The Executive and the Avoidance Canon

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INTRODUCTION

Professor Neil Kinkopf's outstanding article, *The Statutory Commander in Chief*,[1] discusses legal issues of the greatest importance that judges and scholars alike have tended to ignore. In his famous opinion in *Youngstown Sheet & Tube Co. v. Sawyer*,[2] Justice Robert H. Jackson wrote that "court decisions [about the scope of presidential power] are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way,"[3] and there is considerable truth to that observation.[4] Certainly the available case law does not, at first glance anyway, provide clear guidelines for understanding the scope of the President's authority as commander in chief. But despite my admiration for Justice Jackson and for his *Steel Seizure* opinion, the reality is that both judicial and scholarly discussion of the commander-in-chief power has veered toward the broad and abstract, not the narrow and specific. The judges have often spoken in brief, apparently constitutional generalizations, and the scholars in this field—while they cannot be accused of brevity—have preferred for the most part the generous arena of constitutional disputation to the details and demands of statutory construction.[5]

Professor Kinkopf is both a profound student of the American system of separated-but-coordinated powers and a lawyer with great practical experience in addressing specific issues of presidential authority. In *The Statutory Commander in Chief*, he deploys both scholarship and professional experience to good effect: in the actual world of hard political choice, decisions by the commander in chief, he reminds us, are more often than not controlled by the statutes structuring the President's choices.[6] As a

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1. Neil Kinkopf, *The Statutory Commander in Chief*, 81 IND. L.J. 1169 (2006).

2. 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

3. *Id.*

4. *See, e.g.*, Dames & Moore v. Regan, 453 U.S. 654, 661 (1981) ("We attempt to lay down no general 'guidelines' covering other situations not involved here, and attempt to confine the opinion only to the very questions necessary to decision of the case."). The case involved President Carter's authority to settle the Iranian hostage crisis.

5. For these judges, see, for example, Sale v. Haitian Ctrs. Council, Inc., 509 U.S. 155, 188 (1993) (referring to the "foreign and military affairs for which the President has unique responsibility"); Harlow v. Fitzgerald, 457 U.S. 800, 812 n.19 (1982) (referring to "such 'central' Presidential domains as foreign policy and national security, in which the President [has a] singularly vital mandate" and discussing Gravel v. United States, 408 U.S. 606 (1972)); N.Y. Times Co. v. United States, 403 U.S. 713, 727 (1971) (Stewart, J., concurring) ("In the governmental structure created by our Constitution, the Executive is endowed with enormous power in the two related areas of national defense and international relations."); *id.* at 741 (Marshall, J., concurring) (referring to "the President's power as Chief Executive and Commander in Chief to protect national security"). For examples from scholars, read virtually any article on war powers, mine included.

6. *See* Kinkopf, *supra* note 1, at 1175.

practical matter, Kinkopf knows, the executive branch's conclusions about the President's options, and the range of response available to Congress and to the courts—both as a matter of law and, for Congress, as a matter of politics—hinge much of the time on whether the President has a plausible claim to statutory authority for an action or (at least) need not assert the contested executive power to defy a statutory prohibition on constitutional grounds. And that in turn depends heavily, in theory and practice, on the extent to which the statutory constructions that the executive proffers—many of which will be controversial or even counterintuitive—have a claim to deference from the coordinate branches of the federal government and from the public whose government it is.

The Statutory Commander in Chief presses on us these issues of how to construe the statutory framework within which the President exercises his authority as commander in chief, and of how much deference is due to the President's own interpretations of that framework. Kinkopf's own analysis will be the starting point, I hope, for future discussion: his appreciation of the importance of both congressional power and presidential initiative makes him almost uniquely posed to set up the debate. On the merits, I personally find him persuasive. Along these lines, in this Comment I want to address briefly an issue Kinkopf raises, and suggest a further extension of his thoughts—though it is one which he may not wish to endorse!

