PANEL III

CONGRESSIONAL CONTROL OF THE ADMINISTRATION OF GOVERNMENT: HEARINGS, INVESTIGATIONS, OVERSIGHT, AND LEGISLATIVE HISTORY

STEPHEN WILLIAMS*

I am pleased to moderate this program. My role is just as moderator. In actual life, of course, I am a consumer of legislative history. The first speaker is former Attorney General Griffin Bell.

GRIFFIN BELL*

Thank you very much, Judge Williams. I am a consumer of legislative oversight. I have been investigated more than anyone in this room, probably more than everyone put together. I have testified in Congress more than fifty times. I have seen the oversight function in Congress grow from a small part of the duties of Congress to something that probably occupies more than 50 percent of Congress' time. The oversight function probably is one of the most serious things facing our country; what to do about the oversight power. It is now in every subcommittee in the House and the Senate. Some twelve or fifteen years ago, two chairpersons of the House were removed, and great power passed to the subcommittee Chairmen. That is the root of the great increase in the oversight function of Congress, I think. There is no mechanism at all in the House or the Senate above a committee where you have to get permission before you can start one of these wide ranging investigations. There is no executive committee or other authority that regulates these sorts of things. The increase in the number of congressional employees has been tremendous.

If we did just two things, though, I think we could bring the oversight problem under control. I think that if we had some group on the top level, maybe the Speaker of the House and the majority and minority

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leaders in the Senate, where you had to get a prior ruling before you could start an investigation, you would probably cause a decrease in the number of people working in Congress. Nearly every company in America today is engaged in down-sizing, but I have not seen any sign of down-sizing in the government. A good place to start would be in the Congress and then let it spread. We have seen the government grow in enormous numbers since Watergate, which was a watershed in the history of our country. We now have a Congress where, until a year or so ago, the House seemed on the verge of taking charge of foreign policy.

The President's alleged involvement in the Iran-Contra affair brought about one of the biggest oversight hearings we have seen. That all has settled down in the last year, and things are looking a lot better. The Congress seems to be going back to doing what it is supposed to do, and the President is doing what he ought to be doing. Both are doing pretty well, I think.

We have to remember that there has been a great shift in power to the Congress. Congress has its own Justice Department. They have done that by creating Inspector Generals in all of the cabinet agencies and also by creating the office of the Special Prosecutor. There are a number of Special Prosecutors loose in the country at any given time, operating outside the Department of Justice where other citizens are prosecuted.

With respect to my general view of oversight, I think that it would be very difficult to bring about this reform, but Congress has to do it. The House and the Senate need to address, as Senator Robb said, what it is that they ought to be doing in the next ten years, up until the year 2000. Every business does that and Congress ought to be taking the same approach. Questions to be addressed are, for example, how much time is being given to the legislative function, and what is Congress doing about some of the great problems of our country.

We have all heard of the drug problems and the deficit problems, but I would say that one of the greatest problems ahead of us in this country is how to reduce the size of the underclass. If the underclass keeps growing, it will become the majority. We simply have to reduce the size of the underclass and bring them into the "normal" group of people in the country. If we do not do this, we are just setting up a time bomb which will eventually go off. Those are the sort of things that should be part of Congress' function, I think, if Congress spent less time investigating. But I do not look for Congress to do this unless there is some mechanism put in to control them. So long as there is a media—as long as there is a

television camera—if you have the power, as the head of a subcommittee to get a hearing that will generate news, you are very apt to have a hearing. There is a definite relationship between television and the oversight function in Congress. There has to be some higher authority to bring it under control.

With respect to legislative hearings, I will mention only one thing, and it is personal. When I was up for confirmation as Attorney General, there were a number of witnesses against me—but I was the only witness required to testify under oath. I finally asked the Chairman of the Committee, after one witness had testified, if he would mind putting the witness under oath, calling him back, and letting him say all the things he had just said, but this was refused. In the whole hearing, which lasted almost two weeks, I was the only witness who testified under oath, something I thought quite remarkable in America. I think that situation has been corrected by now.

But legislative hearings generally leave a great deal to be desired in the way of due process. I do not suggest that we have a court hearing for every congressional hearing, but it is pretty hard on people to function with bright lights and cameras going off constantly in the witnesses' faces and in the face of the television cameras. Some people who are called to testify, and who may later end up being indicted, probably may never have had the experience of testifying at such a hearing. A little more due process would appear in order.

Now with respect to legislative history, just a word. I was a judge for a long time, and I understand the problem. I came to the conclusion that when you leave the committee reports, the majority and minority reports, you might as well stop. There is a lot of skullduggery, I call it, going on to doctor the legislative history with, floor statements that undercut reports on the law that is about to be passed. This watering down process is in the hope there will be some poor sucker out there someplace, possibly a judge, who will want to rely on the statements to avoid the law as written. My view is that the report of the minority and majority should be the legislative history—that ought to speak for itself, and that is as far as it should go. I think our lawmaking would be a lot better off if we did that.

L. GORDON CROVITZ*

I would like to start this morning with a modest proposal: The President should issue an order to all the officials in the executive branch that they refuse all invitations to come speak before congressional committees until one condition is met. It does not matter to me whether the congressional carpenters have to lower one set of seats or raise another set, but these are co-equal political branches of government. Presidential officials should flatly, absolutely, totally refuse to appear before any congressional hearing where the members of Congress are *seated above* the official called to testify.

If this proposal is too assertive for a President to make, here is my statesman-like compromise: The Constitution does not say one word about congressional investigations or oversight of the executive branch, nor does it say one word about Presidential investigations or oversight of members of Congress. So my compromise is that the executive branch mirror all congressional hearings with its own hearings into the legislative branch. Did Congressman X, for example, lie when he promised President Reagan he would support budget cuts in exchange for tax increases? Did Senator Y mislead the executive branch when he claimed that the CIA never told him about the mining of a Nicaraguan harbor? Why did Senators A, B, C, D, and E—does that make a Keating Five?—straightarm a federal regulator of an industry whose bailout will cost many, many billions of dollars?

Now, many of you might object that these are wild proposals which would inflame animosity between the branches, but let me say that adopting either one would have the opposite effect. If congressmen knew that they might get similar treatment for hauling executive branch officials up to Capitol Hill, they might spend more time legislating and less time in stuffy hearing rooms. They might even get a budget out in time.

