

TRANSCRIPT

THE FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES: 2012 NATIONAL LAWYERS CONVENTION

SHOWCASE PANEL II: SEPARATION OF POWERS

*Panelists: Akhil Reed Amar, David Barron, Hon. C. Boyden Gray,
John O. McGinnis, Victoria Nourse*

*Moderator: Hon. A. Raymond Randolph**

9:15 a.m. to 11:15 a.m.
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DEAN REUTER: Good morning and welcome to this, the second day, the best day, of The Federalist Society's National Lawyers Convention. I am Dean Reuter, Vice President and Director of Practice Groups of The Federalist Society. Thank you all for being here today. We certainly appreciate you coming. I hope you were able to join us last night for a dinner and a celebration and an extraordinary speech by U.S. Supreme Court Justice Samuel Alito. Today we're also going to end our day with an address, this one by entrepreneur Peter Thiel, but we've got a lot going on before that. Before our closing address, we will hear an address from Florida Governor Rick Scott. We'll also hear an address by Senator Mike Lee. And in one of our panels later

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today we'll feature former U.S. Senator Phil Gramm. And we'll hear an address from Senator-elect Ted Cruz. So we've got the Senate completely covered today with a former Senator, a current Senator, and a Senator-elect.

One programming note, those addresses have been juggled. If you're walking around with our printed brochure for the addresses, that's outdated. Our morning address is going to feature Governor Rick Scott, and for our addresses this afternoon, we'll hear first from Mike Lee and later from Ted Cruz. That's a change in the schedule. Obviously, if you have not downloaded our convention app to your smart phone, I urge you to do that. It's all got all the updates on it. It also has one feature that a lot of people haven't found yet, there is a place to provide feedback on the convention for individual panels, for individual speakers, for the convention as a whole. It's sort of like a course evaluation sheet in law schools. We don't have tenure for Federalist Society speakers—

[Laughter.]

DEAN REUTER: —but we will use your feedback as we continue to try to improve this convention experience for you.

But we have a lot more going on today. Also today we have other panel discussions with the former United States Attorney General, the former head of BB&T Bank, now head of Cato, the current head of the Department of Justice Criminal Division, and law school professors from Yale, Harvard, Georgetown, Northwestern, Michigan, Columbia, and many other even better law schools.

[Laughter.]

DEAN REUTER: We've got partners from some of the biggest, best law firms in the country and judges from the Fourth, Ninth, Tenth, Eleventh, and D.C. Circuit Courts of Appeal and the Minnesota Supreme Court.

So let's get started. I'm very pleased to welcome our panel this morning, our first panel, and its moderator, D.C. Circuit Court of Appeals Judge A. Raymond Randolph. I was very privileged and honored to recently attend the ceremony in which Judge Randolph's official courthouse portrait was unveiled.

So, Judge Randolph, thank you for your years of service on

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the bench so far and thank you for your service here with us today.

Judge Randolph.

JUDGE A. RAYMOND RANDOLPH: So the program is changed a little bit from what you already have because Dean Rodriguez could not be with us, the Dean of Northwestern, and so each panelist will have a few more minutes to talk.

The subject matter of our talk today is separation of powers, a rather broad topic. You won't find those words in the Constitution. Did you know that in 1789, in fact, James Madison proposed an amendment to the Constitution to have a clause inserted that specifically dealt with the separation of powers, and it was defeated in the Senate? There are no records and nobody really knows why it was defeated. *The Federalist Papers* discuss, particularly Madison in 47 to 51, discuss separation of powers.

There are a series of checks and balances that are supposed to keep the branches of government within their proper spheres, but there are also instances within the Constitution where one branch of government performs functions seemingly assigned to another branch. For example, the legislature performs judicial functions. How does it do that? Well, it tries impeachments. And the judiciary can perform executive functions. How does it do that? It appoints special prosecutors when there is legislation authorizing it. So these are not airtight compartments and there are checks and balances, which our speakers will go into.

One thing in the brochure mentioned that we'll talk a little bit about Dodd-Frank, and I think Ambassador Gray will do that, in the context of separation of powers. Well, I don't know anything about—didn't know anything about—Dodd-Frank, so I looked it up, and I first looked for a summary of it—

[Laughter.]

JUDGE A. RAYMOND RANDOLPH: —and the summary in *The Congressional Quarterly* was 200 pages long, the summary.

[Laughter.]

JUDGE A. RAYMOND RANDOLPH: And I started reading it, and you could not really tell much of anything about the summary, and it suddenly occurred to me that there may

have been some wisdom in Nancy Pelosi's remark about Obamacare, that you really can't understand the law until after you pass it because, as I found out, no one understands what Dodd-Frank is going to do until the regulations are issued under it and that may well be the problem.

Well, our first speaker is familiar to many of you, Professor John McGinnis. He is the George Dix Professor of Law at Northwestern Law School where he teaches constitutional law, international trade, antitrust, and economics, law and economics. He is a graduate of Harvard and Balliol College, Oxford, Harvard Law School, and clerked on the D.C. Circuit, and was deputy assistant attorney general in the Office of Legal Counsel from 1987 to 1991.

Professor McGinnis?

PROFESSOR JOHN O. MCGINNIS: Thank you very much, Judge Randolph.

As the first speaker today, I want to set the stage for our panel's discussion by talking in quite general terms about how the separation of powers works, or rather fails to work, in the modern administrative state. That is the modern baseline which constrains the Supreme Court's jurisprudence, the subject of this panel, and, frankly, this baseline, largely turns the original Constitution on its head and deprives the separation of powers of its overriding purposes of assuring accountability and protecting liberty.

The original Constitution created three kinds of power—legislative, executive, and judicial—and with specified exceptions, gave the responsibility for exercising such power to legislative, executive, and judicial branches respectively. Sadly, the modern administrative state is built on a wholesale violation of these principles with consequent losses to accountability and liberty.

First of all, Congress delegates vast legislative—we've heard an example of this, and there are even some more undefined powers to the FCC and other branches—undefined powers to executive agencies, which then write rules that impose obligations on the rest of us themselves. Now, what do members of Congress do? Well, they often turn around and deflect accountability by complaining about these very rules as if they were somehow innocent bystanders in the government process.

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The Constitution also puts the president in charge of the executive through Article II's Vesting Clause of all of the executive power of the president, and that also tries to assure accountability for the executive branch's operation. But much of the modern administrative state operates under structures that insulate agency heads from presidential control. The current President, like many of his predecessors, is a master of exploiting this feature for his political benefit. For instance, the general counsel of the NLRB, the National Labor Relations Board, filed an unprecedented complaint against Boeing—you probably heard of it—for deciding to move a plant to a right-to-work state. The general counsel took an action—he filed a complaint—the kind of action you might think at the core of executive power, but the President publicly disclaimed responsibility for his appointee's actions saying that the agency was wholly independent. Independent agencies thus allow an administration to pay off its special interests while confusing the inattentive ordinary citizen.

Finally, the Constitution limits judicial power to Article III courts, but the administrative state permits the executive agencies often to adjudicate themselves and resolve factual disputes with little judicial oversight.

Thus, all these changes in the modern administrative state are not in any sense an accident because they reflect the transformation of the Constitution's original philosophy of government that's implicit in the structure of the Constitution. That document's structure reflected the primacy of spontaneous ordering from the market, the family, and voluntary associations. When all of those failed, individual states were available to correct the failure but were themselves disciplined by jurisdictional competition. Only when the failures threatened interstate or foreign commerce or other specified matters of national import were the feds supposed to intervene and then a separation of powers, more strict than in many states at the time, was designed to safeguard liberty by breaking governmental power into parts that were hard for special interests and partisan majorities to control simultaneously. The special interests of today are what the Framers understood as factions.

Of course, the reigning philosophy of the New Deal, under which we still live today, was precisely the opposite. Here, market failures were deemed pervasive, spillovers from state to state putatively extensive, and more federal regulation became

the preferred solution. Given that the classic separation of powers impeded comprehensive top-down regulation, the architects of the New Deal administrative state were at least honest. Many of them openly stated that the constitutional blueprint needed radical revision. The result was delegation run riot and judicial review confined.

In my remaining time I want to discuss the degree to which the Court can move us back towards the original baseline because I'm skeptical that the Court can get us very far. Instead, some reforms proposed in Congress might do the job.

There are three possible models by which the Court can approach the separation of powers today. The first model can be characterized as the "New Deal triumphant." If President Obama replaces any Republican justice on the Court, we can expect further entrenchment of the New Deal's world of the separation of powers. The core philosophy of the Democratic Party combines moral individualism and substantial economic collectivism, and the best predictor of a justice's vote is now the core philosophy of the appointing president. A headless fourth branch, and even more, open-ended delegation, sustains a bureaucratic engine for big government that is not as easily susceptible to political checks as government in the original Constitution.

The second model may be characterized as "cut back around the edges." This model is likely to be preferred by the current Court, at least intermittently. If Chief Justice Roberts were an Olympian, he would be a gold medalist in the slalom because no justice has ever been better at weaving through precedents while leaving them standing.

[Laughter.]

PROFESSOR JOHN O. McGINNIS: The best recent example is the majority opinion in *Free Enterprise Fund*. There, Chief Justice leaves in place the doctrine that permits Congress to insulate independent agency heads, such as that from *Humphrey's Executor*, all completely untouched. Instead he shows that these precedents don't directly permit a board, like the accounting board at issue in the case, to be insulated from removal from an agency that is already insulated from removal, the so-called double insulation at issue in the case. Therefore, the Court strikes it down. And by this decision, the Court moves us back rather marginally towards the original Constitution and

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presidential accountability.

Another area in which I can see more such incrementalism is reading statutes narrowly to avoid constitutional questions of overbroad delegation. That I think is the greatest prospect of hope for confining the Dodd-Frank legislation.

The third and mostly unlikely model requires a Republican administration to get several new appointments under a Senate perhaps with sixty Republican members. Such justices might indeed go back to the original meaning of the Constitution and the original constraints on federal power unless overruling non-originalist precedent would impose very high costs. This approach would actually overrule some cases. Most obviously, it might lead to the reversal of cases that insulate heads of independent agencies, like the NLRB, from presidential removal. This would require presidential accountability and lead to more coordinated and better decision-making under OMB, and it would generally not create any government emergencies. The next day, after saying there were no independent agencies, all over Washington the thousands of bureaucrats would wake up, go to their desks, and go about their business much as before; the public wouldn't even notice.

The one possible exception to the public notice—the independent Federal Reserve—may actually prove the rule. No less than James Carville has noted the power of the financial markets to constrain the president. It is thus market norms, not statutory constraints, that make rash firings of the Fed chairmen extremely unlikely.

