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PANEL II

PRESIDENTIAL LAWMAKING POWERS: VETOES, LINE ITEM VETOES, SIGNING STATEMENTS, EXECUTIVE ORDERS, AND DELEGATIONS OF RULEMAKING AUTHORITY

DAVID SCHOENBROD*

My topic is the delegation of legislative power which occurs when a statute authorizes the Executive to make the rules of conduct. My purpose is to urge you to begin to rethink whether this prevalent practice is a wise and good thing.

Compare Congress taking away some of the President's power with Congress giving the President some of its own power. Presidents from Franklin Roosevelt to Ronald Reagan and beyond have treated these two situations quite differently. Presidents have been very happy to take power from Congress; they have not been so happy to have Congress tread on their own turf. When Presidents have objected to Congress treading on their turf, they claimed to object on grounds of principle—the principle of separation of powers. But as Judge Silberman pointed out in the first panel, the ultimate purpose of separation of powers is not to protect the President, but to protect the people. This purpose of protecting the people is also a good reason to stop Congress from giving its power to the President. To the framers, Congress giving away its power, as well as Congress taking the President's power, threatened the same evil: too much power in too few hands. With delegation, that concentration of power has occurred on a massive scale.

The power to delegate is worrisome because, like the power to run budget deficits, it allows legislators to use public power for their private gain. With a budget deficit, legislators can claim credit for the benefits from spending without having to take the blame for levying taxes to pay the costs. The public, nonetheless, must still pay the costs, but through taxes levied at some future time by, they hope, some other legislators. With the delegation of legislative power, legislators can claim credit for

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the benefits which the regulatory statute supposedly will deliver without having to take the blame for enacting the costly rules needed to achieve those benefits. The public, nonetheless, must still feel these costs if the statute's goals are to be achieved. They feel them, however, through rules imposed by the agency.

The controversy in 1988 over a proposed 50 percent congressional pay raise illustrates the lengths to which legislators go to shift blame. Congress delegated the power to set its salaries to a commission subject to the proviso that Congress could stop the pay raise by enacting another law. The purpose of the delegation was to give members of Congress the pay raise without exposing them to blame for supporting it. Indeed, the House leadership planned to prevent a vote on a bill to repeal the pay raise so that members could claim that they would have voted against it if given a chance. When, however, public resentment began to build, the House leadership conducted a secret ballot among members to determine whether there should be a public vote. It is disturbing that legislators in a democracy think they may properly keep such secrets from their constituents. The House relented only when public opinion polls showed 88 percent of the citizenry opposed the raise. While in this case delegation did not change the outcome, only rarely do major government decisions get as much public attention and lead the public to come down so uniformly and so passionately on one side.

Congress' skewed exposure to the benefits and costs eventually felt by the public biases it in favor of action—spending in the case of a budget deficit and creating regulatory jurisdiction in the case of delegation. The problem for the public goes well beyond Congress' failure to give adequate weight to the direct costs—either of paying the debt or implementing the regulations. Both budget deficits and delegation also create indirect costs. In the case of budget deficits, these indirect costs, which arise from the borrowing needed to finance the deficit, include interest payments on the government debt, increases in interest rates, which all borrowers face, and inflation. In the case of delegation, the indirect costs, which arise from Congress creating expectations of regulatory benefits without taking commensurate responsibility for regulatory costs, include raising and then dashing the public's hopes for regulatory protection, subjecting industry to uncertainty as to its responsibility, and requiring government, industry, and others to spend massive sums on participation in the administrative rulemaking process. So even if crea-

tion of regulatory jurisdiction does not lead to rules that achieve the regulatory goals, it imposes very real costs on the public.

These features of delegation help to insulate members of Congress from electoral accountability and help to explain, according to political scientists, why incumbent legislators get re-elected at much higher rates than in the past. For example, approximately 98 percent of the members of the House who ran got re-elected in 1986 and 1988. Those that lost were generally tainted by scandal.

So why is it that Presidents from Ronald Reagan back to Franklin Roosevelt fought encroachments on executive power, but not gifts of legislative power? Why is it that in the agenda of our conference this weekend there is much less talk about delegation of legislative power than about other aspects of separation of powers? There are a number of possible explanations.

First, Congress pretends that it is acting in the public interest: "We are giving away our power for the public good." But of course it is not giving away its power because it has plenty of control over what the agencies do. What it is giving away is accountability for its use of power.

Second, the Executive gets something from the delegation of legislative power. The Executive gets the power to make the rules. But of course the Executive takes the blame for the cost of the rules or, if the Executive does not act as quickly as Congress wants, it gets scolded by Congress. But very often that blame is felt by the next President. So the President signs the bill and lets Congress scold the next President.

Third, there are some serious questions about whether the delegation doctrine can work. One question is whether we have a judicially manageable test of delegation. Another question is whether our government could really function without delegation. Still another question is whether we will get rules that are more or less in the public interest if we eliminate delegation. During the later New Deal, all of these questions seemed to get answered against the delegation doctrine. However, that was at a time when we were traumatized by the Great Depression, and many thought wholesale delegation was necessary for national survival. Now, however, we see that much of the intellectual foundation that underlay the New Deal's approach is just plain wrong. It rested upon theories about how delegation would work which have just not panned out. For example, the New Deal assumed that delegation would mean that experts, insulated from electoral politics, would make technical decisions.

Delegation in practice has meant that politicians enmeshed in electoral politics make policy decisions. It is time for all of us to begin to take a hard look at the delegation of legislative powers and surely not to urge the emerging democracies of Eastern Europe to copy us in this regard.

FRANK EASTERBROOK*

I have been told we have ten minutes for these talks. In the Seventh Circuit ten minutes is the amount of time we give appellants with hopeless cases. I hope that this is not a reflection on what I am about to say. I will try to persuade you that the allocation of time should have been greater.¹

This is a panel about Presidential lawmaking authority. I would like to treat that subject to include sources and scope of Presidential power. I want to discuss a question raised in the first panel: the extent to which the President may act on the basis of constitutional views at variance with the law that Congress has enacted.