Now it is always appropriate before the Federalist Society to look to what the Constitution says. One key provision is the recommendation clause of article II, which provides that the President "shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient. . . ."[1] The annual State of the Union address, initi-

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1. U.S. CONST. art. II, § 3.

ated by President Washington, is the direct result of this Presidential duty. But on what grounds does Congress demand more?

The necessary and proper clause[2] has been adequate to warrant extraordinary congressional intrusion. *McGrain v. Daugherty*,[3] a 1927 Supreme Court case involving a Senate investigation into alleged wrongdoing by an Attorney General, established that either house of Congress can compel private citizens to give testimony to a committee. The court acknowledged, "[T]here is no provision [in the Constitution] expressly investing either house with power to make investigations and exact testimony to the end that it may exercise its legislative function advisedly and effectively."[4] The Justices, relying largely on the necessary and proper clause, argued that gathering information is necessarily incident to legislation. No general limits on this power exist, although I think a good argument can be made that the hearings must at least be for gathering information for possible legislation, and not some broad fishing expedition to somehow embarrass executive branch officials. Consider, for example, constitutional questions that might arise if Congress subpoenaed members of the Supreme Court—or their clerks—to demand why they had ruled a certain way, or why they denied certiorari in a particular case. Who thinks this would be legitimate constitutional oversight? Or, as Judge Silberman might have put the question yesterday, would any court likely rule that Congress has this oversight power?

Today's innumerable hearings clearly interfere with any efficient running of executive departments. As Terry Eastland said yesterday, separation of powers issues must be judged in part on whether a congressional practice saps the "energy" the founders intended would reside in the executive branch. The language involved—"oversight," for example—confusingly creates the illusion that Congress oversees the executive branch. Indeed, it is more accurate, constitutionally speaking, to say that if one branch has explicit oversight powers it must be the executive branch. It is the President who has the constitutional duty to "take Care that the Laws be faithfully executed."[5] For example, every year Congress has violated the 1974 Budget Control and Impoundment Act by failing to pass one or more spending bills on time. Maybe the Presi-

2. U.S. CONST art. I, § 8, cl. 18.

3. 273 U.S. 135 (1927).

4. *Id.* at 161.

5. U.S. CONST. art II, § 3.

dent has an opportunity, or even an obligation, to see that this law is faithfully executed. Maybe he should have oversight hearings.

Now, I do not think that oversight in this sense was how the framers of the Constitution envisioned the operation of separation of powers. The powers are separated, but they are also different. It makes no sense to speak of congressional oversight of pardons or congressional oversight of vetoes. These are uniquely Presidential powers. Where do we draw the line? I do not offer a precise line in the sand, but I do suggest the current situation raises some constitutional questions as well as practical questions. It is another reminder of the wisdom of *Federalist Paper No.* 48, which warned, "The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex."[6]

Congress now demands innumerable hearings from private citizens and executive branch officials alike and has established several other institutional ways of gathering information from the executive branch about the state of the union. Representative John Dingell regularly intervenes in the prosecution of legal cases by calling hearings; he has even been known to name securities houses that he wants the Justice Department and Securities and Exchange Commission to investigate. There is also the General Accounting Office, the Congressional Budget Office, and the Congressional Research Service. Interestingly, the only duty Congress has to produce and disseminate information to anyone, including the President, is the constitutional requirement to produce a journal of its proceedings. This may be explained by the fact that at the time of the founding, the executive branch clearly had more information at its disposal than Congress; Congress had no staff, and members did not even have offices as late as the Jefferson Administration.

Let me give you a flavor of how high-ranking administration officials spend their time. Consider the Defense Department. In 1960, we spent about 10 percent of the gross national product on defense. We now spend about half that amount. In 1960, two congressional committees had oversight of Pentagon spending. Until the Carter Administration, just four committees wrote defense legislation. Now 107 committees and subcommittees oversee defense. Only a single assistant secretary, Richard Armitage, was called to testify more than 150 times over a seven-year period during the Reagan Administration.

What is the result? Someone from the Heritage Foundation actually

6. THE FEDERALIST No. 48, at 250-51 (J. Madison) (G. Wills ed. 1982).

measured the number of linear feet of laws and regulations on defense procurement: The total is 1,152 linear feet of library shelving. The Pentagon now gets 100,000 official written inquiries from Congress every year, which comes to about four requests every week from each of the 535 members. Senator Sam Nunn, a critic of this trend, noted that during the years of the Carter Presidency, an average of 15 House and Senate amendments were offered to the Defense authorization bill with three days spent on floor debate. By the first Reagan term, it was 75 amendments and nine days of debate. For the 1989 authorization bill, there were 120 amendments with nine days of debate in the House; 92 amendments and six days of debate in the Senate. Similarly, Congress demanded 36 annual reports or studies from the Pentagon in 1970; 114 in 1976; 231 in 1980; and 719 in 1988. There are more than 500,000 employees in the various procurement departments of the Pentagon to deal with all the congressional demands.

These often lead to hearings that are often no more than low-grade fevers in the constant effort of the legislative branch to usurp executive branch functions. But Congress has recently become impatient and has transformed hearings into something more threatening and dangerous. This is part of what is called Congress' criminalizing of policy differences with the executive branch.

I thought Congress several years ago had perfected the art of calling executive branch officials in to testify, then criminalizing their testimony. The best example may be what happened during the Reagan Administration to an assistant attorney general in charge of the Office of Legal Counsel—the office in the Justice Department that advises the President on separation of powers. He was called in to testify about a claim of executive privilege during one of the epic fights with John Dingell over the Environmental Protection Agency in the early Reagan years. He testified, and two years later Democratic staffers of the House Judiciary Committee wrote a 3,000-page report demanding an independent counsel to investigate whether he had misled Congress. Under the hair-trigger rules of the Ethics in Government Act,[7] an independent counsel was appointed. Three years later, the independent counsel reported that there were no reasons to proceed with an indictment. The target was left with an unpaid legal bill in the hundreds of thousands of dollars. The target,

7. Ethics in Government Act of 1978, Title VII of Act, Oct. 26, 1978, P.L. 95-521, 92 Stat. 1824, 2 U.S.C. §§ 288-288n (1985 & Supp. 1990).

of course, was Theodore Olson, who spoke yesterday, and who has the distinction of being criminally investigated for doing the job of advising his client, the President.

