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## Lecture: 2013 Sumner Canary Memorial Lecture: The Courts and the Administrative State

Honorable Brett M. Kavanaugh

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# THE COURTS AND THE ADMINISTRATIVE STATE\*

*Honorable Brett M. Kavanaugh*†

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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.”<sup>1</sup> 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

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\* 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.

† 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).

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 rare<sup>2</sup>—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.’”

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2. On our court of appeals, only one other judge grew up in the Washington, D.C. area.

*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

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 delays<sup>3</sup> 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

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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].

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.

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!”<sup>4</sup> 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

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4. HENRY J. FRIENDLY, BENCHMARKS 202 (1967) (presenting Justice Frankfurter’s “threefold imperative to law students”).

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.<sup>5</sup> 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.<sup>6</sup> So what happens? How do you reach the

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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

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.<sup>7</sup> 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.<sup>8</sup>

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.”<sup>9</sup> 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.

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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).

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*.<sup>10</sup> 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.<sup>11</sup> The Supreme Court has that case now, and it will hear arguments this winter and decide it presumably in the spring.<sup>12</sup> But there have been

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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

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.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup>

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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.

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*<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> 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.”<sup>19</sup> The text matters, said Chief Justice Warren.

Another good example is the Court's 1983 decision in *INS v. Chadha*<sup>20</sup>—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.<sup>21</sup> 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.

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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.

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.<sup>22</sup> 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.”<sup>23</sup> 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.”<sup>24</sup> “[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.”<sup>25</sup> 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*,<sup>26</sup> 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.<sup>27</sup> So when

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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:

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.<sup>28</sup> Text matters.

I could go on. There are other—many other—separation of powers cases just like this: *Buckley v. Valeo*,<sup>29</sup> on the composition of the Federal Election Commission and how it was going to regulate campaign finance activities; *Bowsher v. Synar*;<sup>30</sup> the *Free Enterprise* case.<sup>31</sup> 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

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‘(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).

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*<sup>32</sup> in the 1950s to *Boumediene*,<sup>33</sup> the case about the Guantanamo detainees in 2008, has been involved in

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32. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

33. *Boumediene v. Bush*, 553 U.S. 723 (2008).

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.*<sup>34</sup> That's the lesson of the Supreme Court's 2006 decision in *Hamdan*<sup>35</sup>: *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.*<sup>36</sup>

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-

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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.”).

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.

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 QUESTIONS<sup>37</sup>

##### *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.

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37. Editor’s Note: Audience questions have been edited for clarity and grammar.

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.<sup>38</sup> 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.<sup>39</sup> First, the Supreme Court ruled

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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).

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.<sup>40</sup> They just said that federal courts can resolve it and then remanded it back to the lower courts to do so.<sup>41</sup> 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.<sup>42</sup>

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

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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.”).

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?<sup>43</sup>

**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.<sup>44</sup> 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

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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.”).

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.<sup>45</sup> 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.

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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).