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## Introduction

With growing frequency, Presidents have asserted that they have the power to disregard any law that they believe to be unconstitutional. Ronald Reagan, during his two terms in the White House, objected to almost 90 statutes on these grounds.<sup>1</sup> In his four years in office, President Bush asserted such claims against 116 acts of Congress,<sup>2</sup> an annual rate almost three times that of his predecessor. The Justice Department, seeking to defend the Reagan Administration's refusal to comply with the Competition in Contracting Act of 1984,<sup>3</sup> told a federal court in January, 1989 that the "President has the authority to decline, in the absence of a judicial resolution of the matter, to implement a statute that is patently unconstitutional or that he reasonably believes undermines his powers under the Constitution."<sup>4</sup>

To the extent that Presidents make good on their constitutional objections to statutes by refusing to enforce them, they are in effect asserting an absolute item veto—"absolute" because Congress gets no opportunity to override the President's action, and an "item veto" because it operates surgically against only those parts of a statute that the White House finds objectionable.<sup>5</sup> This is an alarming development, for it threatens to further enhance the power of what already has many of the trappings of an Imperial Presidency.<sup>6</sup> That this emerging presidential claim to an absolute item veto is limited to allegedly

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1. See *infra* Table 2.

2. See *infra* Table 2.

3. Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175.

4. Supplemental Brief for Appellants at 21, *Lear Siegler, Inc. v. Ball*, 863 F.2d 693 (9th Cir. 1988), quoted in Morton Rosenberg, *Congress's Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627, 633 (1989).

5. See H.R. REP. NO. 138, 99th Cong., 1st Sess., at 15-16 (1985).

6. See ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973); ARTHUR M. SCHLESINGER, JR., *THE CYCLES OF AMERICAN HISTORY* 277-301 (1986).

unconstitutional laws offers little comfort, for as Judge Frank Easterbrook has noted, “[C]onstitutional ‘questions’ are everywhere—it is easy to pose questions and occasionally is possible to characterize a mistaken view of the law or the facts as ‘arbitrary,’ an ‘abuse of power,’ hence unconstitutional.”<sup>7</sup>

This Article will examine presidential refusals to enforce allegedly unconstitutional<sup>8</sup> laws at several levels. Part I ascertains how such a practice squares with the scheme of government which the Founders contemplated in 1787. The evidence on this score rather convincingly demonstrates that the Framers did not envision that Presidents would possess the power to suspend laws, even where a President thought that the law was unconstitutional. Part II examines the historical record—from George Washington through Jimmy

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7. *Marozsan v. United States*, 852 F.2d 1469, 1490 (7th Cir. 1988) (*en banc*) (Easterbrook, Coffey & Manion, JJ., dissenting).

8. This Article does not directly address the issue of how much autonomy the Executive has when it interprets the Constitution; *i.e.*, must a President follow the Supreme Court’s constitutional interpretations, does the Executive have complete autonomy to construe the Constitution for itself, or does the answer lie somewhere in between? While the issues are related, the question of presidential autonomy in construing the Constitution is distinct from that of whether the Executive may decline to honor a law that it believes, using whatever standard, to be unconstitutional. Regardless of how one resolves the issue of executive autonomy, there remains the separate question of whether the President may refuse to comply with an assertedly unconstitutional law. See David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 117-19 (1993) (“In every case . . . the question whether the President may refuse to comply with an act of Congress is distinct from the question whether he must treat Supreme Court precedent as binding.”). For discussion of the executive autonomy issue, see Strauss, *supra*; Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43 (1993); Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81 (1993); Michael Rosenfeld, *Executive Autonomy, Judicial Authority and the Rule of Law: Reflections on Constitutional Interpretation and the Separation of Powers*, 15 CARDOZO L. REV. 137 (1993).

Part III of this Article suggests that a President might justifiably refuse to comply with a law that is “clearly unconstitutional” if such defiance is the only means of securing judicial review of the law in question. While the “clearly unconstitutional” requirement might in theory be applicable even if the Executive were free to employ its own constitutional standards rather than the Court’s, such complete autonomy would strip the requirement of all practical force. A President, relying solely on his own view of the Constitution, could condemn virtually any provision of law. The Executive must not have total interpretive autonomy in the context of refusing to comply with an allegedly unconstitutional law. If a federal court holds a particular law to be constitutional, the Executive must comply with the court’s judgment. See Merrill, *supra*, at 46-47; Paulsen, *supra*, at 82 & n.2; Strauss, *supra*, at 123-24; Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1989-90). In other words, there is no legitimacy to the so-called “*Merryman power*”, under which a President may “decline to enforce judicial decrees that he believes rest on an unsound interpretation of the law . . . .” Paulsen, *supra*, at 109.

Carter—to determine the extent to which Presidents have actually refused to comply with laws on constitutional grounds.<sup>9</sup> The evidence shows that while Presidents from time to time have failed to honor or comply with laws because they thought them unconstitutional, this has occurred relatively infrequently. Part III identifies the very limited circumstances under which a President might legitimately disregard an “unconstitutional” law, and suggests a number of steps that Congress might take to both discourage and redress the Executive’s unwarranted resort to an absolute item veto.

## I. The Framers’ Conception

### A. The Prerogative Power of Suspending the Laws

Presidential nonenforcement of “unconstitutional” laws is equivalent to giving the Chief Executive a suspending power, one of the royal prerogatives exercised by the kings of England, which was wrested from the crown less than a century before the American Revolution.

In 14th century England, the lawmaking power belonged solely to the king. The king acted as legislator in response to grievances submitted by petition, usually from Parliament. If the king chose to redress a grievance, he could do so by issuing either an ordinance or a statute. The king preferred using ordinances, for these could be withdrawn at any time; by contrast, statutes could not be revoked. With growing frequency, however, Parliament conditioned grants of money sought by the king on his redressing grievances by statute. This effectively neutralized the king’s prerogatives of rejecting a petition or of

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9. This Article focuses solely on presidential refusals to comply with laws due to their alleged unconstitutionality. It does not deal with nonenforcement resulting from the routine exercise of prosecutorial discretion, nor does it deal with presidential refusals to honor a law where the Executive’s action rested entirely on policy grounds. For example, Richard Nixon’s impoundment of funds is not discussed here because Nixon did not claim that the expenditures were unconstitutional. See HOWARD E. SHUMAN, *POLITICS AND THE BUDGET* 184-216 (2d ed. 1988); *Constitutionality of GAO’s Bid Protest Function: Hearings Before a Subcomm. of the House Comm. on Gov’t Operations*, 99th Cong., 1st Sess. 338 (1985) [hereinafter *GAO Bid Protest Hearings*] (testimony of D. Lowell Jensen, Deputy Att’y General). Harry Truman’s effort to avert a nationwide strike by seizing the steel mills, rather than using the “cooling off” provision of the Taft-Hartley Act, is likewise beyond the scope of this piece, for Truman’s conduct was based on policy rather than constitutional objections to the Act. See MAEVA MARCUS, *TRUMAN AND THE STEEL SEIZURE CASE* (1977); J. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 Nw. U. L. REV. 437, 445-60 (1990) (noting that some presidential refusals to execute parts of a law do not rest on constitutional grounds).

granting it by ordinance, for if the crown took either of those routes it would receive no funds.<sup>10</sup>

From the 14th century through the late 17th century, relations between the king and Parliament were characterized by a host of stratagems designed by the crown to obtain funds from Parliament without satisfying the conditions on which the grant was made.<sup>11</sup> A common ploy was for the king to issue the statute sought by Parliament; after he had received the money, the king would then exercise his prerogative to suspend the statute, or to dispense with its application as to specific individuals.<sup>12</sup>

By the late 15th century, Parliament's legislative supremacy was accepted in theory, though it was difficult to reconcile this with "the undoubted power which the crown possessed of dispensing from or

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10. 2 WILLIAM A. STUBBS, *THE CONSTITUTIONAL HISTORY OF ENGLAND 570-78*, 585-87 (Oxford, Clarendon Press, 4th ed. 1896). Under the ancient royal prerogative of revocation, the king could even revoke statutes, but by the late 13th century this was deemed unconstitutional. 2 WILLIAM S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 308, 437 (4th ed. 1936). Thus, when Edward III revoked an act of Parliament in 1341, he insisted that Parliament repeal the measure, acknowledging that his purported revocation was ineffectual. Even though Edward's action arose from a belief that the law unconstitutionally impaired the royal prerogative, this still did not justify the king's revoking the statute. 2 STUBBS, *supra*, at 389-92, 582.

11. An early tactic was for the king to agree to the petition but draft the statute so that it differed in key respects from what he had agreed to or so that it included a "saving clause" giving him discretion not to fulfill his promises. Parliament later foreclosed this device by presenting the king with a proposed statute, rather than a mere petition, and by carefully monitoring the bill until it became law. Another ploy was for the king simply not to issue the statute, the matter eventually to be forgotten by Parliament. The king might instead issue the statute but arrange for someone to submit a petition which he would grant by ordinance that effectively nullified the earlier statute. Or the king might ignore the statute, forcing Parliament to request that he honor the laws. 2 STUBBS, *supra* note 10, at 570-90; ALBERT B. WHITE, *THE MAKING OF THE ENGLISH CONSTITUTION*, 449-1485, at 374 (1908). "The constant complaints, recorded in the petitions on the Rolls of Parliament, show that resort was had to each of these means of evading the fulfillment of the royal promises even when the grants of money were made conditional upon their performances . . ." 2 STUBBS, *supra* note 10, at 575.

12. 2 HOLDSWORTH, *supra* note 10, at 437. The suspending power was sometimes invoked on a temporary basis. *See 6 id.* at 221-22 (2d ed. 1927); THEODORE F.T. PLUCKNETT, *TASWELL-LANGMEAD'S ENGLISH CONSTITUTIONAL HISTORY* 426-27 (11th ed. 1960); Carolyn A. Edie, *Tactics and Strategies: Parliament's Attack Upon the Royal Dispensing Power 1597-1689*, 29 *AM. J. LEGAL HIST.* 197, 222-24 (1985). It could be applied to an entire law or to only a portion of it. Edie, *supra*, at 222-23. Suspension had the effect of abrogating a law across the board, in contrast to the royal dispensing power which exempted only those who had been granted a dispensation. PLUCKNETT, *supra*, at 190-91. Unlike the royal pardoning power which merely relieved a person from the consequences of having violated a law, the effect of suspending a law was to legalize the conduct in question. Edie, *supra*, at 198-99.



suspending the operation of statutes . . . .”<sup>13</sup> The matter came to a head under the Stuarts who claimed that the prerogative powers were matters of “divine right” rather than common law and thus could not be restricted by Parliament.<sup>14</sup>

During the reign of Charles II, Parliament appeared to gain the upper hand. In 1662 and 1672, Charles issued Declarations of Indulgence suspending all penal laws aimed at Protestant and Catholic non-conformists. On each occasion, the House of Commons so vigorously protested these exercises of the suspending power that Charles was forced to withdraw the Declarations.<sup>15</sup>

When James II assumed the throne in 1685, he resolved to be less yielding than Charles had been. James was strengthened by a 1686 King’s Bench decision which upheld his exercise of the dispensing power in terms so sweeping as to suggest that none of the royal prerogatives were subject to parliamentary control.<sup>16</sup> Emboldened by this decision, James in 1687 issued a Declaration of Indulgence proclaiming it the “royal will and pleasure that from henceforth the execution of . . . all manner of penal laws, in matters ecclesiastical . . . be immediately suspended . . . .”<sup>17</sup> When the Archbishop of Canterbury and six other prelates objected to James’s order that the Declaration be read in all churches, they were charged with seditious libel.<sup>18</sup> At the trial before King’s Bench, the principal issue was the legality of the suspending power. The judges, disagreeing on the question, sent the case to the jury. The jurors may have been moved by the words of Justice Powell, who warned that if such a suspension “be once allowed of, there will need no parliament; all the legislature will be in the king, which is a thing worth considering.”<sup>19</sup> The verdict of acquittal dealt a fatal blow to the suspending power.<sup>20</sup>

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13. 2 HOLDSWORTH, *supra* note 10, at 443.

14. JACK HARVEY & L. BATHER, *THE BRITISH CONSTITUTION* 193 (2d ed. 1968).

15. COLIN R. LOVELL, *ENGLISH CONSTITUTIONAL AND LEGAL HISTORY* 371-72 (1962); J. R. TANNER, *ENGLISH CONSTITUTIONAL CONFLICTS OF THE SEVENTEENTH CENTURY, 1603-1689*, at 230 (1966); PLUCKNETT, *supra* note 12, at 426-27; 6 HOLDSWORTH, *supra* note 10, at 221-22.

16. *Godden v. Hales*, 89 Eng. Rep. 1050, 2 Show. K.B. 475 (K.B. 1686). The Lord Chief Justice declared that because “the Kings of England were absolute Sovereigns,” it followed “that the King had a power to dispense with any of the laws of Government as he saw necessity for it; that he was sole judge of that necessity; that no Act of Parliament could take away that power . . . .” 89 Eng. Rep. at 1051, 2 Show. K.B. at 478.

17. PLUCKNETT, *supra* note 12, at 442.

18. PLUCKNETT, *supra* note 12, at 442-43; *see also* LOVELL, *supra* note 15, at 391-92, 406-07; F. W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 305-06 (1926).

19. *Trial of the Seven Bishops*, 12 State Trials 1831, 427 (K.B. 1688).

20. LOVELL, *supra* note 15, at 407.

James's abuse of the prerogative led to his abdication in the Glorious Revolution of 1688. The verdict in *Trial of the Seven Bishops* was constitutionalized in the first article of the Bill of Rights of 1689, which declared: "[t]hat the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of Parliament, is illegal."<sup>21</sup> The suspending power which kings had employed for nearly 400 years to avoid implementing the law was never again exercised by the English crown.<sup>22</sup>

## B. The Suspending Power and the United States Constitution of 1787

The drafters of the United States Constitution were closely acquainted with English constitutional history. They "felt themselves the heirs of the Revolution, of the glory derived from 1688. Americans of the 1770s felt they were approaching a 'centennial' of their own, reliving memories of the English Bill of Rights."<sup>23</sup> A critical piece of that legacy was the hard won principle that the Executive did not possess the authority to suspend a law. As William Blackstone, one of the "standard authorities" for the Framers' generation,<sup>24</sup> put it:

An act of parliament, thus made, is the exercise of the highest authority that this kingdom acknowledges upon earth. . . . And it cannot be altered, amended, dispensed with, suspended, or repealed, but in the same forms, and by the same authority of parliament . . . . It is true, it was formerly held, that the king might, in many cases, dispense with penal statutes: but now, by statute . . . it is declared that the suspending or dispensing with laws by regal authority, without consent of parliament, is illegal.<sup>25</sup>

21. 1 William and Mary sess. 2 c. 2 § i I. Though the Bill of Rights condemned the dispensing power only "as it hath been assumed and exercised of late," the power was effectively abolished and could be exercised only as allowed by statute. 1 Wm. and M. sess. 2 c. 2 § i II; Edie, *supra* note 12, at 234 n.86.

22. Edie, *supra* note 12, at 234 n.86.

23. GARY WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* 64 (Vintage ed. 1979).

24. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 30-31 (1967); David A. Lockmiller, *Sir William Blackstone* 169-74 (1938); GRANT GILMORE, *THE AGES OF AMERICAN LAW* 113-14 n.4 (1977); *see also* Robert L. Berg, *Presidential Power and the Royal Prerogative* 90-92 (1958) (unpublished Ph.D. dissertation, University of Minnesota). Blackstone was cited in the Constitutional Convention, *The Federalist Papers*, and state ratifying conventions. *See* 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 472 (Max Farrand ed. 1966) [hereinafter *Farrand*]; *THE FEDERALIST* Nos. 69, 84 (Alexander Hamilton); 3 JONATHAN ELLIOT, *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 544 (Philadelphia, J.B. Lippincott and Co., 2d ed. 1881) (remarks of Patrick Henry in the Virginia ratifying convention); 4 *id.* at 278 (remarks of Charles C. Pinckney in the South Carolina ratifying convention).

25. 1 WILLIAM BLACKSTONE, *COMMENTARIES*, Ch. 2, at 185 (1765).

The text of the Federal Constitution does not specifically bar the President from exercising a suspending power.<sup>26</sup> Yet, while there is no explicit rejection of a presidential suspending power, there is convincing evidence in the text of the Constitution and in the debates surrounding its adoption that most of the Founders endorsed the English Bill of Rights' principle that a statute may be suspended only by the lawmaking authority, and not by the Executive acting alone.<sup>27</sup>

### 1. *The "Take Care" Clause*

Article II, section 3 declares that the President "shall take Care that the Laws be faithfully executed . . . ." Today, these words seem self-evident if not entirely superfluous. But the clause acquires a richer and more specific meaning if we view it against the historical backdrop with which the Framers were familiar—the four hundred year struggle of the English people to limit the king's prerogative and achieve a government under law rather than royal fiat. That struggle culminated in the Bill of Rights of 1689, which made it illegal for the king to suspend or dispense with the laws or refuse their execution without Parliament's consent. The effect was to transfer the suspending power from the executive branch to the legislature.

Read in the light of history, the requirement that the President "take Care that the Laws be *faithfully executed*" is a succinct and all-inclusive command through which the Framers sought to prevent the Executive from resorting to the panoply of devices employed by English kings to evade the will of Parliament. The duty to execute the laws faithfully means that the President may not—whether by revocation, suspension, dispensation, inaction, or otherwise—fail to honor

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26. See FREDERICK J. STIMSON, *THE LAW OF THE FEDERAL AND STATE CONSTITUTIONS OF THE UNITED STATES* 52 (1908) ("English constitutional history clearly establishes . . . [t]hat the king can neither make laws, nor suspend laws, nor grant pardons in advance for a crime or breach of the law, nor ever in cases of impeachment. The first and the last are expressed clearly in the Federal Constitution, and it might be wished that the other two were also.").

27. In referring to the intent of the Founders or Framers, I recognize that those who drafted and ratified the Constitution disagreed on virtually every issue that came before them. Nor is it possible, given the paucity of the surviving records, to identify the view held by a majority of the individual Founders. In speaking of the intent of the Founders, I am attempting only "to identify those founding arguments that offer the most coherent interpretation of the ratified arrangements." JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 8 n.9 (1987).

and enforce statutes to which he<sup>28</sup> or his predecessors have assented, or which may have been enacted over his objection.<sup>29</sup>

## 2. *Suspending the Writ of Habeas Corpus*

The Constitution's text provides further evidence that in the Framers' eyes the suspending power could legitimately be exercised only by Congress, not by the Executive. Article I, section 9, clause 2 provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." As first introduced in the Convention, the power to suspend the writ was explicitly vested in "the Legislature."<sup>30</sup> Though in its final form the clause was less specific,<sup>31</sup> nothing in the debates suggests that the revision was meant to abandon the English Bill of Rights' principle reserving the suspending power to the legislature.

The clause's placement within Article I, section 9 is telling. While there are two clauses in section 9 that restrict the President's powers rather than those of Congress, the presidential limitations appear at the very end of the section, as clauses 7 and 8. Clauses 1 and 3 through 6 all clearly pertain to Congress, strongly suggesting that clause 2 was so intended as well. If the Framers had thought that the suspending power generally belonged to the President, one would have expected the restriction on suspending habeas corpus to appear

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28. This historical study uses the male pronoun in referring to the President. The usage merely reflects the fact that all of our Presidents to date have been males.

29. For similar views that the "Take Care" Clause was intended to limit the President's power, see Robert J. Reinstein, *An Early View of Executive Powers And Privilege: The Trial of Smith and Ogden*, 2 HASTINGS CONST. L.Q. 309, 320-21 n.50 (1975); Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power*, 63 B.U. L. REV. 59, 90 & n.151 (1983); William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 491 n.82 (1989); Rosenberg, *supra* note 4, at 627, 693-95; Steven Ross, *Presidential Lawmaking Powers: Vetoes, Line Item Vetoes, Signing Statements, Executive Orders, and Delegations of Rulemaking Authority*, 68 WASH. U. L.Q. 533, 541 (1990) (panel discussion); *In re Sealed Case*, 838 F.2d 476, 524 n.19 (D.C. Cir. 1988) (Ginsburg, J., dissenting); HOUSE COMM. ON GOV'T OPERATIONS, THE EXECUTIVE'S SUSPENSION OF THE COMPETITION IN CONTRACTING ACT IS UNCONSTITUTIONAL, H.R. REP. NO. 138, 99th Cong., 1st Sess., at 10 (1985); John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 402 (1993). *But see* Susan L. Bloch, *The Early Role of the Attorney General in our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 635 n.232 (1989).

30. 2 Farrand, *supra* note 4, at 341.

31. *Id.* at 438.

either at the end of section 9, or in Article II along with other restrictions on the President's powers.<sup>32</sup>

Contemporaries and early commentators on the Constitution read Article I, section 9 as having given the suspending power to Congress, not to the President. In the Massachusetts ratifying convention, those who discussed the clause treated the suspending power as belonging to Congress.<sup>33</sup> In his 1803 edition of *Blackstone's Commentaries*,<sup>34</sup> St. George Tucker explained that "[i]n England," where the right was protected by the Habeas Corpus Act,<sup>35</sup> "the benefit of this important writ can only be suspended by authority of parliament . . . . In the United States, it can be suspended, only, by the authority of congress . . . ." Four years later in *Ex parte Bollman*,<sup>36</sup> John Marshall expressed the same view that the power to suspend the laws is legislative in nature. Noting that the first Congress had authorized federal courts to issue writs of habeas corpus, Marshall surmised that Congress had done so in order to assure that Article I, section 9 was not violated.

Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, *although no law for its suspension should be enacted*.<sup>37</sup>

Similarly, in his 1833 *Commentaries on the Constitution*, Joseph Story noted that "the power is given to congress to suspend the writ of habeas corpus . . . ." <sup>38</sup> Like the suspending power in general, author-

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32. See, e.g., U.S. CONST., art. II, §2, cl. 1 (President may issue reprieves and pardons except in cases of impeachment); U.S. CONST. art. II, §2, cl. 2 (President may make treaties provided two thirds of the Senate concurs). See Berg, *supra* note 24, at 291 (during the Convention "the power of suspension was taken for granted as pertaining to the law-making body. There was no sign whatsoever that the executive was intended to have to do with this matter.").

33. See 2 ELLIOT, *supra* note 24, at 108-09 (remarks of Judge Dana and Judge Sumner).

34. 1 BLACKSTONE, COMMENTARIES, App. at 290-92 (reprint 1965) (St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small 1803).

35. 31 Car. 2, c.2 (May 27, 1679).

36. 8 U.S. (4 Cranch) 75 (1807).

37. *Id.* at 95 (emphasis added).

38. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1336 (Boston, Hilliard, Gray & Co. 1833) (emphasis added). See also THE FOUNDERS' CONSTITUTION 309-43 (Philip B. Kurland & Ralph Lerner eds., 1987) [hereinafter Kurland & Lerner]. When Lincoln suspended the privilege on his own initiative during the Civil War, Chief Justice Taney ruled the action unconstitutional. *Ex parte Merryman*, 17 Cas. 144 (C.C.D. Md. 1861)(No. 9,487). Lincoln later obtained authorization to suspend the privilege from Congress. CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETA-

ity to suspend the writ was universally understood as resting exclusively with the legislative branch.

### 3. *The Rejection of an Absolute Veto*

One of the colonists' principal grievances with the crown was the absolute veto which the king and his American governors could exercise over colonial legislation.<sup>39</sup> The abuse of the absolute veto was so deeply felt that it constituted the basis for the first article of the Declaration of Independence: "He [the king] has refused his assent to laws most wholesome and necessary for the public good." When the colonies broke with England and created new governments, most of them gave the Executive no veto power whatsoever.<sup>40</sup>

The Framers of the Federal Constitution were equally opposed to giving the President an absolute veto. Attempts to confer such a power were repeatedly rejected. A motion by James Wilson to that effect was unanimously defeated by the Committee of the Whole on June 4, 1787.<sup>41</sup> Two weeks later, the delegates declined to take up Alexander Hamilton's plan for an Executive who would possess an absolute veto.<sup>42</sup> And on August 7, the Convention, by a vote of 9 to 1, rejected a similar motion offered by George Read.<sup>43</sup>

Even the qualified veto generated doubt and concern. It is telling that in one of its final acts, the Convention made it easier to override a presidential veto by reducing from 3/4 to 2/3 the majority needed for Congress to pass a law over the President's objection.<sup>44</sup> The change was prompted by fears that a 3/4 requirement "put too much in the

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TION, S. DOC. NO. 82, 92d Cong., 2d Sess. 364-65 (1973); ALFRED H. KELLY & WINFRED A. HARBISON, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* 410-14 (5th ed. 1976). *But see* Paulsen, *supra* note 8, at 91-95 (stating that Lincoln's view that the power to suspend the writ of habeas corpus inheres in the Executive "was at least an arguable one," especially if Congress is not in session).

39. EDWARD C. MASON, *THE VETO POWER* 17-18 (Boston, Ginn 1890); Richard A. Watson, *Origins and Early Development of the Veto Power*, 17 *PRESIDENTIAL STUD. Q.* 401, 404 (1987).

40. There were three exceptions. The 1776 South Carolina Constitution gave the governor an absolute veto but this proved so unpopular that the veto was abolished two years later. New York's constitution of 1777 gave a qualified veto to the Council of Revision composed of the governor, the chancellor, and judges of the Supreme Court. Massachusetts's constitution of 1780 gave the Executive a qualified veto. Watson, *supra* note 39, at 401, 404-05; ROBERT J. SPITZER, *THE PRESIDENTIAL VETO: TOUCHSTONE OF THE AMERICAN PRESIDENCY* 8-10 (1988).

41. 1 Farrand, *supra* note 24, at 98-103.

42. *Id.* at 292.

43. 2 *id.* at 200.

44. *Id.* at 585-87 (Sept. 12, 1787).

power of the President.”<sup>45</sup> This decision to ease the override requirement would have been pointless if the President had an independent power to suspend a law anytime he wished.

The Convention in fact rejected a proposal to give the President a temporary suspending power. On June 4, 1787, after defeating a motion to grant the President an “absolute negative,” the Convention took up Pierce Butler’s motion that a pending resolution providing for a qualified negative “be altered so as to read—‘Resolved that the National Executive have a power to suspend any legislative act for the term of \_\_\_\_.’” The only recorded debate on this motion was Elbridge Gerry’s objection that “a power of suspending might do all the mischief dreaded from the negative of useful laws; without answering the salutary purpose of checking unjust or unwise ones.” “On the question ‘for giving this suspending power’ all the States . . . were—*no*.”<sup>46</sup> The states then voted 8-2 to give the President merely a qualified veto.<sup>47</sup>

That no one ever proposed giving the President a suspending power in *addition* to a qualified veto is hardly surprising. As the Framers well knew, the prerogative of suspending the laws was functionally equivalent to an absolute veto.<sup>48</sup> Nor was the suspending power any less dangerous because it might be used to nullify a law only temporarily, for the decision as to the length of a suspension would rest exclusively with the king. Indeed, as we saw earlier, English kings frequently preferred the suspending power to the absolute veto because it allowed them to obtain funds from Parliament and to then ignore the statutory promises on which the grant of funds had been conditioned.

Nor is the case for a presidential suspending power any stronger if it is confined to laws that are alleged to be unconstitutional. The veto power that the Framers were willing to confer in only qualified form was principally designed as a safeguard against unconstitutional legislation. As Gerry noted at the Convention, “The primary object

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45. *Id.* at 585 (Mr. Williamson); *see also id.* at 586 (Mr. Pinkney).

46. 1 *id.* at 103-04 (emphasis in original).

47. *Id.* at 104.

48. The former was viewed by the crown as executive in nature while the latter is deemed part of the lawmaking process. *See* Charles J. Zinn, *The Veto Power of the President*, 12 F.R.D. 207, 214-15 (1952). Yet both have the immediate effect of blocking measures approved by the legislature. There is this difference between the suspending power and an absolute veto: under the former, a President may later choose to honor the law, while a successfully vetoed bill can never be revived. There is no evidence that the Founders were impressed by this distinction, for at least in the short run (and probably forever) the suspending power is just as devastating as an absolute veto.

of the revisionary check in the President is not to protect the general interest, but to defend his own department."<sup>49</sup> According to Madison, "the object of the revisionary power is [first] to defend the Executive Rights[.]"<sup>50</sup> In *Federalist* No. 73, Hamilton explained that "[t]he primary inducement to conferring the power in question upon the Executive, is to enable him to defend himself . . ."<sup>51</sup> To augment the veto with a power to suspend laws that the President thinks are unconstitutional would render the veto superfluous in the very class of cases for which it was chiefly designed.