An example. President Reagan refused to implement part of the Competition in Contracting Act of 1984 that required some protests over contracts to be referred to the Comptroller General. The Comptroller General is not an executive official, and President Reagan thought the reference would be a violation of the separation of powers. The Court of Appeals for the Ninth Circuit thought this presumptuous.² Indeed, the court thought it unconstitutional for the President to take the Constitution into account in making an enforcement decision, largely on the ground that he had invaded the province of the courts and violated the clause requiring the President to take care that the laws be faithfully executed. What could be less faithful, the court asked, than refusing to enforce the law?

There turns out to be a long history of Presidents acting on the basis of their constitutional conclusion at variance with statutes. Let me give you two unproblematic examples: Congress passed the alien and sedition acts, essentially making seditious libel criminal. People who were prosecuted under these laws raised the defense that it was unconstitutional. The

* Judge, United States Court of Appeals for the Seventh Circuit.

1. This talk is based on *Presidential Review*, an article forthcoming in *Case Western Reserve Law Review* (1990).

2. *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102 (9th Cir. 1988), *vacated in part*, 893 F.2d 205 (1989) (en banc).

defense was uniformly rejected. President Jefferson, when he came to office, pardoned these people on the stated ground that the alien and sedition acts were unconstitutional. Second case: the Supreme Court held that the Congress has the power to establish the Bank of the United States, but the legislation authorizing it had expired. Congress authorized a new Bank of the United States. The President, Andrew Jackson, promptly vetoed the bill on the ground that the legislation was unconstitutional because the Supreme Court was wrong.³

These cases are generally deemed unproblematic. In both there was no "take care" problem. Pardon power is an explicit power to do otherwise than the law requires: there is no lack of faithful execution in vetoing the bill. These are express powers. If the President has any power to consider the prudence of a bill, he can also consider the Constitution.

Now consider some other nonproblematic or at least noncontroversial cases. For example, the Supreme Court in the 1970s held unconstitutional quite a number of provisions in the Social Security Act on the ground of sexual discrimination. The Social Security Act was riddled with sex-based distinctions. After each decision the executive branch would go through the statute finding other provisions sufficiently like the ones the Supreme Court had held unconstitutional and would decline to enforce these on constitutional grounds. The Administrations of Presidents Ford and Carter did this so frequently that Congress started enacting appropriations riders requiring the Department of Justice to notify Congress every time it refused on constitutional grounds to enforce a statute.

Let me give you some illustrations that are controversial. In the Ford Administration Congress enacted the Advisory Committee Act, requiring open meetings of advisory committees. Is the ABA standing committee on the federal judiciary an advisory committee? President Ford concluded that it is, and nonetheless refused to enforce it on constitutional grounds. He believed that it interfered with his constitutional powers of appointment. He reached this conclusion on the advice of Attorney General Levi, whose advice was based on the advice of the Assistant Attorney General for the Office of Legal Counsel: one Antonin Scalia. Second, President Wilson fired a postmaster who under the law had tenure. President Taft, who had been transmuted into Chief Justice

3. COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, 581-91 (Richardson ed. 1900).

of the United States, upheld this decision.⁴

Then there is the granddaddy of defiance, Andrew Johnson, who sacks Secretary of War Edwin Stanton despite the Tenure of Office Act, which forbade him from replacing any cabinet member until another had already been confirmed. Stanton refused to leave office. Johnson was impeached, and only his acquittal by a very close vote in the Senate persuaded Stanton to vamoose.⁵ There are ongoing disputes about intelligence activities and the War Powers Resolution as Secretary of Defense Cheney reminded us earlier today.

Was President Johnson trapped by the Tenure of Office Act? Was President Ford trapped by the Advisory Committee Act or President Reagan by the Competition in Contracting Act? The argument that they are takes three lines. One is that the take care clause of the Constitution requires the President to implement the law, constitutional or not. Second is that although judges have the necessary expertise to make constitutional decisions, executive branch officials do not. Third is the argument from chaos. If the executive branch could refuse to enforce statutes on constitutional grounds, we would have chaos, which is avoided by leaving these tasks to the judiciary.

I view the latter two of these three as make weights. Take expertise. The President acts on the advice of the Attorney General, who acts on the advice of the Solicitor General and the Assistant Attorney General for the Office of Legal Counsel. Holders of these offices are not journeymen. Let me give you some recent names: Rehnquist, Scalia, Bork, McCree, Olson, and Starr. Earlier occupants include: Jackson, Taft, Hughes, Cox, Griswold, my colleague Walter Cummings, and the man who wrote the veto message for President Jackson in the Bank of the United States case, a fellow by the name of Roger Brooke Taney, who was promoted for good service.

As for chaos: there is only one President. Someone desiring chaos could do no better than to delegate constitutional questions to six hundred district judges, reviewed by 168 circuit judges sitting in panels of three. If you wished to find a method to generate babble you would pick that one. This, by the way, is a task in which we have acquitted ourselves well. A unitary executive always does better in this respect than a hydra-

4. *Myers v. United States*, 272 U.S. 52 (1926).

5. H. TREFOUSSE, *ANDREW JOHNSON* 276-78, 293-334 (1989).

headed, uncoordinated judiciary. Indeed, consistency and accountability were principal arguments for a unitary executive in 1787.

Now for the take care clause. There is a duty to enforce, not to negate. The President must take care that the laws are faithfully executed. Is the Constitution a law? If it is, then the President must execute it, too. In any contest between the Constitution and a statute, the Constitution wins. So I invite you to step back and ask: Why does anyone have the authority to review the statute for conformity with the Constitution?

Why is there judicial review? The argument given by Chief Justice Marshall in *Marbury v. Madison*⁶ was quite simple. It is that the Constitution *is law*. We departed from the United Kingdom by having a written and, therefore, an enforceable Constitution. It has a structure, it limits each actor's powers, and it has a supremacy clause, which creates a hierarchy with the Constitution on top. It requires all officers to take an oath to the Constitution—to that hierarchy, in other words—so that in the event of a conflict the Constitution wins.

These observations turn out to be an insufficient argument on behalf of review. The tough question is not whether the Constitution is superior to the law, but who shall decide. One could say that Congress by enacting the statute has decided that the law satisfies all constitutional obligations. If the Congress approves, who are the judges to doubt it? Chief Justice Marshall's answer was essentially: In this governmental structure, every man for himself. Every official owes a duty to the hierarchy and must make an independent judgment and not knuckle under to the views of others.

Translate this to the executive branch. The hierarchy is the same, the duties of the Constitution are the same, and the role of each constitutional official to make his own decision is the same. Therefore, the conclusion is the same.