Congress may have come up with an even better way of criminalizing its policy differences with the executive branch using congressional hearings. The first issue raised in the appeal of the convictions of Oliver North is that he did not get a fair trial because Congress had demanded that he come testify under immunity. Mr. North was compelled to testify, despite his fifth amendment claim. This is from Mr. North's appeal, scheduled to be argued next month:

> Despite the pervasive, unprecedented dissemination of North's immunized testimony, the trial court inexplicably failed to require the [independent counsel] to make any showing of legitimate independent sources for either grand jury or trial testimony, and no such showing was made before, during, or after trial. At issue here is a trial court's utter refusal to follow the procedures established to protect core Fifth Amendment rights.[8]

Also at issue is whether Congress will begin to use the one-two-three punch of: first, calling an executive branch witness to testify in public; second, demanding appointment of an independent counsel; and third, conducting a trial when the bulk of the information was divulged in what was supposed to be immunized testimony. It will be interesting to see what the appeals court makes of this argument, and the obvious separation-of-powers dangers here.

I started with a modest proposal; I would like to end by endorsing another. Several members of the Bush Administration have been thinking about how they can avoid future outrages like the congressional pressure tactics used against regulators of the savings and loan industry. They have not, to my knowledge, considered calling in the five Senators for Presidential hearings. Instead, in at least one department, they have tried a rule that would make public all communications by members of Congress, or their staff, with any executive branch officials. This sunshine provision could give the public a better understanding of what Congress means by "constituent services."

The Secretary of the Interior demanded that his staff log all communications with members of Congress or their staff. Keeping a record seemed like a good way to inform people about how government works. The policy was not long in effect before members of Congress became

8. Brief of Appellant at 10, United States v. North, No. 89-3118 (D.C. Cir. Nov. 22, 1989).

enraged. Because of the savings and loan problems, some congressmen began to worry that their influence peddling at executive branch and independent agencies might someday get them in trouble. So, as Attorney General Thornburgh noted yesterday, they inserted the following into the Interior Department's appropriation: "None of the funds available under this title may be used to prepare reports on contacts between employees of the Department of the Interior and members and committees of Congress and their staff."

I am told that when the White House counsel's office heard about this, it warned Congress that this would be an unconstitutional usurpation of its power. Indeed, it even threatened to use this provision as the test case to see whether the President has an inherent line item veto. Congress caved in, and changed the provision to a remarkably contorted and ridiculous provision, which passed in mid-October. The provision said: "This section shall be effective only on October 1, 1989." This means Interior contacts cannot be logged on only one day—a day that had already passed. Furthermore, October 1 was a Sunday, so this provision applied retroactively to a day that had passed which was a non-working day.

We have, therefore, some precedent for the executive branch to fight back against congressional hearings, investigations, and oversight by threatening some of that medicine against Congress. For the good of both the executive and legislative branches, for the good of an "energetic" Executive and a Congress that can at least pass budgets on time, let us have less oversight of the Executive by Congress and more of keeping an eye on its own responsibilities.

PETER STRAUSS*

My remarks will be the first on the panel to address the problems of legislative history. We have heard two quite illuminating discussions of congressional oversight activities, with which I largely agree philosophically. When one then reaches the questions of why is this happening, and whether anything can be done about it, the issues become more difficult. My remarks address some complications that may arise from the current distaste for legislative history that may make the oversight problem a little bit worse.

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Preliminarily, let me note that this conference has proceeded in an interesting way. Yesterday was the President's day; today is Congress' day. Yesterday's panelists, on the whole, were Presidential boosters. To judge by the evidence already in, and some sense of what might be coming, today's panelists are a group of congressional thrashers. What then is missing, what I particularly want to call attention to, is a sense of the tension that underlies the Constitution, the great document that is at the root of this quite interesting conference. While the Constitution creates a unitary President, as was amply evidenced in yesterday's remarks, it also and just as clearly says that Congress is in charge of giving the government shape. That is the necessary and proper clause.[9]

This tension is evident, too, in the opinion in writing clause of article II,[10] on which White House counsel relied in responding to the appropriations constraint on the Department of the Interior, which Gordon Crovitz just told us about. That clause authorizes the President to demand a written opinion of the head of any of the executive departments on the duties of his or her department. So, there it is. The President has the consitutional authority in relation to the Secretary of the Interior, to demand a written report on any matter within his ken. An appropriations measure abrogating that authority, in my judgment, is clearly unconstitutional. Yet at the same time, the opinion in writing clause addresses the *duties* of the heads of the departments. So all the talk yesterday about how the President is the one who has the right to decide matters, seems to me to have been in derogation of that quite explicit constitutional recognition that duties can be put some place other than upon the President and be consistent with the consitutional scheme of having a unitary President. The document is full of tensions, and it is to its tensions that I want to call your attention, in the context of the problem of legislative history.

Let me sketch a problem for you. Imagine the general counsel of a regulatory body. She knows, whether or not theory tells her, that her agency is in a complex series of relationships with a variety of oversight bodies—with Congress, with the President, for that matter with Judge Williams and the other members of the courts. She is always dealing with questions of legal authority. And when she does, she does so in an important pair of contexts. The first, a central one, is maintaining her

9. U.S. CONST. art. I, § 8, cl. 8.
10. U.S. CONST. art. II, § 2.

agency's commitment to legality. What is it, she must constantly ask, in my handling of this problem for my client, that will convince the court that there are no delegation problems here, that the action that my client wants to undertake is affirmatively authorized? She is constantly overseeing analyses of agency authority, reasoning from the agency statutes, and whatever may be the appropriate materials of construction of those statutes. The second context of the authority question is not so often noticed. It might be described as the bulwark against politics, whether we are talking about the politics of Congress or the politics of the President. As Lloyd Cutler reminded us last night, having a divided government makes this issue much more complex and much more important for all of us. Here the question she asks herself is where the limits are, if there are any, past which political oversight from any source cannot properly reach. When should her principal be able to say, "I'm sorry, Mr. President," or "I'm sorry Madame Representative, I cannot do that. The law does not permit it."