I. "LOADED DICE" AND THE AVOIDANCE CANON

One of the central themes of Kinkopf's approach is his objection to "loaded dice."[7] The point is a powerful one. Legislating in the areas of foreign affairs and national security is no easy matter. Even the most detailed statute, one that reflects a clear-sighted and united congressional majority, may prove ambiguous in application. The exigent and unpredictable needs of American foreign policy and security may rightly counsel against unduly fettering the President in carrying out Congress's goals in legislating about national security, and this may lead to statutory language deliberately crafted to allow the President considerable discretion in carrying out the will of Congress. Congressional majorities, in these areas as elsewhere, are often coalitions that do not enjoy perfect agreement about what they wish to achieve. All of these observations are commonplace: Kinkopf's great originality is his insistence that statutory construction should not and need not descend into a post hoc set of rationalizations for what a given administration thinks it expedient to do. Congress's laws are, well, laws, and the appropriate role of statutory construction is to bring the laws to bear on the subjects they govern.

There are no easy or obvious solutions to the various problems this ambition encounters, and Kinkopf is well aware of the perplexities that surround the whole topic of statutory construction.[8] But his urgent insistence—one I think entirely correct—is that whatever the interpretation of statutes means, it is not done properly when the interpreter's premises determine her conclusions in a "loaded" manner.[9] Statutory construction is an affair in which the interpreter finds out something that she or he did

7. *See id.* at 1180.
8. *See id.* at 1175–95.
9. *See id.* at 1179.

not know before, to put it far more crudely than Kinkopf does. It is not—emphatically not—the empty exercise of showing how a set of words found in the *Statutes at Large* can be hammered into compliance with whatever the executive already intends to do.

In the course of discussing how honest interpreters can avoid this error, Kinkopf endorses the value of "the avoidance canon," the rule of construction that "the Court should read statutes, where they are critically ambiguous, to avoid significant constitutional controversies."[10] Many of the cases cited by advocates of across-the-board deference to the President are better read as applications of this canon of construction, which changes their import: instead of supporting the idea that judges must surrender their view of a law's meaning to that professed by the President, the cases stand for the proposition that the judges themselves have evaluated the constitutional values at stake and concluded that a given reading of the law steers clear of endangering those values taken as a whole.[11] That seems right to me, but it raises a question that Kinkopf does not resolve: should the executive branch itself, in coming to its conclusions about issues of statutory meaning, employ this same canon of construction? The executive's lawyers do so regularly.[12] My proposal in this Comment is that they should *never* do so when the issue involves the commander-in-chief power or other questions about the separation of powers between Congress and the President. The disavowal of the avoidance canon, where the boundary of legislative and executive power is involved, would further Kinkopf's laudable goal of discarding loaded dice. This goal is independently demanded by the very logic of the canon itself as articulated by the Court.

The avoidance canon is a long-standing principle of Supreme Court statutory construction. "As Justice Holmes said long ago: 'A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.'"[13] The canonical formulation derives from a 1909 decision, *United States ex rel. Attorney General v. Delaware & Hudson Co.*[14]: "Under that doctrine, when 'a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.'"[15] The Court in recent years has repeatedly discussed the avoidance canon and treats it as a settled principle, although individual justices frequently argue over its application.[16] It is unsurprising, therefore, that

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10. *Id.* at 1186

11. Underlining Kinkopf's specific argument is a powerful vision of the Constitution as an integrated and coherent scheme of government rather than a discrete set of rules divided into issues of structure and issues of liberty. We must hope that he will turn to explicating that vision directly in future work.

12. *See, e.g.*, The Constitutional Separation of Powers Between the President and Congress, 20 Op. Off. Legal Counsel 124, 128 n.13 (1996) ("[T]he Executive, like the judiciary, construe[s] statutes so as to avoid constitutional problems.").

13. Almendarez-Torres v. United States, 523 U.S. 224, 237–38 (1998) (quoting United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916)).

14. 213 U.S. 366 (1909).

15. Harris v. United States, 536 U.S. 545, 555 (2002) (quoting United States *ex rel.* Attorney Gen. v. Del. & Hudson Co., 213 U.S. 366, 408 (1909)).