How about an example? Congress is inflamed by the failure of the drug war, and it passes the following law: "Section 1. The President shall summarily execute Drug Czar Bennett and his claque and shall confiscate their property, and none of their lineal descendants shall be eligible for any public office. Section 2. No court shall have jurisdiction to stay the enforcement of section 1." I take it that this is a bill of attainder, with the corruption of blood feature that the framers found particularly repugnant. Whether or not we would think section 2 effec-

6. 5 U.S. (1 Cranch) 137 (1803).

tive, the President has a problem. Does he send the firing squad? I think it is obvious that the President must not. He must refuse to execute Bennett and need not wait for a district judge in Washington, D.C. to tell him so. If you agree, we are done. We have established that the President may decide these questions for himself.

Let us suppose that you do not accept that. Let us suppose you think it matters whether somebody gets judicial review. Let us suppose Czar Bennett gets judicial review, but that a henchman, we will call him Lovett, does not. Must the President execute Lovett? If the President cannot set the constitutional rule above the law, why could he spare Lovett even on the basis of a decision favoring Bennett? Why indeed, if he cannot set the constitutional rule above the law, could he spare Bennett? The Court interprets the Constitution. If the law trumps the Constitution under the take care clause, then presumably it must trump the judicial decree as well. Yet that is absurd because it implies that the judiciary does not have a role.

If we grant judicial opinions any force beyond the parties, that must be because the Constitution prevails over the law. The decision by the judges shows the meaning of the Constitution, but it is the Constitution that then prevails. A President may act on the basis of the Constitution and not merely implement judicial opinions.

We are all temporary office holders. A particular group of office holders on First Street that interprets the Constitution is not fundamentally different in that respect from the group on Pennsylvania Avenue or the group at the corner of Ninth Street and Constitution. The source of all contemporary authority is in documents each of us must implement, and all of us owe our responsibilities to the entire constitutional structure.

STEVEN ROSS*

I was asked to come before what I was assured was a very receptive audience, ready to listen to the views of one who spends his time representing the House of Representatives in litigation, often against the executive branch on questions of separation of powers. The topic was described as that of Presidential lawmaking, although as you hear it described and enunciated by the other panels, it can just as easily be described as Presidential law breaking.

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I say that the notion that the President can simply decide to suspend a law because, in his view, it does not work with his reading of the Constitution, is one that goes to the very essence of our system of government and the rule of law of this nation. It is one that was a typical dispute in the history of England and led to the development of the English Bill of Rights, which served as a predecessor for the take care clause. It was one of the specific things won in the Glorious Revolution and agreed to by King James.

That is not to say that the President does not have a very specific duty to interpret the Constitution and to apply his reading of the Constitution to the law of the United States. There are a number of matters in which that is done and Judge Easterbrook gave perfect examples in describing what he considered to be the two noncontroversial or nonproblematic questions of Presidential constitutional interpretation. I would focus on the veto because that is one of the specific topics for this panel.

Clearly it is within the President's power, and it could be argued within his obligation, to veto a bill that he believes to be unconstitutional. The Constitution gives him that power as the primary mechanism of protecting not only the prerogative of the President, but also the American people from potential encroachments of unconstitutional or unwise congressional acts. Presidents have been diligent, and can be trusted to continue to preserve that power through a vigorous use of their veto power. They should be encouraged to do so.

That is not to say that a President can, with the same sense of constitutional authority, allow a statute to become a law, perhaps sign it into law, and then simply ignore it, and make believe the law was never enacted. There is a presumption of validity to enact the statute, and that presumption should continue until such time as a court of competent jurisdiction deems the statute to be unconstitutional and, therefore, null and void. It is not a question of judges having a monopoly on wisdom about the Constitution. I would like to think that those who populate the halls of Congress as well as those in the executive branch are able to read the Constitution, but clearly no branch is going to be 100 percent correct.

If there was complete wisdom of the Constitution, then we would never have to fear an unconstitutional act. It would never get past the halls of Congress; it would never be signed into law. Some system of government, however, must prevail on how questions of constitutionality will be addressed. The system in our government is that a law is brought before a court, and the court in the performance of its functions deems it

constitutional, and therefore should be followed, or unconstitutional, and therefore null and void. It seems to me that the alternatives are a significant risk to the very structure of our government.

Judge Easterbrook pointed out President Johnson's decision to ignore the congressional statute and to go ahead and fire Secretary Stanton, a decision that led to a constitutional confrontation and ultimately the trial and impeachment of the President. Clearly that should not be the model of appropriate behavior within the government.

I think the determination regarding the Competition in Contracting Act is an excellent illustration of both the pitfalls of a Presidential suspension of a statute and the practical benefits of judicial resolution, which is the preferred alternative. When the Department of Justice advised the Director of the Office of Management and Budget to instruct the offices of the government to ignore the provisions of the Competition in Contracting Act, it created considerable concern in Congress. While the case was proceeding before the judiciary in both the Ninth and Third Circuits, the President's men were called before the appropriate committees in Congress to explain his position. In explaining the President's position, both on the constitutionality of the statute and on the appropriateness of the executive branch's behavior in ignoring or suspending the statute, the Attorney General said that it was within the executive branch's purview, not only to ignore the statute before any judicial resolution, but to continue to ignore the statute upon resolution by the district court. The Attorney General said that there was a question of the district court's competence to decide a question of constitutionality. The Attorney General further said that a court of appeals ruling would certainly be a matter the executive branch would take under advisement, but that he would not consent to the notion that at that point, the executive branch would be compelled to follow the law.

It is interesting that on the underlying question of constitutionality, the President's lawyers were so sure of that, that they were willing to instruct all offices of the government to ignore a newly enacted statute. Yet the ultimate resolution of the question of constitutionality was decided against the executive provision, and the constitutionality of the Competition in Contracting Act was upheld in both circuits in which it was contested.

I think recent history, as well as the history of England and the history during the time of the framing of the Constitution, should give considerable pause to those who would argue that the President's proper role in

interpreting the Constitution extends to a construction that a statute should be ignored. I also think the commonwealth can be better served by the notion that the President has ample opportunity during the legislative process to impress upon Congress his position and view of the Constitution with regard to a statute. The President plays an extensive role, particularly through the methodology of the veto, which Presidents have used frequently to support their view of the Constitution. The President's authority should not extend to the presumptive power to suspend a newly enacted statute.