But even a strong dose of originalism can't realistically put the real genie of the administrative state, broad delegation, back into its vase. For instance, constraining agencies through the implementation of a stringent non-delegation doctrine would simply be too radical and overturn too many regulations for a court to contemplate. Moreover, how much delegation is too much is not a line that admits of easy judicial implementation, as Justice Scalia himself has noted.

Thus, my final message is that the separation of powers for the administrative state is so messed up that the Court cannot put it right. We must ultimately look to recent proposals in Congress if a separation of powers is to be restored. The first is the REINS Act, which would require Congress to approve

delegations for any rule that costs more than \$100 million. Its procedural mechanisms would force Congress to take a stand on important regulations by an up-or-down vote, it would get rid of filibusters, have time limits for requiring a vote. This Act would help restore legislative accountability. Members of Congress couldn't complain about important rules. They would actually have to take a stance on them.

Another bill would require all independent agencies to submit their rules to OMB for cost-benefit analysis in the absence of any contrary statutory directive. I would add two provisions to that bill, one would require the Justice Department to sign off on all enforcement actions of independent agencies and therefore make it difficult for agencies to enforce matters without the actual approval of an official who is responsible to the president. And a second would require all agencies to experiment with information markets—markets in which citizens can bet on future events to predict the results of regulations rather than simply rely on self-serving statements in notice and comment rulemaking or the often biased views of bureaucrats. Such information markets, you may be interested to know, predicted the results of the recent presidential election, the vote shares of the candidates, far more accurately than the consensus of the polls. In my view, which I set out in my forthcoming book, *Accelerating Democracy*, we should look for more opportunities for markets to guide government rather than simply for more government action to guide markets.

[Applause.]

PROFESSOR JOHN O. McGINNIS: A final bill would make judicial review of agency rules less deferential as to factual findings. Since courts are less susceptible to capture by special interests than agencies, that result is likely to screen rules for the legislative compliance and public interest bona fide. Taken together, these various proposals in Congress would constitute a new set of procedures that would reinforce the classic separation of powers and that, unlike the current Administrative Procedures Act, would really restore accountability and discipline to the administrative state according to the original design.

Now, I want to be clear, I'm sure that these bills need fine-tuning, and although they have support from some Democrats, they may require Republican control of both houses for ultimate passage, but they do capture the Constitution's original

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lightning—a lightning for liberty and accountability in government, in the bottle of modern framework legislation. With these reforms, Congress would be forced to make clear its preferences, the president would be more responsible for keeping his house in order, and the judiciary would gain a stronger oversight role. Legislation, not Supreme Court action, is the root to reform and the restoration of the classic separation of powers.

Thank you very much.

[Applause.]

JUDGE A. RAYMOND RANDOLPH: Thank you, John.

Our next speaker is Professor Akhil Reed Amar. He is the Sterling Professor of Law and Political Science at Yale, where he teaches constitutional law in both Yale College and Yale Law School, and not of the sort that we heard about last night through Professor Alito.

[Laughter.]

JUDGE A. RAYMOND RANDOLPH: After graduating from Yale and Yale Law School, he clerked for then-First Circuit Judge Stephen Breyer. He has received the Paul Bator Award from The Federalist Society. He has published many articles, all of them penetrating, and numerous books, and his latest book—which I think you have with you, don't you? Akhil, you can hold it up if you like—

[Laughter.]

JUDGE A. RAYMOND RANDOLPH: —is *America's Unwritten Constitution: The Precedents and Principles We Live By*.

Professor Amar.

[Applause.]

PROFESSOR AKHIL REED AMAR: It is always an honor and a pleasure to be back with The Federalist Society. Thank you so much for inviting me.

We're going to talk about the Founders today, of course, and their vision of not just separation of powers but how that vision fit into a larger framework. Let me just say a couple of words about founders. We're in the presence of a modern-day founder

today—a slightly different kind of founder, as I shall explain—but let's begin with the Founders of America's Constitution. Let's recall that 225 years ago, this season—September 17th, 1787 to be specific—a proposal issues. Before that proposal issued, if you look back on the history of the world, over the millennia, you see very little democracy across the planet. You see a few democratic city-states that aren't able to sustain themselves militarily: Athens, pre-imperial Rome, Florence, and a few other similar, short-lived democratic experiments. In sum, you see very little democracy over the entire planet. Today, by contrast, democracy prevails over half the planet and that's because 225 years ago the Founders put forth this audacious idea. They actually put their proposal to a vote up and down a continent. In eight of the thirteen states, ordinary property qualifications were lowered or eliminated in that special vote. And a remarkable free speech reigned up and down the continent for that year: You could be for the thing, or you could be against it. Ordinary farmers read it. Unlike some modern legislation, the proposed Constitution was short enough so that an ordinary farmer could read it. And I'm fishing here in my back pocket. I have the Cato version, too, somewhere here, rest assured.

[Laughter.]

PROFESSOR AKHIL REED AMAR: It's in one of these pockets here.

[Laughter.]

PROFESSOR AKHIL REED AMAR: There we go. Okay. So ordinary people could decide whether they were for or against it, and the document's ratification was accompanied by remarkable free speech for a year—uninhibited, robust, wide-open free speech up and down a continent! No one dies. Remarkable free speech. People are burned in effigy, but real people aren't burned in person. So an amazing project was launched 225 years ago by one set of Founders. And I mention all of that because I want us to remember what the world was like before the Constitution. That world was not democratic. And now look at the world today—a far more democratic world. In short, the events 225 years ago form the hinge of human history. Everything changes with that year when we, the people, up and down a continent, deliberate and vote and talk about this audacious project.

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I personally remember a time when there wasn't a certain organization—so I want you to remember that time. I remember a time when there wasn't an organization called The Federalist Society. And we're in the presence of a founder here, at least one. I don't see Lee Liberman Otis here or Spencer Abraham or Dave McIntosh, but I do see Steve Calabresi, my dear friend, here. He's a founder. I remember when this organization was just an idea in his head, the way a bunch of people at Philadelphia—thirty-nine of them signing it, fifty-five of them participating—had an idea in their head and actually made something.

And, Steve, congratulations on this.

[Applause.]

PROFESSOR AKHIL REED AMAR: As Judge Randolph told you, the words “separation of powers” don't appear in the Constitution; nor does the phrase “checks and balances.” It is part of an unwritten Constitution.

[Laughter.]

PROFESSOR AKHIL REED AMAR: I think the unwritten Constitution does not exist at odds with the written. Rather, the unwritten completes its written counterpart, with concepts like limited government, the rule of law, federalism, checks and balances, separation of powers, the unitary executive, and so on. These are unwritten concepts that complete the thing.

I want to tell you a little bit about the executive branch in particular. *The Federalist Papers* were referenced by Judge Randolph. They have particular significance. They are part of an unwritten Constitution and have special significance. Even though they're not part of this compact document, they carry special authority, as does the Declaration of Independence, for example—another iconic text that helps make us Americans. Whether we're conservative or liberal, Republican or Democrat, East or West Coast, North or South, we're all Americans, and we all have this unwritten Constitution alongside the written Constitution that we cherish, and *The Federalist Papers* are part of it.

Here is what *The Federalist Papers* say actually. A simple question: Can a president fire a cabinet officer at will? The Constitution's text doesn't quite tell us; it doesn't even use the word “Cabinet.” The idea of a collective executive Cabinet

emerges early in our national experience—but it’s not in the text of the Constitution. *The Federalist Papers*, *Federalist 77*, says actually the Senate is going to have to agree to a removal—to a disappointment, so to speak—just as the Senate is going to have to agree to the initial appointment. That’s what Hamilton says in *The Federalist 77*. But . . . that’s not our practice today. And that’s absolutely clear, that presidents can fire cabinet officers at will. And where does that absolutely clear concept come from? Not from *The Federalist Papers*, not from this year of constitutional conversation where that wasn’t the clear and overwhelming original intent, original understanding, original meaning.

To repeat: the Constitution’s text does not clearly specify the role of the Senate in removal situations. One could infer that since the Senate plays a role in appointment, the Senate will play a symmetric role in disappointment, or one could say, no, this is actually part of the executive power of the United States unimpeded. There are two plausible interpretations of the text, and yet today we don’t think that it’s an even coin toss. When Barack Obama becomes President, it’s absolutely clear to everyone that he can fire Hank Paulson at-will and bring in his own guy, Timothy Geithner. It’s not so clear apparently that he can fire Ben Bernanke at-will. Where did we get this idea that Ben Bernanke is different than Hank Paulson? And the answer is not the text and the answer is not the original intent of this yearlong conversation. We won’t find very much discussion about this issue in 1787–88, but we will find great guidance in the so-called Decision of 1789.

Many of the things that we’re going to be talking about today are clear not because the words of Article II are clear—they’re pretty terse—but because of the first precedents in effect established by our first President. On issue after issue after issue, clarity is achieved when presidents ask themselves, not, “What does the text say?” but, “What would George Washington do?” and “What did George Washington do?” in the same way that Christians ask themselves, “What would Jesus do?” The Decision of 1789 is a settlement achieved between the president and the House and the Senate that cabinet officers serve at the president’s pleasure—they serve at-will. There is no for-cause requirement for Cabinet dismissal, and the House and the Senate do not play a role in removal the way the Senate plays a role, for example, in the appointment process.

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What other things are clear from this decision of 1789, this “liquidation,” to use a word from *The Federalist* 37? Madison suggests that some of the things will be decided not by the text but by early practices, so maybe he understood that, but I’m not sure that every other Framer and Ratifier did, so I’m not sure that the special status of “liquidation” and early precedents were overwhelmingly clear before the Constitution was adopted. But this special status does, I think, become clear early on as people work through these things and these things stick. So here is why Bernanke is different than Paulson: Paulson derives directly from Alexander Hamilton, who, as the first Secretary of the Treasury, was removable at-will and said so actually in the Decision of 1789. He changed his mind and announced that change to friends, and he said so in letters that he wrote to President Washington—saying, in effect that “I’m under your supervision under the Opinions Clause”—a point that Steve and others have made in their scholarship, building on John Harrison and others.

So what is clear from 1789? Well, speaking of the Senate, does the Senate have to be consulted in advance, even give its approval, if a president wants to negotiate a treaty or parley with other nations? It turns out no. Is the text clear on this? No, it’s not, but Washington’s practices are clear. He sends secret envoys, secret ambassadors—Gouverneur Morris, for example—and from that, Nixon says, well, I can send Kissinger as a secret envoy to China. And where does it say that presidents can recognize foreign regimes unilaterally? Yes, we could say maybe it’s from the Receive Ambassador Clause of the Constitution, but Hamilton, in *The Federalist Papers*, says, “Oh, that’s just a matter of courtesy, that’s not a big substantive power, that’s just as a matter of politeness; when you arrive in the United States, you present your credentials to the President and not someone else.” But today, we think that Barack Obama unilaterally will decide when to recognize the Syrian rebels, as he decided when to recognize the Libyan rebels, as Jimmy Carter decided unilaterally to recognize the People’s Republic of China instead of Taiwan and even actually break our treaty relations with Taiwan. And ultimately that’s not a close question in constitutional law because Washington did it first when he unilaterally decided to recognize the French revolutionaries as the lawful regime in France.

