



Illustrations by Taylor Callery

# ONE GOVERNMENT, THREE BRANCHES, FIVE CONTROVERSIES:

## Separation of Powers Under Presidents Bush and Obama

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

Several people called out the answer: Jerome Whitehead.

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

From the audience: Butch Lee.

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

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

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

By Hon. Brett M. Kavanaugh

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## War powers

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

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

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



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

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

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

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

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

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

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



Hon. Brett M. Kavanaugh

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

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

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

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



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

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

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

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

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

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

## Judicial appointments

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

## Executive branch treatment of statutes

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

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

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



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

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

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

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

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

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

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

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

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

And how do we answer that question?

What does history tell us; what does the text

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

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

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



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

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

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

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

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

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

## Statutory interpretation

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

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

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

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

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

## COMMENT

### In Defense of a Little Murkiness

by Paul D. Clement

In his Hallows Lecture, Judge Brett Kavanaugh bravely tackles five separation of powers controversies (six, if you count Dez Bryant's failure to "complete the process," but that was a controversy only in Texas). As he promised, he did not shy away from hard issues. His selection of topics was noteworthy in two respects.

First, statutory construction made his list. It is easy to think of separation of powers in terms of disputes between the president and Congress, with the courts sitting in judgment. But the courts' own rules about standing and statutory construction dictate the scope of the courts' power vis-à-vis the other branches and thus are a vital component of the separation of powers, as Judge Kavanaugh recognizes. We were all reminded of this by Justice Antonin Scalia, constantly while he was with us, and poignantly as we have reflected on his legacy. Justice Scalia scolded litigants for straying from the text and invoking legislative history because only the former complied with the Constitution's requirements of bicameralism and presentment, which give each political branch a distinct role in the lawmaking process. For Justice Scalia, statutory construction was all about the separation of powers.

Second, it is no accident that Judge Kavanaugh included at least one topic—the confirmation process—where disputes between the political branches are extremely unlikely to be definitively resolved by judicial opinions. As long as the presidency and the Senate majority are in the hands of different parties, the president and the Senate will dispute the exact contours of the president's power to appoint and the Senate's advice-and-consent function. But those differences will not find their way into a justiciable dispute brought by a litigant with Article III standing.

This is as the Framers designed it, and confirmation is hardly the only important separation of powers controversy of this type. Disputes over impeachment powers and procedures, the scope of the pardon power, the proper use of executive agreements versus treaties, and executive-branch testimony before Congress, to name a few, are unlikely to produce judicial opinions on the merits. Some issues are expressly deemed political questions (though this seems out of vogue with the current Court), and others are unlikely to produce a plaintiff capable of satisfying the courts' standing requirements (the current Court's preferred mechanism for winnowing disputes). Nonetheless, convention provides reasonably clear answers to some questions (Cabinet secretaries routinely appear before congressional committees, while assistants to the president resist). As to other questions, the contours remain murky.

Judge Kavanaugh generally prefers that the answers to separation of powers questions—the rules of the road, as he terms them—be clear. Yet it is not obvious that every question can or should be answered with the kind of clarity that a Supreme Court decision on the merits provides. Judge Kavanaugh distinguishes between the president's discretion to enforce statutes limiting presidential authority and those regulating private conduct. An earlier jurist who also had extensive executive-branch experience before joining the bench made a similar distinction. In *Marbury v. Madison* (1803), Chief Justice Marshall, fresh from his service as secretary of state, distinguished between cases implicating vested individual rights and "cases in which the Executive possesses a constitutional or legal discretion." Marshall viewed the latter as "only politically examinable," suggesting that sometimes the Framers expected and tolerated a little murkiness.

*Paul Clement is a partner at Kirkland & Ellis in Washington, D.C. He served as the solicitor general of the United States from 2005 to 2008.*



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

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

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

When the rules of the road are not agreed upon in advance, they have to be fought out in the crisis of a particular case, as will happen tomorrow in the Affordable Care Act case in the Supreme Court. If we can agree on the rules of the road in advance, we can narrow the grounds of

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

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



## Independent agencies

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

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

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



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

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

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

## Conclusion

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

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

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

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

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

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

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

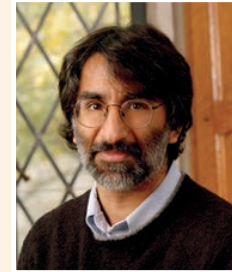
What unites us as Americans is far greater than what divides us. ■

## COMMENT

## Walking in the Long Shadow of Justice Jackson

by Akhil Reed Amar

There are many gold nuggets in my friend Brett Kavanaugh's engaging and enlightening Hallows Lecture. One that particularly caught my eye was his shout-out to Robert Jackson, a jurist who, like Kavanaugh himself, spent time working closely with a wartime president before taking the bench.



Perhaps Jackson's greatest opinion was his concurrence in the 1952 Youngstown steel seizure case. It is Jackson's concurrence, and not Hugo Black's faux majority opinion, that has come to be viewed over time as canonical in the field of separation of powers. Indeed, Kavanaugh himself expressly invokes the basic framework of this concurrence.