16. *See, e.g.*, Jones v. United States, 526 U.S. 227, 239 (1999) (stating that the canon is a "rule [that has been] repeatedly affirmed" and is "beyond debate") (internal citation omitted).

executive branch lawyers, in administrations from both parties, have invoked the canon in their own essays involving statutory construction. "Our approach on this point is consistent with the Supreme Court's admonition to interpret statutes so as to avoid constitutional questions where possible."[17] The executive branch regularly treats its use of the avoidance canon as a duty, and sometimes explains it in terms of the President's obligation to respect Congress.[18]

II. PRESIDENTIAL INVOCATION OF THE AVOIDANCE CANON

The President and the executive's lawyers are wrong. It is an error for the executive branch to employ the avoidance canon when the statute at issue implicates legislative-executive separation of powers issues generally, and emphatically so when the statute bears on, or seeks to structure, the exercise of the President's authority as commander in chief. Let us go back and read more closely what the Supreme Court has said about the avoidance canon. It is, recall, *the Court* that is speaking in this sentence: "It is 'out of respect for Congress, which we assume legislates in the light of constitutional limitations,'" that *the Court* applies the canon.[19] The Court has strongly disavowed the idea that the canon gives the judiciary any license to attribute meaning to a statute that Congress cannot fairly be said to intend. "It is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts. The canon is thus a means of giving effect to congressional intent, not of subverting it."[20] The avoidance canon, in other words, is a tool by which the judiciary denies itself the inadvertent power of imposing its will on Congress.

Confronted with a statute that can plausibly be read to create a constitutional problem that the judiciary might resolve against the law's validity—thus empowering the Court to invalidate a law—but that can also plausibly be read as valid under the judiciary's views of the Constitution, the Court will choose the latter construction. By doing so, the Court avoids the displacement of legislative decision making (which is

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17. Memorandum from Randolph D. Moss, Assistant Attorney Gen., U.S. Dep't of Justice, to Gen. Counsel, Immigration and Naturalization Serv. (Oct. 23, 2000), *available at* http://www.usdoj.gov/olc/ina235Anew.htm (interpreting § 235A of the Immigration and Nationalization Act) (Democratic administration); *see also* Memorandum from M. Edward Wheelan III, Acting Assistant Attorney Gen., U.S. Dep't of Justice, to Deputy Counsel to the President (June 12, 2003), *available at* http://www.usdoj.gov/olc/opinions/06122003_ombdirector2.pdf (Republican administration) ("The principle of constitutional avoidance requires a construction of the statute that removes serious constitutional doubt.").

18. According to a Justice Department opinion,

> [i]t is the duty and practice of the executive branch to avoid statutory constructions that unnecessarily raise grave doubts about the constitutionality of congressional measures. Respect for Congress, furthermore, counsels reluctance to interpret a statute so as to require the assertion of a presidential power to act contrary to the statute.

20 Op. Off. Legal Counsel 253, 278 (1996). Since I worked on this Justice Department opinion, this is as good a place as any to acknowledge that I have been involved in executive branch use of the avoidance canon in separation of powers contexts. I was wrong.

19. *Jones*, 526 U.S. at 239–40 (quoting Rust v. Sullivan, 500 U.S. 173, 191 (1991)).

20. Clark v. Martinez, 543 U.S. 371, 381–82 (2005) (internal citations omitted).

the default resolution of disputes in this Republic) by judicial decision (which denies to democratic politics the power to reach a conclusion when the judges believe the conclusion unconstitutional). As employed by the Supreme Court, therefore, the avoidance canon serves "to minimize disagreement between the branches by preserving congressional enactments that might otherwise founder on constitutional objections."[21] But "[i]t is not designed to aggravate that friction by creating . . . statutes foreign to those Congress intended."[22]

When invoked by the executive branch, in contrast, the avoidance canon invariably serves another function. It is never used as a basis for limiting presidential power, or giving a statute an application that is uncongenial to the administration. Instead, the executive's lawyers cite the danger of "grave and doubtful constitutional questions" as a sound legal reason for giving congressional statutes whatever reading maximizes presidential discretion.[23]

