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ADDRESS
THE NEUTRAL APPLICATION OF
RULES TO EACH OF THE THREE
BRANCHES

C. BOYDEN GRAY*

This is a terrific conference. I am a little nervous about appearing after so many distinguished speakers. I do not think I am really quite up to it, especially if one compares my speaking with that first amendment panel. I have a tape of it, and I treasure the tape. It was one of the most amusing episodes of my life. If you really want to be entertained, ask the Federalist Society for a tape of that first amendment conference. It was absolutely superb.

I want to talk about the level playing field. You have heard a lot about the theory of the separation of powers. It is designed to limit the accumulation of power in government horizontally and vertically: horizontally by three branches; vertically by delegating to, or not taking too much from, the states. That is the theory anyway: casting ambition against ambition.

At the federal level we have heard about the vortex of the legislature. The quote that I always like from *Federalist No. 48* is: “[I]t is against the enterprising ambition of this department,” that is the legislative department, “that the people ought to indulge all their jealousy and exhaust all of their precautions.”¹ It is exhausting, I will tell you that.

One of the ways that the legislative department gains advantage over the other two departments, at least over the executive branch, is to hamstring the executive branch with a lot of restrictions that it does not apply to itself. It is our duty to fight these restrictions, both to relieve ourselves of the ones that are unreasonable, and also to make sure that there is a level playing field.

Most of you are probably familiar with the one-way street, or the examples of the one-way street, but let me run over them briefly. There is the whole realm of ethics. We got a little reform at the tail end of the first session of this current Congress, but not very much. Generally, the

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1. THE FEDERALIST NO. 48, at 251 (J. Madison) (G. Wills ed. 1982).

legislative branch does not have to follow anywhere near the level of strict rules that we have to follow and that I am personally, in part, responsible for overseeing.

When the President, at the very beginning of his term, had the Inspectors General into his office to encourage them to help keep him and his department heads out of trouble, one of the principal complaints they had—or observations they had—was that graduates, if you want to call them graduates, of the legislative branch, who migrated into the executive branch, were the most difficult to deal with because they found the culture of ethics and conscience so hard to fathom. I am not making this up! I am really not making this up.

We made a modest effort to apply to Congress a sliver of our exposure under Section 208 of the Criminal Code involving conflict of interest, just a sliver we wanted to apply to the Congress. It was not well received. We then backed off and said let us try the staff. That was not well received either. One Congressman or Senator, I will not identify which House or who, said that subjecting any staff to any conflict of interest criminal exposure would be an unconstitutional infringement on its duty to represent the special interests. He said, “We cannot have U.S. attorneys from the executive branch looking over our shoulder every other month.” I said, “All the more reason why you should accept our generous offer for an independent counsel.” To his credit, it took him about ten seconds to suppress a laugh.

In the ethics package that was passed, there is some exposure for staff and members under the Revolving Door provisions, perhaps an easy enough thing to give away since the Revolving Door really is not, in my view anyway, that much of a problem. It should not be over regulated, but it is not that hard to comply with the legislation.

You have heard about the independent counsel. The IG’s I mentioned—there are no IG’s on the Hill. We also have the Freedom of Information Act, Government in the Sunshine, the Privacy Act, the Federal Records Act, and the Presidential Records Act. You may say “What is in the Presidential Records Act?” Well, try to keep any notes and think they are your own.

Discrimination, Title VII, the Rehabilitation Act, Age Discrimination: I do not necessarily view these as problematic restrictions, but they are reflections of the one-way street. It is interesting that the Americans With Disabilities Act, which is through the Senate and now pending in the House, is the first statute of its kind to cover Congress, even in a

weakened form. I do not know what that means. It may be a reflection of how good a law the Americans With Disabilities Act is, I do not know. But it is the first time, like the sliver of the Revolving Door, that Congress has subjected itself at all to what it subjects everybody else to in the area of discrimination.

All right, someone might say "So what? So what is the point of this one-way street? It is just a turf fight." There are questions, of course, about the rule of law. I will not go into this because I do not have time to discuss, for example, Congress' practice of passing statutes that have legislative vetoes, and then challenging us to ignore the Supreme Court and follow its statutes.

But we do have a constitutional obligation, as the former Attorney General sitting here pointed out vigorously in the 1980's, the executive branch has an obligation, the President does, to uphold the Constitution just as the courts do. There are, though, several examples that I would like to go into, just to give you some sense of what is at stake in practice.