It is interesting that while Judge Easterbrook was willing to advocate that position from this podium, no judge in the United States, sitting in his official capacity and speaking in a court, has endorsed the view espoused on behalf of the President. When the Department of Justice was arguing its position in the Competition in Contracting Act cases, it was unable to cite for support any decision or language of the official rules of a United States court.

THEODORE OLSON*

Our time limitations remind me of the man driving down a country road who pulled over when he saw a farmer holding a giant pig in his arms. The farmer was lifting the pig so that it could eat acorns out of a tree. The man ran over and told the farmer that it would be much better if he would put the pig down, shake the tree, allow the acorns to fall, and the pig could eat the acorns off the ground. "You'll save a lot of time that way." The farmer replied, "What's time to a pig?"

I also feel like I should apologize for the *Morrison v. Olson*⁷ case. I do not know what else to say about it, but I am sorry.

Before I discuss Presidential lawmaking, I have a comment on the creation and history of the unitary Presidency discussed by the previous panel. It is ironic that we should have to debate today whether we *should* have a unitary executive, because of all the issues considered by the Constitutional Convention, one of the most thoroughly debated and clearly decided was the choice between a unitary and a plural executive. Over Friday, Saturday, and Monday, June 1 through 4, 1787, our fram-

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7. 487 U.S. 654 (1988).

ers conducted one of the most thoughtful and prescient debates of the Convention in response to James Wilson's motion that the executive consist of a single person. The pros and cons were considered at length and a vote was taken. A decision was made on a seven to three vote to reject a plural executive and enact a unitary Presidency.

Unfortunately, without a constitutional amendment or even a direct Supreme Court decision, the vote of the delegates on June 4, 1787 has been overridden and eroded so that we now have precisely the plural executive rejected in Philadelphia. President Kennedy probably said it best in response to a question about a government policy, "Well, I agree with you, but I do not know whether the government will."

Today, just to highlight a few examples, the securities laws are not the responsibility of the President; some of the criminal laws are not the President's to enforce; antitrust laws are partially outside the President's sphere; national economic policy is vested in the Federal Reserve Board, which is not subordinate to the President; energy policy, communication policy, and so on. The list goes on and on and on.

The President not only cannot control or coordinate the execution of certain laws reposed in the hands of independent agencies, it is perceived as an indelicate and somewhat improper act for the President even to speak to the people who make those decisions. Every time the President tries to communicate with someone at the Federal Trade Commission or the Federal Communications Commission, there is an outcry about the importance of the integrity and independence of these agencies. It is news when the President's spokesman speaks (like he did the other day) about something that is within the jurisdiction of the Federal Reserve Board. Judge Breyer made it a point to tell you he would not want these decisions made in the White House. Would that be a terrible thing—if the person elected by all the people of the United States was responsible for enforcing the laws? But the President is the person the framers of the Constitution designated to enforce the laws, not a group of relatively anonymous, "independent" commissioners accountable to no one, except perhaps a few congressional committees.

One of the problems with our current system is precisely that it takes these subjects outside of the political debate. If we do not like the way the SEC enforces the securities laws, what are we going to do about it? We may hope that we can convince our congressional representatives to change the law, but these issues do not come up in Presidential debates, and Presidential candidates do not address them in their platforms.

These subjects are becoming politically untouchable because the President cannot do anything about them.

I should probably now spend a little time talking about the subject assigned: Presidential lawmaking. First, it seems appropriate to provide a definition. While it seems elementary, it is difficult to describe where lawmaking ends and where law execution begins. The Supreme Court in the *Chadha*⁸ case defined "lawmaking" by describing the activity that Congress could not perform except in the manner prescribed in the presentment clauses of the Constitution. But, curiously, in defining "lawmaking" in that context, the Court implicitly upheld Congress' authority to delegate that power to the executive branch.

The Court sustained Congress' delegation to the Attorney General of the power to suspend a deportation, but the Court held that such an action was lawmaking and that the Congress could not overturn the Attorney General's decision with a one-House veto. In reaching this decision, the Court defined legislation as action that had the purpose and effect of altering the legal rights, duties, and relations of a person. Because such action constituted legislation, Congress could not do it except in the constitutionally prescribed manner. Yet by overturning the one-House veto, the Court upheld the power of Congress to delegate that lawmaking act to the executive branch.

The following is a list of some of the ways in which the President participates in the lawmaking process:

(1) The President through his subordinate, the Vice-President, presides over the Senate and may cast the tie-breaking vote directly in the legislative process.

(2) The President has veto power. There are two types of vetoes: return vetoes and pocket vetoes. Most of the time, the President exercises a return veto because Congress is in session, and the Constitution requires the President to return a bill with his objections to the House in which it originated, so that Congress can decide immediately whether to override the President's veto. Only a small fraction of Presidential vetoes are overridden. When Congress has adjourned, the President need not send the bill back because Congress is presumptively not there to receive the returned bill. So the President simply does not do anything at all; he vetoes the bill by sticking it in his "pocket."

The pocket veto is seldom discussed, although it was the subject of

8. *INS v. Chadha*, 462 U.S. 919, 941-42 (1983).

litigation several years ago. But the pocket veto is becoming increasingly important because, although the Constitution denied the President an absolute veto, which would kill a bill outright, in favor of the return veto, which can be overridden, the pocket veto is more like an absolute veto because it cannot be overridden. Congress has to re-pass the bill and, after passing it again, the President can veto it a second time. This is significant because Congress has increasingly postponed its major legislative activity until the final days or even hours of a congressional session. Often it is three o'clock in the morning of the last day of the session, and many subjects are rolled up in one bill so the President may find the bill difficult to veto. But if he can do so politically, the pocket veto is a powerful weapon.

When I was in the Justice Department I did a calculation regarding the 94th, 95th, 96th and 97th Congresses. Somewhere between 25 percent and 33 1/3 percent of the bills passed were passed within the last ten days of a congressional session. Thus, the more powerful pocket veto is available in a substantial number of instances.

(3) The third way in which the President may participate in the legislative process is through the pardon power. A pardon, in a sense, alters the legal rights of persons. It may be used to pardon a particular person, or it may be used generally, as it was after the Civil War or the Vietnam conflict.

