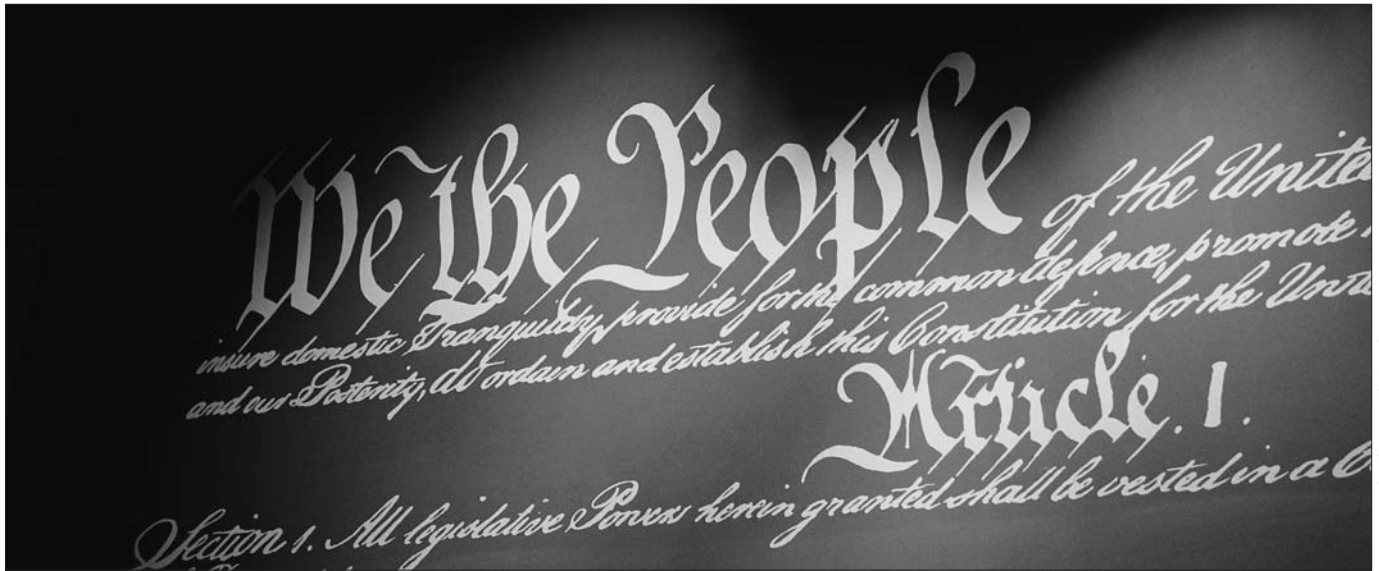


Academy Meetings



The Invisible Constitution and the Rule of Law

Laurence H. Tribe, Frank H. Easterbrook, and Geoffrey R. Stone
Diane P. Wood, Moderator

This panel discussion was given at the 1932nd Stated Meeting, held in collaboration with the Chicago Humanities Festival on November 8, 2008, at Northwestern University School of Law.



Diane P. Wood

Diane P. Wood has been a Judge of the U.S. Court of Appeals for the Seventh Circuit since 1995. A former professor of international legal studies, Associate Dean at the University of Chicago Law School, and Deputy Assistant Attorney General in the Antitrust Division of the U.S. Department of Justice, she is now a Senior Lecturer in Law at the University of Chicago Law School. She has been a Fellow of the American Academy since 2004.

The theme of this year's Chicago Humanities Festival is "thinking big," and we have planned an interesting panel discussion on the big idea of the rule of law. I thought that I would begin with a word about the rule of law. In recent years, there has been a much more searching discussion about this concept than ever before. What does it really mean? Some people think it has both a substantive and a procedural component. From a substantive standpoint, a society that respects the rule of law is one in which open and transparent laws are applied impartially and equally to everyone. From a procedural standpoint, the rule of law requires what Americans tend to call due process; that is to say, the right to the opportunity to be heard before an impartial decision maker. You can find definitions in many places, but the ideas remain constant: no one is above the law; all citizens have certain obligations and certain rights. Our panel will begin by considering where the rule of law fits within our broader constitutional structure.

Laurence Tribe addressed this question, as well as many others, in his recently released book, *The Invisible Constitution*. He is the Carl M. Loeb University Professor at Harvard Law School, where he has taught since 1968. Before joining Harvard's faculty he served as law clerk to Justice Matthew Tobriner at the California Supreme Court and to Associate Justice Potter Stewart at the United States Supreme Court. He also directed the Technology Assessment Panel at the National Academy of Sciences. His scholarly works are far too numerous to list, but they include, in addition to the book he will be discussing today, such publications as *Abortion: The Clash of Absolutes* and *God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes Our History*. Professor Tribe also has had a distinguished career as an advocate before the Supreme Court; he has contributed frequently to congressional hearings; and he has served as a consultant to the drafters of many constitutions around the world.

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Following Professor Tribe will be Chief Judge Frank Easterbrook of the United States Court of Appeals for the Seventh Circuit. Chief Judge Easterbrook began his distinguished legal career as a law clerk to Judge Levin Campbell of the United States Court of Appeals for the First Circuit. He then joined

A society that respects the rule of law is one in which open and transparent laws are applied impartially and equally to everyone.

the Solicitor General's Office, where he served first as an Assistant to the Solicitor General and later as Deputy Solicitor General of the United States. In 1979 he became a member of the faculty of the University of Chicago Law School, where he was named the Lee and Brena Freeman Professor of Law, and where, like me, he continues to teach today as a Senior Lecturer in Law. He, too, has a lengthy and wide-ranging list of publications and has written extensively in the fields of antitrust and corporate law, coauthoring *The Economic Structure of Corporate Law* with Professor Daniel Fischel, and *Securities Regulation*. From 1982 – 1991 he was an editor of the *Journal of Law and Economics*.

Finally we turn to Geoffrey Stone, the Edward H. Levi Distinguished Service Professor at the University of Chicago Law School, where he has been a member of the faculty since 1973. Over the years, Professor Stone has served as both Dean of the Law School and Provost of the University. Before coming to the Law School, he clerked for Judge J. Skelly Wright of the United States Court of Appeals for the District of Columbia Circuit, and then for Associate Justice William J. Brennan, Jr. of the United States Supreme Court. Professor Stone also has many books to his credit; he has focused primarily on constitutional law and the First Amendment. Most recently, he has authored *Top Secret: When Our Government Keeps Us in the Dark*; *War and Liberty: An America Dilemma*; and the award-winning *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism*.

