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CONGRESS, THE COURT, AND THE CONSTITUTION

Mr. Chairman, I appreciate the opportunity to testify on the role of Congress in interpreting the Constitution. To my knowledge, this is the first time that congressional hearings have been used for the purpose of understanding the contributions made by legislators in shaping and protecting constitutional values. Too often, especially in recent years, it is assumed that the judiciary has a monopoly on constitutional interpretation and that Congress must defer to the courts.

The framers expected Congress to play a pivotal role in debating and legislating on constitutional issues. Most of the important constitutional issues in the early decades were decided almost exclusively by Congress and the President. There were few decisions by federal courts to guide the elected branches. The record of this early period has been ably covered by David Currie in a number of law review articles, brought together in his book *The Constitution in Congress* (1997). As he explains in the concluding chapter, it was "in the legislative and executive branches, not in the courts, that the original understanding of the Constitution was forged."

Particularly in the twentieth century, scholars, judges, and sometimes Members of Congress claim that the U.S. Supreme Court has the "last word" on the meaning of the Constitution. Under this theory, if Congress disagrees with a Court ruling the only alternative is to pass a constitutional amendment to overturn the Court. This belief in judicial supremacy overlooks much of the flexibility and political considerations that characterize the relationship between the judiciary and other elements of the political system: Congress, the President, the states, and the general public.

What About *Marbury*?

In recent decades, much has been made of the statement by Chief Justice John Marshall, in *Marbury* v. *Madison* (1803), that it is "emphatically the province and duty of the judicial department to say what the law is." Does that mean that the Court alone delivers the "final word" on the meaning of the Constitution? According to a unanimous ruling by the Court in the Little Rock crisis, *Marbury* "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution." Cooper v. Aaron, 358 U.S. 1 (1958). That principle was reasserted by the Court in the reapportionment case of *Baker* v. *Carr* (1962): "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether

action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and a responsibility of this Court as ultimate interpreter of the Constitution." Seven years later, in the exclusion case of Adam Clayton Powell, the Court again referred to itself as the "ultimate interpreter" of the Constitution. Powell v. McCormack, 395 U.S. 486, 549 (1969).

These statements distort what Chief Justice Marshall decided in *Marbury*. While it is "emphatically the province and duty of the judicial department to say what the law is," certainly the same can be said of Congress and the President. All three branches say what the law is. The Court states what the law is on the day a decision comes down; the law may change later by actions taken by the elected branches. I will give a number of prominent examples of this institutional interplay.

In 1803, Marshall did not think he was powerful enough to give orders to Congress and the President. After the elections of 1800, with the Jeffersonians in control of Congress and the Presidency, the Federalist Court was in no position to dictate to the other branches. Marshall realized that he could not uphold the constitutionality of Section 13 of the Judiciary Act of 1789 and direct Secretary of State James Madison to deliver the commissions to the disappointed would-be judges. President Thomas Jefferson and Madison would have ignored such an order. There is no reason to think that Marshall believed that the Court was supreme on matters of constitutional interpretation.

This conclusion is borne out by the impeachment hearings of Judge Pickering and Justice Chase. *Marbury* was decided on February 24, 1803. The House impeached Pickering on March 2, 1803 and the Senate convicted him on March 12, 1804. As soon as the House impeached Pickering, it turned its guns on Chase. If that move succeeded, Marshall had reason to believe he was next in line. With these threats pressing upon the Court, Marshall wrote to Chase on January 23, 1804, suggesting that Members of Congress did not have to impeach judges because they objected to their judicial opinions. Instead, Congress could simply review and reverse objectionable decisions through the regular legislative process. Here is Marshall's language in the letter to Chase:

> I think the modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than [would] a removal of the Judge who has rendered them unknowing of his fault.

The meaning of *Marbury* is placed in proper perspective when we recall that Marshall never again struck down a congressional statute during his long tenure on the Bench, which lasted from 1801 to 1835. Instead, he played a consistently supportive role in upholding congressional interpretations of the Constitution. In the years following *Marbury*, Marshall upheld the power of

Congress to exercise the commerce power, to create a U.S. Bank (even though no such power is expressly provided in the Constitution), and to discharge other constitutional responsibilities. The judiciary functioned as a yea-saying, not a negative, branch.

