EVERYTHING I NEED TO KNOW ABOUT PRESIDENTS I LEARNED FROM DR. SEUSS

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Oaths are out of fashion these days. This is an era in which it is widely considered unreasonable to expect the President of the United States to obey basic principles of law and justice, much less to honor something as abstract as an oath. Perjury—the violation of a legally binding oath—is publicly defended as proof of the offender's humanity rather than his criminality. And one should not even mention in polite company something as gauche as honoring an oath of marriage. Those pesky vows of marital fidelity were, after all, just words.

The next President of the United States will have to speak some words before he can assume the office of the presidency. Indeed, the precise words to be spoken are inscribed in the text of the Constitution (as they are not for any other office)[1]: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."[2] Of course, the oath clauses of the Constitution have all but disappeared from the modern scene.[3] Nonetheless, there was a time when keeping promises was something important rather than an occasionally useful device for acquiring and retaining power.[4] As anyone who is familiar

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1. The Constitution requires an oath for all legislative, executive, and judicial officers, both state and federal, but does not prescribe the precise form of the oath. U.S. CONST. art. VI, cl. 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution"). The first statute of the first Congress specified the required oaths. Act of June 1, 1789, ch. 1, 1 Stat. 23 (codified in scattered sections of 2 U.S.C.).

2. U.S. CONST. art. II, § 1, cl. 8.

3. Mike Paulsen has valiantly tried to keep the oath clauses alive. *See* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 257-62 (1994).

4. *See* The Judds, *Grandpa (Tell Me 'Bout the Good Old Days)*, *on* SPIRITUAL REFLECTIONS (MCA Records 1985).

with the story of a certain faithful elephant can attest, the older view was right. Keeping your word is good.[5] Breaking your word is bad.[6] This is especially true when your word is formalized through a mechanism, such as an oath, that is specifically designed to emphasize the promise with "I really mean it!" Moreover, if a person acquires property by making a promise that he has no intention of honoring, he commits fraud—in the eyes of reason and justice if not always in the eyes of the law. The Constitution requires anyone who takes the office of the presidency to swear a very specific oath as a condition of receiving the benefits of that office. Taking those benefits (including the substantial salary and pension that goes with the office) while disregarding the oath is fraud by any plausible understanding of the term.

Thus, my advice to the new President is the same advice that I would give to any candidate or officeholder, any witness, or any party to a marriage: Do not take an oath that you are not prepared to keep. The President therefore must have a very clear picture of what the presidential oath of office requires. What does it mean to "preserve, protect, and defend the Constitution"? Against what threats must the Constitution be preserved, protected, and defended?

Assuming that the President conscientiously follows his oath and therefore poses no threat himself, there are three principal threats to the Constitution that the President must address: Congress, the federal courts, and the States.[7] Because the President has no unilateral power directly to control state officials, I will discuss only the President's obligations with respect to Congress and the federal courts. In both cases the President's constitutional duty is clear.[8]

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5. *See* DR. SEUSS, HORTON HATCHES THE EGG 16, 21, 26, 38, 51-52 (1940).

6. *See* CARLO COLLODI, THE ADVENTURES OF PINOCCHIO *passim* (University of California Press 1986).

7. Of course, the President must also be prepared to deal with foreign invaders, but it seems odd to characterize this as a threat to the Constitution.

8. My discussion in this article grows out of, and in some respects replicates, a much longer analysis that I coauthored with Chris Moore five years ago. *See* Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267 (1996). Needless to say, Mr. Moore bears no responsibility for the present article.

I. DEALING WITH CONGRESS

Congress's primary function is to make laws.[9] The Constitution assigns the President four principal responsibilities in connection with this lawmaking function: He must recommend to Congress "such Measures as he shall judge necessary and expedient";[10] he must sign or veto congressional enactments;[11] he must employ "[t]he executive Power"[12] to carry laws into effect;[13] and he must nominate or appoint officers to aid him in these tasks.[14] The President has other responsibilities as well, such as the power to convene or adjourn Congress on occasion[15] and the duty to commission officers,[16] but the initial four are the most important contexts in which the President faces constitutional issues when dealing with Congress.

The President's responsibilities under the Recommendation Clause are clear: recommend to Congress the enactment of measures that are constitutional, and recommend the repeal of existing laws that are unconstitutional. That much is beyond cavil. The only question is how the President is to assess the constitutionality of proposed and existing laws. To what extent can or must the President defer to the constitutional views of others?