By giving the President a qualified rather than an absolute veto, the Framers envisioned that there might be occasions when a President's constitutional objections would be overridden by Congress. In such cases the President is bound to honor and enforce the law despite his constitutional misgivings. As Professor Westel W. Willoughby wrote in 1929:

That there is danger that Congress may by a chance majority, or through the influence of sudden great passion, legislate unwisely or unconstitutionally, was foreseen by those who framed our form of government, and the provision was drawn that the President might at his discretion use a veto, but this was the entire extent to which he was allowed to go in the exercise of a check upon the legislation. It was expressly provided that if, after his veto, two-thirds of the legislature should again demand that the measure become a law, it should thus be, notwithstanding the objection of the Chief Executive. Surely there is here left no further constitutional right on the part of the President to hinder the operation of a law.<sup>52</sup>

Some delegates at the Philadelphia Convention wished to grant the President an absolute veto, but their views were overwhelmingly rejected. James Wilson had urged that "[t]he Executive ought to have an absolute negative. Without such a Self-defence the Legislature can at any moment sink it into nonexistence."<sup>53</sup> Wilson's motion to this effect was unanimously defeated.<sup>54</sup> A similar motion by George Read won support only from Delaware.<sup>55</sup> Yet Wilson continued to press his views when the Constitution was presented to the Pennsylvania ratify-

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49. 2 Farrand, *supra* note 24, at 586.

50. *Id.* at 587.

51. THE FEDERALIST NO. 73, at 443, 445 (Alexander Hamilton) (Clinton Rossiter ed., New American Library 1961); see also SPITZER, *supra* note 40, at 17.

52. 3 WESTEL W. WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES 1503-04 (2d ed. 1929).

53. 1 Farrand, *supra* note 24, at 98.

54. *Id.*

55. 2 Farrand, *supra* note 24, at 200.



ing convention. Addressing that body on December 1, 1787, he contended that the President had the same right as the Judiciary to reject unconstitutional laws.

[I]t is possible that the legislature, when acting in that capacity, may transgress the bounds assigned to it, and an act may pass, in the usual mode, notwithstanding that transgression; but when it comes to be discussed before the judges,—when they consider its principles, and find it to be incompatible with the superior power of the Constitution,—it is their duty to pronounce it void . . . . In the same manner, the President of the United States could shield himself, and refuse to carry into effect an act that violates the Constitution.<sup>56</sup>

This is the only suggestion to be found in the debates of the Federal Convention or the state ratifying conventions to support the proposition that a President possesses an absolute veto over measures that he believes to be unconstitutional.

Alexander Hamilton had seconded Wilson's motion to confer an absolute veto on the President.<sup>57</sup> Yet, in contrast to Wilson, Hamilton acquiesced in the Convention's decision to deny the President a power to completely block measures approved by the Congress. Writing in *Federalist* No. 78, Hamilton noted that once a measure had become law, the Judiciary is the only branch that can decline to enforce it on constitutional grounds.

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice *no other way than through the medium of courts of justice*, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.<sup>58</sup>

Conspicuously absent was any suggestion that the President might refuse to honor such laws, even though all of Hamilton's examples involve criminal statutes uniquely suited to executive inaction.

While James Madison appears to have agreed with Wilson in principle, he opposed giving the President an absolute veto. Madison

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56. 2 ELLIOT, *supra* note 24, at 446. Wilson later repeated this view in his *Lectures on Law*, first published in 1804. See 1 WORKS OF JAMES WILSON 186, 300 (Robert G. McCloskey ed., 1967).

57. 1 FARRAND, *supra* note 24, at 94, 98.

58. THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., New American Library 1961) (emphasis added).

believed that, ideally, each branch of government should possess the ultimate authority to resolve constitutional questions regarding its own sphere of action, so long as rights of the states or individuals were not threatened.<sup>59</sup> This might allow the President to disregard a law that he thought encroached on the executive domain; and the President, not the courts, would have the last word on this constitutional issue. Though Madison later accepted the principle of judicial supremacy,<sup>60</sup> at the time the Constitution was being framed he “denied the right of the courts to overrule another department’s interpretation of the extent of its constitutional powers.”<sup>61</sup> This meant that the President would in effect enjoy an absolute veto over many laws that he believed to be constitutionally objectionable.

Given these views, one might expect Madison to have favored giving the President an absolute veto in cases where the Chief Executive’s opposition to the law was constitutionally based. Instead, Madison objected to Wilson’s proposal for an absolute veto, believing that the public would not stand for it. “To give such a prerogative would certainly be obnoxious to the temper of this country; its present temper at least.”<sup>62</sup>

Madison might have pressed for a compromise under which constitutionally based vetoes would receive greater protection than those resting solely on policy grounds. He outlined such a scheme to Thomas Jefferson, a year after the Federal Convention had adjourned, as part of a proposed constitution for Kentucky.<sup>63</sup> A comparable provision in the Federal Constitution would have meant that policy-based vetoes could, as now, immediately be overridden by the House and Senate.<sup>64</sup> But if a veto rested on constitutional grounds, the measure

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59. EDWARD M. BURNS, *JAMES MADISON: PHILOSOPHER OF THE CONSTITUTION* 157-61 (1973) (quoting from undated manuscript in Madison’s papers).

60. *Observations on Jefferson’s Draft of a Constitution for Virginia*, in 11 *PAPERS OF JAMES MADISON* 281, 284-85 (Robert A. Rutland & Charles F. Hobson eds., 1977); Letter from James Madison to Mr. \_\_\_\_\_, (1834), in 4 *LETTERS AND OTHER WRITINGS OF JAMES MADISON* 349-50 (Philadelphia, J.B. Lippincott & Co. 1865).

61. BURNS, *supra* note 59, at 161.

62. 1 Farrand, *supra* note 24, at 100.

63. Madison proposed giving the Executive and the Judiciary a qualified veto over bills passed by the Assembly; but if either branch rested its veto on constitutional grounds, the law would be suspended until after a new election of the Assembly had occurred; only then could the Assembly vote to override the veto. *Observations on Jefferson’s Draft of a Constitution for Virginia* (with reference to its applicability to the District of Kentucky), in 11 *PAPERS OF JAMES MADISON*, *supra* note 60, at 281, 292-93.

64. Max Farrand mistakenly asserted that Madison’s proposed veto provision for the Kentucky Constitution “[was] identical with the one made in the Federal Convention, on August 15, which was voted down . . . .” 4 Farrand, *supra* note 24, at 81 n.2a. Madison’s

could not become law until both Houses of a newly-elected Congress had repassed it by the requisite majorities. Such a provision would have given the Executive a temporary suspending power over bills the President found constitutionally objectionable.

Instead, the Framers chose not to give special protection to constitutionally based vetoes. Rather than being able to suspend allegedly unconstitutional measures, the President's sole option is to veto such a bill and hope that Congress will sustain him. If the veto is overridden the law must be enforced.

#### 4. *The Executive Power*

In light of the Framers' unbending opposition to an absolute veto and their concern that even a qualified veto might "put too much in the power of the President,"<sup>65</sup> it is virtually inconceivable that they intended the "executive power" conferred by Article II to encompass a prerogative of suspending the laws. To so construe the executive power would effectively render Article I's qualification of the veto meaningless. Such a reading assumes that none of the delegates to the Federal Convention realized the absurdity of their decision to deny the President an absolute veto, and that a similar blindness afflicted the state ratifying conventions. If a suspending power indeed lurked in the shadows of Article II, it went undetected by all of the federal and state delegates except James Wilson, whose lone sighting may have been a case of wishful thinking.

The Framers' conception of the executive power was heavily influenced by the authority belonging to a constitutional English monarch—one whose prerogatives had been successively curtailed over the centuries by the Magna Charta (1215), the Petition of Right (1628), and the Bill of Rights (1689). For 18th century America, this was a natural starting point and one which Thomas Jefferson explicitly adopted in his 1776 draft of a constitution for the state of Virginia. Article II of that proposed constitution described the "executive powers" as embracing "the powers formerly held by the king save only that . . . he shall not possess" certain enumerated "prerogatives" and powers.<sup>66</sup> Since Virginians wished to deny their governor a power to

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August 15th motion did not provide that only a newly-elected Congress could override a veto, nor did it treat constitutionally based vetoes differently than those resting on policy grounds. See 2 Farrand, *supra* note 24, at 294-95, 298.

65. 2 Farrand, *supra* note 24, at 585.

66. Draft of Virginia Constitution, in THOMAS JEFFERSON, 1 PAPERS OF THOMAS JEFFERSON 329, 342, 350 (Julian P. Boyd ed., 1950); THOMAS JEFFERSON, WRITINGS 340-41 (Library of America ed., 1984).

veto bills passed by the assembly, Jefferson had to expressly exclude this power, for it was a prerogative still wielded by the English king.<sup>67</sup> The power to suspend laws, on the other hand, was not among Jefferson's exclusions, for this prerogative had been stripped from the crown by the Bill of Rights of 1689.<sup>68</sup>

The authors of the Federal Constitution designed the presidency against a similar backdrop. When the Convention first took up the question of the Executive, Charles Pinkney voiced fear that the President would become "a Monarchy, of the worst kind, towit an elective one."<sup>69</sup> James Wilson agreed, stating that "[h]e did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers." As Wilson noted, "Some of these prerogatives exercised were of a Legislative nature" and thus properly belonged to Congress. "The only powers he conceived strictly Executive were those of executing the laws, and appointing officers . . . ."<sup>70</sup>

Because it was critical to the Framers that the American Executive not replicate the English Crown, they were careful to specify those respects in which the President's authority was to vary from the British model. Thus, when Hamilton discussed the presidency in *The Federalist* No. 69, he proceeded by comparing each of the President's powers with those of "the king of Great Britain," identifying some areas where the President exercised similar authority, and others

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67. See THE FEDERALIST NO. 73 (Alexander Hamilton); Edmund Burke's letter to the Sheriffs of Bristol (1777), in 2 Kurland & Lerner, *supra* note 68, at 389 ("The king's negative to bills is one of the most indisputed of the royal prerogatives . . . .").

68. That the drafters of the 1776 Virginia Constitution did not intend this omission to be construed as giving the governor a suspending power is made clear by the Virginia Declaration of Rights, §7 of which expressly denied the Executive "all power of suspending laws." *Virginia Constitution* (July 5, 1776), in 1 DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS: THE ANGLO-AMERICAN TRADITION 205 (Zechariah Chafee, Jr., ed., 1963) [hereinafter Chafee]. In final form, the 1776 Virginia Constitution abandoned Jefferson's description of the executive power in favor of language drafted by George Mason. Yet the governor's authority was still defined by reference to the English king. Instead of providing that the governor would possess all royal powers not expressly withheld, the constitution declared that the governor "shall not, under any pretence, exercise any power or prerogative by virtue of any Law, statute, or Custom, of England"—with the exception of a limited power to grant pardons and reprieves. *Virginia Constitution, as adopted*, in 1 PAPERS OF THOMAS JEFFERSON, *supra* note 66, at 380.

69. 1 Farrand, *supra* note 24, at 65. See also Berg, *supra* note 24, at 90 (noting that in the Convention, "the Crown and its powers were a constant point of reference" during the debates concerning the Executive).

70. 1 Farrand, *supra* note 24, at 65-66. This statement appears inconsistent with Wilson's later remark in the Pennsylvania ratifying convention to the effect that the President has the prerogative of refusing to enforce unconstitutional laws. See 2 ELLIOT, *supra* note 24, at 445-46.

where the Chief Executive's powers were inferior.<sup>71</sup> In most of Hamilton's examples the Constitution restricted the President's authority vis-a-vis that of his 18th century English counterpart. Many surviving royal prerogatives were expressly withheld or significantly narrowed, among them the king's authority to confer titles of nobility; the absolute veto; the ability to make treaties and appointments without the consent of the legislature; and the power to declare war.<sup>72</sup> In no instance was the President deemed to possess greater powers than those belonging to George III.<sup>73</sup> Bernard Schwartz was thus surely correct when he wrote:

The Framers of the American Constitution were familiar both with the repudiation of the Stuart claims to absolute prerogative and the more limited prerogative which was conceded in the Crown after the Act of Settlement. It must be presumed that, in their large outlines at least, the conclusions reached in the English experience were incorporated by them in the organic document . . . . Certainly, it was the furthest thing from their intentions to fashion the Executive which they were creating in accordance with the claim for which Charles I lost his life and James II his throne.<sup>74</sup>

Given the Framers' use of Britain as a model, where the text of the Constitution is silent as to the scope of "the executive power," we may seek guidance from those powers still possessed by a late 18th century English monarch. If we do this concerning the suspending power, the issue is quickly resolved. For, as Professor Stimson observed,

The long attempt of the Executive to make laws by orders in Council or by proclamation, or indirectly by suspending laws al-

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71. THE FEDERALIST NO. 69 (Alexander Hamilton).

72. See Gwyn, *supra* note 29, at 480.

73. Richard Pious has suggested that in *Federalist No. 69*, Hamilton deliberately magnified the powers of the British Monarch in order to make those of the President appear modest, and that Hamilton and others who lost the Convention battle for a stronger presidency hoped that in time the vaguely worded "executive power" would expand to royal proportions. RICHARD M. PIOUS, *THE AMERICAN PRESIDENCY* 36-40 (1979). Yet despite Hamilton's preference for an "elective king," there is no indication that he wished the President's authority to be greater than that of a constitutional English Monarch, in which case the Executive would still not possess a power to suspend the laws.

74. 2 BERNARD SCHWARTZ, *A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES, PART I: THE POWERS OF GOVERNMENT* 57 (1963); see Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 13-14 (1993) ("[E]ven advocates of a strong American Chief Executive distanced themselves from the Crown as an acceptable conception of executive authority."). See also STIMSON, *supra* note 26, at 54 ("Hamilton and others" probably intended the "executive power . . . to be given to the president in much the shape that it was enjoyed by a constitutional English king . . .") (emphasis added).

ready existing, may be traced through the history of the middle centuries until they ended in the Bill of Rights. It is now an established constitutional principle that the Executive can neither suspend a law nor suspend a penalty nor even pardon an offence in anticipation of trial.<sup>75</sup>

This was also the conclusion reached by the United States Circuit Court in *United States v. Smith*,<sup>76</sup> an 1806 decision written by Supreme Court Justice William Paterson. The case involved a prosecution under the Neutrality Act in which defendants claimed that their conduct had been authorized by President Jefferson. In an effort to prove this, they subpoenaed Secretary of State Madison and several other Cabinet members. When none of them appeared, the defendants sought to postpone the trial until the secretaries were made available.<sup>77</sup> The court denied the motion on the ground that the President cannot suspend or dispense with the laws. Even if Jefferson had approved defendants' conduct, this would not have constituted a defense to the crime.

Justice Paterson had been a prominent member of the Federal Convention as a delegate from New Jersey.<sup>78</sup> In his opinion for the circuit court, he noted that the law under which defendants were charged

imparts no dispensing power to the president. Does the constitution give it? Far from it, for it explicitly directs that he shall "take care that the laws be faithfully executed." . . . True, a nolle prosequi may be entered, a pardon may be granted; but these presume criminality, presume guilt, presume amenability to judicial investigation and punishment, which are very different from a power to dispense with the law.<sup>79</sup>

In short, said Paterson,

The president of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids. If he could, it would render the execution of the laws dependent on his will and pleasure; which is a doctrine that has not been set up, and will not meet with any supporters in our government.<sup>80</sup>

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75. STIMSON, *supra* note 26, at 48, 52-53.

76. 27 F. Cas. 1192 (C.C.D.N.Y. 1806) (No. 16,342).

77. See generally Reinstein, *supra* note 29, at 309.

78. On Paterson's role in the making of the Constitution, see MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 18-19, 200 (1913); Reinstein, *supra* note 29, at 325-26 n.70.

79. *Smith*, 27 F. Cas. at 1229-30.

80. *Id.* at 1230.

The decision in *Smith* accurately reflected the thinking of the times. Under the plan created by the Framers, the President was given other ways to deal with allegedly unconstitutional laws short of refusing to honor them.

### C. The Suspending Power and the Bill of Rights

If the Framers were opposed to giving the President authority to suspend the laws, one may wonder why they failed to include a prohibition against this power in the Bill of Rights of 1791. Many of the states, in writing new constitutions after the break with England, copied the English Bill of Rights by expressly denying the Executive a power to suspend the laws.<sup>81</sup> The Virginia Declaration of Rights of 1776 was typical; it provided: “[t]hat all power of suspending laws, or the execution of laws, by any authority without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.”<sup>82</sup> Why was no comparable provision placed in the Federal Bill of Rights? The answer appears to be that not even the most ardent Antifederalists feared that the Constitution of 1787 had given the President a power to suspend the laws. As a result, while many of the other state bill of rights provisions found their way into the Federal Constitution, a proscription of the suspending power was not among them.

The various state ratifying conventions proposed more than 200 amendments to the Federal Constitution. These included proposals from Virginia and North Carolina to expressly deny the President authority to suspend a law.<sup>83</sup> In June 1788, the Virginia ratifying conven-

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81. See VA. DECLARATION OF RIGHTS § 7 (1776), reprinted in 1 Chafee, *supra* note 68, at 205; DEL. DECLARATION OF RIGHTS § 7 (1776), reprinted in 1 Chafee, *supra* note 68, at 206, 208; MD. CONST. § VII, reprinted in 1 Chafee, *supra* note 68, at 210-11; N.C. CONST. § V (1776), reprinted in 1 Chafee, *supra* note 68, at 216; MASS. BILL OF RIGHTS, pt. I, art. XX (1780), reprinted in 1 Chafee, *supra* note 68, at 237, 241; N.H. CONST. § XXIX (1784), reprinted in 1 Chafee, *supra* note 68, at 223; VT. CONST. ch. I, art. XVII (1786), reprinted in 9 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 499 (William F. Swindler ed., 1979); PA. CONST. ART. IX, § XII (1790), reprinted in 1 Chafee, *supra* note 68, at 225, 229. As of 1908, twenty state constitutions still provided that laws may be suspended only by the legislature or by authority derived from it. STIMSON, *supra* note 26, at 291-92.

82. 1 Chafee, *supra* note 68, at 205.

83. EDWARD DUMBAULD, THE BILL OF RIGHTS AND WHAT IT MEANS TODAY 164 (1957). In Maryland, a similar provision was proposed but never approved by the ratification convention. CONTEXTS OF THE BILL OF RIGHTS 73, 129 (Stephen L. Schechter & Richard B. Bernstein eds., 1990); Gregory A. Stiverson, “To Maintain Inviolable Our Liberties”: Maryland and the Bill of Rights, in THE BILL OF RIGHTS AND THE STATES: COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES 370, 391-94 (Patrick T. Conley & John P. Kaminski eds., 1992).

tion recommended that the Constitution be amended to add a Bill of Rights closely modelled after its Declaration of Rights.<sup>84</sup> A short time later, the North Carolina ratifying convention “adopted, word for word, the Virginia amendments,” including the ban on the suspending power.<sup>85</sup>

The Virginia and North Carolina conventions appear to have included the suspending power ban only as a formal recitation of Virginia’s Declaration of Rights. After listing virtually all of the rights contained in the Virginia Declaration, both conventions proposed 20 specific amendments to the body of the Federal Constitution.<sup>86</sup> Thomas Jefferson later wrote that the Virginia delegates had annexed the state’s Bill of Rights to their ratification, “not by way of Condition, but to announce their attachment to them.”<sup>87</sup> This perhaps explains the curious fact that in the Virginia debates, not a single delegate expressed a belief that the Constitution had given the President a suspending power. No one in the Virginia proceedings defended the need for the ban, and the only delegates who addressed the matter urged that the provision was unnecessary. In North Carolina the ban on the suspending power was not discussed at all.

Several Virginia delegates urged that there was no need for a federal bill of rights or for a specific ban against the suspending power. The Constitution gave the national government only certain enumerated powers, in contrast to England and Virginia whose governments possessed all powers not expressly withheld. As George Nicholas explained, “In England, in all disputes between the king and people, recurrence is had to the enumerated rights of the people, to determine. Are the rights in dispute secured? Are they included in Magna Charta, Bill of Rights, &c.? If not, they are, generally speaking, within the king’s prerogative.”<sup>88</sup> The same was true under the Virginia Constitution, for “all powers were given to the government without any exception.”<sup>89</sup> In such cases, a bill of rights is essential to placing limits on the authority of government. By contrast, said Nicholas, at the federal level, “the reverse of the proposition holds. Is the disputed right enumerated? If not, Congress cannot meddle with

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84. 3 ELLIOT, *supra* note 24, at 657-63.

85. 4 ELLIOT, *supra* note 24, at 226, 243, 251.

86. See DUMBAULD, *supra* note 83, at 21, 182-85.

87. Letter from Thomas Jefferson to William Short (Sept. 20, 1788), in 13 PAPERS OF THOMAS JEFFERSON 619 (Julian P. Boyd ed. 1956).

88. 3 ELLIOT, *supra* note 24, at 246.

89. *Id.* at 450.



it.”<sup>90</sup> In this sense, he continued, the “Constitution itself contains an English Bill of Rights . . . . The English Declaration of Rights provides that no laws shall be suspended. The Constitution provides that no laws shall be suspended, except one, and that in time of rebellion or invasion, which is the writ of habeas corpus.”<sup>91</sup> While Nicholas did not specify which branch possessed this limited suspending power, what is important is his unchallenged assumption that the President had not been given a general authority to suspend the laws.

John Marshall agreed with Nicholas that the Constitution had not conferred on the President a power to suspend the laws. In defending the creation of a federal judiciary, the future Chief Justice anticipated the decision he would write for the Supreme Court in *Marbury v. Madison*<sup>92</sup> fifteen years later. Marshall noted that the federal courts would offer protection should Congress exceed its powers under the Constitution. “If they were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard . . . . They would declare it void.”<sup>93</sup> Moreover, he said, the federal judiciary is the only branch that can provide relief in these instances. “To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary? *There is no other body that can afford such a protection.*”<sup>94</sup> Marshall thus rejected the idea that the President had authority to prevent the enforcement of an unconstitutional law.

Despite the objections of Nicholas and Marshall, the suspending power ban remained part of Virginia’s proposed federal bill of rights. In its closing hours, the Virginia convention enjoined the state’s delegation “to exert all their influence, and use all reasonable and legal methods” to secure adoption of the proposed amendments.<sup>95</sup> Yet the suspending power provision was one of the few which Virginia’s Representatives and Senators did not press for when the first Congress convened in 1789.

The Virginia amendments were of special importance to James Madison. Not only had he been a member of the Virginia ratifying convention, but his election to the House of Representatives was due in large part to his campaign promise to support Virginia’s proposed

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90. *Id.* at 246.

91. *Id.*

92. 5 U.S. (1 Cranch) 137 (1803)

93. 3 ELLIOT, *supra* note 24, at 553.

94. *Id.* at 554 (emphasis added).

95. *Id.* at 661.

amendments to the Constitution.<sup>96</sup> In June 1789, Madison fulfilled this promise by offering Congress a set of proposed amendments that included many of the changes recommended by his state. However, Madison excluded "the political generalities set forth in the first seven articles, and in the Tenth and Twelfth."<sup>97</sup> The omission of the suspending power ban strengthens the conclusion that Virginia's ratifying convention did not really believe the President had been given a suspending power. The ban had been offered as a mere formality.<sup>98</sup>

This conclusion draws further support from the conduct of Virginia's Senators after a proposed federal Bill of Rights had emerged from the House. According to a contemporary observer, it was "the Virginians who have been the great movers in amendments."<sup>99</sup> The state's Senators, William Grayson and Richard Henry Lee, sought to add to the amendments approved by the House virtually all of the Virginia convention recommendations Madison had left out.<sup>100</sup> Yet they chose to abandon Articles VI and VII, both of which had been copied from the Virginia Bill of Rights. Article VI declared that the election of legislators should be free and frequent, that men with sufficient attachment to the community should enjoy the right to vote, and that there should be no taxation or legislation without representation.<sup>101</sup> These political principles were honored by Article I of the Constitution and were thus superfluous in the federal context. It seems plausible that Article VII, the suspending power ban, was

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96. See Letter from James Madison to Thomas Mann Randolph (Jan. 13, 1789), in 12 PAPERS OF JAMES MADISON, *supra* note 60, at 415-17; 12 PAPERS OF JAMES MADISON, *supra* note 60, at 301-04; JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 425-26 (1971); Kenneth R. Bowling, "A Tub to the Whale": The Adoption of the Bill of Rights, in THE BILL OF RIGHTS AND THE STATES: COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES, *supra* note 83, at 46, 48-49.

97. DUMBAULD, *supra* note 83, at 23.

98. Besides recommending a bill of rights of twenty articles, the Virginia convention proposed twenty other amendments of which Madison accepted only five. DUMBAULD, *supra* note 83, at 47 n.14. All but two of the 40 Virginia recommendations were either included by Madison or proposed as additional amendments by Virginia's two Senators.

99. Letter from Rep. Benjamin Goodhue to Samuel Phillips (Sept. 13, 1789); in CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 294 (Helen E. Veit et al. eds., 1991).

100. DUMBAULD, *supra* note 83, at 47 & n.14; Letter from Richard Henry Lee to Patrick Henry (Sept. 14, 1789), in CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS, *supra* note 99, at 295-96; Letter from Richard Henry Lee and William Grayson to the Speaker of the Virginia House of Delegates (Sept. 28, 1789), in CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS, *supra* note 99, at 299-300 & n.1.

101. 3 ELLIOT, *supra* note 24, at 658.

dropped for the same reason.<sup>102</sup> There was simply no perceived need to bar the President from exercising a suspending power in a Constitution which granted him only a qualified veto, and which enjoined him to “take care that the laws be faithfully executed.”

In short, the failure of the first Congress to include a prohibition against the suspending power in the Federal Bill of Rights did not reflect a belief that such authority rightfully belonged to the President. Instead, it appears that there was a widespread understanding that the Constitution had not given the Chief Executive a suspending power of any kind, and that it was therefore unnecessary “to provide against the exercise of a power which did not exist.”<sup>103</sup>

#### D. The Constitution as Higher Law

Some have nevertheless contended that the President’s Article II duty to execute “the Laws” is qualified by the Supremacy Clause of Article VI, which provides that only those statutes “made in Pursuance of” the Constitution are “the supreme Law of the Land.” A congressional enactment that conflicts with the Constitution is not a “law,” and the President is not obliged—or indeed even permitted—to execute it.<sup>104</sup> The argument builds on *Marbury v. Madison*, where the Supreme Court held that the federal judiciary may not enforce those laws which it determines to be violative of the Constitution. What is good for the Court is good for the President. As Judge Frank Easterbrook summarized the argument, the lesson of *Marbury* “was essentially: ‘Every man for himself.’ Each official owes the same duty to the hierarchy and must make his own decision.”<sup>105</sup> Accordingly,

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102. While it is theoretically possible that Article VII was dropped because the founding generation secretly wished to give the President a suspending power, there is not a shred of support for this conclusion. In light of all of the other evidence as to the Framers’ intent, it is far more likely that Article VII was deemed to be superfluous in the federal setting.

103. 3 ELLIOT, *supra* note 24, at 600.

104. See, e.g., RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH 308 (1974); Easterbrook, *supra* note 8, at 919-22; Sidak & Smith, *supra* note 9, at 452. This position was adopted by the Reagan and Bush administrations to defend their refusal to enforce laws the President believed to be unconstitutional. See *GAO Bid Protest Hearings*, *supra* note 9, at 318, 329; William P. Barr, *Attorney General’s Remarks, Benjamin N. Cardozo School of Law, November 15, 1992*, 15 CARDOZO L. REV. 31, 39 (1993); Edwin Meese, *On Separation of Powers: President’s Right to Challenge a Law*, N.Y. TIMES, May 21, 1985, at A26 (letter to editor). This argument is rejected by others. See, e.g., 3 WILLOUGHBY, *supra* note 54 at 1502-04; EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1957 68-72 (Randal W. Bland et al. eds., 5th rev. ed. 1984); Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 VAND. L. REV. 389, 397-98 (1987).

105. Easterbrook, *supra* note 8, at 920. See also Theodore Olson, *Presidential Lawmaking Powers: Vetoes, Line Item Vetoes, Signing Statements, Executive Orders, and Delegations*

the President can't kowtow to Congress' view any more than the Court will. Especially given the unique presidential oath to the Constitution in article II, section 1, clause 7: "I do solemnly swear 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." Nothing there about executing laws while ignoring the Constitution!