So basically on issue after issue after issue, the president defines foreign policy to a considerable extent. He can issue

statements. He speaks for the nation. He is the voice of the nation, a unique organ of foreign affairs. Well, we could read all that into the words “executive power,” but it’s not so clear. What IS clear is that Washington issues his Neutrality Proclamation, in which he says: “Here is the Federal Government’s position on this emerging conflict in France.” And what is clear is that this proclamation sets a powerful precedent on the scope of presidential power.

I’m going to conclude here to give time for my fellow panelists. On issue after issue after issue, separation of powers—what we call separation of powers, which is itself unwritten, or checks and balances—are defined not just by what the text says but by unwritten practices, many of the most important of which began with George Washington. So my claim in one of the key chapters of my latest book, *America’s Unwritten Constitution*, is that we read the text today—all of us, liberals and conservatives, Republican presidents, Democratic presidents—through a specific set of lens, a specific prism: We read them through the spectacles of George Washington.

Thank you very much.

[Applause.]

JUDGE A. RAYMOND RANDOLPH: Thank you, Professor.

In addition to reading Professor Akhil’s book, I would recommend a book I just finished, it’s on George Washington, the Ron Chernow biography, which is absolutely superb.

Our next speaker is C. Boyden Gray. He is the former Ambassador to the European Union. He was a Special Envoy to the Eurasian Energy Diplomacy, served as Special Envoy to the European Union, and as White House Counsel in the administration of President George H.W. Bush. Mr. Gray also served as Counsel to the Presidential Task Force on Regulatory Relief during the Reagan administration.

Ambassador Gray.

AMBASSADOR C. BOYDEN GRAY: Thank you.

[Applause.]

AMBASSADOR C. BOYDEN GRAY: It is an honor to

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speak here, and I just want to pay my respects to Justice Alito's speech last night. That's a really hard act to follow.

[Applause.]

AMBASSADOR C. BOYDEN GRAY: Not to recognize my—

[Indicating.]

[Laughter.]

AMBASSADOR C. BOYDEN GRAY: It's interesting, the two speakers' reference to various things, which I'll talk about very briefly, but the first is I think I heard the words "special envoy." I was a special envoy, and I want it made clear that I don't want to be accused of any kind of hypocrisy here because, of course, special envoys don't require Senate confirmation. And, in fact, I was also a recess appointment, about which more later, not mine, but somebody else's. Mine was legal.

[Laughter.]

AMBASSADOR C. BOYDEN GRAY: When I was Special Envoy in the Bush administration, I was very special—

[Laughter.]

AMBASSADOR C. BOYDEN GRAY: —because there weren't very many of them. There was one other, I think his name was Rich Williamson, he might have been something had somebody been elected, but we don't know. Now there is a profusion of special envoys and czars and all kinds of extra-constitutional characters. On my last night in Europe, I was asked to attend a dinner given by the commanding general of the European Defense Force. And you may wonder, what is this? Because there is no European Defense Force really.

[Laughter.]

AMBASSADOR C. BOYDEN GRAY: But he commanded a staff and a chef and a house—

[Laughter.]

AMBASSADOR C. BOYDEN GRAY: —and he was very nice to invite me and sent me a guest list to entice me to attend, which I couldn't do because I was, as I say, packing up, but I was

identified as C. Boyden Gray, U.S. Special Convoy.

[Laughter.]

AMBASSADOR C. BOYDEN GRAY: Also references to Bernanke, and I'll get to in a minute about how the regulation works with Dodd-Frank, but Bernanke is an interesting figure because I think Congress does commit to Congress the—the Constitution to Congress the regulation of the currency and the price thereof, which makes you [think], all right, so Bernanke shouldn't be, and that's a congressional kind of thing, but, of course, when he regulates banks, what does that have to do with the currency necessarily? Well, we all know it has a lot to do with it. So those are very mixed questions, and I don't propose any answers. What I want to talk about, though, is something where I do think there are some clear problems and clear solutions, one of which, of course, is repeal. I mean, we can pass all kinds of statutes for the future, but we could repeal this one. It won't happen, but maybe the courts can take care of it.

The Dodd-Frank lawsuit that I'm involved with, with some others, and with assistance from a lot of friends of The Federalist Society, challenges basically two or three titles, but the two entities are—the three entities are the Consumer Bureau, the resolution authority sometimes known as the “Bailout Authority,” sometimes known as the “Too Big to Fail Authority”—and then the Financial Stability Oversight Council, the FSOC, not to be confused with another FSOC. But the theme is that none of these entities has any accountability. They are free of restraint by oversight by the president, by the Congress, and by the courts. And we can talk about delegation—what do we do about delegation? The non-delegation doctrine, is it dead? Is it not dead? The doctrine of constitutional avoidance, which isn't quite dead where you narrow the statutes, courts do, to avoid complex constitutional delegation issues. But this statute presents issues of an entirely different order where all branches are collapsed into one oversight, it's really quite extraordinary.

Now, take the Consumer Bureau—some of you may know this very well, but if you don't know it, you should know it—is an entity that is paid for by the Fed—that is, printed money—and the Fed is prohibited, however, from having anything to do with what it does. The White House is prohibited from having anything to do with what it does, OMB is prohibited from reviewing the budget or having anything to do with what it does,

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and because it's paid by the Fed, Congress is cut out of having anything to do with what it does. Indeed, the legislation goes so far as to purport to say that the chairman of the House and Senate Appropriations Committee may not review the budget. I don't expect the Sergeant At Arms to arrest the chairman of either committee if they actually do hold a hearing, but that's what the legislation actually says. And there are no criminal penalties in that provision. Now, when we get to the resolution authority, you will see that there are criminal penalties for misbehavior on the part of private citizens.

But there is no oversight. Now, when it comes to the judges, the judges are required, John, to defer to the Consumer Bureau as over the only agency in Washington. Now, it is actually taking over the control of some eighteen different statutes from, I don't know, a dozen different other agencies that have been doing this for years, but when it comes to interpreting what these statutes mean, eighteen, the courts must defer to what the Consumer Bureau says. And this is problematic when there is absolutely no ability to oversee what Mr. Cordray does, and to top it off, he, of course, was a recess appointment that occurred during a very, very, very short recess which didn't meet the three-day criteria that we normally associate, have associated, with when there is actually a recess. The OLC opinion flags—buried sort of in the opinion—flags that this is a litigation risk. I wish someone could tell me—John, you were there—did we ever act on one of your OLC opinions that flagged a litigation risk?

PROFESSOR JOHN O. MCGINNIS: No.

AMBASSADOR C. BOYDEN GRAY: No. I don't think so. I didn't think so.

[Laughter.]

AMBASSADOR C. BOYDEN GRAY: Sorry to put you on the spot, but that's quite unusual and a bit of a red flag.

And so the Congress specified in connection—by the way, if you now want to recess, you can do it during your lunch hour if you want because, you know, Congress is not available according to the theory of the OLC opinion, so lunch is a perfectly good time, any good old holiday will do. Veterans Day? Monday would have been a good day. And that is the theory of the case.

The resolution authority is perhaps even worse. This

entitles the executive branch, the FDIC, the Treasury, to go in and seize a financial institution which they deem to be weak financially and of a risk to the financial stability of the United States. They can do this, and will do it, I'm sure, overnight. The judge who is given the reorganization plan is given twenty-four hours to sign off on it. Of course, no judge can sign off on a complex matter of this nature. If anyone leaks it to his favorite or her favorite newspaper in the hopes of kind of heading this thing off publicly, he or she is subject to a criminal penalty and a criminal jail sentence. So it's a real star chamber proceeding. The grounds upon which a court could rule are severely restricted by the legislation. In a letter to the editor in response to an op-ed that I wrote two years ago, the principal argument made by the Treasury was that, well, the finding has to be made that this institution is posing a risk to the financial stability of the United States, but that finding is specifically precluded from being reviewed by the judges. I should also add that judges are also specifically precluded from actually ruling whether or determining whether or not the action is in accordance with law. That's another small—

[Laughter.]

AMBASSADOR C. BOYDEN GRAY: The Congress doesn't have much to say about it. They're told, gee-whiz, this is not going to be a taxpayer bailout, aren't you happy? The Treasury has an assessment authority which extends well beyond just federally insured depository institutions, which, because of the subsidy, you might say, all right, the federal government has some right, but this includes all important big financial institutions, so it's sort of like a tax. And so it's a self-contained world of a black box. All the bankruptcy law, 100 years, is thrown out the window, and we don't really know what the expectations are and how they will be met.

I could go on and talk about the difficulties of all of this, but this is unheard of. I don't think there is any provision or any provision in the law which creates entities with such unaccountability, such arbitrary power. There is virtually no guidance given in the statute for how this business should operate, but even if there was guidance, the courts wouldn't be allowed to follow it.

The director of the Consumer Bureau [is a subject] I want to sort of conclude with. The director of the Consumer Bureau has

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said, or is required to be confirmed by the Senate in order to issue rulemaking. Now, it may be that this is why the director has said, the illegally recess-appointed director has said, that he will not do rulemaking. We don't know, but what he said is, I don't know what the statute means, and I can only tell you what it means on a case-by-case basis after the fact in an enforcement proceeding. So you can see what peril that puts banks in. And our little bank, which is the National Bank from Big Springs, Texas—you might wonder where Big Springs, Texas is? Well, it's going to be hard to find, but he's a highly respected banker, captivated the House Financial Services Committee during a hearing. He doesn't really know and he can't hire people like me, afford to hire people like me, to tell him how to conduct his business. So he's getting out of certain lines of business because he simply can't afford to make a "misguess" because he's never going to be told in advance. Now, that's a great state of affairs.

I know I'm going to be killed by some of my colleagues to say this, but it was a little chilling the day after we filed the lawsuit when the little bank's examiner—won't tell which agency—called up the CEO and said, "What are you doing? Why didn't you tell us? Who are you talking to? People upstairs want to know."

This is not the America I grew up in.

[Applause.]

JUDGE A. RAYMOND RANDOLPH: Well, I can't comment on your pending case.

AMBASSADOR C. BOYDEN GRAY: No.

JUDGE A. RAYMOND RANDOLPH: No.

[Laughter.]