It is helpful to consider this question in the context of a different but related presidential function: the responsibility to approve or veto congressional enactments. If he is presented with a bill that he deems unconstitutional, the President has an obligation, pursuant to his oath, to veto that bill.[17] Because the Constitution does not provide for a line-item veto, the President must veto an entire measure if the measure contains an unconstitutional provision, no matter how much the

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9. *See* U.S. CONST. art. I, § 1.

10. *Id.* art. II, § 3.

11. *Id.* art. I, §7, cl. 2-3. The President can, of course, allow a bill to become law without actually signing it. *Id.* art. I, §7, cl. 2.

12. *Id.* art. II, § 1, cl. 1.

13. This power is constrained by the constitutional duty to "take Care that the Laws be faithfully executed." *Id.* art. II, § 3.

14. *See id.* art. II, § 2, cl. 2-3.

15. *Id.* art. II, § 3.

16. *Id.*

17. For an excellent discussion of the veto power and its discretionary character, see Michael B. Rappaport, *The President's Veto and the Constitution*, 87 NW. U. L. REV. 735, 771-76 (1993).

President may value the bill's constitutionally permissible portions. The President, however, does not work off a blank slate. Congress's decision to send the bill to the President for signature is an implicit assertion that, in Congress's judgment, the measure is constitutional. In some rare cases, Congress will have expressly considered and addressed questions of constitutionality. May or must the President defer to the constitutional judgment of Congress?

A full answer requires careful consideration of the different meanings of the term "deference." Deference, in the sense of giving weight to another's judgment, runs along a continuum. At one extreme lies complete deference, in which one accepts someone else's determination as conclusive. At the other extreme is de novo consideration, in which the views of others are either ignored or given no significance. [18] In between is a range of shades, from "respectful consideration" to "considerable weight" to "near-conclusive presumption." Different standards of review, which govern decisions when a legal actor must decide a question that a prior actor has already addressed, correspond to different points on this range.[19] Accordingly, in any discussion of deference, one must always ask, "How much deference do you mean?"

One must also distinguish between three very different reasons for deferring (in whatever amount) to another actor. These differently-grounded forms of deference can be called *legal deference, epistemological deference,* and *economic deference.*[20]

Legal deference is deference that is due another actor simply by virtue of that actor's status, without regard to the reasoning

18. In principle, one could have negative deference, in which the fact that others hold a view counts (perhaps even conclusively) against that view. Other than Supreme Court review of Ninth Circuit decisions, it is hard to imagine circumstances in which negative deference would play a role in the legal system.

19. My goal here is not exhaustively to catalogue and define the law's standards of review. But one can rank, in terms of degree of deference, at least some of the major legal standards: de novo, clearly erroneous, clear and convincing evidence, substantial evidence, rational basis, denial of review. Some standards, such as the Administrative Procedure Act's arbitrary or capricious standard, 5 U.S.C. § 706(2)(A) (1994), can reflect different degrees of deference depending on the context. *See* GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 705 (1998).

20. Chris Moore and I have elsewhere discussed at length the distinction between legal and epistemological deference. *See* Lawson & Moore, *supra* note 8, at 1271, 1278-79, 1300-02.

or quality of the prior decision. Federal courts must give enormous deference to the factual findings of juries simply because those findings come from juries, even if a particular jury may not have been well suited to its task. Similarly, conventional doctrine requires courts to give considerable deference (although perhaps a lesser amount than they owe juries) to factual findings of administrative agencies or lower courts simply because of the status of those decisionmakers.[21] This holds even if a specific agency or court has a well deserved reputation for ineptitude; the entity's status controls.