This argument for "presidential review," as Judge Easterbrook frankly admits, rests on "arid logic."<sup>106</sup> But even as a matter of logic, the claim that a President's obligation to execute the laws is qualified by the Supremacy Clause encounters a number of difficulties. First, the clause is addressed to the states, not to federal officials.<sup>107</sup> The clause was debated solely in the context of ensuring the supremacy of federal over state law, without any "discussion of the relationship between the Constitution and national legislation."<sup>108</sup> Therefore, even when coupled with the oath to "preserve, protect and defend the Constitution," the clause gives the President no warrant to ignore acts of Congress that he thinks are invalid. Moreover, the clause speaks only to "the Judges," not to executive branch officials. This narrowness of focus reflects the prevailing hostility to an executive suspending power, one which many state constitutions of the era outlawed in express terms. By addressing the Supremacy Clause solely to judges, the Framers were careful not to give executive officials a pretext for evading their duty to honor and enforce the laws.<sup>109</sup>

Quite apart from its intrinsic difficulties, the argument from logic is totally divorced from the scheme which the Founders envisioned

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*of Rulemaking Authority*, 68 WASH. U. L.Q. 533, 550 (1990). *But see*, Strauss, *supra* note 8, at 121-22 (The oath argument begs the question as "[i]t is perfectly plausible to say that the Constitution sometimes requires the President to enforce a law that he considers, on balance, to be unconstitutional. If that is what the Constitution requires, then the oath requires the President to enforce the law—not to defy the law in pursuit of his own interpretation of the Constitution.").

106. Easterbrook, *supra* note 8, at 922. Judge Easterbrook's argument from logic is supplemented with "history," but that history primarily involves events occurring well after the framing of the Constitution. *Id.* at 914-16.

107. Judge Easterbrook acknowledges this but suggests that "the clause implies a structure binding every public officer." *Id.* at 919.

108. SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* 40-41 (1990). Judge Easterbrook recognizes this difficulty but maintains that "[a]ll officers take an oath to that heirarchy." Easterbrook, *supra* note 8, at 919.

109. In addition, the reference to laws "made in Pursuance" of the Constitution was probably not intended as an invitation to state judges (or anyone else) to overturn federal laws they thought unconstitutional, but instead meant only that "statutes must carry the outer indicia of validity lent them by enactment in accordance with the constitutional forms. If so enacted, a federal statute is constitutional." ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 9-10 (1962).

and created. If we were to examine the Constitution without the light shed by the records of the Federal Convention, without the input of the state ratifying conventions, and without even a glance at the British history from which the Founders drew inspiration—in short, if we were to read the Constitution in a vacuum—the logic of *Marbury* might suggest that we are to “equate[ ] the President with the judges in ability and authority to set the Constitution over a statute.”<sup>110</sup> Yet this was not the plan adopted by the Convention. The Framers did not write on a clean slate, but on one which contained the indelible traces of four hundred years of English constitutional history. In a case like this, as Holmes once wrote, “a page of history is worth a volume of logic.”<sup>111</sup>

There is little doubt but that the Founders viewed the Constitution as a paramount law that would trump measures inconsistent with it.<sup>112</sup> Alexander Hamilton, writing in *Federalist* No. 78, explained that “every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid.”<sup>113</sup> In the same vein, John Marshall declared for the Court in *Marbury* that “a law repugnant to the constitution is void.”<sup>114</sup>

Given this vision of the Constitution as higher law, the Framers might have created a structure in which the Executive and Judiciary would each have a right to ignore acts of Congress that they thought violative of the Constitution. This was not the plan they adopted. While the Framers repeatedly recognized that the federal courts could refuse to honor unconstitutional laws,<sup>115</sup> the record is virtually devoid of evidence suggesting that the President was to enjoy a similar

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110. Easterbrook, *supra* note 8, at 922.

111. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

112. See GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC* 453-63 (1969); SNOWISS, *supra* note 108, at 13-44.

113. *FEDERALIST* No. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., New American Library 1961).

114. *MARBURY V. MADISON*, 5 U.S. (1 Cranch) 137, 180 (1803).

115. See, e.g., BICKEL, *supra* note 109, at 15-16 (“[I]t is as clear as such matters can be that the Framers of the Constitution specifically, if tacitly, expected that the federal courts would assume a power . . . to pass on the constitutionality of actions of the Congress and the President . . . . Moreover, not even a colorable showing of decisive historical evidence to the contrary can be made.”); PAUL M. BATOR ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 9 (2d ed. 1973) (“The grant of judicial power was to include the power, where necessary in the decision of cases, to disregard state or federal statutes found to be unconstitutional. Despite the curiously persisting myth of usurpation, the Convention’s understanding on this point emerges from its records with singular clarity.”); SNOWISS, *supra* note 108, at 38-40.

power.<sup>116</sup> The authority to void acts of Congress on the ground that they violate the Constitution was not delegated to the executive branch.<sup>117</sup>

This understanding is reflected in the Convention debates surrounding the proposed Council of Revision, on which Supreme Court Justices would have exercised the veto power jointly with the President. Some thought it inappropriate to give the justices two opportunities to reject a law, first as members of the Council, and then in a judicial role. Elbridge Gerry, for one, expressed “doubts whether the Judiciary ought to form a part of it, as they will have a sufficient check against encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality.”<sup>118</sup> Luther Martin likewise objected that “as to the Constitutionality of laws, that point will come before the Judges in their proper official character. In this character they have a negative on the laws. Join them with the Executive in the Revision and they will have a double negative.”<sup>119</sup> Colonel Mason was untroubled by the fact that this would give the judges “a double negative,” since as judges

[T]hey could impede in one case only, the operation of laws. They could declare an unconstitutional law void. But with regard to every law however unjust or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it a free course . . . .<sup>120</sup>

If the delegates had envisioned that the President, too, could disregard laws he thought unconstitutional, the same “double negative” argument would surely have been raised as to him. However, no one suggested that in addition to asserting a qualified veto, the President could block an allegedly unconstitutional law simply by declining to enforce it. Instead, under the plan of the Convention, the Executive and the Judiciary were each given one means of checking measures

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116. The only evidence supporting such a presidential prerogative is James Wilson’s statement before the Pennsylvania ratifying convention. 2 ELLIOTT, *supra* note 24, at 445-46. As noted earlier, Wilson was one of the prime movers at the Philadelphia Convention to give the President an absolute veto. The view he expressed in the state convention must be discounted as containing a measure of wishful thinking, particularly in the absence of supporting evidence from any other delegates to the Federal Convention.

117. See also FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., New American Library 1961) (there is “no other way than through the medium of courts” to void a law on the ground that it is unconstitutional); 3 ELLIOTT, *supra* note 24, at 553-54 (John Marshall advises the Virginia Convention that only the courts can declare an act of Congress to be void).

118. 1 Farrand, *supra* note 24, at 97.

119. 2 *id.* at 76.

120. 2 *id.* at 78.

that they believe to be unconstitutional: the President, through a qualified veto, may seek to prevent a bill from becoming law; the courts, by the exercise of judicial review, may refuse to enforce such a law in deciding cases before them.<sup>121</sup>

The two branches might have enjoyed parity in terms of their ability to oppose measures they thought unconstitutional had the Council of Revision plan been adopted. For if the Judiciary had been authorized to share the veto power with the President, James Madison believed that the Convention would then have denied the courts a second chance to pass on the constitutionality of laws.<sup>122</sup>

The Executive and the Judiciary would also have stood on roughly equal footing had the President been given an absolute veto. Each department would then have had an unqualified right to block measures they thought unconstitutional: the President by preventing a bill from becoming law, the judges by refusing to honor the law. By opting instead to give the President only a qualified veto, while recognizing the courts' power to disregard unconstitutional laws, the Framers deliberately created a scheme in which the federal judiciary was to play a unique and in some ways superior role in the process of constitutional review. This disparity reflected the Framers' unwillingness to confer on the President the equivalent of a royal suspending power which had been stripped from the kings of England a century before.

#### **E. The Framers' Conception: A Summary**

The argument that a President may refuse to enforce laws he believes to be unconstitutional is but a reincarnation of the claimed royal prerogative of suspending the laws which was abolished in England by the Bill of Rights of 1689. While the American Constitution does not expressly deny such authority to the President, a fair reading of that document, the history that preceded it, and the debates surrounding its adoption makes clear that the Framers did not intend to confer such a power on the Chief Executive.<sup>123</sup> The President's Article II

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121. Cf. *GAO Bid Protest Hearings*, *supra* note 9, at 25 (statement of Mark Tushnet noting that President would have "two or more bites at the apple" if he could invoke the Constitution in deciding whether to veto a bill, and again in deciding whether to comply with the statute).

122. Letter from James Madison to James Monroe (Dec. 27, 1817), in 3 *LETTERS AND OTHER WRITINGS OF JAMES MADISON*, *supra* note 60, at 56 (The Council of Revision plan would have given judges "a qualified negative on Legislative bills. Such a control, restricted to Constitutional points, . . . would have precluded the question of a judiciary annulment of Legislative acts." ).

123. That the Constitution denies Presidents the prerogative of suspending the laws does not necessarily mean the Chief Executive lacks other prerogative powers. The pre-

duty to insure that the laws are “faithfully executed,” the assumption implicit in Article I, section 9 that the suspending power belongs to Congress, the grant to the President of a qualified rather than an absolute veto, the Framers’ concept of “the executive power,” and the failure of even the staunchest Antifederalists to press for a ban against the suspending power in the Bill of Rights—all point to one verdict: the Constitution does not give the President a suspending power, not even where the Chief Executive may think that a particular law is unconstitutional.<sup>124</sup>

The Constitution arguably allows the Executive to ignore an allegedly invalid law under very limited conditions. While the Framers anticipated that a veto based on constitutional grounds might be overridden, they may also have expected that such constitutional disagreements between Congress and the President would be resolved by the courts.<sup>125</sup> To the extent this is true, a President would be justified in disregarding an allegedly unconstitutional law where there would otherwise be no “case or controversy” through which judicial review could occur.<sup>126</sup> Such presidential action would be distinguishable from the practices condemned by the Bill of Rights of 1689, for a royal suspension of the law could not be reviewed by any other body. By contrast, if a court disagreed with the President and found the statute to be valid, the Executive would then have to enforce the statute

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rogative of vetoing bills, for example, has survived in modified form. On the extent to which the President possesses other prerogative powers, see Berg, *supra* note at 24, 416-527; DANIEL P. FRANKLIN, EXTRAORDINARY MEASURES: THE EXERCISE OF PREROGATIVE POWERS IN THE UNITED STATES 41-70 (1991); ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY (1973); 2 SCHWARTZ, *supra* note 74, at 56-85; Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385 (1989).

124. For others who have reached this conclusion, though not always by identical reasoning, see 3 WILLOUGHBY, *supra* note 54 at 1502-04; CORWIN, *supra* note 104, at 68-72; Eugene Gressman, *Take Care, Mr. President*, 64 N.C. L. REV. 381 (1986); Rex E. Lee, *The Provinces of Constitutional Interpretation*, 61 TUL. L. REV. 1009, 1012-15 (1987); Miller, *supra* note 104, at 396-98; Arthur S. Miller & Jefferey H. Bowman, *Presidential Attacks on the Constitutionality of Federal Statutes: A New Separation of Powers Problem*, 40 OHIO ST. L.J. 51, 72 (1979); Memorandum from Raymond J. Calada, Congressional Research Service, Library of Congress, to House Comm. on Gov't Operations (Feb. 6, 1985), *reprinted in GAO Bid Protest Hearings*, *supra* note 9, at 554-55.

125. *But cf.* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 266-70, 368-71 (1980) (arguing that the Framers expected “political interplay between the two branches—rather than judicial intervention—to maintain the proper balance of legislative and executive power,” and that a President’s refusal to comply with a law on constitutional grounds poses a political question“); TULIS, *supra* note 27, at 43-45 (“The founders urged that ‘line-drawing’ among spheres of authority be the product of political conflict among the branches, not the result of dispassionate legal analysis.“).

126. *See infra* Part III.A.



under *Marbury v. Madison*.<sup>127</sup> On the other hand, if the court agreed that the law was unconstitutional, the Judiciary rather than the Executive would take responsibility for the measure's nonenforcement. In either case, the President's suspension of the law would be of only temporary duration.

#### F. Presidential Invocation of the Constitution

To say that the President may not ignore any law he thinks unconstitutional is not to render meaningless his obligation to "preserve, protect and defend the Constitution." *Marbury* rightly noted "that courts, as well as other departments, are bound by that instrument."<sup>128</sup> Though the President cannot invoke the Constitution as a basis for refusing to honor and enforce an act of Congress, there are many legitimate ways in which the Constitution may serve as a guide to executive action.

Presidents have taken the Constitution into account in a variety of settings unrelated to the adoption and enforcement of laws.

*Appointments:* In 1793, President Washington withdrew his nomination of William Paterson for Associate Justice of the Supreme Court upon realizing that the appointment violated Article I, §6. The office of Associate Justice had been created by Congress while Paterson was a Senator, and his term had not yet expired. In his message of withdrawal, Washington stated: "I deem the nomination to have been null by the Constitution."<sup>129</sup>

*Pardons:* Shortly after taking office, Thomas Jefferson granted full and unconditional pardons to those convicted under the Alien and Sedition Acts because he believed that the Acts violated the free speech provision of the First Amendment.<sup>130</sup>

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127. 5 U.S. (1 Cranch) 137 (1803) (holding Supreme Court to be final arbiter as to meaning of Constitution when there is a conflict between the branches as to its proper interpretation). See *supra* note 8; Strauss, *supra* note 8, at 123-24 (Almost everyone, including advocates of executive autonomy in construing the Constitution, "acknowledges that the executive branch must comply with specific judgments of the Supreme Court (and even the lower courts)."); see also *infra* note 666.

128. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803).

129. Message of Feb. 28, 1793, in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 129 (James D. Richardson, ed., 1897) [hereinafter MESSAGES AND PAPERS]; 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 102-03 n.2 (rev. ed. 1937).

130. Letter from Thomas Jefferson to Abigail Adams (July 22, 1804), in 11 THE WRITINGS OF THOMAS JEFFERSON 43-44 (Andrew A. Lipscomb ed., 1905); JAMES M. SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 268-69 & n.67, 358 n.84 (1956).

*Congressional Resolutions:* Presidents have frequently cited the Constitution in refusing to comply with a resolution of one House of Congress. George Washington, in March, 1796, decided to ignore a House resolution requesting documents pertaining to negotiation of the Jay Treaty, explaining that compliance would infringe upon the Executive's Article II treaty-making power.<sup>131</sup> President Madison declined, on constitutional grounds, to honor a Senate resolution asking that he confer with a Senate committee concerning the nomination of a minister to Sweden.<sup>132</sup>

Moreover, even in connection with legislation, a President has a range of legitimate options for dealing with bills or laws that he believes are unconstitutional, short of refusing to comply with a statute on these grounds.

*Shaping Legislation:* The President can use his enormous prestige and influence with Congress, including the threat of a veto, to help ensure that measures he thinks unconstitutional never reach his desk.<sup>133</sup> John Kennedy successfully lobbied Congress to delete a provision from a military procurement bill that would have "directed" the Air Force Secretary to spend "not less than \$491 million during Fiscal Year 1963" on the B-70 bomber. Kennedy, who opposed development of the aircraft, argued that such mandatory language infringed his authority as Commander-in-Chief. As finally approved, the act "authorized" rather than "directed" expenditure of the sum in question.<sup>134</sup>

*Veto:* Numerous presidential vetoes have rested on constitutional grounds.<sup>135</sup> The first veto, issued by George Washington in 1792, rejected a bill apportioning the House of Representatives on the ground that it did not comply with Article I, section 2.<sup>136</sup> James

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131. Message of March 30, 1796, in 1 MESSAGES AND PAPERS, *supra* note 129, at 186-88.

132. Message of July 6, 1813, in 2 MESSAGES AND PAPERS, *supra* note 129, at 515-16.

133. GEORGE C. EDWARDS III, PRESIDENTIAL INFLUENCE IN CONGRESS (1980); PIOUS, *supra* note 73, at 176-202.

134. See EDWARD A. KOLODZIEJ, THE UNCOMMON DEFENSE AND CONGRESS, 1945-1963, 405-19 (1966); LOUIS FISHER, PRESIDENTIAL SPENDING POWER 163-65 (1975); see also *infra* note 374.

135. See Watson, *supra* note 39, at 408; CHESTER J. ANTIEAU, THE EXECUTIVE VETO 98 n.1 (1988) (noting that the first ten presidential vetoes were based on constitutional objections). No attempt has been made here to identify the total number of vetoes that have been based wholly or in part on constitutional grounds. Part II.A of this Article, *infra*, analyzes the constitutionally based vetoes that have been overridden by Congress.

136. Message of April 5, 1792, in 1 MESSAGES AND PAPERS, *supra* note 129, at 116. The clauses of Article I, §2 that Washington believed were violated provided that "[r]epresentatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers," and that "[t]he number

Madison vetoed three public bills—all for constitutional reasons; two were measures to support churches,<sup>137</sup> while the third involved internal improvements.<sup>138</sup> Congress has at times responded by passing a new bill that cures the alleged defect. Twelve days after vetoing an Army appropriations bill on constitutional grounds, Woodrow Wilson signed a revised bill from which the offending provision had been removed.<sup>139</sup>

*Withholding Signature:* Instead of vetoing a bill to which he has constitutional objections, a President may hold the bill for ten days so that it becomes law without his signature. He might then issue a statement identifying the constitutional defect that caused him to withhold his name from the measure.<sup>140</sup>

*Signing Statements:* Presidents have frequently signed bills into law and issued statements explaining that they viewed portions of the measure as unconstitutional. The issuance of such signing statements, though rare in the 19th century, has become a commonplace during the latter half of this century.<sup>141</sup>

*Amendment or Repeal:* Article II, section 3 of the Constitution gives a President the power to “recommend . . . such Measures as he shall judge necessary and expedient . . .” This authority may be used to urge the amendment or repeal of laws that the Executive believes are unconstitutional. Such efforts may be aimed at statutes passed during a prior administration,<sup>142</sup> or at a law enacted over the President’s veto, or which the Executive signed despite his constitutional

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of Representatives shall not exceed one for every thirty Thousand . . .” U. S. CONST. art. I, cl. 2.

137. Message of Feb. 21, 1811, in 2 MESSAGES AND PAPERS, *supra* note 129, at 474-75; Message of Feb. 28, 1811, in 2 MESSAGES AND PAPERS, *supra* note 129, at 475.

138. Message of March 3, 1817, in 2 MESSAGES AND PAPERS, *supra* note 129, at 569-70.

139. See Message of Aug. 17, 1916, in 38 PAPERS OF WOODROW WILSON 40-42 (Arthur S. Link ed., 1982); Statement of Aug. 29, 1916, in 38 PAPERS OF WOODROW WILSON, *supra* at 101-02.

140. See U.S. CONST. art. I, §7, cl. 2. Presidents have issued statements explaining why they were allowing a bill to become law without their signature. See, e.g., Ulysses S. Grant, Message of Feb. 15, 1871, in 9 MESSAGES AND PAPERS, *supra* note 129, at 4076-77. I have found no case where a President stated that he let a bill become law without his signature because it was unconstitutional.

141. See *infra* part II.B.1 and Table 2.

142. A number of Presidents urged Congress to repeal the Tenure of Office Act, ch. 353, 24 Stat. 500 (1887), adopted during Andrew Johnson’s administration, arguing that it unconstitutionally limited the Executive’s power to remove federal officers. See, e.g., Ulysses S. Grant, Message of Dec. 6, 1869, in 9 MESSAGES AND PAPERS, *supra* note 129, at 3992; Rutherford B. Hayes, Message of Dec. 6, 1880, in 10 MESSAGES AND PAPERS, *supra* note 129, at 4557; Grover Cleveland, Message of March 1, 1886, in 11 MESSAGES AND PAPERS, *supra* note 129, at 4960-68.

doubts. President Truman, believing that a legislative ban against paying salaries to two federal employees constituted a bill of attainder in violation of Article I, section 9, signed the measures into law but subsequently persuaded Congress to drop the ban.<sup>143</sup>

*Judicial Review:* A President who believes that a law is unconstitutional can try to give the Judiciary an opportunity to rule on the question. If a suit is brought to challenge the measure, the administration might defend the law but at the same time inform the court that the President believes it to be invalid.<sup>144</sup> The Executive has at times refused to defend the statute in court and even argued that it is unconstitutional.<sup>145</sup> While some of these options raise difficulties of their own, all stop short of a President's taking the extreme step of refusing to enforce the law.

### G. Two Constitutions

We have seen that the Framers rejected the notion that a President may refuse to honor those laws that he thinks are unconstitutional. While this was the original understanding, the meaning of the Constitution is subject to change over time.<sup>146</sup> As the Court observed

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143. See Statement of May 12, 1949, in 1949 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, 250 & n. (1964) [hereinafter PUB. PAPERS].

144. The Nixon administration took this approach with respect to the 1970 Voting Rights Act Amendments, PUB. L. NO. 91-285, 84 Stat. 314 (1970). Nixon signed the bill but objected that some of its provisions were unconstitutional. Statement of June 22, 1970, in 1970 PUB. PAPERS 512-513 (1971). When the Act was later challenged, the Solicitor General defended the measure but "conceded that its validity was 'a very close question.'" He also told the Court that both the Justice Department and the President opposed the Act on constitutional grounds. Fred P. Graham, *New Law on Voting Rights at Age 18 Is Denounced Before Supreme Court by Lawyers for Foul Strategy*, N.Y. TIMES, Oct. 20, 1970, at 25. In light of what Senator Abourezk rightly described as a "lackluster and unenthusiastic" defense, 123 CONG. REC. 2974 (1977), it is not surprising that the Court struck down portions of the Act in *Oregon v. Mitchell*, 400 U.S. 112 (1970).

145. See Miller & Bowman, *supra* note 124 (documenting and objecting to practice); Michael T. Brady, Note, *Executive Discretion and the Congressional Defense of Statutes*, 92 YALE L.J. 970, 970-84 (1983) (documenting practice); GAO *Bid Protest Hearings*, *supra* note 9, at 61-62, 69 (Sanford Levinson suggesting that President may refuse to defend purportedly unconstitutional provisions that are contained in omnibus legislation and that cannot as a practical matter be vetoed).

146. The role that original intent should play in the process of constitutional interpretation is the subject of an intense scholarly debate beyond the scope of this Article. For our purposes it is sufficient to note that virtually all participants in the debate concede that original intent is an important factor in construing the Constitution. While "originalists" urge that such intent should ordinarily be dispositive, "non-originalists" argue that it is a significant but not necessarily controlling consideration. See, e.g., Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objec-*

in 1819, the Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."<sup>147</sup> Such adaptation may come about either by constitutional amendment or through the case-by-case process of judicial interpretation.

Neither of these formal routes has led to any departure from the original understanding that the President lacks authority to ignore allegedly unconstitutional laws. No amendment to this effect has ever been adopted.<sup>148</sup> Nor has the Supreme Court construed the Constitution to give the President such a power.<sup>149</sup> In 1838, the Court in *Kendall v. United States ex rel. Stokes*<sup>150</sup> concluded that the Postmaster General had improperly refused to comply with a law requiring that certain monies be awarded to a postal contractor. While the Postmaster's refusal was not based on constitutional grounds, the Justices categorically rejected the existence of an executive prerogative to disregard acts of Congress. "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible."<sup>151</sup> Recognizing such a power, said the Court,

would be vesting in the President a dispensing power, which has no countenance for its support in any part of the constitution; and is asserting a principle which, if carried out in its results to all cases falling within it, would be clothing the President with a power entirely to control the legislation of Congress, and paralyze the administration of justice.<sup>152</sup>

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*tions and Responses*, 82 Nw. U. L. REV. 226 (1988); Michael J. Perry, *The Legitimacy of Particular Conceptions of Constitutional Interpretation*, 77 VA. L. REV. 669 (1991); Lawrence B. Solum, *Originalism as Transformative Politics*, 63 TUL. L. REV. 1599 (1989).

147. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819).

148. There have been numerous proposals to amend the Constitution to give the President a qualified item veto; most have applied only to appropriations bills, but some would have covered bills of any type; none of these has won approval from even one House of Congress. See SPITZER, *supra* note 40, at 126-29; *Line-Item Veto: Hearing on S.J. Res. 26, S.J. Res. 178 and S. 1921 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. (1984) [hereinafter *Line-Item Veto Hearing*]; S. Doc. No. 11, 87th Cong., 1st Sess. 236-44 (1961).

149. On a few occasions, after a President refused to comply with an allegedly unconstitutional law, the Supreme Court was presented with the question of whether the law was valid; in resolving this issue, the Court did not address the threshold question of whether the President properly refused to comply with the law in the interim. See *infra* note 652 and accompanying text.

150. 37 U.S. (12 Pet.) 524 (1838).

151. *Kendall*, 37 U.S. at 613.

152. *Id.*; see also *Myers v. United States*, 272 U.S. 52, 292 (1926) (Brandeis, J., dissenting) ("The President performs his full constitutional duty, if, with the means and instru-

The modern Supreme Court has reaffirmed this principle in noting that executive branch agencies lack authority to pass on the constitutionality of federal statutes they are charged with enforcing.<sup>153</sup> In *Weinberger v. Salfi*,<sup>154</sup> the Court held that the Secretary of Health, Education and Welfare could not hear a challenge to the validity of the Social Security Act, as that “is a matter of constitutional law conceded beyond his competence to decide.”<sup>155</sup> Justice Scalia has asserted that “the Executive can decline to prosecute under unconstitutional statutes,”<sup>156</sup> but the Court has not endorsed his

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ments provided by Congress and within the limitations prescribed by it, he uses his best endeavors to secure the faithful execution of the laws enacted.”).

153. See, e.g., *Johnson v. Robison*, 415 U.S. 361, 368 (1974); *Oestereich v. Selective Service Bd.*, 393 U.S. 233, 242 (1968) (Harlan, J., concurring); 3 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 20.04, at 74 (1958); see also *Continental Air Lines v. Dep’t of Transp.*, 843 F.2d 1444, 1456 (D.C. Cir. 1988); *Meredith Corp. v. FCC*, 809 F.2d 863, 872 (D.C. Cir. 1987).

154. 422 U.S. 749 (1975).

155. 422 U.S. at 767. The dissent agreed on this point. *Id.* at 794 (Brennan, J., dissenting). Justice Rehnquist’s opinion for the Court in *Salfi* was similar to the position he had taken earlier while an Assistant Attorney General in the Office of Legal Counsel. In a 1969 memo he wrote: “It is in our view extremely difficult to formulate a constitutional theory to justify a refusal by the President to comply with a Congressional directive to spend. It may be argued that the spending of money is inherently an executive function, but the execution of any law is, by definition, an executive function, and it seems an anomalous proposition that because the Executive branch is bound to execute the laws, it is free to decline to execute them.” *Hearings on the Executive Impoundment of Appropriated Funds Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong. 1st Sess. 279, 283 (1971) [hereinafter *Impoundment Hearings*]. See also *U.S. Government Information Policies and Practices: The Pentagon Papers, Hearings Before the Subcomm. on Foreign Operations and Government Information of the House Comm. on Government Operations*, 92d Cong., 1st Sess., pt. 2, at 381 (1971) [hereinafter *Pentagon Papers Hearings*] (Rehnquist testifying that President may not unilaterally determine that a law is unconstitutional except that a President “would have a right to take appropriate steps to have the law tested.”).

156. *Morrison v. Olson*, 487 U.S. 654, 711 (1988) (Scalia, J., dissenting). The only authority Scalia cited was *United States v. Lovett*, 328 U.S. 303 (1946), a case in which President Roosevelt complied with a statute he thought to be unconstitutional. *Id.* at 305. While the Court agreed with Roosevelt’s constitutional assessment, its opinion in no way suggested that he might properly have refused to honor the measure. See *infra* text accompanying notes 338-342. Justice Scalia reiterated his view in *Freytag v. Commissioner*, 111 S. Ct. 2631, 2653 (1991) (Scalia, J., concurring in part and concurring in the judgment) (citing Judge Easterbrook’s article (see *supra* note 8) to suggest that if Congress passes laws that invade the executive domain the President might have the power “even to disregard them when they are unconstitutional”). While Justices O’Connor, Kennedy, and Souter joined Scalia’s *Freytag* concurrence, the quoted statement was a brief aside in an opinion dealing with the question of whether it violated the Appointments Clause for the Chief Judge of the Tax Court to name special trial judges to preside over certain tax proceedings. The case did not involve an executive refusal to comply with the law.

view.<sup>157</sup> No lower federal courts have held that a President may ignore laws he thinks are unconstitutional. Most federal judges who have addressed the issue have agreed that the Executive is obligated to enforce such measures.<sup>158</sup>

Our Constitution thus adheres to the Framers' notion that Presidents can not disregard acts of Congress they believe to be unconstitutional. There may be a difference, however, between the formal or official Constitution and the actual practices of government. In this sense we have two Constitutions:<sup>159</sup> the first, consisting of the text as construed by the Supreme Court, may at times be little more than a

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157. The Court has recognized the legitimacy of prosecutorial discretion, a doctrine which rests on an array of policy considerations that do not include a claimed right to simply ignore "unconstitutional" laws. *See* *Wayte v. United States*, 470 U.S. 598, 607 (1985) (listing factors on which prosecutorial discretion may hinge); *Nader v. Saxbe*, 497 F.2d 676, 679-80 & n.19 (D.C.Cir. 1974) (suggesting that prosecutorial discretion does not include policy of bringing absolutely no prosecutions under a particular law).