The respect of the Court for congressional judgments is evident in some decisions in the 1850s. In 1852, the Supreme Court held that the height of a bridge in Pennsylvania made it "a nuisance." Congress responded with legislation that declared the bridges at issue to be "lawful structures," and the Court then ruled that the bridges were no longer unlawful obstructions.[1] In the second decision, Justices McLean, Grier, and Wayne objected that Congress could not annul or vacate a court decree and that the congressional statute was an exercise of judicial, not legislative, power. Yet the Court has never adopted that position. As the Court noted in 1946: "whenever Congress' judgment has been uttered affirmatively to contradict the Court's previously expressed view that specific action taken by the states in Congress' silence was forbidden by the commerce clause, this body has accommodated its previous judgment to Congress' expressed approval."[2]

Settling Constitutional Issues

In the May 1997 issue of *Harvard Law Review*, Larry Alexander and Frederick Schauer argue that the Supreme Court should be the exclusive and authoritative interpreter of the Constitution. Although they caution that their study is not based on historical precedents, they conclude that the Court is best situated to decide and settle constitutional issues, particularly transcendent questions. They believe that vesting such power in the courts would contribute to political stability.

Neal Devins and I talked about this article. We tried to recall a time when the Court ever "settled" a constitutional issue, transcendent or otherwise. Certainly the decision in *Dred Scott* did not settle the slavery issue. Judicial resistance, over a period of almost forty years, to the use of the commerce power by Congress did not settle the issue of national regulation. Eventually the Court gave way. *Roe* v. *Wade* did not settle the abortion issue. In 1992, the Court jettisoned the trimester standard that had drawn criticism from many quarters. The decision in *Furman* v. *Georgia* (1972) to strike down death-penalty statutes in Georgia and Texas as cruel and unusual did not settle that

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[1] Pennsylvania v. Wheeling &c. Bridge Co., 13 How. (54 U.S.) 518 (1852); 10 Stat. 112, § 6 (1852); Pennsylvania v. Wheeling and Belmont Bridge Co., 18 How. (59 U.S.) 421 (1856).

[2] Prudential Ins. Co. v. Benjamin, 326 U.S. 408, 425 (1946). In 1985, the Court said that when Congress "so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause." Northeast Bancorp v. Board of Governors, FRS, 472 U.S. 159, 174 (1985). In a concurrence in 1995, Justices Kennedy and O'Connor noted: "if we invalidate a state law, Congress can in effect overturn our judgment." United States v. Lopez, 514 U.S. 549, 580 (1995).

issue. Under heavy public pressure the Court later acknowledged that the death penalty, if accompanied by revised procedures, was constitutional.

Even for more popular decisions, such as the desegregation case of 1954, little was settled by the Court's ruling. More than a decade later, a federal appellate court noted: "A national effort, bringing together Congress, the executive, and the judiciary may be able to make meaningful the right of Negro children to equal educational opportunities. *The courts acting alone have failed.*"[3] To deal with racism and segregation, it was necessary for Congress and the President, with bipartisan majorities, to pass such statutes as the Civil Rights Act of 1964 and the Voting Rights Act of 1965.

Devins and I concluded that judicial exclusivity in constitutional lawmaking would be contrary to American history, the framers' intent, and legal development. We also believe that it would lead to political instability, not stability. Our response to the Alexander-Schauer article will appear in the February 1998 issue of *Virginia Law Review*.

To explain the breadth of congressional activity in interpreting the Constitution, the following three sections discuss (1) how Congress resolves these issues before the Court decides, (2) what it may do when the Court upholds the constitutionality of a measure, and (3) what it may do when the Court decides that a measure is unconstitutional. The meaning of the Constitution is not fixed by any one branch, but is rather that product of all three branches acting in concert with the states and the public at large.