(4) Next is the power to make treaties subject to congressional concurrence. Under the Constitution, treaties become the law of the land.

(5) The executive agreement is widely perceived as a way in which the President may get around congressional participation in the treaty power. Regardless of how one might view the appropriateness or legality of executive agreements, many Presidents throughout history have exercised the power to act in this manner. The Louisiana Purchase was initially an executive agreement. The territory was bought and paid for before congressional participation was even sought. President Roosevelt's agreement to lend fifty destroyers to Great Britain in exchange for the right to lease air and naval bases, an action that arguably violated two statutes, was accomplished through an executive agreement. The annexation of Texas and later Hawaii came about the same way.

(6) The Constitution gives the President the express power to recommend legislation. Depending upon the popularity of the President, that may be a significant means of participating in the legislative process.

(7) The President has the power to convene a Congress. In a sense, this is a way to participate in lawmaking.

(8) The President participates in lawmaking on a continuous basis through his power to enforce the laws. However you define lawmaking, taking care that the law is faithfully executed involves the President in making decisions about how the laws should be enforced. Some laws may involve particularly broad delegations of discretion by Congress. The antitrust laws are a prime example. Vast amounts of discretion to make policy may be exercised by establishing enforcement priorities and direction.

(9) The executive branch influences lawmaking through its power to decide what cases to present and what arguments to make to the courts. The President also has the power not to enforce or defend a statute in the courts, a decision that can practically nullify a law. A less dramatic exercise of this same authority is the power to select the cases and issues to present to the courts and what cases to appeal. In this manner, the executive branch exercises significant control over lawmaking by the judiciary.

(10) Through the process of signing statements, the President explains how he perceives and will interpret a statute. His statement becomes a part of the legislative history and may influence how the law is interpreted by the courts.

(11) Executive orders constitute an effective lawmaking instrument. President Truman integrated the Armed Forces with Executive Order No. 9981. Executive Order No. 12,291 was a Reagan Administration Executive Order that reformed the regulatory process in the executive branch.

(12) Regulations enacted by the executive branch pursuant to statute or simply by unilateral executive action constitute the largest body of laws promulgated by the executive branch. The Supreme Court has held that an executive branch regulation is enforceable even against the President. He has the power to reverse, withdraw, or rewrite the regulation, but it remains enforceable and binding until revised. "So long as [the] regulation remains in force, the Executive Branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and enforce it."⁹

(13) Next are the President's emergency powers—sometimes de-

9. *United States v. Nixon*, 418 U.S. 683, 696 (1974).

scribed as Presidential prerogatives; sometimes criticized as Presidential law breaking. Locke described the Executive's emergency powers as including the authority to take steps that may not be authorized by law and may in fact be contrary to law. President Jefferson explicitly defended this power. *Federalists No. 28* and *No. 41* make allusions to these Presidential powers.

An example occurred when Fort Sumner fell while Congress was not in session. President Lincoln proclaimed a blockade of Southern ports, mobilized the state militia, increased the size of the army and navy, and appropriated funds for war materials. These acts were not only not lawfully authorized, but some of them were squarely inconsistent with the Constitution. The Emancipation Proclamation is another example of a Presidential emergency decree without statutory authority.

(14) The power to recognize foreign governments is not given explicitly to the President by the Constitution, but was established by President Washington when he recognized Citizen Genet as the Ambassador from the new French Republic. President Washington's example has been followed by Presidents since then. This authority may have a major impact on foreign relations and the operation and applicability of various laws and treaties.

(15) The final area of Presidential lawmaking authority that I will mention is another controversial one. Does the President have, and under what circumstances may he exercise, the impoundment power? Can he decide not to spend money that has been appropriated by Congress? Can he defer or rescind appropriations?

These are some of the means by which the President participates in the lawmaking process—some are explicitly authorized by the Constitution; some are implied or have been developed through practice over the last two centuries. Taken together, they permit the President a powerful influence in the legislative process.

DISCUSSION

SCHOENBROD: Ted Olson reminds us that the Executive's involvement in lawmaking under the Constitution—the veto power, the Vice-President's vote in the Senate, the power to recommend legislation and so on—is not a delegation of Congress' article I power. We need to distinguish between the inherent article II power of the Executive and the arti-

cle I power of Congress. If the President only exercises article II powers, then there is not any problem of delegation of legislative power. When the President is involved in rule enforcement—I think rule enforcement, like Judge Easterbrook does, includes the power to interpret the laws, including the Constitution—there is no delegation of legislative power. It is a tricky business to distinguish between rule interpretation and rulemaking, but the distinction has substance and is consistent with the purposes of the delegation doctrine.

EASTERBROOK: Some of you may be wondering when we would get to the topic of this panel. The topic is “Presidential Lawmaking Powers: Vetoes, Line Item Vetoes, Signing Statements, Executive Orders and Delegations of Rulemaking Authority.” Now we got off to a good start from the first talk, but I am afraid I may have diverted things. My time is quite brief, so my views will be compressed: yes, no, yes, yes, and dubious.

ROSS: Let me take just a minute to comment on one of the issues that Ted brought up. Let me preface my remarks by saying that I attempted during my ten minutes to present a list of the President’s ample power in the legislative process. I am glad I left the task of filling out the list to Ted, to whom it came more naturally; he did it beyond my wildest expectations.

One thing that Ted talked about was pocket vetoes, a very timely question. The description of the constitutional provision that the President has the ability to pocket veto legislation when Congress is adjourned is interesting, and it is not exactly correct. The difference between Ted’s description of the constitutional provision and my description is that when Congress provides a remedy that prevents its return, the President is able to pocket veto.

The basis of a coming clash between the Congress and the President about the President’s authority to pocket veto a bill is one that is being played out, or will be played out, in the very first stage of the second session of this Congress. The specific controversy revolves around a statute relating to the fates of Chinese students who were in the United States during the Beijing uprising. The question is whether Congress, by authorizing a functionary receipt from the President of a veto message, has obligated the President to exercise veto authority by making a return veto, thus returning the constitutional balance by allowing Congress to override a veto; or whether because Congress is not meeting on the tenth

day of presentation of the bill, the President can obtain a unilateral and absolute negative on the bill. And I think the difference between those two reasons are that those few words will be played out on the front pages of the Chinese student's bill and also most likely in litigation over the next couple of years.

