after all, that an appointment should be considered final after the Senate confirmation vote, or from the other direction, only when the commission is delivered. But the Court did not weigh such questions of policy. The Court asked what the precise words of the Constitution said, and the Court reasoned from the text of the document and the structure of the document established by that text.⁰⁷

III. Marbury's Shadow

It's my submission that Marbury v. Madison continues to mark the proper approach for constitutional interpretation.

*1924 To be sure, there have been eras where some have suggested that the courts should exercise extreme deference to the Legislature. This view is associated with Professor Thayer, Justice Frankfurter, and many others, but the fundamental flaw with this degree of constitutional deference is that it entails abdication of a constitutional responsibility assigned to the Judiciary.⁰⁸ As John Marshall stated, why even bother to have a constitution if it cannot be independently enforced by the Judiciary in individual cases?⁰⁹ To exercise their responsibilities and oaths, Marshall explained, courts cannot simply defer to the President's or Congress's interpretation of the Constitution.⁰

There are also areas where people claim that the precise words of the constitutional text do not matter or should not bind us. Indeed, there are some people today who think we should not be bound by the outmoded and outdated text. Marbury, of course, rejects that notion as well. And, in my judgment, the Supreme Court throughout our history has rejected that notion and has insisted on the binding status of the constitutional text as law. Think of some modern examples from the last fifty years:

Consider Powell v. McCormack,² from 1969. The question was whether the House could exclude Adam Clayton Powell from the seat to which he had been elected.³ The text of the Constitution lists only three apparent qualifications for being a House member: twenty-five years of age, seven years as a citizen, and an inhabitant of the state from which the representative is elected.⁴ In deciding the case, Chief Justice Warren, writing for seven Justices of the Court--let me repeat, Chief Justice Warren, writing for seven Justices of the Court--conducted an extensive analysis of the Constitution's text and history, and the Convention and ratification debates.⁵ And the Court said that its analysis "has demonstrated that in judging the qualifications of its members Congress is limited to the standing qualifications prescribed in the Constitution."⁶ Text matters.

Or consider the 1976 decision in *Buckley v. Valeo*, not the part about the constitutionality under the First Amendment of the campaign finance restrictions, but rather the constitutionality of the structure of the Federal Election Commission.⁷ This was, of course, an entity developed in the heyday of *1925 new-fangled, good-government institutions, which were in fashion in the 1970s and produced ugly first cousins to the Federal Election Commission, such as the independent counsel statute.⁸ The statute in question in *Buckley* created a Federal Election Commission, with two members selected by the Speaker of the House, two members appointed by the Senate, and two members appointed by the President, subject to confirmation by both houses of Congress (I guess confirmation by one house was not enough).⁹

The Court--in part of its eight-Justice per curiam opinion, which all the Justices joined--held the Federal Election Commission unconstitutional under the Appointments Clause.²⁰ Listen to the words of the Court, and keep in mind that this opinion includes Justices from Rehnquist to Brennan to Marshall:

The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787. . . . But there is no need to read the Appointments Clause contrary to its plain language We are . . . told . . . that Congress had good reason for not vesting in a Commission composed wholly of Presidential appointees the authority to administer the Act But such fears, however rational, do not by themselves warrant a distortion of the Framers' work.²

Text matters.

Recall the 1983 decision in *INS v. Chadha*.²² This was the case dealing with the constitutionality of the legislative veto. Legislative vetoes were the provisions that Congress, in the wake of the New Deal, routinely put into legislation in order to allow either one or both houses of Congress to vote down a particular agency action without going through the bicameralism and presentment procedures specified by the text of the Constitution. The basic idea behind the legislative veto, in other words, was: "Hey, things have changed since the Founding, so we should not be bound by that outdated text of the Bicameralism and Presentment Clauses." Well, a large majority of the Supreme Court said, "No."²³ Again, listen to the Court's words, written by Chief Justice Burger, and joined by Justice Brennan and others:

[Some] undertake[] to make a case for the proposition that the one-House veto is a useful 'political invention' But policy arguments supporting *1926 even useful 'political inventions' are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised. . . . [T]he prescription for legislative action in Art. I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.²⁴

Text matters.

Let's remember the Court's 1986 decision in *Bowsher v. Synar*.²⁵ There, the Court considered the constitutionality of the position of Comptroller General of the United States, who performed executive functions but could be removed only by the Congress.²⁶ In an opinion by Chief Justice Burger, which Justices Brennan, Powell, Rehnquist, and O'Connor joined, the Court held the restrictions on removal of the Comptroller General unconstitutional.²⁷ The Court noted that it had been argued that "'[r]ealistic consideration' of the 'practical result of the removal provision'" meant that "the

Comptroller General is unlikely to be removed by Congress.”²⁸ The Court responded: “The separated powers of our Government cannot be permitted to turn on judicial assessment of whether an officer exercising executive power is on good terms with Congress. The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.”²⁹ Text matters.

Then there is *Clinton v. City of New York*, the line-item veto case decided in 1998.³⁰ This was an opinion by Justice Stevens, joined by Chief Justice Rehnquist and Justice Thomas, among others. The Court stated: “Congress cannot alter the procedures set out in Article I, §7, without amending the Constitution.”³¹ Text matters.

Those landmark decisions show us that in structural and separation of powers cases, the text is critical. Contemporary standards of what's good or decent or efficient do not control; the precise text of the Constitution controls. This constitutional textualism is not the unique province of the so-called conservative judges. Judges of all supposed ideological stripes have paid close attention to the text in structural and separation of powers cases. And these cases exemplify that textualism--constitutional textualism and statutory textualism--is politically and policy neutral when applied across the board.

To be sure, the constitutional text does not answer all questions. Sometimes the constitutional text is ambiguous, such as the Equal Protection and Due Process Clauses. No doubt that's true. But in far fewer places than one *1927 would think. As I like to say to my law clerks and my students, we should not strain to find ambiguity in clarity. And even in those areas where there is true ambiguity, that should not mean “anything goes.” Just because there are two reasonable readings of a constitutional provision or a statute does not mean that the gates are open to a completely free-form approach.

Some argue that a textualist approach means a cramped approach to individual liberty. I do not agree. Separation of powers cases are about protecting individual liberty, as the Court has often reminded us.³² But even apart from that, when the constitutional text expressly protects an individual liberty--think of the Takings Clause, or Free Exercise of Religion Clause, or Confrontation Clause, or Right to Counsel Clause--then the courts cannot subtract from that. The text is actually a bulwark against watering down key protections of our liberty that are expressly set forth in the Constitution.

Before I conclude, it bears a brief mention, of course, that most structural and separation of powers disputes never reach court. And in those areas, most interestingly, the relevant political actors and the public tend not just to be textualists, but hyper-textualists.

When I met with Senator Byrd in my confirmation process--after we compared notes about our daughters, mine at the time being one year old and his being sixty-eight and sixty-four years old--he pulled out the Constitution and read to me word-for-word Article I, Section 9's language about the power of the purse. Why did he do that? Because text matters (and because Senator Byrd cared a lot about the power of the purse).

In his confirmation hearings, Chief Justice Roberts famously said that the role of the judge is to be an umpire--to call balls and strikes the same way, no matter who is up at bat.³³ Of course, a fundamental premise of the vision of the judge as umpire is that the definition of the strike zone is the same for each umpire. And in modern constitutional law, as in modern baseball, unfortunately, some umpires employ a different strike zone in some cases. As enduring constitutionalists argue, however, paying close attention to the precise words of the constitutional text is a mainstream and long accepted mode of constitutional interpretation.³⁴ It is a strike zone we can all agree on. Employing it helps us achieve the ideal of the judge as umpire, respect the proper role of the Judiciary that our Framers envisioned, and protect individual liberty. Text matters.

Footnotes

- a1 United States Circuit Judge, United States Court of Appeals for the District of Columbia Circuit. These remarks were given at the 2014 Notre Dame Law Review Symposium, “The Evolution of Theory: Discerning the Catalysts of Constitutional Change.
- 1 Michael Les Benedict, *The Blessings of Liberty* 80–81 (1996). See generally Akhil Reed Amar, *America's Constitution: A Biography* (2005); Richard Beeman, Plain, Honest Men: *The Making of the American Constitution* (2009).
- 2 Benedict, *supra* note 1, at 80–81.
- 3 *Id.*
- 4 *Id.*
- 5 *Id.* at 81.
- 6 *The Federalist* No. 10, at 49 (James Madison) (Ian Shapiro ed., 2009).
- 7 *Id.* at 50.
- 8 *The Federalist* No. 47, at 245 (James Madison) (Ian Shapiro ed., 2009).
- 9 *Id.* at 246.
- 10 See, e.g., U.S. Const. art. I, § 1.
- 11 *Id.*
- 12 *Id.* art. I, § 7.
- 13 *Id.*
- 14 See *id.* art. II, § 3 (“The President] shall take Care that the Laws be faithfully executed....”); *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (noting that Article II, Section 3 of the Constitution gives the executive branch prosecutorial power).
- 15 See *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) (“It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.”).
- 16 U.S. Const. art. II, § 2, cl. 1.
- 17 See, e.g., *Cox*, 342 F.2d at 171 (noting that the President, through the Attorney General who acts as the “hand of the President, retains “the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions”). See generally *In re Aiken County*, 725 F.3d 255 (D.C. Cir. 2013).
- 18 Sedition Act of 1798, ch. 74, § 2, 1 Stat. 596 (expired 1801).
- 19 See U.S. Const. art. II, § 3 (“The President] shall take Care that the Laws be faithfully executed”); *Cox*, 342 F.2d at 171 (noting that the President, through the Take Care Clause, has “free exercise of the discretionary powers ... over criminal prosecutions”).
- 20 See U.S. Const. art. II, § 2 (“The President] shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”).
- 21 See *Ex parte Garland*, 71 U.S. 333, 380 (1866) (“The power thus conferred by the Constitution] is unlimited, with the exception stated.... This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders.”).

- 22 See *Ex parte Grossman*, 267 U.S. 87, 106 (1925) (“The Constitution does establish a system of checks and that the pardoning power does furnish a potential check upon some judicial actions. If the President abuses this power he may be impeached. It is, however, no more inherently unreasonable that the President should have the power to pardon criminal contempts than that he should have the power to pardon treason. ”).
- 23 *Ex parte Garland*, 71 U.S. at 380 (“The President’s pardon power] extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. ”); see also *Ex parte Grossman*, 267 U.S. at 104 (“The President may pardon all offenses against the United States except in cases of impeachment. ”).
- 24 Amar, *supra* note 1, at 187–89.
- 25 U.S. Const. art. I, § 9 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it. ”).
- 26 See *id.* art. II, §§ 2, 3.
- 27 See *id.* art. I, § 9.
- 28 See *id.* § 1 (vesting legislative powers in the U.S. Congress); *id.* art. II, § 1 (vesting the executive power in the President of the United States).
- 29 See *id.* art. I, § 7, cl. 2.
- 30 See *id.* art. I.
- 31 See *id.* art. II.
- 32 See *id.* art. I (prescribing the legislative powers of the U.S. Congress); *id.* art. II (prescribing the executive power of the President).
- 33 See generally John F. Manning, Separation of Powers as Ordinary Interpretation, 124 Harv. L. Rev. 1939 (2011); John F. Manning, The Eleventh Amendment and the Reading of Precise Constitutional Texts, 113 Yale L.J. 1663 (2004).
- 34 U.S. Const. art. V (“The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof.... ”).
- 35 *Id.* amend. XII (ratified June 15, 1804, the Twelfth Amendment outlined the process for electing the President: “The Electors shall meet in their respective states, and vote by ballot for President and Vice President, one of whom, at least, shall not be an inhabitant of the same state with themselves.... The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately by ballot, the President. ”).
- 36 *Id.* amend. XVII (ratified April 8, 1913, the Seventeenth Amendment established direct election of U.S. Senators by popular vote: “The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years.... ”).
- 37 *Id.* amend. XXII, § 1 (ratified February 27, 1951, the Twenty Second Amendment imposed a term limit on the President: “No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once.... ”).
- 38 See *id.* amends. I–VIII.

- 39 Id. amend. I (“Congress shall make no law...abridging the freedom of speech....”).
- 40 Id. amend. II (“The right of the people to keep and bear Arms, shall not be infringed.”).
- 41 Id. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. (emphasis added)).
- 42 See, e.g., id. art. I, §§ 7–8.
- 43 See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).
- 44 See *Boumediene v. Bush*, 553 U.S. 723, 732 (2008).
- 45 See *United States v. Lopez*, 514 U.S. 549, 551, 557 (1995).
- 46 The Federalist No. 10 (James Madison).
- 47 See The Federalist No. 47, at 245 (James Madison) (Ian Shapiro ed., 2009) (“One of the principal objections... to the Constitution, is... that the legislative, executive, and judiciary departments are] separate and distinct.... No regard... seems to have been paid to this essential precaution in favor of liberty.”).
- 48 5 U.S. (1 Cranch) 137.
- 49 See, e.g., *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (holding that the President does not have inherent authority to ignore a law passed by Congress); *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803) (sustaining the Judiciary Act of 1802).
- 50 See William R. Casto, *The Supreme Court in the Early Republic: The Chief Justiceships of John Jay and Oliver Ellsworth* 222–38 (1995) (detailing the methods of constitutional interpretation employed by the early Court).
- 51 See *Marbury*, 5 U.S. (1 Cranch) at 177–79.
- 52 Id. at 154–55.
- 53 Id.
- 54 Id. at 157.
- 55 See William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 Duke L.J. 1, 4.
- 56 See *Marbury*, 5 U.S. (1 Cranch) at 153.
- 57 Id.
- 58 Id. at 155.
- 59 Id. (quoting U.S. Const. art. II, § 2, cl. 2).
- 60 Id. (quoting U.S. Const. art. II, § 3).
- 61 Id. at 155–56.
- 62 Id. at 159–61.
- 63 Id. at 177.
- 64 See id. at 172–73 (rejecting Jefferson’s assertion that the commission only became complete upon delivery).
- 65 Id. at 162.

- 66 See id. at 167 (“The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority.).
- 67 See id. at 177 78.
- 68 Id. at 162.
- 69 Id. at 168 (“It remains to be enquired whether ... hje is entitled to the remedy for which he applies. This depends on... the power of this court.).
- 70 Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73.
- 71 Marbury, 5 U.S. (1 Cranch) at 174 (quoting U.S. Const. art. III, § 2, cl. 2).
- 72 Id.
- 73 Id.
- 74 Id. at 176.
- 75 See Judiciary Act of 1789 § 13, 1 Stat. at 81.
- 76 Marbury, 5 U.S. (1 Cranch) at 176.
- 77 Id.
- 78 See id. at 176 77.
- 79 See id. at 174, 176 80.
- 80 Id. at 178.
- 81 Id. at 176 77.
- 82 Id. at 177 78.
- 83 Id. at 179 (internal quotation marks omitted).
- 84 Id.
- 85 Id. (internal quotation marks omitted).
- 86 Id.
- 87 Id. at 179 80.
- 88 Id. at 180.
- 89 Id. at 176 77.
- 90 Id. at 162.
- 91 Id. at 177 (“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.).
- 92 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
- 93 418 U.S. 683 (1974).
- 94 Id. at 703 05 (noting the President's claim of executive privilege); Youngstown, 343 U.S. at 587 (noting the President's asserted interpretations of the Vesting Clause and of the President's military power as Commander in Chief of the Armed Forces).

- 95 Youngstown, 343 U.S. at 589 (holding that the seizing of the steel mills was unconstitutional).
- 96 See Nixon, 418 U.S. at 686 87, 707.
- 97 520 U.S. 681, 692 (1997) (“Petitioner’s principal submission that ‘in all but the most exceptional cases, the Constitution affords the President temporary immunity from civil damages litigation arising out of events that occurred before he took office cannot be sustained on the basis of precedent. (internal citation omitted)).
- 98 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174 75 (1803).
- 99 Military Commissions Act of 2006, Pub. L. No. 109 366, 120 Stat. 2600.
- 100 Boumediene v. Bush, 553 U.S. 723, 792 (2008) (holding that the Military Commissions Act was not an adequate substitute for habeas corpus).
- 101 Patient Protection and Affordable Care Act, Pub. L. No. 111 148, 124 Stat. 119 (2010) (codified in scattered sections of 25, 26, 29, and 42 U.S.C.).
- 102 Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2591 (2012) (Roberts, C.J.) (“The individual mandate forces individuals into commerce precisely because they elected to refrain from commercial activity. Such a law cannot be sustained under a clause authorizing Congress to ‘regulate Commerce.).
- 103 Id. at 2593 (holding that the individual mandate cannot be upheld under the Necessary and Proper Clause).
- 104 Id. at 2599 (“A tax on going without health insurance does not fall within any recognized category of direct tax.).
- 105 Id. at 2600 (“ I]mposition of a tax nonetheless leaves an individual with a lawful choice to do or not do a certain act, so long as he is willing to pay a tax levied on that choice.).
- 106 Id. at 2608 (“ T]he Medicaid expansion...portion of the Affordable Care Act violates the Constitution by threatening existing Medicaid funding.).
- 107 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803) (stating that “the particular phraseology of the C]onstitution dictates the case’s outcome).
- 108 See, e.g., Alfred S. Neely, Mr. Justice Frankfurter’s Iconography of Judging, 82 Ky. L.J. 535 (1994) (discussing Justice Frankfurter’s adjudicative methods, including criticisms of his extensive deference to Congress); James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129 (1893) (discussing the history of the American constitutional doctrine and arguing for a more limited power of judicial review).
- 109 Marbury, 5 U.S. (1 Cranch) at 151.
- 110 See id.
- 111 Id. at 180.
- 112 395 U.S. 486 (1969).
- 113 Id. at 489.
- 114 U.S. Const. art. I, § 2.
- 115 Powell, 395 U.S. at 532 47.
- 116 Id. at 550 (emphasis added).
- 117 Buckley v. Valeo, 424 U.S. 1, 109 43 (1976).
- 118 The independent counsel statute is the Ethics in Government Act of 1978, 28 U.S.C. §§ 49, 591 99 (2006) (creating an independent counsel to investigate members of the executive branch, as determined necessary by the Attorney General); see

also *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding the constitutionality of the process of appointing the independent counsel, as set forth in the Ethics in Government Act of 1978). See generally Brett M. Kavanaugh, Separation of Powers During the Forty Fourth Presidency and Beyond, 93 Minn. L. Rev. 1454 (2009); Brett M. Kavanaugh, The President and the Independent Counsel, 86 Geo. L.J. 2133 (1998).

119 Buckley, 424 U.S. at 113.

120 Id. at 140.

121 Id. at 124, 127, 134.

122 462 U.S. 919 (1983).

123 Id. at 959.

124 Id. at 945, 951.

125 478 U.S. 714 (1986).

126 Id. at 717.

127 Id. at 736.

128 Id. at 730 (quoting from Justice White's dissent) (internal citation omitted).

129 Id.

130 *Clinton v. City of New York*, 524 U.S. 417 (1998).

131 Id. at 446.

132 See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010); *Boumediene v. Bush*, 553 U.S. 723 (2008); *City of New York*, 524 U.S. at 449 (Kennedy, J., concurring); *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

133 Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Committee on the Judiciary, 109th Cong. 55 56 (2005) (statement of Judge John G. Roberts).

134 See, e.g., Antonin Scalia & Bryan A. Garner, *Reading Law* (2012); Amy Coney Barrett, Substantive Canons and Faithful Agency, 90 B.U. L. Rev. 109, 155 (2010); William K. Kelley, Justice Antonin Scalia and the Long Game, 80 Geo. Wash. L. Rev. 1601, 1604 07 (2012).

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THE COURTS AND THE ADMINISTRATIVE STATE^{a1}

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INTRODUCTION

I am honored to be included among the jurists and scholars who have delivered this lecture. I clerked for one of them, Judge Alex Kozinski, back in the early 1990s. When Judge Kozinski spoke here about twenty years ago, he started by asking his audience to picture the judicial system as “a large snake that feeds largely on field mice and occasional squirrel and maybe a game hen here or there.” Even twenty years later, Judge Kozinski is a hard act to follow.

I have been a judge for seven years, but no field mice or game hen for me. I have been on the D.C. Circuit--the United States Court of Appeals for the District of Columbia Circuit--which has a distinctive history and docket really captured by the title of this lecture and Article, *The Courts and the Administrative State*. I will start by telling you a little bit about the background of the D.C. Circuit, how our court works, and then I will talk briefly about three of our most important responsibilities: (1) interpreting statutes that are administered by administrative agencies; (2) enforcing the Constitution's separation of powers principle and resolving disputes between the legislative and executive branches; and (3) deciding cases during wartime.

I. BACKGROUND OF THE D.C. CIRCUIT COURT

A. Location

One distinctive aspect of the D.C. Circuit is our location. We are about halfway between the White House and the Capitol, which is fitting for the work we do. Even better, our front door is on Constitution Avenue. What could be better than to say, “I work on Constitution Avenue.”

And I love being in the courthouse with the district court judges and the other judges on the D.C. Circuit. Our building houses not only all the federal judges from both the court of appeals and the district court but also a judge's lunchroom where we all eat together and talk about the events of the day, sports, or what is going on at Capitol Hill. Judicial salary might come up once in a while. But developing relationships with other judges and learning about their backgrounds are some of the great aspects of being on this court, or on any court. Of course, we don't talk about pending cases. But after a reversal of the district court, the court of appeals judges tend to avoid the lunchroom for a few days. You can imagine how the conversation goes when you ask the district judge how his or her day is going, and the district judge is clearly thinking, "Did you have to say I abused my discretion? Did you have to say I didn't just 'err' but that I 'clearly erred'?" On those days, a peanut butter and jelly at the desk works just fine.

My personal background of growing up in Washington, D.C.--which is rare²--makes for especially interesting interactions. It is always amusing as a judge--even now I have been on the bench for seven years--how people treat you when you are a judge on the D.C. Circuit. I think it falls into two categories: those who knew you before you were a judge and those who have only known you after you became a judge. The second group is very respectful, very deferential, usually addressing me formally as "Your Honor." But the first group, my old friends, will say "judge," but it is usually "judge?" in a tone of amusement. Someone I have known for a long time--one of my old friends, with whom I had worked a long time ago--had to argue in our court recently. I told my clerks afterward, "You know, it is really hard to do an oral argument like this guy did and do it so well. It is hard to do an oral argument when you are looking up at the bench and saying to yourself, 'I can't believe this guy is a federal judge.'"

***713 B. Appointment Process**

1. Overview and Personal Experience

Another distinctive aspect of the D.C. Circuit is the fact that we are a national court in some respects. It is a function of the appointment process. Think about the appointment process for other courts of appeals; the President--the White House--has to work with the two senators for the state whose citizenry has traditionally filled a circuit judgeship. If either of the two home-state senators objects to a nominee, that's it. It is called the blue-slip process, an old tradition in the Senate, and the nominee will not go forward.

That doesn't happen on the D.C. Circuit. There are obviously no home-state senators involved in the process in the D.C. Circuit. That frees up the President to choose judges from all over the country, a national pool with different kinds of experiences. We have on our court now a former Senate legal counsel; a former justice of the California Supreme Court; a former judge on D.C.'s highest court; former district court judges from North Carolina and South Carolina; former law professors from Michigan, Colorado, Harvard; several former high-level Justice Department officials; and a former Deputy Solicitor General. A range of geographic backgrounds, intellectual backgrounds, and professional experiences are represented, and I think this is distinctive of the D.C. Circuit.

For my part, I came from the White House most immediately before my appointment and before that, private practice in Washington. I worked at the White House for five and a half years before becoming a judge. Now, it is fair to say that certain senators were not entirely sold that working at the White House is the best launching pad for a position in the Article III branch. One senator at my hearing didn't like the idea that I had been working in the White House and would be coming to work in the judiciary, and he said in the hearing "[this] is not just a drop of salt in the partisan wounds, it is the whole shaker." But this is where you need your mother at the confirmation hearing, because my mom afterward said to me "I think he really respects you," as only a mom can.

But White House service, it turns out, is very useful for a job on the D.C. Circuit. It gives you great respect, first of all, for the presidency, the demands of the executive branch, and the burdens of the presidency. But at the same time, it gives you perspectives that might be unexpected to some. Such experience helps refine your ability to determine whether the

executive branch might be exaggerating or overstating how things actually work and the problems that would supposedly arise under certain legal interpretations. White House experience also helps--and history shows that executive branch experience helps--when judges need to show some fortitude and backbone in those cases where the independent judiciary has to stand *714 up to the mystique of the presidency and the executive branch. Fortitude and backbone are important characteristics, I think, for our court and courts generally in our separation of powers structure. Of course, we all think of Justice Robert Jackson in the *Youngstown* case, a role model for all executive branch lawyers turned judges.

2. Challenges and Proposed Reform

Our court has a distinctive composition because of the way the selection process works and a distinctive nominations process because we do not have home state senators involved in the process. But we still have a confirmation process for our court, and, although no home-state senators are involved, nominations to the D.C. Circuit have been contentious for the last twenty years or so. There are several extraordinary people who were nominated to the D.C. Circuit but never confirmed. Even for those who have been confirmed, the process has been beset by years of delays.

I saw this firsthand when I worked in the Bush White House. Nominees were held up for years without hearings or votes, and the same thing happened during the Clinton Administration and, to some extent, during the Obama Administration. The best examples to show this are the D.C. Circuit nominations of now-Chief Justice John Roberts and now-Justice Elena Kagan. Chief Justice Roberts was first nominated to the D.C. Circuit in 1992, renominated in 2001, and did not get through for another two years until he was finally confirmed in 2003. Justice Kagan was nominated to the D.C. Circuit in 1999. But she never got through. It turns out for both of them it was much easier to get confirmed to the Supreme Court than to the D.C. Circuit, which shows that something is wrong, I think, with the confirmation process.

I think something is wrong in not just the confirmation process for our court but for lower courts more generally. A nominee's confirmation may not happen for up to three years. This leaves seats vacant too long, overburdens judges on certain courts, and is unfair to the individual nominees. Moreover, the delays have systemic effects and deter talented people from wanting to become judges. We want to design a system, I think, that encourages good people to want to be judges. During the Clinton and George W. Bush Administrations, then-Chief Justice William Rehnquist discussed the delays³ and their effect of discouraging private practice attorneys in particular from wanting to be federal judges.

There is a better way to do this, I think. As Presidents Clinton and Bush have suggested, the executive branch and the Senate should work *715 together on ground rules that would apply regardless of the President's party or who controls the Senate. Thus, no matter whether the President is Democratic or Republican, no matter whether the Senate is controlled by Democrats or by Republicans, you have the same ground rules for how nominations will be considered. There are four permutations, and the rules should be the same for any of the four.

My personal view is that the Senate should require a vote on all judicial nominees within six months of nomination. That would provide a set ground rule for how the Senate would consider the nominees. Now, it is not my place to say whether that should be a majority vote or what the Senate calls--in Washington speak--a cloture vote that requires sixty votes for something to happen. But either way, the Senate in my view should establish a strict time limit so that the process will come to a final determination within a set amount of time.

Now, changing the ground rules in the middle of a presidency is very hard. Why? Because everyone is affected by the current permutation. But that is always going to be the case, and I don't think after the Clinton Administration, the Bush Administration, or now the Obama Administration, throwing up our hands presidency after presidency makes much sense. But the problem, although it is admittedly not the highest-profile problem in the United States, is an important problem for the administration of justice. We should not just continue to have this problem and continue to live with it. Certainly, there is no reason the problem couldn't be squared away, for example, by 2017, even if it means adopting rules now that wouldn't take effect until the next presidency.

So I think all of us who care about the quality of the federal bench and the administration of justice--and that certainly includes all of us in this room--should do what we can to help promote the idea that the Senate should adopt ground rules for lower court nominations that are firmly established, are consistently applied, fill the courts, are fair to the nominees, and attract really good people to be judges.

II. THE D.C. CIRCUIT'S IMPORTANT RESPONSIBILITIES

A. Administrative Law Docket and Statutory Interpretation

So enough about how judges get on to the D.C. Circuit and about the problems with getting on the D.C. Circuit. What do we do once we are there? And the second aspect of the D.C. Circuit I want to discuss, really the bread and butter of our docket, is our administrative law docket. What I mean by that is determining in a particular case whether an administrative agency, like the EPA, the NLRB, or the FCC, exceeded statutory limits on their authority or violated a statutory prohibition on what they can do. These are the cases that come up to our court constantly. We see very complicated administrative records, and we adjudicate very complex statutes.

***716** But what I have seen in my seven years and what my experience before that told me--but really what I have seen since I have been a judge--is that these cases oftentimes come down to what Justice Felix Frankfurter used to describe as the three rules of resolving these kinds of cases: “(1) Read the statute; (2) read the statute; (3) read the statute!”⁴ So the most important factor in resolving these administrative cases often turns out to be the precise wording of the statutory text. If you sat in our courtroom for a week or two and listened to case after case--I don't advise this for anyone who wants to stay sane--what you would hear is judges from across the so-called ideological spectrum, different judicial philosophies, from all different backgrounds, Democratic appointees, Republican appointees, you would hear them inquiring, “What does the statute say? What is the precise wording of the statutory provision at issue?” And this is a real contrast to how statutory interpretation and administrative law were done thirty, twenty-five years ago when there were a lot more references to the purpose that Congress might have had in mind, to statements of individual members of Congress and Senators, to committee reports, and to floor debates.

And the change is due in large part generally to the influence coming from the Supreme Court and, most particularly, to Justice Antonin Scalia's influence on statutory interpretation, but it is broader than that, I think. It is because both formalists--Justice Scalia a formalist--and also functionalists, people who think about the congressional process and how it results in legislation, have come to realize the centrality of the statutory text to statutory interpretation.

And so formalists, the Justice Scalia model, focus on the text because that is what was passed by both houses of Congress and signed by the President. Under that view, the Constitution requires us to look at the text when resolving cases, not what might have been in the committee report. But functionalists, I think, have come also to realize--I credit a lot of people with this, Professor John Manning and others--that text must matter because legislation reflects a compromise. This is something I saw when I worked in the White House. Legislation is never one person sitting down and writing out a piece of legislation. It is the House, the Senate, and the executive branch-- different parts of the House and Senate, different political parties--which write these laws together, and it is a compromise. When you read a statute and say this doesn't make any sense, it is not because the person drafting it did not know what he or she was doing; it is because it was not a *he* or *she* drafting; it was a *they* drafting it.

So what does that mean? That means that the legislation's precise terms were a compromise among multiple actors, and, as judges, if we ***717** do not adhere to that compromise, if we do not adhere to the text of the provisions, we are really taking sides and upsetting the compromise that was reached in the legislative process. So functionalists have come to agree with the importance of the text. I want to emphasize that the text is not the end-all of statutory interpretation. But

the statutory text is very important in determining how to resolve questions whether the agency has violated statutory constraints on it.

Okay. So text is important. That is one thing we know, and I think people of all ideological stripes agree. But that still leaves the question, “How do we interpret the text?” It is not just read the words and what the words mean. There are a lot of canons or rules of construction that courts apply to help them interpret statutory text. There are semantic canons such as the canon of surplusage and the *ejusdem generis* canon. There are substantive canons that apply in cases of ambiguity or sometimes even may require us to depart from the text. Examples of substantive canons are the constitutional avoidance canon and the presumption against extraterritorial application. These canons reflect substantive values that are designed to reflect perceived congressional intent, and these canons are hugely important.

To take just one example, last year there was a major case about the Alien Tort Statute in human rights litigation, and the presumption against extraterritorial application played a critical, really dispositive role in the Supreme Court's resolution of that case.⁵ But even though there is widespread agreement now about the importance of the text, there is a lot of disagreement--uncertainty I would say--about some of the canons and how to apply them. Some of the venerable canons of statutory interpretation frankly are fairly questionable as reflections of perceived congressional intent. And this disagreement sometimes becomes a big problem in critical cases.

Just consider the constitutional avoidance canon and the healthcare cases. Everyone is familiar with what happened generally in the healthcare cases, but I think most people think the main disagreement between Chief Justice Roberts on the one hand and the four dissenters on the other was on the question whether the Tax Clause justified the individual mandate. But if you look at the opinion and parse it closely, Chief Justice Roberts actually agreed with the dissenters that the individual mandate provision, as written, ordinarily could not be justified by the Tax Clause.⁶ So what happens? How do you reach the *718 conclusion he did? Well, he went on to say that the statute could be construed not to impose a mandate but, rather, just a traditional tax incentive of the kind we have with regulatory taxes, cigarette taxes, the mortgage interest deduction, and other things like that in the Tax Code, and then he relied on the constitutional avoidance canon to interpret the individual mandate to not really be a mandate. So he said by interpreting it that way it will be constitutional. We will avoid the unconstitutionality that would otherwise exist with the statute as drafted.⁷ The dissenters disagreed. They argued that the constitutional avoidance canon was not so flexible so as to allow a judge to stretch the statute so far from its ordinary terms.⁸

So in that case, we have agreement on basic constitutional principles between Chief Justice Roberts and the dissenters, really agreement on how to interpret the text as written. Where the disagreement came--and it is amazing that in a case of that magnitude and that importance and that significance--it came down to, “How do you apply the constitutional avoidance canon?”

Consider also another canon, the surplusage canon. I won't quiz you on that. The principle is that words in a statute should not be interpreted to be redundant of other words in the statute. But it turns out that members of Congress often want to be redundant. They want to be redundant. Why do they want to be redundant? Well, in the words of Shakespeare, they want to “make doubly sure.”⁹ They want to make doubly sure about things. And so oftentimes, just to make sure there is no doubt, Congress is intentionally redundant. A lot of legal drafting is redundant to make sure someone cannot wiggle out with arguing, “Well, if they meant that, they would have used clearer language.” In ordinary conversation, we use extra words to be “doubly sure,” and Congress does that as well.

So why do courts continue to rely on the surplusage canon in interpreting statutes written by Congress? Good question, right? Good question. There is no great answer to that question. Given the realities of congressional drafting and ordinary language usage, courts should be more careful and discerning in applying the surplusage canon.

*719 So in matters of statutory interpretation, text is key. I think in the legal system--the judicial system--although there are lots of disagreements at the margins, there is a pretty broad consensus that the actual words of the statute are critical. But as judges, as lawyers, and as academics, one thing I have seen on the D.C. Circuit is we need to do a better job of reaching consensus on the canons we apply to interpret the text. Justice Scalia--not surprisingly, given his focus on this topic--and Bryan Garner got us started with a wonderful book that came out last year called *Reading Law: the Interpretation of Legal Texts*.⁰ Really, every lawyer should have that book because interpreting text is so central to what we all do as lawyers. Likewise, Professors Manning, William Eskridge Jr., and Abbe Gluck have all done wonderful work on statutory interpretation.

But there is still too much uncertainty about the canons and too much uncertainty about how they apply in particular cases. So my thought for all of us--and especially the academics and the judges--is to work to ensure that the tools of interpretation are stable and consistent and that the rules of the road are agreed upon in advance. That is what we mean by rule of law. Ideally, the rules of the road would be agreed upon in advance so that they are not battled out and manipulated in the crucible of a controversial case. We made great progress in statutory interpretation, I think, over the last couple of decades--again, Justice Scalia deserves a lot of credit, and many others do as well--but we still have a ways to go, even with our shared grounding in the importance of the statutory text.

B. Separation of Powers Cases

A third aspect of the D.C. Circuit is the role of this court in resolving separation of powers cases, disputes that involve the respective powers of the legislative branch and executive branch under our constitutional system.

The most recent, high-profile example from our court involved the Recess Appointments Clause and whether certain appointments by President Obama made during a congressional or a Senate recess were constitutionally permitted under the Recess Appointments Clause. The Supreme Court has that case now, and it will hear arguments this winter and decide it presumably in the spring.² But there have been *720 many others: the constitutionality of the Public Company Accounting Oversight Board; the cases in the 1990s challenging the Line Item Veto Act; the legislative veto challenge; and going back to the famous Youngstown Steel seizure cases. Cases of this kind come to the D.C. Circuit often.

And how do we resolve these cases, the separation of powers cases? Well, it turns out that we often rely on the text again--the text of the Constitution in these kinds of cases. It turns out, if you look at the D.C. Circuit's docket and the Supreme Court's case law in this area, that text matters not only in statutory interpretation today, but it is also of significant value in constitutional interpretation. This is particularly true in separation of powers cases. So the observation that text matters is both normative and positive. Yes, this observation must be normative. The text of the Constitution is the supreme law of the land as Article VI says it is. It is not a set of aspirational ideas. The Constitution is law. One of Chief Justice Roberts's primary points at his confirmation hearing was that the Constitution is law.³ It is a legal document, and this written law binds us as a nation. It binds us as judges, as legislators, as executive branch officials, and as citizens.

To be sure, we are all aware that there is a debate as to the correct method for interpreting the Constitution between--to oversimplify significantly--*living constitutionalists* and what Justice Scalia might call *enduring constitutionalists*. And living constitutionalists argue that the Constitution is to be interpreted in light of contemporary standards of decency, according to the morals and consciences of the times as assessed by judges. They believe that the words of the Constitution are not to be read literally but flexibly in order to adapt to modern conditions so that we are not trapped by views of people who lived 200 years ago.⁴ Again, I am oversimplifying, but you get the idea. Enduring constitutionalists believe that the Constitution is to be interpreted by judges according to its written terms. They believe that we should not strain to find ambiguity in clarity and that policy innovation should come through the legislative process to the

extent not prohibited by the Constitution or, where necessary because legislation is prohibited, through the constitutional amendment process.⁵

***721** So we have a debate between living constitutionalists and enduring constitutionalists. But no matter how one resolves that debate in cases involving, say, the Equal Protection Clause, the Due Process Clause, or the First Amendment--those somewhat open-ended provisions of the Constitution--it turns out that judges of all stripes on the Supreme Court and on the D.C. Circuit pay close attention to the precise words of the constitutional text in separation of powers cases. Let me give you a few examples from the Supreme Court. Again, the point here is that, in separation-of-powers cases, it turns out that text matters--the precise text.

*Powell v. McCormack*⁶ is a case from 1969 at the height of the Warren Court. And the question was whether the House of Representatives could exclude a representative who had been reelected, Adam Clayton Powell, from the seat to which he had been elected.⁷ The text of the Constitution lists three qualifications for being a House Member: age of twenty-five; seven years as a citizen; and living in the state from which the representative is elected.⁸ So the question is whether Congress could exclude an elected member, even though the member met those qualifications. Could Congress essentially have a good morals kind of addition or good behavior kind of addition as a qualification to someone who had been elected to the House of Representatives? Chief Justice Earl Warren wrote the opinion of the court for seven justices, and he conducted an intensive analysis of the Constitution's text and history, the convention debates, and the ratification debates. It was the kind of textual and historical analysis that would make Justice Scalia smile. And the Court finds, says Chief Justice Warren, that its analysis demonstrated that "in judging the qualifications of its members Congress is limited to the standing qualifications prescribed in the Constitution."⁹ The text matters, said Chief Justice Warren.

Another good example is the Court's 1983 decision in *INS v. Chadha*²⁰--a very important case about the respective balance of power between the legislative and executive branches. The precise issue was the constitutionality of the legislative veto.² Legislative vetoes were provisions that Congress put in legislation in the wake of the New Deal that would usually mean one or both Houses of Congress could vote down a particular agency action without going through the whole legislative process again and without having the President sign the law. ***722** What this would do is allow Congress to give broad delegations of authority to executive agencies, but then--say if the House doesn't like what the FCC does--the House alone could pass a legislative veto, and not go through all three required entities that have to participate in the legislative process.

So where did the legislative veto come from? These expert agencies had to have broad delegations given to them--at least that was the thought--so they could tackle changing problems. The legislative veto was a way to preserve some congressional check on what agencies did. The legal basis was that things have changed since the founding, so we should not be bound by the text of the Bicameralism and Presentment Clauses.

So the idea seemed sensible to some as a policy matter. It was considered a sensible accommodation to the rise of the New Deal state. It worked for many years, and when it got to the Supreme Court some forty years after it started being used significantly, what did the Supreme Court say? The Supreme Court said no.²² Listen to the Court's words. This is written by Chief Justice Warren Burger and joined by Justice William Brennan, among others. So the opinion represented a real cross-section ideologically of the Supreme Court. The Court said that "[some] undertake[] to make a case for the proposition that the one-House veto is a useful political invention."²³ The policy argument "supporting even useful 'political inventions' are subject to the demands of the Constitution which defines powers and, with respect to this subject, sets out just how those powers are to be exercised."²⁴ "[T]he prescription for legislative action in Art. I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finally wrought and exhaustively considered, procedure."²⁵ Text matters, the Supreme Court said. It did not

matter that it was a good policy invention. It did not matter that Congress believed this was a way to resolve problems better than the system set up by the Framers.

Consider similarly *Clinton v. City of New York*,²⁶ a Line Item Veto case decided in 1998. This is in some ways a mirror image of the legislative veto. The statute allowed the President to sign part of the bill and to essentially excise parts of the bill that he disliked.²⁷ So when *723 the President is presented with a bill that has lots of things, the President could, in essence, line out parts of the bill the President disliked. Again, in the Constitution, we have a specific procedure for how legislation gets enacted. So was this consistent with the Constitution? And the idea here, similarly, was this is a sensible accommodation to the practical realities of governing in the modern age and, in particular--and this will sound familiar, today--to the budgetary problems of the United States. Congress was putting in too many spending projects that were too parochial, essentially log rolling; and there were projects that would help this member and that member, and they would increase the federal deficit too greatly.

So this Line Item Veto would allow the President, the national figure, to line out those pork-barrel kinds of projects. But the Supreme Court again said no, this time in an opinion by Justice John Paul Stevens, joined by Chief Justice Rehnquist and Justice Clarence Thomas, among others. So, again, an ideological cross-section of the Supreme Court struck down the attempt by the legislative and executive branches to evade the bicameralism and presentment requirements. The Court stated Congress cannot alter the procedure set out in Article I, Section 7 without amending the Constitution.²⁸ Text matters.

I could go on. There are other--many other--separation of powers cases just like this: *Buckley v. Valeo*,²⁹ on the composition of the Federal Election Commission and how it was going to regulate campaign finance activities; *Bowsher v. Synar*;³⁰ the *Free Enterprise* case.³ They all highlight the primacy of the constitutional text, and they reaffirm that the constitutional text is critical in separation of powers cases.

A lot of separation of powers cases never even make it to the Supreme Court or any court, right? A lot of separation of powers disputes are resolved in the executive and legislative branches themselves, and, when you are in the executive branch or when you are in the legislative branch, it turns out that you pay great attention to the precise words of the constitutional text.

Rather than giving you legal stories about that, I will give you one anecdote that I thought underscored it for me. When I was going through my Senate confirmation process, I would meet with individual *724 senators, who were willing to meet with me to talk or who wanted to meet with me to talk about my nomination. One of them was Senator Robert Byrd of West Virginia, who is a legendary senator, a great expert in senate procedure and a great expert in separation of powers. So I was very nervous about meeting Senator Byrd. He was very accommodating. He got me in there, and the first thing he said to me was, ““Tell me about your family.” I said, “Well, “I am married, and I have a daughter.” And he said, “Oh, how old is your daughter?” I said, “She is one.” He said, “I have two daughters. Sixty-eight and sixty-four.” You know, I was thinking, “Yes, he has been here a long, long time, old Senator Byrd.” But then, after the pleasantries, he pulled out the text of his Constitution. And I had been properly prepared. So I pulled out my text to my Constitution, still the same one I have today, and--this will not surprise anyone who knows about Senator Byrd or anyone who thinks about what is going on today--he read to me Article I, Section 9 on Congress' power of the purse, Congress' control over appropriations. He was a legendary appropriator who kept close reins on the appropriations process in the United States Senate. He also asked me about the War Powers Clauses and about the Establishment Clause. But why did he pull out his text? Because the text matters in day-to-day life in the House, the Senate, and the presidency. And it turns out to be the same in separation of powers cases in the courts. So one thing you see, again, in a third aspect of the D.C. Circuit, is that constitutional text matters. Whatever your view about how to interpret the Constitution, say, in the Due Process Clause, the Equal Protection Clause, the Establishment Clause, or the Free Speech Clause, those more open-ended provisions, when it comes to the separation of powers cases, for the courts, the Congress, the precise text of the Constitution matters.

C. War Powers Cases

My fourth and final point today about the D.C. Circuit relates to the most serious cases we have to resolve, and those are war powers cases. So, in wartime, as in statutory interpretation generally, we want rules of the road ahead of time to avoid the potential for political manipulation in the heat of a particular controversy. That is what we want with judicial confirmations. That is what we want with statutory interpretation. That is what we want with constitutional interpretation. Now, that is what we really *need* in wartime cases.

Lives and liberties depend on how courts resolve wartime cases, and the courts have an important role in national security cases. The Supreme Court from *Youngstown*³² in the 1950s to *Boumediene*,³³ the case about the Guantanamo detainees in 2008, has been involved in ***725** national security cases. And then our court, the D.C. Circuit, has played a critical role in the last several years. We have had all the Guantanamo cases--cases on detention at Guantanamo, and also about military commissions trials of certain Guantanamo detainees who allegedly committed war crimes. So what have I seen there? What has happened in those wartime cases?

Some argue that courts should not even be involved. What are the courts doing in national security cases? But, at least in cases where there is standing, where there has been somebody who has been injured, staying out of the case altogether would mean excessive deference to the executive. It would mean the executive wins notwithstanding any statute or constitutional provision that might not countenance what the executive is doing. It would upset the balance of powers among the branches to simply give a blank check to the executive in those cases. And that is why the Supreme Court has not refrained from hearing those cases. That is why the Supreme Court did not do that in Justice Jackson's famous opinion in *Youngstown*, where he said to President Harry Truman: *No, you may not seize the steel mills. I know that you believe it is important to the war effort, and I know you are the Commander in Chief. But no, you cannot do that under our constitutional system given the statutes that have been passed that preclude that.*³⁴ That's the lesson of the Supreme Court's 2006 decision in *Hamdan*:³⁵ *Yes, Mr. President, it is important, we understand, to have military commission trials of al Qaeda war criminals, but you have to follow the rules in the statute, and we do not interpret those rules in the statute to allow the war crimes trials to proceed in this fashion.*³⁶

Even in the high stakes of wartime, what you see from the Supreme Court and what you see from the D.C. Circuit is that courts apply the ordinary rules of interpretation--the ordinary rules of statutory interpretation and the ordinary rules of constitutional interpretation. Of course, in this new war with al Qaeda--not so new anymore but twelve years old, but new compared to the kind of war that we have had historically, with people in uniforms and people who fight in the open as opposed to engage in terrorism--some people come from the other direction. They say the courts should be creating new rules to constrain the executive--that this new kind of war requires new rules created by the courts. Some people say, for example, there is a long- ***726** standing principle justifying detention until the end of hostilities, but that principle doesn't make sense in this kind of war that could go on forever.

Our court, the D.C. Circuit, has responded to these kinds of pleas by saying we are not going to relax the constitutional principles or statutes that regulate the executive, but we are also not going to take on the role of creating new rules to regulate the executive. If there are to be new rules to govern the executive in this kind of war, they need to be created in the usual way by the Congress of the United States or imposed by the executive branch on itself. These new rules should not be created by the courts.

So you see from our case law and the Supreme Court's case law in wartime two principles. We should not expect courts to relax the old constitutional or statutory rules that constrain the executive. At the same time, we should not expect courts to make up new rules in order to constrain the executive. Statutes are very important to wartime decisions. Contrary to

the belief of some, there are lots of statutes that regulate how the executive conducts war, and it turns out that courts interpret and apply the statutes in this area just like they do in other areas.

On this wartime issue going forward, what could be improved? It just seems especially important for me, having observed this from now the judicial perspective, that Congress write the rules clearly and update them to make them clearer, when necessary. It is also essential for courts to be as consistent as we possibly can and to be able to interpret the laws according to settled and consistent principles of interpretation. You cannot always achieve that on all fronts, but it is possible to try. In wartime cases, it is especially important, I think, for courts to be as consistent as possible, and not pull the rug out from under the executive branch when it has relied on what the courts have said before.

CONCLUSION

So I come from Washington. I talked about four aspects of the D.C. Circuit. You look at Washington today with the shutdown, as I said at the start, and it is not a day that you are really optimistic about the nature of our government, but I want to close, at least, with a story of optimism. I think history gives us reason for confidence in the ability of the government to handle crises and to handle difficult times. So the *Youngstown* case was a terrible loss for President Truman, just a horrible political loss to get embarrassed by the Supreme Court in this way and to lose the case in the Supreme Court. All of the justices had been nominated by either President Truman or President Roosevelt. There was no partisan angle to this decision. There was a you-have-violated-the-law angle to this decision.

*727 Shortly thereafter, Justice Hugo Black--I guess things worked a little differently back then--invited President Truman and all the other justices to his house for dinner. This seems awkward to us today, and it must have been awkward even then, but eventually President Truman broke the tension by saying, "Hugo, I don't care much for your law, but this Bourbon is good." So his comment, real or apocryphal, shows the respect that the three branches of government can have for each other and especially for the judiciary's ultimate responsibility to interpret and enforce the Constitution. At a time when civility in Washington and functioning government in Washington appear to be not exactly going well, I think we can all take inspiration from our democracy's history of dealing with challenging and controversial cases.

Thank you again for the invitation to Case Western Reserve School of Law. Thank you for the opportunity to speak as part of this wonderful lecture series, which I am happy to be part of. I am happy to answer questions that people have. Thank you.

ANSWERS TO AUDIENCE QUESTIONS³⁷

On Rules of Interpretation and Canons of Construction

Q: You talked about some of the principles of interpretation and construction. We studied many of those in law school, all of us. There are a lot of them, including principles of constraint and deference. Sometimes it makes you think that a judge who would want to decide an issue or to decide it a certain way could find and invoke principles to support his preference. As a judge, how do you stay grounded in principle as opposed to outcome oriented?

A: Good question. First of all, for the problem you foresee, that is why I think the bench, the bar, and academia need to constantly be improving on the rules of interpretation--the canons of construction--so that they are more settled and so that you are not manipulating them in the course of a particular case. We want stable rules of the road. This is something I just feel strongly about in all sorts of areas and tried to describe today. Stable rules of the road help prevent us from allowing our personal feelings about a particular issue to dictate how we are going to resolve a case. If you have a case where I have canon A or canon B and I really would love for canon A to apply because that would make me feel better about the result in this case, that's not good. So we need more clarity about how the canons of construction apply. This is why Justice Scalia took on his mammoth project with this canons-of-construction book. And I am not saying everyone,

and he admits not everyone may agree with how he describes the canons. But the point is that the statutory text is only first base. *728 Now, we have to move to the canons of construction and try to agree on those.

And your question relates to one of the reasons why the Senate confirmation process is kind of brutal. That is why Senators look at your background. “Gee, you worked in the White House. How are you going to be when an executive branch case comes up?” That is why it is tough sometimes to make it through because once you are there, you are there for life. What a huge responsibility. The Senate wants to find people with backgrounds where they have demonstrated an ability to follow the law, even when it hurts them, and an ability to follow the law even when it leads to a result they dislike. That is the kind of person we would hope would make it through. And, again, making the rules more settled would help with the process once they are there.

On the President Choosing Not to Enforce the Law

Q: It seems like, in recent years, the executive branch has issued signing statements interpreting the law in their own way. But, I think many people have felt that in some cases, if not in most, these signing statements were not an interpretation of the law but the negation of the law and a sort of declaration that the law would be ignored. In the face of this, what recourse does the judicial branch have to uphold the law?

A: So, just as background, when Congress passes a law and a future President comes in thinking that law is unconstitutional--or the current President thinks the law is unconstitutional--and decides not to follow those provisions, that is a traditional exercise of power by Presidents.

You asked what recourse does someone have? Well, if someone is hurt--the term of art is that they have an injury in fact that grants them standing--by the fact that the President is not following the statute, then someone can file a suit and argue that the President has to follow the statute as passed by Congress. And ultimately, a case like that will come to the judiciary. An example in recent years--not one that gets much attention, though--Congress passed a law that said if you are born in Jerusalem, your passport has to say Jerusalem, Israel.³⁸ President Bush said that's unconstitutional. It intrudes upon the Constitution's assignment of the recognition power, the power to recognize foreign governments, to the President. President Obama agreed with President Bush. He is not following that law either. And the case went to the Supreme Court.³⁹ First, the Supreme Court ruled *729 that the courts had a role in resolving it. It went up there to determine whether this is a political question that the courts should stay out of, consistent with what I was talking about earlier. The Supreme Court, per Chief Justice Roberts, said no, we can resolve this case. But they didn't resolve it.⁴⁰ They just said that federal courts can resolve it and then remanded it back to the lower courts to do so.⁴ And so on remand our court, the D.C. Circuit--I was not on the case--has ruled, in fact, that the President does have the exclusive recognition power in this case, and, therefore, the statute does violate the Constitution.⁴²

That is an example where there was a court case where someone was able to argue that the President has to follow the statute and is acting unlawfully by not doing so. There are other examples like that. Now, there are some where there is no one who has standing, and it can never get to court. That presents its own set of challenges. In those cases where no one can get to court, really it is Congress who has to take action, and one of Congress' two big tools of action, we all know, is shutting down the confirmation process or using that as a tool of retaliation against the President. And the other is, as we have seen today, that Congress can refuse to appropriate money to allow the government to operate or to shut down particular aspects of the executive branch.

On Interpreting the Words of the Constitution

Q: You mentioned a term also about being bound by the Constitution of 200 years. So how do we apply this if we are not going to be bound by the Constitution of what was written in 200 years ago as a loose constructionist or strict constructionist?

A: Well, I think my basic point was that in separation of powers cases all of the justices tend to agree that the words of the document are law, and they do bind us more. And so they are different than these open-ended provisions like the Due Process Clause or the Equal Protection Clause. I think my point was that no one can believe the hype that the words of the document do not matter. Believe that the words of the document do matter, particularly in separation of powers cases and, again, recognize that some of the provisions are so open *730 ended that they have been interpreted so as to reflect contemporary standards of decency and the like--the Eighth Amendment, the Due Process Clause, and what have you.

On the Hastings Impeachment Case

Q: Can you talk about the *Hastings* impeachment case?⁴³

A: So in the judicial impeachment cases, the Supreme Court ruled--interpreting the text of the Constitution--that impeachment trials are exclusively committed to the Senate because the Senate, under the Constitution, has the sole power to try impeachments.⁴⁴ The House has the sole power to impeach. The Senate has the sole power to try impeachments. So the Supreme Court in that area, which is one highly unusual area of our Constitution, has said the Senate has the final word on whether someone was convicted of an impeachable offense or not. And in the Supreme Court on those impeachment cases, the argument was, "Well, how can we allow the Senate to have the final word? What if they just flipped a coin?" And Justice Scalia, always quick on his feet, said "What if we went back there, the nine of us, and just flipped a coin?" In other words, someone has to have the final word in a case like that, and, reading the text of the Constitution, in the Walter Nixon case, the Supreme Court said the Senate has the final word on those cases.

On Executive Control over Regulatory Agencies

Q: It has been argued that over the past twenty years we have seen increased centralization of control over regulatory agencies by the executive branch and the White House, in particular. And I am wondering if you think that observation or claim is correct, and, if so, if it has implications for the job of the D.C. Circuit, given that it is the primary court for reviewing the actions of federal regulatory agencies.

A: I think it is hard to generalize on that. I think with certain agencies, yes. Certain agencies, maybe not. It also depends on what the particular President cares about and focuses on. So, I think it is hard to generalize on whether the President has more or less control over a particular agency. I do think, as you know, there are two categories of agencies. There are executive agencies that the President has direct supervisory control over, and then there are so-called independent agencies, over which the President does not have direct supervisory *731 control. And there is an argument that has been made that courts should be more wary of regulations adopted by independent agencies because those have not been supervised by the President in the way that our constitutional structure would suggest. And, for purposes of accountability, that the courts should exercise more review authority over independent agencies. That position, as yet, has not been adopted by the courts, but I do think the question of presidential supervision does have implications for the role of the court. My view in the *Free Enterprise* case was that the President constitutionally does have an important role in the administrative process.⁴⁵ The President on many occasions--whether it be President Bush, President Obama, or President Clinton--would dictate what the agency should do; he would be very involved. The agency would not do anything of significance without checking in with the President beforehand.

Footnotes

- a1 This Article is adapted from the 2013 Sumner Canary Lecture, delivered by Judge Kavanaugh on October 1, 2013, at Case Western Reserve University School of Law.
- d1 Judge, United States Court of Appeals for the District of Columbia Circuit.
- 1 See Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run on Sentence*, 46 CASE W. RES. L. REV. 1, 5 (1995) (adapted from Judge Kozinski's Sumner Canary Lecture).
- 2 On our court of appeals, only one other judge grew up in the Washington, D.C. area.
- 3 See, e.g., WILLIAM H. REHNQUIST, THE 1997 YEAR END REPORT OF THE FEDERAL JUDICIARY (1998), reprinted in 1 STATE OF THE FED. JUDICIARY: ANNUAL REPORTS OF THE CHIEF JUSTICE OF THE SUPREME COURT OF THE U.S. lxxxviii, 7 8 (Shelley L. Dowling ed., 2013) hereinafter ANNUAL REPORTS].
- 4 HENRY J. FRIENDLY, BENCHMARKS 202 (1967) (presenting Justice Frankfurter's "threefold imperative to law students).
- 5 *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013) (" T]here is no clear indication of extraterritoriality here, and petitioners' case seeking relief for violations of the law of nations occurring outside the United States is barred. (quoting *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2883 (2010))).
- 6 *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2594 (2012) (" T]he Government asks us to read the mandate not as ordering individuals to buy insurance, but rather as imposing a tax The most straightforward reading of the mandate is that it commands individuals to purchase insurance.).
- 7 *Id.* at 2597.
- 8 *Id.* at 2653 54 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).
- 9 WILLIAM SHAKESPEARE, *MACBETH* act 4, sc. 1 (Alan Durband, ed., 1984) (1623) (modern English translation) (referring to Macbeth's plan to kill Macduff despite Macbeth's misunderstanding that Macduff is not a threat to him).
- 10 ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).
- 11 *Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *cert. granted*, 133 S. Ct. 2861 (2013).
- 12 Since this lecture was delivered, the Supreme Court heard arguments in this case on January 13, 2014, and affirmed the D.C. Circuit, holding on June 26, 2014, that (1) recesses, under the Recess Appointments Clause, include intra session recesses of substantial length; (2) the Recess Appointments Clause permits appointments to vacancies that occurred before recesses; and (3) the recess appointments that President Obama made during the three day period between two pro forma sessions of the Senate were invalid. *NLRB v. Canning*, 134 S. Ct. 2550, 2577 78 (2014).
- 13 *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States*, 109th Cong. 56 (2005) (statement of John G. Roberts).
- 14 SCALIA & GARNER, *supra* note 10, at 432.
- 15 *Id.* at 427, 432.
- 16 395 U.S. 486 (1969).
- 17 *Id.* at 489.
- 18 U.S. CONST. art. I, § 2, cl. 2.
- 19 *Powell*, 395 U.S. at 550.

- 20 462 U.S. 919 (1983).
- 21 *Id.* at 929.
- 22 *Id.* at 959.
- 23 *Id.* at 945.
- 24 *Id.*
- 25 *Id.* at 951.
- 26 524 U.S. 417 (1998).
- 27 *See id.* at 436 (“The Line Item Veto Act gives the President the power to ‘cancel in whole three types of provisions that have been signed into law: ‘(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit. ’”).
- 28 *Id.* at 449.
- 29 424 U.S. 1 (1976).
- 30 478 U.S. 714 (1986).
- 31 *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010) (holding that dual limitations on the President's ability to remove PCAOB officers, who exercised executive power, violated the separation of powers).
- 32 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).
- 33 *Boumediene v. Bush*, 553 U.S. 723 (2008).
- 34 *See Youngstown*, 343 U.S. at 655 (Jackson, J., concurring) (“With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. ”).
- 35 *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).
- 36 *See id.* at 635 (“But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the rule of law that prevails in this jurisdiction. ”).
- 37 Editor's Note: Audience questions have been edited for clarity and grammar.
- 38 Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107 228, § 214(d), 116 Stat. 1350, 1366 (2003).
- 39 *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012).
- 40 *Id.* at 1430.
- 41 *Id.* at 1431.
- 42 *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 725 F.3d 197, 214 (D.C. Cir. 2013), *petition for cert. filed*, 2013 WL 6140526 (U.S. Nov. 20, 2013) (No. 13 628) (“Having reviewed the Constitution's text and structure, Supreme Court precedent and longstanding post ratification history, we conclude that the President exclusively holds the power to determine whether to recognize a foreign sovereign. ”).
- 43 *Hastings v. U.S. Senate*, 887 F.2d 332 (D.C. Cir. 1989) (per curiam).
- 44 *See Nixon v. United States*, 506 U.S. 224, 230 31 (1993) (“The commonsense meaning of the word ‘sole’ is that the Senate alone shall have authority to determine whether an individual should be acquitted or convicted. ”).