Epistemological deference, by contrast, is based on the reliability rather than the status of the prior decisionmaker. One gives epistemological deference when, and to the extent that, one considers the prior decision to be good evidence of the right answer. I defer to, for example, Akhil Amar, Steve Calabresi, and John Harrison on many questions of constitutional law, not because of anything in their titles, locations, or gene pools, but because they have examined many questions more carefully than I have (or ever will), *and* they are very smart, *and* they generally employ a methodology that is well calculated to yield right answers, *and* they can be trusted to apply that methodology honestly, *and* they have a host of other attributes that give some assurance of reliability. In fact, it would often be affirmatively wrong for me *not* to give them some measure of deference. If the goal is to answer a question correctly, it is irrational to refuse to give weight to considerations that are good evidence of the right answer. Many times, someone else's prior decision will be precisely such a relevant consideration. As long as the relevant indicia of reliability are operative, some measure of deference to these scholars is appropriate. When, however, those indicia are absent—for instance, when these scholars apply an incorrect methodology, such as undue reliance on prior judicial decisions—the conditions of deference may not be present, or may be lessened.

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21. I have elsewhere argued that Congress lacks the power to impose this regime of deference on the federal courts, *see* Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decisionmaking*, 17 CONST. COMMENT. (forthcoming 2000), but the example will still prove useful to those who do not share my somewhat idiosyncratic view on this subject. The Constitution requires federal courts to defer to a jury's factual determinations whether or not Congress has the power to compel judicial deference. U.S. CONST. amend. VII.

Although epistemological deference is ultimately instrumentalist because it is a device for reaching right answers, it need not involve all-things-considered decisionmaking in each application. Indeed, there can be circumstances in which epistemological deference leads, effectively, to legal (or status-based) deference. If someone else is systematically better positioned to resolve a certain class of questions, it may be epistemologically appropriate simply to treat them as though they were status-privileged and to give them deference without any (or any close) examination of whether particularized conditions for deference exist in any given case. Rational thinking requires information-managing rules, and rules can result from epistemological as well as legal (or status-based) inquiries.

Economic deference surfaces when considerations of cost counsel against re-examining previously decided questions. Information is not a free good. Figuring out the right answers to legal questions takes time, thought, energy, and sometimes money—all of which can have significant opportunity costs. In some circumstances, it might not be worthwhile to reconsider even an unreliable answer provided by someone else. As the saying goes, having an answer can be more important than having the right answer. At a minimum, one should always ask how much the right answer costs. There is always a price tag on justice.

This jurisprudential detour, believe it or not, bears directly on the President's constitutional responsibility. When faced with the decision whether to sign or veto a bill, the President has an oath-imposed obligation to determine, as best he can, whether the bill is constitutional. Does the prior (implicit or explicit) judgment of Congress on the bill's constitutionality call forth any legal deference on the part of the President?

It certainly does not conclusively resolve questions of constitutionality as a matter of law. This was precisely the point made so elegantly by Chief Justice Marshall in *Marbury v. Madison*.[22] Marshall correctly reasoned that federal courts, no less than Congress or the President, have an obligation to

22. 5 U.S. (1 Cranch) 137 (1803). In fact, *Marbury* involved a situation in which both Congress and the President had implicitly judged a statute constitutional, but the analysis does not depend on the number of departments that have previously addressed a question.

interpret and apply the Constitution as part of their duty to decide cases and that the Constitution does not make prior congressional judgments conclusively binding on the courts. Precisely the same reasoning applies to the President's evaluation of a bill that the Congress deems constitutional. The President is no more bound by Congress's judgments about the Constitution than are the courts.

That says only, however, that the Constitution does not mandate an extreme form of legal deference to Congress's interpretation of the Constitution; it does not rule out some lesser form of legal deference, such as a presumption (and possibly a strong one) in favor of enacted statutes or bills.[23] Chris Moore and I, however, have elsewhere argued at length that the best reading of the Constitution imposes no general rule of legal deference on the federal courts with respect to constitutional judgments of Congress and the President,[24] nor does it require the President to give legal deference to the views of Congress.[25] The President is free to exercise independent constitutional judgment when faced with decisions under the Presentment Clauses.

What about epistemological deference? Should the President give any degree of weight to the constitutional judgment of Congress because such congressional judgments are good evidence of the right answer? Although one can perhaps imagine specific circumstances in which the answer might be yes, in the general run of cases contemporary congressional judgments about constitutionality carry almost no indicia of reliability. Congress does not generally take its interpretative task seriously, and it certainly does not apply a methodology (namely, the methodology of original public meaning) calculated to yield right answers.[26] It would be starkly

23. The classic defense of such a rule of legal deference to Congress by courts is James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

24. *See* Lawson & Moore, *supra* note 8, at 1274-79. There may be particular obligations of deference stemming from specific constitutional clauses or circumstances, but there is no general obligation of deference.