OLSON: There has been litigation over pocket vetoes. The Supreme Court decided the pocket veto case.¹⁰ Then there was litigation during the Ford Administration after the pocket veto case. If another test is coming along, it would be interesting to see what the Supreme Court will do.

I agree very much that excessive delegation by Congress is deplorable and is not good for the executive branch or for Congress. It undermines accountability for the laws enacted and results in vague laws and capricious regulations. It allows Congress to evade responsibility for the costs of the laws it enacts. As Justice Scalia explained before he was appointed to the Supreme Court, excessive delegation allows members of Congress to vote in favor of laws that, for example, ban "unsafe products." That is a safe thing on which to vote. But, then the executive branch must enact volumes of regulations to explain what actually is prohibited, and no one has really debated the costs, and on whom the burdens are going to fall. Excessive delegation tends to deny due process, because Congress has failed to consider the scope or effect of the legislation that it passes.

Nonenforcement of a statute by the Executive presents an intriguing political and constitutional question, but it happens very seldom. The fact that the President may have signed a bill, partially for the reasons that Attorney General Thornburgh mentioned earlier today, does not make a bill constitutional. That argument was raised in the *Chadha* case, and the Court held that the fact that the law in question may have been passed by Congress and signed by the President does not make it constitutional.¹¹ Certainly legislation has the presumption of validity, but that is all it has. The President does have some responsibility to consider the constitutionality of the statute as he considers its enforcement. The President is given a special oath by the Constitution to preserve, protect, and *defend* the Constitution. That requires some judgment with respect to the enforceability of a statute which he perceives to be unconstitutional.

10. *The Okanogan, Methow, San Poelis, Nespelem, Colville, and Lake Indian Tribes or Bands of Washington v. United States*, 279 U.S. 655 (1929).

11. *INS v. Chadha*, 462 U.S. 919, 941-42 (1983).

QUESTIONS AND ANSWERS

WALTER BERNES:* Mr. Ross began his analysis on the take care clause by referring to British practice, and that is appropriate on some occasions. For example, I recall the first time the Supreme Court faced the necessity of interpreting the ex post facto clause in *Calder v. Bull*.¹² The Court went to Blackstone and found an explanation of that language. I do not think it is appropriate in this particular case when we are talking about the powers of Congress and the President because the principle in Britain is legislative supremacy, whereas the principle in the United States is constitutional supremacy. Now it seems to me, you then recognized that principle and went on to suggest, as I understood you, that your constitutional questions are findings cited by the Supreme Court of the United States or by the judiciary. The question then arises whether the President is always required to obey a court order. Now there is one famous occasion involving a not insignificant President of the United States, namely, Abraham Lincoln, who, faced with a court order handed down by the Chief Justice of the United States, Roger Brooke Taney, refused to obey it. My question to you is: Is the President entitled to do this sort of thing and, to preempt part of the answer or what I hope will be your answer, are there not occasions when it is altogether improper for the Court to have the final word?

The final constitutional court in some matters—matters involving disputes between the President and Congress—is the people of the United States. It seems to me that the Constitution itself recognizes this in its impeachment clause. The Senate is not acting as a legislative body when it tries an impeachment of the President. It is acting as a court: the Chief Justice presides; it is a court acting in the name of the people and charged with the responsibility of deciding a constitutional dispute between the Congress and the President. The President is required to obey whatever the court orders. Does this not imply that he is not always required to obey a Supreme Court order?

ROSS: Let me answer your question in two separate parts. First, about my reliance on the British example, I am not sure I would agree with the description of the status of the British governmental system in 1688 as being one of legislative supremacy. At that time, prior to the

* Professor, Georgetown University.

12. 3 U.S. (1 Dall.) 385 (1798).

Glorious Revolution, it was the King's power to suspend laws that I was relying on, as have the courts citing British history.

BERNS: The British practice that was known in 1787 and 1789 was certainly post-Glorious Revolution practice.

ROSS: I was talking about the 1688 example.

BERNS: Post-1688.

ROSS: Perhaps we are just speaking against each other. Let me turn to the question of the President's obligation to follow a final dispositive resolution by the Supreme Court of a question on the Constitution. I can perhaps best answer that question by telling you what I have advised members of the House of Representatives about a ruling of the Court relating to the House of Representatives. I have taken the position, and members of the House have agreed with the position, that the House should comply with dispositive rulings, that is, final resolutions of questions by the Supreme Court. Is there the practical potential that any other governmental body, be it the President or a House of Congress, would refuse to abide by a final decision? Clearly there is. I hope that we do not see that day. Those of us who practice law, particularly governmental law do owe some obligation to the notion of the rule of law. I think the part of the system that was crafted by the constitutional framers is one in which there will be an ultimate resolution of the question by the Court.

Now it is true that the people of the United States are the final arbiter. Displeased with a ruling by the Supreme Court, the President or Congress has at its disposal several media of going to the people and changing the law of the land: be it through a constitutional amendment, through a bill that changes the composition of the Court, or through persevering and placing people on the Court who will agree with the vision shared by the majority of the people if it differs with the Court. I hope the day does not come when either the President on one hand, or the Congress on the other, decides that it is within its constitutional prerogative to simply ignore a final resolution of a constitutional question by the Court.

QUESTION: Judge Easterbrook suggests "yes" to signing statements. The question that remains, however, is what happens when the President says in his signing statement: "I am signing this law. However, certain clauses of the law, which I believe raise serious constitutional problems, are

unconstitutional.” To what extent does that justify the President’s decision not to enforce or execute the law; what role should that action play in the Court’s review of the law; and how should that be viewed as an integral part of legislative history?

EASTERBROOK: Let me expand my “yes” a little bit. When the President says in a signing statement that he views the law as dubious or unconstitutional, that statement is not itself authority for later action. That would be bootstrapping. Signing statements are more useful in demonstrating understandings of the law’s meaning and scope. The decision not to veto a law is part of the legislative process. The President’s signing statements are entitled to the same kind of weight as, say, a statement in the Senate by the responsible committee that it is sending forward a piece of legislation because it believes it carries the following meaning. As a rule, statements of all sorts are not entitled to much weight. They tend to be *ex post*, they tend to be written by staffers, and so on.