The Supreme Court's decision some years ago in the *Chevron*[11] case appropriately underscored the importance of these issues and of the agency's roles in relationship to them. The fact is, that Congress is often less than fully decisive or clear in resolving issues. The agency has a responsibility and place in the web of politics and law, in the tension, if you like, between politics and law, that suggests that it may be the best resolver of those uncertainties that endure. Moreover, circumstances change: Presidents change; the problems with which one must deal change; the surrounding envelope of law and expectation taken as a whole changes. *Chevron* recognizes this, too, as a reason for primary agency administration of disputable issues of statutory meaning. It anticipates that meanings will change with time.

The general counsel's problem arises when she tries to consider the implications for her function of the move away from legislative history—the growing sense that these materials are no longer a legitimate basis on which to construct the statutory interpretations that are so central a part of her responsibility. We are accustomed to thinking about the problem of legislative history in the context of the courts as being whether Judge Bell or Judge Williams should have looked at these materials in their capacity as members of the judicial branch. We do not think about it from the perspective of the general counsel. Is this an instruction to the

11. Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837 (1984).

general counsel, as well as to the court, that she ought not to attend to legislative history anymore? And if it is, what might it mean?

One possible outcome of discarding legislative history, perhaps the easiest one to project, is one that the people in this room may applaud. It could somewhat change the balance between Presidential and congressional oversight to empower the President at the expense of the Congress. That would be congenial enough to Republicans in an era of divided government, when we are going to have a Republican White House and a Democratic Congress for a long time. One notes that the Justices who have been loudest in praise of "plain meaning" recently were all appointed by Republican Presidents, and imagines some possibility of a connection there.

Empowerment of the President could occur in two ways. Most directly, the general counsel and her agency will have lost some of their weapons to resist policy guidance in dealings with the President if she cannot say, "Given the legislative history, we cannot read the statute that way." The agency is the repository of expert knowledge about the legislative process that generated or failed to generate statutory change. Whatever may be the case for the judge who will occasionally encounter problems of legislative history, she and her staff are unlikely to be snookered about it. They are going to understand it pretty well, and for that matter, they will have a fair amount of help in understanding it and responding to it, as we have often heard. So legislative history provides a means for resisting the President on the sleeve of Congress. *Chevron* invites the President to attempt control; for the agency, legislative history gives a means to resist that effort, a means associated at least fictionally with law. It provides an anchor for the "duties" properly assigned to the agency, not the President.

The second way in which the President might be empowered would be if the abandonment of legislative history served to weaken Congress' controls. It might be seen this way. In my judgment, however, it would be more apt to say that the retreat from legislative history would weaken the control that could be thought to continue to work on behalf of the *enacting* Congress. From *that* Congress, only the words of the statute then would remain. The President has gained weapons, and Congress, in a sense, has lost them.

Once one puts the problem this way, one sees what is arguably an important separation of powers consequence emerge. As political scientists have often reminded us and as you have heard from our two previ-

ous speakers this morning, whenever we think about the Congress and its functioning we ought actually to imagine two Congresses that co-exist: the Congress that legislates and the Congress that oversees. General Bell and Mr. Crovitz have been complaining to you about the oversight Congress, as distinct from the legislating Congress. Congress ought to legislate, it ought not to oversee. The legislating Congress is the one that generates statutes, and it generates legislative history too, however imperfect and manufactured that may be. The constituent-service, oversight Congress is the one that, acting as a counter-executive, attempts to influence agency action in the here and now, without passing statutes. Separation of powers theory makes us want to emphasize the legislating Congress. But public choice theory focuses our attention on the counter-executive, oversight Congress, the place where members learn it is most efficient to put their efforts. The phenomenon of divided government adds to that.

What we need to consider is that letting go of legislative history may have the effect of putting a premium on oversight. It may make it more profitable to the member of Congress, torn between one role as a member of the legislating Congress, and another as a member of the oversight Congress, to pay attention to being a member of the oversight Congress. What she does in making legislation does not count as much anymore. Moreover, since in this hypothesis, the agency is not going to be paying nearly as much attention to what went on during the process of legislating as it used to, our hypothetical member is going to have to put that much more energy into oversight to see to it that it toes the line, that it stays on track in the here and now. Moving away from legislative history, then, may well exacerbate the problems of the Congress that I think quite properly exercised the members of the panel this morning.

To pursue this argument further, consider who it is that the legislator is thinking about when generating legislative history. To be sure, sometimes she is thinking about people who encounter the legislation only infrequently—the judges, if you like—who might be fooled. But Congress' usual course today, for reasons over which we have little control, is to create an agency to carry out the statutes it enacts.[12] When it does that, our hypothetical legislator will be thinking about that agent as that legislative history unfolds. Here the legitimacy of the dialogue has been

12. *See* Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369 (1989); Strauss, *Legislative Theory and the Rule of Law: Some Comments on Rubin*, 89 COLUM. L. REV. 427 (1989).

conceded for decades before *Chevron*, in such propositions as the appropriateness of deferring to those who participated in the drafting process or to those first responsible for putting into effect what Congress had done.[13] The agency is a constant watcher, an expert watcher, of the political history that inescapably surrounds legislation and colors understanding of it. With the devaluing of legislative history, this too may be disregarded. And here again, one can only expect additional oversight as the congressional response. Devaluing legislative history has no negative implication for Congress' counter-executive function.

If you followed me this far, it seems to me, you might accept the characterization that telling the general counsel she ought not to pay any attention to legislative history could be thought to raise separation of powers questions very like those that the Federalist Society and others have appropriately insisted were presented by the legislative veto. It will divert effort from legislating to acting as a shadow executive; it will diminish the claim of the Congress that legislates on law and on the control of executive action; it will weaken the agency's weapons of defense against unstructured contemporary political oversight from either the President or the Congress; and to that extent it will even enhance the power of Congress in what I take to be its undesirable counter-executive function.

Let me close by suggesting an even more important tension that this problem suggests, the tension between politics and law. This is not a defense of legislative history. I am on record agreeing that it has its abuses. Yet Justice Kennedy's opinion last term in *Public Citizen*[14] as much as suggested that abandoning the use of legislative history was required by the separation of powers; that the Constitution imposes the plain meaning rule on the courts as a rule of construction. That is what started me worrying about the implications for agency practice. My tentative conclusion is that Justice Kennedy has the proposition just wrong—that a healthy regard for separation of powers principles requires us to shore up the behavior of the Congress that legislates against the Congress that plays the shadow executive. It may be appropriate to put this argument in Madisonian terms. In the 51st Federalist, Madison described the great difficulty in framing a government to be administered by men over men as this: "You first enable the government to control

13. *See, e.g.*, Norwegian Nitrogen Prods. Co. v. United States, 288 U.S. 294 (1933).