25. *See id.* at 1288-90.

26. I am assuming, of course, that this particular species of originalism is the correct way to interpret the Constitution. *See* Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997). This part of my argument does not depend on such a premise (although much of the rest of my argument does), as it is highly unlikely that Congress consistently employs whatever methodology the reader deems appropriate.

irrational, and a breach of the oath of office, for the President to treat congressional constitutional judgments as presumptively worthy of deference. It might be reasonable for the President to defer to the judgments of trusted advisers, or even wise law professors, but Congress is an improbable source of wisdom about constitutional meaning.

Considerations of economic deference require a more nuanced analysis to reach the same result. As a general proposition, considerations of cost are not a good excuse for a President to accept an answer that does not have a sufficient legal pedigree or sufficient indicia of reliability to warrant, respectively, legal or epistemological deference. The President's oath does not state that he will "preserve, protect, and defend the Constitution whenever it is convenient." But the President cannot spend all of his waking moments pondering deep questions of constitutional law. The oath itself recognizes inevitable human limitations by only imposing a duty to defend the Constitution "to the best of my Ability," which acknowledges that perfection is unattainable, and probably undesirable given its likely cost. Nonetheless, I do not see any room for economic deference to the constitutional judgments of Congress. There are circumstances in which the President will have no rational choice but to defer to the views of others, but those others do not have to be Congress. The President's responsibilities under his oath include the ancillary responsibility to surround himself with people to whom epistemological deference is warranted, so that when the President cannot personally make good decisions about the Constitution, he can rely on the sound views of others.

What about courts? To what extent should or must the President consult judicial interpretations of the Constitution in deciding whether to sign or veto legislation? In deciding, for example, whether to sign a bill involving the minimum wage, is it relevant or decisive that courts will certainly uphold the federal government's power to regulate labor contracts?

Judicial judgments are entitled to no more legal deference in this context than are congressional judgments. Just as courts are not bound by presidential decisions when they exercise their constitutional function of deciding cases, presidents are not bound by judicial decisions when they exercise their constitutional function of signing or vetoing legislation. The

case for a power of presidential (and congressional) review that is independent of prior judicial decisions is precisely coterminous with the case for judicial review that is independent of prior presidential and congressional judgments. A President who considers himself legally bound by the constitutional judgments of courts when exercising the presentment power violates his oath of office.

Nor are court decisions generally entitled to epistemological deference. It is possible to imagine a world in which judicial decisions are presumptive evidence of right answers to constitutional questions, just as it is possible to imagine a world in which congressional judgments are presumptive evidence of right answers. Whether or not that world ever existed—and I think that "not" has the better of the argument—it is clearly not the world that we have today. Courts decide constitutional cases badly.[27] Indeed, they generally decide them entirely without reference to the Constitution.[28] Even to call them "constitutional cases" is merely a polite metaphor. One perhaps could find rare exceptions in which court decisions might warrant epistemological deference, but it would take at least as much work to identify the exceptions as it would simply to figure out right answers from scratch. For the President to rely on judicial decisions as good evidence of constitutional meaning would be a flagrant disregard of the oath of office. And finally, considerations of economic deference do not justify deference to court decisions for the same reasons that they do not justify deference to congressional decisions.

The President thus has a constitutional responsibility to base decisions to sign or veto legislation on his independent judgment about the meaning of the Constitution, unmediated in the general run of cases by analogous congressional or judicial judgments. The same is true a fortiori of decisions under the Recommendation Clause.[29]

In practice, this means that the President has an obligation

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27. *See* any volume selected at random from the Federal Reporter System *passim*.

28. *See id. passim*.

29. In the case of recommendations of new measures, there is no prior congressional judgment to review (although there may be prior congressional, presidential, or judicial judgments that are highly analogous). In the case of recommendations for repeal of existing laws, there are prior judgments to review, and the analysis tracks precisely the line of reasoning in the presentment context.

under his oath to veto virtually everything that Congress will send him and to recommend the repeal of virtually everything that Congress has already enacted. Almost everything that the modern federal government does, in both substance and form, is flagrantly unconstitutional.[30] The fact that Congress, the courts, prior Presidents, and an overwhelming majority of the American people all acquiesce in these violations does not make them go away. The Constitution means what it says, and it is the Constitution that the President swears to preserve, protect, and defend.