All of the difficulties of legislative history also apply to the President’s signing statements. We do not suppose that it is really the President of the United States expressing his own views. It was not so even in the time of President Jackson, who sent off Roger Taney’s non-signing statement in the Bank of the United States bill. But Presidential views about meaning are entitled to the same weight as contemporaneous legislative history. The President is one of the three institutions whose approval must be obtained, so what he understands those words to mean matters.

OLSON: I would add that in *Chadha* the Supreme Court said in footnote 13 that the fact that the President had signed numerous bills containing legislative vetoes did not make them constitutional.¹³ The Court noted that eleven Presidents from President Wilson through President Reagan, had gone on the record at some point challenging congressional vetoes as unconstitutional.¹⁴ The Court collected in that footnote signing statements expressing such objections, and the Supreme Court obviously accorded some significance to those expressions.

QUESTION: *Mr. Olson briefly mentioned the subject of impoundment. I would like to ask if Mr. Ross would state the case against such a Presiden-*

13. 462 U.S. at 942, n.13.

14. *Id.*

tial power being constitutional and then ask if someone else on the panel might tell him if he is wrong?

ROSS: I guess I can do that. I simply state that the Constitution lodges the power of the purse in the Congress. Representatives elected by the people are required to determine how the funds collected by the revenues shall be spent. In working out ways to do so with the Executive, Congress has elected to provide the Executive with only limited flexibility. Absent such a congressional grant, the President does not have the authority to change the appropriations of the Congress. That was one of the very basic powers that I think the framers determined to give Congress in article I.

OLSON: I would like to hear what Judge Easterbrook has to say about it. When I was in the Office of Legal Counsel we considered these questions and found the language of the legislation varied a great deal. Some legislation was very explicit, indicating that mandatory expenditures were required. In some instances, Congress had explicitly given flexibility to the Executive. In some laws, it was not clear at all. Congress apparently had not given any thought to the subject, and it seemed to us that the answer to the question might well depend upon the language used in the particular case. If Congress makes it clear that it is insisting that money has to be spent a certain way, I think Congress does have the power to do so.

ROSS: Let me just pick up on that. I think it is clear to anyone that there are many instances in which the language emanating from the Congress has been less than crystal in its direction to the executive branch. The remedy is better drafting by the Congress, not the development of a new constitutional authority by the executive branch.

EASTERBROOK: I could give you another small piece of history—call it executive history. During the Nixon Administration a broad claim of the power to impound was made. It was uniformly rejected by the lower federal courts. The government filed a certiorari petition in a case involving some environmental matters, *Train v. City of New York*.¹⁵ The Solicitor General at the time was Robert Bork. Solicitor General Bork took a close look at the arguments pro and con on impounding, and he withdrew the government's claim that there was an inherent executive authority to impound. He made in that case exactly the argument that

15. 420 U.S. 35 (1975).

Ted Olson just suggested—the particular statute as written did not require the expenditure of money, conceding that other statutes might be written otherwise without being unconstitutional. The Supreme Court, by a 9-0 vote, rejected the argument even with respect to that particular statute.¹⁶ It has always seemed to me that the conclusion Solicitor General Bork reached about the broader question is exactly right.

QUESTION: Panelists, assuming the Union had stayed together, and you were in the position of President Lincoln, would you feel compelled to enforce the Fugitive Slave Act upheld in the Dred Scott case¹⁷ despite your belief that it was unconstitutional?

EASTERBROOK: The fugitive slave clause is not simply a statute, it is part of the Constitution.¹⁸ The Constitution requires states to deliver up fugitives. In declining to demand or enforce the delivery of the fugitives, Lincoln would have been acting inconsistently with the Constitution. Scott was not found in a free state. His claim was that he had resided in a free state and although he had returned to a slave state, his journey had liberated him. What the Supreme Court held, in one of the most bizarre opinions of all time, is that the whole idea of liberating slaves is unconstitutional, that black people could not be citizens of the United States. That conclusion made the Missouri Compromise unconstitutional. The opinion gratuitously declared the Missouri Compromise unconstitutional even though it had been repealed, making almost all political compromise about slavery impossible from that day forward.

QUESTION: Some insist the line item veto already exists in the Constitution. If the President were to accept that point of view, Judge Easterbrook, how do you think the President should approach that issue based on what you have said about how a President should reconcile his view of the Constitution and the take care clause?

EASTERBROOK: I am not sure that it poses to the President the question that I was presenting. I was supposing that the law had been enacted by valid processes, either with the President's signature or over his veto. Then he must decide between the law and his understanding of the Constitution. If the President decides that he possesses the line item veto, we see a very different sequence. He then would send a veto

16. *Id.* at 44-45.

17. *Scott v. Sandford*, 60 U.S. (18 How.) 393 (1856).

18. U.S. CONST. art. IV, § 2, cl. 3.

message and make a return veto to the Congress saying he is vetoing section 2(a)(3)(i). He would not carry out what he thought he had vetoed, but not because anything is unconstitutional.

You can then imagine the conflict at the next stage. The President vetoes subsection 2(a)(3)(i). Congress sends back a letter drafted by Mr. Ross saying: "Dear Mr. President, some crank has obtained copies of your stationary and sent letters in your name. You have signed this law, and it is now to be enforced. It is not our obligation to do anything." The veto will be followed by private litigation. Whoever was a beneficiary of section 2(a)(3)(i) will sue.

QUESTION: Judge Easterbrook, just a quick follow-up. Would that mean, therefore, that the President would sit in judgment of his own determination to not enforce a provision that he had implicitly vetoed?

EASTERBROOK: If he thought section 2(a)(3)(i) was not law, he would not enforce it. That is how the pocket veto cases come up. The Congress says, in the legislation that Mr. Ross referred to, "We have named an agent who will always be here to accept a return." The Constitution says that the President must make a return veto "unless the Congress by its adjournment prevents its return."¹⁹ So the Congress now believes that there is always someone there, so return is always possible. The President believes, however, that the Constitution asks whether the members of Congress are there, rather than whether an agent is present. So the President makes a pocket veto and takes the position that this bill did not become a statute. He will not enforce it. I think it is wholly appropriate for him to take the view that a particular document is not a duly enacted law. Litigation may ensue or it may not. But whether something is a duly enacted law is something the President must decide.