14. Public Citizen v. United States Dept. of Justice, 109 S. Ct. 2558 (1989).

the governed, and in the next place oblige it to control itself." Legislative history provides a rich context for an understanding that has long served, within government, as one of those means by which bureaucracies control themselves—and do so within what my friend Peter Shane has described as the "culture of the rule of law." *Chevron* and *Public Citizen* taken together significantly substitute the culture of politics for the culture of law. Even if there were short run advantages to such a step, conservatives should want to think long and hard before taking it, and I hope they would shrink back.

Robert Holt puts a wonderful passage in the mouth of St. Thomas More in his play, "A Man for All Seasons," a passage that addresses the hazards of the culture of politics. More is talking with his son-in-law, Roper. Rich, an evil character who will bring about More's downfall, has just left the stage.

> Roper: While you talk, he's gone.
> More: He should go, if he was the devil himself, until he broke the law.
> Roper: So, now you would give the devil the benefit of the law.
> More: Yes, what would you do? Cut a great swath through the law to get after the devil?
> Roper: I would cut down every law in England to do that.
> More: Oh, and when the last law was down and the devil turned 'round on you, where would you hide Roper, the laws being all flat? This country's planted thick with laws from coast to coast, man's laws not God's, and if you cut them down and you are just the one to do it, do you really think you could stand upright in the winds that would blow then? Yes, I'd give the devil the benefit of law, for my own sake.

MICHAEL DAVIDSON*

When the conference organizers asked me last week to substitute for another speaker, I said that I probably would not come with prepared remarks, but that I was confident that there would be matters to which I could respond.

As for Gordon Crovitz's modest proposal—that it be a condition at congressional hearings that members of Congress sit at a common table with members of the executive branch, rather than at a bench elevated above executive witnesses—I think there is a great deal that is compelling

* Counsel, United States Senate.

about that idea. It would be a particularly persuasive proposal if, the next time we argue a separation of powers case in the District of Columbia Circuit, the judges would come down from their bench and, sitting at counsel's table, try to reach an amicable resolution with representatives of the judiciary's co-equal branches.

The several subtopics before this panel deal with a common question, namely, whether Congress, when it does not place all terms of a directive precisely in the text of a statute, may promote its objectives through legislative history or oversight hearings. Of course, other Federalist Society panels might be concerned about Congress' micromanagement of the Executive when Congress, with excessive detail, seeks to control the actions of executive agencies. When the Congress delegates more broadly, lawyers at the Public Citizen Litigation Group have said that Congress has improperly delegated its legislative power. It is, frankly, very difficult to get it completely right.

The argument has been made here that the Congress holds too many hearings, that oversight is not a proper function of the Congress, and that the Congress should confine itself to legislating. Problems, however, do not come to the Congress tidily labeled as constituent service, oversight, or legislative matters. They come in as problems.

I am sure that many of you would agree that it would be wrong to assume that all problems call for yet another statute that prescribes in yet more detail the permissible conduct of citizens and their government. When an issue comes to the Congress, it may call for any number of responses. It may be an issue that communication to an executive official or exposure to public scrutiny would resolve. Certain problems should be resolved by legislation, but to argue for less oversight runs the risk of shifting more of Congress' work into the drawing of hard lines in legislation.

No one would deny that the legislative branch needs information. No one wants laws to be written by a person who knows little about the problems that those laws are addressing. Sometimes informal inquiries are sufficient to obtain information, but there is often virtue in formality. When a member or a committee in Congress disagrees with an executive agency or with a regulatory body, there are times when the problem is best explored on a public record. The criticism has been made at this conference that the Congress conducts too many hearings. A proposal has also been made to log congressional contacts with executive agencies to avoid back door congressional influence. While logging contacts

might serve a useful purpose, secret government is best avoided by having public hearings in which officials address questions in open settings. A public hearing also provides congressional interrogators of both parties, some of whom may be supportive and some of whom may be critical of the witness's position. Reducing the number of congressional hearings may push more executive and legislative communications into secluded settings. The objective of promoting accountability for members of Congress engaged in oversight, as well as for regulators, speaks for doing even more in public hearings.

In terms of legislative history, an approach to the judicial construction of laws that disregards the evolution of statutes would deprive the judicial branch of a valuable source of insights into the reasons for legislative action. Just as a judicial opinion's narrative of the facts and history of a case helps illuminate the legal principles that follow, understanding where a statute has come from often helps to illuminate the reach and meaning of the statute. No matter what one's views on whether a statement or colloquy on the Senate or House floor or an observation in a committee report should control the interpretation of a particular provision of law, understanding the evolution of a statute can be a significant tool in understanding its objectives and limitations.

Peter Strauss discussed the Supreme Court's decision last year in *Public Citizen v. U.S. Department of Justice*,[15] the case in which it was claimed that under the Federal Advisory Committee Act, the American Bar Association should open to public scutiny certain proceedings in screening potential nominees for the federal bench. Congress is divided about the proper role of the ABA in screening judges. However, anyone looking back over time would know with great confidence that at the time of the enactment of the Advisory Committee Act, no one sought to open to scrutiny the American Bar Association's advice to the Department of Justice and the President on the qualifications of judicial nominees. If all that you had was the literal language of the statute, maybe the language of the statute could be read in that way. But that would immediately produce an enormous constitutional problem, and the assumption should not be readily made that the Congress has walked unwittingly into a constitutional conflict with the Executive.

Constitutional conflicts between the executive and legislative branches, or at least those which require adjudication, should be among the rarest

15. 109 S. Ct. 2558 (1989).

kinds of public controversies. The conflict over the constitutionality of the independent counsel law resulted from a knowing decision by the Congress to organize a governmental function in a way that differed from the way the Executive thought that function should be structured under the Constitution. When a justiciable case finally arose, the conflict was thus not accidental. But in enacting the Advisory Committee Act, the Congress was not picking a fight over the President's receipt of advice about potential judicial nominees. In contemplating the possibility of a judicial ruling on the allocation of responsibility between the political branches, it is important to understand whether the legislative branch actually sought to resolve a question in a way that would justify the Court's invocation of the rarely used power to judge the constitutionality of a statute under the separation of powers.