158. *See* *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102, 1121 (9th Cir. 1988) (rejecting as "utterly at odds with the texture and plain language of the Constitution" a claim that "the President's duty to uphold the Constitution and faithfully execute the laws empowers the President to *interpret* the Constitution and *disregard* laws he deems unconstitutional") (emphasis in original), *withdrawn in part*, 893 F.2d 205 (9th Cir. 1989) (en banc); *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 787 F.2d 875, 889 & n.11 (3d Cir. 1986) (dictum) ("This claim of right for the President to *declare* statutes unconstitutional and to declare his refusal to exercise them, as distinguished from his undisputed right to veto, criticize, or even refuse to defend in court, statutes which he regards as unconstitutional, is dubious at best."); *Haring v. Blumenthal*, 471 F. Supp. 1172, 1178-79 (D.D.C. 1979) (holding that each executive branch employee is, like the President, required to enforce measures even if they are thought to be unconstitutional, and cannot "take it upon himself to decide which particular laws, regulations, and policies are legal or illegal, and to base his official actions upon that private determination"). *But see* *Marozsan v. United States*, 852 F.2d 1469, 1492 n.4 (7th Cir. 1988) (Easterbrook, Coffey & Manion, JJ., dissenting) (voicing "doubt" that executive agencies "lacked the authority to disregard statutes on constitutional grounds"); *United States v. Instruments, S.A., Inc.*, Civ.A. No. 91-1574-LFO, 1993 WL 198842 (D.D.C. May 26, 1993) (mem. and order) (stating that the Justice Department's decision to file a declaratory judgment action challenging the constitutionality of the fee-recovery provision of the Competition in Contracting Act, 31 U.S.C. § 3554(c) (1988), rather than paying defendants their fees and costs, was "nothing more than the Department's good faith attempt to do its job in subtle and difficult areas of law. . . ." (*id.* at \*4); while the district court thus implied that a President might refuse to comply with an allegedly unconstitutional law, the court suggested that there may not in fact have been a failure to comply with the law here, both because defendants had not pursued their administrative and judicial remedies to secure payment under the Act, and because the Executive's conduct perhaps reflected a valid interpretation of the statute (*id.* at \*3)).

159. *See* WOODROW WILSON, *CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS* 30 (reprint 1956) (1885) ("The Constitution in operation is manifestly a very different thing from the Constitution of the books."); Miller, *supra* note 104, at 399; Arthur S. Miller, *Pretense and Our Two Constitutions*, 54 *GEO. WASH. L. REV.* 375, 379-82 (1986); Monaghan, *supra* note 74, at 1-9.

“paper description,” while the unofficial Constitution more accurately depicts “living reality.”<sup>160</sup>

The unofficial Constitution can serve either of several functions. In some instances the formal Constitution is silent on a particular point in that neither the text nor any judicial decisions speak clearly to it. To fill these gaps, government officials must adopt whatever practices they deem most appropriate. These informal, interstitial usages may exist for decades as part of our unofficial Constitution. If the Supreme Court ultimately sanctions the practice, it will become part of the formal Constitution. If the Court disapproves it, the practice will presumably cease. In either case, the informal Constitution will have served the role of providing an interim set of working principles until such time as the Court announces a rule to fill the gap in the official Constitution.<sup>161</sup>

On other occasions, the unofficial Constitution serves not to fill gaps in the formal Constitution but instead plays a revisionary role. Government officials at the federal or state level may deliberately adopt a practice that clearly conflicts with the constitutional text or the Court’s interpretation of it, perhaps in hope of persuading the Court to revise its reading of the formal Constitution.<sup>162</sup>

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160. WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 1 (2d ed. London, Kegan, Paul, Trench, Trubner & Co., Ltd. 1872).

161. One example of an interstitial use of the informal Constitution is the legislative veto. This device, first employed in 1932 as a means of allowing Congress to retain some degree of control over authority delegated to the executive branch, permitted one or both Houses of Congress to veto certain actions of executive officials. The formal Constitution did not expressly address the propriety of the legislative veto. As part of the unofficial Constitution, such provisions were included in some 200 federal statutes. In 1983, the Supreme Court ruled that the practice violated the bicameralism and presentment requirements of Article I. *INS v. Chadha*, 462 U.S. 919 (1983). To the extent Congress continues to pass laws containing legislative veto provisions (see FRANKLIN, *supra* note 123, at 85-86), this now involves a revisionary rather than an interstitial use of the informal Constitution.

162. During the New Deal, for example, by sponsoring a series of laws that were inconsistent with the Court’s previous rulings as to the scope of the federal commerce power, the Roosevelt administration finally prevailed upon the Justices to make a “switch in time that saved nine.” See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 47-50 (1991). A more recent example of the informal Constitution serving revisionary ends is the claim of modern Presidents that they have the power to declare war. Although Article I, § 8, cl. 11 expressly gives this power to Congress, Presidents since Lyndon Johnson have insisted that the power to initiate hostilities now belongs to the Chief Executive. See S. REP. NO. 797, 90th Cong. 1st Sess. (1967); Allan Ides, *Congress, Constitutional Responsibility and the War Power*, 17 *LOY. L.A. L. REV.* 599 (1984). Congress formally contested this presidential practice by adopting the 1973 War Powers Resolution. 50 U.S.C. §§ 1541-48 (1988). The Supreme Court has so far declined to resolve the conflict between the official and unofficial Constitutions concerning the locus of the power to declare war. See *infra* text accompanying notes 523-525.



Part II of this Article explores the unofficial Constitution, determining from the historical record the extent to which Presidents have disregarded laws they believe to be unconstitutional.<sup>163</sup> To the extent that the Supreme Court has endorsed the Framers' conception that the President has no authority to suspend allegedly unconstitutional laws, any presidential practice plays a revisionary rather than interstitial role.<sup>164</sup>

Whether employed for interstitial or revisionary purposes, the usages that comprise our unofficial Constitution are important. Such practices are significant in their own right as describing the actual workings of government. They may also foreshadow the future content of the formal Constitution to the extent that a particular practice may be sanctioned by the Court.<sup>165</sup> Yet it is important to note that while custom and usage have sometimes played a role in giving meaning to the Constitution, this has usually been true in defining the scope of individual rights rather than in determining the structure of government. Thus, while the Court has often looked to tradition to give meaning to terms like "liberty"<sup>166</sup> and "due process,"<sup>167</sup> it has been

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163. The approach followed here, of looking first to the original understanding and then to historical practice, is similar to that taken by Professor Henry P. Monaghan in his recent inquiry into the legitimacy of a claimed executive "law-making" authority. See Monaghan, *supra* note 74, at 10 n.41.

164. While the practice of disregarding allegedly unconstitutional laws involves the interstitial use of an informal constitutional means, a specific refusal may play an interstitial or revisionary role, depending on the nature of the President's objection. For example, a refusal to comply with the 1973 War Powers Resolution based on the President's claim that the power to declare war belongs to the President would be revisionary in nature since the formal Constitution expressly gives this power to Congress. U.S. CONST. art. I, § 8, cl. 11. On the other hand, a refusal to honor a law requiring Senate approval before a President could terminate a treaty would serve interstitial ends, for neither the text of the Constitution nor any Supreme Court decision specifies how treaties must be abrogated. See *Goldwater v. Carter*, 444 U.S. 996 (1979). Finally, a President's failure to comply with a law may involve the use of an informal constitutional practice to protect the formal Constitution. This would be true where the President refused to enforce a statute which constituted a bill of attainder, since such legislation is barred by Article I, Section 9.

165. See Miller, *supra* note 159, at 382 & n.24.

166. Compare *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (recognizing a fundamental liberty interest in decision to live together as an extended family "because the institution of the family is deeply rooted in the Nation's history and tradition") with *Bowers v. Hardwick*, 478 U.S. 186 (1986) (finding no liberty interest in private homosexual conduct not protected as a matter of "history and tradition"). See also *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (plurality opinion) ("We have insisted not merely that the interest denominated as a 'liberty' be 'fundamental' . . . but also that it be an interest traditionally protected by our society.").

167. Compare *Duncan v. Louisiana*, 391 U.S. 145 (1968) (noting due process guarantee of right to jury trial in serious criminal cases based on jury's role in the Anglo-American tradition) with *Burnham v. Superior Court*, 495 U.S. 604, 610 (1990) (finding due process

most reluctant to allow custom or usage to upset the original balance of power between Congress and the President.<sup>168</sup>

## II. Presidential Practice, 1789-1981

The task of identifying instances where American Presidents have refused to comply with allegedly unconstitutional laws is, in theory at least, fairly straightforward. One first locates those acts of Congress to which a Chief Executive has made a constitutional objection. As to each of these measures, one then ascertains whether or not the objecting President disregarded the law. Yet the simplicity of the undertaking is deceptive. For unless the White House elected to publicize its refusal to comply with a statute on constitutional grounds, the President's objection and any ensuing decision to ignore the measure may be hidden. Thus, the most that one can do is attempt to trace the fate of those laws to which the Executive has made his constitutional objections known.

Presidents have registered their constitutional disagreement with congressional enactments in several different ways. The classic method, as envisioned by the Framers, is through the veto power. To invoke this, the Executive returns the bill "with his Objections" to the House where it originated, which records "the Objections . . . on their Journal"; for the bill to become law, it must then be repassed by a two-thirds majority of both Houses.<sup>169</sup> By examining presidential veto messages for all vetoes that have been overridden by Congress, we can isolate those measures which became law over the Executive's constitutional protest.

A more recent means by which Presidents have voiced their constitutional objection to laws is through signing statements.<sup>170</sup> As the

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not violated when defendant is served while temporarily present in the state, for physical presence is "[a]mong the most firmly established principles of personal jurisdiction in American tradition . . .").

168. See *infra* notes 543-546 and accompanying text.

169. U.S. CONST. art. I, § 7, cl. 2. This applies only to regular vetoes. A President is not constitutionally required to give his reasons for employing a "pocket veto" by which a bill, sent to the White House less than ten days before Congress adjourns, may be killed by the President simply by failing to sign it before the adjournment. See SPITZER, *supra* note 40, at 115-19 (noting that modern Presidents have generally made a practice of issuing memos explaining the reason for a pocket veto).

170. See Frank B. Cross, *The Constitutional Legitimacy and Significance of Presidential 'Signing Statements'*, 40 ADMIN. L. REV. 209 (1988); Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J. ON LEGIS. 363 (1987); Brad Waites, Note, *Let Me Tell You What You Mean: An Analysis of Presidential Signing Statements*, 21 GA. L. REV. 755 (1987).

name implies, these statements are usually issued at the time a President affixes his signature to a bill; however, they may appear days or even months later.<sup>171</sup> The record of presidential signing statements is relatively complete.<sup>172</sup> By reviewing them, the historian can identify a second group of statutes with which Presidents have taken constitutional issue.

While veto messages and signing statements offer the best leads in a search for laws that the Executive has deemed to be unconstitutional, they cannot provide us with an exhaustive list. If a President objects to a measure that was passed during a prior administration, neither of these devices is available. In such cases, the Executive's objection is likely to come to light only if the President announces his intention not to enforce the measure or urges Congress to repeal it, or if a lawsuit is filed challenging the administration's refusal to honor the statute.

This Article examines each of these categories—vetoes, signing statements, and objections to previously enacted laws—to identify those statutes which Presidents have opposed on constitutional grounds. In each case we will then seek to determine the fate of the measure in question. Of the range of options available to the Executive, we are interested in how often Presidents from George Washington through Jimmy Carter took the extreme step of refusing to honor the law.<sup>173</sup>

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171. For example, President Roosevelt signed the Urgent Deficiency Appropriation Act, ch. 218, 57 Stat. 431, on July 12, 1943. Two months later he issued a statement objecting to a rider to the bill on the ground that it constituted a bill of attainder in violation of Article I, § 9 of the Constitution. Statement of Sept. 14, 1943, in 12 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 385-86 (Samuel I. Rosenman ed., 1950).

172. Signing statements are included in the two major series of presidential papers commissioned by Congress. The first series, MESSAGES AND PAPERS, *supra* note 129, covers the period from 1789 through Jan. 4, 1926. The second, PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, *supra* note 143, covers President Hoover and every President from Truman to the present. Between them these series offer complete coverage of all of the Presidents except Coolidge (missing 1926-1929) and Franklin D. Roosevelt. Some of FDR's signing statements appear in THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, *supra* note 171; this collection may not be complete as it apparently does not even contain all of FDR's veto messages. See 9 *id.* at 127. For Coolidge and Roosevelt, the Congressional Record provides an additional source of signing statements. Since 1986, presidential signing statements have appeared in the *United States Code Congressional & Administrative News*.

173. At this level of the inquiry we again confront a visibility problem, for it may be difficult to determine whether or not a particular statute or provision was actually carried out. As Arthur S. Miller noted,

Congress has delegated large chunks of governing power to the public administration. About four hundred public laws are enacted each year. There is no way, at least no *known* way, that either Congress or the judiciary can oversee the imple-

### A. Constitutionally Based Vetoes Overridden by Congress

From 1789 to 1981, American Presidents vetoed a total of 462 public bills. Of this number, only 87—fewer than 20%—became law over the Executive's objection.<sup>174</sup> Most of the overridden vetoes rested solely on policy grounds. In 27 instances, however, the President's opposition was at least in part constitutionally based.

Table 1 summarizes these 27 cases, showing the nature of the statute, the basis for the veto, and whether or not the law was executed by the President who had unsuccessfully vetoed it. All but six of these vetoes occurred during the 19th century. The constitutional ground invoked most often was federalism; i.e., in two-thirds of the cases, Presidents claimed that Congress had exceeded the scope of its enumerated powers. Five vetoes were based on the separation of powers claim that Congress had invaded the executive domain. The Bill of Rights played a role in six vetoes, in one case forming the sole basis for the President's objection.

**Table 1**  
**Statutes Enacted Over Presidents' Constitutionally Based Veto**  
**1789-1981**

President	Nature of Bill and Statutory Citation	Constitutional Basis of Veto <sup>a</sup>	President's Response <sup>b</sup>
FRANKLIN PIERCE (5)	River & Harbor Approp. ch. 54, 11 Stat. 24 (1856)	Federalism	Executed
	River & Harbor Approp. ch. 55, 11 Stat. 25 (1856)	Federalism	Executed
	River & Harbor Approp. ch. 56, 11 Stat. 25 (1856)	Federalism	Executed
	River & Harbor Approp. ch. 121, 11 Stat. 44 (1856)	Federalism	Executed
	River & Harbor Approp. ch. 126, 11 Stat. 51 (1856)	Federalism	Executed
ANDREW JOHNSON (14)	Civil Rights Act ch. 31, 14 Stat. 27 (1866)	Federalism	Executed
	Freedmen's Bureau Act ch. 200, 14 Stat. 173 (1866)	Federalism; Bill of Rights	Executed

mentation of the details of the statutes in the United States Code . . . . In any event, it requires no documentation (for it is common knowledge) that different political administrations approach statutes in different ways. Some enforce them to the hilt; others casually ignore them.

Miller, *supra* note 104, at 398-99. Yet by reviewing newspaper indices, congressional hearings and reports, presidential papers, and the like, it is surprising how often an answer to the enforcement question can be found. On only rare occasions was the search in vain.

174. SPITZER, *supra* note 40, at 71-75. These figures cover only regular vetoes of public bills and do not include either pocket vetoes (which Congress has no opportunity to override), or vetoes of private bills. Vetoes are compiled in U.S. CONGRESS, SENATE LIBRARY, PRESIDENTIAL VETOES, 1789-1976 (1978) and in U.S. CONGRESS, SENATE LIBRARY, PRESIDENTIAL VETOES, 1977-84, S. PUB. No. 5, 99th Cong., 1st Sess. (1985).

ANDREW JOHNSON (continued)	Franchise for Blacks in D.C. ch. 6, 14 Stat. 375 (1867)	Spirit of the Constitution	No response required
	Admission of Nebraska ch. 36, 14 Stat. 391 (1867)	Federalism	No response required
	First Reconstruction Act ch. 153, 14 Stat. 428 (1867)	Federalism; Bill of Rights	Executed
	Tenure of Office Act ch. 154, 14 Stat. 430 (1867)	Separation of Powers	Arguably Defied
	Second Reconstruction Act ch. 6, 15 Stat. 2 (1867)	Federalism	Executed
	Third Reconstruction Act ch. 30, 15 Stat. 14 (1867)	Federalism; Bill of Rights; Separation of Powers	Executed
	Reconstruction Res. No. 39, 15 Stat. 30 (1867)	Federalism	Executed
	Supreme Court Jurisdiction ch. 34, 15 Stat. 44 (1868)	Separation of Powers	No response required
	Freedmen's Bureau ch. 245, 15 Stat. 193 (1868)	Separation of Powers	Executed
	Admit Arkansas to Congress ch. 69, 15 Stat. 72 (1868)	Federalism	No response required
	Admit 6 States to Congress ch. 70, 15 Stat. 73 (1868)	Federalism	No response required
	Electoral College Exclusion Res. No. 58, 15 Stat. 257 (1868)	Federalism	No response required
CHESTER A. ARTHUR	River & Harbor Approp. ch. 375, 22 Stat. 191 (1882)	Federalism	Executed
GROVER CLEVELAND	River & Harbor Approp. ch. 314, 29 Stat. 302 (1896)	Federalism	Executed
WILLIAM H. TAFT	Webb-Kenyon Act ch. 90, 37 Stat. 699 (1913)	Federalism	No occasion to respond
WOODROW WILSON	National Prohibition Act ch. 85, 41 Stat. 305 (1919)	Federalism	Executed
HARRY S. TRUMAN (2)	Internal Security Act ch. 1024, 64 Stat. 987 (1950)	Bill of rights	Executed
	Immigration & Nationality Act ch. 477, 66 Stat. 163 (1952)	Bill of Rights; Separation of Powers	Executed
RICHARD M. NIXON	War Powers Resolution Pub. L. No. 93-148 87 Stat. 555 (1973)	Separation of Powers	No response required
GERALD R. FORD	Freedom of Information Act Amends., Pub. L. No. 93-502 88 Stat. 1561 (1974)	Separation of Powers	No occasion to respond

<sup>a</sup> "Federalism" means that a law exceeds the scope of the national government's powers and/or invades the province of the states; "Separation of Powers" means that a statute usurps or interferes with the functions of the Executive or the Judiciary; "Bill of Rights" means that the law violates the rights of individuals.

<sup>b</sup> "No response required" means that the law could be carried out without any action on the part of the Executive; "No occasion to respond" means that the President left office before any opportunity to honor or enforce the law arose.

On the question most pertinent to this study, in only one of the 27 instances where a constitutional veto was overridden is there evidence of the President failing to honor the law. That case involved Andrew

Johnson's alleged defiance of the Tenure of Office Act, a move which precipitated his impeachment. In none of the remaining 26 instances, involving 9 different Presidents, did the Chief Executive elect to disregard the statute.

### 1. *Franklin Pierce*

The first President to have a constitutionally-based veto overridden by Congress was Franklin Pierce who, in 1856, unsuccessfully opposed five river and harbor appropriations bills.<sup>175</sup> Like many other 19th century Presidents, Pierce believed that the expenditure of funds for so-called internal improvements was unconstitutional, falling within neither Congress's power to spend for the general welfare<sup>176</sup> nor its power to regulate commerce between the states.<sup>177</sup> However, once the five bills became law, Pierce faithfully executed them by undertaking the authorized improvements as promptly as weather conditions permitted.<sup>178</sup>

### 2. *Andrew Johnson*

Andrew Johnson has the distinction of having had more public-bill vetoes overridden than any other President in history.<sup>179</sup> Of the fifteen statutes enacted by Congress over his objection, fourteen were opposed by Johnson on constitutional grounds.<sup>180</sup> Most of these laws

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175. Act of July 8, 1856, ch. 54, 11 Stat. 24 (Miss. River at Southwest Pass and Pass à l'Outre); Act of July 8, 1856, ch. 55, 11 Stat. 25 (St. Mary's River, Mich.); Act of July 8, 1856, ch. 56, 11 Stat. 25 (St. Clair Flats, Mich.); Act of Aug. 16, 1856, ch. 121, 11 Stat. 44 (Patapsco River and Port of Baltimore); Act of Aug. 16, 1856, ch. 126, 11 Stat. 51 (Des Moines Rapids in Miss. River). Pierce's vetoes of these five bills appear in 7 MESSAGES AND PAPERS, *supra* note 129, at 2919-21. For Pierce's general position on internal improvements, see 7 *id.* at 2790-804.

176. U.S. CONST. art I, § 8, cl. 1.

177. U.S. CONST. art. I, § 8, cl. 3. On the 19th century view of internal improvement appropriations, see MASON, *supra* note 39, at 94-106.

178. See S. EXEC. DOC. NO. 5, 34th Cong., 3d Sess. 340, 345, 365, 367 (1857); S. EXEC. DOC. NO. 11, 35th Cong., 1st Sess., vol. 2 at 219, 287-88, 290, 291, 305-06, 356-63, 393-95 (1858).

179. See SPITZER, *supra* note 40, at 74.

180. The 14 measures were: (1) Act of April 9, 1866 (1866 Civil Rights Act), ch. 31, 14 Stat. 27; (2) Act of July 16, 1866 (Freedmen's Bureau Act), ch. 200, 14 Stat. 173; (3) Act of Jan. 8, 1867 (elective franchise in D.C.), ch. 6, 14 Stat. 375; (4) Act of Feb. 9, 1867 (admission of Nebraska), ch. 36, 14 Stat. 391; (5) Act of March 2, 1867 (Tenure of Office Act), ch. 154, 14 Stat. 430; (6) Act of March 2, 1867 (First Reconstruction Act), ch. 153, 14 Stat. 428; 8-9; (7) Act of March 23, 1867 (Second Reconstruction Act), ch. 6, 15 Stat. 2; (8) Act of July 19, 1867 (Third Reconstruction Act), ch. 30, 15 Stat. 14; (9) Act of July 19, 1867 (Reconstruction), Res. No. 39, 15 Stat. 30; (10) Act of March 27, 1868 (Judiciary Act), ch. 34, 15 Stat. 44; (11) Act of June 22, 1868 (admission of Arkansas to Congress), ch. 69, 15 Stat. 72; (12) Act of July 25, 1868 (Freedmen's Bureau), ch. 245, 15 Stat. 193; (13) Act of July 20,

dealt with Reconstruction, a process which Johnson believed fell within the executive province rather than that of Congress. According to Johnson, the eleven rebellious states had never left the Union and were entitled to immediate representation in the House and Senate. The Republican Congress thought otherwise. Through a series of statutes adopted over Johnson's veto, the former Confederacy was placed under military rule.<sup>181</sup> Many of Johnson's vetoes rested on the premise that Congress could not constitutionally legislate for the southern states at a time when their representatives were excluded from the House and the Senate.<sup>182</sup>

Though Johnson's constitutional opposition to these measures was deeply felt,<sup>183</sup> he more than once acknowledged that if a veto is overridden by Congress, the President is bound to enforce the statute despite his constitutional misgivings.<sup>184</sup> With the possible exception of the Tenure of Office Act, Johnson adhered to this principle. Six of the 14 measures that became law over his constitutionally based veto took

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1868 (Electoral College), Res. No. 58, 15 Stat. 257; (14) Act of June 25, 1868 (admission of six states to Congress), ch. 70, 15 Stat. 73. See 8-9 MESSAGES AND PAPERS, *supra* note 129, at 3603-852.

181. See generally ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (1988); ERIC L. MCKITRICK, ANDREW JOHNSON AND RECONSTRUCTION (reprint ed. 1988) (1960); KENNETH M. STAMPP, THE ERA OF RECONSTRUCTION, 1865-1877 (paper ed. 1965).

182. See, e.g., Message of July 16, 1866, in 8 MESSAGES AND PAPERS, *supra* note 129, at 3620-24; Message of March 2, 1867, in 8 MESSAGES AND PAPERS, *supra* note 129, at 3696-3709.

183. MCKITRICK, *supra* note 181, at 85-93, 108-09.

184. In 1866, several months after the Civil Rights Act had been adopted over his veto, Johnson explained that since the measure was "now a law of the land," it "will be faithfully executed so long as it shall remain unrepealed and may not be declared unconstitutional by courts of competent jurisdiction . . ." Message of July 16, 1866, in 8 MESSAGES AND PAPERS, *supra* note 129, at 3620, 3622. In 1867, Attorney General Henry Stanbery appeared in the Supreme Court on the President's behalf and explained that while Johnson had vetoed the Reconstruction Acts as unconstitutional, "when the President did that he did everything he intended to do in opposition to these laws. From the moment they were passed over his veto there was but one duty in his estimation resting upon him, and that was faithfully to carry out and execute these laws." *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 492 (1867). In his State of the Union Message to Congress in 1867, Johnson discussed the question of how far a President could go "in opposing an unconstitutional act of Congress . . ." Message of Dec. 3, 1867, in 9 MESSAGES AND PAPERS, *supra* note 129, at 3756, 3766-67. Because a President's defiance of the law could lead to "civil war," he said, such action is inappropriate when measures "which are peaceable remain open to him or to his constituents." *Id.* Johnson noted that "[t]he so-called reconstruction acts, though as plainly unconstitutional as any that can be imagined, were not believed to be within the class last mentioned," for the people retain the power to redress the situation at the polls. *Id.* However, Johnson suggested that executive refusal to comply with an unconstitutional law might be proper "if there be neither judicial remedy for the wrongs it inflicts nor power in the people to protect themselves . . ." *Id.*

effect without any action on the Executive's part.<sup>185</sup> Johnson grudgingly complied with seven other statutes dealing with the Freedmen's Bureau and with Reconstruction, despite his basic disagreement with them.<sup>186</sup> While Johnson did everything he could to frustrate Congress's Reconstruction program, he did so by exercising his discretionary powers in ways that, in a "strained and nominal sense," adhered to the letter of the law.<sup>187</sup> Had it been otherwise, not only would the House probably have impeached him much earlier, but the Articles of Impeachment would surely have rested on more than Johnson's debatable refusal to comply with the Tenure of Office Act.<sup>188</sup>

It is far from clear that Andrew Johnson failed to comply with the Tenure of Office Act. That statute, enacted over his veto on March 2, 1867, provided that the Secretary of War and other Cabinet members "shall hold their offices respectively for and *during the term of the President by whom they may have been appointed* and for one month

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Had Johnson wished to adopt a contrary stance, he might have done so with the support of an Attorney General's opinion. Shortly after Johnson became President, Attorney General James Speed advised the Secretary of the Treasury that

[t]he Constitution is the supreme law—a law superior and paramount to every other. If any law be repugnant to the Constitution, it is void; in other words, it is no law. It is the peculiar province and duty of the judicial department to say what the law is in particular cases. But before such cases arise, and in the absence of authoritative exposition of the law by that department, it is equally the duty of the officer holding the executive power of the Government to determine, for the purposes of his own conduct and action, as well the operation of conflicting laws as the constitutionality of any one.

11 Op. Att'y Gen. 209, 213-15 (1865).

185. This was true of the acts extending the franchise to blacks in the District of Columbia, admitting Nebraska to the Union, excluding certain southern states from the electoral college, narrowing the Supreme Court's appellate jurisdiction in habeas corpus cases, and of two laws restoring some of the southern states to representation in Congress. *See supra*, Table 1.

186. In his Annual Message to Congress in December 1867, Johnson urged repeal of many of the Reconstruction acts on the ground that they were unconstitutional. Message of Dec. 3, 1867, in 9 MESSAGES AND PAPERS, *supra* note 129, at 3756, 3760-69.