JUDGE A. RAYMOND RANDOLPH: I can say one thing. Dodd-Frank, I'm told, requires hundreds of regulations that have to be promulgated. There is a website called regulations.gov that I occasionally look at because it affects our workload on our court. And in the next ninety days—I think I have this number right—the number of what they call notifications, notice of rulemakings, that are due to come out total 9,762. 9,700 new—it's just the next ninety days.

Anyway, our next speaker is David Barron. He is the S. William Green Professor of Public Law at Harvard Law School.

He recently served for the first eighteen months in the Obama administration as the Acting Assistant Attorney General for the Office of Legal Counsel. His teaching and scholarship focus on war powers, presidential powers, and the separation of powers. He served as a law clerk to Associate Justice John Paul Stevens.

Professor Barron.

[Applause.]

PROFESSOR DAVID BARRON: Well, thank you very much for inviting me to be here. It's an honor to be on the panel. I'm detecting a certain degree of hostility to the Dodd-Frank legislation.

[Laughter.]

PROFESSOR DAVID BARRON: So I thought I would try and put it in some historical context and to put the challenge itself into some historical context, and what I want to suggest is that the novelty of the constitutional challenge mirrors the novelty of the agency, and to understand the constitutional challenge, we need to ask, why is Congress experimenting with the forms that the agencies take at this time?

So if we just think about the constitutional challenge itself under the conventional doctrine, there are I think some obvious difficulties with it. If we want to challenge it on delegation grounds, as Ambassador Gray says straight up, we have the problem that the non-delegation doctrine is, per Justice Scalia in the most recent iteration of the doctrine, notoriously generous, some would say lax to the point of nonexistent. And whatever one thinks of what an intelligible principle must be, even the loose language that's pointed to as a criticism for the scope of authority of the CFPB would seem to qualify under *American Trucking* as an intelligible principle, so it's not a situation of unbounded power in the constitutional sense if the doctrine remains steady.

If we look at the other way in which we attack independent agencies on constitutional grounds and we look at it through the lens of Article II, similarly the challenge faces an uphill climb, and the reason is that in fact, if anything, the structure of this agency lends itself to more presidential accountability than would be the case with your typical independent agency. The nature of the removal limitation is not unusual, it's the same standard that

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you see in *Humphrey's Executor* for the FTC and myriad independent agencies, but unlike those independent agencies, it's a single-member head, which means that, if anything, there is more presidential accountability rather than less, and to the extent that they are insulated to some extent from the appropriations process with Congress, one might have thought that that makes the Article II problem less bad rather than worse because the typical claim is that the insulation of the independent agency is not just a limitation on the president's power but a potential aggrandizement of Congress's because, as Chief Justice Roberts said recently: Who will step into the breach if the President isn't able to control the agency? It would be Congress.

So if we look at it through the classic lens of just delegation doctrine Article II authority, the challenge faces difficulty, which is why the challenge artfully recast itself in a novel form, and the claim throughout the pleadings is that the violation is to the separation of powers, it's not rooted just in a delegation challenge, nor is it rooted just in an Article II objection—it's the combination of a large degree of policy discretion with a high degree of independence that is thought to make the constitutional claim grounded.

So why the novelty of the challenge? Well, partly why it gets off the ground is because the agency is constructed in a novel fashion. Our independent agencies don't typically look like this, and the claim that it's unusual seems probably true. There is a degree of experimentation going on. And I think it's then important to ask why, what is Congress trying to accomplish by experimenting with the independents at this moment, and in that regard, it's helpful to look at the affinity between the experimentalism that's going on, the design of the CFPB, and the same kind of experimentation that went on in the design of the Accounting Oversight Board that was invalidated in the *Free Enterprise Fund* case.

So in both instances, there was an effort to change the way we think about an independent agency. In the *Accounting Oversight Board* case, the idea was not to just allow it to be independent in the way that the SEC was, but it had to be independent from the independent agencies as well and that was a novel move, at least for actors that had policy discretion beyond adjudication, and similarly, if we look at the CFPB, it's novel, it's

an independent agency with a single-member head rather than multimember and it's self-funded in a particular way.

So what is Congress doing at this moment? What's leading it to reconfigure agencies that were structured for years in classic fashion as multimember commissions, sometimes with bipartisan mechanisms of appointment and with a kind of standard for-cause removal limitation?

I think what's interesting is that the driver, if you credit what the members of Congress themselves who are designing these agencies say, is a concern with what they call capture, that's the driving motivation of design. It's not actually aimed at decreasing the accountability of the president, that's not their focus. In fact, the Accounting Oversight Board is a good example of that, it was already independent from the president because the SEC was presumed to be independent. It needed to be independent from the independent agency. Why? Because the fear is that the agencies, the regulators, will be captured. Now, what does "capture" mean? It's a famously elusive term. Some people think it's a meaningless term. In its classic form, the idea is that the agency serves the regulated entity, it becomes the handmaiden of whom it's regulating, and whether one thinks that story is correct or not ultimately, it is what Congress, by its own self-description, perceives to be the problem that it needs to design around. So it's looking for how to design independent agencies in a way that will address this concern.

In the *PCAOB* case, it came up with this idea of limiting the ability of the independent agency to have control over the independent agency it was newly creating, the Accounting Oversight Board. The similar move in the context of the CFPB is to find a way to insulate it from the concern about capture. And how do they go about doing that? Their bet is that a single-member agency will be less subject to capture than a multimember agency. Now, why would that be? The thinking by those who helped design it was that the ability to pick off one or two people within the multimember agency by the regulated parties is great enough that it would slow it down and stall it from being able to perform its mission and that the novelty of creating the single-member head, though insulated from the president, would enable that agency to free itself from those regulated parties and their ability to control them.

Similarly, the reason for the self-funding is not to protect it

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from the oversight of the president particularly, it's actually aimed at finding some means of getting an appropriation to the agency, funds to the agency, that would be insulated from the regulated parties themselves. There are many ways to self-fund agencies. You could self-fund them by having the parties pay fees for the regulation, as the FDA does with market approval. That wasn't thought acceptable. Instead, they wanted to give them a cut of the Fed's money that it takes in. The Fed, interestingly, is partially dependent on those it regulates for its own budget; the choices it makes about how intensively to regulate will affect the amount of funding it has, but CFPB just makes a request for a portion of those funds, the thought being that it won't actually have to worry about its regulatory choices affecting its budget because of the design of the system.

And then, lastly, there are the unusual limitations on the ability of the agency, employees, to then go work in the regulated firms post-employment, the same type of restriction you see in the Accounting Oversight Board.

Now, this idea of capture and designing around capture really was not something that would have occurred to the architects of the New Deal in the 1930s, it was not where Landis's head was at when he was thinking about what the regulatory state should look like; he was concerned much more with the threat of partisanship or the threat of politicization through the White House, the idea of a neutral set of experts was very much the concern, and even to the point that if you look at many of the New Deal theories of what the regulation would look like, it was actually in some sense based on some notion of a kind of steering cooperative hand of the Federal Government in which the agencies were sometimes described as the new boards of directors for the industries they managed. So far from thinking that they would be captured, the idea was that they would be able to steer them. And over the course of forty years, fifty years, of regulatory experience and theory, the idea of capture started to seep into the conscience of many people who were thinking about what our regulatory state looks like, and, lo and behold, at this time you now see them designing with that idea very much in mind.

So what to make of that change? Well, it seems to me you could say that the world of 1936—and this is Bruce Ackerman's argument—remade the Constitution and it established a regulatory state, and that's the new 1789, that's the moment at

which we now have our new separation of powers, and any deviation from what it looked like in 1936 would then seem very constitutionally troubling—right?—it would be an innovation, an unjustified innovation.

There is another way to read what happened in 1936 and what has happened over time and that would be not that all experimentation is legitimate (though I think Landis and some of the people who were writing at that time probably would have thought that, that position has clearly been rejected by *Chadha* and other cases, and I think that was rightly rejected) but that the actual innovation at that moment was that a certain degree of experimentation in the design of our systems is healthy, is legitimate, and is to be decided through the political to and fro within some bounds.

So what bounds might those be? So to think about what those bounds might, I think it's helpful to go back to the *Free Enterprise Fund* case and the Accounting Board. So the thing about the Accounting Board's way of designing to deal with capture was it designed right into the teeth of one of the standard ideas that the president has to have some control over the bureaucracy. The double layer of removal made the president uniquely and problematically at a distance from the agencies to whom he might be charged with responsibility. But that's not so in CFPB. If anything, as I have suggested, CFPB puts the independent agencies somewhat closer to the president than a typical independent agency is. And if we thought that the delegation was designed in some problematic way, that also might cause one concern, but as I have suggested here, too, and as I think even the pleadings in the case suggest, the delegation isn't designed in any way that's appreciably broader from those delegations that even independent agencies like the FCC operate under every day.

In suggesting this, I just want to close with the idea that it's important, I think, for those who are defending legislation to be able and willing to accept the novelty of the things that they're defending, that there are innovations going on and they need to be understood as innovations, but I also think it's important for those challenging these entities to question whether they really mean to suggest that all novelty and innovation is constitutionally suspect and then to think about, if that's not the case, what are the bounds within which we would want to have

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innovation in a world as complex and challenging as our own?

Thank you.

[Applause.]

JUDGE A. RAYMOND RANDOLPH: Thank you, Professor Barron.

Our next speaker is Professor Victoria Nourse. She is a professor at Georgetown by way of Emory and the University of Wisconsin. She has published widely on constitutional law and separation of powers, legislation, and the criminal law. She began her career clerking for Edward Weinfeld, who was really a magnificent district judge in the Southern District of New York, and then practicing at Paul Weiss. She served as junior counsel in the Senate on the Iran-Contra Committee and then argued appeals in the Department of Justice in the Reagan–Bush years. Professor Nourse is now the director of Georgetown’s first Center on Congressional Studies.

Professor Nourse?

[Applause.]

PROFESSOR VICTORIA NOURSE: Thank you very much for having me here today. I want to thank Ambassador Gray and Judge Randolph, Professors McGinnis, Amar, and Barron.

Now, some of you may know that I was nominated to the Seventh Circuit, and because of that, I now am forced to read my remarks. I had a 4,000-page file up at the Senate Judiciary Committee, and I apologize for that. I have had to withdraw my nomination because of a blue slip, but I am back doing what I love to do, which is to teach and to talk about the things I teach about. And my very first law review article was about *The Federalist Papers*, so I particularly enjoyed this invitation and so I’m going to end the panel where we began, with some general remarks about the separation of powers, and in particular, the removal issue because I don’t think that people truly understand the power of removal and what it means to the separation of powers, and that’s because they confuse the separation of powers with the separation of function as opposed to a separation of relationships that are built into the Constitution. So I’m going to talk a little bit about that.

