University of Dayton Law Review

Volume 43 | Number 1 Article 3

1-1-2018

Federalism: Deference Meets Delegation: Which Is the Most Dangerous Branch

C. Boyden Gray

David B. Rivkin Jr.

John C. Eastman
Chapman University

Brett Kavanaugh

FEDERALISM: DEFERENCE MEETS DELEGATION: WHICH IS THE MOST DANGEROUS BRANCH?

The following is a transcript of a 2016 Federalist Society panel entitled Federalism: Deference Meets Delegation: Which is the Most Dangerous Branch?. The panel originally occurred on November 12, 2015 during the National Lawyers Convention in Washington, D.C. The panelists were: C. Boyden Gray, Attorney at Boyden, Gray and Associates and former U.S. Ambassador to the European Union; David B. Rivkin Jr., Partner at BakerHostetler; Neal K. Katyal, Attorney at Hogan Lovells and former acting U.S. Solicitor General; and John C. Eastman, Henry Salvatori Professor of Law & Community Service at Chapman University School of Law. The moderator was the Honorable Judge Brett Kavanaugh of the U.S.

[RECORDING BEGINS]

Prof. John C. Eastman: My name is John Eastman. I am the Chairman of the Federalism and Separation of Powers Practice Group, I have the distinct honor today to introduce our moderator, who is then going to turn around and introduce me as well as the other panelists, but that's okay. Before we do that, a couple of business matters for the practice group. This is the Federalism and Separation of Powers Practice Group. It's become an intensely important practice group, as it always has been. If you are interested in more than just attending our breakout sessions at the convention every year and becoming involved in the practice group, make sure you sign up for it. If you're interested in joining the Executive Committee and taking on that added layer of responsibility and work, we'd welcome your inquiry. Send it to me or to Dean Reuter or to Juli Nix, and we'll be happy to try and tap you into some of the work we're doing at that level as well.

And then I'm also asked to remind you that we have the Federalist Society blog, and that's a great opportunity for many of you that might want to write about particular things, to talk about federalism or separation of powers issues from this practice group's perspective. Do so. That's a whole table out in the promenade where you can look and find out how to go about doing that.

So, with that out of the way, let me introduce Circuit Judge Brett Kavanaugh. He is a double Yalie, but we won't hold that against him much. He's also a double court of appeals clerk with Judge Stapleton on the Third

Circuit before going out to California with Judge Kozinski on the Ninth Circuit, all of that as a precursor to his clerkship with Justice Kennedy. I got to know him well when he was at Kirkland & Ellis, where I worked briefly, and he, of course, worked with Judge Starr there and in other activities of note. He's been on the D.C. Circuit since 2006. While the court has, in many ways, changed under his feet, he's going to moderate this panel on delegation and deference today. Judge Kavanaugh, thanks for being with us.

Judge Brett Kavanaugh: Thank you, John. Welcome, everyone, to the Federalist Society panel, "Deference Meets Delegation: Which is the Most Dangerous Branch?" Scary title. Interesting topic. Thank you to the Federalist Society, as always, for yet another spectacular national convention with so many great panels and for hosting this particular panel as well.

We have an extraordinary group gathered here. I'll briefly introduce everyone in the order they'll speak, and then they'll speak for a few minutes. We will then have some dialogue and questions after that. Boyden Gray is the founding partner of Boyden Gray & Associates and has served in a variety of important capacities in the executive branch, including: counsel to President George H.W. Bush and counsel to Vice President Bush before that. Under President George W. Bush, he was Ambassador to the European Union, and I know that was an easy task to represent the second Bush administration at the European Union. Mr. Gray is one of the nation's leading experts on administrative law and the separation of powers, and we're honored to have him here with us today.

David Rivkin is a partner of Baker Hostetler, and he has extensive experience in constitutional, administrative, and international litigation. Among many other matters, he was deeply involved in the Affordable Care Act litigation, but also involved in a lot of significant national security litigation over the last several years. He's a deep thinker and an excellent litigator, combining the very best of theory and practice, and we appreciate him for being here, as well.

Neal Katyal is a partner at Hogan Lovells, a truly superb Supreme Court and appellate litigator. He was Principal Deputy Solicitor General and Acting Solicitor General in the Obama administration. He's argued 26 cases before the Supreme Court, and he's been a professor for decades at Georgetown Law School. As an advocate and as a government official, he's been intimately and thoughtfully involved in numerous critical separation of powers cases, and we welcome him here today as well.

John Eastman, of course, apart from running this practice group, is a professor of law and former dean at Chapman University Flower School of Law. He's the founding director of the Center for Constitutional

Interpretation, which is a public interest law firm affiliated with the Claremont Institute. He's long been an influential scholar on the Constitution and administrative law, and we're grateful to him for being on this panel today.

So, our topic today focuses on a phenomenon that is not new but that seems to be receiving newfound attention in the academy and in the courts, including the Supreme Court. We see broad delegations from Congress to agencies to make rules and to exercise discretion, delegations both to executive agencies and to independent agencies. At the same time, as we know, courts traditionally give significant deference to agencies and how they interpret at least ambiguous statutory provisions and how they exercise their discretion. The combination means, at least in some people's view, that agencies are exercising enormous power without sufficient oversight. We see concerns about this at the Supreme Court: the Chief Justice's various opinions, including his majority opinion in King v. Burwell[1], which introduced a new potential wrinkle on Chevron[2] deference; cases such as Michigan v. EPA[3], which I know Mr. Gray will talk about; and in a series of separate opinions by Justice Thomas last year in which he questioned some of the foundations of our modern administrative law jurisprudence.

Are these real problems? If so, how do we fix them? Where are we headed more generally in administrative law and the separation of powers? Boyden Gray will get us started.

C. Boyden Gray: Well, thank you, Judge, for that introduction. It is true that being in Europe representing the United States was difficult. It still is difficult, maybe worse. You missed one little title I had, which was Special Envoy to Europe for Eurasian Energy Affairs. That was to try to get more gas in from the Caspian so that the Russians wouldn't be so dominant, and, of course, I was a total failure at that. But, it did allow me to be invited on my last night in Brussels, when I was packing up and couldn't go, to British General Leakey's dinner. He was head of the European Defense Force, and he had a dinner, and it might strike you as a little odd. There really is no European Defense Force. But, he commanded a chef and a house and a staff. And he sent me, very kindly, a guest list to try to entice me to forget my packing and join him for dinner, and I was identified as "C. Boyden Gray, U.S. Special Convoy." So, I don't know what the Europeans think about me.

Delegation and deference, they have different origins, but they converged, over the last couple of decades, to have a toxic mix of just open-ended carpet, red carpet, for the agencies to do whatever they want. When I

[1] King v. Burwell, 135 S. Ct. 2480, 192 L. Ed. 2d 483 (2015).
[2] Chevron v. NRDC, Inc., 467 U.S. 837, 865–66 (1984).
[3] Michigan v. EPA, 576 U. S. 135 S. Ct. 2699 (2015).

first came to Washington, a delegation wasn't that much of a problem, the over-delegation without any kind of instructive detail. There actually used to be conference committees and the committee system worked. Predictably, the House usually won hands down over the Senate because there were four times as many of them, and they knew four times as much. So, in those days, it was okay, and indeed, even in the 1990 Clean Air Act[4] amendments, Dingell wouldn't permit the agency to make up what the limits were on pollution. He put it in the statute. Every single grant per mile, every single number was actually in the statute.[5] I think it infuriated EPA, but they had to follow orders, and things went much more smoothly under that rubric. But adding climate change, which is something he certainly felt he didn't do, to EPA's agenda has really opened up an extraordinary avenue for mischief.

Now, there are many causes for why delegation got out of hand. Of course, the last case that really punished it, Schechter[6], was a long time ago, and Cass Sunstein is famous for saying, "[nondelegation] had one good year, and 211 bad ones."[7] But, there has been a nondelegation canon developed that he's written about where the courts have sort of taken a little more active role in narrowing the statute to avoid constitutional problems. There are lots of theories for why Congress has just let loose. One of them is, well, they get more credit for having done things but no responsibility for any mistakes. That's part of it. Sort of a reverse theory, Neomi Rao has written about[8]—and others—that it's a way for congressmen to go in and get special rents, that is, campaign contributions, by trying to fix ambiguities that should have been done in committee but weren't, and so the congressmen go out and tell their constituents or anybody who is willing to pay them, to fix things in sort of secrecy.

One answer to that, which sort of proves the validity of some of that, is when Bush 41's slide was occurring, which is written about in the new book, when he went from 90 percent approval down to 35 or something. One of the things that we talked about doing was implementing the same logging requirements that required businesses, EPA, OMB, FDA or whatever, to disclose meetings. Why not make the same requirement applicable to a congressional office? Well, that suggestion went around the White House, and it wasn't three minutes before Dan Quayle was in my office screaming at me, and so, of course, it was quickly dropped. But, that sort of proves the point, I think. And, of course, the White House was engaging in the same thing. They were going to their favorite congressman to get things done that the rules wouldn't permit because we're not supposed to talk to agencies

[4] CLEAN AIR ACT, 42 U.S.C. § 7401 (2012).
[5] *Id.*
[6] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 508 (1935).
[7] Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000).
[8] Neomi Rao, Collusion: How Delegation Diminishes the Collective Congress, 90 N.Y.U. L. REV. 1463 (2015).

except through the Department of Justice. As sort of a minor form of regulatory favoritism, it sounds like an earmark, sort of a regulatory earmark, and a little bit of legislative veto, which is illicit. There are lots of theories. Congress just kind of got goofy.