187. McKittrick, *supra* note 181, at 493. *See also*, Michael Les Benedict, THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON 49, 60 (1973) (noting that while Johnson had sought to undermine Congress's Reconstruction efforts, until the Tenure-of-Office-Act episode, "Johnson had broken no law; he had limited himself strictly to the exercise of his constitutional powers").

188. The House of Representatives, which voted to impeach Johnson on February 24, 1868, had been searching for grounds to impeach him since late 1866. Three earlier impeachment drives failed in the House for want of "charges that contained legal substance . . ." McKittrick, *supra* note 181, at 491. The articles of impeachment voted by the House contained only one allegedly illegal act—Johnson's dismissal of Secretary of War Edwin Stanton without the Senate's consent. This action was alleged to violate the Tenure of Office Act and several other Reconstruction measures. 8 MESSAGES AND PAPERS, *supra* note 129, at 3907-16.



thereafter, subject to removal by and with the advice and consent of the Senate."<sup>189</sup> Johnson had vetoed the measure on the ground that it interfered with the President's power of removal, a position subsequently vindicated by the Supreme Court in *Myers v. United States*.<sup>190</sup>

Johnson's alleged violation of the Tenure of Office Act stemmed from his efforts to remove Edwin Stanton as Secretary of War. Stanton, a holdover from Lincoln's Cabinet, sympathized and cooperated with the Radicals in Congress, and acted to thwart Johnson in a host of ways. As Secretary of War, Stanton occupied a strategic position in carrying out military reconstruction. For Johnson, gaining control of the War Department was thus critical to being able to implement his own very different views of Reconstruction.<sup>191</sup> In August 1867, after Stanton had refused the President's request that he resign, Johnson suspended him as Secretary of War and appointed General Ulysses Grant as interim Secretary. Because Congress was not in session at the time, the President's action was in accord with the Tenure of Office Act, which allowed such an interim suspension subject to the Senate's later concurrence. When the Senate disapproved the suspension on January 13, 1868, Grant relinquished the office to Stanton.

This attempt to displace Stanton having failed, Johnson on February 21, 1868, issued an order removing Stanton as Secretary of War and naming General Lorenzo Thomas as his interim replacement. Three days later, the House of Representatives voted overwhelmingly to impeach Johnson.<sup>192</sup> Of the eleven Articles of Impeachment later approved by the House, all but one related to the President's firing of Stanton in alleged violation of the Tenure of Office Act.<sup>193</sup>

Yet as House Democrats unsuccessfully argued,<sup>194</sup> because Stanton had been appointed Secretary of War by President Lincoln, he was not covered by the Tenure of Office Act. When the final version

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189. Tenure of Office Act, ch. 154, § 1, 14 Stat. 430 (1867) (emphasis added).

190. 272 U.S. 52 (1926). See *infra* text accompanying notes 498-506.

191. See DAVID MILLER DEWITT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* 232-87 (reprint ed. 1967) (1903); RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 259-60 (1973); BENEDICT, *supra* note 187, at 95-97; MCKITRICK, *supra* note 181, at 495, 497.

192. The House vote to impeach Johnson was 126 to 47. DEWITT, *supra* note 191, at 373.

193. Articles I-IX and XI related to the President's efforts to remove Stanton; only Article X, which dealt with Johnson's public criticism of Congress, made no reference to the removal of Stanton. 8 MESSAGES AND PAPERS, *supra* note 129, at 3907-16. See SAMUEL E. MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 720-21 (1965); BERGER, *supra* note 191, at 271-72.

194. DEWITT, *supra* note 191, at 366-70.

of the statute was debated in the Senate, it was noted without contradiction that while President Johnson's hands might be tied with respect to the Cabinet members he appointed, "the Secretary of War . . . according to the terms of this provision, may be removed by him tomorrow."<sup>195</sup>

Andrew Johnson's firing of Stanton was thus not a case where a President, believing a law to be unconstitutional, chose not to comply with it. While Johnson was convinced that the Tenure of Office Act was unconstitutional, he did not think he was violating the Act by removing the Secretary of War. As he told the Senate a day after dismissing Stanton, "Whether the act were constitutional or not, it was always my opinion that it did not secure him from removal."<sup>196</sup>

In the impeachment trial before the Senate, the President's counsel ably refuted the charge that Johnson, by removing the Secretary of War, had violated the Tenure of Office Act.<sup>197</sup> But, perhaps mindful of the inefficacy of similar arguments in the House impeachment pro-

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195. *Id.* at 197-98 (quoting Senator James R. Doolittle). Senator John Sherman agreed that the Act "would not prevent the present President from removing the Secretary of War . . ." *Id.* at 198-99.

196. Message of Feb. 22, 1868, in 8 MESSAGES AND PAPERS, *supra* note 129, at 3820, 3823. According to Johnson, "It would be a violation of the plain meaning of this enactment to place Mr. Stanton upon the same footing as those heads of Departments who have been appointed by myself. As to him, this law gives him no tenure of office." *Id.* at 3822. Johnson also admitted he was "aware that there were doubts as to the construction of the law," *id.* at 3823, and noted that the public and many in Congress believed Stanton was protected by the Act. MCKITRICK, *supra* note 181, at 497. This perception arose from the fact that Stanton would have been protected had the Act's wording not been altered at the last minute by a joint conference committee whose report received little scrutiny in the House. DEWITT, *supra* note 191, at 193-99, 577-78; MCKITRICK, *supra* note 181, at 495-97.

The House Managers contended that because Johnson initially suspended Stanton in accord with the Tenure of Office Act, he was estopped from later claiming that the Act did not cover Stanton. It has also been suggested that Johnson's initial compliance with the Act proves he did not fire Stanton in order to challenge the Act's constitutionality, for "how could he have intended to do so by removing an officer to whom he believed the act did not apply?" BENEDICT, *supra* note 187, at 151, 157-58. Yet a President bent on removing Stanton might first seek to do so in accord with the statute that many regarded as applicable; only when that effort failed was the President then forced to adopt a more confrontational stance, asserting both that Stanton was not protected by the Act, and that even if he were, the measure was unconstitutional.

197. See DEWITT, *supra* note 191, at 424-26; MCKITRICK, *supra* note 181, at 507; BERGER, *supra* note 191, at 274-80. The House prosecutors argued that Johnson was serving out Lincoln's term rather than his own and that Stanton had therefore been dismissed "during the term of the President by whom [he was] appointed." Even if Johnson's term were deemed a continuation of Lincoln's, Stanton was appointed in Lincoln's first term which expired in 1865. See DEWITT, *supra* note 191, at 411-12, 448-51; BERGER, *supra* note 191, at 278-80. *But see* BENEDICT, *supra* note 187, at 148-51 (concluding that it was unclear whether Stanton was protected by the Act).

ceeding,<sup>198</sup> Johnson's lawyers also asserted that the President may sometimes disregard unconstitutional laws, at least if he seeks to have the issue resolved by the courts.<sup>199</sup>

The most careful elaboration of the "test-case defense" was advanced by Benjamin Curtis. In his opening argument for the defense, the former Supreme Court Justice conceded that, as a general rule, the President "is not to erect himself into a judicial court and decide that the law is unconstitutional, and that therefore he will not execute it . . . ." <sup>200</sup> The only time a President may refuse to comply with a law, said Curtis, is when

a question arises whether a particular law has cut off a power confided to him by the people through the Constitution, and he alone can raise that question, and he alone can cause a judicial decision to come between the two branches of the Government to say which of them is right, and . . . when he takes the needful steps to raise that question and have it peacefully decided.<sup>201</sup>

Though the President's lawyers were probably unaware of it, the principle they advanced was recognized by one of the leading constitutional analysts of the day, John Norton Pomeroy. In a treatise published in 1868, but written prior to Johnson's impeachment, Pomeroy stated that the President normally may not disregard a law, even if he believes it to be unconstitutional. Yet there was an exception to this "general rule":

A statute may be passed of such a form and character as to be addressed directly to the President; it assumes to regulate his official action; no private person and no subordinate officer is affected by its provisions. If the Chief Magistrate enforces this

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198. See BENEDICT, *supra* note 187, at 105-06.

199. See BENEDICT, *supra*, note 187, at 153-56; DEWITT, *supra* note 191, at 427-32. Thomas Nelson thus declared that "if a law is unconstitutional in the view of the President it is no law at all, and he is not bound to follow it." CONG. GLOBE, 40th Cong., 2d Sess. supp. at 301 (1868). A similar argument was made by Attorney General Henry Stanbery. *Id.* at 373-74. However, Nelson pointedly added that Johnson had not sought to settle the question by his "own strong hand," but had tried to "submit it to the judicial tribunals of the country . . ." *Id.* at 302. Another of the President's attorneys, William Groesbeck, urged that in "doubtful cases" such as that involving the Tenure of Office Act, a President may ignore a law if he seeks to "test the accuracy of the new interpretation in the forum which is the highest and final interpreter of such questions." *Id.* at 314. According to Groesbeck, only if a "law be upon its very face in flat contradiction to plain express provisions of the Constitution" may a President ignore it "without going to the Supreme Court. . . ." *Id.*

200. CONG. GLOBE, 40th Cong., 2d Sess. supp. at 126 (1868). Curtis's argument is summarized in DEWITT, *supra* note 191, at 427-32.

201. CONG. GLOBE, 40th Cong., 2d Sess. supp. at 126-27 (1868). The test-case defense was consistent with the position Johnson himself had taken earlier in a December, 1867 message to Congress. See *supra* note 184.

law, no question as to its validity can be raised, no opportunity can be given to deny the power of the legislature . . . . In such a case the President, unless he chooses to acquiesce, may plainly exercise an independent judgment, and act upon his own separate convictions.<sup>202</sup>

Pomeroy expressly noted that the Tenure of Office Act posed just such a case,<sup>203</sup> for unless the President ignored the statute, no one would be in a position to bring a lawsuit challenging its validity.<sup>204</sup>

The House Managers who acted as prosecutors in the Senate trial did not deny that the only way to test the Tenure of Office Act in court was for the Executive to violate the statute.<sup>205</sup> However, they vehemently contested the premise that a President may ignore an allegedly unconstitutional law even where necessary to obtain a judicial ruling as to its validity. Benjamin Butler echoed the Framers in his opening argument for the House:

[A]ll the power or right in the President to judge upon any supposed conflict of an act of Congress with the paramount law of the Constitution is exhausted when he has examined a bill sent him and returned it with his objections. If then passed over his veto it becomes as valid as if in fact signed by him . . . . After that he and all other officers must execute the law, whether in fact constitutional or not.<sup>206</sup>

Representative George Boutwell specifically rejected the claim that Johnson “had a right to violate this law for the purpose of obtaining a

202. JOHN N. POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 444-45 (N.Y., Hurd & Houghton 1868).

203. Citing the 1867 Tenure of Office Act as an example, Pomeroy explained that “[i]t is only by a refusal to execute such a statute that the President can possibly create an issue between himself and Congress . . . . In such a case the President, unless he chooses to acquiesce, may plainly exercise an independent judgment, and act upon his own separate convictions.” POMEROY, *supra* note 202, at 244-45.

204. There was no declaratory judgment remedy available at the time. CHARLES ALAN WRIGHT, THE LAW OF FEDERAL COURTS 58-59, 670 (4th ed. 1983). Even if there were, it is unclear whom the President would sue in seeking a declaration that the Act was unconstitutional; the Speech or Debate Clause would preclude suing members of Congress. U.S. CONST. art. I, § 6, cl. 1. See CORWIN, *supra* note 104, at 70-72 (noting that unlike other Reconstruction measures that Johnson opposed on constitutional grounds, the Tenure of Office Act could be challenged in court only by presidential defiance).

205. Thomas Williams, one of the House Managers, stated in his closing argument that “it was not necessary to violate the law . . . . All that it was necessary for [President Johnson] to do, was to issue his order of removal, and give the officer a notice of that order, and its object.” CONG. GLOBE, 40th Cong., 2d Sess. supp. at 332 (1868). However, this was precisely what Johnson did. Stanton ignored the order and did not relinquish the office of Secretary of War until the impeachment trial had concluded. DEWITT, *supra* note 191, at 591-92.

206. CONG. GLOBE, 40th Cong., 2d Sess. supp. at 36 (1868).

judicial determination.”<sup>207</sup> John Bingham concluded the case for the House by dramatically suggesting that Andrew Johnson and King James II presented “the most remarkable parallel that I have ever read in history,” for the “charges against James are substantially the charges presented against this accused President . . . that he has suspended the laws and dispensed with the execution of the laws . . . .”<sup>208</sup>

The impeachment trial of Andrew Johnson thus squarely raised the issue of whether a President may refuse to honor an allegedly unconstitutional law in order to secure a judicial ruling as to its validity. The Senate vote to convict was 35-19, one shy of the two-thirds majority required to remove a President from office.<sup>209</sup> To what extent did Johnson’s acquittal rest on Senate recognition of his claim that the Chief Executive may disregard an act of Congress where this is the only way to test its constitutionality in court?

The President’s test-case defense was accepted in principle by Chief Justice Salmon P. Chase, who presided over the impeachment trial. While Chase did not reveal his position publicly,<sup>210</sup> Senators could easily deduce it from his consistent rulings to admit evidence concerning the President’s belief that the Tenure of Office Act was unconstitutional and his efforts to test it in court.<sup>211</sup> In private, however, the Chief Justice was quite explicit as to his views, even during the trial.<sup>212</sup> On April 19, 1868, ten days after Johnson’s attorneys first presented the test-case defense, Chase wrote to a friend:

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207. *Id.* at 279. As Boutwell explained, “The constitutional duty of the President is to obey and execute the laws. He has no authority under the Constitution, or by any law, to enter into any schemes or plans for the purpose of testing the validity of the laws of the country, either judicially or otherwise . . . . Nor is it any answer to say . . . that ‘there never could be a judicial decision that a law is unconstitutional, inasmuch as it is only by disregarding a law that any question can be raised judicially under it.’ If this be true, it is no misfortune.” *Id.*

208. *Id.* at 405.

209. The Senate voted on Articles XI, II, and III, in that order; each Article turned on whether Johnson had violated the Tenure of Office Act; the vote on each article was the same: 35 to convict, 19 to acquit. *Id.* at 412, 414-415.

210. Douglas Kmiec, head of the Justice Department’s Office of Legal Counsel under President Reagan, erroneously asserted that Chase “cast[ ] the deciding vote against Johnson’s impeachment . . . .” DOUGLAS W. KMIEC, *THE ATTORNEY GENERAL’S LAWYER: INSIDE THE MEESE JUSTICE DEPARTMENT* 55 (1992); only Senators voted on whether or not to convict the President.

211. See BENEDICT, *supra* note 187, at 120-22.

212. On April 20, 1868, Chase told a Congressman who attended the trial that day that the President had a duty to ignore “what he believed to be unconstitutional legislation on the part of Congress, [and] to take the earliest legal measures to test any such question judicially . . . .” Jerome Mushkat ed., *The Impeachment of Andrew Johnson: A Contemporary View*, 48 N.Y. HISTORY 275, 280 (1967).

[I]t seems perfectly clear that the President had a perfect right and indeed was under the highest obligation to remove Mr. Stanton, if he made the removal, not in wanton disregard of a constitutional law, but with a sincere belief that the Tenure of Office Act was unconstitutional and for the purpose of bringing the question of its constitutionality before the Supreme Court. Plainly it was then a proper and peaceful, if not the only proper and peaceful mode of protecting & defending the Constitution.<sup>213</sup>

Despite the Chief Justice's views, the fact that nearly two-thirds of the Senate voted to convict Johnson might seem a clear repudiation of the claim that Presidents may ignore laws in order to test their validity. As students of Johnson's impeachment have noted, however, the case was as much a political trial as a legal proceeding.<sup>214</sup> Our ability to interpret the impeachment proceedings would have been

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213. Letter from Salmon P. Chase to Gerrit Smith (April 19, 1868), in SALMON P. CHASE PAPERS, Library of Congress. See also ROBERT B. WARDEN, AN ACCOUNT OF THE PRIVATE LIFE AND PUBLIC SERVICES OF SALMON PORTLAND CHASE 684-85 (Cincinnati, Wilstach, Baldwin 1874) (reprinting letter in slightly different form). Chase also stated his views in more general terms. "In case a law, believed by the President to be unconstitutional, is passed, notwithstanding his veto, . . . it seems to me that it is his duty to execute it precisely as if he held it to be constitutional, except in the case where it directly attacks and impairs the executive power confided to him by the Constitution. In that case it appears to me to be the clear duty of the President to disregard the law, so far at least as it may be necessary to bring the question of its constitutionality before the Judicial Tribunals." Letter from Salmon P. Chase to Gerrit Smith (April 19, 1868), quoted in CHARLES FAIRMAN, RECONSTRUCTION AND REUNION 1864-88, pt. 1, 524 (1971).

214. See JAMES G. RANDALL & DAVID DONALD, THE CIVIL WAR AND RECONSTRUCTION 614-17 (2d rev. ed. 1969); BENEDICT, *supra* note 187, at 110, 126, 140; HANS L. TREFOUSSE, ANDREW JOHNSON: A BIOGRAPHY 328-31 (1989) [hereinafter TREFOUSSE, A BIOGRAPHY]. Many of the Republicans who made up more than three-quarters of the Senate were prepared to convict the President regardless of the evidence. Charles Sumner, for example, was one of two Senators who found Johnson guilty on every count in the Articles. The President, he said, was "Guilty on all and infinitely more." CONG. GLOBE, 40th Cong., 2d Sess. supp. at 473 (1868). According to Sumner, "It is very wrong to try this impeachment merely on these articles" for impeachment is "a political proceeding, before a political body, with political purposes . . ." *Id.* at 463-64. Many Democrats were equally determined to acquit the President. A middle group of Senators may have made a genuine effort to set their political prejudices aside, including seven conservative Republicans who crossed party lines to vote for Johnson's acquittal. Yet even these recusants did not necessarily accept the President's test-case defense, and may have been influenced by political considerations. If Johnson were removed from office, he would have been succeeded by Ohio Senator Ben Wade, a fiery radical whom the conservatives had reason to fear. See HANS L. TREFOUSSE, IMPEACHMENT OF A PRESIDENT: ANDREW JOHNSON, THE BLACKS, AND RECONSTRUCTION 172-79 (1975); BENEDICT, *supra* note 187, at 126-43; JAMES E. SEFTON, ANDREW JOHNSON AND THE USES OF CONSTITUTIONAL POWER 182 (1980). To the extent their decisions did rest on legal grounds, several of the Republican holdouts voted to acquit solely on the ground that Johnson's firing of Stanton did not violate the Tenure of Office Act, without addressing the issue of whether Johnson would have been justified in violating the Act in order to test its validity in court. See, e.g., CONG. GLOBE, 40th Cong.,

greatly enhanced had all of the Senate's 54 members written opinions explaining their votes. As it was, only 29 Senators did so. Of these, 20 addressed the President's claimed right to ignore laws where necessary to test their validity—8 Senators recognizing such a right, and 12 rejecting it.<sup>215</sup> These opinions represent the views of barely a third of the Senate, making it difficult to distill from the outcome of Johnson's impeachment trial a precedent on the issue of whether Presidents are ever justified in refusing to comply with allegedly unconstitutional laws.

Professor Michael Benedict has suggested a potentially more fruitful approach which focuses on the Senate's evidentiary rulings rather than on the outcome of the case.<sup>216</sup> While the Senate voted 29-20 to exclude evidence tending to show that Johnson and his Cabinet thought the Tenure of Office Act was unconstitutional,<sup>217</sup> it agreed by votes of 29-21, 27-23 and 26-25 to admit evidence of Johnson's desire to obtain a judicial determination of the Act's constitutionality.<sup>218</sup> Thirty-two different Senators voted for at least one of these motions to admit, and 21 supported all three. The Senate was thus more willing to recognize a narrow right of noncompliance, limited to situations where such action is necessary to create a test case, than it was to acknowledge a general presidential right to ignore laws that the Executive believes are unconstitutional.

Though a bare majority of the Senate was willing to hear evidence of the President's efforts to obtain a judicial ruling on the Tenure of Office Act, this does not necessarily mean they accepted the legitimacy of such a defense. John Sherman and Charles Sumner, for example, voted to admit this evidence but then concluded that the President should not be allowed to ignore a law even where this is the

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2d Sess. supp. at 417-20 (1868) (opinion of Lyman Trumbull); *id.* at 452-57 (opinion of William P. Fessenden).

215. See CONG. GLOBE, 40th Cong., 2d Sess. supp. at 417-526 (1868). Senators Grimes, Johnson, Davis, Vickers, Buckalew, Doolittle, Henderson and Frelinghuysen appear to have recognized a presidential right to violate a law in order to test its constitutionality, while Senators Edmunds, Sherman, Ferry, Williams, Wilson, Sumner, Morrill (Vt.), Yates, Tipton, Howard, Patterson (N.H.), and Cattell rejected such a right. *Id.*

216. BENEDICT, *supra* note 187, at 153-57.

217. CONG. GLOBE, 40th Cong., 2d Sess. supp. at 225-27 (1868).

218. *Id.* at 169-171 (testimony of Gen. Sherman as to President's stated purpose in offering Sherman the position of interim Secretary of War); *id.* at 200-201 (testimony of attorney Walter S. Cox as to President's request that he institute legal proceeding to challenge Tenure of Office Act); *id.* at 201-02 (testimony of Walter S. Cox as to efforts to bring a test case at President's direction).

only way to test its validity in court.<sup>219</sup> Others may have felt likewise, which explains why, of 32 Senators who agreed to hear evidence supporting the test-case defense, 13 ultimately voted to convict the President.<sup>220</sup>

It is also likely that some who accepted the test-case defense in principle were not persuaded that Johnson had violated the Tenure of Office Act in order to obtain a judicial ruling as to its validity.<sup>221</sup> The President on several occasions said he wished to obtain a court determination of the question,<sup>222</sup> and he did take some steps to bring this about.<sup>223</sup> The most significant of these occurred after Johnson had ordered Stanton's removal and named General Thomas to replace him. Stanton refused to give up the office and instead filed criminal proceedings against Thomas in the District of Columbia Supreme Court. After Thomas was arrested and charged with violating the Tenure of Office Act,<sup>224</sup> the President hired Walter S. Cox, a private attorney, to represent Thomas. Johnson instructed Cox that "he desired the necessary legal proceedings to be instituted without delay to

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219. *See id.* at 170, 200-02, 447, 471-72. Sumner voted to admit all of the evidence that was offered. *Id.* at 465.

220. The 13 Senators who voted for at least one of the three motions to admit evidence concerning the test-case defense, but who then voted to find the President "guilty," were Republican Senators Anthony, Cole, Corbett, Frelinghuysen, Howe, Morgan, Morton, Sherman, Sprague, Sumner, Wiley, Morrill (Me.), and Patterson (N.H.). *See id.* at 169-71, 200-02, 411. Of this group, six wrote opinions explaining their impeachment vote: Frelinghuysen, Howe, Sherman, Sumner, Morrill (Me.), and Patterson (N.H.).

221. *See* BENEDICT, *supra* note 187, at 157-58 (concluding that there was "no foundation in fact" to the defense that Johnson had fired Stanton with the intent to test the Act in court).

222. CONG. GLOBE, 40th Cong., 2d Sess. supp. at 140 (1868) (testimony of Gen. Lorenzo Thomas); *id.* at 170, 173 (testimony of Gen. William T. Sherman); *id.* at 200 (testimony of Walter S. Cox).

223. When the President suspended Stanton in August, 1867, naming General Grant as interim Secretary, Johnson did so believing that if the Senate disapproved the suspension, Grant would not give up the office, thereby triggering a lawsuit by Stanton. Johnson reportedly offered to pay the \$10,000 fine Grant risked for violating the Tenure of Office Act, in order to test the Act in court. Grant upset these plans by surrendering the office to Stanton after the Senate disapproved the suspension action. *See* TREFOUSSE, A BIOGRAPHY, *supra* note 214, at 306-08 (1989); DEWITT, *supra* note 191, at 282-85, 322-38. In his February 22, 1868 message to the Senate defending the removal of Stanton, Johnson stated: "My order of suspension in August last was intended to place the case in such a position as would make a resort to a judicial decision both necessary and proper. My understanding and wishes . . . were frustrated, and the late order for Mr. Stanton's removal was a further step toward the accomplishment of that purpose." Message of Feb. 22, 1868, in 8 MESSAGES AND PAPERS, *supra* note 129, at 3820, 3823.

224. *See* CONG. GLOBE, 40th Cong., 2d Sess. supp. at 168-69 (1868). Section 5 of the Tenure of Office Act made it a crime, punishable by a fine of up to \$10,000 and imprisonment for up to 5 years, to accept an appointment contrary to the terms of the Act. Ch. 154, § 5, 14 Stat. 430, 431 (1867).



test General Thomas's right to the office and to put him in possession."<sup>225</sup>

There were three avenues by which Cox might have obtained a ruling on the validity of the Tenure of Office Act. First, he could have filed a habeas corpus action seeking Thomas's release from custody on the ground that the law he was charged under was unconstitutional. Second, Cox could have raised the issue of the Act's validity as a defense to the criminal action. Third, he could have arranged to have a quo warranto proceeding brought to challenge Stanton's right to remain in office. None of these avenues was pursued with diligence. The first two were quickly eliminated when Cox asked the court to discharge his client; to Cox's purported surprise, the judge did so, putting an end to the criminal suit and to any chance of filing a habeas petition.<sup>226</sup> Quo warranto proceedings could be brought only by the government with the consent of Attorney General Stanbery.<sup>227</sup> Cox presented quo warranto papers to the local district attorney who refused to sign them "without instructions or a request from the President or the Attorney General."<sup>228</sup> Though Cox passed this information on to Stanbery, nothing further occurred.<sup>229</sup>

The evidence of Cox's ineptitude and the Attorney General's inaction undermined the President's claim that he had sought to have the constitutionality of the Tenure of Office Act resolved by the Judiciary.<sup>230</sup> Instead, it may have appeared that Johnson was trying to clothe his purely political objectives in the more respectable garb of the Constitution. The House Managers made much of the point, noting that he could easily have instituted a test case if he wanted to.<sup>231</sup> Several Senators who had agreed to admit evidence supporting the test-case defense but who later voted to convict cited his weak and

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225. CONG. GLOBE, 40th Cong., 2d Sess. supp. at 200 (1868).

226. *Id.* at 201-04 (testimony of Walter S. Cox); *id.* at 204-06 (testimony of Richard T. Merrick, a private attorney representing Gen. Thomas); DEWITT, *supra* note 191, at 377. According to Johnson's trial counsel, if the D.C. Supreme Court had ruled against Thomas in the habeas proceeding, the plan was to take an immediate appeal to the Supreme Court. CONG. GLOBE, 40th Cong., 2d Sess. supp. at 167 (1868).

227. *See* CONG. GLOBE, 40th Cong., 2d Sess. supp. at 198-200 (1868).

228. *Id.* at 203 (testimony of Walter S. Cox).

229. *Id.* at 203-04 (testimony of Walter S. Cox). The government may have decided not to pursue the quo warranto route because Johnson had by then been impeached, making it unlikely that a federal court would intervene in the matter.

230. *See* BENEDICT, *supra* note 187, at 157-58.

231. CONG. GLOBE, 40th Cong., 2d Sess. supp. at 37 (1868) (opening argument of Rep. Benjamin Butler); *id.* at 271 (closing argument of Rep. George Boutwell); *id.* at 332-33 (closing argument of Thomas Williams).

vacillating efforts to place the question before the courts.<sup>232</sup> In the absence of any serious attempt to create a test case, Johnson was in effect claiming that Presidents may simply ignore allegedly unconstitutional laws—a prerogative which he and his defense counsel had repeatedly disavowed, and to which Congress was firmly opposed.

In sum, Andrew Johnson's dismissal of Stanton was not a case of a President choosing to violate a law to which he had constitutional objections, for Johnson was on solid ground in believing that the Tenure of Office Act did not protect Stanton. Yet because Congress treated the incident as one of presidential noncompliance, the impeachment proceeding does shed light on the perceived legitimacy of such conduct. As we have seen, while there is evidence that the Senate rejected the broad assertion that a President may ignore any statute that he thinks is unconstitutional, a majority of the Senate may have accepted a limited right of noncompliance in cases where such defiance is necessary to produce a test case.

The Johnson impeachment also makes clear that a President who invokes this principle bears a heavy burden. He cannot, as Johnson sought to do, merely assert his belief that a law is unconstitutional. Instead, the Chief Executive must make every effort to assure that the question is presented to the federal courts for final resolution. Without a requirement that a President take these steps, the Executive could routinely invoke the Constitution as a means of suspending laws which he opposes on policy grounds.