The good news is removal is important. The analytic news is that we have to move away from thinking that the separation of powers is only about function. And the tempered news from a breed that is virtually unknown in Washington—I call myself radically moderate—is that although there are some versions of removal statutes and some limits that Congress can put, which are deeply and importantly unconstitutional, the Tenure of Office Act was unconstitutional, I believe the Independent Counsel Act was unconstitutional. There are other limitations, such as the Good Faith Removal Clauses, which are, as Professor McGinnis suggested, banalities. If they were eliminated tomorrow, not much would change.

All right. Let's talk about *The Federalist Papers*, the good news. Analytically, what I want us to do is make a move from this notion, sort of like the schoolhouse rock notion of executive, judicial, legislative idea of the separation of powers, and I want us to do this by reading sequentially through *The Federalist Papers*, which I'll do in a minute. I'm going to dismiss Hamilton because, after all, he did say some unfortunate things about a king and then he changed his mind, so we're going to focus on Madison, but before I do, I want to show you the power of this analytic move with an intellectual experiment. Just so you don't think I'm being academic and all professorial on you, I'm going to make two moves, and I'm going to change the structure of the Constitution, and I'm going to keep function constant. I'm going to keep the Vesting Clauses. I'm going to keep the Bicameralism Clause. I could even add an Express Separation of Powers Clause that we don't have.

So here are the two moves. One, House elects the Senate. Two, Senate names the president's officers. Function hasn't changed. The House is still legislating, the president is executing, and the courts are adjudicating; but in any real sense, by changing these relationships, I have destroyed the separation of powers. Why? In practical terms, by changing relationships, I have changed the incentives of individuals to align with their own departments. If the House elects the Senate, Harry Reid will bow to John Boehner. If the Senate names the president's officers, the president will bow to Harry Reid, who bows to John Boehner. This is the Speaker of the House's dream constitution because he is the most powerful—he or she—is the most powerful person in Washington. So this move from function to relation is not simply an academic matter.

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Now, lest you think this is my experiment, it was the experiment at the Constitutional Convention, for, after all, the Virginia Plan originally provided that “members of the second branch of the national legislature ought to be reelected by those of the first.” It also proposed that the executive, which was thought then to be made up of multiple persons, would be chosen by the national legislature. Now, they rejected that scheme in the Virginia plan and they rejected it for a reason. Like all politicians, they were fighting the last war and the last war they fought were the state constitutions, which I know that Professor Amar and I agree about. And that story about the state constitution is written in a series of essays, *Federalist* No. 47 through 51, which I recommend that you read in sequence and not simply pull chunks of text from at will, as lawyers writing briefs tend to do.

No. 51 is the culmination of a series of essays in which Madison rejects various proposals. He’s looking for the practical internal security that will save the separation of powers. He explains how the state constitutions had all failed Montesquieu’s promise. His discussion of the state separation of powers failures is revealing because he does not cite things that would refer to the Vesting Clauses, which were added at the end of the Constitution. Instead, it’s a comprehensive discussion of all the states and how they had failed in terms of removal and appointment and dual office holding—holding office in the executive and the legislature simultaneously. In Virginia, he tells us “the chief magistrate, with his executive council, are appointable by the legislature; . . . two members of the latter are triennially displaced at the pleasure of the legislature; and . . . all . . . principal offices, both executive and judiciary, are filled by the same department.” That is what he meant by the legislative vortex of power and it was his own state.

In *Federalist* No. 48, Madison rejects the idea that it will be enough—and this is very important—“to mark, with precision the boundaries of these departments . . . , and to trust to these parchment barriers against the encroaching spirit of power[.]” Express separation of powers provisions had failed; they had failed in Virginia. This is why ultimately I don’t think he cared much when he lost in the Bill of Rights debate about whether there was a separation of powers provision. And why had they failed? Well, borrowing from Jefferson, he explains that in fact it was the removal and appointment provisions. You’re not going to

change those provisions if everybody is looking to the executive or everyone is looking to the legislature, and if appointment and removal create that, those internal relations will drive the incentives of the men and women inhabiting the place.

Finally, in No. 51, Madison, who has held off for a long time, actually explains this. “To what expedient, then, shall we finally resort, from maintaining and practice the necessary partition of power . . . ?” He has rejected exterior express parchment barrier provisions—they didn’t work in Virginia or anywhere else—and he has said that we must “contriv[e] the interior structure of the government [so] that its several constituents parts may, by their mutual relations, be the means of keeping each other in their proper places”

He goes on to discuss things like appointment, removal, [and] dual office holding before the very famous line: “Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.” And so thus it is that I have believed since 1996, when I wrote this article, that allegiance and loyalty, the things like appointment, removal, and salary, are the due foundation and practical security for the separation of powers. Now, in this, I am different from so-called functionalists. The functionalists believe that anything Congress wants to do is just fine. That’s wrong. It must be wrong if what Madison said in 51 is correct. There have been attempts to change removal power in dramatic ways. They have yielded impeachments, and there is a reason why. No. 51.

Now having said that, I will also say, being radically moderate, that I believe that the fourth branch view of government, although history suggests that the New Deal has taken this to new heights and perhaps Dodd-Frank has taken it to even newer heights, is a bit exaggerated. Good Faith Removal Clauses I think are constitutional. Why? They simply make a separation of powers battle transparent.

A president who cannot think of a good reason—and remember, Roosevelt had no reason to get rid of Humphrey, at least none he articulated, he had some good reasons, but he didn’t articulate them—if he can’t think of a reason to get rid of a nonperforming agent, it’s sort of like a presidential candidate—and I apologize for this, Texas—who can’t remember the third agency they want to eliminate.

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[Laughter.]

PROFESSOR VICTORIA NOURSE: If you want to eliminate government—and here I am with Professor McGinnis—sponsor bills to simplify law. I have made a suggestion to Vice President Biden, who I used to work for on the Senate Judiciary Committee as a staffer—of a massive repealer bill—there are massive amounts of law that I used to work on in the Criminal Code and elsewhere that need to be repealed, and there is no one who has an incentive in Congress to do that. And if there is nothing else you do, support the reform of the biggest issue in government today, and that is the filibuster.

Thank you very much for your time.

[Applause.]

JUDGE A. RAYMOND RANDOLPH: We'll now take questions, but before we do that, would any members of the panel like to comment on what's been said here?

AMBASSADOR C. BOYDEN GRAY: Just a quick remark from Professor Barron. He makes a case—I'll leave it up to you whether it's good—why, I think, to avoid capture we have to come up with novel and innovative ways of running our government and constructing agencies, but then he shouldn't also accuse us of being novel in the way we characterize the frailty of this new—anyway, I mean, if we're novel, it's not because you're not novel or the government is not novel. So I think the two novelties are meant to be parallel. Our argument is novel only because the government structure is so novel.

JUDGE A. RAYMOND RANDOLPH: Rebuttal?

PROFESSOR DAVID BARRON: I think that's the point. I mean, that's true, that that is the source of the novelty on both sides, but it, I think, just suggests that it means that the novelty of the organization is no more reason to condemn it than the novelty of the objection.

JUDGE A. RAYMOND RANDOLPH: All right. We'll take questions then.

Oh, I'm sorry, John.

PROFESSOR JOHN O. MCGINNIS: I just want to engage a bit with David Barron's remarks because I do think I at least

have some fundamental disagreements with them. I recognize that Professor Barron's view is that Congress is trying to deal with a special interest problem. But I'm not sure why in ordinary politics our first expectation is Congress isn't trying to pay off special interests—here, for instance, by creating an Accountability Board, which is quite narrow in its focus. That narrow focus makes it very easy for accountants to get it and to capture it, and that is generally my expectation with Congress. It's good for them to pay off special interests, and I just have this view of members of Congress—and I hope none of them are here at the moment—

[Laughter.]

PROFESSOR JOHN O. McGINNIS: —they're like everyone else, they're trying to maximize their interests; they're not trying to maximize the public interest unless there is a kind of constraint on them. Now, you would think that the president, as representative of the whole nation, is less likely to be captured than by individual members of Congress, and that's the good aspect to executive supervision of the executive branch, and that's why I'm a little concerned about the sense of experimentation on which Professor Barron's remarks focus because experimentation has to be done within a structure, a constitutional structure, that tries to constrain the ordinary politics because we actually should expect politicians often to try to pay off special interests.

JUDGE A. RAYMOND RANDOLPH: Rebuttal again?

PROFESSOR DAVID BARRON: So I guess the first remark, John, is that to the extent that there is a fundamental disagreement about the attitude of regulators and of the motivations for regulation, that's completely consonant with your suggestion about repeal and that this would be a legislative debate in which there is a policy dimension to it. I guess the question is: Is your suspicion so clearly correct that it would ground a constitutional challenge that would disable Congress from having a different view of the matter? And that's the point where I think I would disagree fairly strongly.

JUDGE A. RAYMOND RANDOLPH: Okay. Anybody else?

PROFESSOR AKHIL REED AMAR: Just one quick thought on Victoria's last point about the filibuster and its

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connection to, for example, the recess appointment of, let's say, Richard Cordray. One way one of thinking about what happened is that this recess appointment was a kind of "tactical nuke," a very small version of the so-called nuclear constitutional option. The Framers had no filibuster. The House and the Senate are indeed different from each other for very good reasons, and Victoria told you about how different the Senate would be if it were selected by the House. So I believe in the cooling and the saucer and a different Senate composed very differently, but the filibuster is no part of George Washington's city, and there is no important law in the entire period before Reconstruction that's ever prevented from coming to a vote if the majority wants to. That's why, let's say, the Compromise of 1850 is such a big deal—Joe Biden would say a BFD—

[Laughter.]

PROFESSOR AKHIL REED AMAR: —because when California enters the Senate without an offsetting slave state, now the free states have an ever-so-slight simple majority in the Senate and that matters because actually simple majorities do rule. These majorities let the dissenters speak and offer amendments, and all the rest is very courteous and open, but it's simple majority rule.

Now, because today we have the filibuster, the President took a pretty aggressive position on recess appointment and called something a recess. One of the reasons I think he did is he believed he actually had fifty-one senators supporting this appointment and the tacit support of Harry Reid, who in effect said, "fifty-one of us support this, but we can't get it to the floor because we don't have sixty." And so the filibuster actually encouraged a certain very aggressive executive move on recess appointment, a kind of constitutional option, fifty-one rather than sixty.