DISCUSSION

WILLIAMS: Members of the panel may have a couple of minutes rebuttal if they wish, but before they start that, I would like to ask Peter Strauss a question. I was struck by your argument that downgrading legislative history might divert Congress more into oversight activity. You divided its authority between the legislative function and the oversight function, putting legislative history in the first. The question that arose in my mind was whether the function of creating legislative history is legislative in any true sense of the word. It seems to me that the besetting sin of Congress is the problem of splintered interests. That is also, of course, its strength: the representation of many different interest groups. But it is through the legislative process of producing something that is finally voted up by a majority that counteracts the splintering tendency. In the creation of legislative history, that force disappears. So my question for you is whether incentives to pursue the generation of legislative history can genuinely be regarded as incentives to the legislative function?

STRAUSS: I think they can. In saying that, I do not want to deny that legislative history is often abused, is the subject of lobbyists' efforts, and so forth. Nonetheless, that occurs in the context of legislating. This is the constitutional moment. To the extent the public is aware of what is happening on the Hill, they are aware at that constitutional moment. Intelligent awareness is particularly likely in the context in which I

spoke—the context not of the general public or for that matter of the court, but of the agency. When one has a statute pending on the Hill, one knows perfectly well what is going on, one is very much in on that process if you like. Understandings about what is meant, generated in that process, occur on the congressional side as well as on the agency side. To be sure, private understandings would not wash very well. But the understandings that find their way into legislative history are not private. With all of its imperfections, legislative history that counts in any sense is a public and enduring record.

BELL: Well, I was struck by Peter's argument myself because when I was Attorney General, it was a rare thing for the general counsel to ask the Office of Legal Counsel for an opinion. Somehow or another the general counsel will do anything but ask for an opinion, when sometimes they should seek an opinion. I think the Office of Legal Counsel, next to the courts, probably has the most expertise at construing statutes and legislative history. A lot of us would do well to simply ask the Office of Legal Counsel for an opinion more often.

I do not know of any better way to handle legislative history than to go by the committee reports. They usually extend it, append it, and if there is a dissenting view, there will be a dissenting opinion. I think, as Cardozo said, that the goal of the judicial process is to take the statute and fill in the interstices. You do that by looking at the legislative history. But, I would not fail to look at some statements— some Senator's statements, for example. That statement may be undercutting the whole purpose of the law. A lot of lawyers will claim it and argue that specifically, but most judges are on to that.

STRAUSS: The committee system is part of the legislative process after all. We fool ourselves if we think of debate on the floor as being the setting in which members are informed, or of the language of the bill as being the context in which they vote. Any realistic assessment of the congressional process accords enormous weight to the workings of the committee system and the reliance that members who are not on the committee place on the work of those who are on it.

CROVITZ: I want to mention a justification for the reliance on legislative history, which is based on the assumption that Congress should be able to regulate all the activities that Congress wants to regulate by whatever means it chooses. Clearly, it is difficult to write specific laws without reliance on legislative history. In many areas of the government

Congress chooses to regulate by reliance on legislative history. Yet, Congress is trying to regulate areas of life in ways that are inappropriate. To place reliance on legislative history is wonderful evidence that this is true. It always seems to me that the purpose of laws is to make clear rules for citizens of this country to live by; to have some measure to show them when they overstep the bounds of the law; to know when they may be held liable; to know when they have polluted to the degree that it is unlawful; and to know when they have committed a crime. It seems astonishing to me that we would allow legislative history to rule any of those categories of law. Citizens of the United States do not read congressional committee reports; they do not read the Congressional Record. To the degree that they know about laws, they know about one or two sentences of what the laws actually say. It seems to me that it raises very serious rule of law questions to attempt to regulate people's lives under some law explained by Senators' statements in congressional reports that people do not know about.

The laws of England were mentioned earlier today. I do not think English draftsmen are better than our draftsmen. I think our congressmen are better able to avoid responsibility and accountability than the members of Parliament, because they rely on vague laws. Congress allows other branches of government to fill in what the laws actually say.

I want to take a minute to give you a feel for what legislating is really like. My best source of information about the legislative process is from a freshman member of Congress, who wrote about the days before the adjournment of the 101st Congress. Rep. Chris Cox wrote in *Human Events*:

> In what is becoming a hallowed tradition with the current group in Congress, *not a single* member of the House or Senate was permitted even to read the budget reconciliation bill before the vote on final passage. It was not even hauled to the chamber until moments before the vote was conducted in the wee hours. Previously, the record this session for the longest bill passed without anyone's reading it was held by the Savings and Loan bailout bill. That legislation was not even printed until the Monday *after* we voted on it.
>
> For sheer volume, the budget reconciliation measure won hands-down. So voluminous was this monster bill, it was hauled into the chamber in an oversized cardboard box. Its thousands of pages, which the clerk hadn't even had time to number, had to be tied together with rope like newspapers bundled for recycling. Reading it was out of the question, it's true. I was permitted to walk around the box, and to gaze upon it from several angles

and even to touch it.[16]

It does seem to me that the defenders of legislative history have a lot of explaining to do about the common practices of Congress.

BELL: This is not unlike when I was on the Fifth Circuit. OSHA had just been passed, and we had a lawyer arguing legislative history. I had to get the law to see what it was, and I was amazed to find that it was over 700 pages. No one goes through the legislative history for a 700 page law. I asked the lawyer if he could find out if any congressman ever read the law before it was passed. Of course no one read it; it was over 700 pages of technical law! It is the same thing with the budget. They look at it, and maybe someone from the staff may read it. I guess this tells us that we live in a complex society, and many of the laws are complex.

DAVIDSON: A significant aspect of reports on appropriations bills is political. It may be that legally an administration would be quite free to ignore some report language, but at the risk that there may be tighter controls the next time. That is one area of language in committee reports that is not intended for judgments by judges but for the actions of administrators.

There is also an aspect of legislative history that has less to do with what is said on the floor at particular moments than in understanding how a bill that does not achieve success in one Congress is modified to become acceptable in another Congress. Simply looking at the process of garnering support through changes in legislative language over the course of one or more Congresses may be instructive about what it took to gain a democratic majority. While understanding some of the concerns about legislative history, such as the concern that language at times is inserted in reports or floor statements at the behest of lobbyists, it is still important to know how a statute developed. Legislative history is one of those difficult subjects to paint broadly or to place either entirely outside or within the pale of acceptable tools of statutory construction.