Returning to Professor Tribe, in the preface to *The Invisible Constitution*, he states that much of what we understand as part of the Constitution does not appear in so many words in its text. In fact, he compares it to the Dark Matter that holds the universe together. So it is my privilege to turn the floor over to Professor Tribe so that he can explain to you exactly what he means by that and how it relates to the rule of law.



Laurence H. Tribe

Laurence H. Tribe is the Carl M. Loeb University Professor at Harvard Law School. He has been a Fellow of the American Academy since 1980.

It is a privilege and a pleasure to talk with you about my book and about how some of its themes relate to the rule of law. A number of friends have asked me how long I have been working on this book. I would love to have said “Oh, just a few months,” but the truth is about forty years. In the meantime, I have published a treatise on the American Constitution as well as other books and articles, helped write a number of other constitutions, and argued a number of cases, but this book has been on my mind from the time I began clerking for Justice Stewart at the Supreme Court.

Katz v. The United States, the case involving electronic eavesdropping on someone in a telephone booth, which was decided in 1967, triggered it all for me. The government's argument stressed that the telephone booth was transparent, so anyone could have seen what the individual involved was saying. Someone could have read his lips. Since he wasn't seeking privacy, electronic eavesdrop-

ping on his conversation did not invade anything. Moreover, the law had previously established that, in order to have a search or seizure within the meaning of the text of the Fourth Amendment, you must have a physical invasion of a constitutionally protected place. In overruling those decisions requiring physical invasion, the Court stated that what Mr. Katz was trying to exclude when he went into that transparent telephone booth was not the unwanted eye but the uninvited ear and that it was a violation of his justifiable expectations of privacy that made this a search and seizure.

The problem the Court confronted was how to decide what expectations of privacy are justifiable. If it is a descriptive rather than a normative matter, you could have the government putting up billboards everywhere saying “Big Brother is listening, watch out.” There was only a single line in the opinion – I tried to persuade Justice Stewart and the Court to expand this discussion – that hinted that you don't find these justifiable expectations of privacy in the Fourth Amendment but rather in something that surrounds it, indeed in the First Amendment. The Court said that in a society that has come to rely on the ubiquitous role of electronic communications, through the telephone in this case, freedom of expression would be unduly shrunk if people knew that Big Brother might overhear anything they said on the telephone. That is what made the expectation of privacy in this case justifiable. So it was a matter of connecting the dots between the Fourth Amendment and its protection of people, places, effects, and houses, and the First Amendment and its protection of freedom of expression.

I hadn't really generalized that into a method – I was only 25 at the time. I have been working on it for a while since, but what I have come to think is that much of what is in the Constitution can be best understood only by connecting the dots between provisions like the First Amendment and the Fourth Amendment, looking at the lines between them, connecting those lines, in turn, with the provisions protecting liberty generally, forming the resulting triangle, and looking at the geometric structure of the Constitution. I call that the Geometric Method of Constitutional Construction.

There is also something that I have come to call the Geological Method. That is, if you ask why the Fourth Amendment protects justifiable expectations of privacy in some places more than others, for example in a home, you are inevitably drawn to conclude that it is because the Constitution presupposes an important value in the autonomy of what goes on within the home – of course, not absolutely. One could beat someone up inside the home and thereby trigger a powerful public interest, but unless there is some special sanctity to the substance of what people do consensually in private within their homes, it makes relatively little sense to have the procedural protections of the Fourth Amendment. One digs beneath the textual protection of persons and homes against unreasonable search and seizure by what I have come to call the geological method that looks at the underlying presuppositions and foundations of what is in the written rule of law.

Now, the choice between, on the one hand, the geometric method, the geologic method, and several others that I describe in the book and, on the other hand, a more constrained linguistic approach in which one looks at the plain meaning of the rules in black and white as written in the Constitution is not left entirely to the imagination because part of the text is a provision telling us that the text is not all there is. The Ninth Amendment says that the enumeration of certain rights in the Constitution shall not be construed to exclude the existence of other rights reserved to the people. Here is an important reminder that what you see on the face of the written document is by no means all there is. It is a way of saying there is more here than meets the eye. Even if that language were not there, I argue that any finite document purporting in a purposive way to chart a course for a nation through imposing certain rules and constraints and constituting certain institutions is inherently incomplete. I draw an analogy to Gödel's Incompleteness Theorem in the field of mathematical philosophy, in which – to reduce an incredibly brilliant and complicated issue to something very straightforward and simple – it turns out that any axiomatic system that is rich enough to include even the elementary operations of arithmetic must include true theorems that are not provable by the meth-

ods of the system. In other words, the system cannot fully describe all that is true within it, and I think no finite document can fully describe within its terms everything that one would need to know about its meaning.

Much of what is in the Constitution can be best understood only by connecting the dots between provisions like the First Amendment and the Fourth Amendment, looking at the lines between them, connecting those lines, in turn, with the provisions protecting liberty generally, forming the resulting triangle, and looking at the geometric structure of the Constitution.

There are at least two sets of constitutional principles that in this sense are necessarily invisible. First there are what I would call meta-principles: principles about how to read the rest of the document. The Ninth Amendment is the primary example in the Constitution itself. It says that the enumeration of certain rights shall not be construed in a certain way; it is a direction to you, as the reader, whether you happen to be a judge like Judge Wood or Judge Easterbrook, or a scholar like Geoffrey Stone or me, or an ordinary citizen, a member of Congress, or a member of the executive branch. Anyone who has taken an oath to uphold the Constitution is instructed about how to read it, and my first claim is that no set of instructions about how to read a document can be complete because if the Ninth Amendment says a certain thing, you might then ask, "Well, how are we to read that?" Judge Robert Bork, when he was nominated to the Supreme Court, didn't do himself much good with the Senate when he said, "Well, the Ninth Amendment is a mere ink blot. I can't read it. It's too indeterminate. It gives

me too much discretion," to which the response of the Senate Judiciary Committee was, "It's not up to you to erase from the Constitution something that you think is difficult to understand." It may sound laughable but the judge was brilliant and had a point. In some ways it was unfortunate that his views were caricatured, but I do think that he missed the point that everything in the Constitution, however hard to read, has to be taken seriously, even if it tells you that there is stuff out there in the Dark Matter that is not specified in the language of the document.