- 45 *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 685 715 (Kavanaugh, J., dissenting) (arguing that the Public Company Accounting Oversight Board's structure unconstitutionally restricts the President's appointment and removal powers), *aff'd in part, rev'd in part*, 130 S. Ct. 3188 (2010).

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I

REMARKS AT OPENING SESSION

By The Honorable Brett M. Kavanaugh
*Judge of the U.S. Court of Appeals for the
District of Columbia Circuit*

*The ninetieth Annual Meeting
of The American Law Institute
convened in the Ritz-Carlton Ballroom,
Washington, D.C.,
on Monday morning, May 20, 2013.
President Roberta Cooper Ramo presided.*

President Ramo: Let us move on, then, and I am looking around to see where Judge Kavanaugh is. Ah, good.

So while Judge Kavanaugh comes up, I should tell you there is hardly anything that the President of The American Law Institute gets to do on her own. Everything is approved by a lot of different people, and in my case that is probably a good thing. But the one thing that you do have an opportunity to do is make the selection of the people who will speak at our Annual Meeting.

I thought, on our 90th anniversary, that it would be particularly good for us to have somebody relatively new to the bench, someone in our terms relatively new in the profession, because, after all, we are used to having people, like a 93-year-old Treasurer Emeritus, and when somebody becomes emeritus, it just means that they have been on the Council I think for 26 years. Now we have a 15-year term limit, which is sort of shocking to us.

And in asking around, as I do sitting in Albuquerque looking at the Sandia Mountains, for people that we might ask to address us on this important day, one name kept coming to me, and that was Brett Kavanaugh from Washington, D.C. What people said about him that I thought was so interesting, because obviously, by definition, everybody sitting here is really smart, what kept coming to me, as I was talking to people, is that Judge Kavanaugh was a person of extraordinary intellect and what extraordinary personal qualities he had. I thought it would be a wonderful opportunity for us, in our 90th year, to hear from someone looking at the profession of the law from a slightly different point of view than some of us.

Judge Kavanaugh began his service on the U.S. Court of Appeals for the District of Columbia Circuit in May 2006. He was elected to The American Law Institute in 2009, and he is an Adviser on our Principles of Election Law project. He graduated from Yale College.

I always remember having heard all this Harvard–Yale stuff for years; that when John Kennedy got his honorary degree from Yale, he said, “I have the best of both worlds, a Harvard education and a Yale degree.” (*Laughter*)

But in this case, Judge Kavanaugh just couldn't kick the Yale habit and stayed there for law school, where he was a Notes Editor of the *Law Journal*. He had an amazing series of clerkships, Walter Stapleton on the Third Circuit, then Judge Kozinski on the Ninth Circuit, and later for Justice Kennedy on the United States Supreme Court.

He has worked in the government, and he has worked in private practice. What is especially interesting to me, I don't know how he does it exactly, distances I know on the East Coast are a little different than they are on the West, but somehow while doing the full load of his work on the court and of course the work that we continually assign him for the ALI, he has managed to teach not as a guest but full-term courses on Separation of Powers at Harvard, National Security and Foreign Relations Law at Yale, and Constitutional Interpretation at Georgetown.

Ladies and gentlemen, please let us welcome, for our 90th-year celebration, our speaker, Judge Brett Kavanaugh. (*Applause*)

Judge Brett M. Kavanaugh: Thank you, Roberta, for your very generous introduction.

Roberta is pretty amazing, as we all know, and her contributions to the profession and to this Institute are enormous and continuing, so thank you for all of that.

I also want to thank Judge Paul Friedman of the district court here in D.C., who is on the Council of The American Law Institute, for his role in my appearance here today. Paul is a great and wise judge, and among the many wonderful things I have learned as a federal judge here in D.C. is the great ability to make relationships with other judges in our courthouse. And so we have this judges' lunchroom where many of the district and circuit judges eat, and Paul and I are regulars, and we talk about the events of the day and gossip about lawyers and talk about sports and what is happening on Capitol Hill, and it is all great fun. We don't talk about pending cases, for obvious reasons, but still, after a reversal of the district court, court-of-appeals judges tend to avoid the lunchroom for a few days. (*Laughter*)

It is not ideal to eat lunch with someone when you have just publicly said that they abused their discretion, so on those days a peanut butter and jelly at the desk is just fine. Of course, it is relative bliss on those days where the district court has been affirmed. If an appellate judge wants to be compared to Learned Hand or John Marshall—and really who doesn't?—then those are the days to appear in the lunchroom.

As Roberta and Paul know, I am humbled and honored to be with you today at The American Law Institute. This is, quite simply, a bedrock and essential part of the American legal system. The Institute pursues clarity about what the law is and seeks progress about what the law should be, and I am proud to be a member of The American Law Institute. The Institute is also a model for civil discussion and debate which is so needed in all three branches of our federal government here in Washington.

In thinking about civility, people ask me about how we get along in the D.C. Circuit, and we do get along. A court is like a large family. Of course, some large families are dysfunctional, but our court gets along well, and I thank Judge Edwards and Judge Ginsburg and Judge Sentelle and now Judge Garland, our last four chief judges, for really making our court work well together. And now that Judge Garland has taken over as chief from Judge Sentelle, it is nice that we don't have to wear cowboy hats to curry favor with the chief judge any longer.
(Laughter)

Now I compare civility in the judiciary sometimes to civility in my prior job. I worked in the White House for five-and-a-half years, and one time I was with President Bush in Portland, Oregon, and he said to me and a few other staffers as we went through town, "You know the odd thing about Portland?" I said, "No. What's that, Mr. President?" He said, "Everyone here seems to have only one finger."
(Laughter)

Among its many virtues, the ALI helps judges stay aware of the thoughts of the bar and the academy, and I am grateful for the opportunity to spend time with all of you at ALI events. Of course, as

a cloistered appellate judge, any human contact is a good thing. The day the President signed my commission, I immediately went up to the Supreme Court, and Justice Kennedy swore me in, in a little private ceremony, and Chief Justice Roberts was there and my family, and that was it. So I was all excited, and then Justice Kennedy sat me down and said, "You're going to get to your office, and there's going to be a phone and a computer and a yellow pad, and no one will ever call you again." (*Laughter*)

So he told me to get out, to get involved, to teach, to get involved in bar activities, and that is one of the reasons I have so enjoyed, was so inspired to become part of The American Law Institute.

Of course, from the other direction, the ALI helps judges explain and demystify the judicial process to practitioners and academics. I think the law and the bar are poorly served when the judiciary is too cloistered and the judicial process is too much of a black box.

Of course, one humorous aspect, I suppose, of being a judge is how people treat you when you run into them outside of the courtroom, and what I find is this falls in two categories, those who have known you only after you became a judge and those who knew you before you became a judge. So the people who have only known you after are very deferential and respectful, at least when you first meet them. Sometimes it can almost get uncomfortable, and I want to hasten to add that not every judge gets uncomfortable when people fawn over them, so I don't want to discourage such activity. (*Laughter*)

But it is quite a different story with those who knew you beforehand. I would say the common reaction from old friends is bemusement, and that is probably generous. When someone I had known for a long time was arguing before me recently, I told my clerks afterwards, "That was a really hard argument for the person to do," and my clerks asked, "Why?" And I said, "It is really hard to argue when you are thinking the whole time, 'I can't believe this guy is a federal judge.'" (*Laughter*)

Now I am a federal judge who came from the White House. I worked five-and-a-half years there before becoming a judge, and it is

fair to say that certain senators were not entirely sold that that was the best launching pad for a position on the D.C. Circuit. And one senator in my hearing noted that I had worked at the White House and was still working there and said in his opening remarks, “This isn’t just salt in the wound; this is the whole shaker.” (*Laughter*)

True story. My mom said to me at a break, just trying to buck up her son, she came up to me and whispered to me, “I think he really respects you.” (*Laughter*) It is always good to have Mom with you at your confirmation hearings.

So a few years ago, when Justice Kagan was nominated to the Supreme Court, Professor Rick Pildes wrote a blog post [Rick Pildes, *Elena Kagan’s Legal Experience*, BALKINIZATION BLOG (May 14, 2010, 2:37 PM), <http://balkin.blogspot.com/2010/05/elena-kagans-legal-experience.html> (last visited June 6, 2013)] touting the relevance of her prior White House experience back in the Clinton Administration. No surprise, I agree with that analysis. White House experience of that kind gives one extraordinary insight into the legislative process, the administrative process. You learn how the President and the presidency operates in a way that people on the outside I don’t think can fully appreciate, even people who work at agencies. It gives you great respect for the presidency, but that does not translate into undue deference.

Serious White House experience gives you some perspectives that might be thought counterintuitive. For one, White House experience really helps refine what one might call one’s B.S. detector for determining when the executive branch might be exaggerating or misstating how things actually work or the problems that would supposedly ensue from a particular legal interpretation. Prior White House experience, I think, is also important and can be helpful to show some backbone and fortitude in those cases where the independent judiciary has to stand up to the presidency and not be intimidated by the mystique of the presidency. I think of Justice Jackson, of course, as a rough role model for us executive-branch lawyers turned judges. We all walk in the long shadow of Justice Jackson.

When people ask me which prior legal experience has been most useful for me as a judge, I tell them I certainly draw on all of them, the clerkships, private practice at Kirkland, Independent Counsel's office, even college jobs on the Hill at Ways and Means, but the five-and-a-half years in the White House, especially the three years as Staff Secretary for President Bush, are among the most interesting and most instructive, and so many memories come to mind and I think about so often.

I remember walking into the West Wing for the daily 8:10 counsel's office meeting on September 12th, 2001, and how much different that felt from going in just 24 hours earlier. I remember, as staff secretary, witnessing the President's meetings and discussion with world leaders, President Putin and President Musharraf and President Karzai and Prime Minister Blair and Pope John Paul.

Being at the G8 meeting in Scotland on 7-7-05 when the London bombings occurred; participating in the process of putting legislation together, whether it was Medicare, prescription-drug or terrorism insurance, immigration-reform attempts.

Times at the Hill in the middle of the night, the last-minute negotiation sessions with the ritual and required yelling matches among congressional staffers who were sleep deprived; drafting executive orders; working on presidential speeches; and when you see regulatory agencies screw up on occasion—gather that still happens on occasion.

I saw how agencies try to comply with Congressional mandates. I also saw how agencies sometimes try to avoid Congressional mandates; saw the relationship and odd dances between the agencies and the White House. I saw the good and bad sides of a President trying to run for President and be President at the same time.

I met Americans from all over the country, all of us did who worked there as we traveled, families of fallen soldiers and small-business owners and farmers and cops and new immigrants. I talked to the President and was able to participate in how should he pick someone for the Supreme Court.

I remember a few days after Hurricane Katrina, easily the worst week that all of us experienced working in the White House, and late that Saturday night sitting on my couch when Dan Bartlett, the communications director, called and said simply, “Rehnquist died; boss wants to meet at 7:00 o’clock tomorrow morning.” And I sat on my couch at home just thinking about the enormity of all of that.

It was not apparent to me at the time, and I am certainly not disinterested, but it seems to me those experiences helped make me a better student of the administrative process, a better interpreter of statutes.

Now appellate judge, completely different, as far away, as I mentioned, as you can be from the frenzied, emotional, chaotic world of the White House staffer. I have been on the D.C. Circuit for seven years now, and after seven years I can end the suspense and say that FERC [Federal Energy Regulatory Commission] cases are still FERC cases. (*Laughter*)

But it is a huge honor, and it is a huge responsibility, and I know it has real-world consequences for the lives and liberties and property of the American people, and so, in the spirit of bench and bar interaction, I thought I would touch briefly on three ideas, three issues that the combination of my experiences in the White House and the combination of my experiences as a judge have led me to think that judges and practitioners and academics should be thinking about. And the connective tissue to these three ideas is to help establish firmer ground rules for particular legal endeavors before those rules are applied in particular cases, a basic, as we all know, rule-of-law value and also something that helps avoid the partisan and ideological squabble that can occur when you are trying to create the rule at the time it is being applied.

So first, at least by the time the next presidency gets going, I think the confirmation process for federal court-of-appeals and district-court judges should be fixed so that it provides for a vote within a set period of time. Why do I think that?

When I worked at the White House, I worked on judicial nominations, and the breakdown in the Senate confirmation process for

lower-court nominees was really in full force at that time. Nominees were held up for years without hearings or votes. Of course, much the same thing had occurred in the Clinton Administration, and some of the same thing is occurring now in the Obama Administration.

I think about the examples of John Roberts and Elena Kagan and their stalled nominations to the D.C. Circuit. It was easier for them to get confirmed to the Supreme Court than to get confirmed for a lower court. That is crazy, but it is true.

So the process for lower-court nominees is too drawn out, and the delays are not right to the individual nominees, and that creates systemic effects. It deters good people from wanting to be judges. Who wants to have their private practice held up for a year or two and lose clients while they are facing an uncertain Senate confirmation process?

The dysfunction means that seats are vacant too long, meaning that courts are overburdened. This causes delays in our system of justice. There is a better way. As President Clinton and President Bush both suggested, and President Bush talked about in some detail in various speeches, the executive branch and Senate should work together on ground rules that will apply no matter who is President and who controls the Senate; in other words, Democratic President, same rules as Republican President; Democratic-controlled Senate, same rules as Republican-controlled Senate. There are four permutations. The rules should be the same for all four permutations.

So my starting suggestion would be that the Senate should require a vote on all judicial nominees within six months of nomination. It is not my place to say whether that should be a 60-vote requirement or a 51 majority-vote requirement, but I do think that a time limit is essential to bring to a close the process of a nomination of a federal judge. It will help fill vacancies more quickly. It will help encourage more good people to become part of the judiciary, which the judiciary needs.

I do not want to inject myself into current events, and I realize changing the rules in the middle of a presidency is sometimes difficult because incentives are skewed by how the new rules would apply, but at least by the time the next presidency gets going, it is time for the execu-

tive branch and the Senate to work together to bring some regularity to this process.

Second, most of the challenging legal issues today are questions of statutory interpretation, so we should work hard to ensure that the ground rules of statutory interpretation are as clear as possible before we must apply them in the context of controversial litigation.

Now in our court, the bread and butter is to figure out whether an agency exceeded its statutory authority or statutory limits. The most important factor is the precise wording of the statutory text. If you sat in our courtroom for a week or two and heard case after case, and I don't advise that for anyone who wants to stay sane, but if you did that, you would hear judges across the ideological spectrum asking, "What does the text of the statute say? What does the text of the regulation say?"

Now this is in large part attributable to the influence of Justice Scalia on statutory interpretation, but it is also because both formalists and functionalists alike have come to realize the centrality of text to statutory interpretation.

Functionalists recognize something I saw repeatedly in the White House, that virtually all important legislation is a compromise of many competing views, and we upset that compromise when we do not follow the text. Professor John Manning of Harvard has done landmark work on that precise point.

But to say that the text is important, which all judges agree on, to say that it is important or it is primary still leaves a number of questions how best to interpret the text. There are canons of interpretation, some that are semantic canons, the canon against surplusage or the *ejusdem generis* canon. There are the substantive canons, such as the constitutional-avoidance canon or the presumption against extraterritorial application.

These canons of interpretation are hugely important to day-to-day statutory interpretation. Just like a few weeks ago, a huge Alien Tort Statute [28 U.S.C. § 1350] case [*Kiobel v. Royal Dutch Petroleum Co.*,

___ U.S. ___, 133 S. Ct. 1659 (2013)], it came down to how do you apply the presumption against extraterritorial application?

Or consider the constitutional-avoidance canon. Most people think that the main disagreement in the healthcare cases between Chief Justice Roberts and the dissenters was on the question whether the tax clause justified the individual mandate. But if you actually look at the opinion [*National Federation of Independent Business v. Sebelius*, 567 U.S. ___, 132 S. Ct. 2566 (2012)], Chief Justice Roberts agreed with the dissenters that the individual mandate provision as written was not justified by the tax clause, but the Chief Justice went on and said that the statute could be construed not to impose a mandate but rather just a traditional tax incentive of the kind we have with cigarette taxes and mortgage-interest deductions and the like.

He relied on what? The constitutional-avoidance doctrine, to interpret the individual mandate that way, and the dissenters disagreed that the constitutional-avoidance doctrine could be used to stretch the statute so far from its terms.

For all the ink that has been spilled about the healthcare cases, very few people seem to appreciate the source of the main disagreement between the Chief Justice and the dissenters: how to apply the constitutional-avoidance doctrine.

It is, of course, better when the ground rules of statutory interpretation are fully settled ahead of time, and I want to quote someone who lamented the lack of accepted ground rules to interpret statutes. He said that statutory interpretation “involves inconsistent practices” on a variety of vexing questions [25 A.L.I. PROC. 10 (1948)], including—and he listed many—including “[h]ow far will we go to construe a law . . . to avoid raising a constitutional question?” [25 A.L.I. PROC. at 11.] And that man continued: “[I]t would help . . . if we could have general acceptance by the Bench as well as the Bar of a few basic principles of statutory construction.” [25 A.L.I. PROC. at 15.] Perhaps this Institute, he said, “could devise a disinterested Restatement that would commend itself as an acceptable standard for enactment by Congress, or for application by the Courts.” And that was Justice Jackson speak-

ing to The American Law Institute in Washington, D.C., in May 1948. [Robert H. Jackson, Associate Justice of the Supreme Court of the United States, “The Meaning of Statutes,” Address Before The American Law Institute (May 20, 1948), revised version in 34 ABA J. 535 (July 1948).]

And the void identified by Justice Jackson persisted for decades and decades thereafter, and it has been filled well now, but only recently, by Justice Scalia and Bryan Garner in their book last year called *Reading Law* [: *The Interpretation of Legal Texts*], a book that really should be on the shelf of every judge and every lawyer. Their extraordinary work identifies and explains 57 canons of construction.

Now this is probably obvious, but their views about how some of those canons should be applied were bound to be contested, and they have been contested as to some. Professor Bill Eskridge’s recent piece in the *Columbia Law Review* [William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUMBIA L. REV. 531 (2013) (book review)] questions a few of the canons’ application as discussed by Justice Scalia and Professor Garner.

And in very important new scholarship, Professor Abbe Gluck of Yale Law School has pointed out that congressional drafters are attuned to some of the canons identified by Justice Scalia and Mr. Garner but not to others. [Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013).]

To take one example, courts often apply a surplusage canon that words in a statute should not be interpreted to be redundant. It turns out that members of Congress want to be redundant. Redundancy, in the words of Shakespeare, helps a speaker to make double sure. In plain English, we often use redundant words to be sure and leave no doubt.

Extra credit for those who got the joke there. Anyway. (*Laughter*)

And beyond that, congressional drafters often purposely use redundant terms to make sure that all bases are covered, to satisfy inter-

est groups and executive officials. So why do courts continue to use the surplusage canon? Good question.

But those examples, those questions are why I think people in this room can make a difference, either individually or as part of this Institute. Justice Scalia and Bryan Garner have helped fill the void identified by Justice Jackson to this group in 1948.

To the extent there are lingering questions about certain canons, we should all endeavor to continue the dialogue and reach greater consensus over time. Justice Jackson said that this issue “is worthy of any effort you might deem proper to make its eventual solution more likely and more immediate.” [25 A.L.I. PROC. at 16.] I agree, so I would say let’s keep working to make the ground rules for statutory interpretation as clear as we can.

My third and final point relates to war. In wartime, as in judicial confirmations, as in statutory interpretation, our system should endeavor to ensure that the legal ground rules are as clear as possible ahead of time. Perhaps the most significant cases that come before our court, before any court, are those that involve the national security and foreign policy of the United States.

In many cases, however, the question really boils down to has the executive branch acted consistently with a statute, and the courts have an important role in those cases, as the Supreme Court has made clear from *Youngstown* [Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)] and *Boumediene* [Boumediene v. Bush, 553 U.S. 723 (2008)] to a decision on the political-question doctrine a year ago in *Zivotofsky* [Zivotofsky ex rel. Zivotofsky v. Clinton, 566 U.S. ___, 132 S. Ct. 1421 (2012)].

Some, of course, have argued that even if the courts are involved, there should be extreme deference to the executive. But at least in cases where statutes are involved and there is a plaintiff with standing, excessive deference to the executive actually means overriding the will of Congress, something that was recognized by the court in *Zivotofsky*. And therefore it would upset the balance of powers among the branches for a court to simply give a blank check to the executive in those cases.

That is the lesson of Justice Jackson's opinion in *Youngstown*. It is the lesson of the Supreme Court's 2006 decision in *Hamdan* [*Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)]. Courts generally apply ordinary principles of statutory interpretation even in wartime cases.

What this means, obviously, is that statutes are very important to the executive's wartime decisions, something Professor Jack Goldsmith at Harvard has pointed out. Contrary to the common belief, or some common belief, statutes really are prevalent in regulating various aspects of war, from detention to interrogation to surveillance to military commissions.

And given that wartime decisions are life or death, it is especially important in this area for Congress to write the rules clearly and to update them to make them more clear when necessary, and then for courts to interpret the laws according to settled and consistent principles of interpretation. It is not always possible, obviously, to achieve that objective on all fronts, but it is certainly possible to try, and all of us who have roles in the legal system should be working to that end.

So in closing, having mentioned war and knowing this is The American Law Institute, we don't dwell on it, but we are a nation at war, with great challenges for the legal system. When I worked at the White House, I saw the difficulty of the job of President, who has a particularly important role, obviously, in wartime. I am aware of that responsibility and the burden that comes with it.

Before his 2004 address at the nominating convention in New York, President Bush was doing a last run-through that afternoon in the hotel room of his speech. As I recall, there were few people in the room—Mike Gerson, Dan Bartlett, myself—and the speech was pretty well locked down. The President was just doing a last practice run to make sure everything was exactly as he wanted it, and we were all reading our drafts on paper as he was reading it out loud.

And anyway, towards the end of the speech there was a passage that read as follows: "I've held the children of the fallen, who are told their dad or mom is a hero, but would rather just have their dad or mom. I've met with parents and wives and husbands who have received a folded flag, and said a final good-bye to a soldier they loved."

And as President Bush finished reading that sentence in the hotel room, there was a pause, and after a few seconds, I looked up, all of us did, as we were reading the speech, and President Bush had stopped because he was choking up, and, of course, being President Bush, he immediately said, “Don’t worry, I’ll get it, I’ll straighten it out tonight.”

But in that moment and in so many others, I remember thinking of the enormity of the responsibility the President carries. I always think of that when I observe President Bush, and I always think of that when I observe President Obama. I thought of that in Dallas, a few weeks ago, when I saw five Presidents, the five living Presidents on a stage at the Bush Library, so seeing that, I will think always that what unites us in America is far greater than what divides us.

Thank you. (*Applause*)

President Ramo: Judge Kavanaugh said that he would take a question or two. We have time, or we are going to make time, so if you have a question, do you want to—I think we have time for two.

Well, Judge Kavanaugh, I think it is probably fair to say that members of the Institute are reluctant to stand up and say “What were you thinking?” to a federal judge, but in my case I was thrilled to hear what you were thinking. I can’t think of a better message for us on our 90th birthday than the importance of the legal system. You have given us homework. Now, Lance, we have a new Restatement to think about, and, although I was a little disappointed, I would say two things. One is you talked about redundancy. I think our English friends would tell you that that makes us a little nervous, because of course, in England, redundancy means something very different than it did in the context in which you were thinking. But the part that really troubled me was when I discovered that you said you didn’t have to wear cowboy hats anymore. You know, it was cowboy hats, boots, and Levi’s that sent me to the University of Chicago Law School, so I hope you will rethink that as you go on about your illustrious career.

Thank you very much for your thoughtfulness. (*Applause*)

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SEPARATION OF POWERS DURING THE FORTY-FOURTH PRESIDENCY AND BEYOND

Many of the contentious, bitter, and defining disputes of the forty-second and forty-third presidencies arose out of separation of powers issues that the nation has been contending with since the Founding. And it seems to me--from having lived and worked through some of those disputes--that this is a good time to attempt to discern some lessons for the forty-fourth and future presidencies.

The challenges facing the nation at this time are urgent. By most accounts, al Qaeda is trying to commit new and even greater attacks on the United States. The nation is involved in two wars, with more than 150,000 U.S. service members deployed in Iraq and Afghanistan.² At the same time, the U.S. economy is in trouble; experts have said the country might be in the worst economic crisis since the Great Depression.³

This country recently witnessed a vigorous presidential campaign in which both candidates seemed to agree that the *1455 federal government is not working effectively in meeting the nation's challenges.⁴ For many months during that campaign, both sides in the political arena talked about the need for change and reform in our nation's capital.⁵ The three words "Washington is broken" became a common refrain--even in Washington.⁶

What precisely does that catchy phrase "Washington is broken" really mean? What exactly is broken in Washington, and what needs to be changed and reformed?

It seems to me that several of the foundational structures and systems in Washington are contributing to the perceived and actual problem. Many of those broken structures and systems implicate the separation of powers--and particularly, the interaction of the legislative and executive branches in performing their respective and sometimes overlapping functions under the Constitution.

Now is a good time, in my judgment, to take a cold hard look at some of the conventional wisdom about these institutions of our federal government. Are they working as they should? And if not, how can we fix them?

A good way to start the discussion is to think about some of the controversies the last two presidents have faced. Both President Bill Clinton and President George W. Bush had tumultuous tenures in office that triggered numerous separation-of- powers controversies.

In President Clinton's administration, separation of powers disputes arose over:

- War powers, and especially whether the President's decision to take offensive military action in Kosovo in 1999 was consistent with the Constitution and the War Powers Resolution, particularly after the House failed to authorize the bombing;⁷

- ***1456** • Impeachment, and whether perjury and obstruction of justice in a civil sexual harassment case and subsequent criminal investigation can constitute high crimes and misdemeanors justifying removal of a President;⁸

- The independent counsel law, concerning both the statute itself and independent counsel Kenneth Starr's exercise of his investigative and prosecutorial authority;⁹

- Executive privilege, primarily whether government attorneys and Secret Service agents enjoy a privilege in federal criminal investigations of the President;⁰

- Presidential immunity, particularly whether the President has the right to a temporary deferral of civil suits while in office, an issue the Supreme Court addressed in *Clinton v. Jones*;

- ***1457** • The pardon power, most notably whether President Clinton properly used that power when he pardoned certain people at the end of his presidency;²

- The President's control over executive branch personnel, particularly President Clinton's decision shortly after taking office to fire all ninety-three United States Attorneys in one fell swoop;³

- The President's ability to obtain votes for his federal judicial nominees, as large numbers of Clinton judicial nominees never received an up-or-down vote in the Senate.⁴

That is a significant list. And President Bush's administration has sparked its own separation of powers disputes. Some of the most contentious struggles have been over:

- Presidential power and the wars against al Qaeda and later Iraq, most notably the controversies surrounding the detention and treatment of detainees at Guantánamo Bay and elsewhere, and the Terrorist Surveillance Program;⁵

- ***1458** • Executive privilege, including disputes over the Presidential Records Act and conflicts over congressional access to executive branch information;⁶

- The President's control over executive branch personnel,⁷ especially the decision to dismiss certain United States Attorneys;⁸

- The President's use of signing statements to indicate his view that certain laws have potentially unconstitutional provisions or applications;⁹ and

- The President's power to obtain a vote for his federal judicial nominees, as large numbers of President Bush's judicial nominees (like President Clinton's) never received an up-or-down vote in the Senate.²⁰

This also is a rather extraordinary list. Between the Clinton and Bush administrations, moreover, the Supreme Court considered *Bush v. Gore* and decided an issue that effectively resolved the outcome of a national presidential election.²

Given all of those events and controversies, it is no wonder that our *1459 system of separation of powers and checks and balances has come under stress.

Based on my experience in the White House and the Justice Department, in the independent counsel's office, in the judicial branch as a law clerk and now a judge, and as a teacher of separation of powers law, I have developed a few specific ideas for alleviating some of the problems we have seen arise over the last sixteen years. I believe these proposals would create a more effective and efficient federal government, consistent with the purposes of our Constitution as outlined in the Preamble.²² Fully justifying these ideas would require writing a book--and probably more than one. My goal in this forum is far more modest: to identify problems worthy of additional attention, sketch out some possible solutions, and call for further discussion.

I. PROVIDE SITTING PRESIDENTS WITH A TEMPORARY DEFERRAL OF CIVIL SUITS AND OF CRIMINAL PROSECUTIONS AND INVESTIGATIONS

First, my chief takeaway from working in the White House for five-and-a-half years--and particularly from my nearly three years of work as Staff Secretary, when I was fortunate to travel the country and the world with President Bush--is that the job of President is far more difficult than any other civilian position in government. It frankly makes being a member of Congress or the judiciary look rather easy by comparison. The decisions a President must make are hard and often life-or-death, the pressure is relentless, the problems arise from all directions, the criticism is unremitting and personal, and at the end of the day only one person is responsible. There are not eight other colleagues (as there are on the Supreme Court), or ninety-nine other colleagues (as there are in the Senate), or 434 other colleagues (as there are in the House). There is no review panel for presidential decisions and few opportunities for do-overs. The President alone makes the most important decisions. It is true that presidents carve out occasional free time to exercise or read or attend social events. But don't be fooled. The job and the pressure never stop. We exalt and revere the presidency in this country--yet even so, I think we grossly underestimate *1460 how difficult the job is. At the end of the Clinton presidency, John Harris wrote an excellent book about President Clinton entitled *The Survivor*.²³ I have come to think that the book's title is an accurate description for all presidents in the modern era.

Having seen first-hand how complex and difficult that job is, I believe it vital that the President be able to focus on his never-ending tasks with as few distractions as possible. The country wants the President to be "one of us" who bears the same responsibilities of citizenship that all share. But I believe that the President should be excused from some of the burdens of ordinary citizenship while serving in office.

This is not something I necessarily thought in the 1980s or 1990s. Like many Americans at that time, I believed that the President should be required to shoulder the same obligations that we all carry. But in retrospect, that seems a mistake. Looking back to the late 1990s, for example, the nation certainly would have been better off if President Clinton could have focused on Osama bin Laden²⁴ without being distracted by the Paula Jones sexual harassment case and its criminal-investigation offshoots.²⁵ To be sure, one can correctly say that President Clinton brought that ordeal on himself, by his answers during his deposition in the Jones case if nothing else. And my point here is not to say that the relevant actors--the Supreme Court in Jones, Judge Susan Webber Wright, and Independent Counsel Kenneth Starr--did anything other than their proper duty under the law as it then existed.²⁶ But the law as it existed was itself the problem, particularly the extent to which it allowed civil suits against presidents to proceed while the President is in office.

With that in mind, it would be appropriate for Congress to enact a statute providing that any personal civil suits against presidents, like certain members of the military, be deferred *1461 while the President is in office. The result the Supreme Court reached in *Clinton v. Jones*²⁷ -- that presidents are not constitutionally entitled to deferral of civil suits-- may well have been entirely correct; that is beyond the scope of this inquiry. But the Court in Jones stated that Congress is free

to provide a temporary deferral of civil suits while the President is in office.²⁸ Congress may be wise to do so, just as it has done for certain members of the military.²⁹ Deferral would allow the President to focus on the vital duties he was elected to perform.

Congress should consider doing the same, moreover, with respect to criminal investigations and prosecutions of the President.³⁰ In particular, Congress might consider a law exempting a President--while in office--from criminal prosecution and investigation, including from questioning by criminal prosecutors or defense counsel. Criminal investigations targeted at or revolving around a President are inevitably politicized by both their supporters and critics. As I have written before, "no Attorney General or special counsel will have the necessary credibility to avoid the inevitable charges that he is politically motivated--whether in favor of the President or against him, depending on the individual leading the investigation and its results."³¹ The indictment and trial of a sitting President, moreover, would cripple the federal government, rendering it unable to function with credibility in either the international or domestic arenas. Such an outcome would ill serve the public interest, especially in times of financial or national security crisis.

Even the lesser burdens of a criminal investigation--including preparing for questioning by criminal investigators--are time-consuming and distracting. Like civil suits, criminal investigations take the President's focus away from his or her responsibilities to the people. And a President who is concerned about an ongoing criminal investigation is almost inevitably going to do a worse job as President.

***1462** One might raise at least two important critiques of these ideas. The first is that no one is above the law in our system of government. I strongly agree with that principle. But it is not ultimately a persuasive criticism of these suggestions. The point is not to put the President above the law or to eliminate checks on the President, but simply to defer litigation and investigations until the President is out of office.³²

A second possible concern is that the country needs a check against a bad-behaving or law-breaking President. But the Constitution already provides that check. If the President does something dastardly, the impeachment process is available.³³ No single prosecutor, judge, or jury should be able to accomplish what the Constitution assigns to the Congress.³⁴ Moreover, an impeached and removed President is still subject to criminal prosecution afterwards. In short, the Constitution establishes a clear mechanism to deter executive malfeasance; we should not burden a sitting President with civil suits, criminal investigations, or criminal prosecutions.³⁵ The President's job is difficult enough as is. And the country loses when the President's focus is distracted by the burdens of civil litigation or criminal investigation and possible prosecution.³⁶

***1463 II. ENSURE PROMPT SENATE VOTES ON EXECUTIVE AND JUDICIAL NOMINATIONS**

Second, to make our government more effective and efficient, the Senate might consider changing the way it approaches presidential nominations to both the executive and judicial branches. The Constitution gives the Senate the power of confirming presidential nominees to both branches.³⁷ But although the constitutional text does not explicitly distinguish between standards the Senate should use in assessing such appointments, there are compelling reasons--deriving from the structure established by the constitutional text--that the Senate should approach its task differently depending on whether the appointment is to the executive or judicial branch.

Executive branch officials are subordinate to (and generally subject to removal at will by) the President. By contrast, federal judges enjoy life tenure and are independent of the political branches. Therefore, the Senate arguably should be more deferential to the President with regard to executive branch appointees (at least those in traditional executive agencies, as opposed to the so-called independent agencies), and less so with regard to judicial appointees. This

observation--coupled with the imperative both to promote government effectiveness by minimizing vacancies and to treat potential appointees fairly and respectfully--prompts some specific thoughts about reforming the confirmation process.

As to executive branch appointments, any observer of Washington realizes that Presidents often have great difficulty filling positions requiring Senate approval because of delays in the confirmation process.³⁸ This phenomenon is particularly severe at the sub-cabinet level.³⁹ The problem has plagued both Republican and Democratic presidents especially, but not only, when the opposing party controls the Senate.⁴⁰ And it has clear costs in terms of efficiency and effectiveness. The President's full team of executive branch officials is essential to carrying out the President's program of regulation and enforcement. Leaving key jobs unfilled can paralyze executive branch efforts to accomplish critical missions and discourages innovative and bold executive branch action.

To be sure, in the power struggle that is Washington, Congress sometimes seems to prefer an enfeebled executive. But this is short-sighted because, as Alexander Hamilton correctly stated in Federalist No. 70, "[a] feeble executive implies a feeble execution of the government."⁴¹ The Senate could help eliminate these long-standing problems by adopting a binding rule requiring the full Senate to vote on all executive branch nominations--at least those within traditional executive agencies--within thirty days of receiving a nomination. Such a rule would conform to the Framers' idea of Senate confirmation, which was to prevent unfit characters from serving in the executive branch.⁴² As Hamilton wrote in Federalist No. 76, the Senate's confirmation power serves as "an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity."⁴³

The constitutional structure does not envision the Senate confirmation process of executive officials as a tool for waging policy disputes, which are more properly contested through legislation and appropriations. After all, executive branch officials are supposed to carry out the policies and priorities of the President. And our constitutional design has a single President; if Congress wishes to cabin the Executive's discretion in implementing statutes or constrain the executive branch's programmatic decisions, it can always pass more detailed statutes or use its power of the purse. But using the confirmation process as a backdoor way of impeding the President's direction and supervision of the executive branch--of gumming up the works--is constitutionally irresponsible and makes our government function less efficiently and effectively. Wielding the confirmation process as a club against executive branch appointees would make sense in a different system of government where the agencies were not subject to presidential direction and supervision.⁴⁴ That is not the system created by the Constitution.

Of course, some parts of the executive branch--the so-called "independent agencies"--are not subject to such presidential discretion and supervision. Therefore, appointees to these agencies may require greater and longer scrutiny. After all, once they assume office, they are largely immune from substantive direction and supervision by the President or anyone else, and cannot be fired at will.⁴⁵ For that reason, it may be important for the Senate to scrutinize such appointees almost as closely as the Senate scrutinizes judicial nominees. In the next part of this Article, I question whether the large number of independent agencies today is sound.⁴⁶ So long as we have independent agencies, however, both presidents and the Senate should exercise great time and care in appointing their heads. The President and Congress have little power over weak or inept leaders of independent agencies once those leaders take office.

As for judicial appointments, structural considerations favor a more intensive inquiry by the Senate. Article III judges are appointed for life and--unlike executive branch officials--are not subordinate to their appointing presidents.⁴⁷ That changes the constitutional dynamic.

The President deserves great deference in the selection of his own subordinates--who, after all, must follow the President's lead and are accountable to the President who is responsible for their actions.⁴⁸ By contrast, the independence and life

tenure of federal judges justifies a more searching inquiry by the Senate into their fitness and qualifications for office. Because the stakes in judicial appointments--particularly Supreme Court appointments--are higher than in executive branch appointments, the constitutional text and structure support a more robust role for the Senate in the judicial appointments process.

That said, the judicial confirmation process has become badly flawed in recent decades. Two aspects of the judicial confirmation fights have been contentious--one substantive, the ***1466** other procedural. The substantive disputes during judicial confirmations are largely inevitable. But the procedural meltdown is constitutionally inappropriate and should be fixed.

Substantively, a debate continues to bubble about whether a Supreme Court nominee's judicial philosophy is a fair basis for inquiry by the Senate (and for voting against a nomination), or whether the confirmation process should focus only on whether a nominee meets objective criteria pertaining to qualifications, temperament, ethical propriety, and the like.⁴⁸

In recent years, a rough Senate consensus has seemed to emerge, as revealed by the last four sets of hearings for Supreme Court Justices.⁴⁹ Many Senators seem to believe that a judicial nominee's general judicial philosophy is appropriate for consideration by the President and--with some deference to the President--by the Senate as well.⁵⁰ At the same time, the political ideology and policy views of judicial nominees are clearly unrelated to their fitness as judges, and those matters therefore appear to lie outside the Senate's legitimate range of inquiry.⁵¹ It is equally plain that judicial nominees do not have to answer substantive questions that might impinge on their ability to make independent judgments once confirmed. The Senate thus has not required nominees to commit themselves--directly or indirectly--on particular cases or issues.⁵² As these confirmation ***1467** proceedings showed, notwithstanding some rocky moments and deviations by individual Senators,⁵³ questions regarding general judicial philosophy can shed light on matters relevant to judicial decision making and to the Senate's ultimate decision without threatening judicial independence.

In short, the current Senate precedents suggest that the Senate will consider general judicial philosophy, with some deference to the President. But the precedents also indicate that this must be done without impinging on judicial independence.

Procedurally, however, the judicial confirmation process for Court of Appeals nominees has broken down. In recent decades, the Senate has increasingly used a multitude of procedural mechanisms to delay action on lower-court judicial nominees--by home-state senators' blue-slipping nominees, by bottling them up in committee, or by using anonymous "holds."⁵⁴ This has been a bipartisan problem--perpetrated by Republican senators on some Clinton appointees, and by Democratic senators on some Bush appointees.⁵⁵ The result has been judicial vacancies left open for years on end, nominees who put their lives on hold while waiting for Senate action that may never come, and talented lawyers who prefer to remain in other jobs instead of subjecting themselves to the whim of the Senate confirmation process.⁵⁶ The judiciary is worse off as a result.

My idea on this issue is simple, and echoes sentiments advanced in recent years by President Clinton,⁵⁷ President Bush,⁵⁸ then-Chief Justice Rehnquist,⁵⁹ and the American Bar ***1468** Association,⁶⁰ among others.⁶¹ The Senate should consider a rule ensuring that every judicial nominee receives a vote by the Senate within 180 days of being nominated by the President. Six months is sufficient time for senators to hold hearings, interest groups to register their preferences, and citizens to weigh in on the qualifications of a judicial nominee for lifetime office. At the end of that time, it seems that senators should stand and be counted. If a home-state senator or a group of ideologically-committed senators wishes to block a judicial nomination, they can do so. But they can do so by persuading their colleagues and

voting, not through procedural maneuvers. In this way, voters can properly hold their senators accountable, nominees can receive prompt and respectful treatment, and key judicial vacancies can be filled without unnecessary delay.

A related and difficult question--which I do not resolve here--is whether votes on judicial nominees must be up-or-down majority votes, or whether the sixty votes currently needed under Senate rules to overcome a filibuster is appropriate for consideration of judges.⁶² Scholars and politicians have argued that constitutional text and historical practice require an up-or-down majority vote.⁶³ That said, it is also clear that the text of the Constitution gives the Senate broad freedom to set its own rules of proceeding.⁶⁴ And the Senate's filibuster rules have been in place for many years now.⁶⁵ It is not my place to settle that ongoing legal debate.

***1469** Regardless of whether there is a fifty-one-vote or sixty-vote or some other numerical vote requirement, a good way to alleviate the judicial confirmations mess⁶⁶ and help fix Washington is to agree on the ground rules, make them known to all parties ahead of time, and allow nominees to receive votes in the full Senate within 180 days.⁶⁷ Over the long run, the presidency, the Senate, and the Judiciary would all benefit from fixed ground rules regarding judicial nominations. The forty-fourth President (like the forty-second and forty-third presidents tried to do before him) and the Senate should work together to solve this procedural problem and fix the ground rules not just for the forty-fourth President but for the foreseeable future.

III. STREAMLINE EXECUTIVE BRANCH ORGANIZATION AND ENSURE THAT OFFICIALS IN INDEPENDENT AGENCIES ARE MORE ACCOUNTABLE

Third, Congress and the President should scrutinize the organizational chart of executive branch agencies, with an eye toward serious reform. The disastrous consequences of some of the highest-profile agency failures in recent years-- the CIA's mistaken assessment of Saddam Hussein's weapons programs in 2002,⁶⁸ FEMA's breakdown during Hurricane Katrina,⁶⁹ and the apparent failure of financial regulatory agencies in the run-up to the current economic crisis--only confirm the pressing nature of the problem.

Two aspects of this regulatory regime are in particular need of attention. The first is the extraordinary duplication, ***1470** overlap, and confusion among the missions of different agencies.⁷⁰ Whether it is the Justice Department's Antitrust Division overlapping with the Federal Trade Commission,⁷¹ the Commerce Department overlapping with the Federal Communications Commission,⁷² the Department of Energy overlapping with the Federal Energy Regulatory Commission,⁷³ the Department of Labor overlapping with the National Labor Relations Board,⁷⁴ the Securities and Exchange Commission overlapping with the Commodities Futures Trading Commission and the Treasury Department,⁷⁵ or the FBI overlapping with the Drug Enforcement Agency,⁷⁶ there are problems wherever one looks. Overlapping responsibilities means redundancy, inefficiency, conflict, and unnecessary finger-pointing.

***1471** A second, related area of concern is the questionable effectiveness and accountability of some of the numerous independent regulatory agencies.⁷⁷ These agencies are freed by statute and tradition from direct control by the President or others in the White House and traditional executive agencies.⁷⁸ The President appoints the members of these independent agencies,⁷⁹ but after that, he exercises minimal control over them and can fire them only for cause.⁸⁰ The Supreme Court has made fairly clear (albeit not crystal clear) that the for-cause standard is hard to meet,⁸¹ and therefore presidents rarely attempt to fire officials in independent agencies even when they under-perform. Indeed, presidents rarely attempt to assert any significant direction and supervision over independent agency heads as they exert their policymaking authority.⁸² Although some legal scholars posit that presidents really do exert some ***1472** level of control over independent agencies through indirect mechanisms,⁸³ those who have worked in a White House tend

to agree that a President exercises far less practical control over independent agency heads than over the leaders of traditional executive agencies who are removable at will.⁸⁴

Independent agencies are constitutional under *Humphrey's Executor v. United States*.⁸⁵ But what is constitutional is not always wise. And there is reason to doubt whether the elaborate system of numerous independent agencies makes full sense today, at least as to the rulemaking and enforcement activities at certain agencies, as opposed to their adjudicatory functions. The independence those agencies enjoy from presidential direction and supervision may weaken the Executive and strengthen Congress's hand in the Washington power game. But this independence has clear costs in terms of democratic accountability. The basic question is this: Should the President direct and manage some of what now are "independent" agencies in the same way that he controls other agencies--by directing and supervising agency heads in their duties and removing them at will for any reason at all?

I recently watched a CNN telecast that illustrated this issue of accountability: the show purported to identify people responsible for the current financial meltdown--"naming names," in the words of the program's anchor.⁸⁶ Among those identified were current or former heads of independent agencies.⁸⁷ These individuals, like all independent agency heads, necessarily operated without meaningful substantive direction or supervision by the President. They could operate their own fiefdoms with *1473 little regard to what the President might have thought was the right approach.

Perhaps the most interesting illustration of this problem occurred when Senator and then-presidential-candidate John McCain called for the firing of the SEC Chairman.⁸⁸ Some immediately responded that the President has no power to fire the SEC Chairman,⁸⁹ prompting Senator McCain to quickly back down from his proposal.⁹⁰ But was Senator McCain's suggestion so unthinkable? Let us assume for a minute that the chair of an independent agency has exercised his or her rulemaking or enforcement authority in a way that is ethically and legally permissible but simply turns out to be unwise and causes great harm. Should that official be subject to removal? What if the agency head is mediocre or just average at his or her job? Normally, persons exercising tremendous executive power and responsibility are not insulated from direction, supervision, and ultimately (if necessary) dismissal, either by elected officials or by the people themselves. Why shouldn't someone have the authority to fire such persons at will? And if anyone is to possess that power, it must be the President. Why is it that the President should not have the power, in the first place, to direct and supervise that independent agency head in the exercise of his or her authority?⁹

When presidential candidates criss-cross the country for two years, engage in endless town halls, speeches, and debates, the people expect that the leader they elect will actually have the authority to execute the laws, as prescribed by the Constitution.⁹² Yet that is not the way the system works now for large swaths of American economic and domestic policy, including energy regulation,⁹³ labor law,⁹⁴ telecommunications,⁹⁵ securities *1474 regulation,⁹⁶ and other major sectors⁹⁷ where the President has little direct role in rulemaking and enforcement actions, despite those functions being part of the executive power vested in the President by the Constitution. In short, the President is vested with the executive power and yet actually exercises a relatively small slice of that power in certain critical areas of domestic policy.

To be sure, in some situations it may be worthwhile to insulate particular agencies from direct presidential oversight or control--the Federal Reserve Board may be one example, due to its power to directly affect the short-term functioning of the U.S. economy by setting interest rates and adjusting the money supply.⁹⁸ It is possible to make a similar case, on similar grounds, for exempting other agencies from direct presidential control, and it also makes sense generally to treat administrative adjudications differently from policy decisions, rulemakings, and enforcement actions. Yet independent agencies arguably should be more the exception, as they are in considerable tension with our nation's longstanding belief in accountability and the Framers' understanding that one person would be responsible for the executive power.⁹⁹ At a

minimum, the implication of affording independence to such agencies should be carefully re-examined to avoid creating overlaps between independent and non-independent agencies for no apparent reason.⁰⁰

***1475** The related problems of overlapping responsibilities and excessive insulation from presidential (and hence democratic) control call out for high-level attention. Congress and the administration should seek to better organize the executive branch, eliminating overlapping responsibilities, and ensuring that public officials are properly accountable to the President and therefore to the American people. Of course, not all of the problems with agency overlap and independent agencies can or should be solved at once. And Washington is notorious for moving at a glacial pace on these kinds of structural issues. But piecemeal reform is usually better than no reform at all. And the costs of the status quo are a significant contributor to the perception and reality that “Washington is broken.”

IV. RECOGNIZE THAT BOTH THE LEGISLATIVE AND EXECUTIVE BRANCHES HAVE LEGITIMATE AND SOMETIMES OVERLAPPING ROLES IN WAR AND NATIONAL SECURITY

Fourth, in the arena of separation of powers law, one issue looms in significance well above all others: the question of war powers. The most significant issue is whether the President can order U.S. troops to initiate large-scale offensive hostilities in a foreign country without congressional approval.⁰ Despite its obvious import, I was amazed that the recent presidential and vice-presidential televised debates lasted a combined six hours without even one question about whether, and if so when, the President can commit the United States to war without prior approval from Congress.⁰² One would expect that this would be ***1476** a critically important question to be asked of a presidential candidate given our history and the President's singular constitutional role as commander in chief, yet the question was never posed during the debates.⁰³

The Constitution grants Congress the power to declare war.⁰⁴ The War Powers Resolution requires congressional authorization of a war within sixty days of hostilities, except in cases of self-defense and similar emergencies.⁰⁵ Before and after the War Powers Resolution was enacted in the early 1970s, however, most presidents asserted their ability to wage war--at least limited war--without any such congressional approval.⁰⁶ On some occasions involving more limited strikes--the invasions ***1477** of Grenada in 1983 and Panama in 1989; the targeted missile strikes on Iraq, Afghanistan, and Sudan in the 1990s; and the broader air campaign against Kosovo in 1999--modern presidents have conducted offensive military operations without obtaining advance approval from Congress.⁰⁷ With regard to larger conflicts--most notably the Persian Gulf War of 1991, the Afghan War (and broader war against al Qaeda) in 2001, and the Iraq War of 2003--modern presidents have sought advance authorization from Congress before acting.⁰⁸

As the actions of these presidents suggest, it is ordinarily understood that seeking the approval of Congress for large-scale military operations overseas is a wise presidential course. Going to war is the most grave and significant action a nation ***1478** can take. As a political and policy matter, it makes sense for there to be an inter-branch consensus among our federal elected officials, as there was (at least initially) for both the Afghan and the Iraq wars.⁰⁹ Such consensus maximizes public and political support for the war effort while minimizing the risk that war will be undertaken hastily without proper consideration. Even more importantly, inter-branch agreement is favored--and according to some, compelled--by the Constitution itself,⁰ in addition to the War Powers Resolution. As even the most energetic defenders of executive prerogatives agree, moreover, Congress has unambiguous power over appropriating money to fund military conflicts, in addition to its other authorities over military matters.² No one denies, therefore, that Congress can stop a President from waging war by, at a minimum, ***1479** refusing to fund the war (although in some cases that may require two-thirds of both Houses to overcome a veto).³ Given that war powers are thus shared by both the President and Congress--and that unity of national effort is crucial for a war effort to succeed--most presidents

and observers have seen it as vastly preferable for the President to obtain congressional approval before initiating large-scale military conflict.

But beyond the question of going to war in the first place are many subsidiary questions involving the relative roles of the President and Congress with respect to the “incident[s] of war.”⁴ To what extent can the Congress legislate and regulate the President's activities in the war arena? And to what extent does the President require authorizing legislation to undertake a war-related activity abroad?

As an initial matter, the constitutional text makes clear that the President does not enjoy unilateral authority with respect to all incidents of war. The Constitution gives the Congress not only the power to declare war, as discussed above, but also the power to raise armies, to fund wars and armies, and to regulate captures, among other powers.⁵ In addition, Article I, Section Eight gives Congress the power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”⁶

Justice Jackson's three-part framework from his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*⁷ has long been used to assess whether a President's activities in the national security arena are permissible. Justice Jackson famously separated the exercise of a President's wartime authorities into three categories. Category One applies when Congress has authorized the President's actions, and his authority is thus “at its maximum.”⁸ Category Two occurs when Congress has neither authorized nor prohibited the President's actions.⁹ Category Three applies when Congress has prohibited the President's actions, but the President asserts his preclusive and exclusive commander-in-chief authority.²⁰ Here, Jackson maintains, the President's power is “at its lowest ebb.”²

The scope of what a President can lawfully do in a Category Three situation is uncertain--and highly controversial with Congress and the public.²² For that reason, it seems preferable for a President to try to ensure where possible that his commander-in-chief activities take place in Category One or Two. In other words, if it appears that the President's activities may run counter to an existing statute, the President may be wise to seek clarifying legislation or commentary from Congress, a point Jack Goldsmith articulated in his thought-provoking book, *The Terror Presidency*.²³ Outside perhaps of a few defined areas (such as command of troop movements in battle) in which preclusive and exclusive presidential war-making authority appears settled as a matter of history and tradition, it is not likely a winning strategy--in this era of continued aggressive judicial involvement in separation of powers disputes--for a President to assume that he will be able to avoid judicial disapproval of wartime activities taken in contravention of a federal statute.²⁴ Recent years have demonstrated that courts are quite prepared to resolve war-related separation of powers disputes.²⁵

In applying Justice Jackson's *Youngstown* framework, courts have a corresponding responsibility to ensure that their opinions are especially clear and provide necessary guidance to the political branches. One major issue in recent years, for example, has been whether the broad language of the Authorization for the Use of Military Force,²⁶ passed in the wake of September 11, overrides more specific earlier-enacted statutes such as the Non-Detention Act,²⁷ the Uniform Code of Military Justice,²⁸ and the Foreign Intelligence Surveillance Act.²⁹ Arguably, the Supreme Court has sent mixed signals on that question, reading the AUMF broadly in *Hamdi*³⁰ and then two years later reading it more narrowly in *Hamdan*.³ This led to complaints by the *Hamdan* dissenters that the Court was reading the AUMF inconsistently.³² Without taking sides in the debate over whether the AUMF should have been read broadly or narrowly in connection with its effect on earlier enacted statutes, or whether the critique offered by the *Hamdan* dissenters is correct, it is enough here to say that courts owe a special duty of consistency and clarity when they decide cases in the war powers arena, including when they interpret landmark statutes such as the AUMF.

In that same vein, courts today should be cautious about finding implied congressional prohibition sufficient to classify a case as a Category Three situation. Modern statutory interpretation generally frowns on drawing inferences from congressional silence--recognizing that there are many reasons Congress might not enact a particular bill into law.³³ It is arguably even less appropriate, moreover, for a court to disallow a President's traditional wartime activity solely on the basis of congressional silence, rather than a written statute. To be sure, in *Youngstown* itself, some Justices drew meaning from the failure of Congress to enact a statute supporting President Truman's seizure; they read the congressional silence against *1482 him.³⁴ But *Youngstown* is not a counter-example to the point because in that case the President's domestic action was not a traditional commander-in-chief activity to begin with--as both Justice Black's majority opinion and Justice Jackson's concurring opinion convincingly explained.³⁵ When, unlike in *Youngstown*, it is clear that the President is exercising his traditional commander-in-chief power and directing action to support a war effort, it appears more consistent with modern principles of statutory interpretation and judicial restraint for courts to require express congressional prohibition before classifying the case as a Category Three situation.

In sum, a President must thoroughly understand and appreciate the significance of *Youngstown* Category Three. And a President should strive to avoid Category Three--for reasons both legal and political. Few claims are as likely to provoke a skeptical, if not hostile, reaction from the courts, Congress, and the public as a claim that the President has a right as commander in chief to violate an express federal statute, at least unless the President's authority to act exclusively and preclusively with respect to the specific wartime activity in question is historically well-established. Avoiding Category Three could help a President alleviate the serious friction that these debates engender between the executive and legislative branches of government, and in the general public. At the same time, courts should be quick, clear, and consistent in deciding war powers questions. And as a matter of judicial restraint and proper statutory interpretation, courts should be careful about finding a commander-in-chief case in Category Three based on implied prohibitions alone.

V. CONSIDER THE POSSIBLE BENEFITS OF A SINGLE, SIX-YEAR PRESIDENTIAL TERM

Fifth, a major source of problems in Washington today is that governance can take a backseat to campaigning. Virtually every elected official complains about the distraction caused by *1483 the "permanent campaign."³⁶ One of the reasons for this complaint is the frequency with which elections are held. To be sure, there is a balance, because elected officials should be accountable to the people, and elections and campaigns connect officials to the public. But today the near-constant prospect of forthcoming elections often undermines the ability to get things done in Washington.

For present purposes, I will focus only on the pitfalls of the modern presidency in the context of the permanent campaign. An analysis of two-term presidencies since the adoption of the Twenty-Second Amendment reveals some problems. To begin with, the requirement that a President prepare for and anticipate re-election leads to several concerns. It distracts from the business of running the country. It makes it harder for presidents to tackle difficult but necessary issues in their first terms. It leads to the perception (sometimes fair, sometimes not) of decisions made with an eye toward the Electoral College. In addition, eight years is too long for a President and his or her team to stay in top form. The stresses and demands of the job have led to more difficult second terms. Indeed, the second terms of the last four two-term presidencies are widely regarded as having been less successful than their respective first terms. One President resigned under the threat of near-certain impeachment and removal (Nixon),³⁷ one endured the major Iran-Contra scandal³⁸ and the bitter defeat of a Supreme Court nominee (Reagan),³⁹ one actually was impeached and tried in the Senate, albeit not removed (Clinton),⁴⁰ and one experienced setbacks in dealing with the Iraq War⁴¹ and responding to a major hurricane⁴² (George W. Bush).

*1484 It is unclear why recent second-term presidents have had more difficulties--and there is a danger of mistaking correlation with causation. History suggests a number of possible explanations: exhaustion, built-up bitterness from the

opposing party, the inevitable aftermath of a bruising re-election, hubris, and many more. Whatever the cause, however, the end results have been clear--and sometimes not very pretty.

Creative ideas to address this problem are worth considering--even those that might seem radical at first blush. One idea is to repeal the Twenty-Second Amendment and return the nation to the original constitutional design.⁴³ Another possibility is to amend the Constitution to provide for a single, six-year presidential term.⁴⁴ A single term is hardly a novel idea. Indeed, at the Constitutional Convention in 1787, the initial vote of the Committee of the Whole was for a single seven-year presidential term.⁴⁵ As we know, the Framers ultimately adopted unlimited four-year terms--which was the rule until the Twenty-Second Amendment, ratified in 1951, set a limit of two four-year terms.⁴⁶

As between those two options--repealing the Twenty-Second Amendment or affording presidents single six-year terms--it seems to me that a single six-year term could achieve many benefits. First, it would help prevent the under-analyzed and under-appreciated onset of the fatigue that too frequently leads to executive branch missteps in second terms.⁴⁷ Second, and consistent with the goal discussed in Part I above of freeing the President from unnecessary distractions, a single six-year term would avoid the enormous difficulty of being President and running a re-election campaign at the same time. I became Staff Secretary to President Bush in July 2003 and witnessed first-hand the challenges inherent in running for President and being President at the same time. It is fair to say that running for re-election while serving as President greatly multiplies the complexity of the President's already difficult job. A senator who runs for President can simply skip his Senate duties for two years. The President does not have that luxury. Third, a single six-year term would alleviate the pressure to think about re-election and the need to run something of a permanent campaign that, according to some, alters (or "politicizes") presidential and executive branch decision making during the first term.⁴⁸ A President and top executive branch officials who never have to think about the President's re-election would have far greater freedom to focus on the business of running a country without regard to short-term popular reactions or fundraising. This would advance the Framers' goal of a President who is able to resist any "sudden breeze," "transient impulse," or "temporary delusion" of the people in order to govern from a more detached perspective in the interests of the long-term public good.⁴⁹

Because any change to the presidential term in office would be dramatic, require extensive deliberation, and ultimately necessitate passage of a constitutional amendment, I would not expect it to happen anytime soon. There are downsides to the single six-year presidential term, perhaps most obviously the fact that a popular or effective President would be precluded from remaining in office for an additional two years. In addition, some might say that this would make the President a lame duck from day one, or reduce his accountability. As a logical matter, however, these objections would apply also to the Twenty-Second Amendment's existing prohibition on serving more than two elected terms in office.⁵⁰ Anyone who objects to my proposal on these grounds logically should object to the Twenty-Second Amendment as well.

The Framers of the Constitution established an amendment process and emphasized the importance of practical experience--"the guide that ought always to be followed whenever it can be found"⁵¹ in constitutional design. That experience has prompted numerous structural amendments during our history--four of which directly involved the presidency: the Twelfth, Twentieth, Twenty-Second, and Twenty-Fifth.⁵² At this time in our history, experience shows that the status quo of two presidential terms since 1951 has not worked all that well. It may be time to consider again a single, six-year presidential term.⁵³

CONCLUSION

The challenges facing the forty-fourth President--like those facing presidents before him--are enormous and daunting. Separation of powers controversies like those that challenged his predecessors will recur. It is a good time to take stock

of those lessons, to examine our foundational structures, and to develop creative solutions to address the structural challenges of the future. I hope these ideas help advance that discussion.