In foreign policy you heard a little bit about Panama, the restrictions now facing the President as he tries to provide economic aid and assistance to the government of Panama. One of the difficulties the prior administration had in helping the opponents of Noriega was that it required so many reviews to get some simple equipment to Delvalle. So many subcommittee sign-offs had to be obtained—you wonder how these could survive after *Chadha*²—that it took a month to unravel it all; the lawyers getting waivers on this and getting signatures on that. And, of course, a month later it was twenty-nine days too late. The sad thing about it is, this equipment could have been bought, can be bought today, at your local Radio Shack. But, you may ask, could we not ask someone else to provide the Radio Shack equipment? Do not ask.

Consider farm programs. It is a fiction of the Agriculture Committee that no aspect of any farm program in the United States of America has any impact on the value of farmland. This is to permit farmers, and others who benefit from the programs, to run the programs. I once asked Cooper Evans, who is the White House Agriculture Advisor and the proud owner of some 22,000 acres of soybeans and corn and cattle, if this may explain why we have so many billions of farm subsidies, and he said "Boyden, I can't quarrel with you. If you want me to go back to Iowa, I will go back to Iowa." I said, "No, the President wants you here and

2. *INS v. Chadha*, 462 U.S. 919 (1983).

there is no reason why you should not be.” He said, “Well, I will stay then.” The pay is very good, actually. He gets paid more than almost anybody in the White House, except the President himself.

I believe there is a relationship between the fiction that there is no conflict of interest and the effects of the farm program. Take a look at the savings and loan crisis. I could go into a long story about this. I would just urge all of you to read, if you have not already, *Honest Graft* by Brooks Jackson. It will explain how a handful of members of Congress, by frustrating efforts of the executive branch to enact legislation to begin the reform process, and by intervening in the regulatory process, gave us our current crisis. This is a book that was written before the revelations about the Keating Five. You do not even have to know about the Keating Five to have your hair curl.

Take the Clean Air Act, on which we are now working. People worry about the cost of what we propose, to say nothing of the cost of what the Senate bill proposes to do. They tend to forget, of course, the cost of the current law. We have the risk, right now, of judges taking over the running of our major cities. It happened in Phoenix. Luckily, the state got its act together and implemented its SIP, that is, a State Implementation Plan for those of you who are not aficionados of the Clean Air Act. But the threat was a FIP, that is, a Federal Implementation Plan—Phoenix was FIP’d. San Francisco is now being FIP’d. The judges are threatening to ban hair sprays and lawn mowers and leaf blowers. Los Angeles may get FIP’d soon. Chicago is on the verge of a FIP. You laugh, but it is quite true. There is really no reason why a judge should be running the affairs of these cities.

We need to reform the law. It has been very difficult to get reform because of the contending special interests that have their baronies. A recent issue of *The Economist* says that the President has broken the log jam with his bill that balances all these interests, which only the unitary executive can do. We will wait and see. The bill has not passed yet, but I believe it will. And it will pass only because the Executive took all these special interests and tried to balance them in a way that could pass the Congress and actually benefit the public. The Congress has not been able to do this now for twelve years, and if the President had not taken action, I do not think we would have been able to act for another twelve years.

The opportunity to raise money that these statutes provide, whether it is honoraria or campaign finance, is just too tempting. It is too tempting,

and we must reform it. But one way to reform it is to have the President take the lead with proposals that can cut through the hidden agendas.

Another loser when you have special interests holding such sway is innovation. One of the great status quo beneficiaries of the current Clean Air regime is the scrubber. It is one of the most extraordinary wastes of the public's money that you could imagine.

If our bill goes through, it will finally allow people with a better idea than the scrubber to compete with it. But the way the current law works, you have to put a scrubber on a new power plant in order to reduce the pollution, the SO₂ that comes out of smokestacks. For those of you who do not know this, this requirement applies even in the West where the coal is so low in sulphur that you have to add sulphur to the boiler to make the whole contraption work. This is to guarantee markets for the high sulphur Midwestern coal. It does not make any sense, and I hope it will finally stop.

So, I do not think it is a question of turf. The President's obligation, and our obligation to fight for the President in his office, involves important questions of principle and practical effect. The Office of the Presidency is, as some people say in a colloquialism, too expensive to be bought by any industry or interest group. The price is just too steep. You might get a congressman, or you might get a staffer; you might get a subcommittee, you might get a whole committee. But, the White House is just too steep. That is just another way of saying that the President is elected to represent the public interest, the whole interest of the Nation, and not just the special interests. The special interests should be represented; they just should not dominate in all cases.