Before the Court Decides

Congress frequently must act on constitutional matters before there are useful precedents from the courts. Many of the difficult issues related to the veto power, the pocket veto, recess appointments, the incompatibility and ineligibility clauses, war powers, covert operations, and other disputes are generally resolved by Congress with little input from the courts.[4]

Occasionally these issues move toward the Supreme Court, but just as quickly they are turned back by various threshold tests. In the 1970s, covert funding of the intelligence community was challenged as a violation of the Statement and Account Clause. In 1974, the Court held that the litigant lacked standing to bring the suit. United States v. Richardson, 418 U.S. 166. That issue was left to Congress and the President to decide. In 1987, when it

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[3] United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 847 (5th Cir. 1966), cert. denied sub nom., East Baton Rouge Parish Sch. Bd. of Davis, 389 U.S. 840 (1967 (emphasis in original).

[4] Louis Fisher, "Separation of Powers: Interpretation Outside the Courts," 18 Pepperdine L. Rev. 57 (1990); Louis Fisher, Constitutional Conflicts between Congress and the President (4th ed. 1997).

appeared that the Court would decide the constitutionality of a pocket veto by President Reagan, the case was dismissed on grounds of mootness. Burke v. Barnes, 479 U.S. 361. That issue, too, was pushed back to elected officials to resolve. A variety of other doctrines—political questions, ripeness, prudential considerations, nonjusticiability, and equitable discretion—are used by the court to sidestep constitutional issues. The result is that a number of constitutional issues are returned to the elected branches.

When the Court Upholds Constitutionality

When the Court decides that a congressional statute is constitutional, the controversy may remain open for different treatment by the legislative and executive branches. For example, President Andrew Jackson received a bill in 1832 to recharter the United States Bank. Although the Court in *McCulloch* v. *Maryland* (1819) had ruled that the bank was constitutional, Jackson vetoed the bill on the ground that it was unconstitutional. His veto message said that he had taken an oath of office to support the Constitution "as he understands it, and not as it is understood by others." His position on the veto power has been followed by all subsequent Presidents. Regardless of the constitutional decisions reached by Congress and the courts, Presidents may independently analyze the constitutionality of bills presented to them.

To take a contemporary example, Presidents Reagan and Clinton signed bills reauthorizing the office of independent counsel. The Court in *Morrison* v. *Olson* (1988) upheld the constitutionality of the independent counsel statute. Nevertheless, President Clinton or any future President has the independence to veto a reauthorization bill on the ground that the office of independent counsel encroaches upon the executive power granted to the President by the Constitution. For that matter, Members of Congress could decide at the next reauthorization stage that the office of independent counsel violates the Constitution. *Morrison* simply means that Congress and the President may create the office if they want to. They may rethink and revisit the statute at any time.

My attached CRS Report, "Congressional Checks on the Judiciary," contains a number of other examples of Congress acting by statute to neutralize a constitutional decision by the Court. In 1986, the Court upheld the constitutionality of an Air Force regulation that prohibited Captain Simcha Goldman from wearing his yarmulke indoors while on duty. The Court decided that the needs of the Air Force outweighed Goldman's constitutional right to freely exercise his religion. Goldman v. Weinberger, 475 U.S. 503. Within a year, Congress attached to a military authorization bill language permitting military personnel to wear conservative, unobtrusive religious apparel indoors, provided that it does not interfere with their military duties. 101 Stat. 1086-87, sec. 508 (1987). The Court decided the conflict between Air Force needs and religious freedom one way; Congress decided it the other way.

When the Court Finds Unconstitutionality

If the Court decides that a governmental action is unconstitutional, it is usually more difficult for Congress and the President to challenge and override the judiciary. But even in this category there are examples of effective legislative and executive actions in responding to court rulings.

In his inaugural address in 1857, President James Buchanan announced that the dispute over slavery in the territories "is a judicial question, which legitimately belongs to the Supreme Court of the United States, before whom it is now pending, and will, it is understood, be speedily and finally settled." Two days later Chief Justice Taney handed down the Court's decision in *Dred Scott*, holding that Congress could not prohibit slavery in the territories and that blacks were not citizens. That decision was eventually overturned by the Civil War Amendments—the Thirteenth, Fourteenth, and Fifteenth Amendments—but before those amendments were ratified Congress and the President had already reversed *Dred Scott*. In 1862, Congress passed legislation to prohibit slavery in the territories, 12 Stat. 432, and in that same year Attorney General Bates released a long opinion which held that neither color nor race could deny American blacks the right of citizenship. 10 Op. Att'y Gen. 382 (1862).