Footnotes

- d1 Judge, United States Court of Appeals for the District of Columbia Circuit. This Article is adapted from remarks I made at the University of Minnesota Law School on October 17, 2008 about two weeks before the presidential election. I derived my suggestions from working in the executive and judicial branches for many years, from collaborating closely with the legislative branch on certain issues while I served in the executive branch, and from teaching separation of powers law at Harvard Law School for the last two years. Copyright © 2009 by Brett M. Kavanaugh.
- 1 See, e.g., Mark Mazzetti & Scott Shane, *Al Qaeda Offers Obama Insults and a Warning*, N.Y. Times, Nov. 20, 2008, at A1.
- 2 See Steven Lee Myers, *America's Scorecard in Iraq*, N.Y. Times, Feb. 8, 2009, at WK1 (indicating that 140,000 U.S. troops remain in Iraq); N. Atl. Treaty Org., *International Security Assistance Force* (Apr. 3, 2009), http://www.nato.int/isaf/docu/epub/pdf/isaf_placemat.pdf (showing 26,215 U.S. troops in Afghanistan).
- 3 See, e.g., Jon Hilsenrath et al., *Worst Crisis Since '30s, With No End Yet in Sight*, Wall St. J., Sept. 18, 2008, at A1.
- 4 See, e.g., Dan Zak, *As Campaigns Heat Up and Washington Gets Beaten Down, Are There Any Pols Who Will Sing Its Praises?*, Wash. Post, Aug. 24, 2008, at A1 (quoting the McCain and Obama presidential campaigns).
- 5 See, e.g., *id.*
- 6 See, e.g., *id.*
- 7 See *Campbell v. Clinton*, 203 F.3d 19, 19 (D.C. Cir. 2000); Memorandum from the Office of Legal Counsel, U.S. Dep't of Justice, to the Att'y Gen., *Authorization for Continuing Hostilities in Kosovo*, available at 2000 WL 33716980 (Dec. 19, 2000); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb A Constitutional History*, 121 Harv. L. Rev. 941, 1090 (2008); Geoffrey S. Corn, *Clinton, Kosovo, and the Final Destruction of the War Powers Resolution*, 42 Wm. & Mary L. Rev. 1149, 1149 55 (2001); Abraham D. Sofaer, *The War Powers Resolution and Kosovo*, 34 Loy. L.A. L. Rev. 71, 71 79 (2000).
- 8 See *Impeachment Inquiry Pursuant to H. Res. 581 Before the H. Comm. on the Judiciary*, 105th Cong. 15 30 (1998) (statement of Kenneth Starr, Independent Counsel, Office of Independent Counsel); Submission by Counsel for President Clinton to the Committee on the Judiciary of the United States House of Representatives, S. Doc. No. 106 3, at 1 3, 7 (1998); H.R. Rep. No. 105 830, at 5 7 (1998).
- 9 See *The Future of the Independent Counsel Act: Hearings Before the S. Comm. on Governmental Affairs*, 106th Cong. 1 5 (1999) (statement of Sen. Fred Thompson, Chairman, S. Comm. on Governmental Affairs); Michael J. Gerhardt, *The Historical and Constitutional Significance of the Impeachment and Trial of President Clinton*, 28 Hofstra L. Rev. 349, 382 84 (1999). See generally Symposium, *The Independent Counsel Act: From Watergate to Whitewater and Beyond*, 86 Geo. L.J. 2011 (1998) (containing contributions on the topic by Michael R. Bromwich, George D. Brown, Arthur H. Christy, Samuel Dash, Joseph E. diGenova, Katy J. Harriger, Philip B. Heymann, Brett M. Kavanaugh, Norman J. Ornstein, Julie R. O'Sullivan, Jerome J. Shestack, Donald C. Smaltz, Cass R. Sunstein, and Lawrence E. Walsh).
- 10 See *In re Lindsey*, 158 F.3d 1263, 1278 (D.C. Cir. 1998) (per curiam) (holding that the attorney client privilege does not prevent government attorneys from testifying in grand jury cases regarding possible criminal conduct by public officials); *In re Sealed Case*, 148 F.3d 1073, 1074 (D.C. Cir. 1998) (per curiam) (rejecting the "protective function privilege for Secret Service agents"); see also *Rubin v. United States*, 525 U.S. 990, 990 (1998) (Breyer, J., dissenting from the denial of certiorari).
- 11 *Clinton v. Jones*, 520 U.S. 681, 684 (1997); see also Akhil Reed Amar, *Nixon's Shadow*, 83 Minn. L. Rev. 1405, 1415 16 (1999) (addressing *Clinton v. Jones*); Joseph Isenbergh, *Impeachment and Presidential Immunity from Judicial Process*, 18 Yale L. & Pol'y Rev. 53, 59 63 (1999) (same); Michael Stokes Paulsen, *Nixon Now: The Courts and the Presidency After Twenty five Years*, 83 Minn. L. Rev. 1337, 1337 45 (1999) (same).

- 12 See President Clinton's Eleventh Hour Pardons: Hearing Before the S. Comm. on the Judiciary, 107th Cong. 1 2 (2001) (statement of Sen. Orrin G. Hatch, Chairman, S. Comm. on the Judiciary); The Controversial Pardon of International Fugitive Marc Rich: Hearings Before the H. Comm. on Government Reform, 107th Cong. 2 (2001) (statement of Rep. Dan Burton, Chairman, H. Comm. on Government Reform); see also Gregory C. Sisk, *Suspending the Pardon Power During the Twilight of a Presidential Term*, 67 Mo. L. Rev. 13,14 16 (2002) (discussing President Clinton's controversial pardons).
- 13 See Paul Houston, *Reno Demands That All 93 U.S. Attorneys Offer Resignations*, L.A. Times, Mar. 24, 1993, at A8; David Johnston, *Attorney General Seeks Resignations From Prosecutors*, N.Y. Times, Mar. 24, 1993, at A1.
- 14 See President William J. Clinton, *The State of the Union Address by the President of the United States* (Jan. 27, 1998), in 144 Cong. Rec. H30, H33 ("I simply ask the United States Senate to heed this plea and vote on the highly qualified judicial nominees before you up or down. "); President William J. Clinton, *President's Radio Address* (Sept. 27, 1997), in 33 Wkly Comp. Pres. Doc. 1442, 1442 43; see also Richard L. Berke, *Clinton Seeks Action on Court Nominees*, N.Y. Times, Sept. 28, 1997, at 33 (reporting on President Clinton's radio address).
- 15 See, e.g., *Boumediene v. Bush*, 128 S. Ct. 2229, 2240 (2008); *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2753 57 (2006), superseded by statute, *Military Commissions Act of 2006*, Pub. L. No. 109 366, 120 Stat. 2600, as recognized in *Boumediene v. Bush*, supra; *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004); *Rasul v. Bush*, 542 U.S. 466, 470 73 (2004), superseded by statute, *Detainee Treatment Act of 2005*, Pub. L. No. 109 148, 119 Stat. 2739; *Al Marri v. Pucciarelli*, 534 F.3d 213, 216 17 (4th Cir. 2008) (en banc), dismissed sub nom. *Al Marri v. Spagone*, No. 08 368 (U.S. Mar. 6, 2009); U.S. Dep't of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President*, 1 3 (2006), available at <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf>; Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2047 56 (2005); Curtis Bradley et al., *On NSA Spying: A Letter to Congress*, N.Y. Rev. Books, Feb. 9, 2006, at 42, 42 44. See generally Jack L. Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (2007) (discussing the Bush administration's response to the terrorist attacks of Sept. 11, 2001); Benjamin Wittes, *Law and the Long War: The Future of Justice in the Age of Terror* (2008) (critiquing the U.S. government's war on terror).
- 16 See, e.g., *Citizens for Responsibility & Ethics in Wash. v. Cheney*, 580 F. Supp. 2d 168, 171 77 (D.D.C. 2008) (mem.).
- 17 See, e.g., *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 372 73 (2004).
- 18 See U.S. Dep't of Justice, *An Investigation into the Removal of Nine U.S. Attorneys in 2006*, at 14 (2008).
- 19 See Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* 236 49 (2007); Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 Const. Comm. 307, 308 12 (2006); Walter Dellinger, Op Ed., *A Slip of the Pen*, N.Y. Times, July 31, 2006, at A17; ABA Task Force on Presidential Signing Statements and the Separation of Powers Doctrine, *Recommendation*, 1 (2006), available at http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation_report_7_24_06.pdf.
- 20 See George W. Bush, *President Bush Discusses Judicial Accomplishments and Philosophy* (Oct. 6, 2008), http://georgewbush.whitehouse.archives.gov/news/releases/2008/10/20081006_5.html; George W. Bush, *Remarks by the President on Judicial Confirmations* (Oct. 30, 2002), http://georgewbush.whitehouse.archives.gov/news/releases/2002/10/20021030_6.html.
- 21 531 U.S. 98, 109 10 (2000) (per curiam).
- 22 See U.S. Const., pmbl. ("I[n] Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity ").
- 23 John F. Harris, *The Survivor: Bill Clinton in the White House* (2005).
- 24 Cf. James Bennet, *U.S. Cruise Missiles Strike Sudan and Afghan Targets Tied to Terrorist Network*, N.Y. Times, Aug. 21, 1998, at A1 (reporting on American missile strikes on targets linked to Osama bin Laden).
- 25 Cf. Richard L. Berke, *Outside Political Circles, a Deep Sense of Sadness and Shock*, N.Y. Times, Aug. 17, 1998, at A11 (describing President Clinton's grand jury testimony as "the most politically and legally hazardous moment of his career").

- 26 I worked for Judge Starr and believe he performed his difficult legal assignment diligently and properly under a badly flawed
statutory regime.
- 27 520 U.S. 681, 684 (1997).
- 28 *Id.* at 709 (“If Congress deems it appropriate to afford the President stronger protection, it may respond with appropriate
legislation. ”).
- 29 See Servicemembers Civil Relief Act, 50 U.S.C. app. §§ 501–596 (2000 & Supp. 2006).
- 30 See Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 *Geo. L.J.* 2133, 2157–61 (1998).
- 31 *Id.* at 2157. Even in the absence of congressionally conferred immunity, a serious constitutional question exists regarding
whether a President can be criminally indicted and tried while in office. See *id.* at 2158–61.
- 32 For fairness’s sake, this proposal may also require extension of the relevant statutes of limitations.
- 33 See U.S. Const. art. I, § 3, cl. 6.
- 34 Brett M. Kavanaugh, *Op Ed.*, *First Let Congress Do Its Job: A Deep Structural Flaw in the Independent Counsel Statute*,
Wash. Post, Feb. 26, 1999, at A27.
- 35 I think this temporary deferral also should excuse the President from depositions or questioning in civil litigation or criminal
investigations.
- 36 In a related manner, I believe that the independent counsel statute was a major mistake for reasons I have articulated
previously. See Kavanaugh, *supra* note 30, at 2134–35. Congress itself came to that conclusion in 1999 when it declined to
reauthorize the statute. See, e.g., 145 *Cong. Rec.* S7766 (daily ed. Jun. 29, 1999) (statement of Sen. Specter) (“Tomorrow, the
independent counsel statute will sunset. The law is dying because there appears to be a consensus that it created more problems
than it solved. ”). The law itself created a perverse structure that was inconsistent with foundational principles of separation
of powers and that created problems for both the President and the independent counsel. See Kavanaugh, *supra* note 30, at
2134–38. Judge Starr himself has made this same point. See *The Future of the Independent Counsel Act: Hearings Before the*
S. Comm. on Governmental Affairs, 106th Cong. 425–34 (1999) (statement of Kenneth W. Starr, Independent Counsel).
- 37 See U.S. Const. art. I, § 2, cl. 5.
- 38 See, e.g., Paul C. Light, *Op Ed.*, *Late for Their Appointments*, *N.Y. Times*, Nov. 16, 2004, at A27; Paul C. Light & Virginia L.
Thomas, *The Merit and Reputation of an Administration: Presidential Appointees on the Appointments Process* 3–4 (2000),
http://www.brookings.edu/~media/Files/rc/papers/2000/0428governance_light/20000428merit.pdf.
- 39 See, e.g., Light, *supra* note 38.
- 40 See, e.g., Lee Epstein & Jeffrey A. Segal, *Advice and Consent: The Politics of Judicial Appointments* 107 (2005).
- 41 *The Federalist* No. 70, at 391 (Alexander Hamilton) (Clinton Rossiter ed., 1999).
- 42 *Id.* No. 76, at 423.
- 43 See *id.* at 425.
- 44 See *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 630 (1935).
- 45 See *infra* Part III.
- 46 See U.S. Const. art. III; *The Federalist* No. 78 (Alexander Hamilton), *supra* note 41.
- 47 See U.S. Const. art. II; *The Federalist* No. 72 (Alexander Hamilton), *supra* note 41.

- 48 See, e.g., Frederick Liu, Comment, The Supreme Court Appointments Process and the Real Divide Between Liberals and Conservatives, 117 Yale L.J. 1947, 1947 56 (2008).
- 49 See Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006); Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2005); Nomination of Stephen G. Breyer to Be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 103d Cong. (1995); Nomination of Ruth Bader Ginsburg to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 103rd Cong. (1993).
- 50 Cf. William H. Rehnquist, The Making of a Supreme Court Justice, Harv. L. Rec., Oct. 8, 1959, at 7, 10 (“ T]here are additional factors which come into play in the exercise of the function of a Supreme Court Justice.).
- 51 See U.S. Const. art. II, § 2, cl. 2 (Advice and Consent Clause); cf. John C. Eastman, The Limited Nature of the Senate's Advice and Consent Role, 36 U.C. Davis L. Rev. 633, 640 47 (2003).
- 52 See Nomination of Ruth Bader Ginsburg to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 103rd Cong. 259, 287 88 (1993) (statements of Sen. Joseph R. Biden, Chairman, S. Comm. on the Judiciary and Judge Ruth Bader Ginsburg) (declining to answer specific questions about some specific past cases on the grounds that the legal issues might return to the Supreme Court for decision in a future case).
- 53 See sources cited supra note 49.
- 54 See Thomas E. Mann & Norman J. Ornstein, The Broken Branch: How Congress is Failing America and How to Get It Back on Track 164 68 (2006) (discussing the blue slip process, “bottling up, committee holds, and filibusters).
- 55 See Sheldon Goldman, Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts, 39 U. Rich. L. Rev. 871, 889 91 (2005).
- 56 See The Presidential Appointee Initiative, Brookings Inst., To Form a Government: A Bipartisan Plan to Improve the Presidential Appointments Process 6 7 (2001), <http://www.brookings.edu/~media/Files/rc/papers/2001/0405governance/0405governance.pdf> hereinafter To Form a Government].
- 57 See, e.g., President William J. Clinton, President's Radio Address, supra note 14, at 1442 43.
- 58 See, e.g., President George W. Bush, Remarks on the Judicial Confirmation Process, 2 Pub. Papers 1929 32 (Oct. 30, 2002).
- 59 See, e.g., William H. Rehnquist, Chief Justice's 2002 Year End Report on the Federal Judiciary, The Third Branch, Jan. 2003, at 1, available at <http://www.uscourts.gov/ttb/jan03ttb/jan03.html>.
- 60 See Am. Bar Ass'n, Independence of the Judiciary: Judicial Vacancies (2003), <http://www.abanet.org/poladv/priorities/judvac.html>.
- 61 See To Form a Government, supra note 56, at 13 14.
- 62 See John Cornyn, Our Broken Judicial Confirmation Process and the Need for Filibuster Reform, 27 Harv. J.L. & Pub. Pol'y 181,182 90 (2003); Catherine Fisk & Erwin Chemerinsky, The Filibuster, 49 Stan. L. Rev. 181, 239 45 (1997); Laura T. Gorjanc, Comment, The Solution to the Filibuster Problem: Putting the Advice Back in Advice and Consent, 54 Case W. Res. L. Rev. 1435, 1454 57 (2004).
- 63 See, e.g., Judicial Nominations, Filibusters, and the Constitution: When a Majority is Denied Its Right to Consent: Hearing Before the Subcomm. on the Constitution, Civil Rights and Property Rights of the S. Comm. on the Judiciary, 108th Cong. 1 5, 22 26, 31 46 (2003) (statements of Sen. John Cornyn, Professor Steven Calabresi, Professor John Eastman, Professor Bruce Fein, and Professor Douglas Kmiec).
- 64 See U.S. Const. art. I, § 5, cl. 2.

- 65 See Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Over Come the Filibuster*, 28 Harv. J.L. & Pub. Pol'y 205, 213 60 (2004) (discussing the history of the filibuster and periodic efforts to reform or restrict its availability).
- 66 See Stephen L. Carter, *The Confirmation Mess: Cleaning Up the Federal Appointments Process* 3 155 (1994) (describing the current criticisms of the federal judicial nominations process); Benjamin Wittes, *Confirmation Wars: Preserving Independent Courts in Angry Times* 37 85 (2006) (same).
- 67 President Bush, among others, argued that a failure to vote on a judicial nominee is an abdication of the Senate's constitutional responsibility. See, e.g., President George W. Bush, Remarks at the Federalist Society's 25th Annual Gala (Nov. 15, 2007), http://georgewbush.whitehouse.archives.gov/news/releases/2007/11/20071115_14.html.
- 68 See Comm'n on the Intelligence Capabilities of the U.S. Regarding Weapons of Mass Destruction, Report to the President of the United States 3 (2005).
- 69 See Office of Inspections & Special Reviews, Dep't of Homeland Sec., *A Performance Review of FEMA's Disaster Management Activities in Response to Hurricane Katrina* 109 10 (2006), available at http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_06_32_Mar06.pdf.
- 70 For one official's views on the problem, see *The Charlie Rose Show: Interview with Nate Silver, Charles Schumer, David Brooks* (PBS television broadcast Oct. 31, 2008), available at <http://www.charlierose.com/view/interview/9333>. (quoting Senator Charles Schumer as saying: "W]e need to have a better system of regulation. No question about it. I believe we need a unitary, strong, quieter regulator. Right now the system is a mess.... T]he bottom line is we have thirty] different regulatory agencies I'm talking about one regulator as opposed to thirty").
- 71 Cf. Eric Lichtblau, *Antitrust Report Exposes Rift Between U.S. Agencies*, Int'l Herald Trib. (Paris), Sept. 10, 2008, at 16 (discussing a rift between the two departments on antitrust policy).
- 72 See U.S. Gen. Accounting Office, *Telecommunications: Competition Issues in International Satellite Communications* 3 (1996) (stating that the Commerce Department, State Department and the FCC all have authority over satellite communications); Joel R. Reidenberg, *Governing Networks and Rule Making in Cyberspace*, 45 Emory L.J. 911, 922 (1996) (stating that several federal agencies, including the FCC and the Commerce Department, have "overlapping authority over information policy").
- 73 See, e.g., Norman L. Rave., Jr., Note, *Interagency Conflict and Administrative Accountability: Regulating the Release of Recombinant Organisms*, 77 Geo. L.J. 1787, 1809 (1989) ("F]ive agencies (NRC, Department of the Interior, Department of Energy, Federal Energy Regulatory Commission, EPA) with widely differing agendas have control over the intersection of environmental and energy policy. ").
- 74 See Valerie A. Sanchez, *A New Look at ADR in New Deal Labor Law Enforcement: The Emergence of a Dispute Processing Continuum Under The Wagner Act*, 20 Ohio St. J. on Disp. Resol. 621, 655 59 (2005) (discussing concerns about overlaps between the Department of Labor and the NLRB dating from the creation of the NLRB).
- 75 See Jerry W. Markham, *1 A Financial History of the United States* 82 (2002).
- 76 See Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 Hastings L.J. 1135, 1151 (1995) (discussing the overlapping jurisdiction between the FBI, DEA, and other agencies during the "War on Drugs. ").
- 77 For an effort to list all of the independent agencies, see Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111, app. at 1236 94 (2000), which includes the following agencies: the Board of Governors of the Federal Reserve System, the Board of Veterans' Appeals, the Chemical Safety and Hazard Investigation Board, the Commodity Futures Trading Commission, the Consumer Product Safety Commission, the Defense Nuclear Facilities Safety Board, the Equal Employment Opportunity Commission, the Farm Credit Administration, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Federal Election Commission, the Federal Energy Regulatory Commission, the Federal Housing Finance Board, the Federal Labor Relations Authority, the Federal Maritime Commission, the Federal Mine Safety and Health Review Commission, the Federal

Trade Commission, the Merit Systems Protection Board, the National Credit Union Administration, the National Indian Gaming Commission, the National Labor Relations Board, the National Mediation Board, the National Transportation Safety Board, the Nuclear Regulatory Commission, the Occupational Safety and Health Review Commission, the Postal Rate Commission, the Railroad Retirement Board, the Securities and Exchange Commission, the Surface Transportation Board, the United States International Trade Commission, the Social Security Administration, and the Office of Special Counsel.

- 78 See *Humphrey's Ex'r v. United States*, 295 U.S. 602, 628 30 (1935); cf. Thomas O. Sargentich, *The Emphasis on the Presidency in U.S. Public Law: An Essay Critiquing Presidential Administration*, 59 Admin. L. Rev. 1, 15 (2007).
- 79 Cf. Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 Va. L. Rev. 889, 898 99 (2008).
- 80 Id. at 984.
- 81 See *Humphrey's Ex'r*, 295 U.S. at 629 30.
- 82 Cf. Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 Admin. L. Rev. 329, 350 (1991) (“Presidents rarely remove these commissioners ... and] potent factors deter active presidential supervision and removal.).
- 83 See, e.g., Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 596 (1984) (“ A]ny assumption that executive agencies and independent regulatory commissions differ significantly or systematically in function, internal or external procedures, or relationships with the rest of government is misplaced.).
- 84 See, e.g., Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2273 74 (2001) (“ T]he existence of independent agencies can pose a particularly stark challenge to the aspiration of Presidents to control administration.).
- 85 295 U.S. 602, 628 (1935) (characterizing the Federal Trade Commission as a valid “administrative body).
- 86 Anderson Cooper 360 Degrees (CNN television broadcast Oct. 20, 2008) (transcript available at [http:// transcripts.cnn.com/TRANSCRIPTS/0810/20/acd.02.html](http://transcripts.cnn.com/TRANSCRIPTS/0810/20/acd.02.html)).
- 87 See id. (listing the former SEC chairman and the former chairman of the Federal Reserve Board of Governors as “culprits of the collapse).
- 88 Carrie Johnson, *Crisis Poses Big Test for Markets' Regulator*, Wash. Post, Sept. 19, 2008, at D1 (noting that Sen. McCain said that if he were President, he would fire the SEC Chairman).
- 89 See, e.g., Posting of David Wright to Political Radar, McCain Flub? Republican Says He'd Fire SEC Chair as President, [http:// blogs.abcnews.com/politicalradar/2008/09/mccain_blasts_o.html](http://blogs.abcnews.com/politicalradar/2008/09/mccain_blasts_o.html) (Sept. 18, 2008, 13:47 EST).
- 90 See Posting of Jake Tapper to Political Punch, [http:// blogs.abcnews.com/politicalpunch/2008/09/mccain_says_he.html](http://blogs.abcnews.com/politicalpunch/2008/09/mccain_says_he.html) (Sept. 21, 2008, 20:18 EST).
- 91 Cf. Les Carpenter, *No Cheering in the Press Box, Except When It Comes to the Boss*, Wash. Post, Jan. 30, 2009, at E6 (quoting Bruce Springsteen discussing his choice of songs for the Super Bowl XLIII halftime show: “I'm the Boss! I decide. The Boss decides. Other people suggest or cajole, but I decide.).
- 92 U.S. Const. art. II, § 1.
- 93 See 42 U.S.C. § 7171 (2006) (“There is hereby established within the Department an independent regulatory commission to be known as the Federal Energy Regulatory Commission.).
- 94 See National Labor Relations Act, 29 U.S.C. §§ 151 169 (2006) (establishing the NLRB as an independent agency to regulate aspects of labor law).
- 95 See Communications Act of 1934 § 4, 47 U.S.C. § 154 (2006) (establishing the Federal Communications Commission as an independent agency to regulate telecommunications).

- 96 See *Freytag v. Commissioner*, 501 U.S. 868, 916 (Scalia, J., concurring) (listing the Securities and Exchange Commission as an “independent regulatory agency”).
- 97 See *supra* note 77 and accompanying text.
- 98 Bd. of Governors of the Fed. Reserve Sys., *The Federal Reserve System Purposes and Functions* 5 (8th ed. 1994).
- 99 *The Federalist* Nos. 69, 70 (Alexander Hamilton).
- 100 See Neal Devins, *Unitariness and Independence: Solicitor General Control over Independent Agency Litigation*, 82 Cal. L. Rev. 255, 322 (1994) (“On matters of substance, for example, regulation of the banking industry, antitrust enforcement, and employment discrimination prosecutions are concurrently managed by both the executive and independent agencies.”).
- 101 This topic has been the subject of considerable academic debate in recent decades. See generally John Hart Ely, *War and Responsibility: Constitutional Lessons of Vietnam and Its Aftermath* (1993); Louis Fisher, *Presidential War Power* (2d rev. ed. 2004); Michael Glennon, *Constitutional Diplomacy* (1990); Louis Henkin, *Constitutionalism, Democracy, and Foreign Affairs* (1990); Michael D. Ramsey, *The Constitution's Text in Foreign Affairs* (2007); Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations That Harbor or Support Them*, 25 Harv. J.L. & Pub. Pol'y 487 (2002); Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by “Declare War,”* 93 Cornell L. Rev. 45 (2007).
- 102 See *The First Presidential Debate* (CNN television broadcast Sept. 26, 2008); *The Second Presidential Debate* (CNN television broadcast Oct. 7, 2008); *The Third Presidential Debate* (CNN television broadcast Oct. 15, 2008); *The Vice Presidential Debate* (CNN television broadcast Oct. 2, 2008) (providing question by question accounts of the televised debates and indicating that such questions were never asked). A version of this question was put to Governor Mitt Romney in a Republican presidential primary debate on October 9, 2007. Asked whether he would need congressional authorization “to take military action against Iran's nuclear facilities,” Governor Romney did not directly answer the question, noting that as President “you sit down with your attorneys and they tell you what you have to do; he then proceeded to discuss the substance of his Iran policy. MSNBC.com, Oct. 9 Republican Debate Transcript, <http://www.msnbc.msn.com/id/21309530> (last visited Apr. 12, 2009). Senator John McCain later criticized Governor Romney's answer for suggesting that lawyers should be involved in making such a determination. SCHotline, <http://schotlinepress.wordpress.com/2008/01/06/john-mccain-2008-launches-new-web-ad-leadership> (Jan. 6, 2008, 08:45 EST) (giving the script for John McCain's web advertisement entitled “Leadership”).
- 103 Cf. *The First Presidential Debate*, *supra* note 102; *The Second Presidential Debate*, *supra* note 102; *The Third Presidential Debate*, *supra* note 102; *The Vice Presidential Debate*, *supra* note 102 (indicating that this question was not asked). In contrast to the paucity of questions on these matters during the televised debates, Boston Globe reporter Charlie Savage asked the leading primary candidates of both parties a detailed set of questions concerning their views of executive power, especially in wartime. See Charlie Savage, *Candidates on Executive Power: A Full Spectrum*, Boston Globe, Dec. 22, 2007, at A1. Then Senator Barack Obama stated during the Democratic primary campaign that “the President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation.” Charlie Savage, *Barack Obama's Q&A*, Boston Globe, Dec. 20, 2007, <http://www.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA>.
- 104 U.S. Const. art. I, § 8, cl. 11.
- 105 War Powers Resolution, 50 U.S.C. §§ 1541–1548 (2000).
- 106 See, e.g., William J. Clinton, *The President's News Conference*, 2 Pub. Papers 1417, 1419 (Aug. 3, 1994) (quoting then President Clinton as “welcom[ing] the support of the Congress to invade Haiti but stating that “I like my predecessors of both parties, I have not agreed that I was constitutionally mandated to get it”); James A. Baker III & Warren Christopher, Op. Ed., *Put War Powers Back Where They Belong*, N.Y. Times, July 8, 2008, at A21 (“Every president since Richard Nixon has treated the War Powers Resolution as unconstitutional”); The Constitution Project, *Deciding to Use Force Abroad: War Powers in a System of Checks and Balances*, at viii (2005), http://www.constitutionproject.org/pdf/War_Powers_Deciding_To_Use_Force_Abroad.pdf (“Since the passage of the War Powers Resolution, presidents have consistently maintained that parts of the Resolution intrude unconstitutionally on the President's war powers.”). Senior members of Congress have at times explicitly agreed with this proposition. See, e.g., 144 Cong. Rec. H11,722 (daily ed. Dec.

17, 1998) (statement of Rep. Gingrich) (seeing no need for President Clinton to obtain advance authorization from Congress before launching military strikes against Iraq); 141 Cong. Rec. S17,529 (daily ed. Nov. 27, 1995) (statement of Sen. Dole) (“Now, in my view the President has the authority and the power under the Constitution to do what he feels should be done regardless of what Congress does.).

- 107 See Andrew Rudalevige, *The Contemporary Presidency: The Decline and Resurgence and Decline (and Resurgence?) of Congress: Charting a New Imperial Presidency*, 36 *Presidential Stud. Q.* 506, 510 (2006) (noting uses of force without congressional authorization in Lebanon, Iran, Grenada, Libya, Panama, Somalia, Iraq, Haiti, Bosnia, Sudan, Afghanistan, and Kosovo).
- 108 The broader historical practice of seeking congressional approval is hard to assess, and would depend largely on one's definition of “war.” The United States has “utilized military abroad in situations of military conflict to protect U.S. citizens or promote U.S. interests hundreds of times. Richard F. Grimmet, Cong. Research Serv., *Instances of Use of United States Armed Forces Abroad, 1798–2008*, at 1 (2009), available at <http://www.fas.org/sgp/crs/natsec/RL32170.pdf>. The U.S. has formally declared war on five occasions, including the War of 1812, the Mexican American War, the Spanish American War, World War I, and World War II. See John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 *Cal. L. Rev.* 167, 177 (1996). Congress has specifically authorized war (without a formal declaration) in other cases, including the naval war with France in the 1790s, the Barbary wars of the early 19th century, the Vietnam War, the Persian Gulf Wars of 1991 and 2003, and the War on Terror. See *id.* (asserting that the war with France, the Vietnam War, and the Persian Gulf War of 1991 were each authorized by Congress without a formal declaration); Bradley & Goldsmith, *supra* note 15, at 2050, 2074, 2076 (2005) (speaking to the 2003 war in the Persian Gulf, the War on Terror, and the Barbary wars). Lack of an advance congressional authorization vote has not prevented U.S. presidents from using military force abroad, however, most notably in the Korean War, the invasions of Grenada and Panama, and the Kosovo War. See *supra* note 107 and accompanying text.
- 109 See 148 Cong. Rec. H7799 (daily ed. Oct. 10, 2002) (listing a vote in the House of 296 to 133 to authorize military action in Iraq, with bipartisan support); 148 Cong. Rec. S10342 (daily ed. Oct. 10 2002) (listing a vote in the Senate of seventy seven to twenty three to authorize military action in Iraq, with bipartisan support); 147 Cong. Rec. S9421 (daily ed. Sept. 14, 2001) (listing a vote in the U.S. Senate of ninety eight to zero for the AUMF); 147 Cong. Rec. H5683 (daily ed. Sept. 14, 2001) (listing a vote in the House of 420 to one for the AUMF).
- 110 See U.S. Const. art I, § 8, cl. 11; cf. Glennon, *supra* note 101, at 72 (asserting that the President's war powers are “paltry and “subordinate to the constitutional war powers granted to Congress).
- 111 The War Powers Resolution ironically may give the President more power to initiate war unilaterally than some believe is granted by the Constitution. Whereas the Constitution grants Congress the power to “declare war,” which some argue means congressional authorization is required before military operations other than those undertaken in self defense, the War Powers Resolution requires affirmative congressional authorization for a war only if the conflict lasts more than sixty days—a time period which can be extended by Congress. See U.S. Const. art. I § 8, cl. 11; War Powers Resolution, 50 U.S.C. § 1544(b) (2000). This is not the forum in which to address how a court should necessarily rule on war powers questions, or even whether such questions are justiciable. Courts could conceivably address such questions in a number of ways, including: (1) deciding the issue to be a non justiciable political question; (2) requiring explicit congressional authorization before the President can initiate war; (3) allowing the President to initiate war unilaterally, unless Congress has explicitly voted otherwise; (4) allowing the President to initiate war unilaterally, even in the face of an explicit negative congressional vote; and (5) treating the congressional appropriations process as the sole mechanism by which Congress can itself police the President and halt or prevent undesired wars. See *Campbell v. Clinton*, 203 F.3d 19, 20, 23 (D.C. Cir. 2000) for an example of a court grappling with a war powers issue.
- 112 See, e.g., John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs After 9/11*, at 143 (2005); see also U.S. Const. art. I, § 9, cl. 7 (giving Congress the power to appropriate funds); *id.* art I, § 8 cls. 11–14 (providing further congressional powers over war related functions).
- 113 U.S. Const. art. I, § 7, cl. 2.
- 114 *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (internal quotations omitted).

- 115 See U.S. Const. art. I, § 8, cls. 11 12.
- 116 U.S. Const. art. I, § 8, cl. 18.
- 117 343 U.S. 579, 634 (1952) (Jackson, J., concurring).
- 118 *Id.* at 635.
- 119 *Id.* at 637.
- 120 *Id.* at 637 38.
- 121 *Id.* at 637.
- 122 Cf. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb Framing the Problem, Doctrine, and Original Understanding*, 121 Harv. L. Rev. 689, 720 21 (2008) (stating that Category Three disputes are “central to the modern law of war powers”).
- 123 Jack Goldsmith, *The Terror Presidency: Law and Judgment inside the Bush Administration* 124 (2007).
- 124 But see *In re Sealed Case*, 310 F.3d 717, 746 (FISA Ct. Rev. 2002).
- 125 See, e.g., *Boumediene v. Bush*, 128 S.Ct. 2229, 2259 (2008); *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 2762 (2006), superseded by statute, Military Commissions Act of 2006, Pub. L. No. 109 366, 120 Stat. 2600, as recognized in *Boumediene v. Bush*, 128 S.Ct. 2229 (2008); *Hamdi v. Rumsfeld*, 542 U.S. 507, 535 (2004); *Rasul v. Bush*, 542 U.S. 466, 485 (2004), superseded by statute, Detainee Treatment Act of 2005, Pub. L. No. 109 148, 119 Stat. 2739.
- 126 Pub. L. No. 107 40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (Supp. I 2001)).
- 127 18 U.S.C. § 4001(a) (2006).
- 128 10 U.S.C. §§ 801 946 (2006).
- 129 Pub. L. No. 95 511, 92 Stat. 1783 (codified as amended in scattered sections of 50 U.S.C.).
- 130 *Hamdi*, 542 U.S. at 517. Justice Souter dissented as to this broad reading. *Id.* at 547 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).
- 131 See *Hamdan*, 126 S.Ct. at 2775. Justice Thomas would have read the Authorization more broadly. See *id.* at 2775 n.24.
- 132 See *Hamdan*, 126 S.Ct. at 2824 25 (Thomas, J., dissenting).
- 133 See, e.g., *Kimbrough v. United States*, 128 S.Ct. 558, 561 (2007) (“The statute says nothing about appropriate sentences within these brackets, and this Court declines to read any implicit directive into the congressional silence.”).
- 134 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 86 (1952).
- 135 *Youngstown*, 343 U.S. at 587 (asserting that the President’s Commander in Chief authority “need not concern us here. Even though ‘theater of war’ be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power ... to keep labor disputes from stopping production.”); *id.* at 644 (Jackson, J., concurring) (“That military powers of the Commander in Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history.”).
- 136 See Bradley Patterson, *The White House Staff: Inside the West Wing and Beyond* 204 18 (2000).
- 137 See Carroll Kilpatrick, *Nixon Resigns*, Wash. Post, Aug. 9, 1974, at A1.
- 138 See David Johnston, *Reagan Nears Center Stage of Iran Contra Affair*, N.Y. Times, Feb. 7, 1990, at A20.
- 139 See Linda Greenhouse, *Bork’s Nomination is Rejected, Reagan ‘Saddened*, N.Y. Times, Oct. 24, 1987, at A1.

- 140 See James Bennet & John M. Broder, Clinton Acquitted Decisively: No Majority for Either Charge, N.Y. Times, Feb. 13, 1999, at A1.
- 141 See Susan Saulny, Some Hitherto Staunch G.O.P. Voters Souring on Iraq, N.Y. Times, May 30, 2007, at A17. On the other hand, President Bush has argued that history will look more favorably on the results of the Iraq War and particularly the “surge” he ordered late in his second term. See Kate Zernike, Bush's Legacy vs. the 2008 Election, N.Y. Times, Jan. 14, 2008, at A4.
- 142 See Hope Yen, FEMA Wasting Millions in Katrina Aid, Audit Finds, Wash. Post, Dec. 7, 2006, at A12.
- 143 See Bruce G. Peabody & Scott E. Gant, The Twice and Future President: Constitutional Interstices and the Twenty Second Amendment, 83 Minn. L. Rev. 565, 601-10 (1999) (describing calls for the repeal of the Twenty Second Amendment dating from the 1950s).
- 144 See Lawrence L. Schack, Note, A Reconsideration of the Single Six Year Presidential Term in Light of Contemporary Election Trends, 12 J.L. & Pol. 749, 749 (1996).
- 145 See Shlomo Slonim, The Electoral College at Philadelphia: The Evolution of an Ad Hoc Congress for the Selection of a President, 73 J. Am. Hist. 35, 38 (1986).
- 146 U.S. Const. amend. XXII.
- 147 Cf. One Six Year Presidential Term: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary, 93d Cong. 4-5 (1973) (testimony of Theodore C. Sorensen, former Special Counsel to President Kennedy); Schack, *supra* note 144, at 772 (“The evidence suggests that electoral concerns increasingly contribute to an already overburdened Chief Executive....”). But see Arthur Schlesinger Jr., Against a One Term, Six Year President, N.Y. Times, Jan. 10, 1986, at A27.
- 148 See Patterson, *supra* note 136, at 204-18.
- 149 The Federalist No. 71, at 400 (Alexander Hamilton) (Clinton Rossiter ed., 1999).
- 150 U.S. Const. amend. XXII, § 1.
- 151 The Federalist No. 52, at 295 (James Madison) (Clinton Rossiter ed., 1999).
- 152 See U.S. Const. amends. XII, XX, XXII, and XXV. For a discussion of the relationship between these and other structural provisions in the Constitution, see Diane P. Wood, Our 18th Century Constitution in the 21st Century World, 80 N.Y.U. L. Rev. 1079, 1082-83 (2005).
- 153 Any such proposal should of course take effect after the then current President has had an opportunity to serve two terms.

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To Us, Starr Is an American Hero

Robert J. Bittman; Brett M. Kavanaugh; Solomon J. Wisenberg

Richard Cohen's Oct. 26 op-ed broadside, "So Long, Ken Starr," grossly mischaracterizes Ken Starr and his investigation. Cohen ridicules the Lewinsky case, but he ignores the following facts: Starr uncovered a massive effort by the president to lie under oath and obstruct justice. The House impeached the president. Fifty senators voted to remove the president. Thirty-two other senators who voted to retain the president nonetheless signed a resolution that condemned Bill Clinton for giving "false or misleading testimony" and "impeding discovery of evidence in judicial proceedings" and concluded that he had "violated the trust of the American people." Judge Susan Webber Wright held the president in contempt because he intentionally provided "false, misleading and evasive answers" and "undermined the integrity of the judicial system." Those conclusions fully vindicate Starr's findings and make Cohen's diatribes against the case ("woe is me, the Republic is in peril") look juvenile.

Cohen contends that certain information in Starr's referral to Congress should not have been made public and that Starr threw "everything out on the lawn for all the neighbors to see." But Starr submitted the report to Congress under seal. It was a bipartisan Congress that publicly released the report without even reviewing it beforehand. Cohen argues that Starr "trapped" the president. Not so. The president "trapped" himself. Clinton knew long before his civil deposition (because Wright repeatedly so ruled) that his other sexual encounters with subordinate employees were relevant to Paula Jones's sexual harassment case. Yet the president decided to roll the dice and lie under oath and obstruct justice. Starr did not cause this; Clinton did. Nor did Starr cause the president later to lie to the grand jury, to parse the meaning of the words "is" and "sex" and on and on. Clinton did all of this with premeditation and on his own. The word that ordinarily describes such behavior is not "trapped" but "guilty." Cohen complains that Starr began by investigating Whitewater and "wound up" investigating the Lewinsky matter. But Janet Reno, not Starr, gave the independent counsel jurisdiction over new matters. Cohen also notes--ominously--that Starr is a Republican. Special prosecutors traditionally have been respected lawyers of the opposite party. Archibald Cox investigated President Richard Nixon. Former senator John C. Danforth is investigating Janet Reno. The reason is simple: A decision not to indict in a politically charged case is more credible if made by a prosecutor of the opposite party. And a conviction requires that 12 citizen jurors vote for conviction, the procedural check on the "aggressive" prosecutor. As important as what Cohen says is what he does not say. Cohen does not mention Starr's successful investigation of Madison Guaranty Savings and Loan. Starr obtained convictions of Jim and Susan McDougal, of Gov. Jim Guy Tucker (the first conviction this century of a sitting governor) and of former associate attorney general Webster Hubbell. And Cohen ignores Starr's investigation of the Clintons' involvement in Madison and Whitewater and his investigations of the Vince Foster, travel office and FBI files issues. Why? Starr brought no criminal indictments and submitted no impeachment referrals in those matters. Starr recognized more than anyone that criminal prosecution (or an impeachment referral, in the case of the president) is not a political game--that a prosecutor should not invoke those processes unless the evidence is strong, almost overwhelming. Cohen also

skips past Starr's remarkable legal record. Starr won nearly every dispute: executive privilege, Secret Service privilege, government attorney-client privilege, jurisdictional issues, the list goes on. Contrary to Cohen's table-thumping, the record establishes that Starr was a thorough, fair, ethical and successful prosecutor. His record is one of extraordinary accomplishment and integrity. And to us, Starr is an American hero. Over time, fair-minded people will come to hail Starr's enormous contributions to the country and see the presidentially approved smear campaign against him for what it was: a disgraceful effort to undermine the rule of law, an episode that will forever stand, together with the underlying legal and moral transgressions to which it was connected, as a dark chapter in American presidential history. The writers served as attorneys in the office of independent counsel Kenneth W. Starr.

---- **Index References** ----

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Are Hawaiians Indians? The Justice Department Thinks So

The Wall Street Journal

September 27, 1999 Monday

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Byline: By Brett M. Kavanaugh

Body

The Aloha state has two classes of citizens: there are Hawaiians and then there are real Hawaiians.

At least that's the message of the state Office of Hawaiian Affairs, which doles out money to certain citizens solely because of their race -- in this case, only to Hawaiians of Polynesian origin ("native Hawaiians," for short). By law, OHA officers must be native Hawaiians and only native Hawaiians can vote in the statewide elections for officers. Hawaiians of all other ethnic backgrounds (whether Latino or African-American or Caucasian, for example) are barred because of their race from receiving OHA funds, voting in OHA elections, or serving as OHA officers.

Sound blatantly unconstitutional? It did to Harold Rice, who was born and bred in Hawaii, but is not of the preferred race (he is white). Rice brought a case against the state contesting this racial scheme, in particular, the state's racial voting qualification.

Mr. Rice's case has now reached the Supreme Court, which is scheduled to hear arguments on Oct. 6. Rice v. Cayetano has implications far beyond the 50th state. Hawaii's naked racial-spoils system, after all, makes remedial set-asides and hiring and admissions preferences look almost trivial by comparison. And if Hawaii is permitted to offer these extraordinary privileges to residents on the basis of race or ethnic heritage, so will every other state.

The Clinton Justice Department nonetheless has filed a brief contending that one's race (at least, if you're a native Hawaiian) can be the sole basis for voting in a state election, serving in a state office, and receiving awards of state money. As a matter of sheer political calculation, of course, the explanation for Justice's position seems evident. Hawaii is a strongly Democratic state, and the politically correct position there is to support the state's system of racial separatism. But the Justice Department and its Solicitor General are supposed to put law and principle above politics and expediency. And the simple constitutional question posed by Rice is whether Hawaii, by denying citizens the right to vote in a state election on account of race, has violated the 14th and 15th Amendments, which prohibit states from denying individuals the right to vote on account of race.

No doubt recognizing that Hawaii's racial spoils system, including its racial voting qualification, is constitutionally indefensible, the Justice Department has charted a novel legal course. Justice contends that native Hawaiians are

Are Hawaiians Indians? The Justice Department Thinks So

the equivalent of an American Indian tribe because Hawaiians are descendants of an "indigenous people" just like American Indians. Therefore, Justice argues, Hawaii's racial scheme is equivalent to constitutionally permissible legislation that singles out Indian tribes and tribal members for special benefits.

But the Justice Department's argument is seriously flawed both as a legal and historical matter. The Constitution expressly established special rules for Indian tribes because the Founders considered Indian tribes to be separate sovereigns. To convert this express recognition of Indian tribal sovereignty into a sweeping license for favorable race-based treatment of the descendants of indigenous people is to allow political correctness to trump the Constitution. A group of people must, in fact, constitute an Indian tribe in order to qualify for the special treatment afforded tribes under the Constitution. The Department of Interior has established strict criteria governing recognition of Indian tribes. Those regulations specify that federal recognition as a tribe is a "prerequisite to the protection, services and benefits of the Federal government available to Indian tribes."

But neither the Congress nor the Department of Interior has recognized native Hawaiians as an Indian tribe. What's more, Hawaiians have never even applied for recognition as an Indian tribe. The reason is obvious. Native Hawaiians couldn't possibly qualify. They don't have their own government. They don't have their own system of laws. They don't have their own elected leaders. They don't live on reservations or in territorial enclaves. They don't even live together in Hawaii. Native Hawaiians are dispersed throughout the state of Hawaii and the United States. In short, native Hawaiians bear none of the indicia necessary to qualify as an Indian tribe.

If Hawaii can enact special legislation for native Hawaiians by analogizing them to Indian tribes, why can't a state do the same for African-Americans? Or for Croatian-Americans? Or for Irish-Americans? After all, Hawaiians originally came from Polynesia, yet the department calls them "indigenous," so why not the same for groups from Africa or Europe? It essentially means that any racial group with creative reasoning can qualify as an Indian tribe. The Justice Department's theory of tribal status thus threatens to end-run the constitutional restrictions on racial classifications that the Supreme Court has reinforced in the last decade.

And that's not all. By claiming that native Hawaiians deserve special privileges because their ancestors lived in Hawaii, the Justice Department's position is also fiercely anti-immigrant, flouting the principle that all American citizens have equal rights regardless of when they became citizens.

At his 1858 Fourth of July address, President Lincoln emphasized that all citizens, whether descended from signers of the Declaration of Independence or new arrivals, were the same in the eyes of the law. As to the new arrivals, he said, "when they look through that old Declaration they find, 'We hold these truths to be self-evident, that all men are created equal,' and then they feel that that moral sentiment evidences their relation to those men, and that they have a right to claim it as though they were blood of the blood, and flesh of the flesh, of the men who wrote that Declaration, and so they are." But now the Justice Department has turned its back on that bedrock American ideal by arguing that some Hawaiians can't vote in certain state elections solely because their ancestors didn't live in Hawaii.

Rice v. Cayetano, then, is of great moment. The Supreme Court ought not be fooled by the Justice Department's simplistic and far-reaching effort to convert an ethnic group into an Indian tribe. Rather, the Court should rule for Harold Rice and adhere to the fundamental constitutional principle most clearly articulated by Justice Antonin Scalia: "Under our Constitution there can be no such thing as either a creditor or a debtor race In the eyes of government, we are just one race here. It is American."

Mr. Kavanaugh is an attorney in Washington and together with Robert H. Bork filed an amicus brief in Rice v. Cayetano supporting Harold Rice.

(See related letter: "Letters to the Editor: Righting the Wrongs Perpetrated in Hawaii" -- WSJ Oct. 18, 1999)

Notes

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Indictment of an Ex-President?

The Washington Post

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Section: OP-ED; Pg. A12; LETTERS TO THE EDITOR

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Body

The Post's Aug. 20 editorial "Mr. Starr's Endgame" does not give sufficient attention to two issues critical to a fair evaluation of Kenneth Starr's "endgame."

First, the editorial contends that Judge Starr should simply announce a decision not to criminally prosecute the president. That suggestion rests on a faulty premise. During the impeachment ordeal, the president's congressional supporters and foes agreed -- consistent with the Constitution, which appears to preclude indictment of a sitting president -- that the government should consider indicting Bill Clinton after he leaves office. Since then, U.S. District Judge Susan Webber Wright has found that Mr. Clinton's testimony under oath was "intentionally false," that he provided "false, misleading and evasive answers that were designed to obstruct the judicial process" and that he "undermined the integrity of the judicial system."

Given that background, the next president (and his or her attorney general or special prosecutor) will have to decide in 2001 whether to seek an indictment of Bill Clinton, decline prosecution or pardon him. Contrary to the editorial's suggestion, it would be irresponsible for Judge Starr to reach out now to purport to make that choice and thereby prejudice the next president's decision. At a minimum, the editorial's cavalier treatment of this question belies the importance of the constitutional and policy issues at stake.

Second, the editorial overlooks the Justice Department's role in Judge Starr's "endgame." Only a few months ago, the department was quite eager to dump on the independent counsel statute and trumpet its own ability to handle sensitive matters. But the department now seems scared of its shadow in actually managing its responsibilities in the post-independent-counsel-statute world. In particular, the department reportedly has balked at Judge Starr's effort to refer certain matters back to the department -- even though the law expressly authorizes him to do so. The Post should focus its criticism on the Justice Department, not on Judge Starr, for this apparent obstacle to closure of his investigation.

The Post should grant Judge Starr the credit and leeway he deserves as he brings his stewardship of his "unusually productive" investigation (to use the words of the court that oversees him) to a constitutionally proper end.

ROBERT J. BITTMAN

BRETT M. KAVANAUGH

Washington

The writers are attorneys who formerly served in the Office of Independent Counsel.

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Indictment of an Ex-President?

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Starr Report

The New York Times

August 1, 1999, Sunday, Late Edition - Final

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Body

To the Editor:

Michael Lind's review of Bob Woodward's "Shadow" (July 11) provided an inaccurate description of what Lind referred to as my "perspective" on Ken Starr and his investigation. In fact, my "perspective" on Starr (for whom I have worked in the Justice Department, in the office of the independent counsel and in private practice) and his investigation is as follows:

Ken Starr has conducted thorough and fair investigations of the Whitewater/Madison, Foster, travel office, F.B.I. files and Lewinsky matters; exercised discretion where appropriate and firmness where necessary; obtained important convictions of the high-ranking government officials Jim Guy Tucker and Webster Hubbell and the S & L operators Jim and Susan McDougal; refused to bow to public pressure in 1995 and 1996 to indict individuals whom the Congress and the news media had thrown to the wolves (Susan Thomases and Hillary Rodham Clinton, for example); won legal battles in court time and again; produced factually accurate reports on the Foster and Lewinsky matters; testified brilliantly for over 12 hours before the House Judiciary Committee; and displayed honor and determination in the face of relentless political attacks. His record is one of extraordinary accomplishment and integrity.

Brett M. Kavanaugh

Washington

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We All Supported Kenneth Starr

The Washington Post

July 1, 1999, Thursday, Saturday, Final Edition

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Section: OP-ED; Pg. A28; LETTERS TO THE EDITOR

Length: 443 words

Body

The material in the June 15 front-page story of excerpts from Bob Woodward's new book left the wrong impression about Ken Starr and his investigation. I barely recognized the man for whom I have worked for many years in the Department of Justice, in the office of the independent counsel and in private practice.

The rather mundane point on which Mr. Woodward focused is that various people in the office of the independent counsel had different views on structural issues related to the impeachment referral. But that only means Judge Starr assembled an office that encouraged -- indeed, required -- vigorous debate. On this critical issue there should be no confusion: Every attorney and investigator in the office strongly supported Judge Starr's decision to send an impeachment referral.

I note three specific points:

First, the article indicated that Judge Starr was somehow gleeful that the president's grand jury testimony had made details of the president's relationship with Monica Lewinsky relevant to the case. That is wrong. The entire office -- most particularly Judge Starr -- was extraordinarily concerned about how to handle those details and at the same time provide Congress with all relevant information. The office believed that Congress would review the materials before making a judgment as to what to release publicly and what to maintain in its evidence room. No one in the office, and certainly not Judge Starr, envisioned that Congress would release truckloads of sensitive personal information onto the Internet without even reviewing the information beforehand.

Second, the article reported that I stated in an office meeting that the office should send evidence to the House without an accompanying report. I never stated or held that position.

Third, the article wrongly described a memo I wrote about the Julie Hiatt Steele case. Without my discussing inappropriate specifics, that memo pointed out that the Steele case might be criticized by others as part of the barrage of criticism of the independent counsel statute. The memo thus suggested that referring the case back to the Justice Department might blunt the defense tactic of bashing Ken Starr and the independent counsel statute. The memo was not a "moral-objection" memo.

Contrary to the impression left by Bob Woodward's article, the truth is that Judge Starr has consistently performed with the highest skill and integrity, and those of us who have worked for him respect him greatly and feel sick about the abuse he has suffered.

BRETT M. KAVANAUGH

Washington

The writer is a lawyer formerly in the office of the independent counsel.

We All Supported Kenneth Starr

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What a Difference a Year Makes

Experts draw lessons, for our politics and our culture, from the impeachment and acquittal of William Jefferson Clinton.

The American Spectator

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Section: Feature

Length: 6387 words

Body

Lamar Alexander

In Paris this past December I visited with the president of the French senate. He asked me why President Clinton in such circumstances received such high poll ratings. I said, "I don't know." He said he thought he did. He reminded me that Napoleon's foreign minister Talleyrand once had said, "What becomes excessive becomes irrelevant."

This quote, I believe, captures the short-term lesson of the Clinton scandal. Finding out about Mr. Clinton's conduct was, for most Americans, like waking up one morning and discovering a drive-in movie screen had been erected overnight in your front yard, and on this screen was playing an XXX- rated movie starring the president of the United States! There you are, fixing breakfast, trying to get the kids off to school, and there is this XXX- rated movie in your yard. Your first reaction is shock. Your next, outrage. But the movie screen and the movie are still there that evening. They're there the next morning. They won't go away. So what can you do? You do your best to throw a sheet over the screen--or several sheets. That doesn't work. So you go about your business and do your best to ignore it, hoping the outrageous event and all those reporting on it will somehow, someday disappear, but knowing that in the meantime you can't do anything about it. In other words, the whole affair becomes so excessive it becomes irrelevant to your everyday life--which is not the same as saying you approve of it or that you do not have your opinion about it. You know exactly what you think. But it has become more than you can deal with. You don't want to hear one more thing about it. You don't want to talk about it.

Which, if I am right, brings me to the long-term lesson. Sooner or later the American people will render a harsh judgment on Mr. Clinton's lack of respect for our presidency. In the long run, their message to public officials will be this: Respect the office. It is ours, not yours.

Lamar Alexander has served as governor of Tennessee and secretary of education.

Bob Barr

The trial procedures adopted by the Senate in the impeachment trial of William Jefferson Clinton promise to be one of the greatest constitutional aftershocks of the recently completed impeachment process. In setting rules effectively guaranteeing an acquittal, the Senate fundamentally altered our system of checks and balances, radically strengthening the position of the executive branch, and necessarily weakening the legislative.

In the days preceding the impeachment trial, senators were quick to publicly refer to themselves as "impartial jurors." They were attracted by the juror's role of impartially deciding guilt or innocence without commenting on the case in advance. Plus, it gave them a chance to toss out huge quantities of appropriately senatorial rhetoric, stressing their weighty constitutional responsibility.

What a Difference a Year Makes
Experts draw lessons, for our politics and our culture, from the impeachment and acquittal of William Jefferson Clinton.

As the trial commenced, however, a light went off in the heads of senators such as Fritz Hollings, Max Cleland, and Robert Byrd who, days before, were eagerly referring to themselves as jurors in correspondence and interviews. In a moment of collective epiphany came the terrifying realization that jurors are actually expected to render a verdict based solely on facts and law; which left one vexing problem facing these "impartial" senators: Based on the law and the evidence, the president was... guilty. Uh-oh. What to do now?

Suddenly, like a magic portal in a B science-fiction movie, an exit appeared. The Senate sitting in an impeachment trial is unlike other juries in one important aspect--it gets to make and reinterpret its own rules as it goes along.

The new exit strategy became jury nullification with an added twist. Instead of nullifying the law by refusing to enforce it, this particular "jury" simply nullified itself. As Sen. Arlen Specter observed, it adopted procedures rendering the case for removal "unprovable."

First, the senators refused the House managers a chance to rebut the president's case, despite the fact such an opportunity would be accorded the moving party in any American courtroom. Then they precluded the possibility of hearing from even a single live witness. Finally, in a stunning coup de grace, they finished off the House case by drastically limiting the number of videotaped witnesses to a pitiful three, to be videotaped in the final stages of the "trial," when the witnesses knew they would be forever off the hook once the short, limited nuisance of the videotaped interview ended.

These procedures have now been written into the rulebook of precedent and will be dusted off and used, as great and learned precedent, in future impeachment trials. Under these rules, it will be virtually impossible to even obtain a fair trial of future impeachments. Thus the impeachment provision in our Constitution, at least insofar as it concerns executive branch officers, has emerged from this trial a pale shadow of its former, intended self.

Just as the Simpson trial taught America that one can get away with murder with a sufficient supply of cash and chutzpah, the legacy of the Clinton impeachment will be a message to future presidents that they can get away with practically anything so long as they are not burdened with a measurable supply of shame, and are willing, at most, to weather the inconvenience of a House impeachment that will surely be gutted by a toothless Senate "trial." It is even more likely--and more unfortunate--that future Houses will look at possible impeachments and not even bother with them in the first place, knowing a Senate "trial" will never be a trial again.

Bob Barr, a House manager in the Clinton impeachment trial and a former U.S. attorney, serves on the House Judiciary Committee.

Gary L. Bauer

Despite the Senate's acquittal of Bill Clinton, the House's first-ever impeachment vote against an elected American president is the sort of event that will have an impact over many years, as well as affect the national debate in the period ahead.

The House of Representatives deserves enormous credit for its act of courage in December 1998, in the face of negative polls and widespread misunderstanding. Most senators clearly did not want the kind of trial that offered a serious chance of conviction. While I disagree with the severe limits regarding witnesses, the Senate made the right decision in proceeding to an up-or-down vote on the president's guilt, rather than allowing themselves the illusory middle-ground of censure or "finding of fact."

I believe the debate of the past few months is but one episode, however frustrating, in a long struggle over who we are and what we believe. Does the president's acquittal, and the widespread public sentiment _n favor of acquittal, mean that Americans no longer want our nation to stand for reliable standards of right and wrong?

I am certain they want such standards as much as ever. I also think it likely that the phenomenon of the Clinton presidency, when fully digested, will make their desire for such standards much greater than before.

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As for the Republican Party, the big question is whether we can put together a persuasive governing vision for 2000. I am certain we can, if we concentrate on what we believe, and what most needs to happen to make those beliefs prevail.

Our example in this challenge should be Henry Hyde, James Rogan, and the rest of the House impeachment managers. These 13 fought to keep alive the core American value of equality under the law, without regard to their own futures. A healthy Republican Party will proudly celebrate these men, and stand with them in the battles that lie ahead.

Gary L. Bauer, former president of the Family Research Council and chairman of the Campaign for Working Families, is a Republican presidential contender.

Terry Eastland

Events of the past year showed just how bad the independent counsel law is. Section 595(c) requires a counsel to advise the House on impeachment, and Ken Starr dutifully carried out this task, sending up his report in September. It was only afterwards that the House began to act. It could have opened an impeachment inquiry earlier in the year, but instead it accepted the law's invitation to shirk its constitutional responsibility and waited for Starr-- the first counsel ever to invoke 595(c)--to finish the job. The House publicly released the report almost as soon as it arrived, as though that would influence public opinion. It eventually conducted an inquiry, but there were no witnesses called. As we know, the House impeached, but it did not send the Senate as compelling a case as it might have. The lesson learned is that the independent counsel law can encourage impeachment even as it works against conviction and removal.

Impeachment encompasses both political and legal judgments. A prosecutor's concern is, or at least should be, only the latter. A law that requires a prosecutor to decide what may constitute an impeachable offense is a very bad idea, if not formally unconstitutional. If Congress does not reauthorize the independent counsel law, there is no guarantee it will reclaim its impeachment power. But at least the members will no longer have the excuse that there is an independent counsel out there, doing our work.

The year also taught a political lesson: that a president determined to do "whatever it takes" can defeat a prosecutor and a Congress controlled by the opposite party. Here then is a question: If some future president is criminally investigated, whether by a court-appointed or Justice-appointed counsel, or even the Justice Department itself, will that president follow the Clinton precedent? That is, will he deny, lie, delay, stonewall, leak, litigate, accuse, and so on and so forth? Or will this president feel the modicum of shame that Clinton did not?

Terry Eastland is publisher of The American Spectator. His books include Ethics, Politics and the Independent Counsel (1989).

Tim W. Ferguson

For most Americans, there's a proportionality test to lying. If the lies (and obstruction) don't concern matters integral to the operation of the government, they'll tolerate them. Clinton critics continue to maintain that such abuses of power in fact are rampant in this White House, but they could not (or at least did not) bring proof to the bar of justice. So most people understandably concluded it was essentially lying about sex. Moral: You better have the cards in your hand to win--table stakes gets expensive.