PROFESSOR VICTORIA NOURSE: Well, I think that actually would support Ambassador Gray's point about the nature of this because, in fact, I think we've seen this. If you've studied the history of Roosevelt, for example, he felt, in fact, that he was forced to do things under extreme circumstances, and I think presidents are pushed to do things that push the constitutional envelope with respect to appointments, et cetera, in these kinds of circumstances. Now, I happen to think that the current situation with the filibuster, we'll see what happens. But

I agree with Professor Amar, it is unconstitutional. I mean, it's not nuclear. In other words, the Founding Fathers did not imagine the filibuster. Aaron Burr was the reason why we don't have the motion for the previous question, and if you have to indict something by association, I think it indicts it.

JUDGE A. RAYMOND RANDOLPH: Okay. We'll take our first question. Please identify yourself.

PROFESSOR ROD SULLIVAN: Sure. I'm Professor Rod Sullivan, from Florida Coastal School of Law. And I think I would like to address my question to Professor McGinnis and help me resolve sort of a personal question. I can't decide whether I am more like a canary in a coalmine or Chicken Little constantly seeing the sky falling. And I'm referring to the carbon tax. The EPA has twice proposed that it has authority to establish a \$35-per-metric-ton carbon tax, roughly twenty-cents a gallon of gas, \$40 a month to the average homeowner's electric bill. The EPA takes the position that it has the authority to do this under the Clean Air Act, and my friends who are originalists say that this is a constitutional crisis and my friends who are enamored with the administrative state say that this is the natural culmination of the *Chevron* doctrine of delegation. Which one is it? Or it is both or neither?

PROFESSOR JOHN O. MCGINNIS: I think under positive doctrine, you might think it is both. I'm not an expert in environmental law, so I can't comment on whether actually the EPA has this authority, but I think it's quite conceivable that they have some very large delegated powers to impose restrictions on carbon emissions that would very much raise the price of gasoline. My concern is, as I suggested in my remarks, that it's hard for the Court to draw a clear line, about what is too much delegation and what is too little delegation. Because the line very hard to draw, the Court is unlikely to strike that delegation down.

But I think it's very problematic in our government to have a world in which something so transformative in our society is not going to go to a vote of Congress, and, indeed, I think it is quite clear that that could not pass Congress, I don't think it would be anywhere close to passing in Congress and that goes to my support for something like the REINS Act, which by defining the two or three percentage most important rules each year in terms of how much they cost the country, would force Congress to take

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an up-and-down vote. That is, I think, the best way of trying to restore the accountability and therefore the liberty for citizens. It is much more likely than to try to change Supreme Court doctrine, which is now quite well established. So I do think it is a kind of constitutional crisis, though my only caveat would be we've been living that crisis for many, many years now and your example just shows the crisis in acute form.

PROFESSOR AKHIL REED AMAR: Just one quick thought on that. If the environmental laws give the EPA the power to prohibit certain pollutants from being emitted—that is, if these laws gave the EPA the power to destroy pollution—the interesting question is whether the power to destroy involves the power to tax.

[Laughter.]

JUDGE A. RAYMOND RANDOLPH: I may be getting into dangerous territory but I just remembered about the blurb that you have about the subject here, one of the things we might talk about was separation of powers and carbon emissions control and the Supreme Court opinion. I have to confess that I wrote the lower court opinion and it was reversed five-to-four. The case was *Massachusetts v. EPA*, and I think the Governor of Massachusetts was somebody who just ran for—at that time.

[Laughter.]

JUDGE A. RAYMOND RANDOLPH: But, anyway, I'll share with you one of the exchanges that I recall from oral argument before our court, not the Supreme Court. The question arose, how exactly would—I haven't followed the tax business—but how exactly would EPA control carbon emissions? And EPA at that time was resisting that on the basis that the science wasn't sufficiently developed for us to really know whether carbon dioxide, which we all breathe out, was in fact having an effect on the temperature of the globe.

I have often wondered about global warming. Where do you put the thermometer?

[Laughter.]

JUDGE A. RAYMOND RANDOLPH: I just have never quite figured that out.

Anyway, so we got an answer, and the answer was there are

two ways. One is you improve tire efficiency. And one of my colleagues said: "Well, that's not in EPA's jurisdiction, that's the Department of Transportation." And the other was you change the fuel mix. And the answer was the same: EPA doesn't have any authority over the fuel mix, that's the Department of Transportation. So, at least in our court, we got no answer, and this idea of a carbon tax is news to me. I didn't know that the EPA is even proposing that.

But, anyway, Professor Rotunda?

PROFESSOR RONALD ROTUNDA: Oh, yeah, thank you. Actually just a comment. Justice William O. Douglas said in dictum in one of the cases that one thing you could not delegate is the power to tax. So when this comes up, that's going to be interesting because even Douglas, who was not exactly a right-wing nut, thought that's something you couldn't delegate.

I have a question about the Dodd-Frank law. What troubles me most about it is that the law exempts the agency from the appropriation process. I mean, the Framers thought that the legislature was the most dangerous branch, so they gave the power of the military, the power of the sword, to the president, and then they divided the most dangerous branch in half to limit the power, with different terms. But then as a way to counteract the president, they gave it the power of the purse, and Dodd-Frank takes away the power of the purse. It just basically says the agency gets its money from, what, the Fed, and it gets a certain percentage, and if I recall right, if that's not enough, they'll take more. And the reason for this is to avoid agency capture not going before Congress, but the Framers thought democracy was the protection, not something to avoid. This really reflects the whole battle of the administrative state, I think, and that is there are some people who think that they're really smart and they know what to do and it's all technocratic and we should avoid—we can do better than the general public about what to do. And then there are people who think, gee, we're not that smart, we'll just vote, one person, one vote. And Friedrich Hayek said the first people, the first group, the ones that are really that smart aren't as smart as they think they are and to think otherwise is a fatal conceit. So what's novel about Dodd-Frank is removing Dodd-Frank from the power of the purse and it's novel. I guess having a king would be novel for us. But those are the things I thought pretty clearly the Framers did not

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want us to have, that is, they did not want it to be removed from the legislative process because then there is no oversight at all.

[Applause.]

PROFESSOR DAVID BARRON: So it's important to see it's not removed from the power of the purse in the sense that one understanding of the appropriation's power is that you have to appropriate the funds for the agency to exist, right? The president can't just get them on his own. Congress has provided a means by which the agency can get those funds. There are continuing indefinite appropriations throughout the government for many agencies. There are many agencies that operate in a self-funding mechanism. So Congress has not lost its power to alter that. It is true, as a functional matter, that there is a shift in the means by which it gets its funding and that functional change will have consequences, that's why Congress did it, but to say that it's removed from the appropriation power, that Congress has lost its power of the purse, I think doesn't capture, as a constitutional matter, the actual situation.

PROFESSOR RONALD ROTUNDA: Just a factual correction, agencies, all the money that agencies collect go into the General Revenue Fund and often they're appropriated right back. But for example, for the SEC to rely on the fines it imposes to fund the agency would be unconstitutional, the Supreme Court has said in other cases. So Dodd-Frank, the way it's set up, you do not go before Congress each year asking for a higher appropriation or a lower one or continuing one, it's immune, and that's the fatal conceit.

AMBASSADOR C. BOYDEN GRAY: Gosh, it's really weird to me to hear some of this. Congress is cut out. Congress is precluded. OMB is precluded. I mean, you say, well, the president has the same—OMB is not allowed to look at this. That's the way the president implements things, at least of a regulatory nature. He works through his Office of Management and Budget. He can't do it by himself sitting in the Oval Office. He has to work through his staff, and his staff is disabled. You know, the CFPB just doesn't have any oversight at all. There is nobody, there is nobody who can say to the CFPB: "Cut it out." There are certain agencies that have some self-funding aspects. I mean, the FDIC can tax the member banks that it oversees.

PROFESSOR AKHIL REED AMAR: Tax. Tax.

AMBASSADOR C. BOYDEN GRAY: Yeah, it can. I mean, it can assess, yes. Tax, fine.

PROFESSOR AKHIL REED AMAR: Yeah. Tax. Tax.

[Laughter.]

AMBASSADOR C. BOYDEN GRAY: But the FDIC is still subject to congressional oversight. The congressional bodies are not prohibited from revealing what it's doing, and it's limited to dealing with federally funds, which is federal money, and it's a little different when you're dealing with regulating how federal money is spent and we've heard about that recently. But there is a difference when federal money is being spent and when you're dealing with my money, which is not—at least I didn't think it was federal—my money. It may now be, but I didn't think it was.

[Laughter.]

AMBASSADOR C. BOYDEN GRAY: So who is going to call into account—the FDIC at least is the regulator. The Food and Drug Administration gets money from the drug companies to help it do its drug approval, but the Congress has full oversight authority and the courts have full review authority, but this is not true of the CFPB. The Congress can't do anything, OMB can't do anything, the courts can't do anything, the president can't do anything, and the entity that pays it can't do anything. And this is all to protect the CFPB from capture?

And I'm told by the head of the Dallas Fed that because it's not subject to any kind of budgetary limitations or pay caps or anything else, it is hiring, it is raiding the Federal Reserve boards, federal banks, of all their best people because you double the salary, and who is going to stick around and work for the Federal Reserve anymore? So this agency is going to rifle all the best people and it's going to go running amok. There is no limit to how many people they can hire, how much they can pay them, and no guidance as to what they're supposed to do or not do, and no ability of the courts to review it anyway, because they've got to defer. John has got provisions or got proposals to move deference in the opposite direction, but this is deference in—I've never seen that in a statute. Maybe I'm really dumb and don't know that this is a common practice. And I've never known that the courts are subject to agency capture. I didn't know that the D.C. Circuit was the province of the hedge funds in New York. Maybe it is,

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Judge Randolph—

[Laughter.]

AMBASSADOR C. BOYDEN GRAY: —but I hadn't heard—now, we used to always have a saying that you could buy a congressman, or at least in John Breaux's case, rent one.

[Laughter.]

AMBASSADOR C. BOYDEN GRAY: You could certainly get kind of hold of a subcommittee and maybe even a full committee, but the whole Congress was really, really hard, and the presidency was impossible. And we've just seen \$2 trillion spent without almost any change at all in the result, and Karl Rove has got to be rethinking the \$300 million he spent to no good.

[Laughter.]

AMBASSADOR C. BOYDEN GRAY: So, you know, I just don't think that agency capture can take you that far as to so insulate an agency from any political accountability whatsoever to anybody anywhere.

JUDGE A. RAYMOND RANDOLPH: Yes, sir.

KYLE ALBERT: Kyle Albert, Port Angeles, Washington. I have a follow-up to the first question to perhaps bring it to a little sharper focus, the separation of powers issue involved. Assume the EPA passes its carbon tax and assume that Congress passes a resolution passed by majority vote explicitly repudiating that tax and saying that is a tax raising billions of dollars, that is our prerogative, "EPA, you shall not do that." Assume that the tax, instead of costing the average homeowner \$40 a month, would cost \$400 a month. Where is the line and how do you see the willingness of the courts to enforce such a line?