And one final explanation is that they had to spend so much time raising money that they no longer could study up and really understand what they're doing when they're actually in a committee room. I don't know how to weigh all these measures or whether that's relevant at all, but Congress did let loose. And it converges with the delegation doctrine, which was kind of ignored as much as it was applied in the early years, but then you combine it with this broader and broader delegation, with less and less instruction, and Chevron got really embedded, and then the agencies were really off to the races.

Now, the awakening started with a case called American Trucking,[9] which seemed like a long time ago, and people thought it was lost because the private sector tried to argue that the limiting factor would be cost-benefit analysis imposed on or undertaken by the agency on itself. However, Justice Scalia said you don't hide elephants in mouse holes[10], and you can't do cost-benefit analysis for erecting a criteria standard under the Clean Air Act,[11] although you can when you apply it at the state level. But, he nevertheless narrowed the statute because the Solicitor General was terrified and made arguments in the Supreme Court, which Scalia picked up on, implying that a standard has to be necessary, which actually was in the transcript. It was in the oral argument, not in any of the briefs. And then he said—and this has sort of been forgotten—"The means that you have to be addressing a substantial risk," which actually is risk, cost-benefit, in the back door, and then he said, "[w]hen it comes to nondelegation, we decide what the statute means, not the agency. We don't defer to the agency on what it's doing." So that was sort of the first opening.

And we know now—Judge Kavanaugh just went through—that Burwell, Brown & Williamson, are opening up another avenue, which are big issues. Now, it's not clear what all that means, but we know from the recent decisions on immigration that this question of deference, and big issues, and the judge making decisions is a big part of that decision and a big bone of contention between the majority and the dissent, and the dissent arguing that, well, you know, this immigration issue isn't all that big an issue. And so, we're going to see how this plays out in the future.

The cost-benefit issue has come back into vogue again with the

---

[9] Am. Trucking Association v. EPA, 175 F.3d 1027 (D. C. Cir. 1999).
[10] Whitman v. American Trucking Associations, Inc., 531 U.S. 457, 463 (2001).
[11] CLEAN AIR ACT, 42 U.S.C. § 7401 (2012).

Michigan[12] case, especially, and Justice Scalia saying, not only was there an issue—technically, the issue was "Was the word 'appropriate' broad enough to encompass cost consideration?" as he says, yes. But, then he also says, indeed, if you have such a mismatch as here, $6 billion in cost and $6 million in benefits, roughly—Susan, you can correct me on that. Susan Dudley is here to watch me on the numbers and other things – if you have that kind of mismatch, this might just be considered arbitrary and capricious, whether or not the statute has a standard like cost-benefit or like "appropriate."

There are other cases where this has been used, of course, SEC v. Business Roundtable.[13] There was a cost-benefit consideration provision embedded in the statute at issue in that case, but still, it showed that a court could easily deal with these issues without causing undue delay in rulemaking. And, indeed, it really sent terror through the hearts of all of the independent agencies. So there are other cases. There is the UR[14] case, the absurd results case, where EPA decided that 100 tons really meant 75,000 tons, which is quite a stretch, and reserved the right to go from 75,000 tons back down to 100 on its own schedule, at its own leisure, at its own pace, with nobody to check it. No courts could do anything. Congress couldn't do anything, and Justice Scalia delivered his famous line—to me, famous—"We are not willing to stand on the dock and wave goodbye as EPA embarks on this multiyear voyage of discovery."[15]

And so I think that sort of captures the tone of where the courts are now. They're on to this. American Trucking[16] was the first. I think Dodd-Frank[17] and the recess appointments sort of triggered the second sort of "Wait a minute. Wait a minute." There was the peekaboo case, of course, about double installation of executive branch oversight. Dodd-Frank[18] comes along, and the Consumer Protection [Financial] Bureau has no oversight from any branch, including the nonexistent branch of the Federal Reserve, which pays its bills but can't say anything to them about anything, even how much money they pay their people. And, of course, they steal people from the Fed because they can pay more than the Fed can with the Fed's money, which is very cute.

So, on that note, I will end. I think we're headed in a good direction. There's a lot more that needs to be done. Congress needs to wake up. We need to get back to the committee structure, but I think the courts are on to this, and in short term, that's not going to be a bad thing.

---

[12] Michigan v. EPA, 576 U. S. 2699 (2015).
[13] Bus. Roundtable v. SEC, 647 F.3d 1144 (2011).
[14] Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 2427 (2014).
[15] *Id.* at 2446.
[16] Am. Trucking Ass'ns v. Scheiner, 483 U.S. 266 (1987).
[17] DODD FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT, 12 U.S.C. § 1209(b) (2010).
[18] *Id.*

David B. Rivkin Jr.: Challenging for one's balance. Well, thanks to the Federalist Society for inviting me. It's a special pleasure to follow Boyden, for whom I had the privilege to work for a number of years and one of the best years in my professional life. I will try to go a little broader and link the dysfunction in horizontal separation of powers area to federalism, which the word "federalism" is in our panel description, so I feel entitled.

Let me begin somewhat dramatically by positing that we live in a time of crisis. That besetting the Constitution separation-of-powers architecture, lots and lots of authority has been transferred from Article I[19] to Article II[20], with very few instructions on how it is to be exercised. The problem has been exacerbated by Article III[21] that employs what I at least would consider excessive deference when reviewing executive branch actions pursuant to the teaching of such cases as Chevron[22], Seminole Rock[23], and Auer.[24] Those voluntary transfers of power aside, the executive branch, particularly under this administration, has seen fit to aggrandize itself at the expense of Congress, partaking both of legislative power and the power of a purse about, I'm sorry to say, much off the institutional resistance from Congress.

Now, Boyden Gray mentioned some of the reasons for this congressional acquiescence. I would add another one to the list. I think that institutional loyalty that the Framers expected to be one of the key aspects of the key components of the political checks and balances has been largely supplanted by partisan loyalties. It's no longer, "where you sit is where you stand," and that's why, of late, we see at least one parting Congress—I'll be slightly euphemistic—not only acquiesce to the President's grabs of power, but seem to be applauding it with much gusto.

Another problem that has greatly weakened Article I[25] is the application of power of the purse because of a filibuster rule in the Senate. For many, many years, congressional majorities have been unable, ladies and gentlemen, to present discrete appropriations bills to the President; instead, sending an omnibus continuing resolution, which entails the possibility of government shutdown and dramatically reshape the political balance between the two branches. I wouldn't be telling you anything new if I were to say that this has enabled the President to prevail pretty much in most of the budgetary battles, whether it's the overall spending issue, the appropriation riders, or

---

[19] U.S. CONST. art. I.
[20] *Id.* at art. II.
[21] *Id.* at art. III.
[22] Chevron v. NRDC., 467 U.S. 837 (1984).
[23] Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945).
[24] *See* Auer v. Robbins, 519 U.S. 452 (1997).
[25] U.S. CONST. art. I.

even the debt ceiling. Not content with all that, we have seen a great panoply of power we have seen in at least one instance, which is at the heart of a House lawsuit—and I'm glad to say survived motion to dismiss—where the Obama administration has withdrawn money from Treasury, not in consequence of appropriations, to fund a particular insurance subsidy. If the rumors that the President is going to close Guantanamo by executive order are to be credited, we are going to see it again, given the fact that there is a clear appropriations language that bars the transfer of any individuals from GITMO to the United States. So, my bottom line is that Article I is in decline, and Article II is ascendant.

Now, I would next argue that because of a seamless nature of the separation of powers architecture, violations of horizontal separation of powers very, very often translate into violations of political separation of powers. This is particularly the case in the domestic sphere. The reasons for it are fairly obvious. Congress, despite all the capacious interpretations of the commerce clause and various other enumerated authorities in Article I, still doesn't have the power to do everything it wants, both constitutionally and institutionally; so, it needs the cooperation of states, and even when it's using its enumerated power, it cannot do it in a way that's coercive or commandeering. So, Congress has to walk a fine line and appear to be respectful, at least appear to be respectful of states' prerogatives and the statutes that are enacted. There are all sorts of protections for the states. In instances where Congress preempts—and Congress often does—either field preemption-wise or conflict preemption-wise, there is at least an assumption that the federal government will be acting responsibly in implementing its authority in the areas where it's taken preemption.