Tim W. Ferguson is the West Coast bureau chief of Forbes.

David Horowitz

What this year of the failed Clinton impeachment trial tells us about American politics is that Democrats are better at it than Republicans. Much better. Democrats understand that, in political war, paranoid projections prevail and the aggressor usually wins. (Call them "partisan" first, before they can pin the label on you, where it belongs. Ditto

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"sexual McCarthyism.") What it tells us about the culture is that Americans are not Paul Weyrich/Dan Quayle/Jerry Falwell/Gary Bauer conservatives. Privately they find Bill Clinton's behavior reprehensible. Publicly--and especially when it comes to making government the arbiter of morals--they are very tolerant, even libertarian. The Clinton defense was successful because it was built on the following conservative/libertarian principles: 1. Defense of "privacy" (yes, I know, I know, but that's what the American people bought); and 2. Suspicion of open-ended prosecutions by the state. I see no cause to be discouraged on either count. The culture is sound. The problem is Republican political strategy: It's lame.

David Horowitz is the author of *Radical Son*, president of the Center for the Study of Popular Culture, and a columnist for Salon.

Paul Johnson

The impeachment of President Clinton has served a long-term useful purpose: It has reminded everyone, including future presidents, that the United States is a republic under the rule of law and everyone in it, including the holder of the highest office, is subject to the law and answerable to it by due process. The principle of equality before the law is absolutely central to good democratic government--in some ways it is more important than one-man- one-vote--and anything which demonstrates that it works in practice and not just in theory is salutary.

However, this is where the weakness in the impeachment process lay, and is the real reason why most of the public were not behind it. President Clinton was not equal before the law. In one key respect he was less equal than his fellow citizens. The law creating a special prosecutor, charged with investigating and indicting members of the administration, including the president, was an iniquitous piece of legislation which goes directly against the principle of equality before the law. It was passed by a Democratic Congress anxious to destroy President Nixon at almost any cost. It did help to destroy him, and it was then in turn exploited by the Republicans in an attempt to destroy President Clinton. I think the public senses that the special prosecutorial system, which gives a Grand Inquisitor unlimited funds to use every legal device to corner an administration official, whose own resources may be limited or non-existent, and so force him into plea- bargaining or even to pleading guilty to imaginary crimes, is fundamentally unfair and unjust. That produced a lot of sympathy for Mr. Clinton, as did the decision to make his sexual weakness the area of investigation, as opposed to the far more serious charge of obtaining electoral finance from Communist China in return for "bending" American foreign policy in Peking's interests.

The most important immediate lesson, therefore, is that Congress should at the earliest possible date abolish the office of special prosecutor and repeal the law creating it. The president must indeed be subject to the law-- that has been usefully shown by the impeachment--but the law must not be stacked against him. Now we must all hope Mr. Clinton keeps his nose clean for the rest of his term and that his successors tread more warily.

Paul Johnson is most recently the author of *A History of the American People* (HarperCollins).

John B. Judis

I came out of the new left rather than the Democratic Party, and prided myself on being able to view the follies of the two major parties dispassionately, but the Republican Party's conduct since November 1994 has turned me into a Democrat and, most recently, a raving Clintonite. Stan Evans used to say that he didn't support Nixon until Watergate. I didn't support Clinton until *The American Spectator*, Ken Starr, and Republicans began fussing over whether, when, and with whom he had sex. The impeachment trial itself stemmed from the exhaustion of Republican policies. Since the Great Depression, the Republican Party has always faced the problem of being branded the party of business and the wealthy. Nelson Rockefeller and Ronald Reagan were each in his way able to give a larger identity, but the Gingrich- DeLay Republicans--by attempting to yoke the party to the religious right and K Street with a single harness--alienated even many wealthy voters. After their colossal failure in 1995 to shut down the EPA and cut Medicare, the Republicans threw all their energies into trying to undermine their opposition through investigations. As a strategy, it recalled the Republicans of 1950 who, after having won Congress in '46 and lost it in '48, attempted to tar the Democrats as the party of Communism. But in the early 50's, there was at least objective crisis in the world to sustain the phony crisis in Washington that McCarthy and the Republicans created.

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This time, the moral crisis the Republicans invoked was really the political crisis of the party. History's verdict on their performance will be harsh: The impeachment drive will be compared to the Salem witch trials as well as to the Army-McCarthy hearings. The Republicans will not be seen as the party of virtue, but in historian Sean Wilentz's words, as the party of "fools and fanatics."

John B. Judis is a senior editor of the New Republic.

Brett M. Kavanaugh

The most important policy question emerging from the Lewinsky saga is how to investigate a president accused of illegal conduct. As both the Lewinsky and Whitewater matters demonstrated yet again, the ironic legacy of Watergate--a scandal in which aggressive congressional inquiries helped uncover presidential crimes--is that we no longer count on Congress to lead an investigation into possible presidential wrongdoing. During the Clinton presidency, for example, the main witnesses regarding the president's possible misconduct--David Hale, Jim McDougal, Susan McDougal, Monica Lewinsky, and Betty Currie--never testified in public hearings held during Congress's Whitewater and Lewinsky inquiries.

The primary responsibility for investigating the president has migrated from Congress to a criminal prosecutor, the independent counsel. This transfer of investigative responsibility not only is constitutionally dubious, it is illogical. If we assume that a sitting president cannot or should not be criminally indicted, a criminal prosecution of a president could occur only after he left office. As a result, the fundamental question is not whether a president accused of illegalities should be criminally prosecuted, but whether he should continue to hold office. Because Congress is the entity constitutionally assigned to determine whether the president should remain in office, it follows that a congressional inquiry should take precedence over a criminal investigation of the president.

Indeed, if there is an allegation of presidential wrongdoing, a congressional inquiry coupled with the threat of perjury prosecutions afterwards also should take precedence over the criminal investigation of any presidential associates (except, perhaps, in violent crime cases)--even if the congressional inquiry would require immunity for those associates. It is more important for Congress to determine whether the president has committed impeachable offenses or otherwise acted in a manner inconsistent with the presidency than for any individual to be criminally prosecuted and sentenced to a few years in prison.

Brett M. Kavanaugh, a Washington attorney, formerly served as an associate counsel for Independent Counsel Kenneth W. Starr.

Michael Kazin

It may take a while for the self-absorbed and self-referential political class (which, of course, includes most political historians) to grasp the larger meaning of the impeachment follies. We do love recounting all those smarmy details--and hoping for fresh ones--and they can blind us to truths that millions of other Americans already comprehend, if inchoately. Two are worth mentioning, and neither will gladden steelier partisans of either right or left.

First, the "culture wars" are over. For a large number of citizens, they probably never really began; most have long resented anyone who persists in shouting, "Which side are you on?" While militant minorities battled over homosexual and abortion rights, growing numbers of people managed to live with the apparent contradictions--lunching with a gay co-worker but blanching at a Mapplethorpe print, or lecturing one's pregnant daughter about the sanctity of life before driving her down to Planned Parenthood.

Bill Clinton still lives in the White House because of this gap between the true believers and everyone else. He and his crew of lawyers and sycophants were able to portray Ken Starr and his congressional allies as hectoring moralists unwilling to recognize the difference between a lying adulterer and a criminal ruler. It wasn't too difficult: The most clever satirist could not have invented Bob Barr, who looks and sounds like a man who would prosecute his own child for uttering a four-letter word. But the left also has its quotient of prigs--and they continue to drag around an image of "political correctness" that hampers the work of more tolerant liberals.

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The second truth is that a president with no Cold War or serious hot war to wage doesn't matter the way his predecessors did. Once upon a time, conservatives reviled Franklin Roosevelt as a crypto-Commie because he recognized the Soviet Union, legitimized the power of the left-leaning CIO, and then embraced Joe Stalin as a wartime ally. Later, radicals and liberals despised Richard Nixon because he hounded Alger Hiss and slaughtered Vietnamese who stood in the way of achieving "peace with honor." But the abiding hatred of Bill Clinton is a far more personal kind of loathing, which the uninitiated can neither share nor really understand.

After all, the man was elected to accomplish the contemporary equivalent of making the trains run on time. Clinton was the first of a now sizable breed-- genial pols with resolutely centrist agendas who now govern most nations in the post-industrial West. He, like Blair and Jospin and Schroeder, campaigned on a promise to advance growth without sacrificing too much equity. Most Americans think he's done that--and no longer care whether the president is a symbol of strength and rectitude, the kind who can face down enemies abroad with a stern word and a massive arsenal at the ready. He's a governor writ large, a public servant rather than an elected monarch. In the end, helping to shrink the role of an office that had outstripped democratic proportions might be the best thing Bill Clinton ever did for his country.

Michael Kazin is currently a fellow at the Woodrow Wilson Center. His most recent book is *The Populist Persuasion: An American History* (revised edition, 1998).

Seth Lipsky

Although President Clinton has turned out to be a disappointment for Reagan Democrats, I have stuck to the opposition so many of us voiced, back during the Reagan years, to the concept of an independent prosecutor. I don't question Kenneth Starr's personal integrity or brilliance. I just feel the structure of the office he holds provides such incentives for mischief that it would take a saint to avoid the kinds of errors of judgment that he made in this case. The biggest was his decision as an inferior officer to target the president himself, a matter that I have felt should be left totally to Congress.

I also feel the Supreme Court itself blundered in permitting a civil litigant to proceed against a sitting president. The court said that it wasn't persuaded that Mrs. Jones's lawsuit would open the way to politically motivated and harassing litigation. Someday we are going to have a president whose constitutional prerogatives we will want to protect. It has seemed to me important to have protected these prerogatives even when a weak, disreputable figure was in the presidency.

I fully appreciate the irony of the Democrats--attackers of Judge Bork and Justice Thomas--pleading for an end to the politics of personal destruction. Indeed, during the confirmation hearings for Justice Thomas, the *Forward*, in an editorial called "Attaining Thomas," lamented "the way the process of attaining individuals has become almost de rigueur in the post-Watergate Congress." We said then that what was being done to Judge Thomas reminded us "of the fever that seized the legislature in the early 1950's and came to be called McCarthyism. Some day people are going to wake up, the way they finally did in the 1950's, and say this is going too far and has got to stop, and when this stupor is shaken off a lot of people are going to wish they'd spoken up at the time."

My concern is with those who wield government power. In contrast, I view the press as having a different responsibility under the Constitution, one that the *Wall Street Journal* and *The American Spectator* and a few others have carried out courageously, putting all of the above into sharp relief.

Seth Lipsky is editor of the *Forward*.

Grover Norquist

The House of Representatives voted to impeach Clinton for perjury and obstruction of justice. Only 50 senators voted to convict and remove Clinton. Now what? Those Democrats who voted against impeachment or conviction begin to sweat. Every morning they will run to read the newspaper to see if a new (or old) Clinton scandal emerges to make their pro-Clinton vote look worse. Those who voted against Clinton have no such worries. Clinton has no

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hidden virtues. There will be no pleasant surprises for Clinton's defenders...only unpleasant surprises. The Juanita Broaddrick story already makes Clinton's defenders look awful.

There are more than 200 people around the globe, any one of whom might wake up and turn state's evidence and we are off to the races on another Clinton scandal. Perhaps it will be some intern who copied FBI files, a Chinese general who defects to Taiwan, an Indonesian businessman, a Buddhist monk, another Jane Doe. Who knows?

Some conservatives argue that America's reaction to the past year shows a moral failing on the part of the people. Nonsense. The American people, in simultaneously judging Clinton a liar, corrupt, and fit to be president, are expressing contempt for Washington and the federal government. If the local minister, high school coach, or businessman did what Clinton did, he would be fired and driven out of town. But Clinton is not a soccer coach or neighbor. He is just the president. Who cares what he does? With a Republican Congress to check his worst political impulses he cannot steal our guns or paychecks. While Reagan's success ironically raised Americans' faith in politics and the federal government, Clinton is driving down America's faith in politics and government. This is a good thing. Citizens do not readily cede power and authority to those they despise. Clinton is the face of the politicized establishment: self-absorbed, self-important, self-centered, selfish. John F. Kennedy and Ronald Reagan made young people want to go into politics and believe that politicians were idealists who wanted to better the nation. Clinton reminds us that politics is ugly, sordid, and about the self-interest of politicians. He reminds all Americans that politicians should not be allowed near small children, sharp objects, or other people's wallets.

The Democrats are the party of politics and of government. They believe politics can make people rich and virtuous. The last year undermines their worldview. In 2000 voters will be more attracted to the Republican message that Washington should not be trusted with our lives, our money, or our guns.

P.S. There is one cheerful option. Perhaps Americans hold a low opinion of Bill Clinton but still oppose removing him because they have read *Earth in the Balance* and realize our vice president is a dangerous, Luddite loon.

Grover Norquist is president of Americans for Tax Reform.

Robert D. Novak

Paul Weyrich might well wonder how far the moral compass of Americans has gone haywire in just a decade. A single assignation deprived Gary Hart of a presidential nomination in 1988 and past drinking bouts and possible philandering in bygone days prevented John Tower from becoming secretary of defense in 1989. Today's citizens of the Republic seem to forgive unspeakable conduct by their president.

Yet, when the Monica Lewinsky story broke, it was widely assumed that Bill Clinton could not stay in office if the allegations were true. A sea-change in public morality does seem to me a less than credible reason for his survival. The correct explanation may be less cultural than political, specifically the development of a bipartisan professional political class to whom electoral victory and governmental power mean everything.

President Clinton's success is tied to that class. Even before his first election as governor in 1978, he had been tapped as a bright new Democratic light but burdened with "too much baggage"--a reputation for uncontrolled womanizing.

That Clinton reached the top while carrying that baggage is testament not only to his personal campaigning skills but the craving for power of Democratic politicians after losing five of the last six presidential elections. Clinton's behavior and, indeed, his ideology were secondary to his electability.

Complaints about Clinton that I've heard from Democratic politicians seldom addressed his moral or ethical transgressions but were directed at occasional deviations from liberal orthodoxy (particularly support of welfare reform) and the wholesale loss of Democratic office-holders during his presidency.

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But by the time Clinton's mishandling of the Lewinsky scandal raised the specter of impeachment, Democratic politicians had come to regard him as their salvation. They interpreted public opinion polls expressing enjoyment of a buoyant economy as a free pass for Clinton and forged what Jude Wanniski first described as a Faustian bargain--loyalty to their tainted leader in return for electoral success. Monolithic Democratic support for Clinton against impeachment cast the process in a partisan light that built public resentment to Republican prosecution.

Republican politicians, part of the same political class, read the polls and backed away from a real trial in the Senate. Fearing loss of their majority nearly as much as they dreaded loss of their seats, Republican senators sought an "exit strategy" at the cost of an effective case to the American people for Clinton's removal.

The impeachment fiasco is a splendid argument for term limits, but that is one issue where the political class defies public opinion in the interests of personal survival.

Robert D. Novak is a nationally syndicated columnist and co-host of CNN's "Evans, Novak, Hunt & Shields."

Bill Press

Pardon me while I gloat. As a defender of the Constitution, I have every right. Henry Hyde and his merry band of managers tried to twist the Constitution for their own partisan purposes--and failed. God bless America!

Are there lessons to be learned? You bet. But first, Republicans should stop wallowing in self-congratulation for having waged a noble, yet unsuccessful, struggle. And stop accusing the American people of being immoral because they never went along.

The truth is, this battle was not about truth and justice. From the beginning, it was purely about naked politics. It was bad enough that Ken Starr, America's self-appointed Top Sex Cop, elevated lying about consensual extramarital sex into an impeachable offense. It was pure folly for Republicans to carry his dim torch all the way through a Senate trial.

Impeachment failed for one reason. Because nobody--not Ken Starr, not House managers, not even a majority of Senate Republicans--could ever connect the dots. Between what Bill Clinton did. And what the Constitution says.

The impeachment ordeal has taught us this:

y Deep gratitude for the wisdom of the Founding Framers. They knew that a rabble in the House of Representatives might, someday, try to impeach a president solely for personal misconduct. That's why they built a governor into the impeachment process: a two-thirds vote for conviction in the U.S. Senate. That twice now has saved the Republic.

y Far-greater appreciation for the wisdom of the American people. They figured things early and never wavered. What Bill Clinton did was inappropriate, but not impeachable. Why couldn't all those geniuses in Washington figure it out? Because they were blinded by their hatred of Bill Clinton.

y The folly of scandal politics. For too long, Washington's been nothing but a big game of "gotcha." Go after Newt to get even for Jim Wright. Go after Clinton to get even for Robert Bork, Clarence Thomas, and Bob Packwood. Enough already! The people's business is legislation, not investigation; substance, not scandal.

Isn't it amazing how quickly we've been able to move from impeachment to other issues? That's because there was so little there. Which is the final lesson future generations should learn: If you're ever going to try to oust a president through impeachment, first make sure you have impeachable offenses.

Bill Press is co-host of CNN's "Crossfire."

Herbert Stein

I wanted him out. But the constitutional process was followed and he is still there. We have to live with that.

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I don't think that the public's endorsement of Clinton as president reflects endorsement or acceptance of his private sexual behavior. I interpret the public reaction as distinguishing between his private behavior and his public behavior. The private story was so titillating that it diverted attention from his public crimes, which were the perjury and the obstruction of justice. Monica diverted Mr. Clinton from his public duties and then diverted the public from his public crimes.

I would not interpret the public's attitude as signifying a decline in private morals. But I think there is a warning that a moral majority does not translate into a political majority.

The Republicans had to proceed with the impeachment process, even though they knew, as they should have known, that it would fail. But they invested too much in it, and when it failed they were left holding the bag, which was empty, except for tax cuts. Tax cuts have rarely been a winning political issue, as was learned in 1948, 1954, and 1982, and as Mr. Dole could remind everyone about in 1996.

It is time for Republicans to leave Monica and taxes behind and concentrate on showing what national problems would be solved by putting a Republican in the White House. As things are today, a Republican contender would bear the burden of running when there are no conspicuous national problems. That may change, but the Republicans should not any more count on a recession to save them than they should have counted on Monica to save them. There are some issues--anti-missile defense, a more discreet foreign policy, improvement of education, reduction of crime, anti-discrimination policy without quotas--but they need to be spelled out. It is a deficiency of our system that the party out of the White House does not develop a program until it chooses its candidate, which is usually only a few months before the election. The focus on the Monica problem demonstrated the vacuum that exists within the congressional wing of the Republican Party, and emphasizes the need for the party to begin soon to decide what it will offer the American people in the year 2000.

Republicans should not bristle at the word "compassion." Clinton floats above his scandals partly because he is believed to be compassionate. He has shown how you can win approval with a billion dollars here and a billion dollars there and a lot of smiles and sympathy. The impeachment process only aggravated the general impression of Republicans as being dour and mean. Of course, being compassionate is not the same as being foolish, but some Republican ought to be able to convey the impression of being one without being the other.

Herbert Stein is a senior fellow at the American Enterprise Institute. His latest book is *What I Think: Essays on Economics, Politics, and Life*, recently published by the AEI Press.

Daniel E. Troy

Just before President Clinton testified before the grand jury, Senate Judiciary Committee Chairman Orrin Hatch warned him against lying, declaring that "if he goes before the grand jury and lies, then I think that would be a real call for his impeachment." We all now know the effectiveness of that threat.

In February, Hatch warned Clinton not to renominate Bill Lann Lee, whom the Judiciary Committee had previously refused to confirm, as chief of the Justice Department's Civil Rights Division. Clinton did so anyway.

Hatch has also threatened that if Clinton were to fire Independent Counsel Ken Starr, "all heck is going to get loose." Boy, that must reassure Ken Starr.

Perhaps for the first time in history, America faces the frightening prospect of a president who is truly unconstrained--either by the prospect of facing the voters again, or of being impeached. America now confronts the "F-- k You" Presidency.

The administration would be justified in believing that, at this point, Clinton would not be removed from office for anything short of a murder captured on videotape. (Even then, unless Clinton killed a political opponent, respected "scholars" would analogize the murder to Andrew Jackson's dueling, and argue that it was "private" and did not "threaten our constitutional system.")

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The post-impeachment Clinton administration is now free to indulge its penchant, manifested even before impeachment, for pressing the outer bounds of the law, if not flagrantly violating it. To illustrate, what is to prevent the administration from rewriting and readopting the ABM treaty with the Soviet Union as an executive agreement with Russia and several former Soviet states, without the Senate's approval? Even before impeachment, a non-binding Senate vote of 99-0 objecting to such a blatantly unlawful maneuver failed to dissuade the administration from its path. What's to stop it now?

Similarly, the Senate has registered its bipartisan opposition to implementation of the Kyoto global warming pact. Yet, even pre-impeachment, the administration was determined to unilaterally enforce those economy-crunching standards.

Neither the courts nor the opinion polls can be counted on to stop the administration from these end-runs around the Senate. The framers anticipated that such efforts by a president would be stopped by the ambitions of the other branches to protect their own prerogatives. Such protection requires political will, however, and it seems entirely spent.

For the remaining two years of this administration, Americans, especially conservatives and the business community, will have to be especially vigilant to guard against Clinton administration lawlessness. It will require great skill with the media, and enormous effort--neither of which have been much in abundance--to combat this tendency. Such are the wages of having failed to (with apologies to the Secret Service) "kill the king."

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FIRST LET CONGRESS DO ITS JOB; A DEEP STRUCTURAL FLAW IN THE INDEPENDENT COUNSEL STATUTE.

Brett M. Kavanaugh

To many of us, including many who have worked in the independent counsel's office, it seemed clear long ago that the independent counsel statute is a dubious idea. But why exactly is the statute so bad? After all, are independent counsel investigations really more aggressive than the often bare-knuckled Justice Department investigations of political figures such as Mayor Marion Barry or Rep. Joseph McDade? The answer is almost certainly no, as any honest defense lawyer would concede. But there is a deeper structural flaw with the statute. It permits Congress to enlist an outside agency within the executive branch (the independent counsel) to conduct an intensive investigation of a president or his administration and then report to Congress and the public on the results.

The statute thus allows Congress to avoid its own investigative and oversight responsibilities and thereby avoid (or at least defer) responsibility for unpopular or politically divisive investigations. The Lewinsky matter is the clearest example yet of this unfortunate phenomenon. To begin with, after allegations of presidential obstruction of justice landed in the public domain in January 1998, the House did nothing for nearly eight months, but instead deferred to the independent counsel's investigation. That is not what the Constitution contemplated. When Congress learns of serious allegations against a president, it must quickly determine whether the president is to remain in office, for only Congress (not an independent counsel) has the authority to make that initial and fundamental decision. In the Lewinsky case, for example, the House Judiciary Committee could have questioned Monica Lewinsky, Betty Currie, Vernon Jordan and perhaps even the president in early 1998 (an approach this author publicly advocated at that time), granted immunity where necessary and gotten to the truth. There simply was no need for this mess to have occupied the country for 13 months. The constitutional confusion continued when the independent counsel submitted his referral to Congress in September. Consistent with the independent counsel statute, the referral identified several possible "grounds for impeachment," the statutory prerequisite for an independent counsel to directly submit grand jury information involving presidential misconduct to Congress. But that raises a serious question: Why does the statute authorize an independent counsel, a member of the executive branch, to describe the possible grounds for impeachment of the president, a decision in the exclusive province of Congress. (Disclosure: I worked on that part of the independent counsel's referral that identified possible legal grounds for impeachment.) The constitutional confusion persisted after the referral arrived in Congress. Most assumed that the Judiciary Committee would, at a minimum, carefully review the referral before authorizing any public release. Some thought that the committee might not release materials submitted by the independent counsel at all, but instead simply use the referral as a springboard to plan and conduct its own investigation. Indeed, the Rodino Judiciary Committee apparently never released the 1974 Jaworski referral, and the Senate Judiciary Committee carefully guards the somewhat analogous FBI background reports on presidential nominees. In this instance, however, after an overwhelming bipartisan vote, the House publicly released the independent counsel's

report without even reviewing it beforehand -- notwithstanding widespread recognition that the referral necessarily would describe extraordinarily sensitive evidence and personal information. The House's immediate and unscreened release of the referral and subsequent release of truckloads of sensitive grand jury material -- the president's grand jury videotape, grand jury transcripts, the Tripp-Lewinsky audiotapes and the like -- obviously caused unnecessary harm to Congress, the presidency, the independent counsel and the public discourse. The referral process also exposed yet again the fundamental flaw in the statute's requirement that independent counsels file substantive reports, as opposed to simply providing Congress raw evidence. The reports divert attention from the evidence to the perceived accuracy and fairness of the report. Because independent counsel cases involve political figures, the prosecutorial reports are inevitably attacked as politically motivated documents. We now have plenty of examples: the McKay report (attacked as unfair to Edwin Meese), the Walsh report (attacked as unfair to presidents Reagan and Bush) and the Starr report (attacked as unfair to President Clinton). Congress's original conception of independent counsel reports -- that the independent counsel's recitation and interpretation of the evidence would be accepted as gospel by all -- reflects a post-Watergate naivete that has been flatly disproved by two decades of experience. In this case, moreover, the House's massive public release of the referral and backup evidence not only was unwise on its own terms, but also suggested that the independent counsel -- not the House -- was defining the impeachment process. Of course, after the public release of the referral, many believed that constitutional normality would return -- that the Judiciary Committee would conduct its own investigation and probe witnesses directly, a seemingly necessary ingredient before impeaching and removing a president of the United States. But that, too, never happened. Instead, to the chagrin of constitutional purists, both the House and the Senate rendered their judgments without a full and independent congressional investigation in either body. So now that it is over, whom do we blame for the morphing of constitutional roles we witnessed over the last year? No one can legitimately blame the independent counsel: He followed the statute and the mandate given him by the attorney general and three-judge court (Sam Dash's reinterpretations notwithstanding), and it obviously was not his role to tell the House that it should be more aggressive in conducting its own impeachment process. Nor can one place much criticism on the House Judiciary Committee, for it deferred to a process seemingly ordained by the independent counsel statute. Rather, the blame lies squarely on the independent counsel statute itself -- the hydraulic force that facilitated, and even caused, the unfortunate blending of constitutional roles throughout the impeachment process. Yet another reason to end this statute and revert to a system more closely resembling the tried-and-true discretionary system of administration-appointed special prosecutors -- one in which Congress does its job and oversees the executive. To be clear, my criticism of the process the country underwent over the past year is not to say whether President Clinton should or should not have been removed from office. One can argue that the president would have been removed had the proper constitutional process been followed. Alternatively, one can argue that he never would have been impeached. Regardless, the procedure that Congress followed in this case, pursuant to the independent counsel statute, was deeply flawed in that it required a single quasi-executive branch officer -- who was, on the one hand, defenseless against relentless and orchestrated political assaults and, on the other hand, unaccountable to the people -- to define the impeachment process. The writer, a Washington attorney, served as an associate counsel for independent counsel Kenneth W. Starr.

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***2134 INTRODUCTION**

Officials in the executive branch, including the President and the Attorney General, have an incentive not to find criminal wrongdoing on the part of high-level executive branch officials. A finding that such officials committed criminal wrongdoing has a negative, sometimes debilitating, impact on the President's public approval and his credibility with Congress and thus ultimately redounds to the detriment of his political party and the social, economic, military, and

diplomatic policies that the President, the Attorney General, and other high-ranking members of the Justice Department champion. For those reasons, the criminal investigation and prosecution of executive branch officials by the Justice Department poses an actual conflict of interest, as well as the appearance thereof.

In addition, when the law of executive privilege is unclear or involves the application of a balancing test, the Attorney General labors under a further conflict of interest. When the Justice Department seeks access to internal executive branch communications, the Attorney General simultaneously must perform two potentially contradictory functions. First, she must act as the chief legal advisor to the executive branch (a role in which she generally would seek to protect the confidentiality of executive branch communications). Second, she must serve as a prosecutor (a role in which she generally would seek to cabin privileges so as to secure relevant evidence). As former Watergate prosecutor Archibald Cox recognized and as Attorney General Reno's role in the privilege disputes between the President and the Whitewater Independent Counsel has revealed, those dual roles place the Attorney General in a difficult, if not impossible, position in determining when the President's assertion of privileges should be challenged.² This conflict alone necessitates an outside prosecutor *2135 (unless the Attorney General announces at the outset of the investigation that she will not accede to any executive privilege claim other than national security). Otherwise, the public cannot be sure that the Attorney General has not improperly sacrificed law enforcement to the President's assertion of executive privilege.

The conflicts of interest under which the Attorney General labors in the investigation and prosecution of executive branch officials, particularly high-level executive branch officials, historically have necessitated a statutory mechanism for the appointment of some kind of outside prosecutor for certain sensitive investigations and cases. As the Watergate Special Prosecution Task Force stated in its report, "the Justice Department has difficulty investigating and prosecuting high officials," and "an independent prosecutor is freer to act according to politically neutral principles of fairness and justice."³ This article agrees that *some* mechanism for the appointment of an outside prosecutor is necessary in *some* cases.

Nonetheless, Congress can improve the current "independent counsel" system, which was established by the Ethics in Government Act of 1978.⁴ Several problems have been identified with the current system, including the following: (1) the appointment mechanism, by attempting to specify situations where an independent counsel is necessary, requires the President and Attorney General to *seek* appointment of an independent counsel in cases where it is not warranted and permits the President and Attorney General to *avoid* appointment of an independent counsel in cases where it is warranted; (2) the appointment and removal provisions (which do not involve the President) are contrary to our constitutional system of separation of powers and, both in theory and perception, lead to unaccountable independent counsels; (3) the investigations last too long; (4) an independent counsel can investigate matters beyond the initial grant of jurisdiction; and (5) independent counsel investigations have become "politicized" (a commonly used but rarely defined term).

This article suggests that those problems—to the extent they are unique to an independent counsel and do not apply to federal white-collar investigations more generally—result primarily from the uneasy relationship between the President and the independent counsel that the independent counsel statute creates. This article advances several proposals that would clarify the President's role in independent counsel investigations, thereby reducing the number of investigations and expediting those that are necessary. Each of these proposals stands on its own; the adoption of any one proposal does not necessitate or depend upon the adoption of any other.

First, Congress should change the provision for appointing an independent *2136 counsel. A "special counsel"⁵ should be appointed in the manner constitutionally mandated for the appointment of other high-level executive branch officials: nomination by the President and confirmation by the Senate. Currently, an independent counsel is appointed by a three-judge panel selected by the Chief Justice of the United States. Although this unusual procedure survived constitutional scrutiny in *Morrison v. Olson*,⁶ it is unwise to assign a small panel of federal judges to select the special counsel because the

prosecutor, no matter how qualified, will lack the accountability and the instant credibility that comes from presidential appointment and Senate confirmation. Appointment by the President, together with confirmation by the Senate, would provide greater public credibility and moral authority to the independent counsel and would dramatically diminish the ability of a President and his surrogates, both in Congress and elsewhere, to attack the independent counsel as “politically motivated.” In addition, any supposed concerns about “accountability” would be alleviated if the independent counsel were appointed (and removable) in the same manner as other high-level executive branch officials.

Second, the President should have absolute discretion (necessarily influenced, of course, by congressional and public opinion) whether and when to appoint an independent counsel. The current statute, by attempting to specify in minute detail the precise situations requiring an independent counsel, is largely overinclusive, thus producing too many investigations. At the same time, the statute is underinclusive because it allows an Attorney General to use the law as a *shield* in situations that by any ordinary measure would warrant the appointment of a special counsel.

For example, Attorney General Janet Reno appointed an independent counsel to investigate whether Secretary of Agriculture Michael Espy accepted illegal gratuities—a very important investigation, but one that Congress and the people *might* have entrusted to the Justice Department.⁷ On the other hand, the Attorney General has refused to appoint an independent counsel for the campaign fund-raising matter based on a narrow analysis of the independent counsel statute's triggering mechanism. That approach ignores the broader question that *should* be the issue (and historically has been the issue): At the end of the day, will the American people and the Congress have confidence in the credibility of the Justice Department investigation if it culminates in a no-prosecution decision against those high-level executive branch officials under investigation?

Third, with respect to an independent counsel's jurisdiction, Congress should *2137 codify and expand upon the Eighth Circuit's 1996 decision in *United States v. Tucker*⁸ to ensure that the President and the Attorney General, rather than any court, define and monitor the independent counsel's jurisdiction. Such a clarification would place sole responsibility for the independent counsel's jurisdiction on these publicly accountable officials. Congress will exercise sufficient oversight to deter the President and Attorney General from illegitimately restricting the independent counsel's jurisdiction. This change would greatly expedite special counsel investigations. Jurisdictional challenges have caused severe delays. For example, a specious challenge to the Whitewater Independent Counsel's jurisdiction delayed a trial of Arkansas Governor Jim Guy Tucker for over two and one-half years before he and his codefendants finally pled guilty.

Fourth, Congress should eliminate the statutory reporting requirement. The reporting requirement adds great time and expense to independent counsel investigations, and the reports are inevitably viewed as political documents. The ordinary rules of prosecutorial secrecy should apply to evidence gathered during an independent counsel investigation, except that the special counsel should be authorized to provide the President and the House Judiciary Committee with a classified report of any evidence regarding possible misconduct by current officers of the executive branch (including the President) that might dictate removal by the President or impeachment by the Congress.

Fifth, Congress can answer a question that the Constitution does not explicitly address, but that can greatly influence independent counsel investigations: Is the President of the United States subject to criminal indictment while he serves in office? Congress should establish that the President can be indicted only after he leaves office voluntarily or is impeached by the House of Representatives and convicted and removed by the Senate. Removal of the President is a process inextricably intertwined with its seismic political effects. Any investigation that might conceivably result in the removal of the President cannot be separated from the dramatic and drastic consequences that would ensue. This threat inevitably causes the President to treat the special counsel as a dangerous adversary instead of as a federal prosecutor seeking to root out criminality.

Whether the Constitution *allows* indictment of a sitting President is debatable (thus, Congress would not have the authority to establish definitively that a sitting President *is* subject to indictment). Removing that uncertainty by

providing that the President is *not* subject to indictment would expedite investigations in which the President is involved (Watergate, Iran-Contra, and Whitewater) *and* would ensure that the ultimate judgment on the President's conduct (inevitably wrapped up in its political effects) is made where all great national political judgments ultimately must be made in the Congress of the United States.

Sixth, Congress should codify the current law of executive privilege available in criminal litigation to the effect that the President may not maintain any executive privilege, other than a national security privilege, in response to a ***2138** grand jury or criminal trial subpoena sought by the United States. That rule strikes the appropriate balance between the need of federal law enforcement to conduct a thorough investigation and the need of the President for confidential discussions and advice. Codifying the law of executive privilege in this manner would expedite investigations of executive branch officials and ensure that such investigations are thorough and effective (at least, unless the courts were to reverse course and fashion a broader privilege as a matter of *constitutional* law).

These six proposals together would reduce the number of special counsel investigations and expedite those investigations that do occur. The proposals would enhance the public credibility of special counsel investigations, reduce the inherent tension between the President and the special counsel, and better enable a special counsel to conduct a thorough and effective law enforcement investigation of executive branch wrongdoing. Finally, the changes would ensure that a specific entity (Congress) is directly and solely responsible for overseeing the conduct of the President of the United States and determining, in the first instance, whether that conduct warrants a public sanction.

I. BACKGROUND

A. THE CURRENT LEGAL SCHEME

1. The Policy Justification for a Special Counsel

The theory behind the appointment of an outside federal prosecutor is that the Justice Department cannot be trusted to investigate an executive branch official as thoroughly as the Justice Department would investigate some other similarly situated person.⁹ Regardless whether the Justice Department is *actually* capable of putting political self-interest aside and conducting a thorough investigation, the problem remains. In cases in which charges are *not* brought, Congress and the public will question whether the investigation has been as thorough and aggressive as it would have been absent the political incentive not to indict. There is no real or meaningful check to deter an under-aggressive or white-washed Justice Department investigation of executive branch officials or their associates.

On the flip side, however, contrary to the claims of some critics, *there is a real check against an over-aggressive special prosecutor* the same check that deters an over-aggressive Justice Department prosecutor. It is the jury. As Professor Katy Harriger correctly noted:

Prosecutors, both independent and regular, must have sufficient evidence to ***2139** convince a jury that a crime has been committed. One clear constraint on independent counsel ... is one that is on all prosecutors. They must ask themselves whether their case will pass the "smell test" in front of a jury. Will they find criminal action beyond a reasonable doubt? There is virtually no incentive for any prosecutor, independent or otherwise, to pursue a criminal case that fails that test. *To argue then that there are no checks on the independent counsel is, to say the least, disingenuous for it ignores the fact that independent counsel do not operate outside the established legal system in their pursuit of criminal cases.* They cannot escape the requirement that their case against an individual be reviewed by an impartial judge and a jury of his peers.¹⁰

Indeed, an acquittal is far more damaging for an independent counsel (whose record will be judged on, at most, a handful of prosecuted cases) than for the Justice Department prosecutor who will handle dozens if not hundreds of cases in his career and for whom one acquittal is ordinarily not a significant blemish.

2. Two Statutory Mechanisms for Appointment of Special Counsels

Commentators do not always appreciate that current federal law provides *two* different mechanisms for appointment of special counsel to investigate and prosecute a particular matter. First, under the discretionary “special attorney” provisions, the Attorney General may directly select a special attorney to conduct a particular investigation where she deems it appropriate. Consistent with this authority, Attorneys General throughout our history have looked outside the Justice Department to appoint special attorneys to handle particular high-profile or politically charged cases.² For example, the Watergate special prosecutors and the first Whitewater outside counsel were appointed directly by the Attorney General under this authority.

Second, under §§ 591-599 of Title 28, the mandatory “independent counsel” statute, Congress has specified a number of covered persons as to whom the Attorney General must seek the appointment of an independent counsel if, after a preliminary investigation, she finds “reasonable grounds to believe that further investigation is warranted.”³ The Attorney General does not select an independent counsel herself, but instead applies to a panel of three judges (the “Special Division”) preselected by the Chief Justice of the United States.⁴ The panel of judges then selects an independent counsel.⁵ The independent counsel’s *2140 jurisdiction is technically defined by the Special Division,⁶ although the Special Division defines it in the manner requested by the Attorney General.⁷ The independent counsel is to conduct all investigations and prosecutions “in the name of the United States,”⁸ and is to conclude his investigation by notifying the Special Division and filing a report on “the work of the independent counsel.”⁹ The independent counsel may not expand his jurisdiction to cover unrelated matters except upon application to the Attorney General and approval by the Special Division.²⁰ Pursuant to this statute, nearly twenty independent counsel have served since 1978, most notably in the Iran-Contra and Whitewater matters.

There are two important differences between the *discretionary* “special attorney” statute and the *mandatory* “independent counsel” statute. First, the special attorney is appointed by the Attorney General, not by a panel of judges. (Neither system involves the Senate.) Second, the Attorney General possesses unfettered discretion whether to seek a special attorney for a particular case, whereas the independent counsel statute requires that the Attorney General seek an independent counsel in certain cases.

B. ARE OUTSIDE FEDERAL PROSECUTORS EVER NECESSARY?

1. An Illusory Debate

Let’s briefly put aside the questions of *who should appoint* the outside federal prosecutor as well as the question of *under what circumstances* the outside prosecutor should be appointed. The initial, fundamental issue is whether Congress should provide *any* statutory mechanism for authorizing the selection of persons outside the Justice Department to lead particular federal criminal investigations and prosecutions. Indeed, the rhetoric spewed and the ink spilled over the independent counsel law often frame the question in these terms—namely, whether an outside prosecutor is *ever* necessary for the investigation of executive branch officials.

This supposed debate is, however, entirely illusory. Even the most severe *2141 critics of the current independent counsel statute concede that a prosecutor appointed from outside the Justice Department is necessary *in some cases*.

For example, Professor Julie O'Sullivan has criticized many aspects of the mandatory independent counsel regime. She nonetheless concedes that “[a]s in the past, in extraordinary cases where the appearance or reality of a genuine conflict of interest requires that a matter be referred to someone outside the DOJ, that referral should be made to a regulatory IC” appointed from outside the Justice Department by the Attorney General.²² In other words, Professor O'Sullivan agrees that there must be *some* legal mechanism for appointing an outside special counsel to handle high-profile investigations of executive branch officials.

Similarly, former Justice Department official Terry Eastland has criticized the independent counsel statute in a lengthy analysis of the history and policy of special prosecutors. But Mr. Eastland, too, believes that “[i]nsofar as criminal investigation and prosecution goes, Presidents or their Attorneys General could exercise their discretionary authority in cases of conflict of interest and name Watergate-type prosecutors.”²²

Theodore Olson, head of the Office of Legal Counsel under President Reagan, has criticized the statute but also has stated that “there is nothing wrong with the idea of going outside the Department of Justice to pick someone special to pursue an investigation because public integrity requires that.”²³ Mr. Olson noted that Attorney General William Barr, for example, had selected special prosecutors from outside the Justice Department to ensure that the lead prosecutor was not a “permanent direct subordinate of the Attorney General or the President.”²⁴

The Bush Administration lobbied against the independent counsel statute in 1992. However, the Deputy Attorney General conceded that “we all recognize that there is a need” for the Attorney General to appoint an outside counsel on occasion, and explained that Attorney General Barr “has on two occasions availed himself of the statute [28 U.S.C. § 515] that allows him to appoint an outside authority as a special counsel.”²⁵

Finally, the most famous critic of the independent counsel statute is Justice Antonin Scalia. His dissent in *Morrison v. Olson*,²⁶ the decision upholding the constitutionality of the independent counsel statute, is largely an analysis of the Constitution's separation of powers, including the requirements of the Appointments Clause and the Court's jurisprudence regarding the removal power of the *2142 President. Notwithstanding the length and force of his dissent, Justice Scalia's objection to the independent counsel statute was really quite simple: The President must be able to appoint and remove at will the independent counsel. If the President can select the independent counsel, and the President can remove the independent counsel at will, then Justice Scalia would have no objection.²⁷

2. The Deeply Rooted American Tradition of Appointing Outside Federal Prosecutors

It is not surprising that most critics of the current mandatory independent counsel statute accept the appointment of prosecutors from outside the Department of Justice in certain cases. This Nation possesses a deeply rooted tradition of appointing an outside prosecutor to run particular federal investigations of *2143 executive branch officials. Outside counsels are *not* a modern phenomenon. Between 1870 (the birth of the Justice Department) and 1973, presidential administrations appointed outside prosecutors on multiple occasions.²⁸

In 1875, for example, President Ulysses S. Grant named a special counsel to prosecute the St. Louis Whiskey Ring a scandal involving a close friend of President Grant. President Grant later ordered the firing of the special prosecutor because the prosecutor was allegedly too aggressive.²⁹

During President Theodore Roosevelt's Administration, two outside counsels were appointed. In 1902, the Attorney General appointed a Democrat as special counsel to prosecute a land fraud implicating a high-level executive branch officer. The following year, President Roosevelt appointed a special counsel to investigate charges of corruption in the

Post Office.³ In so doing, President Roosevelt stated that “I should like to prevent any man getting the idea that I am shielding anyone.”³⁰

In 1924, following a Senate resolution calling for appointment of a special prosecutor,³² President Calvin Coolidge appointed two special prosecutors, one Republican and one Democrat, to jointly conduct the criminal investigation of the Teapot Dome scandal.³³ The special prosecutors subsequently obtained the conviction of the former Secretary of Interior for taking a bribe.³⁴

In 1952, President Harry Truman's Attorney General appointed a Republican as special counsel to investigate allegations of criminal wrongdoing within the administration, including within the Justice Department.³⁵ Like President Grant over seventy years earlier, President Truman's Attorney General eventually fired the special prosecutor.

In 1973, President Nixon's Attorney General named a Democrat, Archibald Cox, as special prosecutor to investigate and prosecute the Watergate cases. President Nixon fired Mr. Cox, but subsequently appointed another Democrat, Leon Jaworski. The prosecutor eventually obtained the convictions of numerous members of the Nixon Administration.

In the wake of Watergate, Congress enacted the Ethics in Government Act of 1978,³⁶ which required the appointment of an independent counsel in certain cases. Since then, Presidents and Attorneys General have sought the appointment *2144 of nearly twenty independent counsels under the statute but also continued to appoint special prosecutors *outside* the mandatory independent counsel mechanism in cases where that statute did not apply or had lapsed.

During President Bush's Administration, for example, Attorney General William Barr appointed retired Judge Frederick Lacey as special counsel to investigate allegations related to Iraqi involvement in an American bank, the so-called BNL investigation. He also appointed Judge Nicholas Bua to investigate the Inslaw case, which involved allegations directed at the Justice Department.³⁷

In 1994, during a brief period when the independent counsel statute had lapsed, President Clinton asked the Attorney General to appoint a special counsel to investigate the Whitewater matter, which involved criminal referrals and allegations against former business partners of the President (James B. McDougal and Susan H. McDougal) and a separate, specific allegation of wrongdoing against the President by former Arkansas businessman and Judge David L. Hale. The Attorney General selected Robert B. Fiske, Jr., who served until the independent counsel statute was reauthorized, at which time the panel of judges determined that the statute required appointment of an independent counsel who was not an administration official.³⁸

This extensive history demonstrates a clear “tradition” of “naming special prosecutors in certain, exceptional circumstances.”³⁹ It shows that criminal investigations of executive branch officials or their associates were handled either “through normal channels, within the Justice Department, or outside them through counsels specially appointed by the President or the Attorney General and therefore accountable to the President for their exercise of power.”⁴⁰

*2145 3. Outside Federal Prosecutors are Necessary in Some Cases

American legal history has clearly demonstrated the necessity of a mechanism to appoint an outside prosecutor to conduct certain sensitive investigations of executive branch officials. In light of this consistent historical practice, it would take an extraordinarily compelling justification for Congress to turn its back on history and common sense by eliminating all mechanisms for appointing a prosecutor from outside the executive branch.

Such a case has not been made *nor has anyone really attempted to make it*. And although there is no scientific answer to the question, it is rather untenable as a matter of common sense to contend that an outside prosecutor is *never* necessary that an ordinary Justice Department prosecutor should *always* preside over a Justice Department investigation. What if the allegation of wrongdoing is directed against the Attorney General herself? What if the allegation of wrongdoing is against the President's spouse or his best friend or the White House Counsel? Would any rational American in such a case believe that the Attorney General and the Justice Department would pursue the matter as vigorously as an outside prosecutor whose personal and professional interests would not be adversely affected by a thorough and vigorous investigation? Two centuries of experience inform us that the citizens (as represented by Congress and the media) will not accept such a procedure. Indeed, the fact that there have been so many outside prosecutors appointed throughout our history demonstrates their importance and necessity. And the further fact that even the strongest critics of the mandatory independent counsel statute concede that an outside prosecutor is necessary in some cases is telling evidence that some mechanism for appointment of an outside prosecutor is appropriate.

For these reasons, future debates should not focus on *whether* a special counsel statute is necessary, but rather on the more pertinent questions of *by whom* and *under what conditions* a special counsel should be appointed.

II. IMPROVING THE SYSTEM

This article proposes that Congress enact the following statutory language in lieu of the current independent counsel statute.

Section 1. Appointment and Jurisdiction of a Special Counsel

(a) When the public interest requires, the President may appoint, by and with the advice and consent of the Senate, a Special Counsel to investigate and prosecute matters within the jurisdiction assigned by the President.

(b) The Attorney General and the Special Counsel shall consult as necessary and appropriate regarding the Special Counsel's jurisdiction. The Special Counsel's jurisdiction shall not be reviewed in any court of the United States. Notwithstanding Federal Rule of Criminal Procedure 6, the Attorney General or the Special Counsel may report to Congress regarding the Special Counsel's jurisdiction.

*2146 Section 2. Reports by a Special Counsel.

The Attorney General or Special Counsel shall disclose evidence of possible misconduct regarding any impeachable officer of the United States in a sealed report to the President, and to the Chairman and Ranking Member of the Judiciary Committee of the House of Representatives. Federal Rule of Criminal Procedure 6 shall not apply to such reports. No person to whom disclosure is authorized under this section shall further disclose the information except as specifically authorized by the Congress.

This article also proposes that Congress adopt two provisions not inextricably linked to special counsel investigations, but which have a substantial impact on them.

Presidential Immunity.

The President of the United States is not subject to indictment or information under the laws of the United States while he serves as President. The statute of limitations for any offense against the United States committed by the President shall be tolled while he serves as President.

Presidential Privileges.

In response to a federal grand jury or criminal trial subpoena sought by the United States, no court of the United States shall enforce or recognize a privilege claimed by the President in his official capacity, or by an Executive department or agency, except on the ground of national security, or as provided by a federal statute or rule that refers specifically to the privileges available to government officials or agencies in grand jury or criminal trial proceedings.

A. Appointment and removal of the special counsel

The single most important change this article proposes concerns the appointment and removal of an independent counsel. Congress should eliminate §§ 591-599 of Title 28, and adopt a new statutory provision:

When the public interest requires, the President may appoint, by and with the advice and consent of the Senate, a Special Counsel to investigate and prosecute matters within the jurisdiction assigned by the President.

This seemingly simple change in appointment and removal would greatly change the perception of the appointed prosecutor and thus would satisfy many opponents of the current statute.

1. Appointment of the Special Counsel

There are two current statutory alternatives for selecting an independent counsel. Under § 515 and § 543 of Title 28, the Attorney General has the *2147 discretion to select a special attorney herself (as Robert Fiske was selected). If the mandatory independent counsel statute is triggered, under § 592, the Attorney General applies to the Special Division and the three-judge panel selects an independent counsel (as Kenneth Starr was selected).

Neither alternative suffices in the kind of investigations of executive branch officials and their associates likely to cause the President and Attorney General, in the exercise of discretion, to seek a special counsel. Congress, therefore, should repeal the provision in the independent counsel statute providing for appointment of an independent counsel by the Special Division and should instead provide that a special counsel be appointed in the manner constitutionally mandated for high-level executive branch officials: appointment by the President and confirmation by the Senate.⁴

Section 515, by which the Attorney General directly selects a special attorney, is problematic because there is no check to prevent the President or Attorney General from handpicking a “patsy” prosecutor. Section 592, the current independent counsel statute by which the Special Division selects a special counsel, is problematic for different reasons.

First, the judges selecting the independent counsel may be perceived as politically motivated partisans because of their previous careers and affiliations. (Sure enough, the current Special Division panel repeatedly has been attacked as excessively partisan.) If the selection process is perceived as political, the credibility of the independent counsel will suffer.⁴²

Second, because of its isolation and its inability to conduct a searching inquiry of the candidates, the panel may select someone who does not possess the qualifications that a special counsel should possess simply because the panel of judges is not able to conduct the kind of search and inquiry that would produce the best possible person.

Third, neither § 515 nor § 592 provides the independent counsel with the moral authority and public credibility that will insulate him from the inevitable political attacks. The need for a special counsel to have the greatest possible insulation against erroneous charges of political partisanship has been demonstrated time and again. Whether it is Ron Ziegler complaining that the Watergate *2148 Special Prosecution Task Force is a hotbed of liberals or President Clinton agreeing that the Whitewater Independent Counsel is out to get him, charges of political partisanship are almost sure to occur during independent counsel investigations.

Such attacks are inevitable because they are built into the system. The very point of an *outside* federal prosecutor is to counter the assumption that the investigation has been whitewashed because of political kinship (the charge to which the Department of Justice has been subject in the campaign fundraising investigation).⁴³ For that reason, outside special counsels historically have been selected from the party *other than that of the President*.⁴⁴ But the appointment of someone from the party opposing the President inevitably sparks doubts whether the outside counsel theoretically a political “foe” of the President in some sense possesses too much of a partisan agenda *against* the President.

Watergate Special Prosecutor Archibald Cox is perhaps the most notorious example. He had worked in the Kennedy Administration and was a very close friend and ally of Senator Edward Kennedy (an opponent of President Nixon). But in virtually all cases, the independent counsel will be quite vulnerable to attacks of political partisanship by the President and his allies simply by virtue of his known political affiliation.

This is not an idle problem. The glib answer that the independent counsel should just “take it” when he is criticized as politically motivated is a nice theory, but it does not work in practice. Although many prosecutors receive complaints that they are politically motivated, those complaints take on a different order of magnitude when they emanate from the Oval Office.⁴⁵ Sustained presidential (and presidentially directed) criticism of an independent counsel eventually will have an impact on a large percentage of the citizens and on their opinion of the independent counsel. Those citizens include both potential *witnesses* and potential *jurors*. The decision by witnesses whether to volunteer the full truth (or not) often may depend on their impressions of the credibility and integrity of the special counsel. As to juries, a truly energetic political campaign to destroy the credibility of an independent counsel is an effort to obtain a hung jury, and there is a real danger that it will work in all but *2149 the most clear-cut cases of guilt.⁴⁶

Congress can and should make it harder for future Presidents and presidential allies to attack the credibility of outside federal prosecutors. The best way to ensure as much insulation as possible, consistent with our constitutional structure, is to require presidential appointment and Senate confirmation. This process would serve many purposes.

First, the President could not credibly attack the special counsel whom the President had appointed. Similarly, Senate confirmation would make it difficult for anyone to claim that the special counsel is excessively partisan, for any person likely to put politics above law and evidence would not navigate the confirmation process.

Second, presidential appointment and Senate confirmation would ensure that the credentials of a special counsel are extraordinarily high. And particular issues regarding the nominee's past could be fleshed out and explained rather than being dredged up years down the road by the subjects of the investigation.

Third, unlike the special attorney provision of § 515, Senate confirmation would prevent charges that the special counsel is *too sympathetic* to the incumbent administration. Before the independent counsel statute was reauthorized in 1994, Robert Fiske was selected by the Attorney General as a special attorney for Whitewater. Like Kenneth Starr after him, Mr. Fiske possessed precisely the kind of superb credentials one would hope for in a special counsel. Yet Mr. Fiske was not subject to Senate confirmation, and Republicans such as Senator Lauch Faircloth were subsequently able to attack Fiske as soft on the administration.⁴⁷ These attacks on Fiske's supposed partisanship would have seemed ludicrous had those same Senators been forced to vote for him during the confirmation process.

Senate confirmation “serves both to curb executive abuses of the appointment power ... and to promote a judicious choice of persons for filling the offices of the union.”⁴⁸ As Alexander Hamilton noted, “the necessity of their concurrence would have a powerful ... operation. It would be an excellent check upon a spirit of favoritism in the President. ... The possibility of rejection would be a strong motive to care in proposing.”⁴⁹ The Supreme Court similarly noted that “by requiring the joint participation of the President and *2150 the Senate, the Appointments Clause was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one.”⁵⁰

To be sure, presidential appointment and Senate confirmation is not a fool-proof method of insulating a special counsel from unfair political attacks. But it would render the special counsel “accountable,” in theory and appearance, and would give the special counsel greater ability to pursue his tasks without being subject to unfair and unrelenting political attack. In short, it would provide the aura of moral and political authority that the special counsel needs if he is to do his job as aggressively as we would hope.

There no doubt will be some objections to this proposal. Some might argue that the President would not be inclined to appoint a truly independent and aggressive prosecutor because the allegations almost by definition would involve the activities of his close associates. But that is the wisdom of Senate confirmation. Indeed, the President would be wise to and likely would consult closely not only with his Attorney General and perhaps his White House Counsel, *but also with Senate leaders*, before even nominating a special counsel. Moreover, the media no doubt would aggressively probe the background and credentials of the individual selected by the President. The danger of the President appointing, and the Senate confirming, a crony or patsy as special counsel seems almost nonexistent.

As noted above, some might oppose this proposal by arguing that a prosecutor should not worry about attacks on his reputation. That, too, is a naive view. Attacks on the prosecutor's reputation ultimately are designed to scare potential witnesses and to infect the jury pool with negative feelings towards the prosecution. It is no secret that many defense attorneys engage in these smear tactics. The prosecutor, as a representative of the people of the United States, must take appropriate steps to counter such attacks lest they allow an injustice to occur—namely, a guilty person being erroneously acquitted because of the jury's negative view of the prosecutor. By means of this proposal, Congress can help to prevent such dangerous reputational attacks on a special counsel.

Others might oppose this proposal on the ground that Senate confirmation is a slow and unwieldy process or that it could turn into a political circus. Neither argument is ultimately persuasive. When the Senate considers nominees for important positions as to which there are severe time constraints, the Senate can and does act very quickly. For example, the Senate proceeds with extraordinary expedition to confirm the Cabinet of a newly elected President so that the Cabinet is in place when the President takes office. A respected individual selected as special counsel would be promptly considered and confirmed.

To be sure, certain Senators might use the opportunity to attack the subject of the investigation, or alternatively to attack the nominee. The first scenario seems unavoidable, but not particularly costly. As to the second, that is the point of the process. Any special counsel who would engender *significant* opposition should *2151 not be nominated in the first place or should be withdrawn if serious opposition develops.

2. Removal of the Special Counsel

Currently, an independent counsel can be removed for “good cause,”⁵ a term undefined as a matter of law or practice. A special attorney appointed directly by the Attorney General can be removed at will.⁵²

The “good cause” provision strikes many commentators as unconstitutional or, at least, unwise. As Justice Scalia intimated in *Morrison*, at first blush it is somewhat difficult to understand why the President does not have the authority to dismiss *any* executive branch official at will.⁵³ In any event, Justice Scalia also argued that a federal prosecutor should be removable at will for more practical reasons—that “the primary check against prosecutorial abuse is a political one” and that the independent counsel system thwarts this traditional check on a prosecutor's actions.⁵⁴ If there is an out-of-control prosecutor, Justice Scalia reasons that the President should possess the authority and the responsibility to remedy the situation.

The notion that the independent counsel is “unaccountable” has become the mantra of subjects of the investigation who inevitably attempt to denigrate the investigation as partisan and out of control. Currently, a President can complain that an independent counsel is politically motivated while implying that he is powerless to do anything about it. This essentially gives the President and his surrogates freedom to publicly destroy the credibility of the independent counsel, and to cleverly avoid questions about why the President does not remove him. Congress should give back to the President the full power to act when he believes that a particular independent counsel is “out to get him.” Such a step not only would make the special counsel accountable, but it also would force the President and his surrogates to put up or shut up.

The objection to “removal at will” is that the independent counsel might be too timid because of fear that he could be fired. That objection overstates the danger. After all, a number of special prosecutors have been appointed throughout our history, and there is simply no persuasive evidence that the threat of removal adversely affected their investigations. Indeed, in a perverse way, removal is a sure way to immortality, as Archibald Cox learned. Moreover, *2152 President Nixon's firing of Cox—the last occasion when a President removed a special counsel—created an enormous controversy and triggered impeachment proceedings.⁵⁵ History clearly demonstrates that the President will pay an enormous political price if he does not have a persuasive justification for dismissing a special counsel. The deterrent to a President dismissing a special counsel thus would be the same as the deterrent to his firing the Attorney General—a practical and political (as opposed to legal) deterrent requiring the President to be able to explain his decision to Congress and the public.

B. THE CIRCUMSTANCES UNDER WHICH A SPECIAL COUNSEL SHOULD BE APPOINTED

As noted above, this article proposes the following statutory language.

When the public interest requires, the President may appoint, by and with the advice and consent of the Senate, a Special Counsel to investigate and prosecute matters within the jurisdiction assigned by the President.

Congress should no longer try to specify *in advance* the circumstances requiring a special counsel. The triggering mechanism of the current mandatory independent counsel statute can be grossly over-or under-inclusive depending on the circumstances. In some cases, the Attorney General is required to request an independent counsel even when it seems evident that Congress and the public would accept the credibility of a Justice Department investigation (for example, the investigation of Secretary of Labor Alexis Herman). In other cases, such as the Democratic campaign fundraising matter, the mandatory appointment provision of the statute is not triggered, even though there seems an obvious need for an outside prosecutor in order to assure the public of a thorough and credible investigation.

Indeed, the campaign fundraising matter has revealed a series of heretofore unforeseen flaws in the triggering mechanism of the statute. First, the decision whether to appoint an independent counsel has degenerated into a debate between the Attorney General and her critics over the precise features of the triggering mechanism—for example, whether a sufficiently specific and credible allegation has been made against a “covered person.” This dispute has focused on the question of which telephones were used to make certain fundraising calls. The debate over such technicalities has obscured the broader question of whether United States officials, or members of American political parties, knowingly solicited or accepted contributions which were provided by citizens of foreign countries.⁵⁶

***2153** Second, at least at the outset of the investigation, Justice Department prosecutors reportedly used the independent counsel statute as a shield to protect the President and Vice President from the kind of investigation that any ordinary citizen might receive. Over the reported objection of FBI investigators, Justice Department officials prohibited certain investigative techniques because the threshold for triggering the independent counsel statute was not met.⁵⁷ Thus, the Attorney General (or, at least, her delegates) has used the statute not as a *sword against* executive branch officials, but as a *shield to protect* them.

Of course, the precise specificity and credibility of allegations against covered persons should be irrelevant. For purposes of the independent counsel statute, the important question should not be whether certain technical requirements have or have not been met. Instead, it should be the following: Will the Congress and the public have confidence in the credibility and thoroughness of the investigation if the investigation results in a determination that such officials did *not* violate the criminal law?