SCHOENBROD: I have a question for Mr. Ross. The argument in favor of the line item veto is that what Congress really has done is put many bills into one bill so that the President is vetoing one bill out of many. But I do not know how the President decides what constitutes a bill. It would be ludicrous if he could line item veto the word "not." But, if the President sent you an alleged line item veto letter, would you say he vetoed the whole statute or vetoed nothing?

19. U.S. CONST. art. I, § 7, cl. 2.

ROSS: I guess it would depend in part on the alleged line item veto letter. It would depend on his choice of words. At times it can be a difficult job to determine exactly what has happened. To go back to the example of the Chinese student bill in which the President said in a message delivered to the House: "Because I cannot deliver this message to you, I therefore have pocket vetoed the bill. But, because I know that there is some confusion about this matter, I am returning the bill with my veto." Congress is scheduled to take up the question of whether or not to override this veto, and the White House is, according to the press, working late at night trying to save this veto which may or may not have occurred.

My guess is that if the President were to be persuaded by what I am convinced is a very small minority, even among pro-executive legal scholars within the executive branch, that the authority for the line item veto somehow exists, he would seek to utilize it. We would have as difficult a time winding our way through whatever message was sent. I would hesitate to answer yes as to whether the House would try to override such a veto. I think it is more likely that when the veto came up people would say, "Sorry, but that is not vetoed."

SCHOENBROD: So therefore the bill, the whole bill, would be passed?

ROSS: That is more likely. Although, again, that is only one way to view the veto letter. But, I think that is probably the most likely way.

QUESTION: Judge Easterbrook, you perhaps prudently abstained from answering Walter Bern's question about the authority of the President to decline court judgments, and then managed to duck it in the Dred Scott hypothetical. I would like to hold your feet to the fire once again. Does your view that the Executive, in interpreting the Constitution independently, has the inherent authority to not enforce statutes also imply that the President has authority to not enforce court judgments that he believes are unconstitutional or rendered in excess of the Court's jurisdiction?

EASTERBROOK: Do I look like a traitor to my caste? Perhaps I have a suspicious air about me. First, I think it is important to understand that Presidents routinely ignore judicial opinions. The doctrine is known as the limitation on offensive non-mutual issue preclusion. There was a controversy about whether, when one court of appeals decides a case, the government must apply the decision nationwide to other liti-

gants. The Supreme Court of the United States held unanimously in *United States v. Mendoza*²⁰ that decisions of district courts, and indeed courts of appeals, are not nationally binding. They are binding between the litigants but are not the same as statutes. That distinction is important.

The question then is whether the same limitation applies in cases decided by the Supreme Court. That is something on which a series of Presidents have spoken, but very few have acted. Thomas Jefferson was of the view that the power of constitutional review is exercised independently by each branch. He never really acted on his view. I believe, however, that he is correct in principle. The three branches need not agree. Congress may enact a law believing that a majority of the Court will hold it unconstitutional. This happened quite a lot during Franklin Roosevelt's first term. Members of Congress do not exceed constitutional limits when they act on the basis of views at variance with the Court's.

There is, finally, the question whether a President may disobey an order in the litigant's own case. In principle he must obey; this is what the "judicial Power of the United States" confides to courts. But is principle always to prevail? Suppose the Supreme Court of the United States does something absolutely wacky, and as President Lincoln did, the Chief Executive perceives the security of the Union at stake. It is his constitutional duty to save the Union. You will not catch me damning Abraham Lincoln. Saying that disobedience may be wise *in extremis* is, of course, extraordinarily different from saying that it ought to be done.

Like the United Kingdom, which has managed to get on without a constitution, the constitutional structure of this government has been worked out in practice. Judicial review was inferred from structure. If you look for the "judicial review clause" you find it is not there. It is inferred from structure. Many later commentators inferred it as Holmes and Hand did, out of the terror of the alternatives, which they perceived as chaos or dissolution of the Union. When those dangers of chaos or dissolution are present if there is obedience, it seems to me, the President must have the authority to reach an independent and contrasting decision. So in the end Lincoln could issue the Emancipation Proclamation, even if that meant freeing Dred Scott personally. But as I have emphasized several times, it must be quite extraordinary. We have seen these

20. 464 U.S. 154 (1984).

occasions very rarely in our history. One hopes they will be rarer still in the future.

QUESTION: Mr. Ross, if a bill was passed by both houses of Congress and signed by the President, and thereafter, a subsequent President believed the legislation unconstitutional, would the President, to correct the suspension of that statute, have to present a case or controversy to obtain judicial review?

ROSS: Not necessarily. Virtually all laws have impact. They are reaching beyond the confines of the governmental structure. There will be other people who will be affected when we can present to the Court their question of the constitutionality of the statutory provision. It then raises a further question which someone alluded to earlier. I might take a moment to address that question. Does the executive branch have an obligation, notwithstanding its current distaste or dislike of a constitutional question concerning a statutory provision, to defend it in court?

Some of you may be aware of what has become an ever increasing, and frankly rather troubling portion of the role of my office, which is to step into the breach, as it were, and to provide an official defense of the statutes that the executive branch is required to fend for before the courts. I say it is troubling, but actually, as you might imagine, it is probably the most joyful and most stimulating part of my job. But from the standpoint of governmental structure it is somewhat troubling.

I will give you one current example. There is a fifty-odd year old statute on the books covering the sale and advertising of beer and malt beverages. The statute prohibits the use and utilization of alcoholic content on either the label or in the advertising of such alcoholic products. The constitutionality of that statutory provision and its enforcement was challenged by a large beer manufacturer whose litigation is now pending. When the case was presented to the court, a determination was made by the Department of Justice that there was no reasonable, constitutional defense that could be offered on behalf of the statutory provision. The Department walked into court and conceded to the unconstitutionality of the statute. That is troubling, especially in light of the fact that several months later the Solicitor General, when it came to the court of appeals, said, "Well gee, it's my role to review the position of the United States in health litigation, and frankly I feel that not only are there reasonable defenses of constitutionality that can be offered, but that they are fairly easy to make." The United States, the executive branch, has now

stepped back into the case and has joined us in the defense of the constitutionality of the statute. The notion that a lawyer will be sitting in the Department of Justice and say, "Well gee, this statute works, defend it or not," is troubling and I think it is part of the question of the role of the executive branch in determining the constitutionality of statutes. People should consider it.