PROFESSOR JOHN O. MCGINNIS: Well, first of all, I do not think the EPA is proposing a tax directly and I think Professor Rotunda may be well right—that would be one area where they might be able to cut back on delegation because it's a tax and say it's hard to delegate a tax. Thus, we may have stronger constraints on that kind of delegation. So that might be an area where at the margin a Roberts Court might constrain things, but I don't think the fact under current law that a majority passed a resolution in Congress would have any effect on

what the Court thinks about the matter because, of course, under *Chadha*, that would not itself be a law. So I don't think that would change things in any way. The best argument would be if EPA actually had a carbon tax, which I don't think they are actually proposing, would be some attempt to say, well, that kind of delegation is somewhat problematic, maybe you could try to read *Clinton v. New York* as an anti-delegation case where they were giving too much power for the President to rescind some kinds of taxes and spending. Maybe that's the best kind of argument that I would make if EPA actually did impose a tax through regulation, but I don't think they're going to do that.

JUDGE A. RAYMOND RANDOLPH: John, why don't you explain the legislative veto, *Chadha*. Not everybody in—

PROFESSOR JOHN O. MCGINNIS: Okay, sure. Well, the argument is that in *Chadha* Congress tried to control a decision of the executive branch by passing a resolution that they did not present to the President for his veto. The Court said that kind of resolution is invalid under the Constitution. The clear text of the Constitution says that Congress can impose legal obligations on anyone, including members of the executive branch, only by going through bicameralism and presentment, and, of course, that means that the resolutions passed by Congress would just be without any legal effect because it's not a legislative action that Congress can take under our Constitution.

PROFESSOR AKHIL REED AMAR: And, of course, we already heard that there can be a power of an agency to impose a tax. The FDIC apparently does that. The question is whether the authorizing statute of EPA or FDIC or anything else permits that kind of self-funding, and then that's the fundamental question, and Congress, of course, is always free to withdraw that by a statute that satisfies itself, bicameralism and presentment, see *Chadha*.

JUDGE A. RAYMOND RANDOLPH: There is always a problem, if I may comment, in dealing with delegation, and you're hearing the arguments on both sides. I just want to frame this up. On the one hand, it's the Congress itself that's giving up the power, which is different than a lot of the separation of powers questions, and the argument on the other hand is that, yes, but Congress is evading its proper responsibility by dumping it on somebody else who will get blamed for a tax or a regulation or so on, I mean, that's the dividing line.

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Yes, sir.

PROFESSOR ILYA SOMIN: Ilya Somin, George Mason Law School. So a lot of debate that we've already seen on the panel each time I attend relates to the concept of the unitary executive and I think there is a more than reasonable originalist case for unitary executive, but I wonder how the originalist case for that idea fits in with the massive expansion of the scope of executive power because in many areas I think there is at least an equally strong argument that the scope of executive power today is much broader than at the time of the founding, so if you restore what you may think is the original structure of executive power, unitariness, but don't change the scope back to its narrower range, then you essentially have a situation where one man has an enormous amount of power far beyond what was originally intended, so restoring one of these things to its original level may not actually get you a more originalist-like result overall. So I wonder if the panelists can comment, if you want, on this issue of whether the structure of executive power can be made more originalist or more unitary without also addressing the issue of the scope of it, saying these two things are related and it's important to consider them together.

JUDGE A. RAYMOND RANDOLPH: Okay. Professor Amar?

PROFESSOR AKHIL REED AMAR: So many things parade under the banner of the unitary executive. There is, for example, Steve Calabresi's idea, that whatever power is in the executive branch needs to be subject to presidential control, and there is John Yoo's argument that presidents can do all sorts of things unilaterally. That's a different point. And so Ilya saying those two shouldn't be run together, absolutely right. Steve wrote a book with Christopher Yoo about his vision of unitary executive, which is this presidential control, and I stupidly missed the chance to blurb it because I wasn't paying attention to my inbox. My blurb was going to be: "No, not that Calabresi, and, no, not that Yoo. Better."

[Laughter.]

PROFESSOR AKHIL REED AMAR: Forget the civil side; forget the New Deal. Today, we have a military industrial complex vastly beyond the scope of the armed forces that we had under General Washington, unless you're going to get rid of the

Army and the Navy—and, by the way, the Air Force isn't mentioned in the Constitution in so many words; it's unwritten. Also, we have a Federal Government that does a lot more because we have a lot more interstate commerce, more interstate spillovers. At the time of the founding, 90% of Americans live and die in a fifty-mile radius and stuff that's done in one jurisdiction doesn't have effects in other jurisdictions, doesn't spill over across state lines. A little Founding-era fireplace is not the same as a modern industrial smokestack. So you just have a lot more genuine interstate commerce and therefore more regulation of genuine interstate commerce, a lot more foreign affairs—it's a smaller world—and therefore a lot more federal military authority over foreign affairs, and that means, if you have Steve Calabresi's version of unitary executive, more presidential things to do.

PROFESSOR DAVID BARRON: Judge, just to Ilya's point, one interesting thing that I think reflects your instinct is that the delegation invalidated in *Schechter* was, of course, to the President himself and that *Yakus*, coming after it, when it went to an administrator, there was a comfort that the Court took in the idea that the delegation would not be going to one man and that it would be situated within an organization that would be structured in some way, which is I think responsive to the instinct that you have—that ideas about presidential power are partly a function of the realistic powers that the president actually has to exercise.

RODERICK MILLER: Roderick Miller. I'm a student at Harvard Law School. My question is for Professor Amar. I very much appreciated your comments on your theory of the unwritten Constitution and about how early historical practice and also documents written by the Framers around the time that the Constitution was ratified significantly inform our understanding of the Constitution. And my question is: Is your theory of the unwritten Constitution reconcilable with textualism or are the two fundamentally incompatible?

PROFESSOR AKHIL REED AMAR: Oh, the whole idea is actually an unwritten Constitution that does not undercut the written. It's the glory of our system that we have a written Constitution and I have tried to devote my life to a careful textualist, structural, and historical (as in originalist) examination of the written Constitution word-by-word, clause-by-

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clause, article-by-article, amendment-by-amendment. That said, it turns out that you can't fully understand the written without the unwritten, without concepts like separation of powers, checks and balances, rule of law, unitary executive, and so on, without understanding the tools and techniques of constitutional interpretation that are themselves outside the text. You know, why do we read the text structurally or intratextually? Whence the doctrine of absurdity? The words seem to say that Joe Biden presides at his own impeachment trial because the Senate tries all impeachments and the Vice President is the presiding officer of the Senate. But against this hyperliteralism, there exists a powerful countervailing idea that perhaps this sort of self-dealing would be constitutionally improper because there are other tools, techniques, canons of interpretation that are themselves unwritten. The Constitution doesn't fully specify how it is to be interpreted. The Ninth Amendment itself gestures to rights beyond the document. So, yes, the written and the unwritten have to fit together.

KRISTIN MYLES: Kristin Myles, from Munger, Tolles & Olson, in San Francisco. I had a related question, which is whether Professor Amar or the other professors could comment on Professor Barron's suggestion that the modern administrative state and the act in particular could be gauged by a reference to 1936 versus the original intention, whether written or unwritten, of the Framers?

PROFESSOR AKHIL REED AMAR: So one question is, whence the modern administrative state? My friend Bruce Ackerman says that there is this sort of magic amendment that's just in his copy, he's got a secret decoder ring, it's not in the rest of our copies.

[Laughter.]

PROFESSOR AKHIL REED AMAR: Now, of course, I just said there is an unwritten Constitution, so I'm not being fair to my friend Bruce. If you ask me why the federal government has so much more authority than at the founding—this is, Ilya, part of the answer to your question—it's because we actually have had these things called Amendments and the Thirteenth Amendment ends with the words: "Congress shall have power." Go see, by the way, Spielberg's movie. And the Fourteenth Amendment ends with the words: "Congress shall have power." And so does the Fifteenth. And the modern administrative state is the logical

structural culmination of a several modern amendments. The Sixteenth Amendment invites a national, redistributive, progressive income tax that can soak the one-percent—that’s actually its legislative history, brought to you by people who are progressives. So the Sixteenth Amendment is nationalist, redistributive, national power. As Victoria mentioned, the Seventeenth Amendment changes the structure of the Senate, and now it’s actually less dependent on state legislatures than it was at the founding, and it’s therefore going to be freer to pursue nationalist projects. And the Nineteenth Amendment gives women the vote, and women today like the welfare state more than men; we call that the gender gap. Without women, we’re talking President-elect Romney. So sixteen plus seventeen plus nineteen equals the New Deal, Great Society, Obamacare, Franklin and Eleanor, Bill and Hillary, Barack and Michelle. So we have a whole bunch of amendments that say “Congress shall have more power than at the founding.”

PROFESSOR JOHN O. MCGINNIS: I just want to respond to Akhil. Surely, Congress does have more power since the founding, but only in specified areas. A lot of the administrative state I do not believe can be justified by the Thirteenth or Fourteenth Amendments. Much of today’s administrative regulation is wholly economic and not related to the subjects of these amendments. There is no doubt also the Sixteenth Amendment gives a great power to tax, but, of course, the administrative state is just not about redistributing through the tax system. The basic structure of the separation of powers is also not repealed by any of those amendments, and I think the concerns about accountability that I and others have raised are not fundamentally changed by those amendments. So while Congress does have a variety of greater powers now, the delegation of undefined powers in a way that allows Congress to deflect accountability and gives more authority to bureaucrats remains a constitutional concern even after these important amendments. So at least in the way I think of the dangers of the administrative state, I do not think that problem is fundamentally addressed by the amendments that Akhil mentions.

JUDGE A. RAYMOND RANDOLPH: I can’t resist. I keep hearing “accountability.” I was Special Counsel to the House Ethics Committee in 1980–81, did some investigations, and there was a first-term congressman who sat right next to me and his

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name was Dick Cheney and we were in executive session, and I was trying to subpoena some of Tip O'Neill's best friends and kept getting voted down because the Committee at that time had an extra Democratic vote, and I guess I was showing that I was sinking lower in my chair and Dick Cheney grabbed me and he said: "Hey, Ray, don't worry about it; in Congress, it's not whether you win or lose, it's how you place the blame."

[Laughter.]

JUDGE A. RAYMOND RANDOLPH: A digression.

[Laughter.]

PROFESSOR AKHIL REED AMAR: And note, by the way, that the written Constitution doesn't say anything about House and Senate oversight—it doesn't say that the House has contempt power over Eric Holder or David Petraeus, for that matter. That's part of an unwritten Constitution that goes all the way back to precedents and practices from George Washington's era when the House of Representatives and the Senate basically asserted inherent authority to perform investigations and oversight and have subpoena and contempt powers.