In addition to meta-principles, there are particular principles that most of us take to be constitutionally fundamental, such as the principle of one person, one vote. They certainly cannot be derived in any meaningful way from the language; rather, they implement underlying values of participatory democracy that the Constitution, as a whole, is thought to contain. The Equal Protection Clause, for example, is a rather unlikely home for the one person, one vote principle, especially when you apply it to the House of Representatives of the United States, where the principle of equal-populous districts certainly cannot be derived from the Fourteenth Amendment's equal protection clause since it applies only to the states, not to the federal government. Nor can it plausibly be derived from the Due Process Clause of the Fifth Amendment. Justice Hugo Black in *Wesberry v. Sanders* purported to derive it from the language essentially stating "the Congress shall represent the people." On that basis, you might say that there is a textual basis for the principle of one person, one vote, but you would be fooling yourself. There is nothing in that language, or plausibly inferable from it, that leads you to the rule of one person, one vote. The rule is legitimate solely because it is plausibly contained in the invisible Constitution.

Take another example: the Anti-Commandeering Principle that prevents Congress – even if it is acting within its substantive authority, for example, to regulate commerce among the states – from using that power to compel states to exercise their sovereign authority to pass or to enforce certain laws, as in the Brady Gun Control Law, which compelled local law enforcement officers to do

background checks for the federal government when people wanted to purchase guns. When the Supreme Court in a five-four decision said that this action violated the Anti-Commandeering Principle, it was quite candid about the fact that it couldn't locate that principle in the text. Rather, it was, as the Court put it, implicit in the tacit postulates of the Constitution. The liberals on the Court, who dissented from that decision and, in fact, accused the majority of making things up because there was nothing in the text that could justify the Anti-Commandeering Principle, were being hypocritical in advancing that accusation because there is similarly nothing in the text that justifies

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what amounts to an Anti-Commandeering Principle invoked by the liberals in the realm of personal life. The principle that there are limits on the ability of the government to take hold of your life and determine how you will lead it, what a woman may do with her body when she's pregnant, what we will do in terms of how we raise our children, is not stated in the Constitution, yet there tends to be very broad agreement that it is a principle implicit in our constitutional order.

When the liberals relied on that principle in decisions like *Griswold v. Connecticut*, involving the right to use birth control, or *Roe v. Wade*, involving the right of a woman to ter-

minate her pregnancy, the conservatives, no less hypocritically, said, "The Constitution doesn't mention abortion; it doesn't mention birth control." Of course it doesn't! It doesn't mention states' rights, either, or the Anti-Commandeering Principle.

The point of my book is to show that the invisible Constitution is an equal opportunity mystery. It is not simply something that liberals invoke when they want to protect reproductive freedom, or that conservatives invoke when they want to protect states' rights. It is an intrinsic feature of any constitution, and in particular one like ours, and a feature that we should be debating.

What are the fundamental core principles on which we as a nation agree? I think we actually agree that there are limits, not just those specified in the Constitution, on how far government can reach into the bedroom, into your personal life, into the body. The reason a decision like *Roe v. Wade* is so intractably difficult and controversial is not that the underlying right isn't written down; it is, rather, that the task of deciding how much protection to give to the unborn, when concern for the survival of the unborn clashes with the exercise of that underlying right, is fundamentally and profoundly imponderable. Some people maintain that, because the task is so difficult, it should not be performed by courts; we should have a different rule in each state; it should be up to the legislatures. But my book is not about the question of when courts should intervene. Even if we took courts out of the business altogether, we would have to remember that the Constitution speaks not only to the judiciary but also to the legislature. If you were a lawmaker asked to pass a law that said "Women cannot drink more than one glass of wine a week when they are pregnant because there is a fetus inside," you would have to ask yourself, even if you were not acting under the shadow of judicial intervention, whether such a law is consistent with the underlying postulates of our Constitution about the limits of government intrusion into personal liberty.

Now, many may object that, in sharp contrast to the ideals of the rule of law, this process of inferring structure is far too indeterminate. Well, it is also the case that the mean-

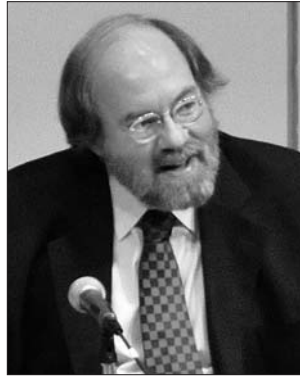
There are particular principles that most of us take to be constitutionally fundamental. They certainly cannot be derived in any meaningful way from the language; rather, they implement underlying values of participatory democracy that the Constitution, as a whole, is thought to contain.

ing of something like freedom of speech is desperately indeterminate. That is why the Court divides five to four in cases like those striking down laws punishing so-called "flag desecration," to take just one particularly controversial illustration. The text, in any event, commands the process of inferring something beyond the text, and that is my point about the Ninth Amendment.

Surely, among the most basic of the postulates not written down in the Constitution is our commitment to living under the rule of law. You will hear from Judge Easterbrook and perhaps others on the panel about the difficulties inherent in elaborating that concept. As Judge Wood has already pointed out, it usually refers to broadly applicable systems of predictable rules that are fairly uniformly applied. That is one idea. Second, there is the idea that the executive branch of the government is bound by the rule of law. That is an idea that is not necessarily implied by the first idea but can be traced largely to the *Magna Carta* in 1215. Third, both the executive branch and the legislature are bound by a principle of judicial review that was articulated most powerfully in *Marbury v. Madison*. It is the idea that one needs an independent judiciary to put teeth in the way the rule of law binds the government, although there are disputes about the degree to which judicial interpretations should be binding on the other branches. And the rule of law goes beyond these several dimensions.

I want to close by suggesting a more positive dimension of the rule of law. One of my favorite cartoons from *The New Yorker* magazine shows people who look like they're pilgrims on what could be the Mayflower. Gazing contemplatively at a distant shore, one of them says to the other, "Religious freedom is my immediate objective, but my long-term goal is to go into real estate." The cartoonist's "original intent" was probably to give a cynical inflection to the American dream and the Constitution's project of securing the blessings of liberty to ourselves and to our posterity. However, the hidden structure of the cartoon's caption, I think, lies deeper: it lies in its recognition that negative liberty ultimately requires a positive edifice of law, like the edifice of public law that creates an institution such as private property, and ultimately the edifice of public law that creates the possibility of meaningful freedom.

I explored that theme in 1989 with the help of a very brilliant law student in an article we wrote together called "The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics." He was probably the most impressive law student I have ever had and certainly the best research assistant. You might have heard of him; his name is Barack Obama. When he takes the oath in January, it will be administered by another very brilliant former student of mine, John Roberts. I think the rule of law will be a bit safer.



Frank H. Easterbrook

Frank H. Easterbrook is the Chief Judge of the United States Court of Appeals for the Seventh Circuit and a Senior Lecturer at the University of Chicago Law School. He has been a Fellow of the American Academy since 1992.