16. Human Events, Dec. 9, 1989 at 10.

QUESTIONS AND ANSWERS

PAUL GIGOT:* I would like to see if I can sort out what I sense is a disagreement between my friend and colleague Gordon Crovitz and Attorney General Bell. They both seem to agree that congressional oversight is going too far. But, I would like to know what is the remedy for it. The Attorney General seems to believe that somehow the solution lies with institutional reform in Congress, but the burden of Gordon's remarks seem to imply that the only answer is for the executive branch and the President to just say "no." Which is it, and what is the solution?

BELL: Institutional reform would be quite simple, it would be something like the council on legislation in a British Parliament. You cannot introduce a bill until it goes through a council. You could not have a hearing, and you could not set off on an oversight investigation unless some council, probably composed of the leadership in the House or the Senate, would agree to it. I have dealt with the Congress over the years a great deal. When I first became Attorney General, we had more than forty committees in the House looking into foreign investigations and more than forty sub-committees. The Senate agreed to set up a Senate select committee under foreign intelligence. I think the House should have set up the same kind of committee. The problem, then, is almost instantly solved. You will not get any more hearings on foreign intelligence other than the Iran-Contra investigation, because you would have to have a reason for one. These two select committees would handle it and would put discipline in the system. That is the only way, as I see it, to bring the oversight problem under control. I have confidence in any Congress that would do that.

Some of these investigations have nothing at all to do with legislative functions, as I can see. They are stirring up publicity, stirring up dust, and just making someone look good. These kind of people are not under control, but can be brought under control. Another problem is that there are too many people in Congress, not members, but staff—the staff is too large. If Congress would cut down on the oversight, they would have a lot of people who would be unemployed or would just not have anything to do.

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* Editorial Board Member, Wall Street Journal.

CROVITZ: I assume that somebody from *The Wall Street Journal* would come back with a tough question for somebody else. It seems to me that the so-called reforms of the 1970s, that broke down the seniority system in Congress, are somewhat to blame for the current problem. I do not know who it is, but somebody made famous the notion that if you ever see a Democratic member of Congress and cannot remember his name, you are safe to refer to him as Mr. Chairman. There are that many committees and subcommittees. I think that as long as our present system is what we have to work with, there are always going to be incentives to have hearings and investigations for publicity purposes, if not for actual legislation. It seems to me that the executive just saying no, in some form, might do the legislators a favor by pulling them back from that system, into a system that more closely resembles the way Congress typically operated in the past. I do not think that Congress is likely to come to that on its own. Public choice theorists explain why individual members have different interests in the institution as a whole. But it does seem to me that the executive branch should do whatever it can to help Congress out.

ADAM MEYERSON*: I have three lines of questions for the panelists. First, what are the most important potential abuses of power in the executive? The executive branch is much larger than anything envisioned by the founders. Second, what role, if any, does Congress play in guarding against those abuses of power? And third, if not Congress, who?

CROVITZ: I can think of one example of a tremendous abuse of power by the executive branch. I have in mind some of the abuses of RICO, the Racketeer Influenced and Corrupt Organizations law,[17] by certain United States Attorneys. It is widely acknowledged that the RICO statute is not used in a manner that Congress intended when it was passed in 1970.

Congress, however, has not done anything to limit the use of RICO. Congress should, I think, limit the abuses of power by the executive branch, but Congress, for whatever reasons, seems incapable of dealing with the problem that this statute is routinely used against legitimate businesses, a use that was never intended.

To answer the third question, "If not Congress, who?" I think the

* Editor, *Policy Review.*

17. 18 U.S.C. §§ 1961-1968 (1984 & Supp. 1990).

answer is nobody. Congress has tremendous responsibilities in areas like this. But it is not meeting them, and it is not meeting them in part because it is spending its time doing other things, including hearings and investigations.

BELL: I do not think any of us are trying to abolish the veto, which I think is being used excessively. It certainly is needed; it is the system of checks and balances. To prevent abuse of power Congress watches the President, and the President, to some extent, watches the Congress, but in accordance with the Constitution. Of course there certainly is a narrow area that has too much power, which is not under control. Criminal prosecution is one such area. You have to understand how the system works, to understand how there can be abuse.

I always thought that the Attorney General should select the U.S. Attorney. The President delegates to the Attorney General the power to faithfully execute the laws, and that includes the discretion to prosecute or not to prosecute. The President delegates that. But, most of the United States Attorneys are selected by Senators. When I was traveling one time in a western state, I thought I would call on the Justice Department. In the U.S. Attorney's Office there happened to be a picture on the wall of the Senator from that state. I said, "Why don't you have a picture of President Carter?" He said, "Because he has nothing to do with my appointment."

So one of the big jobs of the Attorney General is to keep the U.S. Attorneys under control. If you do not know that when you are Attorney General, you will not be there too long. That is how you prevent the abuse of power—know what the chain of command is and help discipline people to follow the chain of command. Otherwise, you would need to have the President delegate his vast power to you. That is too much discretion for me; too many people to handle. You just have to fire people every once in a while. You have to keep people under control. That is the way to keep from having an abuse of power; to always know their business, to always have checks to see what is going on.

QUESTION: I would like to use the North case as an example. Where under our system of separated powers does a committee of the Congress get the constitutional authority to offer immunity from prosecution? As Judge Bell said, the discretion of prosecution is an executive function. Immunity from prosecution is also purely an executive function. In that case, Oliver North should have been a potted plant at the hearings and just refused to

answer any questions. Because, if a committee does have that power, what prevents a committee today from giving immunity to Noreiga, to have him come up and testify about his drug-running deals and so forth, and thereby, preclude the executives from prosecuting that individual?

BELL: Under the separation of powers, the Congress has the right to inquire as part of the legislative oversight power and the power to legislate. Contempt can follow for failure to answer. That is contempt of Congress. This is like two different governments. Congress has its own rules and may give immunity to a witness before it from prosecution by the Congress. It would have been their own prosecution. It would not have anything to do with the Department of Justice. Of course, it has to be very careful to give someone use immunity and not transactional immunity. If Congress gives transactional immunity, it would be interfering with the Department of Justice's right to prosecute. In that case, it attempts to give use immunity so that whatever the witnesses said could not be used against them. It is all very technical but is my understanding of the matter.