In the veto context, at least, Andrew Johnson's impeachment appears to have had a chastening effect. Not until more than 100 years later did another President dare to ignore a law that was passed over his constitutionally based veto.<sup>233</sup>

### 3. *Chester A. Arthur*

On August 2, 1882, Congress overrode President Arthur's veto of an \$18.7 million river and harbor improvements bill,<sup>234</sup> then the largest such appropriation ever. Arthur opposed the measure as being an "extravagant expenditure of public money," and on the ground that

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232. Senator Frelinghuysen stated that "[t]hree months have transpired since the removal, and the first step to make this test has not been taken." *Id.* at 522. Charles Sumner expressed similar views though, by his own admission, he would have voted to convict the President in any event. *Id.* at 471, 473.

233. Ronald Reagan refused to comply with the Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086, which was passed over his constitutionally-based veto. *See infra* notes 551-553 and accompanying text.

234. Act of Aug. 2, 1882, ch. 375, 22 Stat. 191.

“it contains appropriations for purposes not for the common defense or general welfare, and which do not promote commerce among the states.”<sup>235</sup> In repassing the bill, the Congress ignored Arthur’s recommendation that the appropriation be reduced by half.

The President’s veto message did not specify which of the hundreds of projects were allegedly unconstitutional. However, Senator George Hoar later noted that Arthur objected to “a very few items only, amounting altogether to a very few thousand dollars.”<sup>236</sup> Hoar’s account is substantiated by a report which the President submitted to Congress in January 1884, reporting river and harbor improvements “from the beginning of the Government to the present time.” It identified only three projects that did not involve navigable waters: Lake Winnepissiogee in New Hampshire, the North Carolina portion of the Yadkin River, and the French Broad River in North Carolina.<sup>237</sup> The first of these was not funded by the 1882 Act. Thus, the two North Carolina projects were the only improvements in the vetoed bill to which the President was constitutionally opposed. The amounts appropriated for these two projects were quite small: \$25,000 for the Yadkin and \$53,000 for the French Broad.<sup>238</sup>

Despite his constitutional objections Arthur proceeded to implement the Act even as to the disputed projects. While not all of the appropriated funds were spent by the end of the 1883 fiscal year, the Secretary of War expended \$9,061 on the Yadkin River project and \$1,364 on improving the French Broad River.<sup>239</sup> During the same year the administration spent all of the funds remaining from previous appropriations for Lake Winnepissiogee, even though President Arthur had voiced constitutional objections to this project as well.<sup>240</sup>

#### 4. Grover Cleveland

Like Chester Arthur, Grover Cleveland unsuccessfully vetoed a major river and harbor improvements bill.<sup>241</sup> The Act of June 3, 1896 directly appropriated \$12.6 million for 417 projects, and authorized the War Department to contract for an additional \$62 million in im-

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235. H.R. EXEC. DOC. NO. 222, 47th Cong., 1st Sess. 1-2 (1882).

236. 2 GEORGE F. HOAR, AUTOBIOGRAPHY OF SEVENTY YEARS 118 (1903).

237. H.R. EXEC. DOC. NO. 64, 48th Cong., 1st Sess. iii (1884).

238. Act of August 2, 1882, ch. 375, 22 Stat. 199. The Act did not require that the funds be spent within a set period of time.

239. H.R. EXEC. DOC. NO. 64, 48th Cong., 1st Sess. 37, 41-42 (1884).

240. *Id.* at 4-5.

241. Act of June 3, 1896, ch. 314, 29 Stat. 202.

provements to be funded by future appropriations.<sup>242</sup> It is not entirely clear that Cleveland's objections rested on constitutional grounds, but this may have been the case.

In his veto message, Cleveland listed nine reasons for rejecting the bill. The first was that some of the improvements "are not related to the public welfare, and many of them are palpably for the benefit of limited localities or in aid of individual interests."<sup>243</sup> The President perhaps meant by this that the measure violated Article I, section 8, which limits Congress's spending power to "provid[ing] for the common Defence and general Welfare . . . ."<sup>244</sup> The balance of Cleveland's objections reflected his view that if the federal government were to become a "giver of gifts" it would "stimulate a vicious paternalism."<sup>245</sup> This concern, too, may have had constitutional roots. According to one of his biographers, the President "proposed to confine the government to its proper functions *as prescribed in the Constitution*—which Cleveland believed did not include paternalistic aid to any group or individual."<sup>246</sup>

Treating President Cleveland's rivers and harbors veto as having rested on constitutional grounds, there is no evidence that he refused to spend the appropriated funds. Cleveland left office in March 1897, nine months after the bill became law. During this period, the War Department began to carry out the authorized improvements.<sup>247</sup> And though the administration sought in a few cases to limit disbursements under the Act, it did so based on the wording of specific appropriations, not under a claimed right to ignore projects that were thought to be unconstitutional.<sup>248</sup> Cleveland's Attorney General in fact instructed the Secretary of War that, except in a few particular instances, the Act did not "leave anything to your discretion with

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242. H.R. DOC. NO. 2, 54th Cong., 2d Sess., vol. II, at 21-22 (1896); Message of May 29, 1896, in 12-13 MESSAGES AND PAPERS, *supra* note 129, at 6109-11.

243. Message of May 29, 1896, in 12-13 MESSAGES AND PAPERS, *supra* note 129, at 6109-11.

244. U.S. CONST. art. I, § 8, cl. 1.

245. Message of May 29, 1896, in 12-13 MESSAGES AND PAPERS, *supra* note 129, at 6109-11.

246. HORACE S. MERRILL, *BOURBON LEADER: GROVER CLEVELAND AND THE DEMOCRATIC PARTY* 137 (1957) (emphasis added). See also REXFORD G. TUGWELL, *GROVER CLEVELAND* 126 (1968) (Cleveland believed "that the federal government itself ought to be severely restricted in exercising regulatory and directive powers.").

247. See H.R. DOC. NO. 2, 54th Cong., 2d Sess., vol. I, at 40-41 (1896); *id.*, vol. II, at 21 et seq. (1896); H.R. DOC. NO. 2, 55th Cong., 2d Sess., vol. I, at 37-39 (1897).

248. See, e.g., 21 Op. Att'y Gen. 391 (Aug. 1, 1896); 21 Op. Att'y Gen. at 414 (Sept. 29, 1896); 21 Op. Att'y Gen. at 471 (Jan. 11, 1897).

respect to the expenditure of the sum appropriated.”<sup>249</sup> Instead, “[t]he intention of Congress was, except in instances where a contrary intent is manifested . . . that you should proceed with the projects specified to the extent of the appropriations without inquiry as to their wisdom.”<sup>250</sup> There is nothing to suggest that the Secretary of War failed to heed this advice.

#### 5. *William Howard Taft*

The Webb-Kenyon Act, passed by Congress over President Taft’s veto, outlawed the interstate shipment of intoxicating liquor if it was intended for use contrary to the laws of the state of destination.<sup>251</sup> This Act for the first time enabled states to enforce local prohibition laws by barring the importation of liquor. The President had vetoed the measure on the ground that “it [was] in substance and effect a delegation by Congress to the States of the power of regulating interstate commerce in liquors which is vested exclusively in Congress.”<sup>252</sup> However, Taft never faced the choice of whether or not to implement the Act, for he turned the White House over to Woodrow Wilson three days after the measure became law.

#### 6. *Woodrow Wilson*

During World War I, the prohibition lobby capitalized on the need to conserve foodstuffs and on the prevailing spirit of self-sacrifice to push through Congress a series of laws which turned the United States into a “dry” nation on July 1, 1919, more than six months before the Eighteenth Amendment went into effect.<sup>253</sup> Not satisfied with these victories, the Anti-Saloon League in October 1919, nearly a year after the armistice, induced Congress to again use its war powers to expand the scope of the War-Time Prohibition Act even

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249. 21 Op. Att’y Gen. at 421 (Oct. 9, 1896).

250. 21 Op. Att’y Gen. at 420, 421-22 (Oct. 9, 1896) (citation omitted) (concluding that while the Secretary was obliged to spend the funds appropriated by this act, the Secretary had discretion with respect to entering into contracts to be funded from *future* appropriations).

251. Act of March 1, 1913, PUB. L. NO. 398, ch. 90, 37 Stat. 699.

252. 49 CONG. REC. 4291, 4292 (Feb. 28, 1913). The Court later upheld the Act in *Clark Distilling Co. v. Western Maryland R.R.*, 242 U.S. 311 (1917).

253. CHRISTOPHER N. MAY, *IN THE NAME OF WAR: JUDICIAL REVIEW AND THE WAR POWERS SINCE 1918*, at 60-73 (1989). The 18th Amendment, outlawing the manufacture, sale, transportation and importation of intoxicating liquors, was ratified January 16, 1919, and took effect one year later.

though it would be displaced in a few months by the Eighteenth Amendment.<sup>254</sup>

Woodrow Wilson vetoed the bill to expand the War-Time Prohibition Act, declaring that “[i]t has to do with the enforcement of an act which was passed by reason of the emergencies of the war and whose objects have been satisfied in the demobilization of the Army and Navy, and whose repeal I have already sought at the hands of Congress.”<sup>255</sup> While Wilson’s message was ambiguous, he appears to have been asserting that Congress was constitutionally barred from making further use of its war powers and that it must instead wait for the Eighteenth Amendment to take effect. Wilson’s October 27 veto message cautioned that “[i]n all matters having to do with the personal habits and customs of large numbers of our people, we must be certain that the established processes of legal change are followed.”<sup>256</sup>

Congress overrode the President’s veto on October 28.<sup>257</sup> That same day the White House announced that the expanded War-Time Prohibition Act would be fully enforced—a pledge to which the administration adhered.<sup>258</sup> On January 5, eleven days before it was superseded by the Eighteenth Amendment, the Supreme Court ruled 5 to 4 that the expanded War-Time Prohibition Act was constitutional.<sup>259</sup>

## 7. *Harry S. Truman*

President Truman issued two constitutionally-based vetoes that were overridden by Congress. The first involved the Internal Security Act of 1950.<sup>260</sup> In his September 22, 1950 veto message, Truman objected that Title I of the Internal Security Act, which required so-called Communist front groups to register with the government, “would make a mockery of the ‘Bill of Rights’ and greatly chill expression.”<sup>261</sup> He also opposed Title II of the Act, which authorized the President to declare an “internal security emergency,” during

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254. Volstead Act (Act of Oct. 28, 1919), ch. 85, title I, 41 Stat. 305; *see* MAY, *supra* note 253, at 86-91.

255. Message of Oct. 27, 1919, in 6 PUBLIC PAPERS OF WOODROW WILSON 424-25 (Ray Stannard Baker & William E. Dodd eds., 1927).

256. *Id.*

257. MAY, *supra* note 253, at 91-93.

258. N.Y. TIMES, Oct. 29, 1919, at 1; N.Y. TIMES, Nov. 21, 1919, at 10.

259. *Ruppert v. Caffey*, 251 U.S. 264 (1920); *see* MAY, *supra* note 253, at 191, 203-06.

260. Act of Sept. 23, 1950, PUB. L. No. 830, ch. 1024, 64 Stat. 987; Title I was entitled the Subversive Activities Control Act of 1950; Title II was the Emergency Detention Act of 1950.

261. 96 CONG. REC. 15631 (1950).

which the government could detain any persons whom the Attorney General has "reasonable ground to believe . . . probably will engage in . . . acts of espionage or of sabotage." Truman warned that "under our legal system to detain a man not charged with a crime would raise serious constitutional questions unless the writ of habeas corpus were suspended," which the act did not do.<sup>262</sup> The measure became law over the President's veto on September 23, 1950.<sup>263</sup>

The Truman administration immediately proceeded to enforce Title I despite the President's constitutional objections.<sup>264</sup> In October, 1950, the Attorney General issued regulations implementing the registration provisions.<sup>265</sup> A month later he petitioned the Subversive Activities Control Board for an order compelling the Communist Party to register under the Act.<sup>266</sup> The President never had occasion to invoke the emergency detention provisions of Title II. However, the Truman Justice Department did carry out the statute to the extent of rehabilitating six World War II installations for use as detention camps should an internal security emergency be declared.<sup>267</sup>

The second statute that Truman unsuccessfully vetoed on constitutional grounds was the Immigration and Nationality Act of 1952.<sup>268</sup> His veto message of June 25, 1952 was based mainly on policy concerns, but it also noted that "serious constitutional questions" were raised by the Act's provisions dealing with children's loss of citizenship, denaturalization procedures, and judicial review of administrative denials of citizenship.<sup>269</sup> In addition, Truman objected under the "doctrine of the separation of powers" to the section requiring the Executive to provide any information requested by a new Joint Congressional Committee on Immigration and Nationality.<sup>270</sup>

The Joint Committee had no chance to make any requests of the Truman administration for it began to function only after he left of-

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262. *Id.* at 15630 (1950).

263. N.Y. TIMES, Sept. 24, 1950, at 1.

264. *Id.*, Sept. 25, 1950, p. 1.

265. THOMAS I. EMERSON, ET AL., POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 160 (student ed. 1967).

266. 1951 *Att'y Gen. Ann. Rep.* 6; 1952 *Att'y Gen. Ann. Rep.* 11-12; EMERSON ET AL., *supra* note 265, at 160-61. In April 1953, three months after Truman left office, the Attorney General sought to enforce the Act against Communist-front organizations. *Id.* at 182.

267. EMERSON ET AL., *supra* note 265, at 186.

268. Act of June 27, 1952, Pub. L. No. 414, ch. 477, 66 Stat. 163.

269. 98 CONG. REC. 8084 (June 25, 1952).

270. *Id.* Section 401 provided: "The Secretary of State and the Attorney General shall without delay submit to the [Joint Congressional Committee on Immigration and Nationality] all regulations, instructions, and all other information as requested by the Committee . . . ." Act of June 27, 1952, Pub. L. No. 414, ch. 477, § 401(f), 66 Stat. 163, 274.

fi ce.<sup>271</sup> The other provisions of the Act took effect on December 24, 1952, less than a month before Truman's term ended.<sup>272</sup> During this period the administration began to enforce the Act.<sup>273</sup> Implementing regulations published on December 19 contained no caveats or references to the President's prior constitutional objections.<sup>274</sup> In early January, he told Congress that enforcing the Act had increased the Justice Department's expenses, necessitating a supplemental appropriation for 1953.<sup>275</sup> Truman repeatedly urged Congress to amend or repeal the Act,<sup>276</sup> but there is no evidence that he refused to enforce or carry out any of its provisions.

#### 8. *Richard M. Nixon*

The War Powers Resolution of 1973, requiring the President to consult and notify Congress if U.S. military forces are introduced into situations involving actual or imminent hostilities, became law on November 7, 1973, over President Nixon's veto.<sup>277</sup> In his veto message of October 24, 1973, the President asserted that the Resolution unconstitutionally sought "to take away, by a mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years."<sup>278</sup> The message also objected that the section permitting Congress by concurrent resolution to compel the withdrawal of armed forces "denies the President his constitutional role in approving legislation."<sup>279</sup>

Shortly after the War Powers Resolution was enacted, the Nixon administration indicated it would probably comply with the measure,

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271. The House appointed members to the Joint Committee in June 1952, but Congress adjourned before the Senate could do so. 98 CONG. REC. 8621, 9750 (1952). In the next Congress, the House appointed members to the Joint Committee on January 26, 1953; the Senate did so on February 4, 1953. 99 CONG. REC. 574, 824 (1953). Truman left office on January 20, 1953.

272. Act of June 27, 1952, Pub. L. No. 414, ch. 477, § 407, 66 Stat. 163, 281.

273. See *4000 Former Nazis Now May Enter U.S.*, N.Y. TIMES, Nov. 12, 1952, at 12; N.Y. TIMES, Dec. 17, 1952, at 6; N.Y. TIMES, Dec. 21, 1952, at 1; 1953 *Att'y Gen. Ann. Rep.* 46.

274. 17 FED. REG. 11469-11564 (1952).

275. Message of Jan. 9, 1953, in 1953 PUB. PAPERS 1128, 1163 (1966).

276. Anthony Leviero, *President Vetoes Immigration Bill as Discriminatory*, N.Y. TIMES, June 26, 1952, at 1; Anthony Leviero, *New Body to Study Immigration Law*, N.Y. TIMES, Sept. 5, 1952, at 9; *Texts of Truman's Speeches in Harlem and at the Waldorf Astoria*, N.Y. TIMES, Oct. 12, 1952, at 77, 79; *Alien Law Bars 269 of Liberte's Crew*, N.Y. TIMES, Dec. 24, 1952, at 7; Message of Jan. 9, 1953, in 1953 PUB. PAPERS 1128, 1163 (1966).

277. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541-1548 (1988)).

278. Message of Oct. 24, 1973, in 1973 PUB. PAPERS 893, 893-95 (1975).

279. *Id.* at 893. A concurrent resolution requires approval of the House and the Senate but not that of the President.



despite the President's constitutional objections. "The law is on the books," said a White House source, and "we may just have to live with it."<sup>280</sup> In the remaining nine months of his presidency that the War Powers Resolution was in effect, Nixon did not use the military in situations that fell within the Resolution's consulting or reporting requirements.<sup>281</sup> By the time it was passed, American troops had been removed from Indochina and the U.S. bombing of Cambodia had ceased.<sup>282</sup> While the United States later employed the armed forces to evacuate American personnel and foreign civilians from Cambodia and Vietnam, these operations occurred after Nixon had resigned from office.<sup>283</sup>

### 9. *Gerald R. Ford*

Among the changes made by the 1974 Freedom of Information Act amendments was a provision allowing federal courts to review de novo a government agency's claim that requested information is exempt from disclosure, the agency having the burden of proving that it had a right to withhold the records in question.<sup>284</sup> In a veto message issued on October 17, 1974, President Ford objected to this amendment as it applied to classified material. "Such a provision would violate constitutional principles," he said, for "a determination by the Secretary of Defense that disclosure of a document would endanger our national security would, even though reasonable, have to be overturned by a district judge who thought the plaintiff's position just as reasonable."<sup>285</sup> The President's veto was overridden on November 21, 1974.<sup>286</sup>

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280. WASH. STAR, Nov. 9, 1973, at C-back page, *quoted in* JOHN H. SULLIVAN, STAFF OF HOUSE COMM. ON FOREIGN AFFAIRS, 97th Cong., 2d Sess., REPORT ON THE WAR POWERS RESOLUTION 169 (Comm. Print 1982) [hereinafter SULLIVAN REPORT].

281. Members of Congress twice questioned the Nixon administration's compliance with the War Powers Resolution. At issue were the July, 1974 use of Navy helicopters to evacuate American and foreign nationals from Cyprus, and the airdropping of supplies to Cambodian villages under siege by Communist forces. Congress ultimately accepted the administration's explanation that the reporting requirement was not triggered because the aircraft in question were unarmed and because they did not operate in hostile areas. SULLIVAN REPORT, *supra* note 280, at 173-76.

282. See John H. Ely, *The American War in Indochina, Part I: The (Troubled) Constitutionality of the War They Told Us About*, 42 STAN. L. REV. 877, 908, 910 (1990).

283. Clement J. Zablocki, *War Powers Resolution: Its Past Record and Future Promise*, 17 LOY. L.A. L. REV. 579, 580-83 (1984); SULLIVAN REPORT, *supra* note 280, at 179-220.

284. Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561, 1562 (codified as 5 U.S.C. § 552(a)(4)(B) (1988)).

285. Message of Oct. 17, 1974, in 1974 PUB. PAPERS 374, 375 (1975).

286. Act of Nov. 21, 1974, Pub. L. No. 93-502, 88 Stat. 1561.

The amendment to which Ford objected on constitutional grounds was addressed to the federal courts, not to the executive branch. There was therefore no way the President could directly refuse to honor the provision. Moreover, not until 1986 would an appellate court uphold on the merits, a decision to reject an agency's classification claim.<sup>287</sup> Thus, Ford had no occasion to refuse compliance with a court order compelling disclosure of classified material during his years in the White House.

### *Summary*

This historical review reveals that, with perhaps one exception, American Presidents from 1789 through 1980 acted on the premise that once a bill becomes law over their veto, the Executive must honor the measure despite his constitutional misgivings. In some instances, third parties were in a position to challenge the act in court, thereby securing a judicial resolution of the disagreement between Congress and the Executive.<sup>288</sup> But in many other cases, Presidents implemented such laws even though the effect of doing so was that no one would have standing to seek a judicial ruling as to the statutes' validity.<sup>289</sup> That Congress might thus have the last word on the issue of constitutionality was not deemed by the President a sufficient reason for refusing to enforce the law.

### **B. Constitutional Objections to Bills the President Signed Into Law**

With growing frequency, Presidents have registered their constitutional objections to bills, not through exercise of the veto power, but by approving the measure while issuing a statement pointing out its alleged constitutional defects. Where the White House is opposed to a bill as a whole, it may still employ the veto, citing the measure's

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287. JUSTIN D. FRANKLIN & ROBERT F. BOUCHARD, *GUIDEBOOK TO THE FREEDOM OF INFORMATION AND PRIVACY ACTS*, § 1.04, at p. 1-36 (2d ed. 1992).

288. *See, e.g.*, *Clark Distilling Co. v. Western Maryland Ry. Co.*, 242 U.S. 311 (1917) (upholding Webb-Kenyon Act vetoed by President Taft); *Ruppert v. Caffey*, 251 U.S. 264 (1920) (sustaining Title I of the National Prohibition Act vetoed by President Wilson).

289. This was true, for example, of the internal improvement bills vetoed by Presidents Pierce, Arthur, and Cleveland. Had the Executive refused to implement these measures, the states for whom the funds were designated might have challenged the Executive's action. No one, however, had standing to challenge the expenditure of these monies. Even if federal taxpayer standing had been recognized at the time, standing would not have existed since the measures were not alleged to have violated the Establishment Clause. *See Flast v. Cohen*, 392 U.S. 83 (1968); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982).

constitutional defects as among the grounds for rejection.<sup>290</sup> But where, as is often the case, the legislation contains otherwise desirable features, the President may allow the bill to become law while voicing his constitutional objections in a signing or post-signing statement.<sup>291</sup>

### 1. *The Evolution of Presidential Signing Statements*

The Constitution makes no mention of signing statements. Article I declares simply that if the President approves of a bill "he shall sign it,"<sup>292</sup> there is no indication that he is also to issue a statement explaining his action. Only where the Chief Executive elects to veto a measure does the Constitution provide that he is to set forth his reasons for doing so.<sup>293</sup> It is thus not surprising that in the early decades of the Republic Presidents seldom issued statements in connection with signing a bill.<sup>294</sup> During the first half-century under the Constitution only two such statements were issued, both by Andrew Jackson.<sup>295</sup> When President Tyler in 1842 issued a signing statement expressing doubt about the constitutionality of a bill he had signed, Congress branded his action "a defacement of the public records and archives" and an "evil example for the future . . ."<sup>296</sup> In 1854, Franklin Pierce apologized for issuing a signing statement, noting that he had "deviate[d] from the ordinary course of announcing the approval of bills by an oral statement only . . ."<sup>297</sup> Even as late as 1875, Presi-

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290. For example, of the 40 vetoes issued by President Bush during his term in office, 11 (or 27.5%) cited constitutional concerns. 25-28 WEEKLY COMP. PRES. DOC. (1989-92).

291. While most signing statements are issued when the President signs a bill into law, the term is used here also to embrace statements issued by a President at a later date, as well as the occasional statement explaining why the President allowed a bill to become law without his signature.

292. U.S. CONST. art. I, § 7, cl. 2.

293. Article I, § 7, clause 2 provides that when a bill is presented to the President "[i]f he approve he shall sign it, but if not he shall return it, *with his Objections* to that House in which it shall have originated . . ." (emphasis added.)

294. President Monroe twice issued statements long after a bill had become law explaining his understanding of how the measure was to be executed; in neither case did he object that the law was invalid. See Message of Dec. 17, 1819, in 2 MESSAGES AND PAPERS, *supra* note 129, at 632; Message of April 13, 1822, in 2 MESSAGES AND PAPERS, *supra* note 129, at 698.

295. Message of May 29, 1830, in 3 MESSAGES AND PAPERS, *supra* note 129, at 1045; Message of May 30, 1830, in 3 MESSAGES AND PAPERS, *supra* note 129, at 1046. Only the second of these statements raised a constitutional objection.

296. H.R. REP. NO. 909, 27th Cong., 2d Sess. 2, 12 (1842).

297. Message of July 22, 1854, in 6 MESSAGES AND PAPERS, *supra* note 129, at 2776. The message involved an internal improvements bill and did not raise any constitutional objections. In 1848, James Polk had likewise apologized for issuing a signing statement, noting that when a President signs a bill, "usage requires that he shall notify the House in which it originated . . ." but "[t]he mode of giving this notification has been by an oral

dent Grant acknowledged that his use of a signing statement was an "unusual method of conveying the notice of approval . . . ." <sup>298</sup>

Signing statements still remained the exception at the turn of the century.<sup>299</sup> By 1950, however, they had become commonplace.<sup>300</sup> President Truman issued nearly 16 signing statements a year.<sup>301</sup> As Table 2 indicates, the figure has increased significantly since then. Presidents Ford and Carter averaged about 60 signing statements a year.<sup>302</sup> While the annual rate dropped to about 30 during the Reagan years, it rose to more than 50 under President Bush, who issued 80 signing statements in 1992 alone.<sup>303</sup>

Presidents may issue signing statements for a number of purposes. They sometimes play a ceremonial or political role, celebrating the enactment of a law and perhaps giving credit to those responsible for its passage.<sup>304</sup> They may also be employed to identify policy shortcomings in a statute and to urge the adoption of corrective legislation.<sup>305</sup> Presidents have also used signing statements to promulgate their own interpretation of an ambiguous or controversial law, both for the guidance of executive branch officials and with hope that

message by his private secretary." Message of Aug. 14, 1848, in 6 MESSAGES AND PAPERS, *supra* note 129, at 2456.

298. Message of Jan. 14, 1875, in 9 MESSAGES AND PAPERS, *supra* note 129, at 4268.

299. From 1789 until the Civil War, six signing statements appeared. There was a small surge during the Civil War and Reconstruction eras when Lincoln, Johnson and Grant issued a total of 12 such statements. From 1877 through 1900, five more statements appeared. See 1-14 MESSAGES AND PAPERS, *supra* note 129. In the early 1900s, Theodore Roosevelt issued one signing statement. Message of March 7, 1906, in 17 MESSAGES AND PAPERS, *supra* note 129, at 7667. President Taft issued only a few. See 17-18 MESSAGES AND PAPERS, *supra* note 129.

300. See *infra* Table 2.

301. See Harry S. Truman, 1945-1953 PUB. PAPERS (1961-66).

302. See 10-16 WEEKLY COMP. PRES. DOC. (1974-81). Carter holds the record for a single year, issuing 92 signing statements between January 3, 1980 and January 2, 1981. See 16 WEEKLY COMP. PRES. DOC. (1980-81).

303. *U.S. Code Cong. & Admin. News* (1992), Table 4A.

304. See, e.g., Harry S. Truman, Statement of May 22, 1947, in 1947 PUB. PAPERS, 254-55 (1963) (signing statement of Bill Endorsing Truman Doctrine). The perceived political value of signing statements is suggested by the fact that there is often a surge in the year a President is seeking reelection. Thus, Richard Nixon issued 41 signing statements in 1972, well above his yearly average of 26; in 1976, Gerald Ford issued 78 statements, more than twice the number he issued in any prior year; Jimmy Carter, who averaged 57 signing statements a year, issued 92 in 1980; Ronald Reagan, who averaged 31 statements a year, issued 46 in 1984; and George Bush issued 80 signing statements in 1992, 20 more than his previous annual high. See *infra* Table 2; 8 WEEKLY COMP. PRES. DOC. (1972); 12 WEEKLY COMP. PRES. DOC. (1976); 16 WEEKLY COMP. PRES. DOC. (1980-81); Ronald W. Reagan, 1984 PUB. PAPERS, (1986-87); *U.S. Code Cong. & Admin. News* (1992), Table 4A.

305. See, e.g., Ronald W. Reagan, Statement of Oct. 24, 1984, in 1984 PUB. PAPERS, 1643 (1987) (signing statement regarding bill amending Volunteers in the Parks Act).