The title of this meeting, "The Invisible Constitution and the Rule of Law," starts with the title of Professor Tribe's new book,¹ but the punch is in the "rule of law" portion. The usual meaning of this phrase is decision by rule announced in advance, and after an opportunity for a hearing on any material contested facts.² How can there be a rule of law if the Constitution has many invisible clauses, discernible only to judges, professors, and other members of the legal elite? Then there is no law knowable in advance. Isn't it time to acknowledge that the Emperor has no clothes? The question brings to mind the doggerel: "Yesterday upon the stair / I met a man who wasn't there. / He wasn't there again today. / Oh how I wish he'd go away."³

Despite the strangeness of phrases such as "invisible Constitution" or "unwritten Constitution," I agree with Professor Tribe that much of our Constitution is unwritten. Indeed, much of *any* writing is unwritten, because no text contains its own dictionary

¹ Laurence H. Tribe, *The Invisible Constitution* (Oxford; New York: Oxford University Press, 2008).

² See Antonin Scalia, "The Rule of Law as a Law of Rules," *University of Chicago Law Review* 56 (1989): 1175.

³ William Hughes Mearns, "Antigonish" (1899).

and other rules for decoding. Anyone who lectures you about the "plain meaning" of texts, including statutes and constitutions, is playing word games rather than engaging in thoughtful discourse.

It does not take a deep understanding of Wittgenstein and other linguistic philosophers to see that meaning lies in how words are heard by an interpretive community; no text is internally complete. For any modern interpreter of eighteenth-century texts, the problem of incompleteness is compounded by the fact that the interpretive community in which the words were recorded no longer exists. We don't think or hear words exactly like people in an agrarian community of 1787 did and thus cannot be confident that how

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we hear words reflects their actual meaning. Still, we do know that, from the outset of our nation, the living interpretive community saw in the Constitution more than its words. They deduced from the supremacy of the Constitution over statutes that there must be judicial review (which is to say that a judge won't take on faith other persons' view that their deeds are valid) – and I add, as does Professor Tribe, that *every* governmental actor must ensure that the Constitution prevails over other competing sources of law.⁴ The original interpretive community deduced a system of intergovernmental immunities – states can't tax federal entities, nor can the federal government tell the states how to use their own powers. The entire understanding of political sovereignty lies in constitutional structure rather than in particular clauses.

⁴ Frank H. Easterbrook, "Presidential Review," *Case Western Reserve Law Review* 40 (1989–1990): 905.

But what follows from this? Surely not that if some important matters depend on structure rather than text, then judges today may impute new rules to the old text.⁵ One ought not to say “the Constitution contains the word ‘liberty,’ which is vague, so judges can do anything they want in its name.” For that approach would negate the main feature of the *written* Constitution: that new problems are to be resolved through the institutions of a representative democracy.

The phrase “Rule of Law” often goes with the phrase “A government of laws and not of men.” It is helpful to remember the origin of that phrase. It comes from Article 30 of the Massachusetts Constitution of 1780, which reads: “In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.”

Ask yourself why federal judges have life tenure. It is not so that they can play the role of Guardians, à la Plato’s *Republic*. Plato hated democracy; our Constitution embraces democracy and holds representatives on short leashes. Senators, with six-year terms, have the longest; Representatives face the people every two years. After all, it was the problem of non-removable people making important decisions that led to the Revolution of 1776!

Tenure is a curious institution in a democracy. The Jacksonians tried to wipe out tenure even for the judiciary, and in some states they succeeded. Tenure’s justification is to enforce the Rule of Law – to protect people from the mob and to make political compromises more stable.⁶ Judges with tenure can enforce freedom of speech and the rights of enemy combatants, even when these are un-

⁵ People usually say that judges recognize “rights,” but every right for A is a limitation on B; it is better to say “new rules” rather than “new rights.”

⁶ See William M. Landes and Richard A. Posner, “The Independent Judiciary in an Interest-Group Perspective,” *Journal of Law and Economics* 18 (1975): 875.

popular with the majority. A judge can try someone accused of shooting at the President without fear of removal if the judge rules for the defendant – for fear of removal would make it impossible for the accused to have a fair trial.

But tenure, like the Force in *Star Wars*, has a dark side – and, as with the Force, the dark side is self-indulgence. Tenure frees a judge from today’s passions, the better to enforce the law – and paradoxically tenure also frees a judge from the law, the better to enforce his own view of wise policy. Judges sometimes

From the outset of our nation, the living interpretive community saw in the Constitution more than its words. They deduced from the supremacy of the Constitution over statutes that there must be judicial review and that every governmental actor must ensure that the Constitution prevails over other competing sources of law.

yield to this temptation. This leads to a belief that judges are politicians in robes, which in turn makes the selection process political, which leads to an increase in the risk that we will *get* politicians in robes, like it or not.

How do we keep tenure for the benefits it brings, yet retain a Rule of Law against the pull of tenure’s Dark Side? Equivalently, how do we ensure the benefit of tenure for the application of law to fact, while curtailing the tendency of tenure to change the meaning of substantive rules? (The pull of the Dark Side is often abetted by the academy and the editorial pages, which extol the supposed wisdom and dispassion of judges – but that is just a plea for Plato’s Guardians rather than an unruly democracy.

And, for what it is worth, I can assure you that judges have far too many cases to think deeply about any of them.⁷)

Before addressing the question of *how* the Dark Side of Tenure is best controlled, I want to say a few words about whether this has been a serious problem. The press and the Senate Judiciary Committee concentrate on a few social issues, such as abortion and capital punishment, and you read much about 5–4 decisions with “liberal” and “conservative” blocs. Newspapers have taken to identifying judges by the party that appointed them (“Easterbrook, a Reagan appointee”), just as they identify senators by party (“Durbin, D IL”). Scholarly studies show that a judge’s imputed ideology matters to his voting.

Judges, like others, see the world through the perspective of their lives and beliefs, and they have what Justice Holmes called their “can’t helps.” They may justly be censured when they fail to try to control the effects of their beliefs. But it is quite wrong to say that judges regularly fail in this effort at self-control.

The Supreme Court chooses fewer than 100 cases every year from a menu of more than 9,000 applications. The cases it hears are the most difficult that our legal system has to offer. Yet year in and year out it decides about 35 percent of them unanimously. That figure has been stable for almost 60 years,⁸ even though the size of the legal system as a whole has been growing, and the Court correspondingly has become more selective. (Sixty years ago the Court heard roughly 1 in 5 of those in which the litigants sought review; today it is 1 in 90.) That the Justices agree unanimously in a large fraction of the legal system’s *most* contentious cases shows that

⁷ Frank H. Easterbrook, “What’s So Special About Judges?” *University of Colorado Law Review* 61 (1990): 773.