So, you would think that there are lots of protections for the states if Article II were to follow exactly what the statutes provide. Unfortunately, it often does not, and then the executive overreaches at the expense of Congress. It almost exclusively—invariably—not always, but almost invariably, intrudes in matters that aggrieve the states. Immigration policy, briefly, is a perfect example of how it works. Arizona v. United States held that the federal immigration law, INA, occupies the field, and whatever you think about the opinion—and I think that Justice Scalia's dissent has much to recommend—at least it affirmed the areas of responsibility and said the federal government is responsible for the enforcement of federal immigration law, and the states, of course, have a right to expect that this enforcement, subject to resource limitations, of course, would be carried out responsibly.[26] Unfortunately, when the President suspends deportations, he creates new categorical exceptions. Then they're not supported by the statutory language of INA. He upsets this bargain. And we do know the states bear the costs for

[26] Arizona v. United States, 567 U.S. 387, 394, 416 (2012).

overreaching. The most obvious, of course, is the fiscal cost in issuing the case. That was, sort of, the pronounced basis for state standing in the case that Boyd mentioned—the preliminary injunction there was upheld by the panel of the Fifth Circuit. Frankly, what's more interesting to me is not just the fiscal cost, but what I call "injury to quasi-sovereign indignity," because if you think for a second, ladies and gentlemen, while all states live in the shadow of the supremacy clause, the Constitution has provided states with a set of tools to deal with this problem by giving them an opportunity to shape preemptive legislation, delay it or defeat it outright. This has happened many times in our history. The problem is that none of this stuff works when the statute is being rewritten by the President. You cannot deploy your congressional delegations, and given the extent to which the Senate is no longer as much of the citadel of state powers it used to be prior to the 17th Amendment,[27] it's not relevant at all if you do the executive rewriting. So the states get harmed. They can litigate. Tough process, but they've done that and have done well, so far.

Let me just briefly mention, before I switch the solution to another example, you would think that the President overreaches in foreign policy — how can it possibly harm the states? I'll give you one example, and that's the recent Iranian deal. Perfect example. It first trenches in the power of the Senate. It was done by executive agreement, rather than by a treaty, but it also is being implemented by the administration. Then it comes to the waiver of the federal statutory sanctions in a way that violates a statute that Congress enacted in trying to play ball a little bit with the administration. It hurt them because they're doing that. I would argue their waiver of federal sanctions as to come would be unlawful, and the way it impacts the states, because in teaching such cases as Gary, Mandy, and Crosby,[28] the way in which the states can operate in this area, in which the states can have sanctions of their own, very much depends, ladies and gentlemen, on what is the proper federal foreign policy baseline. So, again, the Iranian deal is a perfect example of how the horizontal and vertical separation of powers align.

Let me just spend a couple of minutes talking about how do we try to revitalize the separation of powers. Well, first and foremost, we should try to bring into sharp focus the separation of powers deficit and not do it only for such fun discussions or litigation, as much as we all like it. I would argue that the case has to be pressed vigorously to American people, and they have to be told, "Look, it's not some archaic construct from the 18th century. Separation of powers is the first line of defense for individual liberty."

We also need to try to gently nudge Article II to be more vigorous in defending its institutional prerogatives. It would require fewer delegations of

[27] U.S. CONST. amend. XVII.

[28] *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 367 (2000).

authority in the future, maybe taking back some that have been made improvidently. To the extent any new delegations take place, they have to be more precisely drafted. I know Boyd and I both know from working on the Clean Air Act and a few other things, the difficulty to get Congress to draft precisely, but we should try. I would also argue, at the risk of being pelted with unpleasant things by fellow administrative law practitioners, that it would be nice if Congress would walk back Chevron[29], Seminole Rock[30], and Auer[31] deference. There's nothing sacred about it. Congress can do that, walk them back. Of course, the courts would revert back to the Skidmore-anchored approach[32] quite easily. I can at least not think of any reasons it cannot be done. Congress should consider, maybe cabinet, the current exemption from APA[33] notice and common requirements for interpretive rules. I wouldn't say we should get rid of interpretive rules entirely. That would be too much of a stretch, but maybe we should say that any rules, interpretive rules enacted about notice and comment procedures, should have no power review-wise but the power to persuade.

Now, Article III[34], very respectfully, also has a role to play in revitalizing separation of powers. That would require the courts to be more hospitable standing-wise to the ability of Article I. Proper institutional authorization demonstrating or pleading illegally recognizable institutional injury to grandstanding is necessary. My hope that this process is already under way via a House lawsuit, which has already survived a motion to dismiss, and I have every confidence that it would prevail on a motion for summary judgment. But, of course, that issue really has to be resolved at the Supreme Court level.

When it comes to deference, quite aside from what Congress can do walking back Chevron[35], Seminole Rock[36], and Auer[37], Article III can do something on its own. I would not repeat what Borden said relative to King v. Burwell[38], another example. My personal bugaboo is I think that Article III should be a little bit more generous with state requests, particularly if it can be demonstrated that what's taking place is injuring the quasi-sovereign interest of states because it is a kind of irreparable injury that's really irreparable almost on a day-to-day basis.

Now, last point, at the risk of sounding naïve, Article II should also

---

[29] *See* Chevron v. NRDC., 467 U.S. 837, 866 (1984).
[30] *See* Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 418 (1945).
[31] *See* Auer v. Robbins, 519 U.S. 452 (1997).
[32] *See* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).
[33] ADMINISTRATIVE PROCEDURE ACT, Title 5 U.S.C. § 500 (2012).
[34] U.S. CONST. art. III.
[35] Chevron v. NRDC, 467 U.S. 837, (1984).
[36] Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).
[37] Auer v. Robbins, 519 U.S. 452 (1997).
[38] King v. Burwell, 135 S. Ct. 2480 (2015).

seek to restore separation of powers by exercising self-restraint. Self-restraint is not an easy version to practice, but I'm hopeful if enough judicial pummeling is inflicted for the worst violations of separation of powers and if the broader political debate yields some results, which is to say, public opinion turned against those types of behaviors, the exercise of self-restraint on the part of Article II might be, at least, something worth talking about. Thank you.

Neal K. Katyal: Thank you. It's lovely to be here at the Federalist Society with all of you. I love this event, and it's a particular delight to be here on a panel with folks that I clerked with, litigated with, learned from, and the like, and it's a particular one to be here today with my law school mentor in the front row, Akhil Amar. You know, I arrived at law school in 1992 as your typical knee-jerk liberal, and I thought, "What the heck would I learn from the Federalist Society?" And it was actually Akhil who said, "You know, you should go to these meetings and learn what they have to say," and it's been a profoundly great experience, one of the great joys to learn from all of you at Akhil's suggestion, so thank you for that.

So the question on the panel is "What is the most dangerous branch?" I have been doing this conference for a long time, at least a decade, and a decade ago, I think the answer to that question for many folks in this room was a little bit different. The most dangerous branch was Congress, and then the folks on the other side would have said, "No. The most dangerous branch is the President, President Bush doing all of this unilateral stuff." Certainly, there's inconsistencies on both sides after 2009. Now it's, of course, people of my party saying, "Oh, no. The most dangerous branch is that other one that they said was bad in 2006, Congress. Now that's the one that's dangerous for the left and for the political right, the most dangerous one is the President." And so, we've seen a little bit of flip-flopping, and that's true among all sides of this.

And there's a bit of flip-flopping about how much separation of powers do we really want. Democrats in 2006 said, "We want a lot of separation of powers, got to check this President," and obviously, others in the administration said something different. And it's because of that inconsistency, it seems to me, that government is actually starting to devise mechanisms to deal with this problem.

I think David hinted at part of the problem, which is Madisonian separation of powers was written really without a party structure in mind, and so, you get this inconsistency arising because people are voting on the basis of party and either exercising too much checking or too little checking, depending on who's in power.

So, to answer Judge Kavanaugh's question at the outset, "is this a real problem?," it does seem to me that there is a real problem here. I do think that David and Boyden are exactly right to say that executive power has been increasing historically over time, and then the question is what to do about it. Well, Boyden's answer is, in part, he says, toward those ends, "Look, courts may be doing something here. There's reason to be optimistic." And more colorfully always, as David is, he says, "There's judicial pummeling that may happen that will lead, hopefully, to the executive branch exercising self-restraint." And maybe those things will happen.

I want to suggest there's a different way, a different technique that we are starting to see emerge in the government, and that is internal separation of powers, checking the executive branch from within, precisely because Madisonian separation of powers doesn't work well in a party system and precisely because sometimes Congress can't exercise enough control or constraint, either because of the lack of the committee structures or because, frankly, they're too distracted or because agencies and presidents sometimes can do stuff below the radar. And it's very difficult for Congress to come in and use its oversight or legislative responsibilities to check it in time.

And so, I do think government is starting to devise second-best solutions to this problem because Madisonian separation of powers isn't working so well. I think they're starting to see bureaucratic rivalry develop in what I call "internal separation of powers," which is the idea that you situate agencies so that they check one another, so that State and Defense are a classic example. David referred to the aphorism about where you stand in Washington is a function of where you sit, and that's the basic idea that you can have Colin Powell, who is different when he's at JCS than he is as Secretary of State: same person, but very different substantive views because he's under a different agency structure, inheriting a certain kind of bureaucratic mission of an agency in one way. And you can set the agencies to be rivalrous with one another and attack one another in ways that I think will do a little bit of the checking or perhaps even more than a little bit of the checking.