In 1916, Congress relied on the commerce power to enact a child labor law. In *Hammer* v. *Dagenhart* (1918), the Court held that the statute was unconstitutional. A year later Congress passed new child labor legislation, this time relying on the taxing power. Again the Court, in *Bailey* v. *Drexel Furniture Co.*, struck it down. Congress passed a constitutional amendment in 1924 to give it the power to regulate child labor but ratification proved impossible. In 1938, Congress returned to the commerce power to regulate child labor and this time the Court, unanimously, upheld the statute. United States v. Darby, 312 U.S. 100 (1941).

This record—from 1916 to 1941—was an exceptionally lengthy dialogue between Congress and the Court, with the legislative branch eventually prevailing. The Court later admitted that "the history of judicial limitation of congressional power over commerce, when exercised affirmatively, has been more largely one of retreat than of ultimate victory." Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 415 (1946).

The Court's decision last year in *Boerne* v. *Flores*, striking down the Religious Freedom Restoration Act (RFRA), raises a number of issues about judicial finality. In deciding that Congress had exceeded the scope of its enforcement power under Section 5 of the Fourteenth Amendment, and hinting that the Court has the last and final word in deciding the meaning of the Constitution, the Court nevertheless left the door wide open for future congressional action. The reasoning and premises in the decision are often unpersuasive and internally inconsistent. The Court invites future congressional action by noting that there "must be a congruence and

proportionality between the injury to be prevented or remedied and the means adopted to that end." 117 U.S. at 2164. Does that mean that adjustments to a redrafted bill would pass muster? In comparing RFRA to the Voting Rights Act, the Court says that RFRA's "legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry." Id. at 2169. Is that the problem? If Congress, with findings, could identify recent examples of religious persecution, would RFRA be constitutional?

My CRS report includes other examples, but I will end with a dispute in 1970. The House Committee on Internal Security prepared a report on the honoraria given to guest speakers at colleges and universities. The study included the names of leftist or antiwar speakers and the amounts they received. The ACLU obtained a copy of the galleys and asked a federal district court to enjoin their publication. The court ruled that the report served no legislative purpose and was issued solely for the sake of exposure or intimidation. It ordered the Public Printer and the Superintendent of Documents not to print the report "or any portion, restatement or facsimile thereof," with the possible exception of placing the report in the *Congressional Record*. Hentoff v. Ichord, 318 F.Supp. 1175, 1183 (D.D.C. 1970).

The House of Representatives passed a resolution that told the courts, in essence, to step back. During the course of the debate, Members of Congress explained that it was not the practice of the House to print committee reports in the *Record*. Moreover, the judge's order "runs afoul not only of the speech and debate clause—article I, section 6—of the Constitution, but obstructs the execution of other constitutional commitments of the House as well, including article I, section 5, which authorizes each House to determine the rules of its proceedings, and requires each House to publish its proceedings." After the resolution was passed by a large bipartisan margin (302 to 54), the report was printed without any further interference from the judiciary.

This collision between Congress and the judiciary was unusually abrupt. For the most part, the legislative-judicial dialogue is more nuanced and subtle. In *INS* v. *Chadha* (1983), the Supreme Court struck down the "legislative veto" as unconstitutional. Congress no longer attempts to use one-House or two-House legislative vetoes to control the executive branch. On the other hand, it continues to use committee and subcommittee vetoes to monitor agency actions.[5]

Conclusions

At certain points in our constitutional history, there has been a compelling need for an authoritative and binding decision by the Supreme

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[5] These provisions typically require agencies to obtain the prior approval of the Appropriations Committees; e.g., 110 Stat. 3009-321 (1996). *See* Louis Fisher, "The Legislative Veto: Invalidated, It Survives," 56 Law & Contemp. Prob. 273 (Autumn 1993).