⁸ See Frank H. Easterbrook, “Agreement Among the Justices: An Empirical Note,” *Supreme Court Review* 389 (1984); William M. Landes and Richard A. Posner, “Rational Judicial Behavior: A Statistical Study,” University of Chicago Working Paper, April 2008. (Landes and Posner give a figure of 30 percent by defining a decision as unanimous only if there is a single opinion joined by all Justices. The percentage rises if we count as unanimous decisions in which there are no dissenting votes, and any Justices who write separately accept the same general rationale as the principal opinion.)

they do very well indeed at elevating law over politics.⁹

Take this from another perspective. Ask, for each possible pair of Justices, how often they agree and how often they disagree. Most pairs agree about 75 – 80 percent of the time; Justices who the press depicts as identical (Scalia/Thomas, Ginsburg/Breyer) disagree in about 20 percent of cases.¹⁰ That must be driven by law, not ideology. And the highest rate of disagreement is only 41 percent (that's how often Justices Thomas and Ginsburg disagree). Because about half of all disagreement is law-driven, the portion attributable to different views of the world must be no more than half. Since we are looking at society's most contentious issues, that's pretty low. Judges do well at enforcing law rather than ideology, even when the temptation is greatest.

You read from the newspapers about 5 – 4 splits, which are roughly 20 percent of the docket, as if the very fact of division shows that politics must be at work. Not at all. Suppose Justice Scalia were cloned and the Court populated only with those clones. (If that makes you uncomfortable, mentally clone Justice Ginsburg instead.) You might think that this court would decide *all* cases 9 – 0, but you would be wrong. The fact that the Justices were very similar would change how courts of appeals rule, and which disputes would be worth taking. When selecting 1 of 90 cases for decision, an all-Scalia or all-Ginsburg court would find many issues that are hard *for Scalia* or *for Ginsburg*; and when ruling, this all-Scalia court would issue a lot of 5 – 4 decisions, with some 7 – 2 but still many 9 – 0. But the existence of 5 – 4 decisions would not show that ideology controls; it would show only that for any interpretive theory it is possible to find hard cases.

⁹ There has been much ado in the press about a supposed “pro-business tilt” of the Court in recent years. Yet most of these decisions are unanimous, as are many employment-discrimination cases that go against employers. Most of these decisions resolved conflicts among the circuits, yet the Justices agree more among themselves than the circuit judges do with each other.

¹⁰ These numbers come from tables maintained by the Supreme Court's Reporter of Decisions. Essentially identical figures can be found in the statistical section of the *Harvard Law Review's* November 2008 issue.

Now let's look beyond the Supreme Court. A careful study of all decisions by the U.S. Courts of Appeals, over many years, concludes that the political party of the President who appointed a judge (as a proxy for ideology) explains about 6 percent of all observed disagreement – and that there is rarely any disagreement to observe.¹¹ The other 94 percent of disagreement comes from ambiguity (in statutes and other sources of law), plus doubt about which side's version of events best approximates the truth. My sense of matters, after 24 years of judicial

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service, is in accord: Genuinely ideological disagreement among judges is rare. The Rule of Law is by far the most powerful factor in judicial decisions.

What do we make of the disagreement that remains? Some is irreducible; some can be curtailed by reminding judges that the price of tenure is tight control on the discretion that the actor possesses. If you can't fire the referee in a football game, you make absolutely sure that the rules are clear and controlled by someone other than the referee. The less a person is subject to control by the threat of removal, the more important it is to insist that the person use specific rather than general rules – for the more general a rule or standard, the greater the role that the Dark Side of Tenure can play.

One consequence is that judges must be very suspicious of claims that some rule has lain undiscovered for a long time and is only now being understood. An assertion that the people living at the time of a text's adoption did not really understand its meaning, but that we do, is almost certain to be false. For

as I have stressed, the meaning of a text lies not in the drafter's head but in the way a text is understood by an interpretive community. Claims of newly discovered meaning are *necessarily* admissions to changed meaning. (This is also why the interpretive approach known as imaginative reconstruction is unsuited to tenured deciders, even though it may be fine in a classroom. If we don't know how the old interpretive community understood the actual text, we assuredly can't know what it would have thought about a problem never put to it.)

Another consequence is that a judge must insist on a level of certainty that is adequate to any assertion of power to have the last word.¹² Recall why we have judicial review. It is because the Constitution is *law*, and superior to statutes. When the Constitution is not law but just an aspiration, when rules evolve, then judges must honor the Constitution's two means for handling ongoing disagreements: Political decisions by the national government, and respect for the fact that each state may choose a different solution. Robert Nozick argued in *Anarchy, State, and Utopia* that the best way to organize society when individual preferences differ is to allow many different solutions, as long as each solution's effects are felt only by those in the local jurisdiction. Judges must be exceptionally wary about enforcing what they see as a national consensus; that contradicts the federal system that represents the heart of our national organization.

¹¹ Frank L. Cross, *Decision Making in the U.S. Courts of Appeals* (Palo Alto, Calif.: Stanford University Press, 2007).

¹² See Frank H. Easterbrook, “Abstraction and Authority,” *University of Chicago Law Review* 59 (1992): 349. See also “Textualism and the Dead Hand,” *George Washington Law Review* 66 (1998): 1119.



Geoffrey R. Stone

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One of the points that Professor Tribe makes in his book is that among the list of fundamental principles that are part of the invisible Constitution – that are not rooted specifically or expressly in the text – is the rule of law. As both Judge Wood and Professor Tribe indicated, the precise content of the idea of the rule of law is not perfectly well defined, although it calls forth values such as consistency, neutrality, evenhandedness, nonpartisanship, following the rules, adhering to general principles, and appealing to those general principles as a source of reason and guidance. There is a broad consensus that those are positive values. They are important to our legal system and to our constitutional order, and it would be hard to get an argument these days that the rule of law is a bad thing.

Now, I want to comment on some of Judge Easterbrook's statements about judges, their behavior and ideology, and life tenure, in terms of the rule of law. I agree with Judge Easterbrook that, for the most part, judges follow the rule of law. They seek to be evenhanded, neutral, and nonpartisan. They seek to follow general principles and precedents. As a result, the degree of agreement among judges, even judges appointed by presidents of different political parties, is pretty high. On the other hand, it is also true, as Judge Easterbrook noted, that there is a meaningful correlation between the party of the president who nominated a particular judge and the judge's votes. Judges appointed by Demo-

crats are more likely to disagree with judges appointed by Republicans than they are with judges appointed by Democrats. That alignment is consistently demonstrated. Moreover, looking at the entire array of cases understates this effect, because the effect is particularly evident when we examine ideological cases, especially in areas where controlling precedents are unclear. In those cases, in such areas as abortion, affirmative action, and religion, there is a well-documented correlation between judicial behavior and political affiliation.