There can be no definitive answer to this question, but that is the point. Depending on the circumstances—who committed the alleged offense, the nature of the offense, the credibility of the Attorney General, the confidence of the Congress in the Justice Department—there may be more or less of a perceived need for a special counsel to take over. It has proved wildly unwise for Congress to try to anticipate those situations; the debate over whether an independent counsel should be appointed for the campaign fundraising issues has only highlighted the flaws in the current triggering mechanism.

Some might contend that the statute should still be mandatory against certain officials such as the President and Attorney General. As will be discussed further below, an independent counsel should never be appointed to prosecute the President (because a sitting President should not be subject to criminal indictment until he leaves office or is removed by impeachment proceedings). If the Attorney General is the subject of a truly serious allegation and remains in office, the people can be confident that the President or the Congress will ensure that a special counsel is appointed.

In sum, the decision whether to appoint a special counsel should be at the President's discretion as informed by the Congress and the media. That is as it should be—those audiences are the two primary representatives of the citizens, and the citizens are the persons who ultimately must be persuaded that an investigation resulting in a no-prosecution decision was thorough and credible.

C. JURISDICTION

The following proposed statutory language relates to jurisdiction.

When the public interest requires, the President may appoint, by and with *2154 the advice and consent of the Senate, a Special Counsel to investigate and prosecute matters within the jurisdiction assigned by the President.

The Attorney General and the Special Counsel shall consult as necessary and appropriate regarding the Special Counsel's jurisdiction. The Special Counsel's jurisdiction shall not be reviewed in any court of the United States. Notwithstanding Federal Rule of Criminal Procedure 6, the Attorney General or the Special Counsel may report to Congress regarding the Special Counsel's jurisdiction.

The current mandatory independent counsel statute authorizes the Attorney General to delineate the independent counsel's jurisdiction, to refer related matters to the counsel, and to seek expansion of the counsel's jurisdiction. The statute is silent on the question of whether a criminal defendant or subpoena recipient can challenge the jurisdiction of the prosecutor. In *United States v. Tucker*, however, the Eighth Circuit ruled that the independent counsel's jurisdiction, as specified by the Attorney General, is not subject to judicial review.⁵⁸

Congress should clarify the jurisdictional provisions in a manner consistent with *Tucker*, such that only the President and Attorney General, and not the courts, define and monitor the independent counsel's jurisdiction. This clarification would ensure direct oversight over the independent counsel's jurisdiction by the official primarily affected (the Attorney General), but should not unduly hamper the investigation.

As explained by the Eighth Circuit in *Tucker*, the Attorney General, on behalf of the President, has the competence and authority to monitor an independent counsel's jurisdiction. Ordinarily, she is the “traffic cop” who decides whether a particular investigation should be handled by Main Justice or by a local United States Attorney's Office. She also resolves clashes between different United States Attorneys' offices. So, too, with respect to a special counsel's jurisdiction, the Attorney General should play the role of traffic cop, the role she already performs to some degree. Of course, there is always a danger that the President or Attorney General will attempt to limit an independent counsel's investigation to protect the administration. Regular congressional oversight of the independent counsel's jurisdiction should deter the imposition of such restraints, however.

To be sure, one can expect that there will be some friction at the margins between the special counsel and the Attorney General.⁵⁹ The Attorney General must take pains not to hamstring the special counsel, not to make his investigation *less* effective than an ordinary Justice Department investigation. In particular, it is, of course, common and accepted (and even necessary) police and prosecutorial practice to attempt to investigate and prosecute witnesses for *other* *2155 crimes, thereby inducing the witness to tell the truth in the primary investigation. As Robert Fiske has correctly noted, it would be unwise in the extreme for the Attorney General to take that authority away from a special counsel: “I do think that it is very important that the independent counsel have the authority to pursue related matters when those related matters involve the use of a key witness that the independent counsel may not want to turn over to someone else and, secondly, when those related matters, in his or her judgment, are reasonably designed to produce, in one way or another, evidence against the subject of the investigation.”⁶⁰

Codifying *Tucker* thus would not only clarify the role of the Attorney General and special counsel, but also would greatly expedite special counsel investigations. Judicial challenges to independent counsel jurisdiction have caused severe delays in the Michael Espy and Whitewater independent counsel investigations. For example, a trial of Arkansas Governor Jim Guy Tucker in the Whitewater investigation was delayed well over two and one-half years because of a challenge to the independent counsel's jurisdiction.

D. REPORTS

Congress should enact the following statutory language regarding the special counsel's duty to provide information regarding the evidence developed during his investigation.

The Attorney General or Special Counsel shall disclose evidence of possible misconduct regarding any impeachable officer of the United States in a sealed report to the President, and to the Chairman and Ranking Member of the Judiciary Committee of the House of Representatives. Federal Rule of Criminal Procedure 6 shall not apply to such reports. No person to whom disclosure is authorized under this section shall further disclose the information except as specifically authorized by the Congress.

The most illogical part of the current independent counsel statute is its final report requirement. The provision was originally designed to ensure that the special prosecutor did not “whitewash” the investigation. That rationale does not justify a report; the fear of whitewashing is the reason that a special counsel is appointed in the first place. If anything, the supposed justification for the reporting requirement would call for the *Justice Department* to provide a report in those high-profile investigations where there is a potential for a conflict, but where the Department nonetheless conducts the investigation.

In any event, § 594(h) of the current statute requires that an independent counsel's final report set forth “fully and completely a description of the work of the independent counsel, including the disposition of all cases brought.”⁶

*2156 Before the 1994 amendment, the statute also required that the final report set forth “the reasons for not prosecuting any matter within the prosecutorial jurisdiction” of the independent counsel.⁶²

Section 595(c) of Title 28 also requires that the independent counsel report to the Congress on any information that “may constitute grounds for an impeachment.”⁶³ The latter provision codifies the process by which Leon Jaworski transmitted a report to Congress during the Watergate investigation. As far as is publicly known, however, a report under § 595(c) has never been issued since its enactment in 1978.

As a general proposition, a public report is a mistake. It violates the basic norm of secrecy in criminal investigations, it adds time and expense to the investigation, and it often is perceived as a political act. It also misconceives the goals of the criminal process. A report discussing facts and evidence would make sense if the prosecutor's goal was to establish publicly by a preponderance of the evidence what happened with respect to a particular event—as often is the case in congressional or inspector general investigations, or in civil litigation. That is not the goal of the independent counsel. Instead, an independent counsel is appointed only to investigate certain suspected violations of federal criminal law in order to determine whether criminal violations occurred, and to prosecute such violations if they did occur. That goal—to determine whether criminal violations occurred—is quite different from the goal of issuing public conclusions regarding a particular event.⁶⁴

On the other hand, as is reflected in § 595(c), there is a strong sense that evidence of the conduct of executive branch officers should not be concealed, at least not from Congress, which is constitutionally assigned the duty to determine their

fitness for office. Thus, any information gathered with respect to executive branch officials that could reflect negatively on their fitness for office should be disclosed to Congress (not dissimilar to the manner in which FBI background information is disclosed when a nomination is pending). The statutory language proposed by this article thus attempts to incorporate the best of § 594(h) and § 595(c), to eliminate the worst, and to ensure that, on the one hand, miscreants not serve in the executive branch, and on the other, that personal privacy and reputation not be sacrificed unnecessarily and unwisely.

E. INVESTIGATION AND PROSECUTION OF THE PRESIDENT

This article proposes the following statutory language to establish that a sitting President cannot be indicted.

The President of the United States is not subject to indictment or information under the laws of the United States while he serves as President. The statute of limitations for any offense against the United States committed by the President shall be tolled while he serves as President.

The supposed “politicization” of independent counsel investigations occurs primarily in those investigations where the President is a target or a potential defendant; those investigations quickly become politicized because of the threat that the President might be indicted. As will be explained, a serious question exists as to whether the Constitution *permits* the indictment of a sitting President. Regardless how the Supreme Court ultimately would rule on that question, however, Congress should enact legislation clarifying the proper procedure to follow when there are serious allegations of wrongdoing against the President. In particular, Congress should clarify that a sitting President is not subject to criminal indictment while in office. Such legislation not only would go a long way towards disentangling the appearance of politics from special counsel investigations, it also would greatly expedite those investigations where the President otherwise would be one of the subjects of the investigation.⁶⁵

In an investigation of the President himself, *no* Attorney General or special counsel will have the necessary credibility to avoid the inevitable charges that he is politically motivated—whether in favor of the President or against him, depending on the individual leading the investigation and its results. In terms of credibility to large segments of the public (whose support is necessary if a President is to be indicted), the prosecutor may appear too sympathetic or too aggressive, too Republican or too Democrat, too liberal or too conservative.

The reason for such political attacks are obvious. The indictment of a President would be a disabling experience for the government as a whole and for the President's political party—and thus also for the political, economic, social, diplomatic, and military causes that the President champions. The dramatic consequences invite, indeed, beg, an all-out attack by the innumerable ***2158** actors who would be adversely affected by such a result. So it is that any number of the President's allies, and even the Presidents themselves, have criticized Messrs. Archibald Cox, Leon Jaworski, Lawrence Walsh, and Kenneth Starr—the four modern special prosecutors to investigate presidents.

The Constitution of the United States contemplated, at least by implication, what modern practice has shown to be the inevitable result. The Framers thus appeared to anticipate that a President who commits serious wrongdoing should be impeached by the House and removed from office by the Senate—and then prosecuted thereafter. The Constitution itself seems to dictate, in addition, that congressional investigation must take place in lieu of criminal investigation when the President is the subject of investigation, and that criminal prosecution can occur only after the President has left office.⁶⁶

Watergate Special Prosecutor Jaworski concluded, for example, that “the Supreme Court, if presented with the question, would not uphold an indictment of the President for the crimes of which he would be accused.” Accordingly, he thought

it would be irresponsible conduct to recommend that the grand jury return an indictment against the President. He based this conclusion on the arguments presented to him:

[T]he impeachment process should take precedence over a criminal indictment because the Constitution was ambivalent on this point and an indictment provoking a necessarily lengthy legal proceeding would either compel the President's resignation or substantially cripple his ability to function effectively in the domestic and foreign fields as the Nation's Chief Executive Officer. Those consequences, it was argued, should result from the impeachment mechanism explicitly provided by the Constitution, a mechanism in which the elected representatives of the public conduct preliminary inquiries and, in the event of the filing of a bill of impeachment of the President, a trial based upon all the facts.⁶⁷

President Nixon similarly argued that “[w]hatever the grand jury may claim about a President, its only possible proper recourse is to refer such facts, with the consent of the court, to the House and leave the conclusions of criminality to that body which is constitutionally empowered to make them.”⁶⁸ As Solicitor General, Robert Bork reached the same conclusion, arguing that a Vice President could be criminally prosecuted, but that the President could not.⁶⁹ Judge George MacKinnon, too, argued that “a President is subject to the criminal *2159 laws, but only after he has been impeached by the House and convicted by the Senate and thus removed from office.”⁷⁰ To indict and prosecute a President or to arrest him before trial “would be constructively and effectively to remove him from office, an action prohibited by the Impeachment Clause. A President must remain free to travel, to meet, confer and act on a continual basis and be unimpeded in the discharge of his constitutional duties.”⁷¹ Therefore, he concluded, “the real intent of the Impeachment Clause, then, is to guarantee that the President always will be available to fulfill his constitutional duties.”⁷²

The Supreme Court's decision in *Clinton v. Jones*⁷³ indicated that the President is subject to *private* lawsuits to remedy individuals harmed. But the Court's decision does not apply to *criminal* proceedings against the President, which seek to enforce *public*, not private, rights. The Court thus repeatedly referred in its opinion to “private” actions against the President.⁷⁴

The constitutional mechanism of impeachment recognizes, at least implicitly, that criminal prosecution of a sitting President is fraught with peril—virtually untenable as a matter of practice and unwise as a matter of policy. The President is not simply another individual. He is unique. He is the embodiment of the federal government and the head of a political party. If he is to be removed, the entire government likely would suffer, the military or economic consequences to the nation could be severe, and the President's political party (and the causes he champions) would almost certainly be devastated. Those repercussions, if they are to occur, should not result from the judgment of a single prosecutor—whether it be the Attorney General or special counsel—and a single jury. Prosecution or nonprosecution of a President is, in short, inevitably and unavoidably a political act.⁷⁵ Thus, as the Constitution suggests, the decision about the President while he is in office should be made where all great national political judgments in our country should be made—in the Congress of the United States.

***2160** The words of Alexander Hamilton ring as true today as they did two centuries ago:

[O]ffenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust ... are of a nature which may with peculiar propriety be denominated POLITICAL The prosecution of them, for this reason, will seldom fail to agitate the passions of the whole community, and to divide it into parties more or less friendly or inimical to the accused. In many cases it will connect

itself with the pre-existing factions, and will enlist all their animosities, partialities, influence, and interest on one side or on the other....⁷⁶

Investigation of the President, Hamilton stated, is a kind of “NATIONAL INQUEST” and “[i]f this be the design of it, who can so properly be the inquisitors for the nation as the representatives of the nation themselves.”⁷⁷

The Federalist Papers thus suggest the ill wisdom of entrusting the power to judge the President of the United States to a single person or body such as an independent counsel: The discretion “to doom to honor or to infamy the most confidential and the most distinguished characters of the community forbids the commitment of the trust to a small number of persons.”⁷⁸ In the constitutional debates, Gouverneur Morris explained that the Senate should try impeachments, and that the President would be liable to prosecution afterwards.⁷⁹ The Federalist Papers similarly point out that:

the punishment which may be the consequence of conviction upon impeachment is not to terminate the chastisement of the offender. After having been sentenced to a perpetual ostracism from the esteem and confidence and honors and emoluments of his country, he will still be liable to prosecution and punishment in the ordinary course of law.⁸⁰

Hamilton further noted that the checks on a President include that he shall be “liable to be impeached, tried, ... and removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law.”⁸

Thus, the Framers explained the wisdom, and perhaps also the constitutional necessity, of the idea that *public* judgment with respect to the President be *2161 rendered not by a prosecutor or jury, but by the Congress. A prosecutor acts to vindicate harm *to the public*, not to any private individual (unlike in a civil case such as *Clinton v. Jones*). The decision to vindicate harm *to the public* caused by the President, no matter how he caused it, should belong to the Congress in the first instance.

Why is the President different from Members of Congress or Supreme Court Justices or Cabinet officials? The Constitution vests the entire executive power in a *single* President: the powers of the Commander in Chief of the Army and the Navy, the power to command the Executive Departments, the power shared with the Senate to make treaties and to appoint Ambassadors, the power shared with the Senate to appoint Justices of the Supreme Court and other civil officers, the power and responsibility to execute the laws, and the power to grant reprieves and pardons.⁸²

While federal prosecutors have credibly prosecuted Cabinet officers, White House officials, and other friends and associates of the President, a credible determination by a federal prosecutor to indict (or not indict) the President himself would be nigh impossible. The experience of recent years has only reinforced the wisdom of the Framers.

What, then, should happen? When nonfrivolous allegations or evidence of wrongdoing by the President is received by a prosecutor, that evidence should be forwarded to the House of Representatives. If Congress declines to investigate, or to impeach and remove the President, there can be no criminal prosecution of the President at least until his term in office expires.⁸³ (Most criminal investigations include multiple potential defendants, so the criminal investigation as a whole generally might proceed, depending on the circumstances.) As an extreme hypothetical, some might ask what would happen if the President murdered someone or committed some other dastardly deed. In such a case, we can expect that the President would be quickly impeached, tried, and removed; the criminal process then would commence against

the President. There is simply no danger that such crimes would go criminally unpunished; the only question is *when* they can be punished.

F. THE PRESIDENT'S PRIVILEGES

The following statutory language is proposed:

In response to a federal grand jury or criminal trial subpoena sought by the United States, no court of the United States shall enforce or recognize a privilege claimed by the President in his official capacity, or by an Executive department or agency, except on the ground of national security, or as provided by federal statute or rule that refers specifically to the privileges *2162 available to government officials or agencies in grand jury or criminal trial proceedings.

One *major* cause of delay in independent counsel investigations has been the repeated assertion of various executive privileges. The privilege assertions not only force the President and various independent counsels into adversary postures, but they also have undermined the independent counsel's ability to conduct an expeditious and thorough investigation. During the last quarter-century, the federal courts have resolved many of the executive privilege issues that have arisen during criminal investigations.⁸⁴ In particular, the Supreme Court's 1974 decision in *United States v. Nixon*,⁸⁵ the Eighth Circuit's 1997 decision in *In re Grand Jury Subpoena Duces Tecum*,⁸⁶ and Judge Silberman's 1990 concurrence in *United States v. North*⁸⁷ (as well as a subsequent 1997 D.C. Circuit decision in *In re Sealed Case*⁸⁸) have essentially defined the boundaries of the executive privileges that the President may assert in federal grand jury or criminal proceedings. The result of those cases is clear: the courts may not enforce a President's privilege claim (other than one based on national security) in response to a grand jury subpoena or a criminal trial subpoena sought by the United States.

Any dire claims that this rule disables the Presidency are overstated, moreover, because the President is *always* free to withhold other sensitive or critical information if he finds it necessary.⁸⁹ To do so, a President must order the federal prosecutor not to seek the information and must fire the prosecutor if he refuses (as President Nixon fired Archibald Cox).⁹⁰ Such action would surely focus substantial public attention on the President's privilege claims, but if the President's argument is as strong as he purportedly believes, he should (and must) be able to explain it to the Congress and the public. But *Nixon*, and the cases since *Nixon*, establish that the President cannot rely *on the courts* to protect him except with respect to national security information.⁹

*2163 The current law of governmental privileges available in criminal proceedings derives from two sources: (1) Section 535 of Title 28, which requires all executive branch officials to disclose *any* information to law enforcement regarding possible criminal activity by a member of the executive branch, thus overriding any purported *common-law* privileges available to the President; and (2) the Supreme Court's decision in *Nixon* regarding the scope of the constitutional executive privilege for presidential communications available to the President under article II of the Constitution.

1. Non-Constitutional Executive Privileges

Federal Rule of Evidence 501 provides that privileges in federal criminal trials and grand jury proceedings are “governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience” except as “provided by Act of Congress” or the Constitution. Section 535(b) of Title 28 makes clear for purposes of federal *criminal* proceedings that the President may not maintain any *common-law* privilege claim such as the governmental attorney-client and work product privileges that President Clinton asserted in the Whitewater investigation. The statute provides:

Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency....⁹²

In its decision in *In re Grand Jury Subpoena*, the Eighth Circuit labeled the statute “significant,” and stated that “executive branch employees, *including attorneys*,” have a duty to report information relating to criminal wrongdoing.⁹³

Some have attempted to dismiss this statute, arguing that it contains an implicit exception for information received by government attorneys.⁹⁴ That *2164 argument contravenes the clear and all-encompassing language of the statute. The statute contains no distinction between information obtained by government attorneys and that obtained by other government employees. In addition, Congress included a specific exception to this disclosure obligation for “classes of information” as to which the Attorney General “directs otherwise,”⁹⁵ and the Attorney General has not exempted information obtained by government attorneys representing the government. As a matter of elementary statutory construction, that explicit exception confirms the statute's plain meaning and no further exceptions can be judicially inferred or created.⁹⁶

The legislative history supports that conclusion as well. The House Committee Report accompanying § 535 stated that “[t]he purpose” of the provision is to “require the reporting by the departments and agencies of the executive branch to the Attorney General of information coming to their attention concerning *any* alleged irregularities on the part of officers and employees of the Government.”⁹⁷ The report emphasizes that “if the Attorney General or the Federal Bureau of Investigation undertakes such investigation, they should have *complete cooperation* from the department or agency concerned.”⁹⁸ The Justice Department supported the legislation:

The Department of Justice urges the prompt enactment of the measure, for such legislation will emphasize the congressional intent that the *chief law-enforcement officer of the Government is to have free access to all units thereof for the purpose of ferreting out personnel criminally violating their trusts and oaths of office*.⁹⁹

In addition, the President's official counsels have traditionally recognized this obligation. For example, Lloyd Cutler, who served as White House Counsel in two Administrations, has stated that there can be “problems relating to misconduct that you learn about somewhere in the White House or elsewhere in the Government.”¹⁰⁰ Mr. Cutler noted that there is a “Government rule of making it your duty, if you're a Government official as we as lawyers are, a statutory duty to report to the Attorney General any evidence you run into of a possible *2165 violation of a criminal statute.”¹⁰¹ Mr. Cutler further remarked that “when you hear of a charge and you talk to someone in the White House ... about some allegation of misconduct, almost the first thing you have to say is, ‘I really want to know about this, but anything you tell me I'll have to report to the Attorney General.’”¹⁰²

Similarly, twenty-five years ago, after White House Counsel John Dean had resigned, Robert Bork was asked whether he would consider becoming President Nixon's official White House Counsel. Bork asked Chief of Staff Alexander Haig whether he would be on the government payroll and was told that he would be. He then explained to Haig that “[a] government attorney is sworn to uphold the Constitution. If I come across evidence that is bad for the president, I'll have to turn it over. I won't be able to sit on it like a private defense attorney.”¹⁰³ (Bork ultimately did not receive the job).

In the same vein, the 1993 White House report on the Travel Office episode stated that “White House personnel may find that they have information about a *possible* violation of law. If there is a reasonable suspicion of a crime ... about which White House personnel *may have* knowledge, the initial communication of this information should be made to the Attorney General, the Deputy Attorney General, or the Associate Attorney General.”⁰⁴

Some have argued against this commonsense conclusion, pointing for apparent support to several unpublished Office of Legal Counsel (OLC) memoranda but the Eighth Circuit quickly and correctly concluded they were totally inapposite.⁰⁵ The OLC memoranda do not apply to situations where a government attorney represents a *government agency* and learns information during **2166* the course of *her official* representation of that agency.⁰⁶

In short, § 535 refutes any claim of an executive *common-law* privilege (including a governmental attorney-client or work product privilege) in federal criminal proceedings in response to a grand jury or trial subpoena sought by the United States.

2. Constitutionally Based Executive Privileges

Section 535, of course, does not prevent the President from asserting *constitutionally* based privileges. In *United States v. Nixon*,⁰⁷ the Supreme Court applied the executive privilege for presidential communications, which the President had asserted in response to a criminal trial subpoena sought by the United States. For purposes of *criminal* cases where the United States has sought a subpoena, the Court concluded that executive privilege protects only national security and foreign affairs information.⁰⁸

The dispute in *Nixon* arose in connection with a criminal trial of seven individuals, including former White House officials. The District Court issued a trial subpoena sought by the United States (represented by the special prosecutor) to obtain tape recordings of conversations among President Nixon and various high-level White House officials, including White House Counsel John Dean.⁰⁹ President Nixon resisted production of the tapes, citing the executive privilege for presidential communications.

In the Supreme Court, President Nixon argued that the subpoena did not meet the threshold requirements under Federal Rule of Criminal Procedure 17 of relevance and admissibility.¹⁰ He also asserted executive privilege, citing article II of the Constitution. President Nixon contended that the executive privilege for presidential communications was absolute and that the courts could not compel production of the tapes. Even if the privilege were not absolute and “even if an evidentiary showing as required by Rule 17(c) had been made as to each of the requested items,” President Nixon argued that “the Special Prosecutor must demonstrate a unique and compelling need to overcome **2167* the privileged nature of the materials.”¹² President Nixon thus argued in the alternative for some heightened showing, not dissimilar to the standard applied by the D.C. Circuit in *Nixon v. Sirica*, where the Court of Appeals held that the privilege claim of President Nixon was overcome by the “uniquely powerful” showing made by the special prosecutor.¹³

The Supreme Court found that the special prosecutor had met the relevance and admissibility requirements of Federal Rule of Criminal Procedure 17 for trial subpoenas: “there was a sufficient likelihood that each of the tapes contains conversations relevant to the offenses charged in the indictment” and there was “a sufficient preliminary showing that each of the subpoenaed tapes contains evidence admissible with respect to the offenses charged in the indictment.”¹⁴

The Court recognized, based on Article II, a “presumptive privilege for Presidential communications.”¹⁵ The privilege derived, the Court said, from the Constitution and from the “valid need for protection of communications between high Government officials and those who advise and assist them” the “importance” of which “is too plain to require further

discussion.”⁶ The Court stated that “the expectation of a President to the confidentiality of his conversations and correspondence ... has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking.”⁷ The privilege, the Court said, was “fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.”⁸

However, the Court stated that the tapes, by President Nixon's concession, did not reveal military or diplomatic secrets and thus did not implicate the President's authority “as Commander-in-Chief and as the Nation's organ for foreign affairs.”⁹ The Court therefore found that the President possessed only a “generalized interest in confidentiality.”²⁰

The Court then struck the balance between the President's generalized interest in confidentiality and the “need for relevant evidence in criminal trials.”² In this regard, the Court said it was important to distinguish the need for evidence in criminal proceedings from the need for evidence in congressional proceedings, civil cases, or Freedom of Information Act (FOIA) actions. In the latter situations, it may well be that the executive privilege for presidential ***2168** communications is absolute (or in the case of congressional subpoenas, a nonjusticiable question). However, the *criminal* context is different. As the Court emphasized, the traditional commitment to the rule of law is “nowhere more profoundly manifest than in our view that the twofold aim of criminal justice is that guilt shall not escape or innocence suffer.”²² The Court further noted that “the need to develop all relevant facts in the adversary system is both fundamental and comprehensive. ... To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.”²³

The Court then held that the need for relevant evidence in criminal proceedings outweighed the President's “generalized interest in confidentiality” unless the executive privilege claim was founded on a claim of state secrets:

[T]he allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.

We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.²⁴

The Court thus accepted neither President Nixon's primary argument that the privilege was absolute, nor his secondary argument that the Special Prosecutor must show a “unique and compelling need” to obtain the tapes. The Court found that the showing under Rule 17 itself demonstrated a need sufficient to obtain non-state secret presidential communications in criminal proceedings. The Court thus ordered that, upon remand, “[s]tatements that meet the test of admissibility and relevance” must be produced to the special prosecutor.²⁵ *Nixon*, in short, held that the showing

required under Rule 17 (relevance and admissibility for a trial subpoena; relevance for a grand jury subpoena) itself demonstrates the specific need for evidence that overrides the President's *2169 general need for confidentiality.²⁶

Lest there be any doubt about the meaning of *Nixon*, a foray into internal memoranda available from the Library of Congress provides historical confirmation. The Court specifically and consciously rejected the suggestion of President Nixon and the D.C. Circuit in *Nixon v. Sirica* that there be a case-by-case balancing test in which the prosecutor or grand jury must make some particularized, compelling showing in addition to the showing required by Rule 17. The memoranda among the Justices reveal some initial disagreement regarding this precise question, with Justice Byron White being in favor of the position ultimately adopted and Justice Lewis Powell favoring some undefined higher showing of need. The case was argued on July 8, 1974. On July 12, Justice Powell wrote to the Justices that “[w]e were not entirely in agreement as to the standard to be met in overcoming the privilege.”²⁷ Justice White wrote on July 15, 1974:

[T]he privilege does not extend to evidence that is relevant and admissible in a criminal prosecution. The public interest in enforcing its laws and the rights of defendants to make their defense *supply whatever necessity or compelling need* that may be required to reject a claim of privilege when there has been a sufficient showing that the President is in possession of relevant and admissible evidence. ... I, therefore, differ with *Nixon v. Sirica* insofar as it held that the Special Prosecutor must make some special showing beyond relevance and admissibility. Necessarily, then, the trial judge, who followed *Nixon v. Sirica*, did not apply the correct standard in this case.²⁸

After the Chief Justice circulated a new draft that still did not fully accord with Justice White's views, Justice White wrote the Conference on July 18, 1974:

[The current draft] impl[ies] that there must be a compelling need for the material to overcome presumptively privileged executive documents. I take it that you are suggesting that there is a dimension to overcoming the privilege beyond the showing of relevance and admissibility. This makes far too much of the general privilege rooted in the need for confidentiality, and it is not my understanding of the Conference vote. As I have already indicated, *my view is that relevance and admissibility themselves provide whatever compelling need must be shown*. I would also doubt that the Prosecutor has made any showing of necessity beyond that of relevance and admissibility.²⁹

*2170 Justice White felt sufficiently strong about this issue to add that “it is likely that I shall write separately if your draft becomes the opinion of the Court.”³⁰

On July 22, Justice Potter Stewart circulated an alternative draft on the privilege issue containing the suggestions of Justice White. The draft no longer contained any reference to a heightened standard, and the cover memo indicated that the opinion had received the approval of Justices White and Thurgood Marshall. The Chief Justice then quickly incorporated the Stewart section into his opinion and recirculated the entire draft the next day, July 23. All of the Justices then joined, and the opinion was issued on July 24, 1974.³¹

This interpretation of *Nixon* was advanced by Judge Silberman in his 1990 concurrence in *United States v. North*.³² The district court in that case, Judge Silberman noted, had interpreted *Nixon* as “constructing a very high barrier to a criminal defendant who wishes to call a President or ex-President who, it is asserted, will give evidence relevant to the defense.”³³ Finding “it instructive to note how easily the Court in *Nixon* was satisfied that the tapes sought by the Special Prosecutor

... were relevant,” Judge Silberman indicated that in cases where national security is not asserted, no special showing other than relevance is necessary even after executive privilege is claimed.³⁴ Judge Silberman continued:

To be sure, the Court used the language “essential to the justice of the pending criminal case” and “demonstrated specific need for evidence” in describing what was needed to overcome the President’s qualified privilege. But the Court does not appear to have meant anything more than the showing that satisfied Rule 17(c). Nowhere in the opinion does the Court ever describe any offer by the Special Prosecutor other than the rather perfunctory showing of relevance Even in the section of the opinion dealing with executive privilege, the Court stated that “the President’s broad interest in confidentiality *2171 of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.”³⁵

In the 1997 dispute between President Clinton and the Whitewater Independent Counsel over the governmental attorney-client privilege, the Eighth Circuit addressed President Clinton’s contention that *Nixon* set forth some higher standard for executive branch documents than that required by Rule 17. The Court concluded otherwise, stating that “*Nixon* is indicative of the general principle that the government’s need for confidentiality may be subordinated to the needs of the government’s own criminal justice processes.”³⁶ The Court stated that it “doubt ed ” that a case-by-case need determination “constitutes the proper need threshold” set forth in *Nixon*.³⁷

The D.C. Circuit also addressed an executive privilege dispute between the President and Independent Counsel Donald Smaltz in the investigation of former Secretary of Agriculture Michael Espy.³⁸ The decision is essentially in accord with the above analysis, although certain parts advance a slightly different articulation. In particular, noting Judge Silberman’s opinion in *North*, the court first opined that it would be “strange” if *Nixon* required nothing more to overcome the presidential privilege than the showing required by Rule 17, because then the privilege “would have no practical benefit.”³⁹ Of course, *Nixon* indicated that the privilege may well be absolute in civil, congressional, and FOIA proceedings; it is only in the discrete realm of *criminal* proceedings where the privilege may be overcome.⁴⁰

In any event, any difference between Judge Silberman and this D.C. Circuit panel is more apparent than real, more *procedural* than *substantive*. At the outset, it is significant that the Court specifically rejected the President’s argument that “the information sought must be shown to be critical to an accurate judicial determination.”⁴¹ That argument, the Court said, “simply is incompatible with the Supreme Court’s repeated emphasis in *Nixon* on the importance *2172 of access to relevant evidence in a criminal proceeding.”⁴² The court concluded that in grand jury cases where national security is not at issue and where the Rule 17 standard is satisfied, presidential communications can be obtained, first, if “each discrete group of the subpoenaed materials likely contains important evidence,” and, second, if the evidence “is not available with due diligence elsewhere.”⁴³

The court stated that this first component “can be expected to have limited impact.”⁴⁴ In the grand jury setting, moreover, “the fact that evidence covered by the presidential communications privilege may be inadmissible should not affect a court’s determination of the grand jury’s need for the material.”⁴⁵ The court further stated that the second component also will be “easily” satisfied when “an immediate White House advisor is being investigated for criminal behavior.”⁴⁶ Even in cases where a person *outside* the White House is under investigation, the court said that this second component still will be satisfied when the proponent can “demonstrate a need for information that it currently possesses, but which it has been unable to confirm or disprove.”⁴⁷ Of course, that showing can be made in virtually all

investigations few facts are ever fully confirmed or disproved. The court further stated that this standard would not impose “too heavy” a burden on the subpoena proponent.⁴⁸

In short, the D.C. Circuit opinion does not deviate in substance from *Nixon*, the Eighth Circuit's opinion, or Judge Silberman's approach; it differs, if at all, only with respect to the *time* when relevant information can be obtained, as the court itself recognized.⁴⁹

3. The Relevance of *Nixon* to a Claim of Governmental Attorney-Client or Work Product Privilege

Nixon is important not only for constitutionally based privileges, but also because it establishes a principle that applies to other common law privilege claims that the President might raise. For example, even if § 535 of Title 28 were erased from the U.S. Code, *Nixon* itself demonstrates, as the Eighth *2173 Circuit held, that any claim of governmental attorney-client or work product privilege would be similarly overcome in federal criminal proceedings.

The judicial process in this country is deeply committed to the principle that “the public ... has a right to every [person's] evidence.”⁵⁰ Because testimonial privileges “obstruct the search for truth,” there is a “presumption against the existence of an asserted testimonial privilege.”⁵¹ Privileges thus “are not lightly created nor expansively construed.”⁵² In light of these settled principles, the Supreme Court has recognized privileges, or applied them in a particular setting, only when the privilege (or application thereof) is historically rooted or recognized in the vast majority of the states, and is justified by overriding public policy considerations.

In criminal proceedings, a governmental attorney-client or work product privilege has no roots whatsoever. There is no case, statute, rule, or agency opinion suggesting that a department or agency of the United States (or any state governmental entity) can maintain a full-blown governmental attorney-client or work product privilege in federal criminal or grand jury proceedings.⁵³

Nixon, moreover, held that even the deeply rooted and constitutionally mandated executive privilege for presidential communications did not override the need for relevant evidence in criminal proceedings, except when a specific claim of national security was at issue. The decision in *Nixon* demonstrates that a governmental attorney-client and work product privilege (the other two privileges that have been at issue in investigations of executive branch officials) also cannot overcome the need for relevant evidence in criminal proceedings. If the constitutionally rooted executive privilege for presidential communications is overcome by the need for relevant evidence in criminal proceedings, the result cannot be different for a newly conceived governmental attorney-client and work product privilege. *A fortiori*, a governmental attorney-client or work product privilege fails in federal criminal proceedings.

4. The Policy of Executive Privileges

Section 535, the Eighth Circuit decision, and the Supreme Court decision in *Nixon* demonstrate *as a matter of law* that the only executive privilege currently valid against the United States in federal criminal proceedings is a national security/state secrets privilege. As a *policy* matter, that rule reflects the proper *2174 balance of the President's need for confidentiality and the government's interest in obtaining all relevant evidence for criminal proceedings.

Government officials, even government attorneys, are *public* officials who work for the people. Any claim to confidentiality against the United States stands on a radically different footing than a claim made by a *private* party. The Supreme Court recognized the difference between such *public* and *private* responsibilities in declining to apply an attorney-like privilege to an accountant's work papers:

The *Hickman* work-product doctrine was founded upon the private attorney's role as the client's confidential advisor and advocate, a loyal representative whose duty it is to present the client's case in the most favorable possible light. ... [T]he independent auditor assumes a *public* responsibility transcending any employment relationship with the client. ... This "public watchdog" function demands that the accountant maintain total independence from the client at all times *and requires complete fidelity to the public trust*. To insulate from disclosure a certified public accountant's interpretations of the client's financial statements would be to ignore the significance of the accountant's role as a disinterested analyst charged with *public* obligations. ⁵⁴

For this same reason, in addressing the narrow question of a governmental attorney-client privilege, respected commentators and the American Law Institute (ALI) reject equating private corporations with public entities. The McCormick treatise states that "[w]here the entity in question is governmental ..., significantly different considerations appear." ⁵⁵ Professors Wright and Graham note that "the costs of the government privilege may be very high. ... Legitimate claims for governmental secrecy should all be worked out in the context of the existing privileges for secrets of state and official information." ⁵⁶ Indeed, the ALI's Restatement (Third) of the Law Governing Lawyers states that the rules for private lawyers do not translate to public lawyers; instead, "more particularized rules may be necessary where one agency of government claims the privilege in resisting a demand for information by another. Such rules should take account of the complex considerations of governmental structure, tradition, and regulation that are involved." ⁵⁷

These commonsense propositions led the Eighth Circuit flatly to reject any claim that a governmental or executive attorney-client or work product privilege could be asserted against the federal grand jury. The court stated that the "general duty of public service calls upon government employees and agencies *2175 to favor disclosure over concealment." ⁵⁸ Citing *Arthur Young*, the court explained that "the public responsibilities of the White House are, of course, far greater than those of a private accountant performing a service with public implications." ⁵⁹ The court added:

[T]he strong public interest in honest government and in exposing wrongdoing by public officials would be ill-served by recognition of a governmental attorney-client privilege applicable in criminal proceedings inquiring into the actions of public officials. We also believe that to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets. ⁶⁰

If the law embodied the contrary position, a government official (including the President or White House Counsel) safely could tell a White House or other agency attorney (or other official) that he destroyed subpoenaed documents, paid off potential witnesses, erased a subpoenaed tape, or concealed subpoenaed materials or worse. The courts have rightly rejected the executive's attempt to conceal such information, and Congress should codify those results to prevent future Presidents from trying the same gambit.

Supporters of broad executive privileges contend that limiting privileges will have a chilling effect that the presidency might be disabled and that governmental officials might be less forthcoming to a President or government attorney if they knew that the information could be disclosed in criminal proceedings. This argument, however, was rejected by the Supreme Court in *Nixon* (in the context of the all-encompassing presidential communications privilege) and was rejected by the Eighth Circuit (in the context of governmental attorney-client and work product privileges).

It is surely true that a President and government attorneys must be able to obtain information in order to perform their functions, but that assertion proves nothing. The interest in gathering facts to perform those functions does not require the further step of concealing facts from a federal grand jury if they are (or become) relevant to a federal criminal investigation.

As noted above, the dire claims about the disabling of the presidency are false, moreover, because the President is *always* free to withhold other information if he finds that necessary. To do so, a President must simply order the federal prosecutor not to seek the information and fire him if he refuses, thus taking political responsibility for his privilege claims. ⁶

The chilling-effect argument is illusory, in any event, because executive branch employees and attorneys know that they do not control the ultimate ***2176** assertion of privilege in any forum. ⁶² As a result, the government employee can have *no* expectation of confidentiality and *no* assurance that his communications or work product will remain confidential if called for in federal criminal proceedings. Thus, government employees necessarily know that their communications and work may be disclosed if relevant to a federal criminal investigation.

In addition, the frequency of disclosure will be low. Even in today's environment, the overwhelming majority of White House business and federal agency work never comes under grand jury scrutiny. ⁶³ Grand jury investigations obviously occur more often than criminal trials, but grand juries operate in secret and thus present little risk of chilling particular conversations, as the Supreme Court has emphasized. ⁶⁴

Finally, the debate over privileges, particularly a governmental attorney-client privilege, often is framed in generalities and fails to consider *actual* situations where the issue might arise. There are three basic situations where a government attorney or official might obtain information from other government employees and where the information might become relevant to a subsequent criminal investigation.

The first situation occurs when the employee seeks advice from a government attorney or official about his possible *future* course of conduct. If the employee follows the advice and does not commit a criminal act, it is hard to see what chill or harm might be caused by subsequent disclosure of the information. On the other hand, if the employee ignores the advice and commits a criminal act, then what possible *governmental* interest is there in protecting the employee from the charge that he knew his activity was criminal? Moreover, if the attorney mistakenly advises the employee that a proposed course of conduct is not criminal, even the employee will wish that communication disclosed if he is subsequently prosecuted. In the end, the only employee seeking advice about proposed conduct who will be chilled is the employee who hopes to obtain a government attorney's blessing for potentially criminal conduct. That scenario, however, hardly justifies creation of a far-reaching privilege.

The second category arises where the employee seeks to discuss *past* conduct that might be criminal. In that situation, of course, the primary interest of the United States is and must be in detecting and prosecuting crime, as the OLC repeatedly has emphasized. The United States has no interest in harboring criminals in government employment, even at high levels. Agency attorneys employed by and representing the United States are not authorized to act as criminal defense attorneys *against* the United States.

***2177** The OLC thus has long rejected any suggestion that the United States can participate on both sides of a criminal investigation. ⁶⁵ That explains why there is no tradition suggesting that a government attorney can consult with an employee about the employee's past criminal conduct and then refuse to disclose that information to the federal grand jury. Federal agencies, unlike corporations, are not subject to criminal investigation or indictment by the United States, so an agency cannot be adverse to the United States in a criminal prosecution. When an agency becomes aware of internal

wrongdoing, the agency's sole interest is to ferret it out, and there can be no risk of endangering a governmental interest by doing so and by disclosing the results to federal law enforcement authorities.

The third situation occurs not where the employee initiates conversation, but where the agency elicits information from its employees about some event. Government agencies and government agency attorneys often have a legitimate interest in obtaining facts about a particular event; the fact-gathering process enables an agency head (or delegate) to discipline employees, institute new policies that will prevent similar errors in the future, inform the Congress or the public of the facts, or merely deal with the latest political controversy. Thus, the White House has conducted numerous internal investigations, as have many agencies and inspectors general. Given the number of such investigations, a far-reaching and novel governmental attorney-client privilege is, by definition, unnecessary to *encourage* such activity.⁶⁶ Unlike a corporation (which is subject to indictment), no legitimate government agency would be, or has been, discouraged from conducting internal factfinding by the knowledge that any evidence of *crime* uncovered will in fact be presented to the relevant law enforcement authorities. Indeed, this was the premise behind the enactment of Section 535 (and the many inspector general statutes as well).

CONCLUSION

Outside federal prosecutors are here to stay. They have existed at least since President Grant's Administration. As we have seen over the last twenty-five *2178 years, the system of outside prosecutors can make an extraordinary difference in how our nation is governed. As Justice Scalia stated, the debate over a special counsel is about power—that is, “[t]he allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish”⁶⁷

The fundamental flaw with the current independent counsel statute is that it creates, almost by definition, a scenario whereby the President and the independent counsel are adversaries. From that basic mistake flows most of the other problems that critics identify in the statute. Clarifying the role of the President in the manner proposed in this article would expedite, depoliticize, and enhance the credibility and effectiveness of special counsel investigations; and ensure that the Congress alone is directly responsible for overseeing the conduct of the President of the United States and determining, in the first instance, whether his conduct warrants a public sanction.

Footnotes

a1 Mr. Kavanaugh served as Associate Counsel in the Office of the Whitewater Independent Counsel from 1994 to 1997 and also for a period in 1998. The views reflected in this article are his own.

1 The Attorney General is a political actor, as are all high officials of the Justice Department. In other words, the Attorney General supports not only the ideas and policies of the incumbent administration but also publicly supports candidates for elective office who espouse those policies.

2 Mr. Cox has noted that the “normal position of the Justice Department is “one for defending an expanding executive privilege, whereas the Special Prosecutor in Watergate and other subsequent investigations “were challenging executive privilege. *So there are some real conflicts.*” 67th Annual Judicial Conference of the United States Court of Appeals for the Fourth Circuit, *The Independent Counsel Process: Is It Broken and How Should It Be Fixed?*, at 138 (June 27, 1997) [hereinafter *Fourth Circuit Judicial Conference*] (emphasis added). The Justice Department's brief in the litigation between the President and the Whitewater Independent Counsel Kenneth W. Starr demonstrated this point. The Justice Department has agreed with neither the White House nor the Independent Counsel about the proper scope of privilege. *See* Brief Amicus Curiae for the United States, Acting Through the Attorney General, Office of the President v. Office of Independent Counsel at 20, 117 S.Ct. 2482 (1997) (No. 96 1783) (“The United States has compelling interests in investigating and prosecuting crimes inside or outside the government and the Justice Department's performance of those tasks is aided by the duty of the President

and other government officials to report evidence of criminal violations to the Attorney General. At the same time ... the President must have access to legal advice that is frank, fully informed, and confidential.).

1975 REPORT OF THE WATERGATE SPECIAL PROSECUTION TASK FORCE, at 137 38.

28 U.S.C. §§ 591 99 (1994).

The Olympian term “independent counsel” has always promised more than it could deliver. Moreover, the term would be inappropriate under the regime proposed here because “independent” connotes a counsel appointed outside the Executive Branch and accountable to no one. The Ethics in Government Act initially called for the appointment of a “special prosecutor,” but Congress changed the name in 1982 to “independent counsel.” The term “special counsel” best captures the position and is used here in describing the proposed regime.

487 U.S. 654 (1988).

See George D. Brown, *The Gratuities Offense, and the RICO Approach to Independent Counsel Jurisdiction*, 86 GEO. L.J. 2045, 2049 (1998).

78 F.3d 1313 (8th Cir.), *cert. denied*, 117 S.Ct. 76 (1996).

The Justice Department is a department within the executive branch whose head is appointed by the President. *See* 28 U.S.C. § 501 (1994) (“The Department of Justice is an executive department of the United States at the seat of Government.”); 28 U.S.C. § 503 (“The President shall appoint, by and with the advice and consent of the Senate, an Attorney General of the United States. The Attorney General is the head of the Department of Justice.”).

KATY J. HARRIGER, *THE FEDERAL SPECIAL PROSECUTOR IN AMERICAN POLITICS* 153 (1992) (emphasis added) (quotation marks omitted).

28 U.S.C. § 515 (1994); 28 U.S.C. § 543 (1994).

See infra text accompanying notes 28 40.

28 U.S.C. § 592(c)(1)(A). The Attorney General's decision is judicially unreviewable, however, which means that threat of impeachment or other congressional retaliation is the only legally enforceable check requiring the Attorney General to enforce the law.

28 U.S.C. § 592(c).

Id. § 593(b).

Id. § 593(b)(3).

Morrison, 487 U.S. at 679.

28 U.S.C. § 594(a)(9). The symbolism of this nomenclature is important and should be retained in any future legislation. Criminal defendants (and other critics) inevitably try to imply to juries (and the public) that the appointed counsel is somehow an extra governmental official who does not warrant the same respect as prosecutors representing the United States. In the 1996 trial of Jim Guy Tucker, James McDougal, and Susan McDougal, for example, the defendants refused to refer to the prosecutors as the “United States,” arguing that “they are independent Counsel appointed under a special act.” The Court put a quick end to this tactic: “The indictment which was rendered by citizens of this state, the caption is United States of America versus James B. McDougal, Jim Guy Tucker, and Susan H. McDougal. Mr. Jahn and his associates represent the United States of America. Disregard the comment made by Mr. Collins. *United States v. McDougal, Tucker, and McDougal*, No. LR CR 95 173, Tr. at 4525 27 (E.D. Ark. Apr. 11, 1996).

28 U.S.C. § 594(h).

Id. § 593(c).

- 21 Julie R. O'Sullivan, *The Independent Counsel Statute: Bad Law, Bad Policy*, 33 AM. CRIM. L. REV. 463, 505 (1996).
- 22 TERRY EASTLAND, ETHICS, POLITICS, AND THE INDEPENDENT COUNSEL 134 (1989).
- 23 *Fourth Circuit Judicial Conference*, *supra* note 2, at 133.
- 24 *Id.*
- 25 Reauthorization of the Independent Counsel Law: Hearing on S. 3131 Before the Subcomm. on Oversight of the Senate Comm. on Governmental Affairs, 102nd Cong. 15 (1992) (testimony of George J. Terwilliger III Deputy Attorney General of the United States).
- 26 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).
- 27 In the final pages of his dissent, Justice Scalia also pointed out what he termed the “un]fairness” of an independent counsel investigation, and he did so in broad terms that arguably seem to apply to *all* special counsel, whether appointed by a court or by the President (or Attorney General). In comparing a special counsel to an “ordinary” Justice Department prosecutor, however, Justice Scalia appeared to rely on a romantic vision of “ordinary” federal prosecutors. In fact, an “ordinary” federal prosecutor is at least as likely to engage in hardball, near the edge tactics as a special counsel whose every move is publicly tracked, analyzed, and criticized. Moreover, the only concrete measure of *over* aggressiveness is the prosecutor's conviction rate. A careful prosecutor should not bring many cases that end in outright acquittal on all counts. As it turns out, the record of independent counsels appointed under the statute is better than that of the Justice Department. Only one independent counsel appointed under the statute has ever suffered an outright jury acquittal, which is an impressive record, particularly given the skilled attorneys retained by the defendants in such cases.
- Justice Scalia also pointed out that ordinary federal prosecutors suffer from constraints on resources and that independent counsels generally do not. *Morrison*, 487 U.S. at 727–33 (Scalia, J., dissenting). That is not an entirely accurate or persuasive argument. First, the fact that some federal prosecutors' offices may be understaffed and thus unable to prosecute federal crimes that should be prosecuted is hardly a model for investigations of possible crimes by our highest national officials. Indeed, that is the kind of backwards logic that Justice Scalia ordinarily ridicules. Second, in allocating its enormous annual appropriation, the Department of Justice regularly determines that certain *kinds* of crimes warrant intensive investigation and prosecution, whether it be drug distribution or health care fraud or abortion clinic bombings or church burnings or the like. By means of the independent counsel statute, Congress has simply made the altogether rational judgment that public corruption by high federal officials should be one such area of concentration. That policy judgment hardly warrants condemnation. It is worth noting, in that regard, that the United States Attorney's office for the District of Columbia recently has received severe public criticism for devoting *insufficient* resources to public corruption cases. *See, e.g.,* Paul Butler, *Why Won't the Prosecutor Prosecute?*, LEGAL TIMES, Jan. 19, 1998, at 19 (discussing the lack of prosecutions for corruption among public officials). Third, contrary to the implicit undercurrent of Justice Scalia's discussion of “fairness,” the Justice Department itself devotes extraordinary resources to numerous high profile public corruption cases. The Congressman Dan Rostenkowski case, the Mayor Marion Barry prosecution, the campaign fundraising investigation, the Governor Fife Symington case in Arizona, and the Congressman Joseph McDade investigation in Pennsylvania are all recent examples of *massive*, single minded, intense, and occasionally out of control (in the case of Congressman McDade, perhaps) investigations. The history of independent counsel investigations certainly measures up no worse than those investigations. Fourth, any true comparison of resource constraints is, in the end, virtually impossible because the Justice Department never identifies exactly how much money its prosecutors and the FBI spend on particular investigations and prosecutions; thus, the Department is able to “hide” its costs and avoid the kind of public and congressional scrutiny that independent counsels constantly face. How much money did the United States spend pursuing Congressman McDade? Governor Symington? Mayor Barry? A lot.
- 28 *See* RESPONSES OF THE PRESIDENTS TO CHARGES OF MISCONDUCT (C. Vann Woodward ed., 1974).
- 29 *See* EASTLAND, *supra* note 22, at 8; DAVID A. LOGAN, HISTORICAL USES OF A SPECIAL PROSECUTOR: THE ADMINISTRATIONS OF PRESIDENTS GRANT, COOLIDGE AND TRUMAN 7 (Congressional Research Service Nov. 23, 1973).
- 31 *Id.* at 8.

- 30 EASTLAND, *supra* note 22, at 8, 14.
- 32 S.J. RES. 54, 68th Cong. (1924).
- 33 This article advocates the procedure of presidential appointment and Senate confirmation used during the Teapot Dome Scandal.
- 34 EASTLAND, *supra* note 22, at 8 9.
- 35 *Id.* at 8. The Justice Department was not created until 1870, and there was very little federal criminal law before the 20th century.
- 36 28 U.S.C. §§ 591-99 (1994).
- 37 *See Reauthorization Hearings*, *supra* note 25, at 15 (1992).
- 38 The independent counsel statute states: “The division of the court may not appoint as an independent counsel any person who holds any office of profit or trust under the United States. 28 U.S.C. § 593(b)(2). This provision on its face disqualified Mr. Fiske from appointment as independent counsel under the statute. In the public law reauthorizing the statute in 1994, however, Congress stated that the usual disqualification did not apply to persons appointed as regulatory independent counsel, thus granting the Special Division discretion whether to appoint Mr. Fiske. *See* Pub. L. No. 103-270, §§ 7(a), (h). The court chose not to appoint Mr. Fiske on the theory that, notwithstanding Congress’ *ad hoc* suspension of § 593(b)(2), the policy, if not the strict terms of the provision, still disqualified Mr. Fiske because he was an administration official.
- 39 EASTLAND, *supra* note 22, at 8. This tradition is not confined to the federal system. The state of New York also has a tradition of appointing special prosecutors (Thomas Dewey, for example) to investigate and prosecute public corruption cases. *See Harriger*, *supra* note 10, at 3.
- 40 *Id.* at 15. At the same time, there is a long tradition of congressional investigation of executive branch malfeasance. These investigations often occur simultaneously with criminal investigations of executive branch officials. Some of these congressional investigations have led to the resignation of executive branch officials, and sometimes efforts have been made to impeach (although no executive branch official has been impeached by the House and convicted by the Senate). Congressional investigations historically have been the primary manner in which the public learns whether executive branch officials have committed malfeasance in office. This tradition has continued to the present day. This article argues that Congress must continue to have primary responsibility for determining whether the President should be removed.
- 41 Although the Supreme Court upheld the system of court appointed outside counsel in *Morrison v. Olson*, the separation of powers analysis in that case is quite inconsistent with the analysis in more recent cases such as *Edmond v. United States*, 117 S.Ct. 1573 (1997). In particular, *Morrison* held that the independent counsel was an “inferior officer” whose appointment thus could be wrested from the President. *Morrison*, 487 U.S. at 671-72. In *Edmond*, however, the Court said that inferior officers “are officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate.” *Edmond*, 117 S.Ct. at 1581. Under this mode of analysis, an independent counsel could not realistically be considered an inferior officer. Thus, if the issue were presented today and there were no *stare decisis* concerns, there is little telling how the Court would resolve the issue. Justices Anthony Kennedy, Clarence Thomas, David Souter, Ruth Bader Ginsburg, and Stephen Breyer have been appointed to the Court since the decision in *Morrison*.
- 42 This was a foreseeable flaw that Justice Scalia correctly identified in his dissent. *See Morrison*, 487 U.S. at 730 (Scalia, J., dissenting).
- 43 *See, e.g., CNN Capital Gang* (CNN Television Broadcast, Dec. 13, 1997) (Senator Orrin Hatch questioning Attorney General Reno’s decision not to appoint an independent counsel to investigate Vice President Al Gore’s fundraising, calling it a “conflict of interest”).
- 44 Some might say that we should find totally apolitical persons to serve as independent counsel. But even if that were desirable (in our democracy, one would hope, all people would be *active* participants in a variety of political and social causes), “nearly

everybody who is qualified to be independent counsel has some kind of political involvement in their background. *Fourth Circuit Judicial Conference*, *supra* note 2, at 39 (comments of Special Division Judge David B. Sentelle).

Even with respect to ordinary cases, Eric Holder, a former United States Attorney for the District of Columbia and now Deputy Attorney General, has written that a prosecutor cannot remain publicly silent in the face of challenges to the prosecutor's ethics and motivations. Eric H. Holder & Kevin A. Ohlson, *Dealing With the Media in High Profile White Collar Crime Cases: The Prosecutor's Dilemma* (on file with author).

In the Whitewater investigation, the independent counsel obtained the convictions of Jim Guy Tucker, James McDougal, and Susan McDougal in June 1996 despite sustained attacks on his credibility. In a subsequent August 1996 Arkansas trial of two bankers, the result was a hung jury.

See, e.g., Ruth Marcus, *The Prosecutor: Following Leads or Digging Dirt?*, WASH. POST, Jan. 30, 1998, at A1 (calling Faircloth a "leading crusader against Fiske).

Edmond v. United States, 117 S.Ct. 1573, 1579 (1997) (quotations omitted). As Justice Joseph Story noted, "If the President] should ... surrender the public patronage into the hands of profligate men, or low adventurers, it will be impossible for him long to retain public favor. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 375 (1833).

THE FEDERALIST NO. 76, at 457-58 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Edmond, 117 S.Ct. at 1579.

28 U.S.C. § 596(a)(1).

Id. § 515; *id.* § 543.

Morrison, 487 U.S. at 723-24 & n.4 (Scalia, J., dissenting). Justice Scalia stated that "the President must have control over all exercises of the executive power and that "failure to accept supervision constitutes "good cause for removal. *Id.* at 724 n.4 (Scalia, J., dissenting). That, in essence, defines "good cause such that it means little more than "at will. Although Justice Scalia disclaimed the logical conclusion of his position, it would seem that he believes, as the Court described his position, that "every officer of the United States exercising any part of the Executive power] must serve at the pleasure of the President and be removable by him at will. *Id.* at 690 n.29 (majority opinion describing Justice Scalia's position).

Id. at 728-29 (Scalia, J., dissenting).

President Grant and President Truman's Attorney General also ordered dismissal of special prosecutors. *See EASTLAND*, *supra* note 22, at 14, 16.

See CNN Capital Gang, *supra* note 43 (Senator Hatch argued: "Who cares about the phone calls ... It's all the other stuff that ought to be investigated.).

Susan Schmidt & Roberto Suro, *Troubled from the Start; Basic Conflict Impeded Justice Probe of Fundraising*, WASH. POST, Oct. 3, 1997, at A1.

United States v. Tucker, 78 F.3d 1313, 1316-19 (8th Cir.1996).

That friction revealed itself, for example, in the investigation conducted by Independent Counsel Donald Smaltz.

Fourth Circuit Judicial Conference, *supra* note 2, at 91.

28 U.S.C. § 594(h)(1)(B).

28 U.S.C.A. § 594(h)(1) (West 1993), *as amended by* Pub. L. No. 103-270 § 3(o) (1994). After the 1994 revision, the statute also requires that the independent counsel submit to Congress "annually a report on the activities of the independent counsel, including a description of the progress of any investigation or prosecution conducted by the independent counsel. Such

report may omit any matter that in the judgment of the independent counsel should be kept confidential, but shall provide information adequate to justify the expenditures that the office of the independent counsel has made. 28 U.S.C. § 595(a)(2).

28 U.S.C. § 595(c).

See, e.g., The Independent Counsel Reauthorization Act of 1993: Hearing on S. 24 Before the Comm. on Governmental Affairs, 103d Cong. 49 (1993) (Professor Samuel Dash, Georgetown University Law Center, stating: “Independent counsel investigations and prosecutions carry out the responsibilities of the executive branch to enforce the Federal criminal laws. The scope of congressional committee investigations and hearings is generally broader than those of investigations and prosecutions conducted by independent counsel.).

Congress has the power to provide privileges or immunities regardless whether they are constitutionally required. *See Clinton v. Jones*, 117 S.Ct. 1636, 1652 (1997) (“If Congress deems it appropriate to afford the President stronger protection, it may respond with appropriate legislation.). On the other hand, Congress would not have the power to definitively say that a President *is* subject to indictment. The courts have the final word on the minimum level of immunity the Constitution affords the President. *See id.* (“If the Constitution embodied the rule that the President advocates, Congress, of course, could not repeal it.).

See U.S. CONST, art. I, § 3, cl. 7 (“Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.).

REPORT OF THE WATERGATE SPECIAL PROSECUTION TASK FORCE, *supra* note 3, at 122.

See Brief for Respondent, Cross Petitioner at 101, *United States v. Nixon*, 418 U.S. 683 (1974) (Nos. 73 1766, 73 1834) [hereinafter Brief for President Nixon].

Brief for the United States, *Agnew v. United States* (D. Md. 1974) (No. 73 0535).

Nixon v. Sirica, 487 F.2d 700, 757 (D.C. Cir.1973) (MacKinnon, J., concurring in part, dissenting in part).

Id.

Id.

117 S.Ct. 1636 (1997).

See id. at 1639 (noting that suit was brought by “private citizen for damages); *id.* at 1642 n.12 (noting that question presented involved “litigation of a private civil damages action); *id.* at 1645 (“With respect to acts taken in his ‘public character that is official acts the President may be disciplined principally by impeachment, not by private lawsuits for damages. But he is otherwise subject to the laws for his purely private acts.”); *id.* at 1648 n.36 (referring to “suits against the President for actions taken in his private capacity); *id.* at 1650 (“We therefore hold that the doctrine of separation of powers does not require federal courts to stay all private actions against the President until he leaves office.); *id.* (referring to “burdens of private litigation); *id.* at 1651 (referring to private plaintiff’s “interest in bringing the case to trial); *id.* at 1652 (referring to possibility that Congress could provide for “deferral of civil litigation).

Determining how to conduct an investigation or whether to seek an indictment is not a ministerial task, but involves the exercise of judgment and discretion. The exercise of judgment and discretion inevitably means that the decision cannot be separated, in the eyes of the public, from its political consequences.

THE FEDERALIST NO. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Id. at 397.

Id. at 398. This passage was written largely with respect to a debate over whether the Senate or the Supreme Court should try an impeachment. But the ideas and themes discussed in explaining why the Senate was superior to the Supreme Court in passing *public* judgment upon the conduct of the President apply, *a fortiori*, to a single prosecutor attempting to do so.