Now, I think in the academy, the debate about the unitary executive—I do believe that that's the right way of thinking about executive power, but I do think that that's obscured this question because that is a view that sometimes is understood as saying, "Oh, the President must control all this. These agencies are irrelevant. It's up to the President." I certainly think it's right. These decisions, all these executive branch decisions, are up to the President. The question is, how do you structure inputs to the President? And if the President is doing it at the front end as opposed to the back end, if he's saying, "Look, here is the kind of answer I want," I don't think you get the kind of debate and discussion in the executive branch as you would if you

empower the agencies to first create the inputs without fear of reprisal and then tee that up ultimately to the executive branch for approval.

And so, here, my model is one that I saw in the Solicitor General's office. People can criticize the Justice Department for all sorts of things, but here is a process that I thought worked exceptionally well. When certiorari was granted in a case, any agency with a substantive view could write a memo to the Solicitor General saying, "Here is what I think would happen," and sometimes we had up to two dozen memos from all the different agencies saying what would happen. And there was no stovepiping: You couldn't send your memo secretly to the Solicitor General if you were at HHS or something like that. You had to send it around to everyone, and then they'd write their memos and have to send it around to everyone, and you'd have all sorts of back and forth among the agencies about who is right and who is wrong and so on. And then you'd have a long meeting where all of this gets hashed out, and ultimately, a decision gets teed up for the Solicitor General to make and then depending on different administrations do it differently, how much White House involvement there would be after that point. But the process was designed to basically be free from any political involvement at the front end, in order to try and get the best inputs into that structure in a better decision-making process.

Now, I think that's true in government more generally, and you can start to have those kind of rivalries between agencies, but I think the coolest thing happening in the last 15, 20 years, is the rise of this internal checking function within a single agency. So take, for example, what happens the day after 9/11 at the CIA. What happens the next day is Tenet goes to his senior staff and exclaims, "I want to have, effectively, a red cell created, a group of people who are contrarians who are basically designed to say, 'Here is what we really should be doing,' outside of the regular structure of the agency.'" And those intelligence products, there's actually an article in Foreign Policy magazine just last week about it, those intelligence products turn out to be extremely good, so much so that President George W. Bush reads them all, according to the Foreign Policy article.

So you could have a structure like that within an agency to try and seed some dissent, to try and incorporate the idea that Madison had, which is we don't want government to all think alike. We want them to actually be against each other at various times in ways that is often helpful. The State Department has done this for years with its dissent channel, the idea that anyone can write a cable to Washington, to the Office of Policy Planning if they feel that there's a certain problem, and try and get senior-level attention to a problem that they see. These are different techniques that I think are already in the executive branch. I think you could think about this more instead of just always turning to courts. For example, some people in my

party want drone-strike courts, courts to oversee drone strikes. I think you could imagine, for example, standing courts within the executive branch, internal courts in which arguments would be made in highly classified settings. You could do the same thing for surveillance, FISA techniques and the like, but trying to basically empower individuals to disagree with the bureaucracy from within and not just rely on political parties and Congress, which doesn't work so well, and courts, which are, after all, generalists. And we obviously have great judges serving on the courts, but they're generalists and oftentimes can't second-guess the executive, particularly in big matters of national security.

And so, I think, we have focused too much for the last 15 years on what substantive limits should there be on executive power. Instead, I am making a plea that we think about process a little more and think about how we could situate a structure in the executive branch that would institutionalize some of the dissent that Madison celebrated for all sorts of just reasons, so thanks.

John C. Eastman: Thanks, Neal. Thanks, everybody. I think we have to give some credit where credit is due. I am reminded of a story after the November 2012 election going in to buy some ammunition from my local gun store, and up on the wall there was a picture of President Obama as Salesman of the Month. I won't say any more about that, but it seems to me something similar is going on here. We've been in a slow boil of complacence toward this administrative overreach for about three-quarters of a century, and the elevation of what is happening now, I think, has finally caught our attention because it's happening in not just a couple of places. It's happening in every agency on everything great and small, from major immigration policy changes to things as relatively minor as renaming Mount McKinley to Mount Denali in Alaska.[39] All of these things are being done by agencies with barely a pretext or pretext read of authority in any statute.

And I think the aggressiveness with which this is going on has brought it to our attention, so much so that there's a trilogy of opinions by Justice Thomas last year that I commend to all of your attention. They're not the kind of cases that we would normally read in federalism and separation of powers. They deal with mortgage banking. They deal with Amtrak running. They deal with EPA, all the things that would normally be addressed by different practice groups here, but I think they're extraordinary in their confluence of thought in raising these issues.

[39] Julie Hirschfeld Davis, *Mount McKinley Will Again Be Called Denali*, N.Y. TIMES (Aug. 30, 2015), https://www.nytimes.com/2015/08/31/us/mount-mckinley-will-be-renamed-denali.html?mcubz=0.

In Perez v. Mortgage Bankers,[40] for example, he says, "[t]hese cases call into question the legitimacy of our precedents requiring deference to administrative interpretations of regulations" challenging the whole notion of Auer deference, something that Justice Scalia the author of the opinion in Auer[41] ends up agreeing with.

Justice Thomas goes on in the Amtrak case, "We have come to a strange place in our separation-of-powers jurisprudence. Confronted with a statute that authorizes a putatively private market participant to work hand-in-hand with an executive agency to craft rules that have the force and effect of law, our primary question –indeed, the primary question the parties ask us to answer— is whether [Amtrak] is subject to an adequate measure of control by the Federal Government. We never even glance at the Constitution to see what it says about how this authority must be exercised and by whom[,]" raising for the first time in my memory, a real serious effort of reviving the nondelegation doctrine.[42]

I mean, I teach in my constitutional law class, Schechter Poultry.[43] I don't think it's well taught in our law schools generally because most people have thought this doctrine was long dead. In fact, I get just ordinary citizens coming up to me all the time and say, "You know, I'm not a lawyer, so I really don't know much about what the Constitution says," and I think about that comment, how extraordinarily different that view of the Constitution is from what our Founders had. I mean, the language in Article I, Section 1—I mean, it's not buried deep into the bowels of this thing—"All legislative Powers herein granted shall be vested in a Congress of the United States."[44] That's written so that ordinary people and even lawyers ought to be able to understand it, and yet, we've lost our way on it.

Justice Thomas continues in that Amtrak case, "We have held that the Constitution categorically forbids Congress to delegate its legislative power to any other body, but it has become increasingly clear to me that the test we have applied to distinguish legislative from executive power largely abdicates our duty to enforce that prohibition."[45] And then, he goes into a whole litany of how the intelligibility principle morphed from what was a filling-in-the-blanks and applying facts to the rule that the Congress established into something that given unfettered deference to the agencies. And so, in that case, he says we need to reinvigorate the non-delegation doctrine.

In the third of the trilogy, Michigan v. EPA[46], he takes on both the

---

[40] Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1213 (2015).
[41] *Auer*, 519 U.S. 452.
[42] *Id.*
[43] *See generally* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).
[44] U.S. CONST. art. 1, § 1.
[45] *Dep't of Transp.*, 135 S. Ct. 1225 at 1246.
[46] *See generally* Michigan v. EPA, 135 S. Ct. 2699 (2015).

nondelegation doctrine and Chevron deference. He says, "[EPA] asks the Court to defer to its interpretation of the phrase 'appropriate and necessary.'"[47] I don't know what that means under any intelligible principle, but that barely scratches the surfaces of the kind of delegations that the court has previously upheld. Then, the majority in the case just said that it's not a subject to which Congress intended deference, and so they said, "We're not going to give deference here." Justice Thomas says, he writes separately to note, "[EPA's] request for deference raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes."[48] We often describe Congress's intent to allocate interpretive authority of the agency as the reason we give this deference, but, of course, that intrudes on the judicial power." And then he says, "But we sometimes treat that discretion as though it were some form of legislative power," and that, of course, then allows the executive to intrude on the legislative power.[49] "Either way," he writes, "Chevron deference raises serious separation-of-powers questions,"[50] and then he says in his conclusion, "Although we hold today that EPA exceeded even the extremely permissive limits on agency power set by our precedents, we should be alarmed that it felt sufficiently emboldened by those precedents to make the bid for deference that it did here. . . . [W]e seem to be straying further and further from the Constitution without so much as pausing to ask why. We should stop to consider that document before blithely giving the force of law to any other agency 'interpretations of federal statutes.'"[51]

Now, these are not just Justice Thomas's musings about what the right answer is. The fact that there are three in one single term suggests to me he is laying important markers that the court has now finally come to the realization of the problem and is prepared to start doing something about it. And I think that means that every litigator in this room ought to be looking not at the regulation, the interpretations of the regulations, the guidelines on the interpretation of the regulations or the letter to the regulated agency on how we are going to interpret that interpretation of the regulation: we ought to start every complaint in a litigation we have with the text of the statute and start regaining the ground that all legislative powers herein granted are vested in a Congress in the United States, and put it that way.