DAVIDSON: I want to pick up on Judge Bell's response. Testimonial immunity is provided pursuant to statute. There is no inherent congressional power to give immunity. Instead, there is a process that is contentious at times, as in the case of some Iran-Contra witnesses, but is generally amicable in which federal prosecutors and committees of the Congress reach an understanding as to whether congressional witnesses should be called under grants of immunity.

QUESTION: In a minor area known as the Internal Revenue Code, one can find thousands of examples of a number of subjects of legislation, of congressional attempts to legislate through the use of the record. Whether it is the Ways and Means Committee reports, or the Finance Committee reports, or the Joint Committee reports or the infamous blue book, there are a thousand examples. My question to all of you is: Is the use of legislative history a means by which Congress gets around the institutional limitation inherent in legislation? Is the legislative history used as a reduction of a 700 page law, which would otherwise require 700 pages of legislation, or which would otherwise require midnight changes in the legislation?

STRAUSS: The burden of my remarks was to invite you to think about the fact that the agency is a participant in this process, when it occurs. I did not intend to put forward a brief for 700 page, unread bills. They are

garbage, and their history should be so regarded. Not all bills have character, however, and some of the conversation proceeds as if all did. The agency is a participant in the development of legislation and that participation contributes to what I describe as the rule of law culture within the agency. One ought to be very careful about putting that culture aside.

Many of the remarks made this morning, remarks with which I thoroughly concur, have to do with discipline or, if you like, with courage. One of the important differences between our system and the English system, which has been mentioned a couple of times, is that the latter is a system with discipline. It is a system in which the executive and the legislative cannot come from different parties, in which debate is, if anything, more of a side-show than it is here because the final form of the bill can be completely controlled within the political party that is going to enact it. Our problem, in some respects, is dealing with the issues that the absence of discipline in our system presents for us. I do think that one can look quite outside the legislative process in the Congress and see that the use of explanatory documents of one kind or another—understanding of the context, as Mike quite eloquently put it—is an element that all of us are accustomed to use and to rely on. One example that comes to mind is the Uniform Commercial Code. It consists not only of code text but also of an enormous body of negotiated-out comments and explanations. We all understand that those are not part of the law, and also that they provide an important context within which to understand it.

BELL: I will add on to that. The Internal Revenue Service is almost an exception, because you never know what the law is until they write the regulations. In a sense, regulations are memorializing the legislative history. It is not a bad process. Immediately after Congress passes a change in the tax code, the IRS will say that we cannot do a thing until the regulations are written. That might not be a bad system for people to follow generally. After the law is passed, memorialize the meaning by regulations.

QUESTION: Perhaps I expressed myself unartfully. The point I was trying to get at was whether Congress abdicates its legislative responsibility when it passes a simple piece of legislation, has the staff write a thousand pages of legislative history, and passes the buck to the executive branch, therefore continuing to impose its will on the people without providing explicit legislation. It would seem to me it would raise the question of

whether Congress is intruding too deeply into the lives of its constituents when it is unable to pass legislation that is clear enough. Should that not be a warning sign to the Congress that perhaps they have passed some boundary beyond which they should not go?

BELL: I am going to take a shot at it. Would you suggest that everything be written by a committee? No one would be able to understand it. And we cannot have a moratorium on laws—life is too complex. When I was about your age, I once made a statement that we should have a two year moratorium on the passage of new laws. Senator Russell later told me that we cannot do that. He said, "When I was your age, I thought that also. The world is too complex, and it has too many problems." So, we must have a workable system, and the system we have now is working; it may need a little oiling, but it is working. We ought not to make it too complex and too large.

QUESTION: I was struck by Professor Strauss' comments. I put this question to Professor Strauss or others who may wish to respond: whether or not legislative history is a product of or a tool of ascertaining civic virtue, which if disregarded by the third branch and others, is a negation of civil virtue which Professor Wexler, author of a treatise on the majoritarian process, intimates is lodged in the majoritarian process? People have an opportunity to have access to the government through Presidential elections, ABA comments, the judicial system, or elected state representatives. So if the courts now are going to limit, or not use legislative history, are we not to some degree negating some aspects of this access to the government or some aspects of this term civic virtue?

STRAUSS: Certainly, if judges were regularly to refuse to educate themselves in the political background of legislation in the sense that Mike Davidson was raising earlier, we would quickly see a return to the disreputable style of statute-reading that characterized the country in the period, say, 1885 to 1920, when judges thought all they had to do was to read a statute and they would know what it meant. That is undesirable from the perspective of political responsibility, and I thought we had learned that lesson.

QUESTION: Gordon, I have the distinct displeasure of having to ask a somewhat hostile question which I will try to ask in as friendly a way as I can. I would like to know how broad you intend your attack on congres-

sional oversight to be in the context, for example, of the current Chinese student's bill?

CROVITZ: I hope you do not view this as a cop-out. With issues as important as immigration and citizenship, I think it is all the more important that Congress pass simple legislation. After all, Congress does have express consitutional authority in this particular area. I think that if Congress wanted to assure fair treatment to the Chinese students or other immigrants, what Congress should do, instead of considering a new immigration bill which will limit the number of immigrants, is take away executive discretion by passing a statute moving toward more open borders. That seems to me to be a pretty good solution to the problem, procedurally and substantively.

There are areas by which congressional oversight can improve the policy. The question always is, though, is it oversight that you need, or is it clear laws that you require? I think whether you take immigration or insider trading laws, which intentionally are not defined by Congress, regulation should be through simple provisions, such as more open borders or some other policy decision. Clarity is always an enemy of perfection through detail, and that is the trade off. Congress does not often acknowledge that.

BELL: Well, over the immigration power or policy, the Congress, under the Constitution, has what is known as plenary power. They have more power over immigration than they do normal things. I guess it would be almost equal to the power to appropriate or to tax. That is something that I learned when I was a judge; that Congress has such plenary power. Then when I was Attorney General I learned that the power was vested in the Attorney General by the Congress. The President asked me one day why I had that power instead of him. I replied that Congress gave it to the Attorney General and not to the President. When the President had people that he wanted to admit to our country, he would ask me or have the Secretary of State do so. I would have to decide what to do about the request because I had to answer to Congress. This is a very peculiar thing in the law, and I believe that it only exists in the area of immigration.