- 79 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 550 (Max Farrand ed., 1966).
- 80 THE FEDERALIST NO. 65, *supra* note 76, at 398 99 (Alexander Hamilton).
- 81 THE FEDERALIST NO. 69, *supra* note 76, at 416 (Alexander Hamilton).
- 82 U.S. CONST. art. II.
- 83 As indicated in the statutory language proposed by this article, Congress should take appropriate steps to ensure that the statute of limitations would not prevent prosecution of a President after he leaves office.
- 84 President Clinton has litigated privilege claims against both the Whitewater and Espy independent counsels. He also has raised privilege claims against the Justice Department. *See* S.REP. NO. 104 280, at 67 70, 82 83 (1996). The Public Integrity Section issued a grand jury subpoena to the White House in 1994, and that the White House in response claimed privilege as to 120 documents. H.R.REP. NO. 104 849, at 152 53 (1996).
- 85 418 U.S. 683 (1974).
- 86 112 F.3d 910 (8th Cir.), *cert. denied*, 117 S.Ct. 2482 (1997).
- 87 910 F.2d 843, 950 54 (D.C.Cir. 1990) (Silberman, J., concurring in part, dissenting in part).
- 88 121 F.3d 729 (D.C.Cir. 1997).
- 89 This proposed language is premised on the assumption that a special counsel's motion to enforce a subpoena would be justiciable. The Court in *Nixon* so held, 418 U.S. at 697, and there is no reason to revisit that decision, particularly because the President retains authority to prevent such disputes from reaching the courts.
- 90 Even under the current “good cause” restriction, as Justice Scalia stated in *Morrison*, an inferior officer such as an independent counsel is removable for cause if he refuses to accept supervision. *See Morrison*, 487 U.S. at 724 n.4 (Scalia, J., dissenting).
- 91 Notwithstanding *Nixon*, it is at least theoretically conceivable that the Supreme Court might rule that the Constitution provides a greater scope of executive privileges than this section would grant. If so, then the Constitution would trump. *See Clinton v. Jones*, 117 S.Ct. at 1652. But that is unlikely, given the clarity of *Nixon*.
- 92 28 U.S.C. § 535(b). The subsection states in full:
Any information, allegation, or complaint received in a department or agency of the executive branch of the Government relating to violations of title 18 involving Government officers and employees shall be expeditiously reported to the Attorney General by the head of the department or agency, unless
(1) the responsibility to perform an investigation with respect thereto is specifically assigned otherwise by another provision of law; or
(2) as to any department or agency of the Government, the Attorney General directs otherwise with respect to a specified class of information, allegation, or complaint.
- 93 *In re Grand Jury Subpoena*, 112 F.3d at 920 (emphasis added).
- 94 *See* *Petition for a Writ of Certiorari, Office of the President v. Office of Independent Counsel* (No. 96 1783) *cert. denied*, 117 S.Ct. 22, 23 n.7 (1997).
- 95 28 U.S.C. § 535 (b)(2).
- 96 *See Honig v. Doe*, 484 U.S. 305, 325 (1988) (stating a court is “not at liberty to engraft onto the statute an exception Congress chose not to create”). In general, “courts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so, and no matter how widely the blame may be spread.” *Brogan v. United States*, 118 S.Ct. 805, 811 12 (1998).
- 97 H.R.REP. NO. 83 2622, at 1 (1954) (emphasis added), *reprinted in* 1954 U.S.C.C.A.N. 3551, 3551.

- 98 *Id.* at 3552 (emphasis added).
- 99 *Id.* at 3553 (emphasis added). In an independent counsel investigation, the independent counsel is the official who receives information about matters within his jurisdiction. “When issuing ... subpoenas, an independent counsel stands in the place of the Attorney General. S.REP. NO. 100 123, at 22 (1987); *see* 28 U.S.C. § 594(a).
- 100 Lloyd N. Cutler, *The Role of the Counsel to the President of the United States*, 8 REC. OF THE ASS'N OF THE B. OF THE CITY OF NEW YORK 470, 472 (1980).
- 101 *Id.*
- 102 *Id.*
- 103 *A Conversation with Robert H. Bork*, 26 D.C.B.REP. No. 3, at 9 (Dec. 1997 Jan. 1998).
- 104 White House Travel Office Management Review, 23 (1993) (emphases added). In addition, federal regulations require each agency to have a “designated agency ethics official, generally an attorney, to provide ethics counseling to employees. 5 C.F.R. § 2635.107 (1997). The regulations state: “*Disclosures made by an employee to an agency ethics official are not protected by an attorney client privilege.* An agency ethics official is required by 28 U.S.C. § 535 to report any information he receives relating to a violation of the criminal code, title 18 of the United States Code. *Id.* (emphasis added).
- 105 *In re Grand Jury Subpoena*, 112 F.3d at 921 n.10. The Attorney General has authorized an exception to § 535(b) for information obtained by government attorneys who, pursuant to a specific regulation (28 C.F.R. § 50.15), represent government employees in their *personal* capacities for example, in civil suits alleging *Bivens* violations. The OLC memoranda address only the exception for these *personal* representations. *See* Office of Legal Counsel Memorandum, at 5 (Mar. 29, 1985) (analyzing duty under C.F.R. § 50.15 and U.S.C. § 535(b) of an Assistant U.S. Attorney who discovered information while representing *Bivens* defendants); Office of Legal Counsel Memorandum, at 1 (Apr. 3, 1979) (addressing question regarding “propriety of providing Justice Department representation in a civil suit to a government employee”); Office of Legal Counsel Memorandum, at 4 (Aug. 30, 1978) (analyzing under C.F.R. § 50.15 and U.S.C. § 535(b) the “contours of the relationship between a Department attorney and an individual government employee whose representation has been undertaken”); Office of Legal Counsel Memorandum, at 1 (Nov. 30, 1976) (addressing question regarding situation where “the U.S. Attorney's Office is currently representing both a Federal employee and the United States as defendants in a civil suit for damages and the employee has told the Assistant U.S. Attorney information that could incriminate the employee).
- 106 *See* 6 Opinion of the Off. of Legal Couns. 626, 627 (1982) (stating, in context of proposal for certain kinds of inspector general investigations, that “evidence of criminal conduct ‘uncovered’ during the course of an investigation will be referred directly to the Department of Justice, *as is required by 28 U.S.C. § 535*” (emphasis added). The OLC recognizes in the crucial distinction between representation of the personal interests of a government employee and representation of the governmental interests of a government agency. *See, e.g.,* 4B Op. of the Off. of Legal Couns. 749, 751 (1980) (distinguishing between representation of personal interests and governmental interests).
- 107 418 U.S. 683 (1974).
- 108 *Id.* at 706 13.
- 109 *Id.* at 687 88.
- 110 Brief for President Nixon, *supra* note 68, at 122 31. Rule 17 requires that the government demonstrate relevance and admissibility when seeking a trial subpoena. The Rule 17 standard for grand jury subpoenas is more relaxed, reflecting the different goals of grand jury investigation. *See* *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297 301 (1991).
- 111 Brief for President Nixon, *supra* note 68, at 48 86.
- 112 *Id.* at 86 87.
- 113 *Nixon v. Sirica*, 487 F.2d 700, 717 (D.C. Cir.1973).

114 *Nixon*, 418 U.S. at 700.

115 *Id.* at 708.

116 *Id.* at 705.

117 *Id.* at 708.

118 *Id.*

119 *Id.* at 710 (quoting *C&S Airlines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948)).

120 *Id.* at 712 n.19.

121 *Id.*

122 *Id.* at 709 (quotation marks omitted).

123 *Id.*

124 *Id.* at 712 13.

125 *Id.* at 714.

126 The privilege considered in *Nixon* was the privilege for presidential communications, not the more general executive privilege for deliberative processes. The deliberative process privilege is, of course, even less weighty than the presidential communications privilege. *See In re Sealed Case*, 121 F.3d 729, 745 (D.C. Cir.1997).

127 *See* Files of Justice Thurgood Marshall, *United States v. Nixon*, 418 U.S. 683 (1974) (available at Library of Congress).

128 *Id.*

129 *Id.* This memo is very important as an historical matter. Justice White stated that President Nixon *would* have been entitled to withhold the tapes had some higher standard been adopted. Those who currently favor the adoption of such a higher standard must come to grips with that fact and how it might have altered the course of Watergate.

130 *Id.*

131 As reported in *The Brethren*, Justice Powell had last minute reservations about the legal standard and said at the conference on July 23 that he was considering a last minute concurrence because “t]hey were ruling that any grand jury could subpoena material from the President in a criminal investigation. That was too sweeping. They could, and they should, rule more narrowly. . . . BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN* 409 (1979). Woodward and Armstrong report that the room “erupted” and Justice William Brennan “made an impassioned plea for unanimity. *Id.* Justice Powell then decided to adhere to the Chief Justice’s opinion, and thus the opinion rejected a *Nixon v. Sirica* kind of standard and instead held that evidence meeting the requirements of Rule 17 must be produced unless there was a claim of state secrets. *Id.* at 410.

132 *United States v. North*, 910 F.2d 843, 950 53 (D.C. Cir.1990) (Silberman, J., concurring in part, dissenting in part).

133 *Id.* at 951. The issue arose in connection with a trial subpoena to President Ronald Reagan sought by North. The court affirmed the District Court’s denial of the subpoena, ruling that such evidence would not have been material or favorable to the defense, and the majority therefore did not reach the question of privilege. *Id.* at 892 n.26 (per curiam).

134 *Id.* at 952.

135 *Id.* (citation omitted). Similarly, Professor Laurence Tribe has stated: “Ostensibly, *United States v. Nixon* suggests that, while presidential conversations are presumptively privileged, the presumption will *always be overcome* by a showing that the information is relevant to a pending criminal trial in federal court. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 281 (1988) (emphasis added).

- 136 *In re* Grand Jury Subpoena, 112 F.3d 910, 919 (8th Cir.1997). In his dissent on the facts of that case, Judge Richard Kopf agreed that “a]t this elevated level of abstraction — namely the “public interest — “*Nixon* teaches that the President's general need for confidentiality ... is outweighed by a grand jury's need for evidence of the truth. *Id.* at 936 (Kopf, J., dissenting).
- 137 *Id.* at 918 n.9.
- 138 See *In re* Sealed Case, 121 F.3d 729 (D.C.Cir.1997).
- 139 *Id.* at 754.
- 140 See *Nixon*, 418 U.S. at 712 n.19 (“We are not here concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation, nor with that between the confidentiality interest and congressional demands for information”).
- 141 *In re* Sealed Case, 121 F.3d at 754.
- 142 *Id.*
- 143 *Id.*
- 144 *Id.*
- 145 *Id.* at 757.
- 146 *Id.* at 755. See also *id.* at 760 (noting, in explaining standard, that “h]ere, unlike in the Nixon cases, the actions of White House officers do not appear to be under investigation”).
- 147 *Id.* at 761.
- 148 *Id.* at 756.
- 149 The Court said that “i]n practice, the primary effect of this standard will be to require a grand jury to *delay* subpoenaing evidence. *Id.* at 756 (emphasis added). Any open ended balancing test requiring some higher need showing would violate the Supreme Court's repeated emphasis that the criminal process should not tolerate such delays. See, e.g., *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 298 (1991) (“grand jury proceedings should be free of such delays — that proposed multifactor test would cause); *Branzburg v. Hayes*, 408 U.S. 665, 705 (1972) (under proposed heightened relevance standard, “courts would ... be embroiled in preliminary factual and legal determinations with respect to whether the proper predicate had been laid”).
- 150 *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996) (quotation marks omitted).
- 151 *Branzburg*, 408 U.S. at 691 n.29, 686.
- 152 *Nixon*, 418 U.S. at 710.
- 153 The Office of Legal Counsel has *not* issued an opinion about the application of Executive privileges in *criminal* proceedings, as the Eighth Circuit correctly recognized. See *In re* Grand Jury Subpoena, 112 F.3d 910, 921 n.10 (1997). Even for purposes of *congressional* inquiries, moreover, the OLC has stated that “communications between the Attorney General, his staff, and other Executive Branch ‘clients’ that might otherwise fall within the common law attorney client privilege should be analyzed *in the same fashion* as any other intra Executive Branch communications. 10 Opinion of the Off. of Legal Couns. 68, 78 (1986) (emphasis added).
- 154 *United States v. Arthur Young & Co.*, 465 U.S. 805, 817 18 (1984) (emphases added).
- 155 MCCORMICK ON EVIDENCE § 87.1, 321 (J. W. Strong ed. 1992).
- 156 24 CHARLES A. WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5475, 126 27 (1986).

- 157 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 124 cmt. b (1996) (Proposed Final Draft No. 1) (also stating that “unlike persons in private life, a public agency or officer has no autonomous right of confidentiality in communications relating to governmental business”).
- 158 *In re Grand Jury Subpoena*, 112 F.3d at 920.
- 159 *Id.* at 921.
- 160 *Id.*
- 161 *See supra* notes 89–91 and accompanying text.
- 162 The President at the time the information is sought controls the privilege. With respect to the attorney-client privilege (as opposed to the Presidential communications privilege), a President no longer in office would have no authority to assert the privilege. *See* CFTC v. Weintraub, 471 U.S. 343, 349 & n.5 (1985) (stating that common law privilege for entities belongs to current management, not former management).
- 163 *See Nixon*, 418 U.S. at 712; *cf. Branzburg*, 408 U.S. at 691.
- 164 *See Branzburg*, 408 U.S. at 700.
- 165 *See* 4B Opinion of the Off. of Legal Couns. 749, 751 (1980) (“This Office has long held the view that the Government may not participate on both sides of a federal criminal investigation.”).
- 166 The President (or relevant agency head) can require that the employee cooperate in an internal agency investigation. *See* 4B Opinion of the Off. of Legal Couns. 421, 427 (1980) (“The obligation of public officials to answer questions related to the performance of their public duties is well recognized”). To be sure, an agency employee questioned by an agency attorney may refuse to answer questions out of a fear of self-incrimination, although the failure to answer questions may lead to his dismissal. *See* LaChance v. Erickson, 118 S.Ct. 753, 756 (1998) (“It may well be that an agency ... would take into consideration the failure of the employee to respond.”).
- The government employee who does not claim the Fifth Amendment and speaks to the attorney could be investigated or prosecuted based at least in part on the communications to government attorneys (Oliver North, for example). But that is a good result: Insulating government employees from criminal investigation and prosecution has never been considered a *governmental* interest that justifies withholding relevant information from the federal grand jury. Indeed, the only governmental interest is precisely the opposite.
- 167 *Morrison*, 487 U.S. at 699 (Scalia, J., dissenting).

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DEFENSE PRESENCE AND PARTICIPATION: A PROCEDURAL MINIMUM FOR BATSON v. KENTUCKY HEARINGS

“Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons.”

In *Batson v. Kentucky*,² the Supreme Court held that a prosecutor's purposefully discriminatory use of peremptory challenges³ against venirepersons of the same race as the defendant violated the equal protection clause of the Fourteenth Amendment.⁴ *Batson* eased the difficult burden of proof that the Court had imposed on defendants in *Swain v. Alabama*.⁵ *Swain* required a defendant challenging the prosecution's practices to prove repeated striking of blacks over a number of cases. In *Batson* the *188 Court stated that this requirement had placed a “crippling burden of proof”⁶ on defendants, rendering peremptory challenges “largely immune from constitutional scrutiny.”⁷

To establish a *prima facie* case of purposeful discrimination under *Batson*, the defendant must show: (1) that he is a member of a cognizable racial group; (2) that peremptory challenges have been used to remove members of the defendant's race from the jury;⁸ and (3) that the facts and other relevant circumstances raise an inference that the prosecutor used peremptories in a racially discriminatory manner.⁹ In deciding whether a *prima facie* case has been raised, the trial judge⁰ is to consider such circumstances as a pattern of strikes against black jurors and a prosecutor's voir dire questions and statements.

After the defendant has made out a *prima facie* case, the prosecutor must explain the peremptory challenges in question. The prosecutor is not entitled to peremptorily challenge a juror on the assumption that because of shared race the juror would be partial to the defendant, nor may a prosecutor simply assert good faith performance of his duties.² Rather, the prosecutor “must articulate a neutral explanation related to the particular case to be tried.”³

One of the questions *Batson* left unanswered⁴ is what procedure courts *189 should use when inquiring into prosecutorial motives for peremptory challenges. Once the defense⁵ makes out a *prima facie* case of purposeful discrimination, a court can hear the prosecutor's reasons for the peremptory challenges in question in one of four ways: (1) an *ex parte*, in camera hearing in which the prosecutor explains his peremptory challenges out of the defense's presence and the defense has no opportunity for rebuttal; (2) an open, non-adversarial hearing in which the defense is present but is not given an opportunity to rebut the prosecutor's reasons;⁶ (3) an open, adversarial hearing allowing the defense

to rebut the prosecutor's reasons and attempt to show them to be pretextual or openly discriminatory; or (4) a full-scale evidentiary hearing in which the prosecutor is a witness, testifies to the reasons for his peremptories, and is subjected to cross-examination by the defense counsel.

The federal circuit courts have split on the question of *Batson* procedure. Some courts have allowed ex parte, in camera *Batson* hearings (the first option above) and thus the exclusion of the defense from listening to or rebutting the prosecutor's reasons, while other courts have stated that *Batson* hearings should be adversarial (the third option above).⁷ No court has yet required full-scale evidentiary hearings (the fourth option above),⁸ but no court has ruled that they are impermissible, either.

This Note argues, first, that the defense must be present to hear the prosecutor articulate his “neutral explanation” and, second, that the defense *190 should have an opportunity to rebut the prosecutor's reasons before the trial judge decides whether to allow the prosecutor's peremptories.

Section I analyzes the *Batson* opinion and the procedures it requires or suggests, if any, and argues that *Batson* left the formulation of procedures to the lower courts. Section II considers the present split in the federal circuits and also examines state court decisions. Section III contends that a defendant's presence at a *Batson* hearing is a requirement of the due process clause of the Fifth Amendment. This Section also demonstrates that the general presumption in American criminal procedure is to allow the defendant to be present at all stages of the criminal prosecution.

Section IV argues that a standard in which the defense has the opportunity for rebuttal after the prosecution has articulated reasons for the peremptory challenges in question should be adopted as a floor of protection against the potential abuse of the jury selection process that still exists in the wake of *Batson*. Section V considers the fourth option above—full-scale evidentiary hearings—and concludes that they should be neither required nor forbidden. This option should fall completely within the discretion of the trial judge.

I. PROCEDURAL REQUIREMENTS OF *Batson*

In *Batson*, the Supreme Court declined “to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges.”⁹ The Court made “no attempt to instruct ... lower courts how best to implement”²⁰ the holding “i n light of the variety of jury selection practices followed in our state and federal trial courts.”²

Despite this apparent refusal to construct a standard procedure, conflicting signals emerge from the language of the opinion, leading some courts to believe that the Court did in fact envision a particular procedure. One portion of *Batson* suggests that a *Batson* hearing should consist of three steps: (1) the defense makes out a prima facie case of purposeful discrimination; (2) the prosecutor gives reasons for the peremptory challenges in question; and (3) the trial court rules on the validity of those peremptories.²²

At another point, however, the Court hinted that *Batson* hearings should be more extensive and follow the lead of Title VII proceedings, which would permit defense rebuttal of the prosecutor's reasons. In a footnote, the Court cited three Title VII cases²³ that “explained the operation *191 of prima facie burden of proof rules. The party alleging that he has been the victim of intentional discrimination carries the ultimate burden of persuasion.”²⁴

Some lower courts have read the Court's use of Title VII cases as evidence that a Title VII-type procedure is required in *Batson* hearings.²⁵ However, the footnote in which the Title VII cases were cited purported to explain the operation of prima facie burden of proof rules. In this way, the Title VII cases merely illustrate how the burden shifts to the prosecutor

after the defendant has made out a prima facie case. It may not have been intended to specify the particular procedure to be followed, but rather to identify who carries the ultimate burden of proof.²⁶

Courts that have attempted to “divine” a particular procedural mandate from *Batson* have missed the point. In spite of mixed signals in the opinion, the Court deliberately declined to formulate procedures, thus leaving lower courts room to experiment. This does not mean that courts should not find that Title VII provides an appropriate example for *Batson* hearings. However, to come to that conclusion merely by relying on language in *Batson* is to misread that decision.

II. CASE LAW IN THE FEDERAL CIRCUITS AND THE STATES

This Section considers the present split in the federal circuits over the question whether a trial court must allow the defense to be present to hear and rebut the prosecutor's presentation of reasons for his peremptory challenges. This Section also considers state court cases that have addressed this issue.

A. Federal Cases

In the first case to address this question, *United States v. Davis*,²⁷ the Sixth Circuit held that neither the Constitution nor Rule 43(a) of the Federal Rules of Criminal Procedure²⁸ requires the presence of the defense at a *Batson* hearing. At trial the prosecution had exercised seven of its peremptory challenges to remove seven of the nine black venirepersons; *192 the other two black persons were removed for cause. The trial court decided, over the strenuous objection of the defense, to hear the prosecution's reasons for its challenges in camera. After hearing those reasons and denying the defense's motion to disallow the peremptories, the court declined to reveal any of the hearing's record to the defense.²⁹

In affirming the trial court's decision, the Sixth Circuit relied on the lack of mandatory procedural standards in either *Batson* or *Booker v. Jabe*,³⁰ and on *Snyder v. Massachusetts*,³ which held that a defendant's right to be present at a particular stage of trial was a fact-specific determination. The court in *Davis* also based part of its decision on the defense's opportunity to present its arguments in open court before the court held the in camera hearing.³²

In *United States v. Tucker*,³³ the trial court had conducted an ex parte, in camera hearing after the prosecution exercised four of its seven peremptory challenges to exclude all four blacks on the thirty-six person panel. The Seventh Circuit upheld the proceeding,³⁴ agreeing with the Sixth Circuit that “*Batson* neither requires rebuttal of the government's reasons by the defense, nor does it forbid a district court to hold an adversarial hearing.”³⁵

In the interim between these two cases, a divided panel of the Ninth Circuit in *United States v. Thompson*³⁶ disagreed with *Davis*. The prosecution had exercised its peremptory challenges to remove all four blacks from the venire. After hearing the prosecutor's reasons ex parte and in camera, the trial judge allowed the peremptories without revealing any of the proffered reasons³⁷ to the defendant.³⁸

In overturning the district court, the Ninth Circuit rejected the government's *193 argument that defense counsel could contribute nothing to the proceeding by being present and participating. The court also questioned the government's administrative burden argument, stating that “[w]e would be surprised ... if these proceedings were to involve anything more elaborate than the prosecutor's articulation of his reasons, followed by the argument of defense counsel”³⁹

In *United States v. Garrison*,⁴⁰ the Fourth Circuit adopted the Ninth Circuit's standard, concluding that “the important rights guaranteed by *Batson* deserve the full protection of the adversarial process except where compelling reasons

requiring secrecy are shown.”⁴ In *United States v. Roan Eagle*,⁴² the Eighth Circuit agreed with the Fourth and Ninth Circuits that the defense should have an opportunity to rebut the prosecution, but it refused to require a full evidentiary hearing.

B. State Cases

State courts have also confronted the issue of the most appropriate procedure for conducting a *Batson* inquiry into prosecutorial motives for peremptory challenges. These courts have either read the Title VII language in *Batson* as mandating the framework for deciding a claim of discriminatory peremptory challenges⁴³ or assumed that the defendant must be allowed to rebut the prosecutor's reasons.⁴⁴

III. REQUIRING THE PRESENCE OF DEFENDANTS AT *Batson* HEARINGS

This Section addresses the importance of allowing the defendant to be present at a *Batson* hearing. It argues that: (1) the due process clause of the Fifth Amendment and Federal Rule of Criminal Procedure 43(a) require *194 the defendant's presence at a *Batson* hearing; and (2) an examination of the few situations in the criminal process where the defense is excluded argues against exclusion from *Batson* hearings.

A. Constitutional Right to Presence

1. Gagnon and Stincer

The confrontation clause of the Sixth Amendment⁴⁵ is the source of a criminal defendant's right to be present at every stage of the trial.⁴⁶ The right applies in state as well as federal proceedings.⁴⁷ Even in situations where the defendant is not actually confronting witnesses or evidence-and, therefore, not implicating the literal provisions of the Sixth Amendment⁴⁸-the defendant's right to be present is protected by the due process clauses of the Fifth and Fourteenth Amendments.⁴⁹ Federal Rule of Criminal Procedure 43(a) codifies this constitutional requirement.⁵⁰

The starting point for analyzing a defendant's claim to be present at a *Batson* hearing is the Supreme Court's pronouncement that a “leading principle ... [pervading] the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner.” *195⁵ Two recent Supreme Court cases have outlined the standards for determining whether a defendant has a right to be present at a particular trial-related proceeding.

In *United States v. Gagnon*,⁵² the Supreme Court stated that a defendant has a due process right to be present when the defendant's presence has “a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge.”⁵³ In *Kentucky v. Stincer*,⁵⁴ the Court reiterated and refined the *Gagnon* standard, stating that “a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.”⁵⁵

*196 2. Application to *Batson* Hearings

A defendant's absence at a *Batson* hearing would violate the *Gagnon* standard because a *Batson* hearing has a reasonably substantial relationship to a defendant's opportunity to defend against the ultimate charge. The defendant's right to be present applies to jury selection, including that phase involving the exercise of peremptory challenges.⁵⁶ Since a *Batson* hearing is an integral part of the jury selection process, the right to be present should also apply to that proceeding. A

fair and just hearing is thwarted by the defendant's absence since the defendant will not witness the determination of the group that will decide his guilt or innocence.

Unlike *Gagnon*, in which a defendant's presence at an in camera conference was considered counterproductive,⁵⁷ a defendant could both gain from and contribute to a *Batson* hearing. By being present to hear the prosecutor's reasons, a defendant could gain the sense of fairness that the Supreme Court has recognized as an important element of the criminal justice system. By rebutting a prosecutor's reasons, the defense could also contribute to the search for the true reasons behind the prosecutor's peremptory challenges. The defendant's presence at a *Batson* hearing could not be counterproductive as in *Gagnon*, since the issue is not the impartiality of a fearful juror but the prosecutor's reasons for her peremptory challenges. Further, unlike *Gagnon*, where none of the defendants objected at trial, the defense has generally objected when a *Batson* hearing has been held ex parte and in camera.⁵⁸

A *Batson* hearing also would meet the "critical to the outcome" and the "contribution to fairness" elements of the *Stincer* standard. There is little doubt that the composition of juries is and has been treated as critical to the ultimate verdict. Numerous Supreme Court pronouncements have confirmed the importance of the jury's composition.⁵⁹ The very existence of peremptory challenges and the extraordinary amount of time spent on voir dire⁶⁰ demonstrate the perceived importance of the jury selection procedure in the outcome of the trial.

*197 In addition, the presence of the defendant would meet the second part of the *Stincer* standard since it contributes both to the actual fairness of the procedure and to the appearance of fairness. As the Court stated in *In re Murchison*,⁶ "fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness."⁶² Thus, "due process is denied by circumstances that create the likelihood or the appearance of bias."⁶³ Excluding the defendant from a hearing that determines who will sit on the jury, besides presenting opportunities for actual bias, certainly creates the appearance of bias.

B. Total Exclusion of the Defense

The rarity of instances where criminal proceedings are permissible in the absence of defense presence further argues against holding a *Batson* hearing without the defense. Courts exclude the defense when determining whether evidence possessed by the prosecution is discoverable by the defense.⁶⁴ Similarly, prosecutors reveal the identities of informers to the court in camera because disclosing their identities might cause harm to the informers.⁶⁵ The use of an in camera hearing enables the court to weigh the balance of interests between the accused and the government without revealing the information unnecessarily and irretrievably.

The general rule that emerges from these examples is that hearings are held without any defense presence only when the court must initially decide if a compelling justification exists for the government not to reveal certain evidence. The defense is precluded from receiving the information only after a court makes this initial determination.

IV. ALLOWING DEFENSE REBUTTAL OF THE PROSECUTION'S REASONS

The previous Section argued that a defendant's right to be present to hear the prosecutor's reasons for his peremptory challenges is a requirement of both the Constitution and Rule 43(a), and is consistent with the presumption of presence at all stages of the criminal process. This Section argues that, once defense presence is established as a right, policy reasons *198 favor allowing the defense to rebut the prosecution's reasons before the court decides whether to allow the peremptory challenge in question.

A. Detection of Discrimination

1. Batson

The process of determining whether a prosecutor has exercised her peremptory challenges in a racially discriminatory manner places an enormous burden on the trial court judge.⁶⁶ Since purposeful racial discrimination is difficult to detect,⁶⁷ defense rebuttal of the prosecution's reasons for challenging certain venirepersons can assist the judge in his determination by pointing out how the prosecution's explanations do not conform to the facts. For example, the defense counsel could show that white jurors who are similarly situated to the challenged blacks were not challenged.⁶⁸

Participation by the defense also would help guard against "outright prevarication,"⁶⁹ "a prosecutor's own conscious or unconscious racism,"⁷⁰ or "a judge's own conscious or unconscious racism."⁷¹ Justice Marshall feared that these factors could limit the effort to rid the jury selection process of racial discrimination. Because of this possibility, his concurrence in *Batson* argued that the only way to end racial discrimination in the jury selection process is to eliminate peremptory challenges entirely.⁷²

Justice Powell's majority opinion answered Justice Marshall's skepticism about prosecutorial and judicial enforcement of *Batson* by stating somewhat conclusorily that there was "no reason to believe that prosecutors will not fulfill their duty to exercise their challenges only for legitimate *199 purposes,"⁷³ and that "trial judges, in supervising *voir dire* ... will be alert to identify a prima facie case of purposeful discrimination."⁷⁴

If this were true, *Batson* never would have been necessary. In *Swain v. Alabama*, the Court stated that prosecutors could not deny blacks "the same right and opportunity to participate in the administration of justice enjoyed by the white population."⁷⁵ Yet discrimination in the exercise of peremptory challenges remained widespread after *Swain*.⁷⁶ The language in *Swain* prohibiting discrimination obviously did not succeed; reliance solely on the good faith of prosecutors is misguided in light of the history of peremptory challenges in the period between *Swain* and *Batson*.

The problem with detection of racial discrimination in the jury selection process extends beyond discovering overt racism.⁷⁷ Examples of subtle stereotyping and racism point out the need to require defense rebuttal of the prosecution's reasons, since arguably much racism and racial stereotyping is lodged in the subconscious and will stay there unless forced into the open.⁷⁸

The assistance of the defense is also necessary because *Batson* does not prescribe a result but rather proscribes discriminatory purpose. Some courts have had difficulty finding a *Batson* prima facie case when a black remains on the petit jury despite evidence that a disproportionate number of peremptory challenges were used to strike blacks from the venire.⁷⁹ This is an incorrect reading of *Batson*. A court may not simply ensure that an adequate number of blacks remain on the petit jury; rather, the judge must look into the circumstances of each peremptory challenge.⁸⁰ *200 Because *Batson* mandates this difficult inquiry into purpose, the role of the trial judge is better suited to allowing the defense to rebut the prosecution before the judge decides whether to allow a particular peremptory challenge than it is to acting as the sole questioner of the prosecution, as must occur when the judge is without the aid of the defense.⁸

2. Sixth Amendment Analysis

To prevent discrimination that *Batson* does not reach, some courts have relied upon the Sixth Amendment right to a fair and impartial jury composed of a representative cross-section of the community rather than upon the equal protection

clause, which *Batson* utilized.⁸² A *Batson*-type standard has been used but, unlike *Batson*, has been restricted neither to venirepersons of the same race as the defendant⁸³ nor to race as the only factor triggering inquiry.⁸⁴

For example, in *Booker v. Jabe*,⁸⁵ the Sixth Circuit used the Sixth Amendment as the basis for prohibiting a prosecutor's discriminatory use of peremptory challenges, but did not go so far as to prescribe a result. Instead, under *Booker*, a prima facie showing is made if "(1) the group *201 alleged to be excluded is a cognizable group in the community, and (2) there is a substantial likelihood that the challenges leading to this exclusion were made on the basis of the individual venirepersons' group affiliation"⁸⁶ Since discrimination under such a standard will be as difficult to detect as in *Batson* and will require the same type of inquiry into prosecutorial motives, an adversary hearing procedure allowing for defense presence and rebuttal should also apply to jurisdictions using a Sixth Amendment standard, such as the one in *Booker*.⁸⁷

B. Standard of Appellate Review

In *Batson* the Court noted that a trial court's ruling on a claim of a *Batson* violation will largely be an "evaluation of credibility."⁸⁸ Because of this, "a reviewing court ordinarily should give those findings great deference."⁸⁹ This past Term in *Tompkins v. Texas*,⁹⁰ an equally divided Supreme Court upheld without opinion an extremely deferential standard of appellate review of a trial court decision on a *Batson* claim. The lower court in *Tompkins* found that "the prosecuting attorney's reasons ... constitute a racially neutral explanation, and it is not the office of this Court to judge her credibility."⁹ The lower court also stated that whether it "would have made the same judgment as the trial judge did is unimportant, because her conclusion, given a subjective belief in the truth of the prosecuting attorneys' explanations, which is supported by sufficient evidence, comports with that of a rational trier of fact."⁹²

The issue of the defense's role during the prosecution's response to its prima facie case is intertwined with the standard of appellate review. If the Court is to continue its standard of "great deference," then it is even more vital to require defense participation in order to ensure, first, that the trial judge is forced to confront all the facts; and, second, that an adequate record is developed for genuine appellate review since the absence *202 of defense participation will leave important facts out of the record and make it virtually impossible to overrule a trial court's decision.⁹³

C. Administrative Costs

An argument such as the one raised by the government in *United States v. Thompson*⁹⁴—that the administrative costs of an adversary hearing will outweigh the benefits—misses on three counts. First, almost all constitutional guarantees involve administrative costs. Second, since the amount of time for both sides to state their arguments, rebut the other side, and let the judge rule should be very short, and usually less than going into chambers to hear the prosecution's reasons, the administrative burden in terms of time spent is very slight.⁹⁵ Third, if administrative cost is the primary goal, the best solution would be to abolish the peremptory challenge altogether since that would reduce the burden to its minimum level.⁹⁶

The procedure this Note advocates could lengthen voir dire for two reasons: Prosecutors who wish to remove a group from the jury may want to ask more questions in order to have neutral justifications to point to, and defense attorneys in response may want to ask more questions to elicit answers that show the prosecutor's reasons to be pretextual. However, judges retain great discretion over the content of questions that may be asked at voir dire.⁹⁷ In exercising this power, judges should not allow extensive "fishing expeditions" in voir dire by prosecutors attempting to avoid the *Batson*

restrictions.⁹⁸ Judges could accomplish this by, for example, setting time limits, reviewing questions the attorneys wish to ask prior to voir dire, or conducting voir dire themselves, as is already done in some jurisdictions.⁹⁹

*203 D. Deterrence

Although many authors have advocated the elimination of peremptory challenges because they believe that discrimination cannot otherwise be eliminated from the jury selection process,¹⁰⁰ an adversary hearing procedure could deter and thus eliminate most, if not all, of the discrimination in the jury selection process while retaining some form of the peremptory challenge, which has historically been an important part of the protection afforded both defendants and the government at trial.¹⁰¹

The difference between the deterrent value of *Swain* and that of *Batson* is that *Swain* was basically a toothless rejoinder to prosecutors that they should not discriminate, while *Batson* requires prosecutors to articulate reasons for their challenges. An adversarial *Batson* hearing further requires a prosecutor, knowing that the defense counsel will be poised to attack any hint of racial motivation, to have truly neutral reasons for the peremptory challenges that she exercises. Forcing a prosecutor to state reasons in an adversary hearing-and possibly under cross-examination if the judge so desires-should help to deter many if not all uses of discriminatory peremptory challenges.

E. Exceptions to the Adversary Hearing Requirement

A prosecutor may have a legitimate reason for not wanting the defense to hear her reasons for a peremptory challenge. Nevertheless, courts must limit any exception to the general rule.

Prosecutors have claimed that open disclosure of their reasons for peremptory challenges will reveal case strategy to the defense.¹⁰² In *United States v. Thompson*,¹⁰³ the Ninth Circuit, although forbidding ex parte, in camera *Batson* hearings, carved out an exception to its general rule for circumstances where a prosecutor claims that revealing reasons for his peremptory challenges would divulge case strategy.¹⁰⁴ Allowing case strategy *204 as an exception to a general rule of adversary hearings is too open-ended, for just as prosecutors have become expert in articulating “neutral” reasons for their challenges in the aftermath of *Batson*,¹⁰⁵ so too they could relate their peremptory challenges to case strategy in an attempt to obtain an ex parte, in camera hearing. This exception to a general policy of adversary hearings thus serves to undermine the values that the policy was intended to preserve. As the court in *Tucker* correctly stated, “the *Thompson* exception swallows the *Thompson* rule.”¹⁰⁶

The case strategy exception rests on the assumption that a prosecutor's sole duty is to win a case¹⁰⁷ and that disclosing case strategy to the defense would create an unfair playing field. Much of the debate over peremptory challenges prior to *Batson* similarly concerned the idea that the trial is a game in which each side should be allowed to carry its fight to the fullest.¹⁰⁸ However, the Supreme Court has recognized the folly of seeing trials as mere sporting events. In upholding a Florida notice-of-alibi rule, which required that a *defendant* give notice in advance of trial if he intended to claim an alibi, the Court stated: “t he adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played.”¹⁰⁹

An exception to the general policy of adversarial *Batson* hearings should be allowed only for a “compelling reason.” A “compelling reason” occurs only when harm to persons unconnected with that criminal proceeding may result from disclosure, such as when a prosecutor strikes a *205 venireperson because that venireperson is the subject of another criminal investigation.¹¹⁰

If a “compelling reason” is present and the judge grants the prosecutor's request to give her reasons in camera, the judge should ensure that a court reporter is present to record the hearing. Then the defense should be presented with a transcript of the hearing with such redactions as the judge deems necessary to preserve the rights of persons not connected to the criminal proceeding. This procedure is the best way to balance the competing concerns of the defendant and of ongoing criminal investigations or persons not involved in the defendant's trial.

V. FULL EVIDENTIARY HEARINGS

The previous Sections have argued that courts must allow the defense to be present and to rebut the prosecution during *Batson* hearings. This Section considers whether courts should require prosecutors, after the defense has made out a prima facie case, to testify under oath to the reasons for their peremptories, to answer the defense counsel's questions on cross-examination, and to respond to questions that the trial judge may have. Because of the administrative burden that would result, appellate courts should not require this procedure, except in hearings on remand, but they should permit them. Therefore, the decision should be entirely within the discretion of the trial judge. ²

*206 A. *Balancing the Benefits and Burdens in the Typical Batson Hearing*

Appellate courts that have reviewed trial court denial of a defendant's motion to subject the prosecutor to cross-examination have not required such a procedure. ³ They wish to avoid the administrative burden of a “trial within a trial.” ⁴ This burden is not outweighed by the benefits of the full evidentiary hearing since the additional benefits are usually slight. An adversary hearing in which the parties argue their cases and the defense rebuts will usually be sufficient for the judge to make an informed decision, ⁵ thus making a full evidentiary hearing unnecessary in the majority of cases.

Although no court has yet required a full-scale evidentiary hearing, trial courts should be allowed to conduct such a hearing when, in their discretion, it would be warranted. Therefore, appellate courts should leave this decision entirely within the discretion of the trial judge and neither forbid nor require such a hearing.

B. *Balancing in the Batson Hearing on Remand*

When an appellate court finds a potential *Batson* violation and remands the case to the trial level, the appellate court should require that the trial court conduct a full evidentiary hearing. When a court remands a case, it has found some problem that needs to be addressed by the trial court. In such a case, forcing a prosecutor to state reasons under oath, and subject to cross-examination, ensures that the remand is properly handled. Since the amount of time between the original jury selection process and the hearing on remand is likely to be great, testimony under oath and cross-examination will serve as a useful aid in the attempt to reconstruct the earlier event.

In terms of burden, the major difference between the typical *Batson* hearing and the hearing on remand is the number of times that each occurs. Since *Batson* hearings on remand should be rare, requiring a fuller hearing would not overly burden the courts in the way that holding such a procedure at every *Batson* hearing would. ⁶

*207 VI. CONCLUSION

Allowing the defense to be present to hear the prosecution's reasons and to rebut them whenever a prima facie case of discrimination is made eliminates the truly “peremptory” nature of the peremptory challenge. The Supreme Court, however, recognized this consequence in *Batson* and subordinated it to a goal of removing racial discrimination. *Swain* represented an attempt to preserve the “peremptory” nature of the challenge, but the dreadful accounts of the use of

peremptory challenges in the years between *Swain* and *Batson* convinced the Supreme Court that it could no longer allow these practices.

Courts must not allow the spirit of *Batson* to be diminished by misguided allegiance to the peremptory challenge. *Batson* is an attempt to remove discrimination from the jury selection process without eliminating the peremptory challenge. The balance is delicate, but *Batson's* movement is towards the eradication of discrimination and away from a truly “peremptory” challenge. The post-*Batson* peremptory is forever changed; allowing *ex parte*, in camera hearings serves to limit that change and the rights it was intended to protect.

Courts should not read *Batson* as mandating a procedure, since it did not, but should go beyond *Batson* and require both the presence and participation of the defendant at the *Batson* determination unless there is a compelling reason for an in camera hearing. This procedure helps to secure the rights of defendants, the excluded jurors,⁷ and the community⁸ and provides both fairness and the appearance of fairness, fundamental values in the American criminal justice system.

Footnotes

¹ *Batson v. Kentucky*, 476 U.S. 79, 106 (1986) (Marshall, J., concurring).

² 476 U.S. 79 (1986).

³ After the group of prospective jurors has been assembled, each side is allowed an unlimited number of “challenges for cause, which are made on a “narrowly specified, provable, and legally cognizable basis of partiality. *Swain v. Alabama*, 380 U.S. 202, 220 (1965). In addition, each side is allowed a specified number of peremptory challenges. These are made “without a reason stated, without inquiry and without being subject to the court's control. *Id.*; see J. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 139 75 (1977). Peremptory challenges are not a constitutional right. *Batson*, 476 U.S. at 91; *Swain*, 380 U.S. at 219.

⁴ The Court based its decision in *Batson* on the equal protection clause of the Fourteenth Amendment rather than on the Sixth Amendment right to trial by an impartial jury. Prior to *Batson*, two federal circuits had utilized the Sixth Amendment as the basis for prohibiting a prosecutor's discriminatory use of peremptory challenges to sidestep the almost impossible burden that *Swain v. Alabama* imposed on a defendant. *Booker v. Jabe*, 775 F.2d 762 (6th Cir. 1985), *vacated*, 478 U.S. 1001, *aff'd on reconsideration*, 801 F.2d 871 (6th Cir. 1986), *cert. denied*, 479 U.S. 1046 (1987); *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984), *vacated*, 478 U.S. 1001 (1986). Prior to *Batson*, five state courts used state constitutional equivalents to the Sixth Amendment to reach the same result. *People v. Wheeler*, 22 Cal.3d 258, 583 P.2d 748, 148 Cal. Rptr. 890 (1978); *Riley v. State*, 496 A.2d 997 (Del. 1985); *State v. Neil*, 457 So. 2d 481 (Fla. 1984); *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979); *State v. Crespin*, 94 N.M. 486, 612 P.2d 716 (Ct. App. 1980). The Supreme Court has granted certiorari in a case raising the question whether the fair cross section requirement of the Sixth Amendment prohibits the prosecution's racially discriminatory use of peremptory challenges, specifically in the context of a white defendant objecting to the removal of black jurors. *Holland v. Illinois*, 121 Ill. 2d 136, 520 N.E.2d 270 (1987), *cert. granted*, 109 S.Ct. 1309 (1989). The Court in the context of “death qualification” for jurors has stated that “an extension of the fair cross section requirement to petit juries would be unworkable and unsound *Lockhart v. McCree*, 476 U.S. 162, 174 (1986). See *infra* text accompanying notes 82-87.

⁵ 380 U.S. 202 (1965).

⁶ *Batson*, 476 U.S. at 92.

⁷ *Id.* at 92-93.

⁸ Relying on this language, the Third Circuit held that *Batson* also applies to white defendants who claim that the prosecutor is purposefully removing white venirepersons from the jury. *Virgin Islands v. Forte*, 865 F.2d 59 (3d Cir. 1989).

⁹ *Batson*, 476 U.S. at 96.

- 10 In *Gomez v. United States*, 109 S. Ct. 2237 (1989), the Supreme Court held that the Federal Magistrates Act, 28 U.S.C. § 636(b)(3) (1982), does not authorize federal magistrates to conduct voir dire.
- 11 *Batson*, 476 U.S. at 96-97.
- 12 *Id.* at 97-98.
- 13 *Id.* at 98.
- 14 For an analysis of many of the unanswered *Batson* issues, see Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 163-211 (1989). Alschuler identifies seven questions *Batson* left in its wake: (1) What constitutes prima facie proof of discriminatory purpose? *Compare* *State v. Vincent*, 755 S.W.2d 400, 401-03 (Mo. Ct. App. 1988) (prosecutor's use of all peremptories to strike blacks does not spoil jury that includes substantial number of blacks) *with* *Stanley v. State*, 313 Md. 50, 72-75, 542 A.2d 1267, 1278-79 (1988) (prima facie case made when prosecutor used eight of ten challenges against blacks even though three blacks remained on jury). (2) What qualifies as a racially neutral explanation? *See* Alschuler, *supra*, at 174 ("Whether the presence of one neutral reason is sufficient, whether the prosecutor must have been wholly uninfluenced by race, or whether the court must probe the prosecutor's psyche deeply enough to determine how he or she would have treated a white juror who exhibited similar characteristics is uncertain. "). (3) Should a court remedy improper exclusion by seating the improperly challenged juror or by dismissing the entire panel? (4) Should representation of a targeted group on the jury nullify any attempt to raise a prima facie case of discrimination against that group? This question is related to the first question of what constitutes prima facie proof of discrimination. (5) Is discrimination on nonracial bases allowed? *See* *State v. Oliveira*, 534 A.2d 867, 870 (R.I. 1987) ("*Batson* does not extend to gender based discrimination. "); Alschuler, *supra*, at 183 ("Were *Batson* limited to cases of racial discrimination, the limitation would be unattractive. Nevertheless, if *Batson* were extended to discrimination grounded on 'things like race' as well as race itself, there might be little left of the peremptory challenge. "). (6) Does a defendant have standing to object to discrimination against prospective jurors of a race other than his own? The Supreme Court will hear arguments this Term on the question whether either the equal protection clause of the Fourteenth Amendment or the Sixth Amendment right to a fair and impartial jury provides a basis for a white defendant to object to the exclusion of a black juror. *Holland v. Illinois*, 121 Ill. 2d 126, 520 N.E.2d 270 (1987), *cert. granted*, 109 S. Ct. 1309 (1989). (7) Is racial discrimination in the use of peremptory challenges permissible for defense attorneys? *See* Goldwasser, *Limiting A Criminal Defendant's Use of Peremptory Challenges: On Symmetry and the Jury in a Criminal Trial*, 102 HARV. L. REV. 808, 809 (1989) (*Batson* restrictions on prosecutorial peremptory challenges should not be extended to defendants' use of peremptory challenges). *But see* Note, *Discrimination by the Defense: Peremptory Challenges After Batson v. Kentucky*, 88 COLUM. L. REV. 355, 365-68 (1988) (discriminatory peremptory challenges by either side should be disallowed).
- The number of issues generated by *Batson* led one commentator to remark: "If one wanted to understand how the American trial system for criminal cases came to be the most expensive and time consuming in the world, it would be difficult to find a better starting point than *Batson*." Pizzi, *Batson v. Kentucky, Curing the Disease but Killing the Patient*, 1987 SUP. CT. REV. 97, 155 (1987).
- 15 This Note uses the term "defense" to refer to both the defendant and the defense counsel, except where otherwise noted. Section III will discuss the defendant and defense counsel separately. *See infra* text accompanying notes 45-65.
- 16 *Gerstein* hearings are an example of this procedure: Judges, in the presence of the defendant, conduct a non-adversarial hearing to determine probable cause in "information" states that do not provide preliminary hearings. *Gerstein v. Pugh*, 420 U.S. 103 (1975).
- This second option is unlikely to be adopted as a rule for all *Batson* hearings. Nevertheless, some courts have allowed such a *Batson* procedure to occur.
- 17 *Compare* *United States v. Tucker*, 836 F.2d 334, 338-40 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 3154 (1989) *and* *United States v. Davis*, 809 F.2d 1194, 1200-02 (6th Cir.), *cert. denied*, 483 U.S. 1007-08 (1987) *with* *United States v. Roan Eagle*, 867 F.2d 436, 441 (8th Cir.), *cert. denied*, 109 S. Ct. 1764 (1989) *and* *United States v. Garrison*, 849 F.2d 103, 106-07 (4th Cir.), *cert. denied*, 109 S. Ct. 566 (1988) *and* *United States v. Thompson*, 827 F.2d 1254, 1257-61 (9th Cir. 1987).
- 18 *But see* *Powell v. State*, 187 Ga. App. 878, 882, 372 S.E.2d 234, 238 (Ct. App. 1988) (Pope, J., concurring specially) (defense should be allowed to cross-examine prosecutor at *Batson* hearing).

- 19 Batson v. Kentucky, 476 U.S. 79, 99 (1986).
- 20 *Id.* at 99 100 n.24.
- 21 *Id.* at 99 n.24.
- 22 “The prosecutor ... must articulate a neutral explanation related to the particular case to be tried. The trial court then will have the duty to determine if the defendant has established purposeful discrimination. *Id.* at 98 (footnotes omitted).
- 23 In Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), the most important Title VII case cited, the Court adopted a three step procedure that would apply in the following way to *Batson* hearings. First, the defendant has to prove by a preponderance of the evidence a prima facie case of discrimination; second, the prosecutor has to articulate a legitimate, nondiscriminatory reason for his challenges; finally, the defendant must have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the prosecutor were not true.
- 24 *Batson*, 476 U.S. at 94 n.18 (citations omitted).
- 25 See Stanley v. State, 313 Md. 50, 62, 542 A.2d 1267, 1273 (1988); State v. Antwine, 743 S.W.2d 51, 63 (Mo. 1987) (en banc).
- 26 See United States v. Davis, 809 F.2d 1194, 1201 (6th Cir.) (*Batson* “has not] fashioned any procedural guidelines outside those articulating burdens of proof and persuasion”), *cert. denied*, 483 U.S. 1007 08 (1987).
- 27 809 F.2d 1194 (6th Cir.), *cert. denied*, 483 U.S. 1007 08 (1987).
- 28 “The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule. FED. R. CRIM. P. 43(a).
- 29 *Davis*, 809 F.2d at 1200.
- 30 775 F.2d 762 (6th Cir. 1985), *vacated*, 478 U.S. 1001, *aff’d on reconsideration*, 801 F.2d 871 (6th Cir. 1986), *cert. denied*, 479 U.S. 1046 (1987). *Booker* was one of the two federal cases prior to *Batson* that held that the Sixth Amendment applied to a prosecutor’s exercise of peremptory challenges. See *supra* note 4.
- 31 291 U.S. 97 (1934).
- 32 This approach ignores the additional information defense rebuttal could bring to a *Batson* hearing *after* the prosecutor has given his reasons, such as showing the prosecutor’s reasons to be pretextual by, for example, pointing out non black venirepersons who possess characteristics similar to those of the black venirepersons who were challenged. The court’s broad language underscored its view on the trial court’s discretion: After the defense has established a prima facie case of racial motivation, defense “participation was no longer necessary for the district court to make its determination. At that point, the district court was entitled to hear from the Government under *whatever circumstances* the district court felt appropriate. *Davis*, 809 F.2d at 1202 (emphasis added).
- 33 836 F.2d 334 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 3154 (1989).
- 34 Despite its conclusion, the court stated that it believed adversarial hearings to be the “appropriate method for handling most *Batson* type disputes. *Id.* at 340. It did not, however, require them.
- 35 *Id.*
- 36 827 F.2d 1254 (9th Cir. 1987).
- 37 The prosecutor’s statements included: “She looked really sullen, and she just, I mean it was like a glare. I felt very uncomfortable with her, and I wouldn’t put her on ; “I thought he lived in the neighborhood he’s black, too, and he was dressed casually, and I thought he might identify with him too much so I excused him. *Id.* at 1256 n.1.
- 38 *Id.* at 1256.

- 39 *Id.* at 1259 60. In addition, the court considered the argument that an adversary hearing is inappropriate because the government lawyer may be required to reveal confidential matters of tactics and strategy, potentially impairing his ability to prosecute the case. Although the court found this reason not to be a sufficient justification in that particular case, it did adopt an exception to its general requirement of open, adversarial proceedings. The court held that a judge can examine the prosecutor's reasons *ex parte* and *in camera* if the prosecutor claims that the reasons relate to case strategy and the judge agrees after a separate *in camera* hearing. The Ninth Circuit affirmed this exception to the adversarial requirement in *United States v. Alcantar*, 832 F.2d 1175 (9th Cir. 1987).
- 40 849 F.2d 103 (4th Cir.), *cert. denied*, 109 S. Ct. 566 (1988).
- 41 *Id.* at 106.
- 42 867 F.2d 436, 441 (8th Cir.), *cert. denied*, 109 S. Ct. 1764 (1989).
- 43 *See Stanley v. State*, 313 Md. 50, 62, 542 A.2d 1267, 1273 (1988) (“We read *Batson* as allowing rebuttal as per the Title VII cases. ”); *State v. Antwine*, 743 S.W.2d 51, 63 (Mo. 1987) (en banc) (“*Batson* intimates that it should be read side by side with the Supreme Court's Title VII cases. ”).
- 44 *See Ex parte Branch*, 526 So. 2d 609, 624 (Ala. 1987) (defense can offer evidence that reasons are sham or pretext); *Gray v. State*, 317 Md. 250, 258, 562 A.2d 1278, 1282 (1989) (trial judge should offer defense opportunity to rebut prosecutor's explanations); *Williams v. State*, 507 So. 2d 50, 53 (Miss. 1987) (defense afforded opportunity to challenge and rebut explanations); *State v. Jackson*, 322 N.C. 251, 258, 368 S.E.2d 838, 842 (1988) (defense allowed to offer evidence to strengthen case after prosecution made showing).
- 45 “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ... and to have the Assistance of Counsel for his defence. U.S. CONST. amend. VI.
- 46 *Illinois v. Allen*, 397 U.S. 337, 338 (1970); *see also Diaz v. United States*, 223 U.S. 442, 453 55 (1912) (defendant in felony case has right to attend all stages of trial from impaneling of jury to delivery of verdict).
- 47 *Pointer v. Texas*, 380 U.S. 400, 403 06 (1965).
- 48 In a *Batson* hearing the only “witness” against the defendant is the prosecuting attorney, and the “evidence” is not of the type that will be used against the defendant at trial.
- 49 *United States v. Gagnon*, 470 U.S. 522, 526 (1985) (per curiam). The due process clause of the Fifth Amendment states, “No person shall ... be deprived of life, liberty, or property without due process of law. U.S. CONST. amend. V. The equivalent clause of the Fourteenth Amendment states, “nor shall any State deprive any person of life, liberty, or property, without due process of law. U.S. CONST. amend. XIV. The Court has also held that the defendant's right to be present at all critical stages of the trial is a “fundamental right. *Rushen v. Spain*, 464 U.S. 114, 117 (1983).
- 50 “The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule. FED. R. CRIM. P. 43(a). When Rule 43 was enacted, it was intended to be a statement of the law existing at the time. FED. R. CRIM. P. 43 advisory committee's notes, ¶ 1. The Supreme Court has not subsequently defined the contours of Rule 43 relative to the Constitution. Some courts have stated that Rule 43 extends beyond the Constitution, including the protections afforded by the common law right of presence, as well as the Sixth Amendment confrontation clause and the due process guarantee of the Fifth and Fourteenth Amendments. *United States v. Gordon*, 829 F.2d 119, 123 (D.C. Cir. 1987); *United States v. Alessandrello*, 637 F.2d 131, 138 (3d Cir. 1980); *cert. denied*, 451 U.S. 949 (1981); *United States v. Brown*, 571 F.2d 980, 986 & n.5 (6th Cir. 1978). *Contra United States v. Tortora*, 464 F.2d 1202, 1210 n.6 (2d Cir. 1972) (rule no more than restatement of defendant's constitutional rights). The minimum guarantee of Rule 43 extends at least as far as the Constitution in requiring the defendant's presence at a *Batson* hearing. Therefore, an appellate court's inquiry into the defendant's right to be present at a *Batson* hearing should not end with the Constitution, especially because the language of the Rule explicitly states that the defendant should be present at the “impaneling of the jury. *But see United States v. Davis*, 809 F.2d 1194, 1202 (6th Cir.) (“unpersuaded that Rule 43 requires defendant's presence at *Batson* hearing), *cert. denied*, 483 U.S. 1007 08 (1987).

- 51 Lewis v. United States, 146 U.S. 370, 372 (1892). The trial starts “at least from the time when the work of empanelling the jury begins. Hopt v. Utah, 110 U.S. 574, 578 (1884).
- 52 470 U.S. 522 (1985) (per curiam). In *Gagnon* a juror expressed concern after noticing that defendant Gagnon was drawing sketches of the jurors. The judge, juror, and Gagnon's counsel conferred in camera to determine the juror's impartiality. The Supreme Court ruled that Gagnon's absence was not a due process violation, stating that the defendant could neither have contributed to nor gained from being present at the conference. In fact, the Court said, the defendant's presence could have been counterproductive in trying to determine whether the juror's concerns had affected impartiality. The Court concluded that the defendant's presence was not required to ensure either fundamental fairness or a reasonable opportunity to construct a defense. *Id.* at 527. The Court also held that the defendant waived any rights he may have had by failing to object at the time of the conference. *Id.* at 529.
- 53 *Id.* at 526.
- 54 482 U.S. 730 (1987).
- 55 *Id.* at 745. Like *Gagnon* and *Stincer*, the typical presence case arises on appeal when a defendant raises a claim that he was not present a proceeding at which the defendant's attorney was present. Courts analyze such a claim by looking at the stage of the criminal process, by asking whether the defendant was represented by counsel at the proceeding, and, finally, by inquiring whether the defendant's interests were adequately protected by the defense counsel. For example, in *United States v. Gordon*, 829 F.2d 119 (D.C. Cir. 1987), the D.C. Circuit held that the defendant had a statutory right under Rule 43(a) of the Federal Rules of Criminal Procedure and a constitutional right to be present at voir dire despite the defense counsel's presence. Other cases have held that the defendant's interests were protected by the presence of defense counsel. For example, in *United States v. Boone*, 759 F.2d 345 (4th Cir.), *cert. denied*, 474 U.S. 861 (1985), the Fourth Circuit held that the absence of the defendant from an in camera conference concerning the dismissal of a juror was not a constitutional violation so long as counsel for the defendant was present. Courts do this under the rubric of a harmless error analysis: If the defense counsel's representation is adequate and thus the defendant's absence does not affect the outcome, the absence of the defendant is treated as irrelevant. Rule 52(a) of the Federal Rules of Criminal Procedure states: “Harmless Error: Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded. FED. R. CRIM. P. 52(a). In *Chapman v. California*, 386 U.S. 18 (1967), the Court stated that the purpose of the harmless error rule was to avoid “setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial. *Id.* at 22. When a court uses harmless error analysis and asks whether the defendant's interests were adequately represented by defense counsel, the court implies that the stage of the trial is one in which the defendant has a right to be present. If the stage of the trial were not one in which the defendant has the right to be present, then the court would simply dispose of the case. Therefore, *Gagnon* and *Stincer*, and other cases that address a defendant's right to be present by looking at whether the defendant's interests were adequately represented by defense counsel, suggest that trial courts should allow defendants to be present at those stages. On appeal they may be analyzed under a harmless error standard if the defendant was not present, but the existence of this safety net on appeal does not mean that trial judges should not allow defense presence at the stage in question.
- 56 *United States v. Bascaro*, 742 F.2d 1335, 1349 (11th Cir. 1984), *cert. denied sub nom. Hobson v. United States*, 472 U.S. 1017 (1985); *United States v. Chrisco*, 493 F.2d 232, 237 (8th Cir. 1974). For an example of the Supreme Court's acceptance of the jury selection process as a critical stage of the criminal proceeding, see *Gomez v. United States*, 109 S. Ct. 2237 (1989) (Federal Magistrates Act does not authorize magistrates to conduct voir dire). The Court in *Gomez* cited *Lewis v. United States*, 146 U.S. 370, 374 (1892), in “affirming voir dire as a critical stage of the criminal proceeding, during which the defendant has a constitutional right to be present. *Gomez*, 109 S. Ct. at 2246.
- 57 *Gagnon*, 470 U.S. at 520.
- 58 See, e.g., *United States v. Tucker*, 836 F.2d 334, 337 (7th Cir. 1988) (“All the defendants objected to an ex parte procedure.), *cert. denied*, 109 S. Ct. 3154 (1989).
- 59 *Strauder v. West Virginia*, 100 U.S. 303 (1880); see also *Batson v. Kentucky*, 476 U.S. 79, 84 n.3 (1986).
- 60 An eleven county study in New York, a jurisdiction that retains attorney conducted voir dire, discovered that voir dire took longer than the trial itself in 20% of 462 cases studied by the New York Governor's Commission on Administration of Justice.