**Table 2**  
**Presidential Signing Statements (1945-1993)**

President	Signing Statements of All Types		Constitutionally Based Signing Statements		
	Total	Annual Average	Total	Annual Average	As Percent of All Signing Statements
Truman (1945-53)	121	15.7	4	0.5	3.3%
Eisenhower (1953-61)	146	18.3	9	1.1	6.2%
Kennedy (1961-63)	37	12.8	1	0.3	2.7%
Johnson (1963-69)	171	33.5	9	1.8	5.3%
Nixon (1969-74)	146	26.1	9	1.6	6.2%
Ford (1974-77)	146	60.8	15	6.3	10.3%
Carter (1977-81)	229	57.3	30	7.5	13.1%
Reagan (1981-89)	247	30.9	87	10.9	35.2%
Bush (1989-93)	217	54.2	116	29.0	53.5%

*Source:* The data for Truman, Eisenhower, Kennedy, Johnson, Nixon, Ford, and Carter is drawn from the volumes of PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES covering their presidencies. The data for Reagan and Bush is drawn from the same series and from *U.S. Code Cong. & Admin. News*, volumes for 1981 through 1992.

judges will treat the White House's views as a part of the act's legislative history when the measure is later construed by the courts.<sup>306</sup> Finally, signing statements may express the President's constitutional

306. See, e.g., Harry S. Truman, Statement of July 3, 1946, in 1946 PUB. PAPERS, 336-37 (1962) (signing statement interpreting Hobbs Bill as not infringing rights of organized labor). President Reagan made extensive use of signing statements for this purpose. In 1986, Attorney General Edwin Meese made arrangements for presidential signing statements to appear in the "legislative history" section of *United States Code Congressional & Administrative News*. Strasser, *Executive Intent*, NAT'L L.J., Mar. 10, 1986, at 2. This use of signing statements has triggered a vigorous debate as to the legitimacy of the Executive's attempt to create legislative history. Compare Douglas W. Kmiec, *Judges Should Pay Attention to Statements by President*, NAT'L L.J., Nov. 10, 1986, at 13; Cross, *supra* note 170; and Kathryn M. Dessayer, Note, *The First Work: The President's Place in 'Legislative History'*, 89 MICH. L. REV. 399 (1990) (defending the practice) with Garber & Wimmer, *supra* note 170; Waites, *supra* note 170; and William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 IND. L.J. 699 (1991) (criticizing the practice).

disagreement with a statute. These goals are not mutually exclusive and a signing statement may often serve more than one of them.<sup>307</sup>

Only in the last 50 years have signing statements emerged as a principal means for the White House to assert constitutional objections to acts of Congress. Prior to 1945, the number of signing statements that raised constitutional issues was negligible. From 1789 to 1945, only 15 such statements were issued, an average of about one a decade.<sup>308</sup> In the period from early 1945 to mid-1974, embracing the presidencies of Harry Truman through Richard Nixon, constitutionally based signing statements appeared at a rate of one every year.<sup>309</sup> As Table 2 reveals, during the Ford and Carter eras, the number increased to between 6 and 8 a year.<sup>310</sup> The upward trend continued under Ronald Reagan who averaged 11 constitutionally based statements a year for an 8-year total of 87,<sup>311</sup> nearly equal to that of all of his predecessors combined.<sup>312</sup> During the next four years, George Bush almost tripled Reagan's annual output, averaging 29 constitutionally based signing statements a year.<sup>313</sup> Such statements, rather than appearing once a decade, now arrive at a rate of roughly one every two weeks.

The extent to which signing statements have become a vehicle for raising constitutional objections is further reflected in the fact that during the administrations of Presidents Truman, Eisenhower, Kennedy, Johnson, and Nixon, the percentage of all signing statements that rested on constitutional grounds hovered in the range of 3% to 6%.<sup>314</sup> As Table 2 indicates, the proportion has jumped dramatically since then. During the Bush administration, over half of the Presi-

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307. See, e.g., Lyndon B. Johnson, Statement of July 17, 1964, in 1964 PUB. PAPERS, 861-62 (1965) (signing statement praising the Water Resources Research Act and the Senator who guided it through Congress, but requesting deletion of a provision that violated the spirit of the Constitution).

308. These 15 statements were issued by Presidents Jackson, Tyler, Buchanan, Lincoln, Johnson (2), Grant, Arthur, Cleveland, Taft, Wilson (2), Hoover, and Roosevelt (2).

309. During this 29-year period, 32 constitutionally based signing statements were issued, as follows: Truman (4), Eisenhower (9), Kennedy (1), Johnson (9), and Nixon (9). See *supra* Table 2.

310. Gerald Ford issued 15 constitutionally based signing statements; Jimmy Carter issued 30. See 10-16 WEEKLY COMP. PRES. DOC. (1974-81). See also *supra* Table 2.

311. See Ronald W. Reagan, 1980-1988 PUB. PAPERS (1982-90); see also *supra* Table 2.

312. Presidents from George Washington through Jimmy Carter issued a total of 92 constitutionally based signing statements, only 5 more than Reagan's individual total.

313. See U.S. Code. Cong. & Admin. News (1989-92); 28 WEEKLY COMP. PRES. DOC. (1992). See also *supra* Table 2.

314. See *supra* Table 2.

dent's signing statements raised constitutional objections.<sup>315</sup> Thus, whether measured in absolute terms or as a percent of all statements issued, constitutionally based signing statements have become much more prevalent in recent years.

## 2. *The Constitutional Grounds for Objection*

Table 3 presents a breakdown of the constitutionally based signing statements issued between 1789 and 1981, showing the ground on which the President objected.<sup>316</sup> If a President opposed a measure on more than one constitutional ground, the statute appears more than once. Thus, while signing or post-signing statements were issued with respect to 93 laws during this period, Table 3 has a total of 103 entries.<sup>317</sup>

**Table 3**  
**Presidential Signing and Post-Signing Statements: Constitutional Grounds for Objection and Nature of President's Response (1789-1981)**

*Note:* If a signing statement contained more than one constitutional objection (whether to a single provision or to different provisions of the same law), the statement will appear more than once in this table; such statements are identified by an asterisk (\*). As a result, while only 93 statutes were objected to on constitutional grounds, this table contains 103 entries.

<i>PRESIDENT, STATUTE, AND BASIS OF OBJECTION</i>	<i>PRESIDENT'S RESPONSE<sup>a</sup></i>
<i>FEDERALISM (7)</i>	
<i>Exceeds Scope of National Power (3)</i>	
Jackson      May 31, 1830, ch. 232, 4 Stat. 427	Complied
Grant         Aug. 14, 1876, ch. 267, 19 Stat. 132	Disregarded
Cleveland    Aug. 2, 1886, ch. 840, 24 Stat. 209	Complied
<i>Intrudes Upon Other Rights of States (4)</i>	
Tyler         June 25, 1842, ch. 47, 5 Stat. 491	No Occasion
A. Johnson   July 24, 1866, Res. No. 73, 14 Stat. 364	No Occasion

315. A total of 590 public laws emerged from the 102d Congress, which met during 1991 and 1992; President Bush issued signing statements raising constitutional objections to 59 of these laws, representing 10% of the statutes enacted. *See U.S. Code Cong. & Admin. News* (1991-92).

316. This Article's analysis of signing statements in terms of the grounds on which they were based and the President's response to the law in question covers the period from 1789 to 1981. To have similarly analyzed the more than 200 constitutionally based statements issued by Presidents Reagan and Bush would have required at least five more years of research. For a list of constitutionally based signing statements issued in the period 1972-88, without an indication of the President's response to the law, *see* Popkin, *supra* note 306, at 718-22.

317. Of the 93 statutes with respect to which signing statements were issued, 6 were opposed on 2 distinct constitutional grounds, and 2 were opposed on 3 distinct grounds. These 8 laws account for 18 entries in Table 3.

A. Johnson	March 2, 1867, ch. 170, § 6, 14 Stat. 485*	No Occasion
Nixon	June 22, 1970, PL 91-285, 84 Stat. 314	Complied

*SEPARATION OF POWERS (83)**Appointment (and Removal) Power (8)*

Arthur	Jan. 16, 1883, ch. 27, 22 Stat. 403 <sup>b</sup>	Disregarded
Truman	June 29, 1948, ch. 754, 62 Stat. 1112*	Complied
Truman	May 12, 1949, ch. 101, 63 Stat. 67*	Complied
Nixon	Nov. 16, 1973, PL 93-153, 87 Stat. 576	No Occasion/ Complied <sup>c</sup>
Ford	Oct. 23, 1974, PL 93-463, 88 Stat. 1389	Disregarded
Ford	Dec. 20, 1975, PL 94-158, 89 Stat. 844*	Complied
Ford	Jan. 3, 1976, PL 94-201, 89 Stat. 1129	Complied
Carter	Dec. 12, 1980, PL 96-515, 94 Stat. 2998-3000*	Disregarded

*Members of Congress Holding Other Office (2)*

Ford	Oct. 20, 1975, PL 94-118, 89 Stat. 603	Disregarded
Ford	Dec. 20, 1975, PL 94-158, 89 Stat. 844*	Complied

*Executive Functions Placed Outside Executive Branch (1)*

Nixon	Aug. 15, 1970, PL 91-379, 84 Stat. 796	Complied
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*Commander-in-Chief (5)*

Buchanan	June 25, 1860, ch. 211, 12 Stat. 104	Disregarded
A. Johnson	March 2, 1867, ch. 170, § 2, 14 Stat. 485*	Complied
L. Johnson	Sept. 12, 1966, PL 89-568, 80 Stat. 739	Complied
L. Johnson	April 4, 1967, PL 90-8, 81 Stat. 8	Complied
L. Johnson	Oct. 21, 1967, PL 90-110, 81 Stat. 279	Complied <sup>d</sup>

*Power to Pardon (1)*

Carter	Aug. 2, 1977, PL 95-86, 91 Stat. 444*	Disregarded
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*Conduct of Foreign Relations (10)*

Grant	Aug. 15, 1876, ch. 288, 19 Stat. 170	Complied
Wilson	June 5, 1920, ch. 250, 41 Stat. 988, 1007 <sup>e</sup>	Disregarded
Truman	Sept. 6, 1950, ch. 896, 64 Stat. 595, 758	Complied
Eisenhower	Aug. 2, 1955), ch. 491, 69 Stat. 435	Complied
Eisenhower	July 31, 1956), ch. 803, 70 Stat. 733	Complied
Eisenhower	Aug. 8, 1956, ch. 1036, 70 Stat. 1119	Complied
Eisenhower	July 29, 1958, PL 85-568, 72 Stat. 426	Disregarded
Ford	April 13, 1976, PL 94-265, 90 Stat. 331	Complied
Carter	Aug. 17, 1977, PL 95-108, 91 Stat. 871	Complied
Carter	Aug. 15, 1979, PL 96-60, § 108, 93 Stat. 397*	Disregarded

*Legislative (and Committee) Veto: Disapproval Power (31)*

Eisenhower	Aug. 6, 1956, ch. 972, 70 Stat. 1044	No Occasion
Eisenhower	Aug. 6, 1959, PL 86-137, 73 Stat. 280	No Occasion
Eisenhower	July 14, 1960, PL 86-648, 74 Stat. 504	No Occasion
Kennedy	Oct. 23, 1962, PL 87-872, 76 Stat. 1163 <sup>f</sup>	Complied
L. Johnson	July 17, 1964, PL 88-379, 78 Stat. 329	No Occasion
L. Johnson	Oct. 8, 1964, PL 88-638, 78 Stat. 1035*	No Occasion
Nixon	Aug. 5, 1974, PL 93-365, 88 Stat. 399	No Occasion
Ford	Aug. 21, 1974, PL 93-380, 88 Stat. 484	No Occasion
Ford	May 26, 1975, PL 94-25, 89 Stat. 90	Complied
Ford	Aug. 9, 1975, PL 94-88, 89 Stat. 433	No Occasion
Ford	May 11, 1976, PL 94-283, 90 Stat. 475 <sup>g</sup>	Complied
Ford	June 30, 1976, PL 94-329, 90 Stat. 729	No Occasion
Ford	Sept. 14, 1976, PL 94-412, 90 Stat. 1255	No Occasion
Ford	Oct. 15, 1976, PL 94-502, 90 Stat. 2383	No Occasion
Carter	July 27, 1977, PL 95-75, 91 Stat. 308	No Occasion
Carter	Aug. 4, 1977, PL 95-92, 91 Stat. 622-23	No Occasion
Carter	Dec. 28, 1977, PL 95-223, 91 Stat. 1628	No Occasion
Carter	Mar. 10, 1978, PL 95-242, 92 Stat. 120	No Occasion
Carter	Sept. 18, 1978, PL 95-372, 92 Stat. 641, 668	No Occasion



Carter	Oct. 5, 1978, PL 95-421, 92 Stat. 923	No Occasion
Carter	Oct. 6, 1978, PL 95-424, 92 Stat. 956	Complied
Carter	Aug. 15, 1979, PL 96-60, 93 Stat. 405-06*	No Occasion
Carter	March 5, 1980, PL 96-199, 94 Stat. 73-74	No Occasion
Carter	May 23, 1980, PL 96-247, 94 Stat. 352-53	No Occasion
Carter	May 28, 1980, PL 96-252, 94 Stat. 393-96	No Occasion
Carter	Aug. 29, 1980, PL 96-332, 94 Stat. 1057	No Occasion
Carter	Oct. 17, 1980, PL 96-464, 94 Stat. 2067	No Occasion
Carter	Dec. 12, 1980, PL 96-515, 94 Stat. 3004*	No Occasion
Carter	Dec. 16, 1980, PL 96-533, 94 Stat. 3136, 3142	No Occasion
Carter	Dec. 17, 1980, PL 96-539, 94 Stat. 3195	No Occasion
Carter	Dec. 24, 1980, PL 96-592, 94 Stat. 3449-50	No Occasion

*Legislative (and Committee) Veto: Approval Power (14)*

Truman	July 5, 1949, ch. 296, 63 Stat. 405	Complied
Eisenhower	July 13, 1955, ch. 358, 69 Stat. 301, 321	Complied
L. Johnson	Dec. 31, 1963, PL 88-257, 77 Stat. 844	No Occasion
L. Johnson	Oct. 8, 1964, PL 88-638, 78 Stat. 1035*	Complied <sup>h</sup>
L. Johnson	Oct. 14, 1964, PL 88-643, 78 Stat. 1043 <sup>i</sup>	Complied
L. Johnson	Oct. 26, 1965, PL 89-298, 79 Stat. 1073	No Occasion
Nixon	May 27, 1972, PL 92-306, 86 Stat. 163	No Occasion
Nixon	June 17, 1972, PL 92-313, 86 Stat. 216	Complied
Nixon	July 11, 1973, PL 93-66, 87 Stat. 152	Complied
Ford	Feb. 9, 1976, PL 94-212, 90 Stat. 153	Complied
Ford	June 30, 1976, PL 94-330, 90 Stat. 771	Complied
Carter	Sept. 30, 1978, PL 95-405, 92 Stat. 877	No Occasion
Carter	Nov. 10, 1978, PL 95-625, 92 Stat. 3549	Complied
Carter	Sept. 8, 1980, PL 96-342, 94 Stat. 1082	No Occasion

*Recommending Measures to Congress (2)*

Taft	Aug. 23, 1912, ch. 350, 37 Stat. 360, 415 <sup>j</sup>	Disregarded
L. Johnson	Sept. 8, 1966, PL 89-556, 80 Stat. 689	Complied

*Executive Privilege (2)*

Eisenhower	July 24, 1959, PL 86-108, 73 Stat. 246	Complied
Nixon	Nov. 18, 1969, PL 91-120, 83 Stat. 203	Complied

*Prosecutorial Function (1)*

Nixon	Dec. 17, 1973, PL 93-190, 87 Stat. 736-37 <sup>k</sup>	No Occasion
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*Execution of Laws and Supervisory Power (6)*

Wilson	June 23, 1913, ch. 3, 38 Stat. 4	Complied ?
Roosevelt	June 17, 1944, ch. 262, 58 Stat. 280	No Occasion
Carter	Dec. 9, 1977, PL 95-205, 91 Stat. 1460	Complied
Carter	Oct. 1, 1980, PL 96-369, 94 Stat. 1356	Complied
Carter	Dec. 12, 1980, PL 96-515, 94 Stat. 2999*	No Occasion
Carter	Dec. 12, 1980, PL 96-516, 94 Stat. 3007	No Occasion

**RIGHTS OF INDIVIDUALS (13)***Punishment for Treason (1)*

Lincoln	July 17, 1862, ch. 195, 12 Stat. 589	No Occasion
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*Bill of Attainder (4)*

Roosevelt	July 12, 1943, ch. 218, 57 Stat. 431 <sup>l</sup>	Complied
Truman	June 29, 1948, ch. 754, 62 Stat. 1112*	Complied
Truman	May 12, 1949, ch. 101, 63 Stat. 67*	Complied
Carter	Aug. 2, 1977, PL 95-86, 91 Stat. 444*	Disregarded

*First Amendment (5)*

Ford	Oct. 15, 1974, PL 93-443, 88 Stat. 1263	Complied
Carter	Nov. 2, 1978, PL 95-567, 92 Stat. 2405	Disregarded
Carter	Nov. 10, 1978, PL 95-629, 92 Stat. 3636-39	Disregarded
Carter	Jan. 8, 1980, PL 96-187, 93 Stat. 1367	No Occasion
Carter	Dec. 24, 1980, PL 96-593, 94 Stat. 3452	No Occasion

*Due Process (2)*

Hoover	March 23, 1932, ch. 90, 47 Stat. 70	No Occasion
Carter	Aug. 2, 1977, PL 95-86, 91 Stat. 444*	Disregarded

*Equal Protection (1)*

Carter	Oct. 8, 1977, PL 95-126, 91 Stat. 1106)	Complied
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*Notes to Table 3*

- <sup>a</sup> The following designations are used in this column of the table: "Complied" indicates the President complied with the law, either by honoring or agreeing to honor the provision whose constitutionality was questioned, or by finding a lawful manner of proceeding that made it unnecessary to use the provision in question; "Disregarded" indicates the President disregarded the law by failing to honor or enforce the allegedly unconstitutional provision; "No Occasion" indicates the President had no occasion to honor or ignore the provision because, for example, the Executive was not required to take any action with respect to it, or the provision was quickly amended or repealed, or the President left office before an opportunity to respond to the law arose.
- <sup>b</sup> Post-signing statement issued March 1, 1883, in 11 MESSAGES AND PAPERS *supra* note 129, at 4745 (objecting to law which Arthur had signed on January 16, 1883).
- <sup>c</sup> President Nixon objected to two different sections of this act, § 404 and § 405, claiming that each interfered with his power of appointment. There was no occasion to honor or ignore § 404 because the position in question was abolished. See EXEC. ORDER NO. 11775, 39 Fed. Reg. 11415 (1974). Nixon complied with § 405.
- <sup>d</sup> President Johnson objected to 3 provisions of this act — §§ 809, 810 and 1001 — on the basis that each interfered with his authority as Commander-in-Chief; because each provision was challenged on the same ground, the statute appears only once in this table.
- <sup>e</sup> Message of Aug. 24, 1920, in 17 MESSAGES AND PAPERS, *supra* note 129, at 8871-72; 66 PAPERS OF WOODROW WILSON, *supra* note 139, at 136-37 (post-signing statement issued by State Department at Wilson's direction on August 24, 1920, objecting to § 34 of Jones Act which Wilson had signed June 5, 1920).
- <sup>f</sup> Message of January 8, 1963, in 1963 PUB. PAPERS 6 (1964) (post-signing statement objecting to law Kennedy had signed without objection on October 23, 1962).
- <sup>g</sup> The legislative veto provision to which Ford here objected had been added by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 209, 88 Stat. 1287, and was simply carried forward by this law. When Ford signed the 1974 act he objected to other aspects of the law but not to the legislative veto provision. See 1974 PUB. PAPERS 303-04 (1975). By now objecting to this provision, Ford was in effect issuing a *post-signing* statement concerning the 1974 act. However, for simplicity's sake, his May 11, 1976 signing statement will be treated as an objection to the 1976 act.
- <sup>h</sup> The law required approval of an Advisory Committee made up of both executive branch officials and designated Members of Congress.
- <sup>i</sup> The act required that before certain regulations issued by the CIA could take effect, they had to be approved by "the chairmen and ranking minority members" of the House and Senate Armed Services Committees, but not by the committees as a whole.
- <sup>j</sup> Post-signing message issued February 26, 49 CONG. REC. 3985-86 (1913), submitting proposed budget to Congress in a form barred by an act of Congress which Taft had signed without objection on August 23, 1912. Prior to passage of that act, however, Taft had informed Congress that he believed he possessed the constitutional authority to submit a proposed budget in whatever form he wished. 48 CONG. REC. 8500-01 (June 27, 1912).
- <sup>k</sup> Non-signing statement explaining why President let bill become law without his signature.
- <sup>l</sup> Post-signing statement issued September 14, 1943, objecting to one provision in an appropriations measure that Roosevelt had signed on July 12, 1943. 89 CONG. REC. 7521, 7558 (1943).

The most frequent ground for challenge involved some aspect of separation of powers. This was the basis for 80% of the constitutional objections raised.<sup>318</sup> Not surprisingly, virtually all of these entailed

318. Table 3 places objections to legislative veto provisions in the separation of powers category. Though such devices have been held to violate Article I of the Constitution, *INS v. Chadha*, 462 U.S. 919 (1983), the veto provisions objected to in signing statements all involved attempts to allow Congress or its committees to take action without presentment to the President, thus denying the Executive one of its essential functions.

alleged inroads on the authority of the executive branch. More than half of the separation of powers objections were directed at “legislative veto” provisions giving one or both Houses of Congress, or specified congressional committees, the power to approve or disapprove action taken by the executive branch.<sup>319</sup> Presidential claims that a law violated the rights of individuals made up 13% of the objections raised. Federalism concerns, that Congress had exceeded the scope of its enumerated powers or otherwise invaded the domain of the states accounted for only 7% of signing statement challenges.

### 3. *Presidential Compliance*

As we saw earlier in reviewing constitutionally-based vetoes, it is one thing for a President to assert that a law is unconstitutional, and quite another for him to actually disregard it. The same distinction has held true with respect to signing statements. Of the 93 statutes whose validity was challenged in presidential signing statements between 1789 and 1981, only 12 were disregarded by the President. In the remaining 81 cases, representing 87% of the total, the Chief Executive either had no occasion to execute the law or chose to honor the statute despite his constitutional reservations.

Most of the instances where the White House was not put to the choice of executing or defying the disputed statute resulted from circumstances beyond the President’s control. In the legislative veto cases, for example, the Executive seldom faced the issue of whether or not to comply with a congressional vote of disapproval, for Congress rarely exercised its veto authority.<sup>320</sup> In other instances, the statute was such that no action on the part of the Executive was called for. This was true, for example, of President Tyler’s 1842 signing statement suggesting that Congress could not constitutionally require the states to establish single-member districts for electing representatives to

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319. See *INS v. Chadha*, 462 U.S. 919, 974, 978 & n. 15 (White, J., dissenting) (recognizing that the term “legislative veto” in its broad sense embraces provisions requiring the approval of one or both Houses of Congress, and those giving the power to approve or disapprove to congressional committees); accord LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 135 (3d ed. rev. 1991).

320. Most of the instances in Table 3 where Presidents are shown to have complied with a legislative veto provision involved cases where the Executive agreed in advance to abide by Congress’s wishes, but where Congress never actually voted a resolution of disapproval. In a few instances Presidents acquiesced in committee vetoes or agreed not to act until committee approval was granted.

Congress.<sup>321</sup> And in a few cases the President left office before there was time to execute the provision in question.<sup>322</sup>

Not every instance where the Executive lacked occasion to enforce a disputed law was foreordained. A President who would prefer not to enforce a law he thinks unconstitutional, but who is equally reluctant to take the extreme step of ignoring the law, may be able to escape the dilemma by finding a middle course. One way to accomplish this is by persuading Congress to amend or repeal the offensive provision. Indeed, many signing statements asserted that the White House would seek corrective action from Congress, but the fact that the provision was enacted in the first place suggests that such efforts are likely to prove ineffectual.<sup>323</sup> Yet, in a few instances the White House did secure an amendment which cured the perceived constitutional defect.<sup>324</sup>

In other cases, Presidents found ways of by-passing the allegedly unconstitutional provision without having to engage in conduct that amounted to noncompliance. In 1975, Gerald Ford signed a bill giving executive functions to the Federal Council on the Arts and the Humanities even though four of its members were not appointed in accord with the Constitution.<sup>325</sup> In his signing statement, Ford noted that another statute allowed him to alter the Council's membership

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321. Message of June 25, 1842, in 5 MESSAGES AND PAPERS, *supra* note 129, at 2012-13. For Congress's protest and remonstrance against this message, see H.R. REP. NO. 909, 27th Cong., 2d Sess. (1842).

322. Richard Nixon, for example, issued a constitutionally based signing statement four days before he resigned the Presidency. Message of Aug. 5, 1974, in 1974 PUB. PAPERS, 620 (1975).

323. See, e.g., Grover Cleveland, Statement of Aug. 2, 1886, in 10 MESSAGES AND PAPERS, *supra* note 129, at 4992-94; Harry S. Truman, Statement of July 5, 1949, in 1949 PUB. PAPERS, 346-47 (1964); Lyndon B. Johnson, Statement of Oct. 26, 1965, in 1965 PUB. PAPERS, 1082-84 (1966). In none of these instances did Congress amend the statute as requested by the President.

324. See, e.g., Act of Aug. 14, 1959, Pub. L. No. 86-157, 73 Stat. 338 (deleting legislative veto provision from a law Eisenhower had signed but objected to 8 days earlier); Statement of Aug. 6, 1959, in 1959 PUB. PAPERS, 566 (1960); Act of July 13, 1972, Pub. L. No. 92-351, 86 Stat. 471 (repealing provision in statute Nixon had signed but objected to 6 weeks earlier); Statement of May 28, 1972, in 1972 PUB. PAPERS, 627-28 (1974); Act of Dec. 23, 1980, Pub. L. No. 96-579, 94 Stat. 3359 (amending statute Carter had signed but objected to three and a half months earlier); Statement of Sept. 8, 1980, in 1980 PUB. PAPERS, 1667-68 (1982).

325. Arts and Artifacts Indemnity Act, Pub. L. No. 94-158, 89 Stat. 844 (giving new functions to the Federal Council on the Arts and the Humanities which had been created by the Act of Sept. 29, 1965, Pub. L. No. 89-209, § 9, 79 Stat. 845, 851-52). The Act allowed four Council members to be appointed in a manner not provided for by Article II, § 2. In addition, one member could be a Congressperson, contrary to Article I, § 6.

and he immediately exercised this authority to resolve the constitutional problem.<sup>326</sup>

In the legislative veto context, Presidents were occasionally able to circumvent the objectionable provision by not engaging in the conduct for which congressional approval was required. Lyndon Johnson, for example, signed the Flood Control Act of 1965 but objected to the validity of a section which required House and Senate committee approval of any water resource development projects the Army wished to undertake.<sup>327</sup> Johnson sidestepped this legislative veto mechanism by ordering the Secretary of the Army not to exercise the authority given him by the Act until Congress deleted the provision.<sup>328</sup> While the question may be a close one, the President's action probably did not amount to a refusal to comply with the law. The Act authorized, but did not direct, the Army to pursue these projects. Moreover, it was so worded as not to appropriate any funds until after a proposal was approved by the committees, thereby precluding a charge that the President had impounded funds which Congress had directed him to spend.<sup>329</sup>

Johnson similarly managed to steer clear of a legislative veto clause written into the 1964 Water Resources Research Act.<sup>330</sup> The provision, to which Johnson had objected in a signing statement,<sup>331</sup> barred the Secretary of the Interior from funding a project under Title II of the Act if it was disapproved by either of two congressional committees. While the Act authorized up to \$1 million a year to be spent on these projects, no funds had been appropriated, and Johnson ordered the Secretary not to request any. Congress might have

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326. Statement of Dec. 20, 1975, in 1975 PUB. PAPERS, 1990-91 (1977) (noting constitutional objections and invoking authority given him by Act of Sept. 29, 1965, Pub. L. No. 89-209, § 9(b), 79 Stat. 851, to order that when the Council carries out functions given it by the 1975 Act, the four members in question "shall not serve as members of the Council . . .").

327. See Statement of Oct. 26, 1965, in 1965 PUB. PAPERS, 1082-84 (1966).

328. See *Separation of Powers: Hearings Before the Subcomm. on Separation of Powers of the Senate Judiciary Comm.*, pt. I, 90th Cong., 1st Sess. 148, 153 (1967) [hereinafter *Separation of Powers Hearings*].