And I want to give you just a couple of examples of how this might play out because there's a terrific one. Boyden referenced it earlier. I don't know if Judge Smith is here. I saw him in the hallway a moment ago, but I commend to your attention Part 7 of his opinion in United States v. Texas,[52]

---

[47] *Id.* at 2712.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.* at 2713–14.
[52] *See* Texas v. United States, 809 F.3d 134, 178–186 (5th Cir. 2015).

decided just two days ago. The alternative ground, not that the Administrative Procedure Act[53] requires notice and comment before I could make such a fundamental change in our policy as the President and his officers did, but the alternative ground for affirming the injunction. In specific and detailed provisions, the INA expressly and carefully provides legal designations allowing for a lawful presence and then also for work authorizations, and yet the government has found four words in a miscellaneous definitional provision in that entire body of law, of statute, and the phrase is just, we can give work authorizations if they're authorized by this subsection or by the Attorney General, and they've put into those five words "or by the Attorney General," the authority to do the entire immigration plan.[54] Judge Smith writes, that is "an exceedingly unlikely place to find authorization for DAPA,"[55] and then there's a little footnote. I love it. "Congress . . . does not hide elephants in mouseholes."[56]

The Department of Justice's "interpretation . . . would allow [the Secretary] to grant. . . . work authorization to any illegal alien . . .an untenable position in light of the . . . intricate system of immigration classifications and employment eligibility."[57] Then he says, another footnote, "When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the . . . economy,' we typically greet [that] announcement with a measure of skepticism."[58] That's terrific.

Two other cases I want to talk about briefly, and then I'll sit down. So, the Supreme Court granted cert earlier this week in what I call the "Seven Little Sisters of the Poor cases,"[59] dealing with the Religious Freedom Restoration Act[60] and the religious exemption from the contraceptive mandate. But, there is a huge nondelegation and deference issue that ought to be raised in those cases, and it's only barely extant in one of the seven. Senator Mikulski, when she authored the language of preventative care that exists in that statute, said this on the floor of the Senate, "[There's] a shrill advocacy group . . . spreading lies about this amendment. They are saying that because it is prevention, it includes abortion services. There are no abortion services included. . . . It is screening for diseases that are the biggest killers for women. Please, no more lies[,]"[61] and yet when it gets over to the agency, they write the regulations to do exactly the very thing that she specifically

---

[53] *See generally* ADMINISTRATIVE PROCEDURE ACT, 5 U.S.C. §§ 550–559 (2012).

[54] *Texas*, 809 F.3d at 183–84 (citing 8 USCS § 1324a(h)(3) (Lexis through P.L. 115–60)).

[55] *Id.* at 183.

[56] *Id.* at n. 186.

[57] *Id.* at 184.

[58] *Id.* at n. 190.

[59] Supreme Court of the United States Blog, *Little Sisters of the Poor Home for the Aged v. Burwell*, SUPREME COURT OF THE U.S. BLOG, http://www.scotusblog.com/case-files/cases/little-sisters-of-the-poor-home-for-the-aged-v-burwell/ (last visited June 17, 2016).

[60] *See generally* RELIGIOUS FREEDOM RESTORATION ACT, 42 U.S.C. § 2000(bb)1–4 (2012).

[61] 155 CONG. REC. S12028 (daily ed. Dec. 1, 2009) (statement of Senator Mikulski) (*available at* https://www.gpo.gov/fdsys/pkg/CREC-2009-12-01/pdf/CREC-2009-12-01.pdf).

said on the floor of the Senate that it could not do.

Here is another one, and then I'll sit down. In Home Care Association v. Weil,[62] it was decided in the D.C. Circuit a couple of months ago, cert petition would be due this month. The Fair Labor Standards Act 1974[63] amendments that covered minimum wage and maximum hour laws for home care workers expressly excludes companionship services or live-in care for the elderly in their own homes. Those regulations were challenged by an in-home care worker years ago and who lost. There were efforts to delete this exemption that were attempted in Congress. Those efforts failed, and so the District Court writes, "Undaunted by the Supreme Court's decision . . . and the utter lack of Congressional support [for this effort to remove] this exemption, the Department of Labor amazingly decided to try and do administratively what [it] had failed to achieve in either the judiciary or the Congress,"[64] and yet, nevertheless, I'm sorry. Your court upheld the regulation.

So, I give you these examples to show you how pervasive this is and how broad a field of opportunity we have for bringing cases, requiring the courts to start focusing on the statutes, and both get rid of the deference doctrine and revive to some measure, hopefully a large measure, the nondelegation doctrine, as well. Thanks very much.

Judge Brett Kavanaugh: A couple reactions, and then I'll ask a few questions. First, I know there are a lot of students here and younger lawyers. Supplemental readings after something like this, I would point you to a few things. Chuck Cooper has written a series of really interesting articles recently summarizing, in essence, the questions that we have been discussing that have been raised primarily by Justice Thomas, but also by Chief Justice Roberts in King v. Burwell. Adam White has an excellent piece in the Weekly Standard coming out tomorrow on 10 years of the Roberts court, which puts all these questions in a somewhat broader perspective, and I think in any separation of powers forum, Akhil Amar, our mentor and friend's book, America's Constitution: A Biography[65], should be required reading, so I would encourage all of you to read that as well.

One thing about another follow-up point I want to make about Neal's point, especially for the students and young lawyers again, process. Process, he focuses on. Process protects you, and that's something that's very important to remember for those of you who are in government or going into

---

[62] *See* Home Care Ass'n of Am. v. Weil, 799 F.3d 1084 (D.C. Cir. 2015).

[63] *See* FAIR LABOR STANDARDS ACT OF 1974, 29 U.S.C. ch. 8 (2012).

[64] Home Care Ass'n of Am. v. Weil, 76 F. Supp.3d 138, 142 (D.D.C. 2014), *rev'd and remanded*, 799 F.3d 1084 (D.C. Cir. 2015).

[65] AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY (2005).

government. Process protects you when controversy erupts after a decision has been made or when a decision, as inevitably happens with many decisions, goes wrong. Things don't work out. To have a process in place helps you make better decisions and helps assure others that you went through the right steps before making the decisions. I think he points out something very important and a model that really is a model to follow for all of you when you're the young lawyers, when you're wherever you are, but particularly in government positions.

Okay. On the question presented, "Which is the most dangerous branch?" I am not sure we hear a crystal-clear answer. One idea, Mr. Gray, would be the executive is the most dangerous branch, and it's being facilitated by Congress and the judiciary not exercising sufficient controls. Is that your view?

C. Boyden Gray: Well, I was always told that there was a fourth branch of government, and I think—that's not the media, but I think it's the agencies and that fourth branch was not really contemplated by the founders when the Constitution was adopted. One of the big offenders, Dodd-Frank[66], makes very clear that the executive branch is to have no say at all over what the CFPB does and what many of the other entities under that statute do. And, indeed, a member of the fourth branch itself, which funds the CFPB, the Fed, as I said earlier, itself can't have anything to do with it. So you've got a fourth branch within a fourth branch, and it's the administrative state. That's what it is—it's something separate than the founders anticipated. So, all three branches have to get involved and start exercising control.

And when I first came to Washington or first went into the government, we did this regulatory reform stuff under President Reagan. No one saw any really compelling constitutional reason why independent agencies shouldn't be included, but they were, politically, —you know, Dingell used to always refer to the SEC as "his agency." You don't want to get the guy too angry. So, we didn't cover independent agencies in those days, but today, given the high-tech revolution and everything else, those agencies: the FCC, the SEC, the CFTC, and, of course, all the financial agencies really do have more of the economy now than all the other agencies combined, with the possible exception of the unlimited and unstoppable EPA. And so, it really is time to understand the administrative state as something separate, some separately operating entity, sort of roaming around outside and inside the other three branches of government.

So, I would say the most dangerous branch is the fourth branch, and

[66] DODD FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT,12 U.S.C. tit. 12.

we've got to get ahold of it.

Judge Brett Kavanaugh: Mr. Rivkin, what do you think?

David B. Rivkin Jr.: I agree with Boyden. I would say just a couple of things briefly. First of all, I agree with Neal about their inter-executive branch checks and balances, having often been on the receiving end of those, both foreign policy-wise and domestic policy-wise. But one problem with relying too heavily on this paradigm is, remember ladies and gentlemen, our goal is not merely to impede the government from doing things: it's to impede the government from doing things that are unconstitutional, either inherently across the range of all government entities or at least within that branch. The internal separation of powers is uniquely bad at those things. So, it often impedes the article from doing what it should be doing and does not impede it from doing what it should not be doing.