Court. The unanimous ruling in *Cooper* v. *Aaron* (1958), signed by each Justice, was essential in dealing with the Little Rock desegregation crisis. Another unanimous decision in *United States* v. *Nixon* (1974) disposed of the confrontation between President Nixon and the judiciary regarding the Watergate tapes. For the most part, however, court decisions are tentative and reversible like other political events.

There is no reason for Congress to defer automatically to the judiciary because of its supposed technical skills and political independence. Much of constitutional law depends on factfinding and the balancing of competing values, areas in which Congress justifiably can claim substantial expertise. Each decision by a court is subject to scrutiny by private citizens and public officials. What is "final" at one stage of our political development may be reopened at some later date, leading to revisions, fresh interpretations, and reversals of Supreme Court doctrines. Members of Congress have both the authority and the capability to participate constructively in constitutional interpretation.

Through this process of interaction among the branches, all three institutions are able to expose weaknesses, hold excesses in check, and gradually forge a consensus on constitutional values. Also through this process, the public has an opportunity to add a legitimacy and a meaning to what might otherwise be an alien and short-lived document.[6]

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[6] I provide further details on three-branch interpretation in the following works: Political Dynamics of Constitutional Law (with Neal Devins) (2d ed. 1996); American Constitutional Law (2d ed. 1995); Constitutional Dialogues: Interpretation as Political Process (1988); "Congress and the Fourth Amendment," 21 Georgia L. Rev. 107 (Special Issue 1986); and "Constitutional Interpretation by Members of Congress," 63 N.C. L. Rev. 707 (1985).

BIOSKETCH FOR LOUIS FISHER

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His books include *President and Congress* (1972), *Presidential Spending Power* (1975), *The Constitution Between Friends* (1978), *The Politics of Shared Power* (4th ed. 1998), *Constitutional Conflicts Between Congress and the President* (4th ed. 1997), *Constitutional Dialogues* (1988), *American Constitutional Law* (2d ed. 1995), *Presidential War Power* (1995), and *Political Dynamics of Constitutional Law* (with Neal Devins, 2d ed. 1996). His textbook in constitutional law is available in two paperbacks: *Constitutional Structures: Separation of Powers and Federalism* and *Constitutional Rights: Civil Rights and Civil Liberties*. With Leonard W. Levy he edited the four-volume *Encyclopedia of the American Presidency* (1994). He has twice won the Louis Brownlow Book Award, the encyclopedia he co-edited was awarded the Dartmouth Medal, and in 1995 he received the Aaron B. Wildavsky Award "For Lifetime Scholarly Achievement in Public Budgeting" from the Association for Budgeting and Financial Management.

He received his doctorate in political science from the New School for Social Research (1967) and has taught at Queens College, Georgetown University, American University, Catholic University, Indiana University, Johns Hopkins University, the College of William and Mary law school, and the Catholic University law school.

Dr. Fisher has been invited to testify before Congress on such issues as executive spending discretion, presidential reorganization authority, the legislative veto, the line-item veto, the Gramm-Rudman-Hollings Act, executive privilege, executive lobbying, covert spending, the pocket veto, recess appointments, the budget process, the balanced budget amendment, biennial budgeting, and presidential impoundment powers.

He has been active with CEELI (Central and East European Law Initiative) of the American Bar Association, traveling to Bulgaria, Albania, and Hungary to assist constitution-writers, participating in CEELI conferences in Washington, D.C. with delegations from Bosnia-Herzegovina, Lithuania, Romania, and Russia, and serving on CEELI "working groups" on Armenia and Belarus. As part of CRS delegations he traveled to Russia and Ukraine to assist on constitutional questions.

Dr. Fisher's specialties include constitutional law, war powers, budget policy, executive-legislative relations, and judicial-congressional relations. He is the author of more than 200 articles in law reviews, political science journals, encyclopedias, books, magazines, and newspapers. He has been invited to speak in Albania, Australia, Bulgaria, Canada, the Czech Republic, England, Germany, Greece, Holland, Israel, Macedonia, Malaysia, Mexico, the Philippines, Romania, Russia, Slovenia, Taiwan, and Ukraine.