JUDGE A. RAYMOND RANDOLPH: Yes, sir.

JOHN SHAY: Good morning. John Shay. I have a question that is perhaps not strictly separation of powers question, so I apologize to the panel if this is off topic. We've seen recent examples, such as Speaker Pelosi's response to being questioned about the constitutional basis of the Affordable Care Act with incredulity as well as the Obama administration's complete refusal to defend the Defense of Marriage Act in court based on an arguably questionable assertion that it's unconstitutional. So my question is in two parts. First, does the doctrine of separation of powers have anything to say about the responsibility of the various branches by their oath to uphold and defend the Constitution and laws of the United States, and the element of personal discretion and conscience involved in the carrying out of that oath? And secondly, do any of the panelists believe, or believe the opposite, that a or several conceptions, false conceptions, of separation of powers have led to such extremes as a complete legislative disregard for the question of constitutionality sort of using judicial review as a backstop or the executive branch essentially saying in a lawsuit over the

constitutionality of the statute, we will not defend it?

PROFESSOR JOHN O. MCGINNIS: I want to take this opportunity to agree with the Obama administration. If the President actually thinks this statute is unconstitutional, he is following his oath in refusing to defend it. He takes an oath to defend the Constitution, and I think he should not defend the constitutionality of unconstitutional statutes. One of the aspects of the Whig philosophy of the Constitution that I describe is a separation of powers that requires not only the Congress believes legislation is constitutional in passing the legislation, but the President thinks the legislation is constitutional in prosecuting someone for it, and ultimately we have the judiciary in having the final backstop in that it can refuse to apply unconstitutional legislation. So not discussing the merits of the question but discussing the President's authority, I want to give a full-throated defense of President Obama and I'm glad he's a convert to what is, I think, now the consensus in the academy, the view of departmentalism that each branch has the obligation and authority to enforce the Constitution.

PROFESSOR AKHIL REED AMAR: There is an important article on executive review, presidential review, by Judge Frank Easterbrook. I think it is in the *Case Western Law Review*. And on this point, note that Thomas Jefferson pardoned everyone convicted by the Sedition Act, even though courts had upheld the Act as constitutional, because Jefferson thought it was unconstitutional. And so I'm with my friend John McGinnis on what I call in my work "executive review," aka "presidential review." It's like judicial review. Judges aren't supposed to enforce a law they think is unconstitutional and presidents aren't either. On this view, the only thing you could actually fault the Obama administration on is being willing to actually enforce the law until judges tell them otherwise. Why wait for judiciary? "Mother, may I? Can I refuse to enforce a law that I think is unconstitutional?" So executive review is, I think, a deep part of our constitutional structure.

AMBASSADOR C. BOYDEN GRAY: There is one point that I think should be clarified just with an anecdote, if you'll permit me thirty seconds. There was a time—many of you here are too young to remember—when the National Airport belonged to the federal government, but then it was devolved down to a compact between interstate—between D.C., Maryland, and

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Virginia—by an act of Congress back in the Reagan years. But Congress held onto, put in, a board of governors on top, which it appointed, which was challenged, of course, as violating the Appointments Clause. And so what was our obligation to defend that, [being] obviously unconstitutional? And, of course, now, the D.C. Circuit—I can't remember whether Judge Randolph was on this case or not—but the D.C. Circuit predictably held it unconstitutional as a violation of the Appointments Clause. And at that point in the Solicitor General's Office, it is a practice that you can review whether or not the White House executive branch should continue to defend a statute that is clearly unconstitutional. And so I took the opportunity to call my counterpart, John's boss, and maybe he left by then, to ask if we could change the position and defend the statute, because it was going to be defended at the end by the Supreme Court anyway. And I get a call minutes later from the Attorney General, Thornburgh, screaming at me, I made an understanding—you don't know what you're talking about of the statute, going back to the Reagan administration, I just think, blah! And I said: "Look, if I had wanted to call you, Mr. Attorney General, I would have, it's not that important, you're going to lose anyway, the thing is going to be—

[Laughter.]

AMBASSADOR C. BOYDEN GRAY: And it's just not that big a deal." And it's the only unpleasant conversation I ever had with him. Well, not too many hours later Sam Skinner calls up, he was Secretary of Transportation. Now, the reason why you know they had this board of governors that Congress wanted to keep, they wanted to be able to control the flights so they could have direct flights beyond 500 miles and they wanted to keep their parking lot.

[Laughter.]

AMBASSADOR C. BOYDEN GRAY: It was right there in the center, right? So Sam Skinner calls me up, Boyden, he says, I hear you're messing with my airports.

[Laughter.]

AMBASSADOR C. BOYDEN GRAY: And I said: "Sam, they're not your airports anymore." "Well, what's the matter?" And I said: "Look, if you are a diplomat, you get a parking place

right there in the middle of everything; if you're a cabinet officer, you get a place; if you're a member of Congress, you get this special parking; but if you're a commissioned senior officer in the White House, forget about it." And there was a silence. And then he said: "If it's a parking place you're worried about, maybe we can cut a deal."

[Laughter.]

LORIANNE UPDIKE TOLER: Lorianne Updike Toler. I'm a doctoral student at Penn Law and I do a little bit of consulting work in legal history and Constitution writing, formerly of ConSource. And this conversation has been fascinating for me because my consulting work right now focuses on Libya, and if we zoom out a little bit and look at some of the issues that we've been discussing, the question that I have for the panel is there have been countries, specifically in South America, that have tried to pattern our separation of powers take in a unitary executive separate from the legislature and judiciary, et cetera, but that has tended towards authoritarianism. And the trend now is largely to go with parliamentarianism, in which we know that there are less separation of powers and/or a hybrid of the two. And we've seen some of this slouching towards authoritarianism [which] has reminded me, as a historian of the Constitution, of what happened in the states, as was mentioned earlier.

So is it possible—and some of the contention has been that you cannot have these parchment barriers without another structure, meaning our federal structure, our state and our national structure, that helps these powers work together. So my question is, absent of federal structure, is it possible to have separation, true separation, of powers in a presidential model or will it continually slouch? Essentially, how do you make this functional rather than just a parchment barrier in a new context like Libya?

PROFESSOR AKHIL REED AMAR: One of the best pieces on that—perhaps the best piece—is written by Steve Calabresi as a response to the work of Bruce Ackerman. Steve does say that because of American federalism, we have a second set of checks against the executive branch above and beyond the horizontal separation of powers. He builds on the work of Juan Linz, a great political scientist at Yale, who says that the separation of powers model, especially in South America, has led to a kind of caudilloism. Critics say, oh, if you take the South

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American examples out of the dataset, you don't get the same result. But then the question is, why would you do that, take some data out of the dataset? And there are arguments back and forth. But note that in the United States of America we have not just the horizontal separation of powers and not just the vast geographic separation from the rest of the world. (For the first 150 years, we didn't have a big military structure because we had the Atlantic and Pacific Oceans that helped to develop traditions of civilian supremacy rather than South American style caudilloism.) In addition to our geographic isolation, and in addition to horizontal separation of powers, we have had the extra check of a whole bunch of mini presidents at the state level who had militias and could resist possible federal abuse. The Virginia and Pennsylvania militias played an important role in preventing the 1800–1801 crisis from spiraling out of control, and note also that governors are plausible presidential candidates. So look at the last presidential elections: you've had governors who had executive experience who could put themselves forward as plausible presidential alternatives: Mitt Romney, Ronald Reagan, Jimmy Carter, Bill Clinton, Michael Dukakis, George W. Bush. Every one of those was a governor of one party when the presidency was controlled by another party and could put forth an alternative model of competent governance. And so Calabresi's article, responding to Bruce Ackerman, says American separation of powers in presidentialism needs to importantly be thought of alongside American federalism.

JUDGE A. RAYMOND RANDOLPH: Thank you. We have time for one more question.

PROFESSOR VICTORIA NOURSE: Can I just answer that one?

JUDGE A. RAYMOND RANDOLPH: Oh, I'm sorry.

PROFESSOR VICTORIA NOURSE: Just briefly. There is no precise analog in the South American constitutions to our federal constitutional separation of powers either. And so that is one check. And in fact departmentalism, which was Madison's idea, which we talked about before, is an important way in which you will gain checking without having a federal system. Having said that, I agree with Amar and Calabresi, that the second layer is indeed helpful.

JUDGE A. RAYMOND RANDOLPH: Thank you.

BRIAN BISHOP: Brian Bishop. I'll try and be uncharacteristically quick. I agree with Professor Amar, that Congress has a great many more powers, but I also agree with Boyden Gray, I don't think they have the power yet to make lawmakers. And what I'm wondering, though, is I think that Boyden kind of alleges that your unwritten Constitution is being violated by the CFPB with the lack of oversight with these ideas of congressional oversight and I'm wondering if you believe that's so.

PROFESSOR AKHIL REED AMAR: I do think that the novelty raises real questions. One big question is, is independence in a single-headed entity actually more or less in consonance with structural themes of the Constitution? I think David thinks it's actually better in some ways than commissions having independence, and I suspect that Boyden thinks it's actually worse. And that's the right issue to be joined, it seems to me. I do in the book have a detailed discussion of why independent agencies exist, and why Bernanke and the Fed are different than Paulson and the Treasury. For me, commissions actually have horizontal monitoring. Each commissioner is monitoring each other, and maybe you need less presidential removal authority because there are other accountability structures and monitoring structures. So I would want to hear more about why you have insulation from the president without the horizontal monitoring, and I suspect David is going to have an answer for me.

AMBASSADOR C. BOYDEN GRAY: If I could just say one thing. The one little bright light about our case is that yesterday I'm told that the government asked for five more pages in their first response and I took that as a good sign.

[Laughter.]

PROFESSOR DAVID BARRON: You've got a lot of challenges in your complaint.

[Laughter.]

PROFESSOR DAVID BARRON: You know, to Akhil's point, I think if you think of the separation of powers in general, it's more challenging when it's a single head, and I think it tends towards a delegation type argument. Right? The thing that that argument runs into is a complete comfort in modern doctrine for a

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long time with broad delegation. Right? Now, on the other hand, the other means of challenge is presidential accountability, and I do think it's hard to see how the single head exacerbates a presidential accountability problem, so that if there is a separation of powers problem, it's got to be some concern about just the breadth of the authority given to an agency, and I find that hard to see on its own because if you look at single-headed agencies like the Treasury Secretary, we allow him to exercise quite broad powers without finding that to be a delegation concern, the idea that Congress can only do it when they give it directly to the president and his men with no insulation seems to me to create problems that we wouldn't want to require Congress to confront.

JUDGE A. RAYMOND RANDOLPH: Thank you very much.

[Applause.]