But I do not find this troubling. The process of judging necessarily involves judgment, and when the precedents are unclear and there is no unambiguous statute to dictate the outcome, judges will bring to bear their own understandings of the proper role of courts and judges, the proper relationship

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among government institutions, and the proper way in which one goes about interpreting the Constitution. The differences among judges on these issues do, in fact, correlate with political affiliation in our society, and there is nothing illegitimate or insincere or disingenuous about the fact that those disagreements exist. They are an inevitable product of the fact that judgment involves something more than simply asking a computer a question. So, for the most part, I agree with Judge Easterbrook that this is not a serious problem in our judiciary, although it has been the subject of a great deal of scholarly inquiry in recent years.

I do disagree with Judge Easterbrook, however, on the question of life tenure. Certainly, he is right to note that there are dangers in the arrogance that can come with life tenure and in the notion that one is not accountable to anyone else for a decision. The temptation to act lawlessly if one is unac-

countable must be taken quite seriously. On the other hand, judges have life tenure for a reason, and it is a reason rooted deeply in the fundamental philosophy of the American constitutional order. Although our system is based in large part on the idea of democracy and "majoritarianism," it is also based on the recognition that majorities are not always wise or tolerant or respectful of difference or calm or level-headed. There are circumstances in which majorities predictably do bad things – things that are, in fact, incompatible with the larger values and aspirations of our society.

One of the truly magisterial achievements of the American Constitution, particularly as it has evolved over time, is the recognition that judges with life tenure are sufficiently unaccountable to prevailing majorities, and (hopefully) sufficiently dedicated to the rule of law, that they can provide an invaluable check on majoritarian abuse. In my view, then, judicial abuse of life tenure isn't a primary concern. The greater danger would be the absence of judicial review. In my view, without judicial review – and life tenure – judges would not have played the critical role they have played in helping to maintain an essential balance in our constitutional system.

I want to give a couple of illustrations of the rule of law, some positive, some negative, particularly in the judicial process, but also in the executive process. First, there is the Nixon tapes case, which arose out of the Watergate controversy. In that case, the Supreme Court held that the President was not above the law and that he therefore could be compelled to turn over tape recordings of his conversations, despite the claim of presidential immunity. What is striking about that decision is that it was endorsed by justices from both political parties, looking to principles of the rule of law, consistency, neutrality, and accountability that went beyond any partisan political interests. Even more impressive, though, was President Nixon's compliance with the Court's ruling. Despite the consequences to him and to his presidency, he acted in accord with the rule of law. Although he disagreed with the Supreme Court decision, he understood that it was his responsibility under the Constitution to act in conformity with it.

But adherence to the rule of law should not be taken for granted. For example, after *Brown v. the Board of Education*, many Southern states refused to comply with the rule of law, insisting in effect that *Brown v. Board of Education* was itself an abuse of judicial authority and a violation of the rule of law, a position Nixon could easily have taken, but chose not to take.

Another example of judges acting in conformity with the rule of law is the Paula Jones case, which involved President Clinton, a case, I should say, in which I was one of the lawyers who represented President Clinton in the Supreme Court. We lost nine to zero. I believe that subsequent events proved that we were right and that the Supreme Court was wrong, but the important fact is that, despite the political party of the presidents who appointed those nine justices, they all (erroneously) thought they understood the requirements of the rule of law and reached a decision regardless of their individual political preferences. Again, that is to the credit of the Court, and a good example of the justices acting in a way that furthered their commitment to principle and to the rule of law.

In a less inspiring illustration, involving the 2000 presidential election, I think it is fair to say that at every level – from the polling officials who held up ballots to look for hanging chads to the Florida Supreme Court, from the Florida legislature to the Supreme Court of the United States – there was very little confidence on the part of the American people that anyone involved in that dispute acted in accord with the rule of law. In the case of *Bush v. Gore*, the justices voted in a way that concurred perfectly with what most people understood to be their personal political preferences. There is good reason to believe that the rule of law was not, in fact, followed. But in defense of the Court, I want to say that at the time that decision was pending, among all of my legal colleagues, everyone I knew believed that the right decision in *Bush v. Gore* was the result that correlated with the election of his or her preferred candidate for president. This was really interesting, because it showed the power of distortion and bias when the law is ambiguous, when there is no controlling precedent, and, more importantly, when there is no opportunity for real reflection, which I think is essential to the rule of law.

Part of what made *Bush v. Gore* such a perilous case for the Court was that there was little time for the justices to deliberate. Ordinarily, judges don't have to decide cases instantly. They have time to think, to argue, to reason, and eventually, in their own good time, to reach a decision. *Bush v. Gore* was unusual in part because the time frame was dictated not by the Court, but by the constitutional demands of the election process. The justices had to decide the case extremely quickly, and they were therefore unable to overcome their biases. This is a good example of a case where I think the rule of law did

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not work. That is not to suggest, by the way, that I think there was a necessarily right or wrong answer in *Bush v. Gore*; it is, rather, that I think the ideological dispositions of the justices determined their votes.

The final examples I want to give relate to some of the actions of the Bush administration over the past eight years. The rule of law involves not just courts; it also involves executive branch officials, as illustrated by Nixon's compliance in the tapes case. In my view, the Bush administration was repeatedly guilty of arrogance and defiance of the rule of law in ways that are deeply troubling. This is true not only in the sense that the Bush administration adopted unlawful policies – although there are, in my view, clear examples of that – but also in the sense that

it often propagated and attempted to implement those policies in secret – where secrecy was not dictated by the circumstances, was not consistent with the rule of law, and was intended to circumvent the rule of law and to avoid democratic accountability. The secrecy invoked by the Bush administration in its promulgation of the NSA electronic surveillance program, its use of secret prisons, and its approval of torture was not designed to protect national security. Rather, the intention was to insulate the executive branch from public scrutiny and to shield it from the checks and balances that the Constitution assigns to Congress and the Supreme Court in enforcing the rule of law. Indeed, when the Supreme Court finally had the opportunity to evaluate the constitutionality of many of these policies, in cases like *Hamdi*, *Rasul*, and *Hamdan*, its basic position in holding the actions of the Bush administration unconstitutional was not so much that the policies themselves were unconstitutional, but that they had been promulgated and implemented without regard for the rule of law. They were judgments where Congress should have played a role, and where the Court should have had an opportunity openly to evaluate the constitutionality of the government's programs.

