THE ROLE OF THE LEGISLATIVE AND EXECUTIVE BRANCHES IN INTERPRETING THE CONSTITUTION

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The specific form of the question that we're talking about is this: are the President and Congress, in the exercise of their constitutional duties and powers, legally obliged to follow the courts' interpretation of the laws of the United States where those interpretations exist as precedents rather than as judgments in specific cases? My answer is, that in the strict legal sense, they are not obliged to follow precedent as opposed to judgments, but as a general rule they will be well-advised to do so in order to keep the government functioning smoothly. This argument presupposes the distinction between legal rules and sound conduct which takes into account legal rules.

I want to start the analysis with a discussion of the position of an ordinary citizen under the United States Constitution. He has a legal obligation to obey the law. That's an analytic truth. The law of the United States consists of the Constitution, which is paramount, statutes of Congress, and treaties. Courts interpret these sources of law, and what the courts say will be either right or wrong, depending on what the Constitution, treaty, or statute really means. Suppose you were a litigant and you had the law on your side in your case, and you lost when you should have won. The fact that you were right does not necessarily do you any good as a practical matter, but it is still meaningful to say that you were right and to say that the court was wrong, that what the court said was something other than what the law really is.

To emphasize the primacy of legal obligation as opposed to what the court tells you your legal obligation is, I want to take two cases. In the first, you take a position on a question—for example, the interpretation of a statute—that has never come up before. The judge decides that you are wrong. What happens? You lose. The

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I do not include the common law as a law of the United States. But see 1, Pt. 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 620 (1953).
second case is exactly the same, except that there is controlling precedential authority on the point that goes against you, authority that you did not know about. What happens? You lose. Then you fire your lawyer. Legal realism is an accurate description of the market for legal services. But are the cases otherwise any different, except that your lawyer is now out of work? In particular, are there any additional consequences from defying precedential authority? If the point is well enough known, you may have to pay the other side's attorney fees because you have wasted everybody's valuable time. But if, for example, the law you misinterpreted was a criminal statute, have you committed two crimes, one of violating the law and one of misreading the precedents? Of course not. In the standard case the sanction for defying the court’s interpretation of the law is coextensive with the sanction for defying the law. You lose. Any incidental trouble you get into for wasting other people’s time does not change the basic point: the law is the law. Primarily, that is what you are obliged to obey. That's the case of the ordinary citizen.

Does anything change when we move to the case of the non-judicial branches? I will focus on the President because he does most of these things and because Mr. Ross will speak about Congress. Is the obligation of the President any different from the obligation of the ordinary citizen under the law? Well, the President takes an oath to “preserve, protect and defend” the Constitution, and the Constitution says that “he shall take care that the laws be faithfully executed.” I agree that he has an obligation to obey judgments, and where necessary to execute judgments against other people. Does he, however, have any obligation to follow precedent where there is no binding judgment in the situation? I do not know of one. His obligation, like that of any citizen, is to the law and primarily to the supreme law.

Some people, however, think that the President is obliged to follow precedent in exactly the same sense that he is obliged to obey law. Where might such an obligation come from? I want to talk about two possible sources. The first is the argument that the Constitution gives the job of interpreting the law primarily to the courts, perhaps exclusively to the courts, and specifically to the country’s juridical head, the Supreme Court of the United States. How do we know this? I suppose that we know it because *Marbury v. Madison*[^2] says that it is the power and duty of the judiciary to say what the law is.

The correct response to this claim is: No, it does not. The argument that the Constitution allocates the interpretive power to the

[^2]: 5 U.S. (1 Cranch) 137 (1803).
courts is wrong. The Constitution allocates to the courts the case
deciding power, the power to issue judgments, that is where the
duty to obey judgments comes from. The power to interpret the
Constitution, however, comes from the case-deciding power. To
suggest that the power to interpret is primary and the case deciding
power secondary, is to misinterpret the Constitution and to confuse
cause and effect.

The second argument is a little more subtle. It begins by not-
ing that the President and the entire executive branch have to apply
the law constantly, because they have a huge government to run, a
government that operates according to the law. The argument is
that the executive branch must follow precedent when applying the
law because if it does not, there would be constant litigation
brought by people trying to force the executive branch to follow
precedent, and the executive branch would constantly lose. This ar-
gument has something to it, but it is not an argument about legal
obligation. It is an argument about what is a sane way to run a gov-
ernment—what is an intelligent thing for the President to do. Yes,
there would be a mess if the President always defied the precedents,
and that is why he does not do it.

What I want to point out here is that there is a fundamental
error in proceeding from arguments about good ways to run the
government to arguments about legal obligation. Let me phrase the
question this way: does the President have an obligation to make
the government run smoothly? In a sense he does—in the sense
that it is his obligation to be a good President. But this obligation is
not the same as his duty to follow the law. The underlying distinc-
tion I want to stress is between the things the President is legally
obliged to do and the things he ought to do in order to get the job
done right. The Constitution contains many incentives for the Pres-
ident to do his job well: incentives appealing to patriotism, to love
of honor, and to love of power. Those incentives, however, are not
legal obligations.

Even more fundamentally, the commands of the Constitution
should be distinguished sharply from what we might call its expecta-
tions. Its expectations are the results that the Constitution will pro-
duce if its framers were correct in their predictions of political
science—their predictions of how people will respond to their in-
centives and what they will do. But the expectations are different
from the Constitution itself: you can abide by the Constitution, fol-
low your legal obligation, and still cause the Constitution to defeat
the motivations that underlie it. Let me give a silly illustration.
Suppose that the Senate stops confirming judges. They just do not
want to confirm any more judges. Pretty soon, we start running out
of judges. Is the Senate behaving irresponsibly? Yes. Is the Senate
behaving unconstitutionally? No.

I cannot stress too much the distinction between expectations
and legal obligations. The Constitution was written, as far as possi-
ble, to make legal obligations fairly clear, especially on structural
questions like who decides what, how many Senators from every
state, and other important matters. It is also true that the Constitu-
tion was designed the way it was because the people who designed it
thought those obligations would have certain consequences, and it
is also true that the designers thought the Constitution would create
incentives for people to behave a certain way. To look behind the
obligations and the incentives to the design, however, is to misun-
derstand completely how the Constitution operates. The design—
the outcome the designers expected the constitutional rules to pro-
duce—is not the same thing as the content of the constitutional
rules. If, in order to understand the provision mandating two Sena-
tors from every state, we had to debate whether the interests of the
small states were being consulted enough in legislation, we would
never figure it out. However, we can readily apply the rule that
there will be two Senators from every state. That is how the impor-
tant parts of the Constitution work, by cutting off the larger pur-
poses and the predictions of political science from the simple
content of the rules, so that it is enough to follow the rules without
inquiring whether they are serving their purpose.

That constitutional arrangement is an instance of an even more
fundamental concept that is basic not just to the Constitution, but to
the entire rule of law: legal formality. My account of the Constitu-
tion distinguishes between the content of the rules and the purpose
of the lawmaker. Legal formality distinguishes between the content
of the law and everything else. Because the Constitution is formal in
this sense, the judge's job, or the interpreter's job generally, is to
understand the rule, and, at least as to certain rules, not to consult
the purpose or the expected outcome. Formalism is so fundamental
that I would like to go on about it, but because I am running out of
time, I will just urge everyone to keep it in mind.