But I agree, and again, it's administrative-state serious warping of horizontal separation of powers, and I've gotten religion, since used to be very much an avid article—two men having worked at DOJ and the White House Counsel's office and the private sector have become much more of a fan of federalism. I've seen this tremendous, tremendous decline in state power and not just because of expansive interpretation of a commerce clause and necessary and proper clause of various other things, just for the sheer mass of federal enactments. So, it is something that really requires a return to the Madisonian channels. And I am hopeful that Article III—let me say I am very much against deference— I think in some ways Article III, think the Framers would not have disagreed with him, given their interest in the Newtonion physics. Article III should be a great balancer in a situation where you have two political branches, reinforcing ways that have disrupted the horizontal separation of powers and the diminished vertical separation of powers. It is incumbent in Article III to be far more aggressive than they would be in different circumstances, sort of a kind of role Britain played in maintaining the constant of Europe, and it can swing back to greater deference. Most things have to ebb and flow.

Judge Brett Kavanaugh: So, Neal and John, then, administrative agencies identified here, and do you agree, and do you see a distinction between independent agencies and executive agencies in terms of the risks, dangers, problems that are posed?

Neal K. Katyal: So, definitely, I think Boyd is on to something when

he says independent agencies are a unique problem because of the lack of accountability. So, absolutely, they are dangerous in ways not anticipated by our founders. Having said that, their grant of substantive powers is not quite the same as the executive branch. After all, CFPB is not going around killing anyone or spying on anyone in quite the same way. So, I do think that the executive has a suite of powers, and of course, now that we have term limits on the President, the accountability structure our Founders had initially envisioned for Presidents doesn't work quite as well as it used to either for second-term Presidents. So, we have an accountability deficit there as well.

So, to me, the most dangerous branch, ultimately, I give you the answer, I think it's Congress because they were the first best solution that our Founders envisioned to check an executive branch or agencies that have run amok, and they haven't—they're falling down on their job. And so, they're dangerous because of their sins of omission rather than their sins of commission, and so that's why I think we're in a second-best world. What do we do to try and restore some of that? That's where I think internal separation of powers does something to help.

And, David, you're absolutely right. Sometimes that debate and dialogue in executive branch can stymie quick executive solutions, but so, too, did Madisonian separation of powers, at least in terms of divided government, and because I believe that you can have a unitary executive override, the President can always truncate that debate at any time if he has to, if he has to make a quick decision. But then, he has to face the consequences, as the Judge was saying. That's not the best process, and it might even be that courts should defer to decisions made by agencies or by the executive branch as a whole if they lack that kind of debate and dialogue and that pedigree of internal separation of powers.

C. Boyden Gray: I'm going to be a little bit different here. I don't think it's an either/or question. I think every one of the branches is dangerous in its own way. I think the judiciary is dangerous when it abdicates its role to enforce the separation of powers, but I think it is also dangerous when it claims powers to decide questions that it has no ability to look at. We focus a long time on judicial supremacy, focusing only on the latter and forgetting that an activist court can be equally dangerous when it declines to strike down a statute that exceeds constitutional authority or declines to strike down a regulation that exceeds its statutory authority. Those are both dangers that facilitate acts of power and aggrandizement by the other branches.

And the executive, the difference between an independent and a non-independent agency doesn't matter much in the real world. I remember when I was at the Civil Rights Commission, we said that we had a member of Congress who was our ninth commissioner and expected us to be treated as

such—because the committee appropriator had more control over our agency than anybody in the executive branch did, and that reality I think needs to be addressed. Congress didn't do this because they were fond of giving up power. They did all this stuff because they figured out a way to exercise greater power without any responsibility, and that is the problem. There is as wonderful line that I didn't quote from Justice Thomas. He says that, we should go back to the original meaning of the Constitution on this. Now, maybe this is going to inhibit government from acting with the speed and efficiency Congress has sometimes found desirable. Oh, the world is going to come to an end. Government has gotten too complex. Life has gotten too complex. There are too many things. And he answers it, no, that might be a good thing. We might end up with a lot smaller government doing a lot less things because they couldn't possibly do it all in Congress, and it's restoring that notion of very limited government, certainly at the central level, that seems to be the critical path to solving this problem. Because, if they think they can accomplish all sorts of things and don't have to take responsibility, they're going to find ways to help their constituents or help their donors get through the morass they've created. And it's the morass they've created that exceeded their power. So I think you've got to get all three branches back in the game of doing the job that the Constitution assigned to them, and that's why I think the invitation that we have here in this trilogy of cases is so important and needs to be taken so seriously.

Judge Brett Kavanaugh: Mr. Gray, you referred to the fourth branch, but there are executive agencies and independent agencies, as you discussed, and of course, Humphrey's Executor[67] upheld independent agencies. I'm interested in whether in your experience as a practical matter, as a real-world matter, is there a difference and concern about independent agencies versus agencies under the ultimate supervision, even if not always exercised, of a President?

C. Boyden Gray: Well, I'd answer that question, having worked in the White House, the distinction in terms of what the White House can do is not as meaningful as it might appear on the surface. There are all kinds of ways of getting around. You can, as President Reagan did, make a speech about his own industry that he came from, Hollywood, in connection with some FCC rules, and it would resonate. It was heard at the FCC, even though he didn't threaten their budget or anything like that. So, there are ways to do it, but where it cuts at other branches is, of course, the judiciary. If it's an independent agency, an executive order on cost-benefit doesn't apply and

[67] *See* Humphrey's Ex'r v. United States, 295 U.S. 602 (1935).

certain other rules that do apply to executive branch agencies don't apply to an independent agency. And the Congress feels, whether or not it's justified, feels a certain ownership, a sense of ownership established. As I was saying, Chairman Dingell said, "It's my agency, and they treat it as though it's their agency." I think John McCain is the same way. I mean, I don't think there's any difference in the parties on this. I mean, he loved being Chairman of the Commerce Committee because it gave him really unparalleled access to the FCC.

So, I think there are real distinctions between the two in terms of the other branches, maybe not the executive branch, but in terms of what the courts can do and what Congress is culturally conditioned to do. And that's got to change, because as I say, these independent agencies are now in the driver's seat for—I mean, take a look at this latest Internet. There's going to be equipment we shouldn't talk about, but take this Internet thing. I mean, it's amazing that the FCC should say the whole Internet is just like a utility. This is like going back 100 and some years. There's no risk, as I was saying, under one of the requirements under the Supreme Court rubric. There's no risk being addressed, and have the wires, the transmitters, the pipes really messed with content providers? Not really. There is really no evidence of it. It could happen. Yes, it could happen, but it hasn't happened.

And the one place where there was kind of a glitch—and it got worked out because the FCC intervened, not necessarily because the FCC intervened, but it did get worked out . . . . They did intervene, and one of the players said, "Boy, I wish we had been able to get this worked out without having the FCC involved." So, I don't view that as being evidence of it.

So, this is going on—well, I think, you know, the Supreme Court said okay to EPA on global warming, even though Congress has clearly said, "No. We're not going to cover it, at least not yet," and so there is a distinction that does matter, especially with the judicial branch and Congress. But, in terms of the White House, I have to confess, there are other ways to skin that cat.

Judge Brett Kavanaugh: So we'll get to questions in a second. We're talking about three, I think, big categories of things here: independent agencies versus executive agencies; broad delegations; and then deference, Chevron deference by the courts. And the concurrences of Justice Thomas or dissents certainly flag all of those. Of course, the majority opinion is where the action is in the near term at least, and on that, Chief Justice Roberts's majority opinion in King v. Burwell[68] in the potential major questions exception or however you want to phrase it to Chevron deference. I'm curious, David, if you want to start it or anyone wants to comment on how should we

[68] *See* King v. Burwell, 135 S. Ct. 2480 (2015).

be thinking about where that's going and where it came from and how is it supposed to be applied. What makes something a big enough question to be a major question under King v. Burwell?

David B. Rivkin Jr.: Thank you. At the idealistic level, I think it's very promising. I think it reflects recognition of abusive nature of a current system, and I agree that the two factors that the Chief elucidated are useful: the significance of the issue and the fact that the IRS really had absolutely no expertise in the business of running insurance exchanges. At my cynical level, I wonder if we are going to carry in a case with somewhat different ideological baggage from the justices that joined that position. So I hope I'm wrong, but to be seen.

Neal K. Katyal: Yeah. I think for those of you who are against deference or at least against deference until November of 2016—that you will. There is some reason to think that this is a significant opinion by the Chief on that, the idea that big decisions can't be made by the IRS and get deference.

On the other hand, Brown & Williamson[69] says something kind of similar: so, there's a pretty good argument that it didn't actually change existing law. But I do think, reading the tea leaves there, I think there's something there. I disagree very much with my friend John's view that the Justice Thomas opinions are telling us anything about where the court is. I certainly don't know that I would advise all litigators to rush all these arguments to court. You will get Justice Thomas' vote, but my business is trying to get to five in every case. I don't really quite see that with that set of opinions, interesting though they may be.

John C. Eastman: If we're replacing Chevron deference with deference to the court and statutory interpretation of the kind we saw in Burwell, I don't think we've gained any ground.

Neal K. Katyal: Well, how about disaggregating it from the results of King v. Burwell?[70]

John C. Eastman: Yeah, yeah. Look, but I think the challenge to Chevron deference has to be broader than just this is so big or of a different

[69] *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).
[70] *See King*, 135 S. Ct. 2480.

nature than the kind of thing we expected Congress to be giving deference to the agency to.