Thus, the new President's first obligation is to veto pretty much every bill sent to him and to recommend the repeal of pretty much everything in the United States Code.

The President next must decide how to handle unconstitutional laws that Congress enacts over his veto or refuses to repeal. Consider what courts are supposed to do in these circumstances. An unconstitutional law is no law at all and therefore should be given no effect in adjudications.[31] By precisely the same reasoning, the President should give unconstitutional laws no effect in executing his responsibilities. The power of presidential review is the same as the power of judicial review.[32] The President has both the power and the duty to refuse to enforce laws that he determines (without either legal or epistemological deference to Congress or the courts) are unconstitutional.

Thus, the new President's second obligation is to refuse to enforce most of the United States Code.[33]

Obviously, the President cannot personally carry out all of the functions required by the Constitution. Other executive department personnel must assume most of the day-to-day responsibility for executing the laws of the United States. The

30. *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

31. Whether such laws are voidable or void depends on theories about party control of litigation that are far beyond the scope of this Article.

32. Chris Moore and I have elsewhere argued at length that neither the veto power nor the Take Care Clause weakens the case for independent presidential review in the context of law execution. *See* Lawson & Moore, *supra* note 8, at 1304-06, 1312-13.

33. What about pardoning people who have been convicted under unconstitutional laws? As Thomas Jefferson taught us, that is a fine idea, and it may even be a moral duty, but it does not rise to the level of a constitutional duty. The pardon power is inherently discretionary, even on constitutional matters. *See* Rappaport, *supra* note 17, at 776-79.

President has two obligations with respect to these subordinates. First, the President must ensure (to the extent possible) that his presidential appointees (including both those who do and do not require Senate confirmation) will maintain fidelity to the Constitution. Second, to the extent that his subordinates fail to preserve, protect, and defend the Constitution, the President must take the steps within his power to control them, whether by removing them from office,[34] overruling their decisions,[35] or both.

Thus, the new President's third obligation is to ensure that his subordinates do not enforce most of the United States Code.

II. DEALING WITH COURTS

Courts routinely fail to decide cases in accordance with the Constitution. What can the President do about this? Not very much.

Congress has the power to impeach and remove judges who fail in their duty, but the President has no role in that process. Nor can the President recommend measures to control the decisionmaking processes of judges; those processes cannot be regulated by statute.[36] There are really only two things that the President can do. The first is to appoint judges who will get it right. If that means litmus tests, such as ruling out any prospective nominee who thinks that the Constitution contains an inalienable right to suck the brains out of babies, so be it. Second, the President can refuse to enforce at least some court judgments that contravene the Constitution.[37] This, however, is the one context in which the decision of another actor—a judicial judgment—imposes an obligation of legal deference on the President. That deference is not absolute, but it does require the President to enforce judgments unless he is firmly convinced, with a high degree of confidence, that the judgment rests on constitutional error. And even in those circumstances, the President must honor a judgment of no liability. The President's powers, and therefore oath-imposed duties, with

34. *See* Morrison v. Olson, 487 U.S. 654, 723-27 (1987) (Scalia, J., dissenting).

35. *See* Lawson, *supra* note 30, at 1241-46.

36. At least, I don't think that they can. *See* Lawson, *supra* note 21. If I am wrong about that, then the President may have relevant obligations under the Recommendation Clause.

37. This is a complicated topic that Chris Moore and I have dealt with at length elsewhere. *See* Lawson & Moore, *supra* note 8, at 1313-29.

respect to the judiciary are sharply limited.

III. CONCLUSION

The President's constitutional duty under his oath of office is far broader and more radical than any modern President will likely acknowledge, much less execute. Indeed, no President who took his oath seriously could get elected or stay in office, nor could most members of Congress.[38] That is merely a reflection, though, of the fact that we long ago stopped being governed by the Constitution in any meaningful sense. It does not affect the content or significance of the oath of office. If the President wants to place expediency, the Gallup polls, or even a genuine concern for the national interest above his oath, he should do it openly by simply dispensing with the oath and its accompanying pretense of constitutional government. He should not drag the defenseless oath down with him.

38. The only exception that comes to mind is Congressman Ron Paul, who takes his oath fairly seriously and has nonetheless managed to be elected several times.