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THE ROLE OF THE LEGISLATIVE AND EXECUTIVE BRANCHES IN INTERPRETING THE CONSTITUTION

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I have spent most of my professional life as a lawyer representing the interests of Speaker O'Neill, Speaker Wright, and the House of Representatives, normally in disputes with the Department of Justice. Therefore, when I got an invitation to talk with the Federalist Society about Attorney General Meese's speech at Tulane,[1] I assumed that I was not being asked to come and sing a harmonious part in the chorus praising the Attorney General's view of the world. However, when I reviewed again the Attorney General's speech, I found that in large part the ideas that he put forward are neither remarkable nor particularly controversial. Let me go through some of the main parts of Meese's speech that have not been focused on yet in this Symposium.

The first is that there is a difference between the Constitution itself and constitutional law. Meese described constitutional law as the body of the decisions of the Supreme Court. That is hardly something that can be argued with. The second is that Supreme Court decisions do not have an absolute sense of finality about them. Again, that is something that cannot be argued with. Certainly the Supreme Court has reversed itself and has been reversed by the passage of amendments, and it is folly to suggest that the Supreme Court forever closes an issue once it decides it. Third, the Attorney General wanted to make it clear that the art of constitutional interpretation is not the sole province of the Court. That again is an area where there can be broad agreement. Congress, on an everyday basis, although perhaps not as effectively as some might hope, engages in constitutional interpretation. There are many bills that are proposed either from within the institution or from outside that get thrown in the trashbin simply because the members feel that they would be unconstitutional if enacted.

The fourth point that the Attorney General made, and the one that I will spend the rest of my time discussing, is controversial. Let me quote for you exactly what he said. In talking about Supreme Court decisions, he said: "But such a decision does not establish a

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1 Meese, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987).

supreme law of the land that is binding on all persons and parts of government henceforth and forevermore."[2] Let me suggest that there is a difference between a Supreme Court decision binding the President of the United States and the underlying law, be it the Constitution or a statute, binding the President. If we look at it in terms of either the Constitution or the statute being the device that is binding the President, then it follows that the executive branch is, to that extent, bound by the decision of the Supreme Court. The Supreme Court decision does not state a law in and of itself, but instead it simply explains what either the Constitution or the law says. This explanation, I suggest to you, is binding on the executive branch when it attempts to execute or administer the law.

I have limited my focus on the binding nature of Supreme Court decisions and the underlying law to the executive branch because I believe that it does not have the same binding effect upon the legislative branch. The reason that Supreme Court decisions do not have the same binding effect upon the legislative branch is that when Congress faces a decision from the Supreme Court that it does not agree with, it has the option of passing another law, perhaps the exact same law, and seeing whether on second consideration the Supreme Court will rule differently. This has, on occasion, happened, and in fact there are occasions where the Supreme Court has invited the Congress to submit the question again.

Similarly, Supreme Court decisions do not have the same binding effect on the President in his role in the legislative process, a role which should not be denigrated and that the President plays very well. The President participates in the legislative process by suggesting the passage of laws or by vetoing a bill on the grounds of constitutionally and sending it back to Congress. Instead of an override, the result of a veto may be the passage of a substantially different bill that takes into account the objections that the President registered. He participates in the legislative process and certainly should not be foreclosed by any prevailing decision of the Supreme Court. It is entirely permissible for the President to veto legislation on the grounds that he believes it to be unconstitutional, notwithstanding the fact that there may be in existence a ruling of the Supreme Court that holds directly to the contrary. The President is well within his constitutional prerogatives in issuing such a constitutional veto just as the Congress is well within their constitutional prerogatives in passing a statute notwithstanding a Supreme Court decision.

I think that what it comes does to is that the Attorney General's

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2 *Id.* at 983.

name of the word "final" to describe the effect of a Supreme Court decision is mistaken. The significance of a Supreme Court decision is that it is the prevailing reading of the law. It is the President's obligation in executing the law or administering the law to follow that law whether it is constitutional or statutory. The President has no constitutional warrant to ignore the prevailing reading of the law in implementing either enacted statutes or constitutional provisions. To that limited extent, I disagree with John Harrison and say that there are instances in which the President cannot feel free to abrogate his responsibility to execute the law as it has been enacted because he desires to raise a test case or because he believes that a law is so unconstitutional that he cannot see how a court might have upheld it.