Finally, I agree with Judge Easterbrook that the idea of the rule of law is vague, open-ended, lacks clear meaning in specific circumstances – and that this is not a problem. Our Constitution is about debate, deliberation, judgment, discourse, argument, and reason. These processes are fundamental to the American constitutional system, and they make us who we are.

Discussion

Laurence H. Tribe:

With respect to these nine to nothing decisions such as the one Professor Stone mentioned in which he believes the Court was unanimous but wrong, I can unfortunately think of a couple of decisions that I have *won* nine to nothing in which I have come to think the Court might well have been wrong. As Chief Judge Easterbrook pointed out, one can infer very little from either close division or unanimity; even a court of clones would often find something about which to dis-

agree. I want to make a comment about some of the things that Chief Judge Easterbrook mentioned about these “invisible clauses in the Constitution” supposedly discernable solely to the legal elite – that is clearly not what I had in mind, not the obscure, invisible clauses, but rather the dramatic ones.

Why do we agree upon principles that you need not be a member of any elite to recognize? Take the principle that the states may not secede from the Union; we do not need to read Wittgenstein for that! You won’t find it written in ink in the parchment of the Constitution; you’ll find it written in blood in a lot of places like the Gettysburg battlefield. The fact that many of these principles are not written down is simply the beginning of the end of wisdom.

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I think any assertion that the interpretive community in 1789 or in 1868 (to take the ratification dates of most of the Constitution and of the Civil War amendments) did not understand the meaning of something – but that we do – is almost certainly false. The view of most people who believe in what they call the “living Constitution” is rather that the meaning was elastic. For example, the authors of the Fourteenth Amendment, though they did not expect that it would be used to strike down racial segregation, meant that the subordination of one group by another through the legal system was wrong. They left open the question of what would constitute such subordination. In 1954, the Court said, “We understand that the social meaning of segregating people by law is the subordination of one race to another.” By that they were not saying, “We know what was meant by *Plessy v. Ferguson*

better than the folks back then did;” rather, they’re saying that the principle that was propagated is a principle which, by the very generality of the terms in which it was cast, was meant to have an evolving meaning. Neither the invisible Constitution nor the idea of an evolving Constitution rests on the notion that some special elite privileged to be alive today understands what was meant better than those at the time did.

Frank H. Easterbrook:

I always worry when Professor Tribe or other of my friends talk about the living Constitution or the evolving Constitution. If you are not evolving, you are no longer fit for duty. I think it is not only important to understand that legal principles continue to evolve – that is what democracy is for – but that it is also important not to overstate the role of courts in bringing about the security of people’s “life, liberty, and property,” as the Fifth Amendment has it. If you look around the world, what is really important is the rule of law principle – the idea that the government is conducted in a regular way, that it engages in hearings before putting you in prison, that there is an availability of review by someone with tenure to test the application of the law to you, but not necessarily the availability of a hearing to test the validity of the law. If you look at the legal systems of the United States, Canada, and France, the United States has a system of judicial review with which you are familiar. In Canada, there is a Supreme Court that will make constitutional decisions, but it can be overridden by Parliament; this is the Notwithstanding Clause of the Canadian Constitution. In France, the legal system cannot make constitutional decisions on any law once it had been adopted. And yet, if you go to Canada or France, you will find that they have fundamentally the same liberties as we do, not because of the details of constitutional structure but because these are all democratic countries and they all adhere to what I have defined as the basic features of the rule of law, including review of application by a tenured judiciary. Although there are particular features to America’s structured judicial review, when we look to the Western democracies I mentioned, we see a convergence of rights among them, even though the systems are fundamentally different.

Question

Do you agree with the premise that the most important or one of the most important tasks of a President is the appointment of Supreme Court justices?

Frank Easterbrook:

It seems like it would be one of the important things that a President does, and there is no question that if you imagine a Supreme Court consisting of nine Anthony Scalias versus nine William Brennans, American law and American society would look very different over an extended period. But I think it is actually one of the least important things a President does, for the reasons that should be evident from my comment. When you get

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a broad convergence in personal rights and liberties across countries with very different judicial structures, very different means of appointing justices, it is hard to locate that convergence in the identities of particular people on the Court. What is important is that anybody appointed to the Court be an adherent of the rule of law in the sense of procedural regularity, publicly announced rules, and accurate application of rules to the facts of a particular case. These are what the Western democracies have in common; it is not the details of who is on the Supreme Court.

Geoffrey R. Stone:

Let me dissent just a bit from that proposition. Take the recent decision by the Court in the case of *Boumediene et al. v. Bush* concerning the rights of Guantanamo Bay prisoners. The Court held that the writ of habeas cor-

pus cannot be suspended by Congress without some adequate substitute, in the absence of the very special conditions mentioned in the Constitution. A majority opinion authored by Justice Anthony Kennedy stated that it is impermissible to create a legal black hole within which no law applies, in which the rule of law cannot be enforced by habeas corpus. It was a five-four decision and the

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dissents were vigorous. The one by Justice Anthony Scalia said that the majority in this decision is guilty of murder because a number of terrorists are going to go out and kill people as a result of this decision. Chief Justice Roberts wrote a more moderate opinion but joined the Scalia thinking. If Justice Stevens or any of the other justices in the majority were to leave, I submit it would make a very great difference whether the President was John McCain who said during the campaign that *Boumediene* was one of the worst decisions in the history of the Court, or Barack Obama who said it was one of the best decisions in the Court's history. Whether over the entire arc of history we would be worse off if we didn't have a system of strong judicial review is too large a question for any of us to answer. The path of a nation that relies heavily on judicial review to protect certain basic freedoms is very different from the path that would be followed in another society. To say that France and Canada manage with very different systems isn't to say that if you ripped judicial review out of our system, we would be just fine; it is to say that if you redid our history entirely, made us more French or more Canadian in many other respects, then maybe we wouldn't be worse off, but you have to be much more of a psychic and a historian than I am to evaluate the plausibility of that proposition. I think the burden lies on Chief Judge Easterbrook to defend it, if that is genuinely his view.

Frank H. Easterbrook:

I think *Boumediene* is one of the least relevant decisions in the history of the Supreme Court. I don't think anybody dies because of *Boumediene*, nor was the dispute in that case between the rule of law and a black hole. The actual dispute in that case was whether the Detainee Treatment Act of 2006 provided procedures that were adequate substitutes for the Great Writ. The Detainee Treatment Act provides for a plethora of hearings, followed eventually by review in the D.C. Circuit.