The average voir dire took 12.7 hours, which was 40% of the time of the entire case. Chambers, *Who Should Pick Jurors, Attorneys or the Judge*, N.Y. Times, June 13, 1983, at B4, col. 3.

349 U.S. 133 (1955).

Id. at 166.

Peters v. Kiff, 407 U.S. 493, 502 (1972) (opinion of Marshall, J.).

See United States v. Bailleaux, 685 F.2d 1105, 1114 15 (9th Cir. 1982) (court should examine in camera whether evidence is relevant for discovery).

See United States v. Sharp, 778 F.2d 1182, 1187 (6th Cir. 1985) (court must conduct in camera interview of informant before disclosing identity), *cert. denied*, 475 U.S. 1030 (1986).

See State v. Antwine, 743 S.W.2d 51, 64 (Mo. 1987):

The trial judge's task is extremely difficult. One doubts that a prosecutor will admit that his decision to challenge a particular member of the venire was based upon race. ... *Batson* thus requires the trial judge to embrace a participatory role in voir dire, noting the subtle nuance of both verbal and nonverbal communication from each member of the venire and from the prosecutor himself.

The Supreme Court adopted the discriminatory purpose standard for equal protection claims in *Washington v. Davis*, 426 U.S. 229 (1976). *Batson* may represent a step away from *Washington v. Davis*, because it can shift the burden of proof to the prosecutor by allowing evidence of result a “pattern of strikes during voir dire to show purpose. *Batson v. Kentucky*, 476 U.S. 79, 96 97 (1986).

This method seems to be the best way to show discrimination after the prosecutor has proffered her reasons, since reasons given to challenge black venirepersons may also apply to white venirepersons who were not challenged. *See, e.g., Floyd v. State*, 511 So. 2d 762, 765 (Fla. Dist. Ct. App. 1987) (disparate treatment of black and white venirepersons “strong evidence of] subterfuge to avoid admitting discriminatory use of the peremptory challenge); *Gamble v. State*, 257 Ga. 325, 330, 357 S.E.2d 792, 796 (1987) (trial court's finding clearly erroneous because, among other reasons, “similarly situated white jurors were not challenged).

Batson, 476 U.S. at 106 (Marshall, J., concurring).

Id.

Id.

Id. at 107.

Batson, 476 U.S. at 99 n.22.

Id.

Swain v. Alabama, 380 U.S. 202, 224 (1965).

See Batson, 476 U.S. at 101 (White, J., concurring); *Batson*, 476 U.S. at 103 (Marshall, J., concurring).

Professor Lawrence has recently indicated how racial discrimination or stereotyping can occur even among white persons apparently strongly opposed to racial discrimination. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). Lawrence used examples from modern life to illustrate his point that stereotypes may be present in persons not thought to be racists. Howard Cosell, a consistent champion of the rights of black athletes, referred to a professional football receiver as a “little monkey on national television. *Id.* at 339 40. Nancy Reagan spoke to a group of supporters and remarked that she wished her husband could have been present to see all the “beautiful white people. *Id.* at 340. Lawrence concluded that “r]acism continues to be aided and abetted by self conscious bigots and well meaning liberals alike. *Id.* at 387.

- 78 *See id.* at 322 (“We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation. ”).
- 79 This of course raises the question of what constitutes a prima facie case. Some courts have used a statistical basis for their decision, stating that a prima facie case is not raised when the jury includes a substantial number of blacks, while others have probed more deeply into the prosecution's actions. *Compare* *United States v. Montgomery*, 819 F.2d 847, 851 (8th Cir. 1987) (no remand since jury accepted by prosecution included two of four blacks in original venire) *with* *Stanley v. State*, 313 Md. 50, 72 75, 542 A.2d 1267, 1278 79 (1988) (prima facie case made even though three blacks remained on jury). *See generally* *Alschuler, supra* note 14, at 170 73.
- 80 *Batson*, 476 U.S. at 96 97.
- 81 The American criminal justice system is based upon adversarial argument. Arguing the inferences to be drawn from all the testimony and pointing out the weaknesses in the other side's position helps to sharpen and clarify the issues for the factfinder. *Herring v. New York*, 422 U.S. 853, 862 (1975).
Typically, the judge renders decision after hearing the arguments of both sides. Placing the judge in an adversarial position, as a closed *Batson* hearing necessarily does, forces him away from the normal judicial role of objective arbiter. Therefore, to avoid compromising the judicial function and the judge's role as detached decisionmaker, *Batson* hearings should involve the full arguments of the attorneys and thus include opportunity for defense rebuttal.
- 82 Some courts relying on the Sixth Amendment or a state equivalent of the Sixth Amendment did so prior to *Batson* to overcome the formidable burden of proof under *Swain*. *See, e.g.,* *People v. Wheeler*, 22 Cal. 3d 358, 583 P.2d 748, 148 Cal. Rptr. 890 (1978). Others have used the Sixth Amendment since *Batson* to cover a white defendant black juror situation, since *Batson* applies only to jurors of the same race as the defendant. *See, e.g.,* *Gardner v. State*, 157 Ariz. 541, 544 46, 760 P.2d 541, 544 46 (1988); *Seubert v. State*, 749 S.W.2d 585, 588 (Tex. Ct. App. 1988). For cases holding that *Batson* does not apply to the white defendant black juror situation, see *United States v. Townsley*, 856 F.2d 1189, 1190 (8th Cir. 1988) (en banc) (*Batson* does not apply to white defendant tried with black defendants); *United States v. Vaccaro*, 816 F.2d 443, 457 (9th Cir. 1987) (*Batson* mandates defendant be of same race as excluded juror). The Court will hear arguments this term in *Holland v. Illinois*, 121 Ill. 2d 136, 520 N.E.2d 270 (1987), *cert. granted*, 109 S. Ct. 1309 (1989), to determine if either the equal protection clause of the Fourteenth Amendment or the Sixth Amendment right to trial by an impartial jury covers the white defendant black juror situation.
Extending the right to a non discriminatory jury selection process to defendants not of the same race as the juror is a logical extension of *Batson*. *Batson* spoke of harm to the excluded juror and the community, as well as to the defendant, when venirepersons are excluded because of race. *Batson*, 476 U.S. at 87. Therefore, the race of the defendant should not be the only relevant factor. A good example of discrimination against jurors regardless of the defendant's race is contained in a Dallas County District Attorney's Office manual, which stated that prosecutors should not look for “any member of a minority group when picking jurors. J. VAN DYKE, *supra* note 3, at 152 53.
- 83 *See, e.g.,* *Gardner*, 157 Ariz. at 546, 760 P.2d at 546; *Seubert*, 749 S.W.2d at 588.
- 84 *See, e.g.,* *Commonwealth v. Soares*, 377 Mass. 461, 488 89, 387 N.E.2d 499, 516 (using state constitution to prohibit discrimination based on race, sex, color, creed or national origin), *cert. denied*, 444 U.S. 881 (1979).
- 85 775 F.2d 762 (6th Cir. 1985), *vacated*, 478 U.S. 1001, *aff'd on reconsideration*, 801 F.2d 871 (6th Cir. 1986), *cert. denied*, 479 U.S. 1046 (1987).
- 86 *Id.* at 773; *see also* *State v. Gilmore*, 103 N.J. 508, 535 36, 511 A.2d 1150, 1164 (1986) (adopting standard similar to *Booker* in a post *Batson* case).
- 87 If the Court holds in *Holland v. Illinois*, 121 Ill. 2d 136, 520 N.E.2d 270 (1987), *cert. granted*, 109 S. Ct. 1309 (1989), that the Sixth Amendment applies to the petit jury and requires neither that race be the only prohibited basis of discrimination nor that the venireperson in question be of the same cognizable group as the defendant, the Court should dictate a procedure in which the defense is presented an opportunity to rebut the prosecution after the prosecution has presented reasons for its peremptory challenges.

- 88 *Batson*, 476 U.S. at 98 n.21.
- 89 *Id.*
- 90 109 S. Ct. 2180 (1989), *affg by an equally divided Court* No. 68,870 (Texas Crim. App. Oct. 7, 1987) (WESTLAW, State directory, TX CS database), 1987 WL 906.
- 91 *Tompkins v. State*, No. 68,870 (Tex. Crim. App. Oct. 7, 1987) (WESTLAW, State directory, TX CS database), 1987 WL 906, at 51. One of the prosecutor's reasons for striking a black postal worker was that the prosecutor did not have "very good luck with postal employees." *Id.* at 50.
- 92 *Id.* at 52.
- 93 See Note, *Batson v. Kentucky and the Prosecutorial Peremptory Challenge: Arbitrary and Capricious Equal Protection*, 74 Va. L. Rev. 811, 835 36 (1988) (use of ex parte, in camera proceedings freezes analysis of *Batson* claims in their infancy).
- 94 827 F.2d 1254 (9th Cir. 1987).
- 95 For a similar argument, see *id.* at 1259 60; *Gray v. State*, 317 Md. 250, 258 60, 562 A.2d 1278, 1282 83 (1989).
- 96 In his concurrence in *Batson*, Justice Marshall advocated complete elimination of peremptory challenges because he believed it to be the only way to eliminate discrimination from the jury selection process. *Batson*, 476 U.S. at 102 08 (Marshall, J., concurring). Elimination of peremptory challenges could occur if those concerned most with removing discrimination and those concerned most with trial speed unite as critics of the continued use of peremptory challenges.
- 97 See W. LAFAVE & J. ISRAEL, *CRIMINAL PROCEDURE* § 21.3 (1984 & Supp. 1989).
- 98 It is also possible that defense counsel may use a *Batson* challenge as a tool of harassment. One commentator almost invites such abuse by suggesting that "[p]roperly used, *Batson*] can become an important weapon in the defense arsenal. JURYWORK § 4.07 3] (E. Krauss & B. Bonora eds. 1989). However, since even one challenge against a same race juror may raise a prima facie case of purposeful discrimination, harassment, in effect, could never be proved. Defense counsel's subjective purpose may be to harass the prosecution as well as to prevent blacks from being excluded from the jury, but the result remains the same: Most same race peremptory challenges will have to be explained by the prosecutor if the defense objects.
- 99 See V. STARR & M. MCCORMICK, *JURY SELECTION, AN ATTORNEY'S GUIDE TO JURY LAW AND METHODS* 39 40 (1985) (judges conduct voir dire alone in 13 states, attorneys are primarily responsible in 18 states, judges and attorneys share in 19 states, 75% of federal judges allow no oral attorney participation).
- 100 *Batson*, 476 U.S. at 102 08 (Marshall, J., concurring); J. VAN DYKE, *supra* note 3, at 167 69; Note, *Batson v. Kentucky: A Half Step in the Right Direction (Racial Discrimination and Peremptory Challenges Under the Heavier Confines of Equal Protection)*, 72 CORNELL L. REV. 1026 (1987); Note, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.C.L. L. REV. 227 (1986); Note, *Due Process Limits on Prosecutorial Peremptory Challenges*, 102 HARV. L. REV. 1013 (1989). But see Babcock, *Voir Dire: Preserving "Its Wonderful Power"*, 27 STAN. L. REV. 545, 552 (1975) (approving peremptory challenge because it "avoids trafficking in the core of truth in most common stereotypes").
- 101 One commentator has suggested that "[a]rguably *Batson's* force, if any, will lie in the deterrent effect it will have upon prosecutors. Wilson, *Batson v. Kentucky: Can the "New Peremptory Challenge Survive the Resurrection of Strauder v. West Virginia?*, 20 AKRON L. REV. 355, 364 (1986).
- 102 The Ninth Circuit addressed such a claim in *United States v. Thompson*, 827 F.2d 1254, 1259 (9th Cir. 1987).
- 103 *Id.*
- 104 In that situation the trial judge is to conduct an initial ex parte, in camera hearing to hear the relationship to case strategy; if the judge concludes that revealing the prosecutor's motives to the defense may be prejudicial to the prosecution's case, then the trial court judge has the discretion to hear the reasons for the peremptory challenges in an ex parte, in camera hearing.

- 105 Some reasons that courts have allowed prosecutors to use are of questionable racial neutrality. *See, e.g., United States v. Cartledge*, 808 F.2d 1064, 1070 71 (5th Cir. 1987) (one venireperson was young, single, and unemployed while defendant was young, separated and experiencing financial hardship, another venireperson avoided eye contact, and third venireperson was divorced and had low income); *United States v. Mathews*, 803 F.2d 325, 331 (7th Cir. 1986) (one venireperson appeared hostile to prosecutor). While these reasons may seem acceptable, allowing such reasons leaves an easy out for prosecutors determined to obtain the most favorable jury possible: merely “uncovering similar reasons to use in future trials. Since the substantive protection of *Batson* can be evaded, a strong procedural framework such as the one advocated in this Note is necessary if discrimination is to be eliminated, or at least reduced.
- 106 *United States v. Tucker*, 836 F.2d 334, 340 (7th Cir.), *cert. denied*, 109 S. Ct. 3154 (1989).
- 107 On the contrary, a prosecutor “is the representative not of an ordinary party to a controversy, but of a sovereignty ... whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. *Berger v. United States*, 295 U.S. 78, 88 (1935).
- 108 The debate over criminal discovery illustrates the demise, over time, of that view of the criminal process. *See LAFAVE & ISRAEL, supra* note 97, § 19.3, at 474 82. In other contexts, the prosecution has been required to disclose evidence to the defense. *See, e.g., Brady v. Maryland*, 373 U.S. 83 (1963) (prosecution must disclose material evidence that is favorable to defense); *Roviano v. United States*, 353 U.S. 53 (1957) (informer's privilege must give way where disclosure of identity, or of contents of communication, is relevant and helpful to defense of accused, or is essential to fair determination of cause).
- 109 *Williams v. Florida*, 399 U.S. 78, 82 (1970); *see also Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U.L.Q. 279 (1963) (arguing for discovery in criminal cases).
- 110 *See United States v. Garrison*, 849 F.2d 103, 106 (4th Cir.) (example of compelling exception is government investigation of potential juror's involvement in other crimes), *cert. denied*, 109 S. Ct. 566 (1988); *Gray v. State*, 317 Md. 250, 257 58, 562 A.2d 1278, 1282 (1989).
- 111 A variation on the question of what procedure to use for hearing a prosecutor's reasons is whether a prosecutor's written submissions that are in addition to or in lieu of her arguments in open court should be subject to the defendant's examination. Two panels of the Fourth Circuit have recently addressed this issue and upheld *ex parte*, in camera examinations of the prosecutorial papers. *United States v. Tindle*, 860 F.2d 125 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3176 (1989); *United States v. Garrison*, 849 F.2d 103 (4th Cir.), *cert. denied*, 109 S. Ct. 566 (1988).
These decisions are incorrect. Although courts may ask for written arguments, they should not compel submission of the prosecutor's notes. When the prosecutor's notes are voluntarily submitted or when written arguments are made to the court, the judge should treat the prosecutor's writing in the same way they handle a prosecutor's request for an *ex parte*, in camera oral hearing: The written submission, whether it is notes from the jury selection process or a written argument, should be disclosed to the defense except for a “compelling reason. To prevent surprise and to balance the scales, trial courts should inform prosecutors of this rule before any writings are submitted.
- 112 One problem with requiring or even conducting a full evidentiary hearing is that in such a hearing the prosecutor must act as both an advocate and a witness. This dual role may appear to conflict with Rule 3.7 of the Model Rules of Professional Conduct. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 (1983) states:
(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client.
This concern is misguided in the context of a *Batson* hearing because Rule 3.7 is directed towards protecting the rights of the opposing party. The comment to the Rule states: “The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.7 comment (1983). In a *Batson* hearing the defendant is the party making the request for a full scale hearing. Therefore, a court should not deny a defendant's motion to put the prosecutor on the stand solely because of a potential violation of Rule 3.7. Additionally, courts should not be constrained from using this procedure *sua sponte*, unless the defendant objects.

- 113 United States v. Garrison, 849 F.2d 103 (4th Cir.), *cert. denied*, 109 S. Ct. 566 (1988); Powell v. State, 187 Ga. App. 878, 372 S.E.2d 238 (Ct. App. 1988); Gray v. State, 317 Md. 250, 562 A.2d 1278 (1989); State v. Jackson, 322 N.C. 251, 368 S.E.2d 838 (1988).
- 114 *Jackson*, 322 N.C. at 258, 368 S.E.2d at 842; *see also Garrison*, 849 F.2d at 106 (“Although a district court could conduct such a hearing if it believed circumstance warranted it, *Batson* does not require this intrusion on the trial proceedings.), *cert. denied*, 109 S. Ct. 566 (1988).
- 115 *See Jackson*, 322 N.C. at 258, 368 S.E.2d at 842 (“presiding judges are capable of passing on the credibility of prosecuting attorneys without the benefit of cross examination).
- 116 In several cases involving *Batson* hearings on remand, the trial court has conducted a full evidentiary hearing with sworn testimony by the prosecutor and cross examination by the defense. *See Shelton v. State*, 521 So. 2d 1035 (Ala. Crim. App. 1987); *Chew v. State*, 317 Md. 233, 562 A.2d 1270 (1989); *see also Roman v. Abrams*, 822 F.2d 214 (2d Cir. 1987) (prosecutor testified at hearing).
In *Gray v. State*, 317 Md. 250, 562 A.2d 1278 (1989), the court held that a trial judge's refusal in a *Batson* remand hearing to require the prosecutor to testify under oath or to permit cross examination was not an abuse of discretion. When an appellate court is confronted with an appeal after a remand hearing, the decision in *Gray* is appropriate, so long as the court is satisfied with the procedure utilized by the trial court. However, when an appellate court initially remands a case to the trial court, it should explicitly require a full evidentiary hearing.
- 117 “ [T]he Court has] recognized that by denying a person participation in jury service on account of his race, the State unconstitutionally discriminate s] against the excluded juror. *Batson v. Kentucky*, 476 U.S. 79, 87 (1986).
- 118 *Id.* (discriminatory jury selection “undermine s] public confidence in the fairness of our system of justice and harms entire community).

99 YLJ 187

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The next coach does not face an easy task. Although the team has good Ivy League talent, it is torn by dissension and that is not a good sign heading into next year's tough schedule.

Penn loss

By BRETT KAVANAUGH

Yale Coach Tom Brennan had stressed the importance of his team

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putting 80 well-played minutes together in order for the Elis to

defeat Princeton and Penn this weekend. But Yale was unable to do that as the Elis were mathematically eliminated from the Ivy race in Penn's 89-72 blow-out Friday night at Payne Whitney. Playing only for pride Saturday, Yale showed a lot of it in a 64-50 trouncing of Princeton.

The weekend split left Yale's record at 12-12, and in fourth place in the Ivy League at 6-6.

Penn captured the Ivy League championship a year ago and was expected by most to repeat this season. But the Quakers have fallen

— continued on page five

Cagers handle Tigers, but Quakers win handily

— continued from page six
apart on the road, swept first by Columbia and Cornell, then by Dartmouth and Harvard. Yet, most people in the small crowd Friday night were left wondering how Penn had ever lost an Ivy game this season.

Playing a game Brennan termed "exceptional," Penn shot a phenomenal 59 percent from the field, and the five Quaker starters made 27 of 39 field goal attempts.

Perry Bromwell, a 6'2" guard and First-Team All-Ivy performer a year ago, scored at will on long jump shots and off-balance inside moves in racking up 24 points. Bromwell has had a superb season, often because he has seemed bored during games. Easily a level above most Ivy players, he has had trouble keeping his concentration in certain games. That was not a problem Friday night.

The teams stayed close in the opening minutes of the game until Penn made its first run. The Quakers reeled off seven straight points to gain a 25-16 lead midway through the half. Yale battled back to within six, 44-38, at the half.

Yale came storming out of the locker room, scoring the first six points of the second half on a dunk by junior center Chris Dudley and two tip-ins by Brian Fitzpatrick '88. But with Penn leading, 50-48, the Quakers netted 13 straight points as Yale went dry for four straight minutes. Yale never was closer than 11 points the rest of the way.

Earlier in the season Brennan said that Penn was the most talented team in the Ivies. No one personified

Jr. '59

as to Collapse

Only serious spectators



PITTS STOP — Penn's Phil Pitts stops and pops over Yale's Johnny Rice '88 in the Friday night Quaker victory. Pitts was a one-man show against the Elis, pumping in 18 points, including an array of Michael Jordan-style dunks.

Brennan's remarks more than Phil Pitts. The 6'5" sophomore forward connected on eight of 12 field goal attempts in an 18-point, seven-rebound show. Included in Pitts' totals were three jarring dunks, the last a behind-the-head, double-clutch slam that would have earned a perfect "10" in the NBA Slam Dunk Contest.

Yale's statistics on the night reflected its poor performance. The Elis shot a miserable 35 percent from the field in the second half and hit only 12 of 21 free throw attempts on the night. Brian Fitzpatrick led Yale for the second straight game, netting 16 points. Dudley added 12 points, 10 rebounds, and two blocks.

Saturday night against a less-talented Princeton team, the Elis played well in a 64-50 defeat of the Tigers. The night before Penn could have given the Lakers a game; on Saturday Princeton would have had a tough time in a pickup game on Payne Whitney's fifth floor.

Dudley and sophomore forward Paul Maley had no trouble scoring against the smaller Tigers. Yale gained an early lead behind nine quick points from Dudley. The Elis increased the lead to 23-14 on a monster dunk by Maley, and cruised to a 31-22 halftime lead.

In the second half, Princeton closed Yale's lead to 37-36 with 11:30 left. But Pete White '88 made a clutch jumper in the lane and followed that with a steal and layup to dispel any Tiger notions of upset. In the last nine minutes, Princeton never came closer than seven points.

Dudley netted 20 points, gathered 13 rebounds, and blocked two shots on the night. The 6'10" center is third in scoring and first in both rebounding and blocked shots in the league. Maley added 18 points, 12 rebounds, and four assists for the Elis.

Brennan was pleased with his team's better performance Saturday night. "It's so tough to figure this team out. But Dudley got it going, and that dunk really helped Maley. He's really only a freshman playing (since he was hurt last season) and needs a confidence booster once in a while."

Yale travels to Harvard and Dartmouth this weekend to close out its season against the two worst teams in the Ivy League. Out of the race and having already clinched the mythical H-Y-P crown, Brennan sees a winning season as motivation in Yale's last two games.



THE MAILMAN — Sophomore forward Paul Maley rams home a thundering dunk in Yale's easy 64-50 victory over Princeton Saturday night. Maley continued a fine season, pouring in 18 points and grabbing 12 rebounds against the Tigers.

YDN-Jack Plym

Ailing Elis hope to get well in Penn, Tigers weekend games

By BRETT KAVANAUGH

Two weeks ago, Yale traveled to Penn and Princeton and earned a split of the toughest road games in the Ivy League. The Elis will be looking to avenge the earlier 71-67 loss to the Quakers, when Penn invades Payne Whitney Friday. Yale

usually waste most of the 45-second clock before shooting. Yale has to get ahead early to defeat the Tigers.

The Elis have also had trouble putting together complete games. In the loss to Dartmouth, Yale dominated the first half but came unglued in the

second. Last weekend against Columbia, the Elis looked bad in the first half but played perhaps their best 20 minutes of the season after intermission in a comeback victory.

Brennan knows this. "We have to play consistently well to win both,"

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faces Princeton the next night, a team the Elis beat 52-47 in the first meeting.

With only four games remaining, Yale is 5-5 in the Ivies, two games behind league-leaders Cornell and Brown. The Elis' championship hopes entail winning all four and hoping for the two leaders to fall apart.

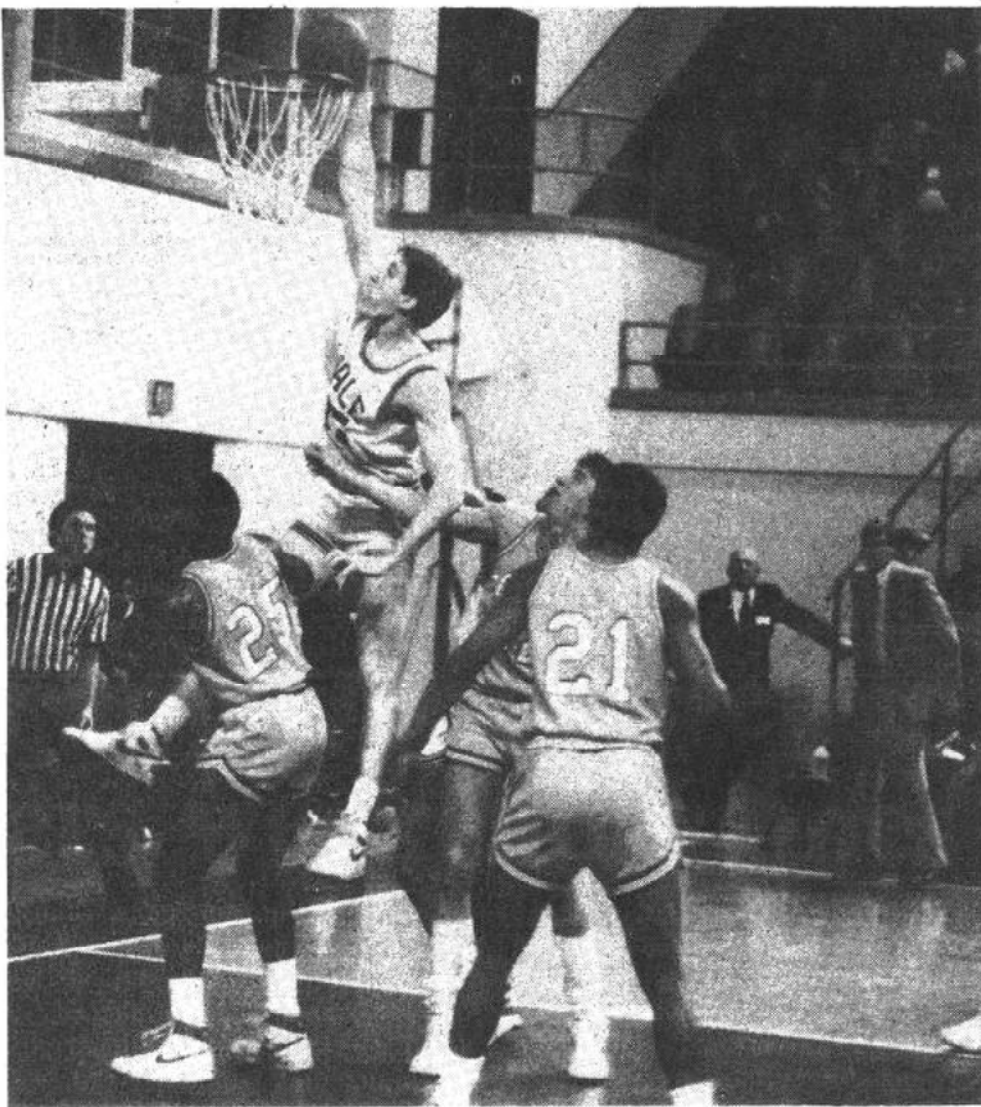
Coach Tom Brennan is concerned about the health of his team. Illness has sidelined a few Elis this week in practice, including Matt Whitehead '88 and Chris Dudley '87. "Although we are pretty sick, I think we are ready to go mentally and emotionally," Brennan said. "It's the latest a Yale team has been alive in the Ivy race in a long time."

Penn, the defending Ivy League champion, was the consensus choice to take the title again this season. But the Quakers (4-5; sixth place in the Ivies) have inexplicably fallen on hard times, losing five of their last seven Ivy contests.

Brennan said, "They seem either to play great or very poorly. Last time they started fast against us. We're going after them right away this time." The Elis will not sit back in a zone in this meeting, but instead will use a pressuring man-to-man defense against the sharpshooting Quakers.

While the Quakers fortunes have taken a turn for the worse, Princeton has won three straight since its loss to Yale. Despite a relative scarcity of talent, the Tigers (5-4) are in third place.

The Tigers play a sagging zone defense, while on offense, they



—YDN-Mike Subit

PENN SHOULD BE QUAKING — All-Ivy center Chris Dudley '87 sends one home during Friday's game against Columbia. Tonight, Yale will entertain Penn, who the Elis lost to earlier this year. While Penn has lost five of seven recent Ivy contests, Princeton, the Elis opponent on Saturday, has won three straight.

Elis tame Lions, lose to Big Red

Split leaves cagers two back

By BRETT KAVANAUGH

In basketball, as in few other team sports, it is possible for one person to completely dominate a game, no matter what the opposition does. John Bajusz of Cornell did just that

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Saturday night against Yale. The 6-1 junior guard scored 29 points, shooting 10 of 16 from the field and nine of 10 from the foul line, to lead the Big Red to a 79-73 victory over the Elis.

The defeat was especially disappointing after Yale's 70-66 victory over Columbia the night before had placed the Elis within one game of league leading Brown and Cornell.

Yale's record now stands at 11-11 and 5-5 in the Ivy League. The Elis are tied for fourth place, two games behind the Big Red and the Bruins with four to play. This weekend, Yale takes on Penn and Princeton at Payne Whitney.

Against the Lions, Yale was led by outstanding performances from Pete White '88 and Paul Maley '88. Each player scored 20 points to bring the Elis back from an eight point halftime deficit to defeat the Lions.

Yale started well against Columbia, scoring the game's first four points, but went to play a very poor first half. The Elis turned the ball over 13 times in the first 20 minutes and seemed flustered on the offensive end of the court. After a tie at 18, Columbia outscored Yale 14-6 to take a 32-24 lead into the locker-room. Columbia's Mark Settles showed signs of things to come by converting two long jump shots in the final minute of the half.

The game looked like it might have been over with 18 minutes left. Chris Dudley '87, Yale's number one offensive weapon, picked up his fourth foul with 18:17 left and the Elis trailing by seven. With Dudley

out of the game for at least the next 10 minutes, prospects did not look bright for Yale.

Enter Pete White. The 5-11 sophomore, known for his excellent playmaking abilities, took the game upon his shoulders and brought the Elis back into the contest.

16:21 left — White pulls up off drive and hits foul line jumper.

14:27 left — White finds handle inside and lays it in.

12:25 left — White hits baseline bomb.

12:01 left — White hits short jumper.

10:13 left — White hits two foul shots.

9:07 left — White sinks from long range on top of key.

That last shot finally put Yale over the top — a 48-47 lead. The teams traded baskets for the next few minutes. Dudley returned to the game and immediately made his presence felt with a rebound dunk off a Paul Maley miss to tie the score at 54 with 5:31 remaining.

Maley connected on two key jump shots that gave Yale the lead for good, 60-58, with 3:16 left. The Elis hit 10 of 13 free throw attempts in the final three minutes to seal the victory.

In addition to White's heroics, Maley played a beautiful all-around game. The 6'8 forward hit eight of 14 field goal attempts, connected on all four shots (20 points), grabbed nine rebounds, blocked two shots, and dished out two assists in a 37 minute virtuoso performance.

Dudley, playing only 20 minutes, added 12 points, six rebounds, and three blocked shots.

For Columbia, Mark Settles lit up the Elis for 22 second-half points, but his efforts were not enough to stave off Yale's comeback.

Coach Tom Brennan was elated with his team. "I'm very impressed with our comeback. It's a testimony



DUD'S THUDS — Center Chris Dudley '87 (15) rams home a Paul Maley '88 (24) miss to tie the score at 54 Friday against Columbia. —YDN Mike Subit

to these kids. We weren't playing well in the first half, but I knew we wouldn't panic. We were more aggressive [after intermission]," Brennan said.

Brennan praised his heady point guard, White, "He really makes us go and makes the big plays. When he's on, he's one of the best guards in the league, and tonight he was on."

Entering Saturday's matchup with Cornell, thanks to more upsets in the Ivy League, the Elis knew that a victory would firmly plant them in second place, and a win coupled with a Columbia victory at Brown would put Yale in a first-place tie.

Bad news item one: Brown edged Columbia 97-95.

Bad news item two: Yale never led after 20-18 lead in the 79-73 loss to Cornell.

Ironically, Cornell star guard

John Bajusz's first basket took away Yale's last lead and tied the score at 20. Then Bajusz canned three straight to give the Big Red a 26-22 lead with 6:24 left in the half. Bajusz stayed hot, hitting a flying 15-footer to give Cornell a 40-33 lead at intermission.

In the second half, Cornell increased its lead to 55-42 with 11:17 left before Yale began another furious comeback. The Elis closed Cornell's lead to 63-60 with 2:54 left, but could not come up with the big shots down the stretch.

The Big Red were deadly from the foul line. Cornell scored its last 19 points from the stripe. They didn't have a field goal in the last nine minutes, but connected on 21 of 29 second-half free throw attempts and also shot a blazing 56 percent from the field for the game.

Meanwhile, as torrid as Yale's shooting had been 24 hours earlier, it was ice cold in this contest. The Elis shot a miserable 41 percent from the field and 57 percent from the foul line for the game.

Brian Fitzpatrick '88 was the bright light for Yale. He came off the bench to score 17 points and grab 7 rebounds. Dudley added 15 points and nine rebounds, and Captain Kenny Wheeler '87 notched 10 points.

But, Yale could not stop Bajusz. He scored 29 points in the last 29 minutes of the game. Brennan said, "He made a lot of shots with people in his face and as the [45 second] clock ran out. We didn't think he would shoot that well."

Overshadowed by Bajusz was the performance of forward Drew Martin. Martin, a 6'4 senior, notched 20 points, seven rebounds, three assists, and two steals for the Big Red.

Yale's title hopes, which looked promising after Friday's contest, may have slipped down the drain in the loss to Cornell.



PISTOL PETE — Eli guard Pete White '88 lays one in Friday night in Yale's 70-66 victory over Columbia. White scored 12 points in a seven minute span in the second half to lead the Elis to victory. White finished with 20 points on the night. —YDN Mike Subit

Ivy Standings

School	W	L
Brown	7	3
Cornell	7	3
Princeton	5	4
Yale	5	5
Dartmouth	5	5
Penn	4	5
Columbia	4	6
Harvard	2	8

defenseman Dave Baseggio said. "We're having a lot of fun, and I guess that's part of the game."

The Elis have a right to be confident after last weekend. After nipping Vermont, Yale crushed RPI in resounding fashion 10-3. "We all

goals over the last six games. This production has been marked by remarkable balance: nine Elis have accumulated over 20 points, led by Randy Wood '86 (17 goals, 18 assists, 35 points), Bob Logan '86 (17-17-34), and Kudelski (13-17-30). There has

— continued on page five

SAVAGE ON THE DRIVE — Forward Karen Yarasavage '86 goes for two in a game earlier this season. She scored 13 points in Yale's 82-79 loss to Boston University Wednesday night. Despite the loss, which dropped the Elis' record to 5-4, it was their "best game of the year."

Lions, Big Red fear Eli repeat performance

By BRETT KAVANAUGH

One year ago, Yale entered the Cornell-Columbia weekend with a 10-11 overall record and a mediocre 3-6 mark in the Ivies. Both opponents had beaten Yale earlier in the season and seemed likely to do so again. But Yale's young lineup came

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of age and played two superb games. The Elis crushed Cornell, 75-61, and defeated Columbia 55-52. The level of play exhibited that weekend was the spark which was supposed to propel the Elis to the rank of serious contender in the Ivy League.

Things have not quite gone as planned for Yale this season. The Elis enter this weekend's games with Columbia and Cornell with a record of 10-10, 4-4 in the Ivies. The

Elis have been up and down this season and are currently mired in a three-way tie for fourth-place, although they are only two games back of the lead with six to play.

This weekend brings another set of endless crucial games. Yale will need to string together performance reminiscent of a year ago in order to sweep two. The Elis could be anywhere from first to seventh place depending on what happens around the Ivies this weekend.

Coach Tom Brennan has repeatedly attributed the Elis inconsistency to the team's youth. There are no seniors on the squad, and four sophomores start.

Brown has proven the value of experience thus far. The Bruins are leading the Ivies with a 6-2 record and are the most experienced team in the league, starting three seniors and two juniors. But they showed

signs of crumbling when they suffered a surprising loss at Princeton last Saturday.

Tom Gwydir leads Columbia in both scoring and rebounding for the second straight year. He nets 13.9 points and 4.7 rebounds per game for the 4-4 Lions. He earned Second-team All-Ivy honors for his efforts a year ago.

Columbia will be hurt this weekend by the loss of point guard Chip Adams. Adams cut his leg badly in a training room accident last weekend.

Cornell is led by 6'1" junior guard John Bajusz, one of the premier players in the Ivy League. Bajusz is scoring 17.8 points per game and connects on a phenomenal 55 percent of his shots. He shoots from long range, which makes that figure even more outstanding. He also is eighth in the country in free throw per-

centage (89.6 percent). Bajusz was a First-team All-Ivy and Honorable mention All-American pick a year ago. He ranked 13th in the nation in field goal percentage, and third among guards.

Drew Martin, a 6'4" forward, leads the Big Red in rebounding, snagging 6.5 per game. He also is scoring 13.9 points per game. Greg Gilda, a 6'8" sophomore center, is averaging 9.3 points per game and shoots 63 percent from the field.

Amid Yale's ups and downs, Chris Dudley '87 has emerged as the most consistent Eli. He averages 16.1 points, 9.8 rebounds, and one block per game. Dudley is first in rebounding and second in scoring in the Ivies. Matt Whitehead '88 is netting 10.6 points per game and shoots a team-high 84 percent from the foul line.

The games both start a half hour earlier than usual — at 7:00.

Tiger men, Cantab women look sharp for HYP's

By MIKE SEERY

The Yale track teams will travel to Princeton, tomorrow to compete in the HYP indoor championships. Both the men and women are in the midst of fine seasons and both have excellent chances of returning with the title.

Track

On the men's side the competition will come from the Tigers.

Princeton also has some good field event people who should perform well in the weight events, where Yale athletes have suffered injury.

Harvard looks to test Yale in the middle distances. The Crimson have four excellent runners who undoubtedly will make things difficult for Yale in the 800, the 1000, and the 1500.

"Some guys are sick and we've had some injuries on the

Crimson are strong in the distances; they won the cross-country Heptagonal championship last fall. Harvard boasts some good sprinters, a quality hurdler, and an excellent high-jumper. Despite such an array of talent, they have not come together at all,

at least not yet.

Key races to watch will be the 1500, the 3000, the 55, the 400, and the high jump. In the high jump Jane Buchan '86, consistent at 5'9" this season, will face Harvard's Erin Sugrue, who has cleared 5'10" this year.

frequent wasn't clutch Terrier victory. Rand League second with 22 floor. I a strong points, assists. 13.

Yale erases 23 years of Tiger frustration

By BRETT KAVANAUGH

Although Yale earned only a split of this weekend's basketball games at Princeton and Penn, Coach Tom Brennan was still smiling. "I'm very proud of this team and very encouraged by the way we played this weekend. It's the best we've played

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in a while."

That was evident as the Elis defeated Princeton Friday night, 52-47, and even when they lost to Penn Saturday, 71-67. The trip south is the toughest in the Ivy League, and a split is rare indeed for the Elis.

Twenty-three years. There had been close losses (50-49 in 1982) and embarrassing losses (108-64 in 1971), but, above all, there had been losses — 22 straight of them at Princeton. Yale had not won there since 1963.

Friday night, Yale ignored history and beat the Tigers behind 20 points and nine rebounds from Chris Dudley '87. The Elis also had solid performances by Matt Whitehead '88, Pete White '88, John Rice '88, and Brian Fitzpatrick '88. Val Carlotti '88 sank a free throw with 14 seconds left to clinch the victory for Yale.

Brennan had stressed the importance of starting quickly in both games this weekend. Against the Tigers, the Elis took heed and stormed out to a 14-6 lead after seven minutes. But Princeton started connecting on its outside shots to close the margin. Princeton gained a 23-20 lead at intermission.

Yale started mixing up its defenses in the second half to counter Princeton's shooters. That combined with better shooting to give the Elis a 33-29 lead with 10 minutes left.

The game was tight down the stretch, but the Tigers never took the lead. A beautiful pass from White to Fitzpatrick on an alley-oop gave Yale a 43-37 lead with 3:30 left.

The Tigers closed to within two with 22 seconds left on two long-range bombs by Aaron Belz. Princeton then fouled Carlotti, who missed his foul shot with 17 seconds left. But Dudley alertly tipped the ball to Carlotti, who was fouled again. He nailed the free throw to seal the victory.

Brennan said, "We were very poised, made our free throws, hung tough, and won a big game. I thought the key to the game was that they started slowly and had to catch us."

Yale's strategy, as it has been all

season, was to go inside to Dudley. "We knew it would be difficult for them to stop him. If we got him the ball enough, we knew he'd come through," Brennan said.

Yale never led in the loss to Penn, the preseason favorite to win the Ivy League. The Quakers came out smoking and took a quick 15-8 lead before a big crowd in the famed Palestra. Perry Bromwell, a First-team All-Ivy performer a year ago, was hitting from the perimeter and notched 10 first-half points. His 15-foot jumper gave Penn a 34-25 lead at the half.

The Elis outplayed the Quakers at times in the half with a determined effort. Yale sank 14 of 22 field goal attempts and 14 of 16 free throw attempts in the half, but costly turnovers and some tough calls by the referees kept the Elis from ever taking the lead.

Trailing 55-43, the Elis ran off nine straight points, five by Dudley and

four by Whitehead, to cut Penn's lead to three with six minutes left. Bromwell hit another jumper, but Whitehead answered, and then White made a big steal and was fouled on his attempted layup. He hit both foul shots to make the score 57-56, Penn.

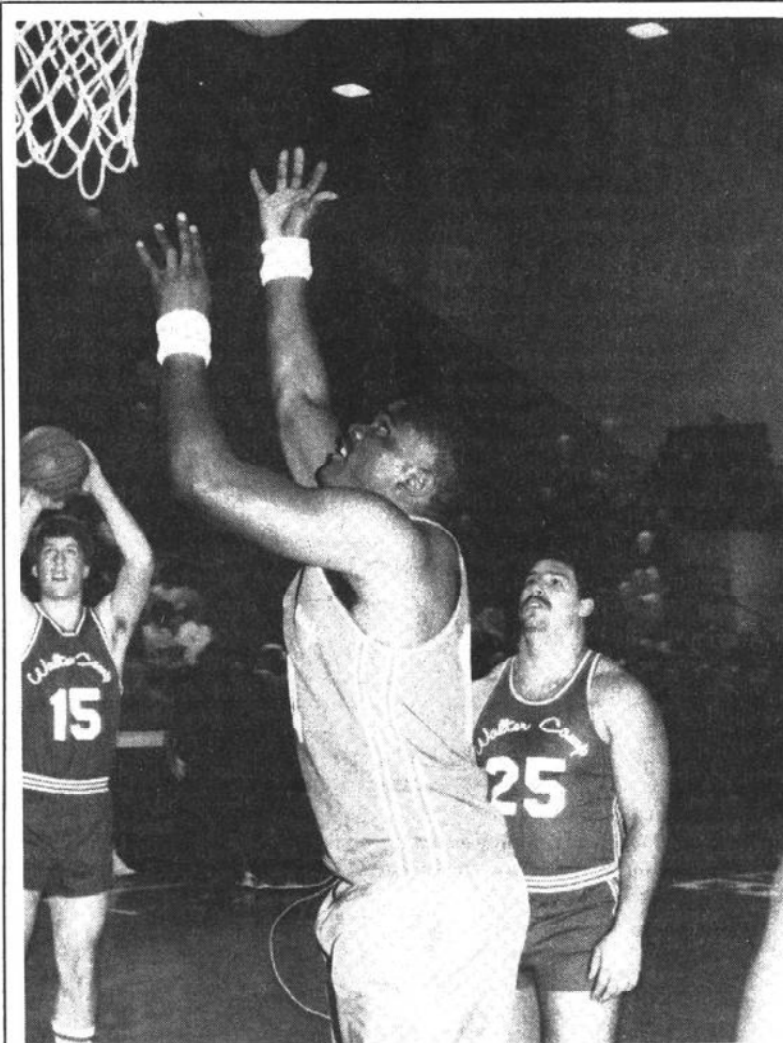
Tyrone Pitts hit an off-balance 12-foot prayer to put Penn in front by three with 3:30 left. That shot seemed to take all the air out of the Elis' sails, after a magnificent comeback.

Brennan was very pleased with the effort. "We didn't get one call, but the players played hard even when they could have folded up the tents," he said.

Dudley once again led the Elis with 18 points and 10 rebounds. Whitehead added 12 points, and Fitzpatrick and Captain Kenny Wheeler '87 came off the bench to score 13 and 10 points, respectively. White dished out 12 assists, and Rice did a good defensive job on Bromwell in

the second half.

Yale's record stands at 10-10 and 4-4 in the Ivy League. To have a chance for the Ivy crown, the Elis will probably have to win their next six games and get some help from other teams.



—YDN-Jack Plym

'B'-LT — Giants linebacker Lawrence Taylor takes a shot for charity at the annual Walter Camp Football Foundation Basketball game. Other performers included San Diego Charger tight-end Kellen Winslow and Bo Jackson, the 1985 Heisman Trophy recipient. Proceeds from the game went to support a variety of charities.

Bulldogs head south to home of Ivy crown

By BRETT KAVANAUGH

Princeton and Penn. They are the names synonymous with Ivy League basketball excellence for the last quarter-century. In fact, in the past 17 years, the Tigers or Quakers have won every Ivy crown. The last team to dethrone them was Columbia, in

Men's Basketball

1968.

With that in mind, the men's basketball team travels south to Princeton and Penn this weekend, attempting to keep their fading hopes for an Ivy title alive. The Tigers have not been playing well and will be the easier of the two contests. The fourth-place Elis will have to play an excellent game to beat the Quakers.

The greatest moments in Ivy basketball history have been provided by the two schools. In 1965, Sen. Bill Bradley's (D-N.J.) heroics led

Princeton to the Final Four. The Tigers captured the NIT title in 1975, when it was still an outstanding tournament. And in 1979, Penn defied all the odds, defeating North Carolina, Syracuse, and St. John's before succumbing to Magic Johnson and Michigan State in the Final Four.

Princeton is coached by the dean of Ivy coaches, Pete Carril, but is having problems so far this season. The Tigers are 2-3 in the Ivies and have lost three straight. Tuesday night, Penn destroyed Princeton as the Quakers raced out to a 31-14 halftime advantage on the way to a 67-47 blowout.

Center Alan Williams leads Princeton in both scoring (14.8) and rebounding (5.5). Steady point guard Joe Scott nets 8.1 points per game while John Thompson (son of the Georgetown coach of the same name) is adding 6.2 points and 4.2 rebounds. Allowing 52.5 points a contest, the Tigers lead the nation in

defense mainly because of their traditionally slow tactics on offense.

Yale Coach Tom Brennan calls Penn "the most talented team in the league." The Quakers, preseason favorite to repeat as Ivy champions, are 9-8 and 3-2 in the Ivies. They beat Southern California and came within four points of beating defending national champion Villanova, but suffered two surprising losses at Cornell and Columbia last weekend. Forwards Chris Elzey and Phil Pitts are leading the Quakers in scoring with 13.2 points per game. Perry Bromwell is not scoring as he did a year ago, but is still a tough player to stop.

While Princeton likes to slow things down, Penn's style is very up-tempo. Brennan said, "What makes this trip so hard is that we really can't worry about Penn until Saturday morning. And Princeton plays one way, and Penn plays entirely different."

Yale's season has been a roller-coaster. They have looked great at times but stumbled against weaker teams such as Dartmouth the past weekend. As usual, Brennan attributes the inconsistency to the team's "youth."

"I don't question their character," Brennan said. "They've won games they had to and also some close ones. We have eight games left, and we're just going to let it roll and see where we stand when the smoke clears."

Brennan sees the key to both games as getting ahead early. "Princeton is not a very good catch-up team. They're like a wishbone team [in football]. To beat Penn we must control Bromwell, although he's been struggling, and also Pitts. We have to jump on top of them early like we did last year [when the Elis upset Penn 77-75]."

The games this weekend can be heard on WELI-960 AM.

Dartmouth rally upends streak

Rice helps Cagers earn split

By BRETT KAVANAUGH

Tom Brennan has stressed the importance of winning every home game if Yale is to have a shot at the Ivy League championship. If this weekend's Payne Whitney home-stand performance is any indication, the Elis will have a hard time achieving that goal.

Men's Basketball

After beating Harvard, 54-45, in a lackluster performance Friday for its fifth straight win, Yale collapsed in an 82-69 loss to Dartmouth the following night. "Sometimes we look like the Lakers, and sometimes we look like P.S. 36," Brennan said following Saturday's game. Yale's record now stands at 9-9 and 3-3 in the Ivy League.

Yale struggled to the nine-point victory over a winless squad Harvard (0-4 Ivy). Yale was clearly the superior team, but played poorly. The Elis shot a miserable 36 percent from the floor, turned the ball over 11 times, and compiled only seven assists.

Coach Tom Brennan was happy with the Elis' intensity but summed up the game by saying "I'm just happy to win, because we didn't play very well."

Yale opened the game on a positive note. The Elis scored the first nine points and threatened to blow the game wide open. Meanwhile the Elis' mixed up their defenses, using a 2-3 zone, man-to-man, and a full court trap to rattle a young Harvard squad that includes eight freshmen.

But Harvard countered with some tough defense of their own. The Crimson played an effective 2-3 zone for much of the game, using as many as four players to collapse on center Chris Dudley '88 when he got the ball at the low post. Without the Dudley option, the Yale offense seemed stagnant. The lack of motion contributed to their poor shooting.

Harvard also had an effective game plan on the offensive end. Coach Peter Roby who likened his team to "a fighter without a knock-out punch" told his players to run off as much time as possible off the 45-second clock before looking for an open jump shot.

Yale scored five straight points to open the second half, but a pesky Harvard squad fought back and trailed 33-32 with 10 minutes left in the game.

Yale then ran off a streak of eight unanswered points. Matt Whitehead '88 and John Rice '88 hit consecutive jump shots and Rice canned two free throws. Rice then took a charge and Peter White '88 hit a 15-footer.

Harvard fought back to within six, 43-37, with 2:45 left but Rice grabbed a big offensive rebound, was fouled, and hit both free throws. After an Eli time out Yale put the game out of reach when White drove the lane and dished off to Dudley for a lay-up.

As the Elis prepared for Saturday's matchup with Dartmouth, the Ivy race had turned upside down. League leaders Penn and Princeton had both lost Friday and were to be upset again Saturday by Columbia and Cornell.

The Elis, sensing a big jump in the standings, stormed out as they had the evening before, taking leads of 14 twice and 15 once en route to a 41-28 halftime lead. Eric Mitchell '88 provided the spark off the bench with 11 first half points in place of center

Chris Dudley '87. The referees pegged Dudley with two questionable offensive foul calls in the first three minutes of the game.

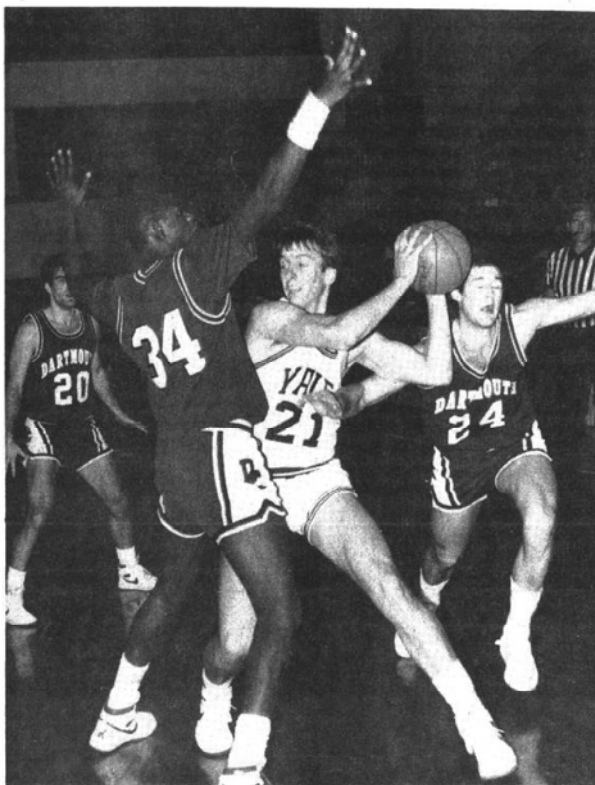
Yale went without a point for five minutes in the second half as Dartmouth reeled off nine straight points to cut the Yale lead to 43-39 with 13 minutes remaining. Meanwhile, the referees allowed the game to get completely out of control as Big Green players consistently hammered Dudley without the whistle blowing. Several scuffles broke out during this period.

The Elis appeared flustered the rest of the way and after Dartmouth gained a 50-49 lead with 10 minutes left (its first since 2-0), the Blue never led by more than a point. The game was tied three times down the stretch, the last at 63 on an eight-foot jump shot by John Rice '88.

The Big Green scored four straight to go up 67-63 before Matt Whitehead '88 dropped in two foul shots to close the Eli deficit to two with 1:55 remaining. Dartmouth then scored 15 of the game's final 19 points as Yale was forced to foul.

Mitchell finished with 17 points and Whitehead poured in 16 in only 19 minutes of play. Dartmouth was on fire in the second half, converting 18 of 26 shots from the field and 18 of 20 free throw attempts.

The Dartmouth shooting, combined with their bruising inside defense, left the Elis mired in a four-way tie for third place in the Ivies, two games out of first place.



—YDN-Paul Fu

THE MITCH IS BACK — Yale forward Eric Mitchell '88 is surrounded by a host of Dartmouth players as he tries to shake off intense pressure. Mitchell was a standout in the loss to Dartmouth, pouring in 17 points in place of the foul-plagued Chris Dudley '87.

Penn rips

By DAVE ISENBERG

The men's squash team met an undefeated Penn squad in an important Ivy League clash Saturday afternoon. When the dust settled on the fourth floor of Payne Whitney Gym, the Quakers had upset the Elis 5-4. It was Penn's first victory over Yale in five years and upped their Ivy record to 3-0. The Elis fell to 1-1.

Squash

Coming off a 5-4 win the night before against a mediocre Trinity squad, the Quakers played an inspired match. They managed to exploit all the weaknesses of a slightly offbalance Eli team. But the Elis were hampered greatly by the loss of their fourth seed, All-American Julian Benello '86, who sat out for disciplinary reasons. Benello's absence was the primary reason for the Quaker victory. Second-seed Tom Clayton '89 was forced to play even though suffering a case of the flu, and dropped his match in straight games, 3-0.

To make up for the loss of Benello seeds five through nine played one seed higher than usual. Although this did not effect the top of the ladder, it did have a profound effect on the bottom. "They beat us with their depth," Yale Coach Dave Talbot said, noting the Quakers' strength down below. The Elis dropped their bottom four matches, all in very close games.

In the closest of these matches sophomore Keith Flavell, Yale's seventh-seed, lost a dogfight to Penn's captain, Don Ambrose, 3-1 in the last game of the day. Ambrose won three of his games in tiebreakers, 18-17, 17-14, and 16-14. Ambrose's victory ended up as the

Yale looks to continue streak

Resurgent Elis host slumping Ivy opponents

By BRETT KAVANAUGH

After facing the prospects of a losing season and being knocked out of the Ivy race early, the men's basketball team has rebounded from its early-season setbacks to post four straight victories. This weekend the Elis host Harvard and Dartmouth at Payne Whitney. "We think we have to win both games," Coach Tom Brennan said. "To be a contender in the league we have to win all of our home games."

Men's Basketball

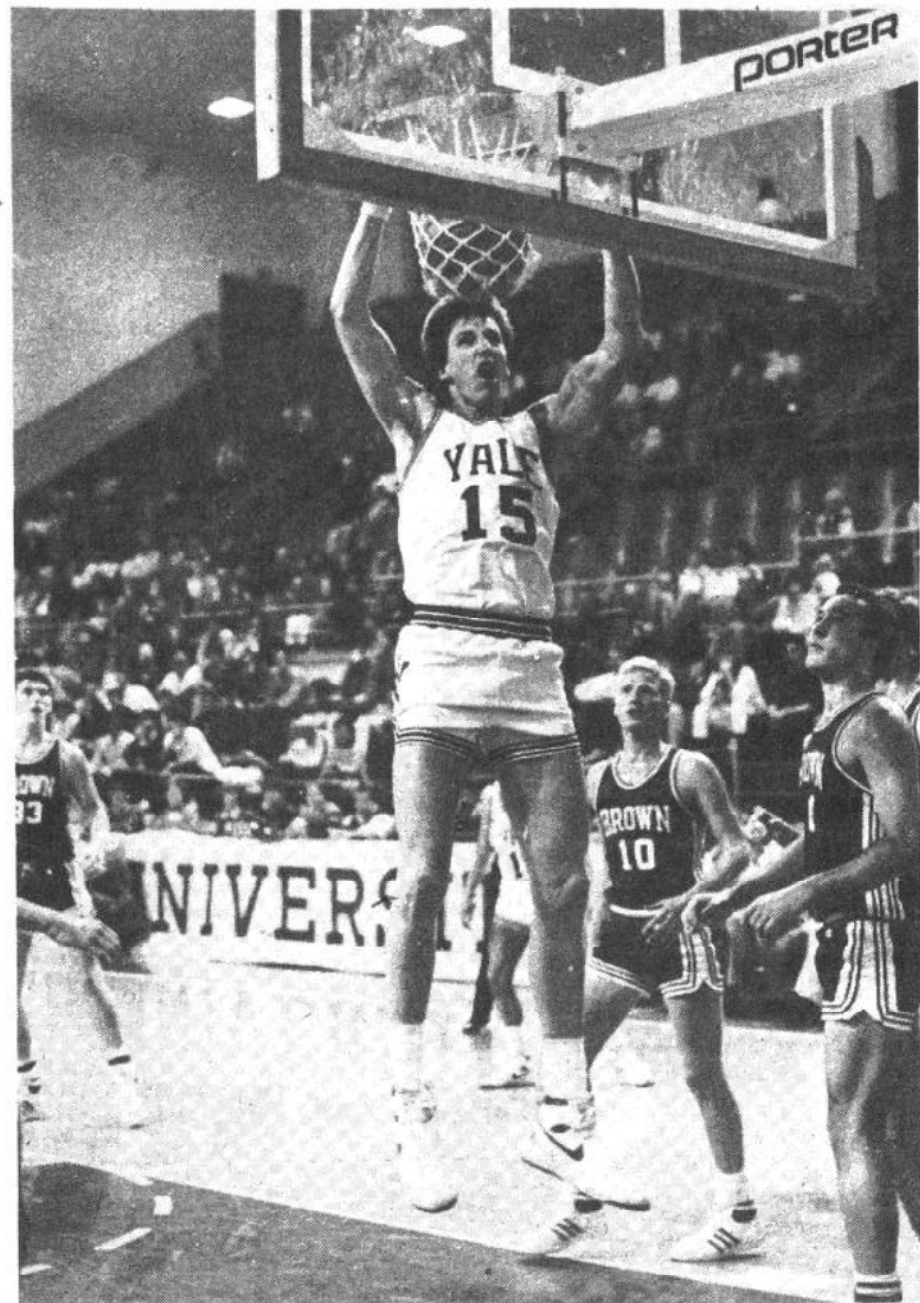
Harvard, with a record of 0-3 in the Ivies and 4-11 overall, is having a difficult time adjusting to the loss of center Joe Carrabino and forward Bob Ferry. The Crimson hold the dubious distinction of being the only team in the country to lose to Manhattan, vanquished by Yale Wednesday, 90-63.

Harvard's leading scorers are freshman Neil Phillips and junior Keith Webster. Each is averaging 11.9 points per game. The only Crimson player with any size is 6'8" sophomore Bill Mohler. He averages only 6.5 points per game and has fouled out of six contests. He is going to be in big trouble against 6'10" Chris Dudley.

Dartmouth has also had its troubles this season, although they have beaten Harvard and come within a point of victory at Princeton. Bryan Randall, last year's Ivy League Rookie of the Year, is a good player who killed the Elis in Hanover last winter. Many freshmen are playing key roles in the second year for Coach Paul Cormier.

Dudley has been the key to Yale's resurgence and four-game winning streak. The All-Ivy center is playing better than anyone in the Ivies at this stage of the season. He is averaging 24 points and 12 rebounds in four league contests.

Brennan commented, "Chris keeps getting better every game. He



YDN/Paul Y. Fu

CAPTIVE AUDIENCE — As three Brown players stand by with mouths agape, All-Ivy center Chris Dudley '87 slams down two of his 23 points in the game. The Elis host a weekend set against Harvard (tonight) and Dartmouth (tomorrow). Both teams are struggling in the Ivy League.

has proven himself to be a force and is the guy who is going to carry us. He is shooting well and playing with a lot of confidence."

Captain Kenny Wheeler '87 will join the starting lineup this weekend. Brennan said, "Kenny has been playing well and had a couple of pretty good games for us."