The problem here is not that the President or the executive branch's lawyers are craven or corrupt.[24] The error lies in the idea that the executive should use the avoidance canon at all; for when it does so it automatically plays with loaded dice. The Supreme Court created the canon to assist it in the difficult task of enforcing constitutional rules without aggrandizing its own power and thereby improperly restricting that of Congress. But when the executive employs the canon, it is defending the scope of its authority against a statute that may be constitutional in restricting that authority—*by definition, for if the statute were plainly invalid the canon would have no role.* The judicial avoidance canon restrains the peculiarly judicial form of governmental power; the executive version enlarges executive governmental power. When the President or his lawyers invoke the avoidance canon, they turn the judicial rationale for the canon on its head: it becomes a means of restricting congressional power and doing so, furthermore, without undertaking the tough legal and political task of arguing that the executive can disregard a statute because it *is*—not just that it *may be*—unconstitutional. "The canon is not a method of adjudicating constitutional questions by other means,"[25] but that is unavoidably its role in executive branch statutory construction when the President defends executive power.

If the executive were to disavow use of the avoidance canon, or if the rest of us were to reject that use, the benefits to constitutional law and American democracy would be immense. Some highly dubious executive actions would not take place, and a fair number of ridiculous claims about statutory meaning would be out of bounds. In the teeth of a statutory provision most easily read to limit presidential discretion, the executive would have to deal with the details of the statute in order to act. In the alternative, the President could take on Congress squarely and assert the power to disregard the statute because it is, not just that someone might argue that it might be, unconstitutional. The result of the avoidance canon is a United States Code full of provisions that look like rules of law, which members of Congress may well believe to

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21. Almendarez-Torres v. United States, 523 U.S. 224, 238 (1998).

22. *Id.*

23. *See* Kinkopf, *supra* note 1, at 1194.

24. Of course they might be, but the problem posed by malfeasance on the part of executive officers is a quite different one than that which concerns me in this Comment, which is the error long embedded in the practices of outstanding and upright executive branch lawyers.

25. *Clark*, 543 U.S. at 381.

be rules of law, but which the executive branch treats as suggestions of congressional preference to be followed or ignored at its leisure. In contrast, when the executive admits that it intends to disobey an act of Congress on constitutional grounds, it is unlikely to do so on the basis of specious or flimsy reasoning, and Congress and the public at large can more easily grasp the scope and plausibility of the President's claims of authority.

Despite its lack of internal logic—as well as the clear invitation it gives to de facto claims of executive power that would not survive scrutiny if made de jure—the executive's use of the avoidance canon is a matter of long-established practice. It might well be thought improper for an executive branch lawyer below cabinet rank to disavow the practice on his or her own, although I believe the Attorney General clearly has the authority, as law officer of the government, to do so.[26] But it is ultimately the duty of the President to "take care that the Laws," including the law of the Constitution, are "faithfully executed."[27] I do not expect a President to leap at the chance to disavow executive use of the avoidance canon anytime in the near future, but our politics would be more honest, more democratic, and more respectful of the rule of law if some President did.

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26. *See* Walter Dellinger, *After the Cold War: Presidential Power and the Use of Military Force*, 50 U. MIAMI L. REV. 107, 109–10 (1995) ("[U]nlike an academic lawyer, an executive branch attorney may have an obligation to work within a tradition of reasoned, executive branch precedent, memorialized in formal written opinions. Lawyers in the executive branch have thought and written for decades about the President's legal authority to use force. Opinions of the Attorneys General and of the Office of Legal Counsel, in particular, have addressed the extent of the President's authority to use troops without the express prior approval of Congress. Although it would take us too far from the main subject here to discuss at length the stare decisis effect of these opinions on executive branch officers, the opinions do count for something. When lawyers who are now at the Office of Legal Counsel begin to research an issue, they . . . are expected to look to the previous opinions of the Attorneys General and of heads of this office to develop and refine the executive branch's legal positions."); Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1323 (2000) ("This is not to say that the executive branch lawyer should allow his or her personal legal views to dictate the scope of executive branch authority . . . . Rather, the executive branch lawyer must approach his or her duty to interpret the law with due respect, not only for judicial precedent, but also for the existing body of executive branch practice and precedent.").

27. U.S. CONST. art. II, § 1.