Question

I wonder if it isn't a little misleading to discuss this question of the rule of law along the statistical lines that Judge Easterbrook laid out in his discussion of how many times justices on the Supreme Court and judges on the appellate courts disagree. That perspective assumes that Democratic Presidents will always appoint similar-viewed justices and so will Republicans. It leaves out all the nuances of the political forces of the time that may lead to centrist or less centrist judges. In terms of Courts of Appeals statistics, it seems to me that most of our appeals judges do a very good job of following the directions of the Supreme Court, so when the Court takes a conservative turn, for example, Courts of Appeals across the country have taken a conservative turn, regardless of the particular backgrounds of their judges on those appeals. I wonder if you can comment on whether that is a correct observation.

Laurence H. Tribe:

I can comment briefly on the latter point because a professor who used to be at the University of Chicago Law School and is now happily a colleague of mine, Cass Sunstein, has done a comprehensive study of all Court of Appeals decisions since 2000 and reached the conclusion – rather distressing to him, to me, and to many others – that there is an enormous correlation between how judges on those courts vote and which political party they belong to in areas where the Supreme Court has left substantial room for disagreement. I certainly agree that there are nuances; it's not all captured by which party's members are nominated: Justice Stevens is the most liberal member of the

current Court and yet was appointed by a Republican, and there are big differences between Justices Scalia and Thomas, even though they both purportedly follow a somewhat similar methodology and were both appointed by Republican presidents.

Frank H. Easterbrook:

The political party of the appointing President is historically a very rough proxy for what a justice will do on the Court. Approximately 20 percent of the voting on the Court can be chalked up in one way or another to something that probably aligns with what many people call ideological. That is a significant percentage given the fact that these are all very difficult cases, but it is not surprising and not particularly regrettable. The idea that Courts of Appeals would construe statutes in generally liberal or conservative ways when the Supreme Court is generally liberal or conservative suggests that they are not following the rule of law, because there were many statutes that were enacted from liberal times. Title VII of the Civil Rights Act of 1964 is a genuinely liberal statute, but if the Court goes conservative it doesn't mean one should turn around and trim back on Title VII. That's not honest interpretation. The idea that a Court of Appeals should follow the trends of the Supreme Court rather than make their best estimate, on a particular statute, is, I think, not compatible with the rule of law.

Question

In light of the rule of law, can you explain the significance of the unitary executive period of constitutional justification and also the significance of signing statements?

Laurence H. Tribe:

In terms of signing statements, it's good for the President to give a signal to the country; it advances transparency for the President to say "I'm signing this, and it's ambiguous, and here's what I think it means," or "I'm signing it because on the whole it doesn't merit veto but I can think of three or four applications in which it would be unconstitutional." I would rather be warned about that in advance than to be confronted later, so the suggestion that signing statements

are evil and Congress should be able to get rid of them is fallacious. That's why Barack Obama declined to promise never to use signing statements when John McCain said "I'll never use a signing statement." The underlying idea that the President cannot be interfered with by Congress and, in fact, that the President is necessarily immune from legislative restriction when it comes to executing the law is itself a novel and problematic theory that has never gained general acceptance. Among its implications, if properly understood, is that John McCain was actually right when he said he could fire the head of the SEC, because the statute purporting to give independence to the head of the SEC is unconstitutional under the "unitary executive" theory. The reason is that the statute prevents the flow of power directly to the one President we have; the whole alphabet soup of independent agencies is a violation of the unitary executive theory.

Frank H. Easterbrook:

I agree completely with Professor Tribe about signing statements. Those people who objected to President Bush's signing statements objected to the substance of what he was asserting, not the fact that he was telling people what he believed. With respect to the unitary executive, it seems very important to distinguish claims made by some who use the phrase to assert that the President is above statutes. The Constitution does say that the President shall faithfully execute the law of the land. Some people who use the term "unitary executive" are referring to Article 2 of the Constitution: the President is the top of the organization, and you can't insulate him from the people lower down in that organization. Senator McCain could fire the head of the SEC not for any constitutional reason but because that's what the statute says. The statute says that any President can designate a new chairman of the SEC.

Geoffrey R. Stone:

One of the ambiguities in the controversy over signing statements is whether the purpose is merely to inform the public and the Congress that this is what the President thinks the law is, or whether it is an assertion of authority by the President to rewrite the intended and understood meaning of the

law and suggest that it now means something very different from what Congress intended. Did the President faithfully execute the law he signed into existence or bastardize its meaning at the same time he signed it? And then there's the question of whether a President who signs a statement binds his successor. The answer to that is clearly no, but it was part of the controversy.

Question

I would like to follow up on Professor Stone's reference to instances where an administration may have circumvented the rule of law. I know that Cass Sunstein has made certain statements about not criminalizing the public service, but I would like to get the panel's views on whether or not it would be important to prosecute instances of circumventing the rule of law by this administration in the new administration.

Geoffrey R. Stone:

My own view is that public officials should be held accountable for acting in conformity with the law, and if they, in fact, violate the law then there is reason to hold them accountable, either through impeachment or through criminal prosecution or otherwise. On the other hand, it is important to recognize that public officials are often acting in areas where there is a great deal of ambiguity about what the law requires, and, as a matter of general policy, we don't want to make public officials so intimidated about the consequences of their actions, particularly given the fact that a subsequent administration might accuse them of violating the law merely because they disagree with their policy. Although it is appropriate to hold public officials accountable, that authority should be exercised with a great deal of attention to the need to prevent public officials from becoming too wary about enforcing their responsibilities while they have power.

Frank H. Easterbrook:

I agree completely with Professor Stone. I can't discuss current circumstances but I can give you a brief story. It was discovered that the Postal Service was opening mail that was being sent to the Soviet Union and reading the contents. It had been directed to do so

by President Eisenhower at the time of the U-2 controversy and had continued on autopilot until 1975. Statutes had been passed both before Eisenhower's directive and later that made this, let's just say, problematic. The question for Attorney General Levi was whether to ask a grand jury to indict the people who were carrying out programs established by the President of the United States and assured by the Justice Department to be valid. It was a subject of agonizing debate for Levi, for his staff, for many members of the Justice Department. There was a widespread belief that the legal opinions validating this program were unreasonable but that it would be unjust to put these people in jail. Levi thought that no prosecution should be brought, but he chose to consult with Judge Griffin Bell, who President Carter designated as his incoming Attorney General. Bell agreed with Levi, and the Justice Department issued a public report stating its view on why the practice was illegal, why it couldn't continue, and why any future repetition of it would be criminally prosecuted. It seems to me that the Levi was wise in that respect, as in many others. ■

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