Black argued that in general a president could not seize private property far from a theater of active war, to settle a labor dispute, unless Congress affirmatively granted the president authority to do so. On Black's view, the text of the Constitution was clear: The president has only "executive" and not "legislative" power, and the power to take private property in the situation at hand fell exclusively to the legislature. The history of actual governmental practice in the years between 1789 and 1952 was largely irrelevant, said Black; he refused to credit the Truman administration's legal argument that various past presidents, with apparent congressional acquiescence, had in certain situations done things similar to what Truman was now doing.

To create the impression of a unified Court, Jackson purported to join Black's opinion; in fact, Jackson sharply disagreed with both Black's interpretive method and Black's central substantive conclusion, as Jackson made clear in his own separate concurring opinion. On method, Jackson explicitly condemned "the rigidity dictated by a doctrinaire textualism"—an obvious swipe at Black. Relatedly, Jackson suggested that the history of actual presidential practice and congressional reaction between the Founding and the Korean conflict—the history that Black dismissed out of hand—contained important insights about how best to construe the respective powers of the president and the Congress.

On substance, Jackson argued that Black had gone too far. There was no need to say, as Black had said, that a president must always have an affirmative congressional statute on his side to do what Truman had done. It was enough to decide the case, Jackson argued, to note that a congressional statute had in effect prohibited the very thing that Truman had done. When Congress had already clearly said "No," Truman could not act in contravention of Congress. But if Congress had merely been silent, then perhaps Truman might have prevailed, depending on various practical factors and settled customs.

Although I share Hugo Black's reverence for constitutional text, I confess that some issues cannot be resolved simply by textual analysis. The ultra-terse constitutional text of Article II must be supplemented by analysis of actual presidential practice, beginning with the practices of George Washington himself. Particular attention must be paid to how Congresses and presidents over the years have worked things out between themselves, thereby glossing ambiguous patches of constitutional text with institutional settlements among the very branches of government to which and about which the texts speak, albeit imprecisely.

And this is exactly the analysis that Jackson's Youngstown concurrence provided, canvassing the practices of prior presidents and Congresses. This was just the sort of thing that one would wish for from an outstanding attorney general experienced at advising the president himself about the proper scope of presidential power—and just the sort of thing that might have exceeded the skill set and the knowledge base of a jurist who had never advised a president day after day and face to face about high matters of law and statecraft.

Jackson's Youngstown concurrence repeatedly called attention to his own past professional life. His opening words reminded his audience that he had served "as legal adviser to a President in a time of transition and anxiety," an experience that, he candidly confessed, was probably "a more realistic influence" on his view of the case than anything else, including the Court's prior case law. From his unique vantage point, judicial precedent was not the be-all and end-all that some blinkered lifetime judicialized folk might imagine it to be. "Conventional materials of judicial decision . . . seem unduly to accentuate doctrine and legal fiction." Later passages echoed this opening theme, with additional and obviously autobiographical references to "executive advisers" and "presidential advisers."

Jackson took pains to stress that he was not bound as a justice to endorse all the things he might have previously argued as the president's lawyer. "A judge cannot accept self-serving press statements of the attorney for one of the interested parties [i.e., the president] as authority in answering a constitutional question, even if the advocate was himself." Once a pol (or a pol's mouthpiece), but now a judge. Black robes and life tenure freed Jackson to act in a judicial fashion even though he had not been entirely free to do so in some of his earlier assignments. In all these openly autobiographical musings by Jackson, we see that one of the most canonical decisions of all time was greatly and self-consciously enriched by the non-judicial experience that one of its notable members brought to the bench.

Our current chief justice, John Roberts, directly descends from Jackson, insofar as Roberts clerked for William Rehnquist who in turn had clerked for Jackson. And like Jackson, Roberts brought to the Court years of service as a lawyer within the executive branch.

Now consider the biggest judicial decision of John Roberts's career—his decision in the 2012 case of *NFIB v. Sebelius* to provide the decisive fifth vote to uphold the Affordable Care Act as a simple exercise of the sweeping congressional power to raise revenue. The act is among other things a tax law, and the Constitution was emphatically adopted and later pointedly amended to give Congress sweeping tax power. None of the other conservative justices credited this basic point, but Roberts did.

One reason that John Roberts may have been more able to see this basic point is that he had spent more time than had any of the other conservatives in executive-branch positions in which the tax power was highly relevant. Anthony Kennedy, the current justice who exudes the most confidence in the judiciary itself in his voice and votes, never worked in the federal executive branch, or in Congress, for that matter. Before joining the Court, Clarence Thomas had executive-branch experience only in matters far removed from the federal fisc. Both Samuel Alito and Antonin Scalia did have wider experience within the executive branch. But neither of them had anything close to John Roberts's many years of experience operating at a moderately high (albeit subcabinet) level within the executive branch, dealing with a very broad range of complex federal laws raising revenue and regulating the economy.

I doubt that Robert Jackson would agree with everything that his grand-clerk wrote in the defining opinion of his still-young career as chief. But John Roberts did reach the right legal result in this key case. And he did so, I suspect, thanks in part to his own executive-branch experience; and he did so even though the party that had put him on the Court was none too pleased with this act of judicial integrity. Somewhere, Robert Jackson is smiling.

*Akhil Reed Amar is Sterling Professor of Law and Political Science at Yale University. Some of the themes sketched herein are explored at greater length in his 2015 book, The Law of the Land.*



# RACE AND SENTENCING

IN WISCONSIN CRIMINAL COURTS —  
A PRELIMINARY INQUIRY



Illustration by Richard Mia