Yale is 4-1 since major lineup shifts two weeks ago. Brennan remarked that "the guys who were benched [Brian Kasbar '88, Brian Fitzpatrick '88, and Matt Whitehead '88] were really good about it, putting the team first and not sulking. In the games since, one or two or

sometimes all three have really played a key role."

Kasbar is playing the rest of the season with a deep bruise under his kneecap. He will play on the weekends and then take three days off from practice the following week, according to Brennan.

Brennan sees no danger of the Elis getting overconfident because of their recent successes. "It was a good sign to go down and beat Manhattan the other night. That's the type of game we've proven we can lose when we're not ready to play."

Elis trounce Jaspers

Blue wins 90-63 in Big Apple

By BRETT KAVANAUGH

Yale had no trouble winning its fourth consecutive game, gliding by Manhattan, 90-63, Tuesday. The victory evened the Elis' record at 8-8 and concluded the non-conference portion of their schedule. The downtrodden Jaspers are now 1-18 and ranked as the worst team in Division I by *USA Today*.

Men's Basketball

Four Eli players, led by Chris Dudley '87, scored in double figures. The 6'10" center notched 19 points and grabbed 14 rebounds, though it wasn't one of his most inspired performances.

Yale led by six at halftime, 31-25, and took command of the game early in the second half, pulling out to a 52-37 lead. The Elis increased the lead to 66-46 with nine minutes re-

maining and cruised the rest of the way. Pete White '88 scored 16, Matt Whitehead '88, 14, and Kenny Wheeler '87 added 13.

For the second straight week, a Yale player has been named Ivy League Player of the Week. Paul Maley '88 earned the honor with his 25 point-12 rebound performance against Brown in the Elis' 73-70 victory last Saturday.

Dudley, last week's recipient, continues to lead the Ivies in rebounding, averaging 10 rebounds per game. Dudley is also second in the league in scoring, with a 16.6 average. Pete White '88 is leading the Elis in assists, with 5.5 per game.

The Elis are at home this weekend against Harvard and Dartmouth. They should win both. Harvard is 0-3 in the league and was embarrassed at Duke this week. Dartmouth is 1-2.

Elis hang on, beat Army, 54-51

By BRETT KAVANAUGH

The men's basketball team overcame a five-point halftime deficit to defeat Army at Payne Whitney last night, 54-51. Sophomore forward Eric Mitchell hit the front end of a one-and-one opportunity with eight seconds left to seal the win.

The Elis now possess a 6-8 record as they head into the meat of the Ivy League season. Yale faces a crucial matchup with surprising league-leader Brown Saturday at Payne Whitney.

The Elis won their second straight close game, and Coach Tom Brennan is obviously pleased. After the game, he said, "I'm tremendously proud of them. Now we're beginning to hang on at the end. We still can't hit the free throws, but the idea is we won a close game."

Army took control of the game in the first half behind the play of center Mark Michaelsen, who hit all five of his field-goal attempts before intermission. The Cadets took leads of eight three different times, but Yale battled back to within three on a Brian Kasbar '88 jump shot with 45

seconds left.

Army's lead at intermission was especially surprising because their two top scorers, Kevin Houston (21.5 ppg) and Ron Steptoe, combined for only six points. Brennan said, "I

Men's Basketball

notice distinctly that when we get down, we tend to hurry. But we're still young and inexperienced."

The Elis roared back at the start of the second half to tie the score at 33 on a Brian Fitzpatrick '88 lay-up.

Fitzpatrick and Matt Whitehead '88 both started in the second half and responded well with six points each.

The game was tight down to the end. There were six ties before Yale finally forged ahead by four, 47-43, on a Chris Dudley '87 jump shot with seven minutes remaining. Pete White '88 connected on a 12-foot jumper with four minutes left to put the Elis up by six, 53-47.

From there, Yale, as has unfortunately become the norm, allowed the Cadets to climb back into the

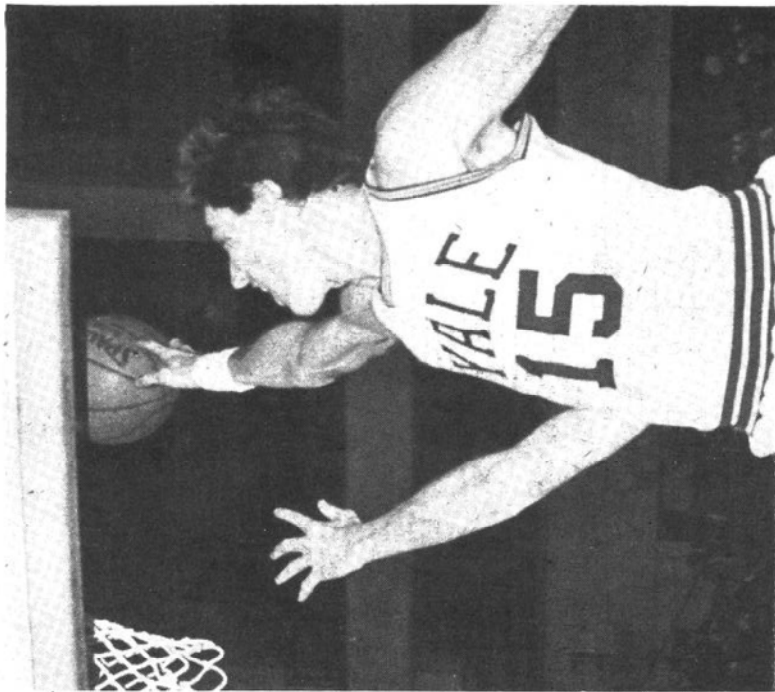
game because of poor free throw shooting. In the final three minutes, John Rice '88, Kasbar, and White all missed front ends of one-and-one situations.

Army closed to within two with two and a half minutes left, but neither team scored again until Mitchell knocked in his foul shot to clinch the victory.

Yale's defense was excellent throughout the contest, holding Army to 41 percent shooting from the floor. Houston, averaging 21.6 points coming into the game, hit only five of 21 attempts and missed the potential game-tying shot with 12 seconds

left.

Dudley dominated the backboards throughout the game and finished with 17 points and 17 rebounds. He hit eight of 10 shots from the floor and also contributed a big blocked shot to prevent Army from tying the game with a minute left. Dudley earned Ivy League Co-Player of the Week for his performances in three contests last week. In the last four games, Dudley has poured in 88 points and hauled down 53 rebounds. His play recently has given the Elis strong hopes in their quest for the Ivy title beginning Saturday in Providence.



YDN Steve Lefkowitz

DOMINATION—A towering Chris Dudley skies over Army forward Mike Yaeger last night at Payne Whitney. The 6'10" junior poured in 17 points and grabbed 17 rebounds to lead the Elis to their second straight close win. Dudley is averaging 22 points in his last four games.

submerge Columbia

relay going away in a time of 3:38.19.

Leary was a double winner for the girls, taking the 200 yard freestyle in a time of 1:58.12 and the 500 yard freestyle in 5:12.64. Leib also won twice. She grabbed top honors in both the 200 yard butterfly (2:12.31) and in the 100 yard butterfly (1:00.06).

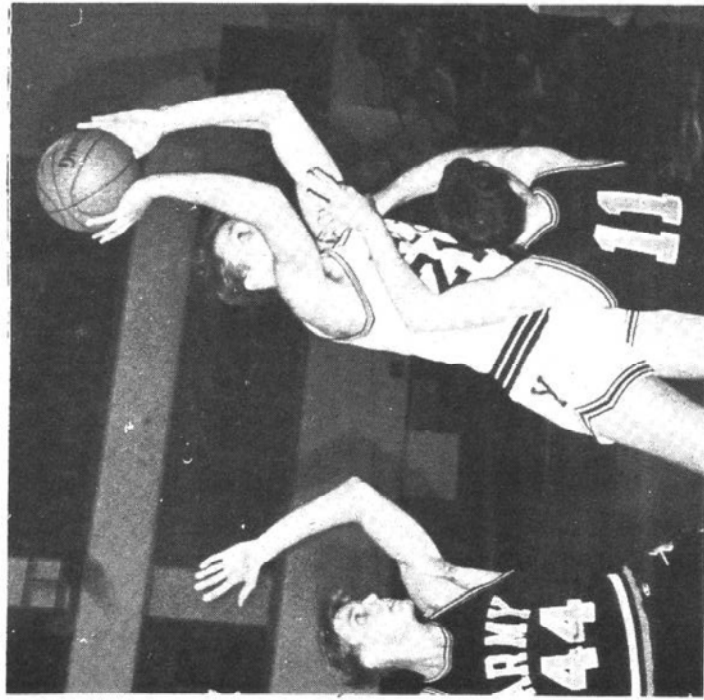
Katie Hazelwood '86 came through with a first place finish in the 100 yard breaststroke (1:10.25), a second place finish in the 200 yard individual medley (2:14.29), and a se-

cond place in the 500 yard freestyle (5:17.31).

Suh also had two seconds and a first. She touched first in the 50 yard freestyle (25.07) and second in both the 100 yard freestyle (54.69) and the 1000 yard freestyle (10:45.61).

The women improved their duel meet record to 3-1.

Both teams stay active in the next ten days. Yale swims Navy Saturday and follows that up with meets against Brown and Cornell next week.



YDN Steve Lefkowitz

THE ICEMAN—Sophomore forward Eric Mitchell, here driving against Cadets Kevin Houston and Shawn Genal, nailed the front end of a one-and-one with eight seconds left to preserve the Elis' 54-51 win last night. Yale was 6-13 from the line.

Dudley leads Bulldogs in split

By BRETT KAVANAUGH

The men's basketball team earned a badly needed victory during this weekend's games at Cornell and Columbia, and remained alive in the Ivy

Men's Basketball

League race. The Elis fell to Cornell, 64-51, Friday night but came back with a gutsy performance at Columbia Saturday to defeat the favored Lions, 71-70.

Center Chris Dudley was the star of the weekend, confirming his status as one of the premier players in the Ivy League. The 6' 10" junior poured in 48 points and grabbed 26 rebounds to bring his Ivy averages to 24 points and 12 rebounds per game.

The Elis fell to Cornell Friday night as John Bajusz, the Big Red's star guard, connected for 20 points while forward Drew Martin added 11. Dudley led the Elis with 25 points and Matt Whitehead '88 notched 13, but the rest of Yale shot a collective seven of 31 from the floor.

The Elis trailed 26-22 at the half, but were able to tie the contest at 44 with fewer than seven minutes remaining. Cornell, which trailed only three times in the game, pulled away from that point at Greg Gilda scored six points in a one-minute

period down the stretch.

Entering the game Saturday with a 0-2 Ivy record and a seven-point underdogs to Columbia, the Elis responded behind excellent performance from Whitehead Pete White '88, and Dudley.

White turned in one of his best showings of the season as he connected on six of seven shots from the floor in a 16-point, five-assist night. Whitehead hit six of nine attempts coming off the bench. Whitehead, Brian Kasbar and Brian Fitzpatrick '88 were benched in favor of sophomores Eric Mitchell, John Rice and Paul Maley this weekend. Whitehead played well, the best of anyone involved in the shuffle.

The Elis came out smoking in the first half and led the Lions 41-34 at intermission behind 19 points from Dudley. They increased the lead to 62-50 with eight minutes left before Columbia made a late run. The Elis hit clutch free throws down the stretch to clinch the victory, after struggling from the foul line earlier in the contest.

Saturday's performance bodes well for Yale as it looks forward to three straight Ivy home games. The first is a matchup Saturday with league-leading Brown, who is the surprise of the Ivies at this juncture in the season. But before the league confrontations, the Elis face Army

Thursday at Payne Whitney.

In order to come back and challenge for the title, Yale must do two things. First, as always, the Elis must improve their foul shooting. The Elis hit only 22 of 45 attempts on the weekend, a terrible 49 percent mark. Also, White and Dudley must play consistently. When one of the two has struggled this season, the whole team has verged on collapse.

For now, Yale can be happy. They faced a must-win situation on the road and came away with a victory. The Elis are alive in the championship race.



—YDN-Peter Wu

ON THE WAY UP — Cornell's Dave Crombeen raises his stick in celebration as Yale's Tom Rzeszut '86 laments during Cornell's victory Saturday night. The triumph was the Big Red's sixth in its last seven tries, while the Elis dropped their fifth of six.

Cornell 57-47; Elis 71-70

Yet it was the play of Kelly LeCompte '86 that created the most excitement. It could have been just another night for the Eli forward,

Lackluster Yale needs a boost

Lineup shuffle, crucial weekend upcoming for slumping cagers

By BRETT KAVANAUGH

After starting the season with hopes for an Ivy title and a second straight winning season, the men's basketball team has inexplicably

Analysis

lost six of its last eight games. The face the possibility of being knocked out of the Ivy race by Sunday unless they win at least one out of two this weekend at Cornell and Columbia.

Yale's game against Brown Monday was typical of its misfortune this season. The Elis played a decent game but did not convert on a last second shot in a disappointing 68-65 loss to Brown, a team not expected to be very strong this season. Last year, the same Yale team beat a better Bruin squad on a game-ending shot by Pete White. This year, however, the ball has not been bouncing so fortunately for Yale.

Two of the Elis' losses have been the most embarrassing in recent memory. They fell at home to Clark and Trinity — both Division III teams. In both games, the Elis went to sleep against patient offenses executed to perfection by smaller, slower opponents. It is nearly impossible to explain how Yale could fall victim to those weaker teams, especially after the Blue defeated fine Fairfield and Holy Cross squads and came close to beating an excellent Connecticut team at the beginning of the season.

Perhaps, as Coach Tom Brennan suggested yesterday, the players obtained a false sense of security by winning so many close games a year ago.

But there are other reasons for the downturn. The four sophomores in the starting lineup have not jelled and played as consistently as they did in the 14-12 season of a year ago. The outside shots which must be made to keep sagging defensive pressure off All-Ivy center Chris Dudley '87 have not been falling.

The three outside shooters in the starting lineup — sophomores Peter White, Brian Fitzpatrick, and Matt Whitehead — are all shooting below 50 percent from the floor. And Dudley has been having problems from the foul line, which especially hurts because he goes to the stripe twice as often as any other player.

One positive development has been the emergence of Paul Maley '88. Against Brown, the 6'8" sophomore forward notched 16 points, grabbed 10 rebounds, and



YON — Steve Lefkowitz

This weekend the Elis hit the road with important games at Columbia and Cornell. Brennan will shuffle his starting lineup for the matches.

GUIDANCE COUNSELOR — Yale Coach Tom Brennan advises his troops during a timeout. The Elis have dropped three consecutive games and are now 4-7. Monday night, Yale lost to Brown, 68-65 in its Ivy

opener. This weekend the Elis hit the road with important games at Columbia and Cornell. Brennan will shuffle his starting lineup for the matches.

earned himself a starting spot this weekend. His deadly outside shot could make a big difference. There is no "later" for the Elis, however. They face a very difficult task this weekend in Ithaca and New York. Yale has not won at either site since 1982 and has won only two of its last 15 Ivy League road contests. Brennan said that both Cornell and Columbia are "tough and playing well, but if we go in and play well, we can win both."

It is much too early for the Elis to give up on the season despite the setbacks so far. They have the talent to match any team in the league, but must play a little harder and a little smarter to get back on track. Thus far in the season, they are striking a depressingly similar pose to the team of two years ago which stumbled its way to a 7-19 record after being highly touted for the Ivy crown. This weekend will go a long way to determining the course of this year's season.



CAPTAIN SWISH—Right wing Liz Swisher '87 dribbles past an opponent in a game earlier this year. The scrappy Eli was the team's leading scorer in 1985. Her teammates chose her to be captain of the 1988 squad, citing her leadership abilities.

SPORTS

Brown triumphs, 68-65

By BRETT KAVANAUGH

The Yale men's basketball team travelled to Providence last night for the opening game of the Ivy season and fell to the Bruins 68-65. The Elis have lost three in a row and now possess a disappointing 4-7 record. This weekend, they face a big test on the road at Columbia and Cornell and must win one of two to stay alive in the Ivy race.

In the first half against Brown, the Elis fell behind early but rallied behind Paul Maley '88, who provided a much-needed spark with 12 points. Brown held a 37-34 lead at intermission.

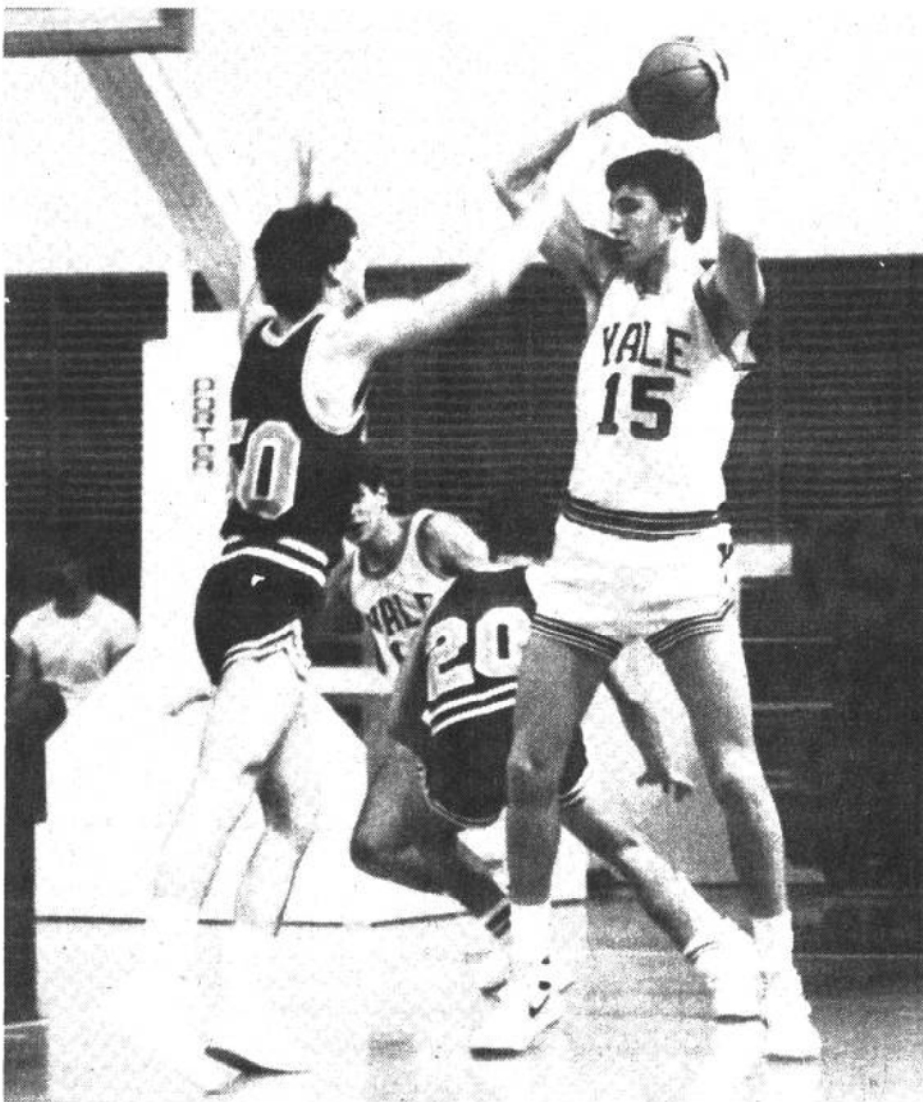
Yale opened the second half with a new look, starting three different players: Maley, John Rice '88, and Eric Mitchell '88. They gave the Elis a 46-42 lead. Brown quickly recovered with a 10 point spurt of their own. Guard Kieron Bigby came off the bench and hit a couple of big jumpers as Brown forged ahead 56-48 with nine minutes left. Junior Kenny Wheeler's defense, center Chris Dudley's inside power game and good foul shooting brought

Yale back to within three with four left.

But Brown senior Mike Waitkus, who passed the 1,000-point mark in the game, kept the Bruins in front. Dudley closed the Elis to within one with two minutes left. The Elis finally took the lead on a clutch jump shot by Rice with 1:10 left, but David Fisher quickly answered for the

Bruins to put them up 66-65 with 45 seconds remaining. Yale held the ball for the last shot, but Maley's jumper rolled out and Dudley's tip missed with three seconds left.

For the game, Dudley led all scorers with 23 points, and Maley added 16 for the Elis. Todd Murray led Brown with 21 points.



YDN-Paul Fu

ishegoss

tain a constant dialogue while he played. "Rodg Citron," Nud said, running over to slap me five as soon as he saw me in the gym. "I haven't seen you since you and your boys ran all over that girls' team! Get warmed up and I'll get you on my team and you can run a few with me and some of these misfits down here." Grinning at Nud's exuberance, I complied eagerly.

HOLD—UP — Junior center Chris Dudley looks to stat the Eli fast break as he holds a defensive rebound high above his head. Dudley led all scorers with 23 points in last night's Ivy League opener at Brown. Yale fell 68-65 despite his efforts.

Clark upsets Elis, 78-70

By BRETT KAVANAUGH

The men's basketball team turned in one of its worst showings in years in an embarrassing 78-70 loss to Division III Clark University before only 361 people at Payne Whitney, Tuesday.

Returning from a tough road trip to Stanford, the Elis had looked forward to an easy match against Clark before a three week hiatus for finals. One year ago to the day, the same Yale squad had blown out the Cougars 110-64.

Clark, which is ranked eighth na-

tionally in Division III, had other ideas. The Cougars consistently outthrustled the lethargic Elis throughout the game. For Yale, Ricky Ewing '88 had a solid game, netting eleven points, but in the end Clark held on and left Yale with a disappointing 2-4 record.

The Elis must now regroup from what all-Ivy center Chris Dudley '87 termed a "low point." Yale plays next on January 2nd against Holy Cross. Their first Ivy League game is January 13th at Brown.

Eli cagers drop two in California tourney



YOUBERG, MEBERG — Yale's Randi Meberg '89 defends against a Fordham player in the Elis' 73-66 victory Monday night. Meberg and other Yale reserves combined to outscore Fordham's bench 28-4 in the game. Meberg scored 13 points in Yale's 77-34 win over Trinity last week.

YDN • Robin Packet

Stanford bags 129-108 victory

BY BRETT KAVANAUGH

The men's basketball team journeyed to Stanford this weekend to play in the Apple Invitational Tournament with high hopes of winning their first tournament game in three years. But an all-too-familiar combination of poor defense, missed foul shots, and turnovers left the Elis with a 2-3 record after losses to Stanford, 129-108, and St. Mary's of California, 84-81. The Elis dropped a third straight last night when Clark upset Yale (2-4) 78-70. They do not play again until January 20, when Holy Cross visits Payne Whitney amphitheater.

The Yale-Stanford matchup was the first time the two had met since the Cardinals defeated the Elis in a 1948 contest.

Yale was mired in terrible foul trouble throughout Friday's game. Also, all three-Eli centers picked up three fouls by halftime and eventually fouled out. Stanford built up a 70-52 lead by the half, and the Elis were never able to make a game of it after intermission.

Stanford's 43 free throws, 70 first half points, and 129 points for the game set Yale records for most allowed. The Cardinals shot a blistering 61 percent for the game and placed seven players in double figures. They were aided by 34 Eli turnovers.

There were few bright spots for

Yale. Captain Kenny Wheeler '87 scored 22 points, though an ankle sprain forced him out after only 19 minutes of play. But forward Paul Maley '88 came off the bench to make eight of nine shots for a career-high 16 points, and sophomores Matt Whitehead and Brian Fitzpatrick added 15 and 13 points apiece.

Yale, without Wheeler, faced St. Mary's in Saturday night's consolation game. Center Chris Dudley '87, who made the All-Tournament Team, turned in a splendid performance, notching 27 points and 16 rebounds. It was not enough to overcome the Gaels, who made 18 of 28 shots in the second half to earn the victory.

But foul shooting once again killed Yale as the Elis converted only two of seven attempts in the second half, including several crucial misses in the final minutes. Whitehead, who has been one of the team's most consistent performers, scored 12 points, and sophomore guard Pete White added 10 assists.

After five games, Yale is led in scoring by Chris Dudley (15.6), in rebounding by Dudley (7.6), in assists by Pete White (8.8), and in blocked shots by Ricky Ewing (2.1 bpg). Whitehead, Wheeler, Brian Fitzpatrick '88, and Brian Kaspar '88 are also scoring in double figures.

Footnotes

Hockey skates North

The seventh-ranked men's hockey team makes the long trek to frigid upstate New York this weekend for two crucial ECAC contests against Clarkson and St. Lawrence.

The 5-1 Elis (3-1 ECAC), coming off a sluggish 6-3 win at New Hampshire last Tuesday, will try to defeat Clarkson tonight for the first time since the 1982-83 season. The Golden Knights come into the game 3-3 and 1-0-3 in the conference. They beat Lowell, 5-1, last week in the Empire Cup Tournament in Glen Falls, N.Y., but lost in the final to St. Lawrence, 7-4.

St. Lawrence hasn't beaten Yale in two years — last season the Elis swept the Saints in two 3-2 victories — and is off to a rocky start in 1985. Right now they're in last place of the 12-team ECAC, with an 0-4 conference record. Their victory over Clarkson doesn't count toward the ECAC standings.

Hoopsters head West

The men's basketball team goes west to play Stanford tonight at 9:00 PST. The Elis are participating in the Stanford Invitational Tournament along with Richmond, St. Mary's of California, and the host Cardinals. Richmond is the favorite to capture the championship.

The Elis enter the contests with a 2-1 record after victories over Case Western and Fairfield and a loss to UConn. They are looking for their first win in tournament play since 1982. Last year's team was blasted by Georgia and Brigham Young in the Cotton State Classic in Atlanta.

Stanford is not going to challenge for the Pac-10 title this year, but will be a tough opponent for Yale on its Maples Pavilion home court. Leading the Cards is forward Earl Koberlein, who averaged 10.4 points and 4.4 rebounds a game last season. Richmond's John Newman is considered one of the better forwards in the country. Last season Newman averaged 21.3 points per game, and two years ago he dominated Charles Barkley, now with the Philadelphia 76ers, in an upset of Auburn in the NCAA tournament.

— Brett Kavanaugh

Paddock places

Laura Paddock '86 finished 49th in a field of 136 at the NCAA cross country championships November 25 in Madison, Wisconsin. Paddock placed fourth in New England, behind runners from Harvard, Boston University, and Boston College. The Massachusetts harriers were probably better accustomed to the icy conditions on the University of Wisconsin's 3.1 mile course.

WYBC on the air

David Warren '86 will handle the play-by-play for the Yale-Clarkson hockey game while Drew Vallero '88 and Dean Chadwin '86 team for the Yale-Stanford basketball clash from Palo Alto tonight in a WYBC (94.3 FM) doubleheader beginning at 7:20 p.m. The hoop broadcast will air tape delayed at the conclusion of the hockey game. Tomorrow the same announcing schedule applies for the broadcasts of Yale/St. Lawrence hockey and the Elis second round opponent in the Stanford tournament.

SPORTS

Bullpups rally for 18-15 win

By HAL EDELMAN

The Bullpups rallied in the closing minute of play to defeat Harvard 18-15, at Yale's new Clint Frank Field, the afternoon prior to The Game. Yale overcame an injury to star tailback Kevin Brice, a muddy and treacherous field, and a strong and aggressive Crimson team, to finish the season 5-1.

The Bullpups fought back from a 15-6 deficit in the fourth quarter with two touchdowns. Defensive end Ed Dooley grabbed a short rolling kickoff after a Crimson touchdown and ran 75 yards through a stunned group of Harvard defenders to pull Yale within 15-12.

The Bullpup defense halted Harvard, and with 90 seconds left, Crimson punter Allan Hall mishandled the snap and Yale gained possession on the Harvard 32. A 20 yard pass play from Mark Lesko to Tom Szuba brought the Bullpups to the Crimson 8 with 50 seconds remaining. Lesko went back to Szuba for the winning touchdown, and the freshmen had come from behind again.

"We were so pumped up after the kickoff return," lineman Chuck Bray said. "It completely turned the game around and gave us the momentum." Coach Joseph Benanto said, "These kids have done it all year long. I've never seen a group like them."

Again, the Bullpups fell behind early. On the opening series of the game Brice went down with a hyperextended knee. After the Bullpups failed to gain yardage, punter Talley Lambert mishandled the rain-soaked ball and the Crimson recovered it at midfield. Harvard struck quickly, as tailback Chris Williams bolted 38 yards for a touchdown, and quarterback Tom Yohe sprinted in for the conversion to give the Crimson an early 8-0 advantage.

With time running down in the first half, Lesko and Szuba hooked up on a clutch 20-yard pass play to put Yale on the Crimson 1 with 30 seconds remaining. Tailback Pat Eilers, in for Brice, plowed through the Crimson line, and after a two-point conversion pass failed, the half ended with Harvard ahead 8-6.

Yale's fortunes seemed as bleak



MILK DUDS — Eli center Chris Dudley '87 sets for a shot from underneath against the Finland national team earlier this year. Dudley has helped to pace Yale to two victories in its first three games with more than 14 points and six rebounds per game.

—YDN Gary Glasser

Crimson trip Elis 4-1 in finale

By RUSTY SULLIVAN

The men's soccer team ended a frustrating season on the morning of The Game by falling to Harvard, 4-1. The loss gave Yale a disappointing final record of 5-8-2 (2-3-2 in the Ivy League).

The Harvard game mirrored the frustration of the entire season. Following a familiar pattern, the Elis fell behind early, then managed to sustain enough spirit to come back and tie. But lack of team speed and offensive firepower halted the rally. When the Crimson forged ahead again, Yale could not climb back into the contest.

Yale placed a huge importance on

Just three minutes later, the Elis knotted the score. Charley Dumphy '87 put some pressure on the Crimson net, spraying two shots at the goal. His second shot was deflected, and Kevin Genda '87 was there to put it home.

But Harvard regained the lead early in the second half and never looked back. On a breakaway, Paul Nicholas was stopped by goalie Jeff Duback '87.

But in a year where everything that could have gone wrong has gone wrong for the Elis, the ball, instead of bounding away from the goal, got stuck in the mud at the goalmouth. Nicholas simply strolled over and

Yale nets two of three

Elis rebound at Fairfield after UConn loss

By BRETT KAVANAUGH

The Yale men's basketball team has started the season well, capturing two of its first three games. The Elis easily defeated Case Western Reserve 97-71, lost by a surprisingly close margin to Connecticut 80-76, and upset favored Fairfield 69-67.

Although not very sharp in their opener against Division III Case Western, Yale disposed of the Spartans by 28 points. After Case Western closed to 54-50 with 15 minutes left, the Elis regrouped and overwhelmed their smaller, slower opponents. Chris Dudley '87 led Yale with 18 points while Brian Fitzpatrick '88 netted 14 points and grabbed eight rebounds. Pete White '88 added 11 points and 11 assists.

White has averaged 9.7 assists per game, while Dudley leads in scoring (14.6 ppg) and rebounding (6.3 rpg).

Last Tuesday, Yale met a heavily-favored UConn at Storrs. The Elis battled back from a 16-point second-half deficit to cut the Husky lead to two with 49 seconds remaining. However, two foul shots and a layup by Earl Kelley iced the game for the Huskies, 80-76. Kenny Wheeler '87 had an excellent game for the Elis, connecting on seven of eight shots in the second half and finishing with 16 points. Dudley also tallied 16, and Rick Ewing '88 came off the bench to add seven points,

grab five rebounds, and block three shots in an impressive 15 minutes.

The Elis defense was a bright spot as well, holding Kelley to a subpar four field goals in 12 shots. The Huskies managed only 41 percent from the field for the night.

But, Yale's long-time nemesis — foul shooting — haunted the Elis again against UConn. The Elis hit only 14 of 30 attempts in the game, starting with a dismal six out of 17 in the first half.

At Fairfield Saturday night, the Elis fell behind by three to the favored Stags in a hot-shooting first half. Both teams hit 67 percent from

the field during the first, but Yale continued to shoot well in the second while holding Fairfield to 40 percent. Matt Whitehead '88 and Brian Kasbar '88 led with 16 and 15 points respectively. White played the entire 40 minutes because of injuries to

John Rice '88 and Val Carlotti '88 and added 10 assists and six points.

Although Kasbar hit two clutch free throws in the last minute, Yale once again had its problems at the line. Two one-and-ones were missed down the stretch which allowed Fairfield back into the contest.

While five of the top six Elis are shooting over 50 percent from the floor, three of those six are under 50 percent from the "charity" stripe. In their first three games, Yale have cracked two old problems — defense and winning on the road — but it has yet to solve the mystery of the foul line.

Yale travels to California this weekend to compete in the Stanford Invitational Tournament. The Elis will open against Stanford Friday night and will face either Richmond or St. Mary's of California Saturday night. Tuesday, the jet-setters return to face Clark.



Men's Basketball shoots for Ivy championship

By BRETT KAVANAUGH

High expectations have haunted many Yale teams this year, causing great disappointment when the preseason hopes faded. With that warning behind, the 1985-86 Yale men's basketball team *really* should be excellent and should challenge for the Ivy title. Overcoming favorite Penn will be difficult, but the Elis possess both the talent and experience necessary to capture the crown.

Yale has not won an Ivy league title since 1962, and no team other than Princeton and Penn has taken the championship in seventeen years. However, the Elis return all five starters from last season's 14-12 team. Most of the reserves also return, and the bench will be bolstered by the return of 6-11 Ricky Ewing after a year's absence.

Coach Tom Brennan is in his fourth season as head coach of the

Elis. He modestly said that he would be "disappointed if we are not competitive this year, although our year should be next year when all the sophomores and Chris Dudley and Kenny Wheeler will be back." Brennan sees Penn as the team to beat in the race.

Chris Dudley, who earned first-team All-Ivy status as a sophomore, returns as the top center in the League. Dudley, a 6-10 junior, averaged 12.5 points, 10.2 rebounds, and two blocked shots per game in 1984-85. He led the Ivies in rebounding and blocked shots. Dudley dominated games at the end of the year when the Elis won five of their last seven. No team in the League except Penn can come close to matching Dudley's size, and Brennan says "he is getting better every day." Coupled with the 6-11 Ewing, Yale should have no trouble controlling the inside.

Yale has an exceptional group of sophomores, many of whom played key roles last year. The four returning sophomore starters are Pete White, Matt Whitehead, Brian Fitzpatrick, and Brian Kasbar. The bench will consist of Ewing, Eric Mitchell, Chad Ludington, Byron Taylor, and Paul Maley in the front-court. Captain Kenny Wheeler, Val Carlotti, and John Rice are the backup guards.

Brian Fitzpatrick, a 6-7 guard, led the Elis in scoring last season, netting 13.8 points per game while also grabbing four rebounds per game. He has a deadly outside shot but must stay consistent to combat the sagging defenses opponents will often deploy. Brian Kasbar is a 6-8 bruiser who can both score and rebound. He had a fine freshman season, averaging eight points and five rebounds per game. Like Fitzpatrick, Kasbar's improvement will come with greater consistency.

Pete White is the point guard and quarterback of the Yale offense.

White responded well in pressure situations as a freshman and led the Ivy League in assists, dishing out 5.3 per game. Matt Whitehead earned a starting position in the middle of the season. He is superb on the fast break and possesses a good shot and considerable leaping ability. He likely will improve on his 8.6 points per game average of a year ago. Captain Ken Wheeler, who Brennan calls our "sixth starter," is both the most exciting and the best defensive player on the team. He will swing between guard and forward, giving flexibility to Coach Brennan in making substitutions.

Yale has all the ingredients of a championship team: height, speed, rebounders, shooters, passers, and defense. However, the Elis will have to overcome three nemeses of the past to take the crown: poor defense on the ball, inconsistent foul shooting, and an inability to win on the road. If Yale can do these three things, the two games against Penn will likely decide the Ivy title.



—YDN-Gary Glasco

JOCKEYING FOR POSITION — Forward Brian Kasbar '88 tries to get the advantage against an opponent last season. The 6' 8" bruiser will try to improve on his eight point, five rebound per game average this season. Both the Eli front and back courts look strong.



—YDN-Gary Glasco

PUTTING ON THE FITZ — Sophomore guard Brian Fitzpatrick led the Elis in scoring last season with a 13.8 ppg average. Yale returns all five starters from last year's 14-12 squad, including All-Ivy center Chris Dudley. Yale opens against Case Western Saturday.

Ivy Basketball Predictions

By BRETT KAVANAUGH

Here is a look at the other Ivy League teams in predicted order of finish:

1. Pennsylvania — The Quakers won the championship last year and are the favorites this season primarily because of their junior guard Perry Bromwell. In 1984-85 Bromwell averaged 15.3 points per game and emerged as the finest guard in the League. An excellent supporting cast surrounds Bromwell. Forwards Bruce Lefkowitz (10.2 ppg, 7 rpg), Neil Bernstein, and Phil Pitts are all returning starters. Chris Elzey (10.2 ppg) is strong off the bench, and center Abe Okorodudu is returning after a year's absence.

Penn finished 10-4 in the Ivies last season, and their four losses were by a total of only 11 points. If they are disciplined and play as a team under

new coach Tom Schneider, the Quakers should repeat as champions.

2. Yale

3. Columbia — The Lions surprised everyone last year as they finished 9-5 in the League, only one game behind Penn. Seven of the top nine players are returning, including forward Tom Gwydir, who averaged 10.9 points and 6.0 rebounds a game. Columbia lacks both height and a true center. This will prevent the Lions from winning a championship season.

4. Cornell — Four starters include 6-1 All-Ivy guard John Bajusz return for the Big Red. Bajusz is the best outside shooter in the Ivies. Last season he averaged 15 points per game, shooting an incredible 60 percent from the field, an unheard-of figure for an outside shooter. Drew Martin will help Bajusz, but the loss

of Ivy League Player of the Year Ken Bantum will keep Cornell in the middle of the pack.

5. Princeton — The Tigers do not have much talent, but they do have Pete Carril returning for his 19th year as head coach. His teams have compiled a record of 312-170. Known for their methodical, boring style of play, Princeton will be forced to speed it up this season because of the new 45 second shot clock. Veteran guards Joe Scott and John Smyth and forward John Thompson will lead the squad.

6. Dartmouth — Ivy League Rookie of the Year Bryan Randall and running mate John Mackay give the Big Green one of the better backcourts in the League. However,

the only big man with any experience is Scott Schroeder, and he is only 6-4. The Big Green have the potential to surprise as Yale learned last winter when Randall scored 25 points, dished out 10 assists, and hauled down eight rebounds in an upset of the Elis.

7. Brown — The Bruins are yet another team with an excellent backcourt and a depleted frontcourt. Four-year starter Mike Waitkus and flashy Kieron Bigby are expected to lead the team.

8. Harvard — It is a rebuilding year in Cambridge following the loss of Joe Carrabino and Bob Ferry. The Crimson will be very slow and will have to struggle to stay out of the Ivy cellar.

PBS brings 'Carmen,' Cozza to living room

By BRETT KAVANAUGH

When one thinks of the Public Broadcasting System (PBS), the first things that come to mind are the Boston Pops, Masterpiece Theater, and documentaries on pandas.

But Ivy League football?

For the second consecutive year, PBS is televising the grit and glory of football in the Ivies, and Saturday's Yale-Penn clash was the latest effort.

Why the Ivy League on television? Two years ago the monopoly which ABC and the NCAA had for college football telecasts was broken up, enabling other networks to become involved in the huge football market.

Gary Morganstein, a publicist for WNET-13 in New York said, "We [PBS] are always looking to expand our programming, and this was a perfect opportunity for us to do so."

Stations in New York, Boston, Philadelphia, Washington, Pittsburgh, San Francisco — 25 to 30 cities in all — carry the Game of the Week on Saturdays.

Though the telecasts don't provide a bonanza of viewers for the stations, Morganstein said "the ratings are getting better. There has definitely been an increase in the number of people watching." The increase comes despite a glut of college football games on competing networks.

The telecasts give participating schools obvious exposure, but that could turn out to be a double-edged

sword. Looking bad, as Yale did against Penn, won't help a program's recruiting efforts. Yale coach Carm Cozza, although pointing out that television is "good for the league," stated that it "is not going to help (recruiting) the way we played Saturday. That can only hurt us."

The telecasts can also have an unhappy bearing on ticket sales. Austin Sass, who heads Yale's ticket office, believes that 5000 to 10,000 fewer tickets were sold because Saturday's game was televised. Tickets cost \$5 and \$10, which means that Yale lost between \$25,000 and \$100,000 in gate receipts, Sass said.

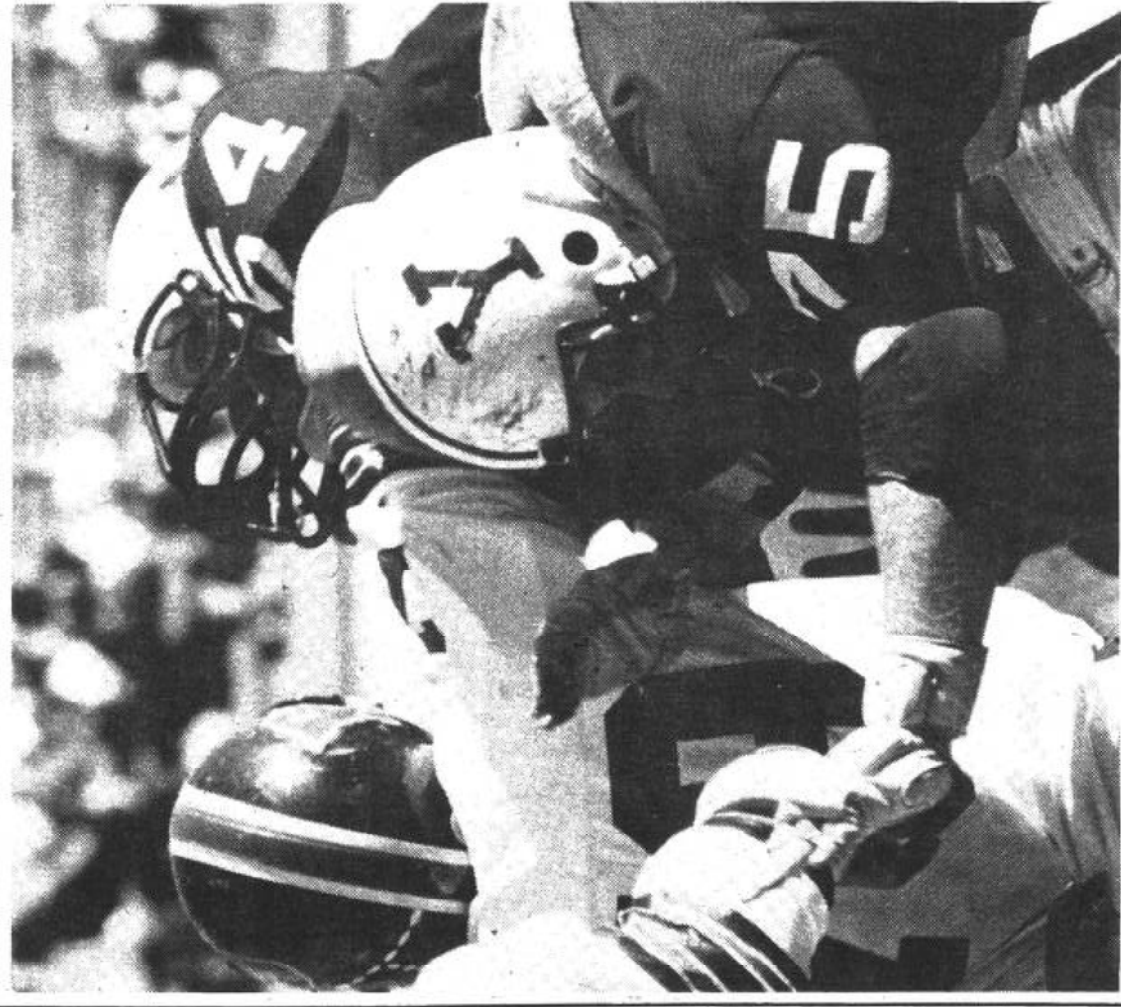
Sass also noted that "people are not going to take a chance in buying advance tickets when they know that the game is on television. It was announced on Sept. 9 that this game would be televised. It was basically an Ivy League championship game, yet it drew not much better than Brown or Holy Cross."

Whatever their effects on attendance, the games are produced and packaged by a first-rate company, Trans World International (TWI). TWI is presently the world's largest independent producer of sports programs and is responsible for more televised sports than anyone else in the industry, according to the Ivy League press office. The company holds the television rights to Wimbledon, the U.S. Tennis Open,

and the British Open Golf Championship.

The enthusiasm of PBS, the increased ratings, and the financial backing of Paine Webber, GTE, and American Express make continua-

tion of Ivy football likely. Barry Frank, senior vice-president of TWI said, "We're confident that the 1985 season will begin the first of many thrilling moments of Ivy League football on public television."



by Steve Lefkovits

Ivy League Roundup

Princeton 11, Harvard 6

Princeton captured the first leg of the Big Three Championship, upsetting Harvard before 18,000 at Harvard Stadium. Tom Urquhart returned a Harvard free kick 75 yards for a touchdown with five minutes remaining in the game to move the Tigers into a second-place tie with Yale in the Ivies.

Punts, penalties, and punishment dominated the contest as neither offensive unit was able to penetrate the opposition's 10-yard line. Harvard led 6-3 at the half on the strength of two field goals by Rob Steinberg.

Late in the fourth quarter Harvard center Kevin Dusky snapped the ball over punter Steinberg's head. Steinberg alertly booted the ball out of Harvard's end zone, allowing a safety and making the score 6-5. On the ensuing free kick, Urquhart gathered the ball at his own 25, sprinted through a hole in the middle, broke one tackle, and outran the Crimson down the right sideline for the winning score.

The victory was Princeton's first against Harvard since 1981. The Tigers are suddenly a contender in the League and face Penn Saturday in Philadelphia.

Brown 20, Holy Cross 20

Brown plack kicker Chris Ingerslev missed a field goal on the final play of the game as the Bruins tied Holy Cross, 20-20, in Worcester.

Brown's rugged defense and Ingerslev's leg kept the Bruins in contention throughout. Holy Cross running back Gill Fenerty was held to 54 yards on 21 carries. Ingerslev booted field goals of 22, 47, 27, and 45 yards. On the final play, he actually had two chances to give Brown its fourth win. He missed from 48 yards, but a penalty against the Crusaders gave him a second chance. The kick was blocked and marked the second time this year Ingerslev had been unsuccessful on a last-second field goal.

Earlier this year, Ingerslev missed a 53-yard attempt for a win against Yale. The miss yesterday broke a streak of nine in a row that he had made.

Bucknell 13, Columbia 10

Columbia lost another game, this one to Bucknell in what Lions quarterback Henry Santos termed a "total giveaway." The Lions have now lost 17 in a row and 10 in a row at home.

Columbia built a 10-0 lead in the third quarter on a five-yard John Chirico run and a 37-yard Larry Walsh field goal. However, two fourth-quarter Bucknell touchdowns returned Columbia to reality. First, backup Bucknell quarterback Jack Valinotti connected with George Long on a 52-yard pass for a score.

Then with five minutes left, Earl Beecham reversed field and carried the ball 17 yards into the end zone for the Bucknell victory.

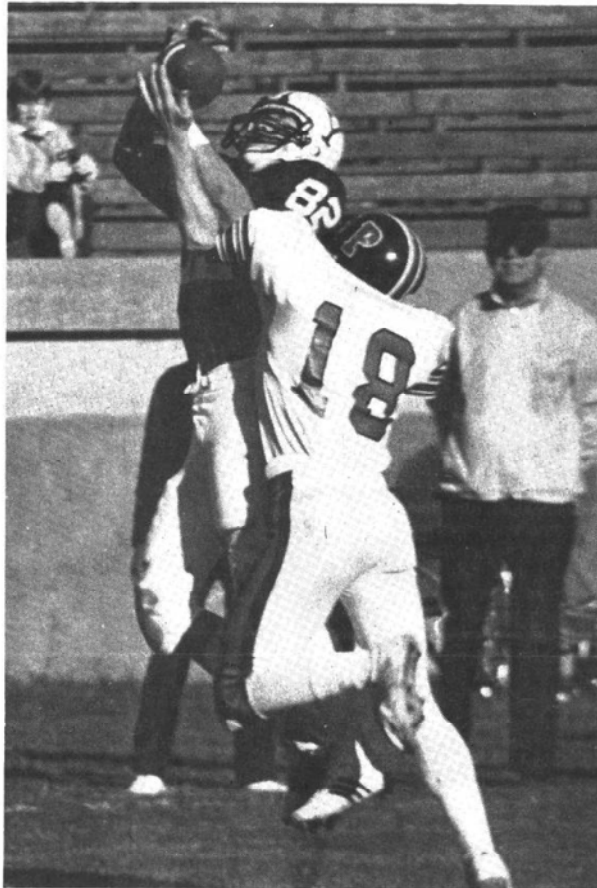
One bright spot remained for Columbia at the end of the game: the attitude of coach Jim Garrett. Facing yet another demoralizing loss, Garrett did not point any fingers. Instead he looked ahead to the remainder of the campaign and stated simply, "It was close, so we'll still win two."

Dartmouth 20, Cornell 17

In a battle for the Ivy League cellar, Dartmouth earned its first victory of the season, beating Cornell 20-17 on a 27-yard Craig Saltzgaber field goal with 2:33 left in the game. Saltzgaber was successful on four of six field goals, and Tom Duax carried the ball 30 times for 164 yards to lead the Big Green.

John Tagliaferri accounted for the majority of Cornell's offense, rushing for 103 yards and racking up 60 yards in receptions. However, he was not enough as Dartmouth dominated the Cornell defensive line. The Big Green rolled over the Big Red for 278 yards on the ground

— Brett Kavanaugh



—YDN Gary Glasser

... BUT NO CIGAR — Penn cornerback Duane Hewlitt breaks up a potential touchdown pass to Eli wide receiver Kevin Moriarty '86 late in the third period with Penn leading 20-7. The unsuccessful fourth down play was the final nail in the Yale coffin as Penn triumphed, 23-7.

Ivy League Football Standings

League						
School	W	L	T	PF	PA	Pct.
Penn	4	0	0	96	41	1.000
Harvard	3	1	0	92	52	.750
Princeton	3	1	0	52	26	.750
YALE	2	1	0	45	44	.667
Brown	2	2	0	62	27	.500
Dartmouth	1	2	0	30	44	.333
Cornell	0	4	0	23	52	.000
Columbia	0	4	0	43	154	.000

Overall						
School	W	L	T	PF	PA	Pct.
Penn	5	1	0	114	82	.833
Harvard	4	2	0	116	76	.667
Brown	3	2	1	114	74	.600
YALE	3	2	0	80	118	.600
Princeton	3	3	0	109	112	.500
Dartmouth	1	5	0	79	138	.167
Cornell	0	6	0	63	110	.000
Columbia	0	6	0	63	187	.000

Saturday's Games

Penn 23, Yale 7
Dartmouth 20, Cornell 17
Brown 20, Holy Cross 20

Princeton 11, Harvard 6

Bucknell 13, Columbia 10

Next Week's Games

Yale at Dartmouth
Princeton at Penn
Columbia at Colgate

Harvard at Brown
Cornell at Bucknell

TV moves game to 1 p.m.

The starting time for tomorrow's football showdown between Yale and Penn has been moved up to 1:00 p.m. PBS is televising the game nationally as its Ivy League Game of the Week. The game can be seen locally on Channel 65.

The telecast marks Yale's first appearance on PBS this year. Last season the Elis won two of three televised contests, beating Dartmouth (28-18) and Harvard (30-27) but losing to Penn (34-21). Before 1984, the last Yale TV game was ABC's 1981 broadcast of the Dartmouth game in New Haven.

— Brett Kavanaugh

TenBrink vital to Elis' success

Last year's leading scorer will pace Yale's scoring attack

By BRETT KAVANAUGH

Yale's 1985 soccer team is expected to be one of the strongest Elis squads in years. A major reason for the optimism is the presence of junior center-forward Jim TenBrink. TenBrink led the Elis in scoring in 1984, netting thirteen goals and adding four assists. He hopes to help lead the team to an Ivy League championship this fall.

TenBrink was a prolific scorer in high school, earning All-County, All-State, and All-American honors at Deer Park High School on Long Island. Recruited by Columbia, Rutgers, and Lafayette, among others, TenBrink chose Yale for its "better education and opportunities." Soccer coach Steve Griggs, said that TenBrink was definitely a "player worth recruiting;" although, as a prospect, he was not necessarily a guaranteed success.

TenBrink's freshman year was not quite what he or Griggs had envisioned. Bothered by a nagging quadricep muscle pull, he missed more than half the season. This was especially disappointing because the loss of 12 players from the previous year's team had created a great opportunity for extensive playing time.

TenBrink eventually made it back late in the season and worked his way into the starting lineup for the Harvard game, but he ended the campaign without scoring a goal.

Fortunes changed both for TenBrink and Yale soccer in 1984. Bolstered by the return of goaltender Jeff Duback '87, Yale rose to a 10-4-1 record and a third place finish in the Ivies. TenBrink had what Coach Griggs referred to as a "dream season," earning second-team All-Ivy status and racking up thirty points to lead the Elis. Coach Griggs said, "There is no way that we can expect more from TenBrink. Scoring almost a goal a game is the most you can ask from any center-forward."

Looking forward to this season, which began Sunday with a 2-0 victory over Hartford, TenBrink believes Yale possesses a "good possibility" of capturing the Ivy crown. He sees Harvard, Columbia, and Penn as the stiffest challengers. He pointed out that Yale lost only four players and should have enough all-around strength and depth to pose a challenge to the traditional Ivy Powers.

Although TenBrink had a great season last fall, he would like to improve himself this year. "You would always like yourself to improve enough to score a goal or two more each year," said TenBrink. Other teams likely will key on TenBrink which could handicap his scoring output. However Griggs believes Yale's depth and versatility will prevent other teams from concentrating too much on TenBrink.

TenBrink is not the type of soccer player who will create a lot of his own chances because, although he is quick, he is not particularly fast. He is heavier and broader than the average soccer player and often uses his size to gain possession of the ball against smaller defenders. He is constantly in the center of the action, has a very quick release on his shot, and extremely accurate right foot. TenBrink's excellent one-touch passing coupled with good vision enable him to play with his back to the goal at times. Both TenBrink and Griggs pointed out that his left foot



Yale Daily News

A TB SHOT—Jim TenBrink '87 came back from an injury-plagued freshman season to lead the Elis in scoring last year. He will be called on once again to provide the offensive spark as Yale seeks to improve upon its 10-4-1 record in 1984.

needs some work both in kicking and ball handling. "He is also not the type of player who can play the full 90 minutes," remarked Griggs.

TenBrink was modest when speaking of honors and attention given to him. "I just want to play hard; it's for others to judge my performance," he said. A quiet player, not a vocal leader, TenBrink is nonetheless "looked to in crucial situations by the other players," said Griggs.

TenBrink is happy to be a part of the Yale soccer program. He said

that the increase in crowds and attention paid to the soccer Elis has encouraged the team. Speaking of Griggs, TenBrink commented, "He has molded us together as a team and has done a good job keeping us team-oriented."

Neither the Yale soccer team nor Jim TenBrink is an unknown quantity any longer. For TenBrink, improving on last season's statistics may be difficult but no doubt number 24 will be spending a lot of time near the opponent's net this fall.



YDN-Daniela Saunders

HAVE FOOT, WILL KICK—Jim TenBrink '87 goes airborne trying to redirect a pass last season. TenBrink's forte is the ability to stand his ground and knock opposing players off the ball, according to coach Steve Griggs.

Crimson defeats Eli freshmen 14-7

By Brett Kavanaugh

With its perfect 4-0-1 record on the line, the Bullpups ended their season with a disappointing 14-7 loss to the Harvard Crimson. Despite the defeat, the team played well this year and many players will be counted on heavily next year by head coach Carm Cozza. With the victory, Harvard improved its record to 5-1 and captured an unofficial Ivy League championship.

Yale dominated the first half of play. The defensive line, anchored by 6-foot-3, 236 pound tackle Yves Labissiere, effectively neutralized the Crimson offense.

Eli quarterback Mike Stewart, a native of Altamont Springs, Florida, scored Yale's lone touchdown when he executed a perfect option play. He faked a pitchout to his running back, kept the ball, and outran the Harvard defenders on his way to a 91 yard touchdown gallop.

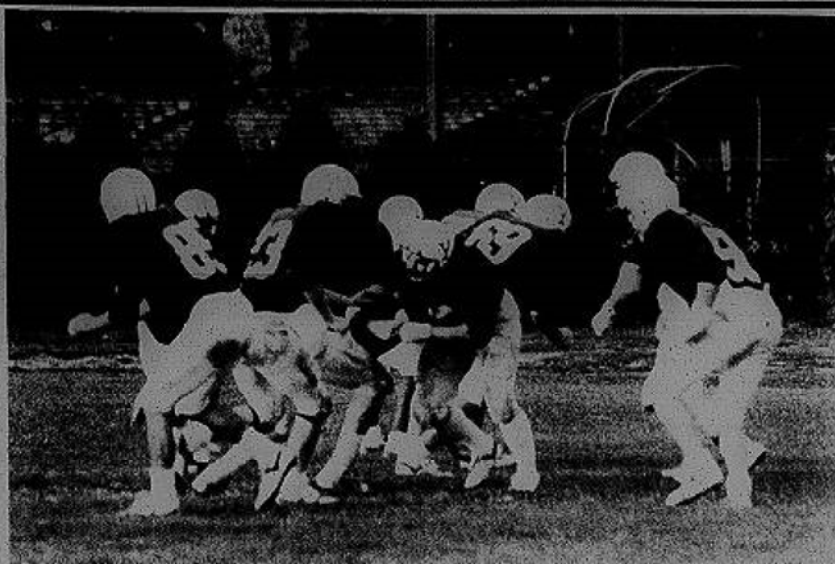
Although the defense stopped the Har-

vard attack and forced the Crimson to punt often, Yale's offense failed to get untrack after that first score and never converted its scoring chances into points. The offense stalled after Stewart's dash. The Elis missed a field goal which would have increased their lead to 10-0.

Harvard made up for its lethargic play in the first half by controlling both lines of scrimmage and make the most of its opportunities.

The Crimson had two time-consuming drives which resulted in touchdowns. With the score tied at 7-7, and the Crimson facing a third down and 10 from their own one yard line, Harvard executed the play of the game.

A 46-yard pass, which took Harvard all the way to its 47, broke the spirit of the Elis. After that play, Yale never mounted a serious challenge.



YDN Michael Subi

BOUND FOR GLORY—The freshman football team has played impressively in its wins over Brown, Columbia, and Army and some of its players, particularly downlinemen, will play a big role on next year's squad, head coach Carm Cozza hopes.

Unbeaten freshman team is a good sign for Cozza

By Brett Kavanaugh

Depressed by the performance of the football team? Take heart, the future looks bright. The 1983 freshman squad has looked impressive in its three outings this year and that is a good sign because head coach Carm Cozza has already said that he is counting on this year's freshmen to be an integral part of next year's team.

Big, strong, and psyched, the Bullpups rolled over Brown in their season opener, 17-0, defeated Columbia 14-7 two weeks ago, and last Friday edged Army's junior varsity 17-14. The team has played well in victory, despite turning the ball over too many times. The defense has held its own while the offense has moved the ball well.

This year's squad differs from those of the past in that players on both the offensive and defensive lines are more physically imposing. This strength has made the difference in the first three wins.

On defense, tackles Steve Kline (6-1, 220) and Yves Labissiere (6-3, 236), along with Aaron Osleger (6-2, 210) have anchored the run defense. The pass defense has also been outstanding, with defensive backs Paul Lisella and Mike Flannery stifling the opposition's chances to throw. As a unit, the defense has only allowed one touchdown in eight quarters, relying on sheer strength rather than the quickness used last year, when the Bullpups shut out their first four opponents.

The offense has shown the ability to explode for quick scores in its first two wins. The quarterback situation is stable with Mike Stewart at the helm, although three others are competing for the backup spot, including Don Mahlke, who turned in a strong performance as the number two quarterback against Columbia.

But it's the line which Benanto labelled as the team's main strength, with players like tackle Chris Martin (6-2, 240), center George Matthews (6-1, 235) and guard Ken Lund (6-1 1/2, 195) doing the job of blocking. The loss of guard John Chrostowski will hurt, but the depth and size should be able to make up for it.

The Bullpups have been receiving added offensive punch from wide receiver David

White, who has caught six passes for 64 yards and one touchdown, a 12-yard play against Columbia, and tailback Ted MacCauley, who has rushed for 160 yards and three touchdowns. In addition, MacCauley had a 69-yard touchdown reception against Army. Two powerful fullbacks alternate in front of MacCauley—John Risley and Tom Mercein. The only problem thus far has been the turnovers, which have prevented the offense from racking up the points it is capable of.

With such an impressive squad, the only weakness seems to be a lack of speed, which is compensated by the size of the players. The Bullpups are optimistic about their future—already the defensive unit has been pressuring the varsity offensive unit. While they realize that they will be under a lot of pressure next year, they are confident of their ability to help rebuild Yale's football program.