It is interesting to compare the article VI requirement that members of all three branches of government, at both the state and federal levels, pledge "to support this Constitution," with the article II requirement that the President take a unique and much more specific oath: "I do solemnly swear that I will faithfully execute the Office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."³ You see, the Constitution itself recognizes that the President has a special responsibility, a special *obligation*, to maintain the constitutional separation of powers. That is an end, in and of itself, to provide the balance, and it is not just a turf

3. U.S. CONST. art II, § 1.

fight. It is not just a question of fun and games. It is designed to allow the public interest to be vindicated.

In the end, when you have a Congress that is overwhelmed with special interests, you have a fragmentation that gets out of hand—committees, subcommittees. There are eighty-five committees and subcommittees dealing with foreign policy. The President often talks about the 535 Secretaries of State, but even if it were proper you could not have a coherent foreign policy when you have eighty-five subcommittees all with a hand in it, especially when they do not even talk to each other, I might add.

Another example. One senator called me up from the Energy Committee last June and said, "You are not doing enough on global warming." I said, "We are having trouble integrating the agricultural side of it, the rain forests, our own forests and our own agriculture, into the industrial side of it. It is difficult. You have to get the Agriculture Department in with EPA and the Department of Energy." He said, "That is irrelevant." I said, "What is irrelevant?" He said, "Agriculture is irrelevant to global warming." I said, "Why?" and he said, "Different committee, different committee."

The budget, the budget. The budget is in trouble in part because they separated out long ago the functions of raising money and the functions of spending money. But even those who have to authorize or appropriate to spend it, are split into separate committees, too. The purpose of this, of course, is partly to hide accountability, I think, but it is also to expand the opportunity of individuals to raise money and get exposure and, therefore, get re-elected.

There is an old joke that many of you may have heard: if you run into a congressman or a senator and for some reason or another draw a blank—cannot remember his or her name—always the safest thing to do is to address him or her as Mr. Chairman, or Madame Chairman, because you are likely to be right.

Now the way the Senate rules operate, one person can put a hold on almost anything. Stopping legislation may not always be mischievous. There are many of you who might think, "Gee whiz! That is not a bad idea." It is a good way to stop the vortex from doing damage. The trouble is that it also stops undoing damage that has been done previously. But more important, much of the damage that is done by the congressional side is done by interfering with the management of the executive branch. You heard discussion yesterday, I am told, about execu-

tive and White House review of regulations. Committees will go in and grab after, or their staff will go in and grab after, a regulatory agency or part of one. The only way any sense can be made of all this is to have the White House bring all the departments in to do the coordinating that the fragmented committees will not do. We need a drug czar, in large part, because there is no coordinating committee in the Congress.

But the President has to provide coordination for Congress as well as for the executive branch. The President, for example, has taken his obligation to consult with Congress about foreign policy, very, very seriously. Think about all the members of the competing committees with a role in foreign policy—Armed Services, Foreign Relations, Foreign Affairs, Senate Intelligence, House Intelligence, and Finance—in terms of international trade. I would wager that they get together and discuss the issues more often with the President in the cabinet room than they do in Congress.

The President can do this. The Congress is not doing it. The President has an obligation to do it. And on that note, I will close.

Part of the problem is a very simple one. I grew up in the South. People have heard me say this: God bless the man who sues my client. In the Congress, creating problems is great because it helps you get invited to places, helps you with honoraria. There is this marvelous anecdote told by Senator Simpson about how he went out on a junket and was waiting around having asked, “When am I going to give my speech?” Lunch passed, dinner passed, and no one asked him to give a speech.

Finally, the next morning he walked into the empty ballroom and said, “I want to give my speech.” They said, “Oh, come on, Senator Simpson! Go out and ski a little bit, play a little tennis, swim. Don’t worry about it, we will take care of it.” He said, “I want to give a speech.” He made them pull in the lectern and he gave the speech to an empty hall.

Whether it is to raise money for campaigns, or to get invited on trips, there might be fewer opportunities if you engage in less mischief. Again, God bless the man who sues my client! One lawyer in a small town will not do very well, but two lawyers will do very well, indeed. Lead us not into temptation. Like lawyers, members of Congress face a lot of temptations. The executive branch has a duty to resist the temptation.