And the reason I agree with you, it's only one or two votes at the moment, I think maybe I can get to three, but there is a roadmap in those opinions about how to start thinking about these issues that I think is important. And, on this question, it's not so much how big is the issue or was this the kind of issue that Congress intended to give deference on—see the use of regulatory authority to stop assisted suicide cases I'm escaping the name for a moment—but is it instead the kind of thing that involves really executing rather than making policy in law? Am I applying the facts on the ground to the policy judgment already made by Congress? And giving deference on that rather than making the policy judgment itself is, I think, a line that we are going to start seeing articulated more broadly, and if that's what we're talking about in backing away from the old Chevron deference, then I think that's a very good thing.

Judge Brett Kavanaugh: Okay. Why don't we take some questions.

Audience Question: I just quickly wanted to thank Neal for his continued kind, gracious and thoughtful participation in these meetings. I think the feeling is reciprocated by all of us that you expressed when you spoke.

Neal K. Katyal: Oh no....now what are you going to say to me?

John C. Eastman: But—

Audience Question: Well, I do want to pick up on the suggestion you made about internal checks. Some people might pooh-pooh them as kind of incremental or not really a proper constitutional solution, but it does strike me, in a way, at least in the economic realm, you're speaking about the kind of things that were some interaction of statute, but were certainly championed within administrative circles by Cass Sunstein and the kind of OMB processes that attempted to review other aspects of regulations that could be lost at a very singular focus.

As I look at that, it hasn't there or perhaps in the realms that you have suggested—I haven't really seen an effect. Are you just saying it's a good trend, or do you think we can actually look and see that this has been effective rather than attempted?

Neal K. Katyal: Yeah. No, I do think it's—it's a great question. I think that we need to build on it more, but I do think that it is effective. I think already—we see it all the time, for example, in State versus Defense, and I do think better product emerges when a White House doesn't just go to one agency or the other, but they are going to both. That's the whole idea behind the creation of the National Security Council in 1947, to actually create that debate and dialogue. And I think we get the worst decisions when that's truncated. If the news reports are to be believed, it sounds like it was truncated here, for example, even on legal questions like can you kill bin Laden. And, if the news reports are true—I was out of the government then, but the idea that the Attorney General and the White House Counsel were cut out of that decision strikes me as something of concern if you actually really do want good decision-making, a good process to unfold.

Judge Brett Kavanaugh: I might ask relatedly—there's a lot of stories with Charlie Savage's new book and Jack Goldsmith has written about the decline of OLC—that's the title of one of Jack's recent posts—and your reaction to those stories and posts and Charlie Savage's book about the process.

Neal K. Katyal: I haven't read the book yet, so I don't know. I can't really speak to that, but I certainly do think that we have been seeing the decline of OLC. It had one good recent year, the year Jack was there. But it's been tough. I think it's tough for OLC, though. I mean, we've had some great advisors—Virginia Seitz, others—at OLC in the Obama administration, but OLC in some sense is hopelessly compromised because their mission is to both be an internal judge of the executive branch when there is a dispute, but also an advisor to the President. And those two roles conflict a lot, and you can't really easily be that impartial judge trying to decide a legal question if you're also at the same time trying to be a friend to the President and try and get questions teed up to you. So OLC, I don't fault any of the individuals in the last several administrations. I think that they've been great. It's a tough, very hard mission.

David B. Rivkin Jr.: I found OLC, at least in my experience, to be able to manage this sort of internal tension, and about getting the details, Boyden would agree there are a number of times OLC has said no. Now, as some of you may know, OLC does say no, typically. You ask the question, they give you a preliminary answer, and if you don't like the answer, you're not going to get a formal opinion. So, there are certainly instances where OLC has said no.

My only concern, briefly, is with inter-branch and executive branch checks and balances, which I understand and agree with. They avert a lot of midlevel wrongdoing. They do not avert fundamental usurpation of power because, if a President wants to push something through —be it DAPA, be it closing of Guantanamo, be it an arcane type situation—he'll get his way. So, not to get into a game theory, the parapet is not very, very high, and it is that fundamental warping of the Madisonian separation of powers that troubles me.

John C. Eastman: If this idea of internal executive conflict resolution would result in the executive kind of taking greater control of runaway agencies, like Reagan tried with OMB and some other things, then it has some prospect of moving us back toward a constitutional system. If it's instead competition over whether we're going to regulate the vernal pools or the Corps of Engineers is going to regulate the vernal pools, neither of which has any statutory authority, then it doesn't do any good whatsoever.

Judge Brett Kavanaugh: Go ahead.

Audience Question: Great. So, I'd just like to also, in a welcoming spirit, sort of push back a little bit against Neal, principally because— first of all, one thing I'd like to say at the outset is that interagency conflict is not the same as interagency coordination, and conflict between Defense and State can often be enormously damaging to the vital interest of the United States and has been for a very long time. So, it's one thing I would say, that to laud conflict between Defense and State as systematically producing a better product—I mean, I was at the Pentagon 10 years ago, and I think I still have nightmares about conflict between Defense and State.

So, the main thing I want to point out about the paradigm of internal agency checks and balances as solving some of the separation of powers problems is that I think it sort of completely fails to address two of the main things that a lot of us in this audience are concerned about. One of them is agency rulemaking, like EPA's greenhouse gas regulations, as just sort of completely jumped the ship of the enabling statute that delegated rulemaking authority to the agency. And the second one is—which I think David Rivkin just addressed briefly is what do you do about situations like the DAPA order or, to give an example out of the Obamacare case, you know, we're suddenly deciding we're not going to collect a statutory tax obligation. In the case of the agency rulemaking, sure, you have under the Reagan era and especially the Clinton modification of the rulemaking process—you have a sort of formalized interagency coordination of proposed rules and then rules through

various stages, but to the extent that there is a conflict between agencies over the proposed greenhouse gas regulation, even under the Clinton era executive orders, the conflict is resolved by the President. So, the President wants EPA to push the rule through. He's going to push it through, so that's going to—

Judge Brett Kavanaugh: I don't mean to rush you too much, but we got to give it to Neal.

Audience Question: Yeah. And so then in the case of the DAPA, it's even worse because there's no coordination at all in the interagency process. There's no way for agencies to object to what is, in the end, an informal memo from Jeh Johnson to his guys.

And so, my question to you is, given that the total uselessness of the Congressional Review Act[71] in periods of divided government and united government sort of shows that the problem is more than Congress just falling down on the job, isn't there an indispensable role for the courts to play in checking some of these checks and balances problems?

Neal K. Katyal: My answer to that question is undoubtedly yes. I mean, after all, my very first Supreme Court case about Handan was litigated on exactly that, to the degree that the President was going beyond the statutory authority, and the courts had to come in and enforce the separation of powers. I'm an absolute believer in that. The problem is that sometimes you have situations which aren't quite at that level of the direct conflict between a statute and what the President wants to do, and there, we've seen courts having a much more hands-off attitude. And I do think that there are some—you know, we can debate about whether that's right or wrong, but I think that that is a trend line that we have seen for a long time. They are generalist courts. They are worried about second-guessing agencies. They think Presidents are more accountable than courts, and so, for a bunch of different reasons, including reasons that this Society has championed for decades, courts do have something of a hands-off attitude towards some of this. Because of that, I think we need to think about second-best solutions.

And the idea that this is some sort of new problem, State versus Defense creating foreign policy problems, that is something that has been true from the very early days of the country and something I think our Founders recognized and celebrated. I mean, just think about the neutrality proclamation and the debates between Hamilton and Jefferson, State and

[71] CONGRESSIONAL REVIEW OF AGENCY RULEMAKING, 5 U.S.C. §§ 801–808 (2017).

Treasury, on that, for example, and if you can't remember that from your history class, then go see the play Hamilton which will teach it to you.

Judge Brett Kavanaugh: One thing I would add there on the hands-off judiciary, it's often thought that judges are staying out of the political thicket if they're hands-off, whether it's Chevron deference or the political question doctrine or having a limited nondelegation doctrine, but it is very pro-executive. Hands-off is almost always pro executive vis-à-vis Congress, and it's something to keep in mind.

Next question.

Audience Question: I'm in George Mason University School of Law. John Eastman earlier made reference to hiding elephants in mouse holes. I wonder if I could direct attention to a different elephant that I think may not have gotten as much attention yet, despite all the other good points the panel has made, and that is that I wonder if it is really significantly possible to much reduce the discretion these agencies have unless you reduce the range of functions of the federal government because, with the federal government regulating almost every aspect of our lives and the enormous scope of federal, criminal, and civil law and regulations and the like, even if we get rid of Chevron deference, which I'm sympathetic to, even if courts are playing a bigger role, even if there is internal agency checks and balances in the executive branch, it seems to me there will still be a huge amount of discretion left in the hands of agencies and also in the hands of the White House regarding whether the President can exercise discretion about which laws to enforce in a formal way, like he did last November. He will still be able to do so—and does all the time—in an informal way of just saying, "I want you to prioritize enforcement of this but not that." So I wonder if maybe—

Judge Brett Kavanaugh: Okay. How about John Eastman for that?

Audience Question: —if maybe, actually—or anybody wants to, maybe, the key here, maybe, is to reduce the number of functions of federal government rather than, sort of, playing with the levers about exactly how deference will work.

John C. Eastman: Look, I think that's right. If the theory is life has gotten too complicated, government too complex for Congress to be able to answer all of these questions, and if we got rid of deference, there would be

whole areas of the law that we couldn't possibly regulate, my answer is "Yeah, that's exactly right." And I think that's what the Founders' answer would have been. This was not supposed to be a central government that controlled every aspect of life and daily living.

So, if we push back on some of these deference doctrines, we revive nondelegation, maybe we'll find an incentive to kind of transfer some of the power out of D.C. back to the states and local governments or, heaven forbid, the government not regulate some of these things at all.

Neal K. Katyal: I may have misunderstood your question, but I agreed with what I thought your point to be and disagree with my friend John. That is, if we're having a debate—I mean, if we want to shrink the size of government, the last place to have that debate is over deference. We should have it over how big government should be. Should we have an education department? Should we have all these testing standards or this or that? I mean, that's a very important substantive debate, but doing it through the guise of deference seems to me to be really the wrong way to go about it.

C. Boyden Gray: Just one quick comment about the size. One of the problems with this conversion of deference and delegation is that it opens the government up to being bought, the agency capture and all that, crony capitalism. One of the things that has been suggested is, all right, really strengthen the rules about a revolving door so that no senior bureaucrat, staffer, or even congressman can for life, maybe, work in an industry that he or she regulated or oversaw. And the liberals gasp at that. Oh, they just go, "Gasp. We could never staff government," and to that, I say exactly.

Judge Brett Kavanaugh: One of the interesting things on your point is that I think it does fold in, in the court cases, to the underlying concern they have about some of these, what you would say, less important structural issues. Certainly, the Chief Justice, if you look at Free Enterprise Fund,[72] his dissent in City of Arlington,[73] and then his majority opinion in King v. Burwell[74], you see a lot of the themes about a large national government pervading his rhetoric in those cases. You may be right, but I don't think they're necessarily as divorced from one another as you set out in the question.

David B. Rivkin Jr.: Can I make a very, very quick point? In part, if

[72] *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477 (2010).
[73] City of Arlington, Tex. v. FCC, 569 U.S. 290, 312–28 (2013) (Roberts, J., dissenting).
[74] *See King*, 135 S. Ct. 2480.

you remember, the accountability is one of overarching virtues as separation of power is meant to ensure. You do not need to worry about the legislature exercising legislative power because the court would review the final result, and if it exceeds the power of Congress, it's going to go down.

The problem of delegating to the executive branch, which essentially is a lawmaking authority—let's be honest—is they're not functioning in the same way accountability-wise as Article I. So, things like APA, things like government and the sunshine laws, and all of the things that relate to deference, is an effort to re-create a dose of accountability in Article II that may not match exactly—that's inherent in Article I, but at least is better than nothing. So, with respect, the deference issue very much relates to the broader separation of powers problem we're talking about.

Judge Brett Kavanaugh: Question down there?

Audience Question: Thank you. So, the panelists today have been exploring why Congress, over time, has increasingly delegated rulemaking authority to the administrative agencies, and the consensus seems to be that's largely due to political pressures and factors, which the federal courts do not have. So, I'd be curious on the panel's thought of the evolution over time of the courts' increasing deference to administrative agencies' interpretations, specifically being mindful of the constituents that Congress serves. Do the courts have the duty to defend Congress's constitutional authority when Congress itself won't defend its own authority?

John C. Eastman: That's a terrific question. Here is my theory on why the courts got into the deference business in the first place. This kind of starts in the early 1970s, the growth of the administrative state, and the parallel thing that was going on was a criticism of the aggressive activism of the Warren court. And I think there was a conservative response that it's better to put these decisions, these policy decisions, in the hands of the least nominally accountable political branch and the executive rather than have the court making all of those decisions. And, I think that started the ball rolling.

Kind of the leading champion of originalism on the court, Justice Scalia, comes up through that mantra, and I think that's why he's been kind of a champion of these deference doctrines for a while. Only in the last term or two has he started to question them, seeing that there's something else going on.

And, on the second part of the question, I do think the courts have a fundamental role. Look, Congress is not giving away its power. It's finding

a way to exercise powers sub rosa, and that means it is especially important for the court to engage vigorously on this because Congress cannot—it can't give it away even if it was giving away power, right? But it specifically—particularly shouldn't be able to give power away if it's going to then be able to exercise it behind the scenes without any accountability. And I think that's exactly why the court has to be there, and it has got to get aggressive on this.

Neal K. Katyal: So, it seems to me that we have to ask what is the reason Congress is abdicating its responsibility here. Your premise of the question was you said it was because of political pressures, and I think that's part of it, but I don't think that's the whole story. Part of the story is also there's some really complicated things in the world, and sometimes we want expert agencies to deal with them. That's at least part of why we've had this rise in the administrative state since the 1930s, why, for example, I think many people want the Federal Government ultimately to set policy. There may be other reasons as well. We want to insulate them from accountability in election years and so on, but those are traditional reasons also why we have these agencies. And, if you think of it that way, then you might still want some deference because, after all, we are dealing with generalist courts that don't have quite that same suite of fact-finding skills as does an expert agency.

David B. Rivkin Jr.: Just one thing, if you don't mind, the problem is that the pendulum has swung too far, and it sets inverse synergy. So, very briefly, what happens is Congress has fewer and fewer incentives to legislate intelligently or legislate at all. If a President is going to rewrite statutes, what's the point of writing any statutes, at least on complicated issues? If agencies can get away with getting things treated with excessive deference—I'm not going to say Roberts—to Article III, then they write worse and worse rules, and it's bad for everybody. It's like a machinery that's gone out of kilter and all the parts are not working well.

Audience Question: Neal, you made the unimpeachable point that Justice Thomas writes for himself and not for the court, but in Professor Eastman's defense, at least on the question of Auer deference[75], which strikes me as the most extreme version of what we're taking about, sort of meta deference, deference to deference itself, don't you think that we get close to counting to five? We have at least four likely votes there. Don't you think Professor Eastman is correct to push advocates to try to change the law there?

[75] *See* Auer v. Robbins, 519 U.S. 452, 461–62 (1997).

Neal K. Katyal: Absolutely. I think Auer deference[76] is extremely vulnerable, and I think perhaps rightly so. So, I suspect that we will see five votes on that question. I think the courts flinched a couple times recently, but—it's gotten out of hand, and I do suspect that that's a vulnerable part of the doctrine. But that, to me, is a small piece of what is a larger project that Justice Thomas has. It's a very coherent, powerful vision. I just don't think it represents where five votes are on the court.

John C. Eastman: One can hope.

Judge Brett Kavanaugh: It's interesting to think as well about an Auer deference[77], the Chief Justice's role. Again, I think he is someone who came up through that same tradition, a little behind Justice Scalia, but seems to have markedly different views on some of these Administrative Law deference issues. Certainly, his rhetoric has been very strong in some of these things.

John C. Eastman: I think that's right, and I also think it explains his decision in NFIB[78] and his decision in Burwell[79]. This old notion that when I'm striking down—

Neal K. Katyal: Why do you think it can be explained?

John C. Eastman: Yeah. I mean, when I'm striking down acts of the legislature, I'm acting as an activist on the court. I mean, I think that's a carryover from the same theme. He's not made the distinction between the two sides of the coin of the court's role, that it's as important a role for the court to enforce the limits on the power of the other branches as it is not a power of the court to make up things to strike down perfectly legitimate exercises of power by those branches. And he's got one of those in place, and but because of the mantra that I think he grew up with, that he's not gotten the other one. It doesn't' defend it. I think it offers an explanation for it.

David B. Rivkin Jr.: Could I just disagree for 10 seconds with my good friend, Professor Eastman? I actually don't agree frankly with decisions

[76] *See id.*
[77] *See id.*
[78] *See generally* National Federation of Independent Business v. Sebelius 132 S. Ct. 2566 (2012).
[79] *See generally King*, 135 S. Ct. 2480.

on King[80] or NFIB[81], and I don't view them as deference to executive decision. At least the way I read things between the lines is that this is the chief enshrining what he believes to be an underlying congressional purpose, underlying congressional intent, and in the process, if you have to write pesky statutory language that stands in the way, so be it. But, technically, the executive won. I mean, look, the executive did not win NFIB[82], as an exercise of a Commerce Clause, and did not win it as an exercise of the Necessary and Proper Clause. The tax argument was enough, they thought. So, they are really not deference cases to me. It is the court upholding Congress—just my view.

Judge Brett Kavanaugh: Well, we are out of time. Thank you to all the panelists for a great panel.

[END RECORDING]

[80] *Id.*
[81] *See generally Sebelius*, 132 S. Ct. 2566.
[82] *Id.*