329. The Act expressly stated: "No appropriation shall be made" until a project was approved by the House and Senate committees. Pub. L. No. 89-298, § 201(a), 79 Stat. 1073. But see FISHER, *supra* note 134, at 166, 308 n.52 (stating that Johnson impounded these funds). Fisher confuses the statute at issue here with the 1954 Watershed Protection and Flood Control Act, which Johnson also objected to on legislative veto grounds.

330. Water Resources Research Act of 1964, Pub. L. No. 88-379, § 200, 78 Stat. 329, 331.

331. Statement of July 17, 1964, in 1964 PUB. PAPERS, 861-62 (1965) (stating that the veto provision violated separation of powers).

amended the President's budget to include such funding,<sup>332</sup> but it failed to do so. As a result, Title II was not implemented until after Congress amended the Act in 1966 to delete the committee approval requirement.<sup>333</sup>

However, in more than half the cases where constitutionally-based signing statements were issued, Presidents ultimately confronted the issue of whether to honor the law or defy it.<sup>334</sup> In the vast majority of these instances (i.e., 76% of the time) the President chose compliance.<sup>335</sup>

In many cases where the President honored a statute about which he had constitutional doubts, he at the same time sought to resolve the problem in other ways. The Chief Executive often urged Congress to amend the law in question,<sup>336</sup> sometimes submitting an administration bill to this effect.<sup>337</sup>

On at least five occasions, Presidents complied with a law while at the same time taking steps to have the question of its constitutionality resolved by the courts. The first of these involved Franklin Roosevelt who, in July, 1943, approved an urgent deficiency appropriation bill that contained a rider prohibiting the government from continuing to

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332. See PROUS, *supra* note 73, at 258, 276-77; ALAN SCHICK, CONGRESS AND MONEY: BUDGETING, SPENDING AND TAXING 169-77 (1980).

333. Act of April 19, 1966, Pub. L. No. 89-404, 80 Stat. 129; *Water Resources Research: Hearings on H.R. 3606 and S. 22 Before the Subcomm. on Irrigation and Reclamation of the House Comm. on Interior and Insular Affairs*, 89th Cong., 2d Sess. 6, 8, 15, 32 (1966); Office of Water Resources Research, U.S. Dep't of the Interior, *1965 Ann. Rep.* xv-xvi, 27-28 (1965); Office of Water Resources Research, U.S. Dep't of the Interior, *1966 Ann. Rep.* 3, 132, 135 (1966).

334. See *supra* Table 3.

335. Of the 103 entries in Table 3, 43 were situations where the President had no occasion to honor or defy the law, 44 involved compliance, and 15 were cases of defiance; one entry, involving two statutory provisions, involved both "no occasion" and "compliance." The President thus chose between compliance and defiance in 59.5 (44.5 + 15) or 58% of the 103 cases. The instances of compliance (44.5) comprised 75% of this group.

336. See, e.g., Andrew Johnson, Message of Dec. 3, 1867, in 8 MESSAGES AND PAPERS, *supra* note 129, at 3760; Andrew Johnson, Message of Dec. 9, 1868, in 8 MESSAGES AND PAPERS, *supra* note 129, at 3871-72 (urging Congress to repeal provisions of Act of March 2, 1867, ch. 170, 14 Stat. 485, to which he had objected in March 2, 1867 signing statement (8 *id.* at 3670)); Richard M. Nixon, Statement of July 11, 1973, in 1973 PUB. PAPERS, 642-43 (1975).

337. See, e.g., *Defense Production Act Amendments, 1972: Hearings on S. 669 and S. 1901 Before the Subcomm. on Production and Stabilization of the Senate Comm. on Housing and Urban Affairs*, 92d Cong., 2d Sess. 1-2, 8-9 (1972) (Nixon administration submitted proposal to amend Pub. L. No. 91-379, 84 Stat. 796, the constitutionality of which Nixon had objected to in his Statement of Aug. 17, 1970, in 1970 PUB. PAPERS, 674-76 (1971)).

employ three named individuals after November 15.<sup>338</sup> In mid-September, Roosevelt issued a post-signing statement "placing on record" his view that the rider was a bill of attainder, and explaining that he had approved the measure in order "to avoid delaying our conduct of the war."<sup>339</sup> Roosevelt complied with the act but made sure that the men would have standing to challenge it in court.<sup>340</sup> When they later sued, the Justice Department refused to defend the validity of the act, a task which fell to Congress participating as an *amicus curiae*. After the Court of Claims found for the plaintiffs without reaching the constitutional issue,<sup>341</sup> the Justice Department took the case to the Supreme Court where the Attorney General successfully argued that the rider was unconstitutional.<sup>342</sup>

President Nixon also turned to the courts to vindicate his constitutional opposition to the Voting Rights Act Amendments of 1970 insofar as they lowered the voting age to 18 in federal, state, and local elections. In his June 22 signing statement Nixon announced that he had "directed the Attorney General to cooperate fully in expediting a swift court test of the constitutionality of the 18-year-old provision."<sup>343</sup> In order to produce a test case, the administration immediately undertook to enforce the law despite its opposition to it.<sup>344</sup> By the end of August four cases involving the constitutionality of the amendments had been filed directly in the Supreme Court.<sup>345</sup> In contrast to the Roosevelt administration, the Nixon Justice Department

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338. Act of July 12, 1943, ch. 218, § 304, 57 Stat. 431, 450 (barring employment of the men in any capacity unless, prior to November 15, 1943, they were appointed to office by the President and confirmed by the Senate).

339. Statement of Sept. 14, 1943, in *PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT*, 1943, *supra* note 171, at 385-86; U.S. CONST., art. I, § 9 ("No Bill of Attainder or ex post facto Law shall be passed.").

340. When one of the men, Robert M. Lovett, lost his job prior to the November 15 termination date, he was named to another post, giving him a salary claim sufficient to confer standing to challenge the validity of the rider in the Court of Claims. See John H. Ely, *United States v. Lovett: Litigating The Separation of Powers*, 10 HARV. C.R.-C.L. L. REV. 1, 4-6 n.20 (1975).

341. *Lovett v. United States*, 66 F. Supp. 142 (Ct. Cl. 1945).

342. *United States v. Lovett*, 328 U.S. 303 (1946).

343. Statement of June 22, 1970, in 1970 *PUB. PAPERS*, 512-13 (1971).

344. See Christopher Lydon, *Mitchell Gives States to Aug. 3 to Act on Vote at 18*, N.Y. TIMES, July 15, 1970, at 16, col. 5; *Mitchell Promises Vigorous Defense of Vote Age Suit*, N.Y. TIMES, July 18, 1970, at 11, col. 4; *Mitchell Sets Subpoena Rules to Allay Growing Press Fears*, N.Y. TIMES, Aug. 11, 1970, at 24, col. 1; *Fred P. Graham, U.S. Sues to Uphold 18 year old Vote*, N.Y. TIMES, Aug. 18, 1970, at 25, col. 3; *U.S. Widens Test of Vote at 18 Law*, N.Y. TIMES, Aug. 20, 1970, at 27, col. 5.

345. See *Oregon v. Mitchell*, 400 U.S. 112, 117 n.1 (1970); *Oregon v. Mitchell*, 400 U.S. 802 (1970).

formally defended the Act, but its performance was "lackluster and unenthusiastic."<sup>346</sup> At oral argument, Solicitor General Erwin Griswold told the Justices that both the President and the Attorney General thought the voting rights amendments were unconstitutional, and conceded that in his own mind their validity was "a very close question."<sup>347</sup> Nixon's efforts met with partial success. On December 21, 1970, the Court sustained all of the Voting Rights Act Amendments except the one lowering the voting age in state and local elections, which was held to be unconstitutional.<sup>348</sup>

Two of the other three instances where Presidents complied with the law but sought to have the issue of its validity decided by the courts involved the Ford administration. In October 1974, Ford signed but expressed First Amendment reservations about amendments to the Federal Election Campaign Act,<sup>349</sup> which placed limits on individual contributions and candidate expenditures; however, Ford was confident "such issues [could] be resolved in the courts."<sup>350</sup> When a suit challenging the constitutionality of the amendments was filed, the Justice Department vigorously defended them despite the administration's doubts as to their validity.<sup>351</sup> The Supreme Court partially sustained Ford's position, holding some of the expenditure limits to be unconstitutional.<sup>352</sup>

The same 1974 Federal Election Campaign Act Amendments contained a one-House legislative veto provision which Ford did not oppose at the time.<sup>353</sup> During 1975 and 1976, the Ford administration acquiesced in the provision by routinely submitting proposed Federal Election Commission regulations to Congress where some of them were blocked by the House or the Senate.<sup>354</sup> But when the provision

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346. 123 CONG. REC. 2974 (1977) (remarks of Sen. James Abourezk).

347. Fred P. Graham, U.S. Sues to Uphold 18 year old Vote, N.Y. TIMES, Aug. 18, 1970, at 25, col. 3; Fred P. Graham, New Law on Voting Rights At Age 18 is Denounced Before Supreme Court By Lawyers For Four States, N.Y. TIMES, Oct. 20, 1970, at 25, cols. 1-3; 123 CONG. REC. 2974 (1977) (transcript of oral argument).

348. *Oregon v. Mitchell*, 400 U.S. 112 (1970).

349. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263.

350. Message of Oct. 15, 1974, in 1974 PUB. PAPERS 303-04 (1975).

351. See *Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975); *Buckley v. Valeo*, 424 U.S. 1 (1976).

352. *Buckley v. Valeo*, 424 U.S. 1, 6 (1976).

353. Pub. L. No. 93-443, § 209, 88 Stat. 1287-88.

354. See Federal Election Comm'n, 1976 *Ann. Rep.* iii, 45; Federal Election Comm'n, 1977 *Ann. Rep.* 6 n.\*, 7; 121 CONG. REC. 32321 (1975); S. REP. NO. 94-409, 94th Cong. 1st Sess. (1975); 121 CONG. REC. 33664, 33674 (1975); H.R. REP. NO. 94-552, 94th Cong., 1st Sess. (1975).



was carried over by the Federal Election Campaign Act Amendments of 1976,<sup>355</sup> Ford now objected that the veto was unconstitutional. He instructed the Attorney General "to challenge the constitutionality of this provision at the earliest possible opportunity."<sup>356</sup> Rather than defend the disputed provision, the administration this time took the offensive by having the United States intervene as a plaintiff in a suit which former Attorney General Ramsey Clark brought against various defendants, including the Federal Election Commission.<sup>357</sup> However, the President failed in this effort to secure a judicial resolution of the issue, for the case was dismissed as not being ripe.<sup>358</sup>

Jimmy Carter likewise turned to the Judiciary, in order to determine the validity of a 1977 rider limiting the Department of Health, Education, and Welfare's authority to enforce Title VI of the 1964 Civil Rights Act.<sup>359</sup> The Carter administration complied with the provision by settling or dismissing proceedings HEW had filed against local school districts to compel bussing.<sup>360</sup> When the provision was challenged in court, the Justice Department vigorously and successfully defended it,<sup>361</sup> apparently satisfied that the case against its constitutionality would be argued capably by the plaintiffs.

There may have been instances where compliance with a law reflected a presidential awareness that the constitutional objection raised in a signing statement was so insubstantial as to border on the frivolous. It is difficult to imagine a President undertaking an official act in jest, yet it is hard to come up with any other explanation for Lyndon Johnson's objection to a section of the Military Construction Authorization Act for Fiscal Year 1968, which barred the Defense Department from closing the Naval Academy's dairy farm at Annapolis.<sup>362</sup> According to the President, "Congress, which has given the Navy Department authority over the world's most powerful fleet, has withdrawn the Department's authority over 380 cows." This, he said,

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355. Pub. L. No. 94-283, 90 Stat. 475.

356. Statement of May 11, 1976, in 1976 PUB. PAPERS 1530 (1979).

357. Vote Law Change Sought by Clark, N.Y. TIMES, July 2, 1976, at A9, col. 5; Justice Department Opposes Veto Plan On Election Rules, N.Y. TIMES, Aug. 7, 1976, at 7, col. 4; Clark v. Valeo, 559 F.2d 642, 644 (D.C. Cir. 1977) (en banc).

358. Clark, 559 F.2d at 647, *aff'd sub nom.* Clark v. Kimmitt, 431 U.S. 950 (1977).

359. Statement of Dec. 9, 1977, in 1977 PUB. PAPERS 2087-88 (1978) (objecting to Act of Dec. 9, 1977, Pub. L. No. 95-205, 91 Stat. 1460).

360. See Brown v. Califano, 627 F.2d 1221, 1229 n.42, 1237-38 (D.C. Cir. 1980).

361. Brown v. Califano, 455 F. Supp. 837 (D.D.C. 1978), *aff'd*, 627 F.2d 1221 (D.C. Cir. 1980).

362. Pub. L. No. 90-110, § 810, 81 Stat. 279, 309. Pressure to close the dairy came from private local milk producers who wished to supply the Academy with dairy products. L.A. TIMES, April 16, 1989, at 19, col. 1.

“raise[s] questions concerning the constitutional separation of powers.”<sup>363</sup> Questions, but not “grave” ones. The plan to sell the Naval Academy’s dairy was dropped.

Presidential compliance with measures to which the President had objected was not always intentional. On two occasions, a White House attempt to defy an allegedly unconstitutional law was thwarted by subordinates in the executive branch. Both cases involved legislative veto provisions which executive officials may have been reluctant to ignore for fear that Congress might retaliate by reducing the agency’s future funding level.<sup>364</sup> On January 8, 1963, John Kennedy issued a memorandum objecting, on the Attorney General’s advice, to the validity of a committee veto provision in an appropriation act that he had signed the previous October.<sup>365</sup> Kennedy instructed David E. Bell, head of the Agency for International Development to whose actions the veto applied, that he was to treat the provision as a mere “request for information” on the part of the congressional committees.<sup>366</sup> The agency nevertheless complied with the provision during Fiscal Year 1963 when it was in effect. AID did so, said Bell, because “the Comptroller General gave an opinion that it was in the act, unconstitutional or not, and we had to abide by it as long as it was in the act . . . .”<sup>367</sup> It is unclear whether Kennedy ever learned that this executive agency had ignored his instruction and the advice of the Attorney General in favor of a contrary legal opinion issued by someone who was an agent of Congress.<sup>368</sup>

President Carter was similarly frustrated when he attempted to ignore a two-House legislative veto provision contained in the National Parks and Recreation Act of 1978. A section of the Act required the Department of Agriculture to obtain, by concurrent resolution, House and Senate approval before making certain land exchanges in Montana’s Gallatin-Beaverhead National Forest, if the ex-

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363. Statement of Oct. 21, 1967, in 1967 PUB. PAPERS 935 (1968). See JACK SWEETMAN, *THE U.S. NAVAL ACADEMY: AN ILLUSTRATED HISTORY* 163-64 (1979); L.A. TIMES, April 16, 1989, at 19, col. 1.

364. On the fact that executive agencies sometimes show greater loyalty to Congress than to the President, see FRANKLIN, *supra* note 123, at 63-64; LOUIS FISHER, *THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE* 89-92 (2d ed. 1987); FISHER, *supra* note 134, at 73.

365. Act of Oct. 23, 1962, Pub. L. No. 87-872, 76 Stat. 1163, 1164; Memorandum, Jan. 8, 1963, in 1963 PUB. PAPERS 6 (1964).

366. Memorandum, Jan. 8, 1963, in 1963 PUB. PAPERS 6 (1964)

367. *Foreign Assistance and Related Agencies Appropriations for 1964: Hearings on H.R. 9499 Before the Sen. Comm. on Appropriations*, 88th Cong., 1st Sess. 312-13 (1963).

368. See *Bowsher v. Synar*, 478 U.S. 714, 727-32 (1986) (finding Comptroller General to be an agent of Congress).

change involved over 6400 acres.<sup>369</sup> Carter's November 10, 1978 signing statement noted that both he and the Justice Department thought the section was unconstitutional. Carter directed the Secretary of Agriculture that while he should listen to Congress's views, he should "consummate any land exchanges covered by [the section] which are, in his opinion, otherwise authorized by statute, irrespective of the acreage involved."<sup>370</sup> Senator John Melcher of Montana, who had sponsored the section, took the extraordinary step of appealing the President's action to the Justice Department, persuading it that "in spite of the President's direction, the Department and the Forest Service should cooperate with him and the Congress in processing these land exchanges."<sup>371</sup> The Justice Department then advised the Agriculture Department that it could as a matter of policy elect to comply with the veto provision. On November 22, ten days after Carter had issued his directive to the contrary, the Department of Agriculture ordered the Forest Service "to proceed as if [the section] were applicable, that is, that proposed exchanges exceeding 6,400 acres would have to be approved by concurrent resolution of Congress."<sup>372</sup> The Forest Service saw the writing on the wall and suspended further consideration of the proposed exchanges.<sup>373</sup>

#### 4. *Presidential Noncompliance*

Table 4 shows the 12 instances in which Presidents failed to comply with laws to which they had objected in a signing or post-signing statement.<sup>374</sup> What is immediately striking is that a majority of these

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369. National Parks and Recreation Act, Pub. L. No. 95-625, § 1301, 92 Stat. 3467, 3549; *Additions to the National Wilderness Preservation System: Hearings Before the Subcomm. on Public Lands of the House Comm. on Interior and Insular Affairs*, 96th Cong., 1st Sess. 24-26 (1979) [hereinafter *Wilderness Hearings*].

370. Statement of Nov. 10, 1978, in 1978 PUB. PAPERS 1999-2000 (1979).

371. *Wilderness Hearings*, *supra* note 369, at 244-45.

372. *Id.*

373. *Id.* at 35 (testimony of Bill Cunningham, Wilderness Society); *id.* at 42-47 (testimony of Tom Costen, U.S. Forest Service).

374. There are a number of well-known incidents that may be thought to involve presidential refusals to honor a law on constitutional grounds, but which do not belong in this category.

*Andrew Jackson*: In 1830 Jackson signed an internal improvements bill, Act of May 31, 1830, ch. 232, 4 Stat. 427, but issued a signing statement declaring that the \$8,000 appropriated for the road from Detroit to Chicago could not be used to extend the road beyond the Michigan Territory (into the state of Indiana). Statement of May 30, 1830, in 3 MESSAGES AND PAPERS, *supra* note 129, at 1046. This reflected Jackson's view that Congress had power to provide for improvements in the territories but not within the states. See 3 *id.* at 1046-56, 1071-77. In this case, Jackson's concerns were purely hypothetical, for the Chicago Road was still far from the Indiana border. Contrary to later assertions, see, e.g., H.R.

REP. NO. 909, 27th Cong., 2d Sess. 5-6 (1842), all of the funds were spent during his administration, as were some later appropriations for the Chicago Road. See H.R. EXEC. DOC. NO. 2, 21st Cong., 2d Sess. 97, 102-03 (1830); H.R. EXEC. DOC. NO. 2, 22nd Cong., 1st Sess. 84, 104-05 (1831); H.R. EXEC. DOC. NO. 2, 22nd Cong., 2d Sess. 99-100 (1832).

*Abraham Lincoln:* Lincoln allegedly "ignored Congressional directions to terminate the Rush-Bagot Agreement disarming the Great Lakes . . ." LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 418-19 n.136 (1972). Yet no such directions existed. After Secretary of State Seward had notified Great Britain that the 1817 treaty would be terminated, Congress passed a joint resolution which "adopted and ratified" the notice "as if the same had been authorized by [C]ongress." Act of Feb. 9, 1865, Res. No. 13, 13 Stat. 568. Because Congress only authorized rather than directed termination of the treaty, Seward's later withdrawal of the termination notice was not a refusal to comply with the resolution. See Jesse S. Reeves, *The Jones Act and the Denunciation of Treaties*, 15 AM. J. INT'L LAW 33, 35-36 (1921).

*Ulysses Grant:* In 1876, President Grant signed a river and harbor appropriation bill, Act of Aug. 14, 1876, ch. 267, 19 Stat. 132, but issued a statement asserting that many of the items were "for works of purely private or local interest, in no sense national," and declaring that "during my term of office no public money shall be expended upon them." Statement of Aug. 14, 1876, in 9 MESSAGES AND PAPERS, *supra* note 129, at 4331. Grant made good on his promise. Of the 146 projects funded by the Act, he spent nothing on more than half of them; many others received only partial funding. See 1876 ANN. REP. OF THE SECRETARY OF WAR, H.R. EXEC. DOC. NO. 1, 44th Cong., 2d Sess., pt. 2, at 12, 35-37 (1876); 1877 ANN. REP. OF THE SECRETARY OF WAR, H.R. EXEC. DOC. NO. 1, 45th Cong., 2d Sess., vol. 2, at 31 (1877). While for some earlier Presidents, an objection to funding "local" projects might have reflected constitutional scruples, this was not so with Grant, who earlier and without objection had signed two river and harbor bills that funded many of the same projects he now refused to undertake. See Act of June 10, 1872, ch. 416, 17 Stat. 370; Act of March 3, 1873, ch. 233, 17 Stat. 560. The problem in 1876 was that the country was in a depression and tax revenues were down. Grant's signing statement thus gave, as the only reason for his action, that "[t]here is very great necessity for economy of expenditures at this time . . ." 9 MESSAGE AND PAPERS, *supra* note 129, at 4331. See also WILLIAM B. HESSELTINE, *ULYSSES S. GRANT, POLITICIAN* 75, 80, 159 (1935) (Grant had no sense or knowledge of the Constitution and as President was "[u]ntrammelled by constitutional scruples . . .").

*Harry Truman:* In 1949, Congress appropriated funds to increase the Air Force to 58 groups; Truman, believing that 48 groups would suffice, impounded the extra funds. While it has been said that Truman based his objection partly on his "authority as Commander-in-Chief," FISHER, *supra* note 134, at 162-63, his opposition rested solely on policy grounds. Statement of Oct. 29, 1949, in 1949 PUB. PAPERS 538-39 (1964). Truman cited his authority as Commander-in-Chief only as the basis for ordering the Secretary of Defense not to spend the funds. See *Impoundment Hearings*, *supra* note 155, at 524-25.

*Dwight Eisenhower:* Eisenhower signed a 1959 law amending the Mutual Security Act, but objected on separation of powers grounds to a provision requiring the Executive, at the request of the General Accounting Office or any congressional committee, to furnish Congress with material concerning the International Cooperation Administration (ICA). Act of July 24, 1959, Pub. L. No. 86-108, 73 Stat. 246; Statement of July 24, 1959, in 1959 PUB. PAPERS, 549 (1960). In response, Congress amended the Act to provide that FY 1960 funds for the ICA and for the State Department's Office of Inspector General would be cut off if requested materials were not disclosed; but this provision accommodated the President's concerns by stating that no cut-off would occur if, in rejecting a request, the President personally certified that the material should not be disclosed. Act of Sept. 28, 1959, Pub. L. No. 86-383, § 111(d), 73 Stat. 720. A similar certification and cut-off provision was included in the FY 1961 appropriation act. Act of Sept. 2, 1960, Pub. L. No. 86-

incidents occurred between 1974 and 1981, the last 7 years covered by this study. Before 1970, there were only 5 such occurrences—2 in the last half of the 19th century, and 3 more between 1900 and 1973. To put it differently, from 1789 through 1973, executive noncompliance occurred on an average of once every 36 years, while during the period from 1974 through 1980 it was an annual event. To the extent there is now a developed practice of Presidents refusing to enforce laws based on constitutional objections raised in signing statements, it is one of extraordinarily recent vintage.

In examining each of these 12 episodes, we will consider among other things the extent to which the President's attempt to defy the law was subject to check by Congress or the courts. While every refusal to carry out the law raises serious concerns, the danger is somewhat reduced where the Executive's action is such that it can have no effect without the affirmative cooperation of Congress. Similarly, to

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704, § 101(d), 74 Stat. 776, 778. Eisenhower denied several requests for information, in each instance giving the required certification. See Letter from Dwight D. Eisenhower to Chairman, Senate Foreign Relations Subcomm. (Nov. 10, 1959), in 1959 PUB. PAPERS 776-77, (1960); Letter from Dwight D. Eisenhower to Comptroller Gen. (Dec. 15, 1959), in 1959 PUB. PAPERS, 874-75 (1961); President's certification (Dec. 2, 1960), in 1960 PUB. PAPERS 881-83 (1961). The Comptroller General nonetheless ruled that these refusals required cutting off funds; the Attorney General replied with an opinion explaining that the Comptroller General's reading of the law was erroneous, and stating that, if it were correct, the law would be unconstitutional. 41 Op. Att'y Gen. 507 (1960). Eisenhower then ordered funding to continue during his remaining term in office. CHARLES J. ZINN, *EXTENT OF THE CONTROL OF THE EXECUTIVE BY THE CONGRESS OF THE UNITED STATES*, 87th Cong., 2d Sess. 18 n.5 (Comm. Print 1962). Some say Eisenhower refused to comply with the law. See, e.g., CLARK R. MOLLENHOFF, *WASHINGTON COVER-UP* 169-76 (1962); BERGER, *supra* note 104, at 306. Yet his actions were fully supported by a fair reading of the statute. Eisenhower did defy the Comptroller General, but it seems inappropriate to characterize this incident as one where the President chose to defy an act of Congress.

*John Kennedy:* Kennedy refused to spend funds appropriated in 1962 to develop the RS-70 weapons system, but his action was not based on constitutional grounds, nor did it amount to a refusal to carry out the law. Kennedy had opposed a provision in the bill which "directed" the administration to spend at least \$491 million on the program, stating that this would interfere with his authority as Commander-in-Chief. Letter from John F. Kennedy to Carl Vinson (March 20, 1962), reprinted in *Impoundment Hearings*, *supra* note 155, at 526. Due to his objection, the language of the bill was changed from "directed" to "authorized" before it became law. Gerald W. Davis, *Congressional Power to Require Defense Expenditures*, 33 *FORDHAM L. REV.* 39, 40-44 (1964). Kennedy's only remaining objection to the Act rested on policy grounds. See KOŁODZIEJ, *supra* note 134, at 408-19. Because Congress had expressly changed the wording of the Act to make it permissive rather than mandatory, Kennedy's failure to spend all of the funds was not a refusal to comply with the law.

**Table 4**  
**Presidential Noncompliance with Laws to Which the President**  
**Had Constitutionally Objected in a Signing or Post-Signing**  
**Statement (1789-1981)**

President	Statute	Nature of Objection
BUCHANAN	Act of June 25, 1860 ch. 211, 12 Stat. 104	Requiring Washington Aqueduct to be completed only under the supervision of Captain Meigs violates President's authority as Commander-in-Chief.
ARTHUR	Act of Jan. 16, 1883 ch. 27, 22 Stat. 403	Chief Examiner of Civil Service Commission is an officer of the U.S. and cannot be chosen by Commission but must be appointed in accord with Article II.
TAFT	Act of Aug. 23, 1912 ch. 350, 37 Stat. 360	President has constitutional right to submit additional budget information to Congress in any form he chooses.
WILSON	Act of June 5, 1920 ch. 250, 41 Stat. 988	Congress may not direct that President terminate treaties.
EISENHOWER	Act of July 29, 1958 PL 85-568, 72 Stat. 426	President may enter into executive agreements without the approval of the Senate.
FORD	Act of Oct. 23, 1974 PL 93-463, 88 Stat. 1389	Senate may not participate in the appointment of executive branch officials who are not appointed by the President.
	Act of Oct. 20, 1975 PL 94-118, 89 Stat. 603	Members of Congress may not participate as voting members on a federal commission.
CARTER	Act of Aug. 2, 1977 PL 95-86, 91 Stat. 444	Congress may not prohibit the executive branch from spending funds to implement a presidential pardon.
	Act of Nov. 2, 1978 PL 95-567, 92 Stat. 2405	Federal ban on editorializing by public broadcasting stations violates the First Amendment.
	Act of Nov. 10, 1978 PL 95-629, 92 Stat. 3636	Establishment Clause prohibits government from spending money to restore and maintain the San Antonio Missions.
	Act of Aug. 15, 1979 PL 96-60, § 108, 93 Stat. 397	Congress may not direct the President to close certain U.S. Consulates abroad.
	Act of Dec. 12, 1980 PL 96-515, 94 Stat. 2998	Congress may not name members of an advisory council that performs executive functions.

the degree that there are persons with standing to secure prompt judicial review, a President's ability unilaterally to suspend a law is substantially diminished.<sup>375</sup>

a. James Buchanan: The Captain Meigs Affair

In June 1860, Congress appropriated \$500,000 to complete the Washington Aqueduct, an Army Corps of Engineers project that was to carry water from the Great Falls of the Potomac to the cities of Washington and Georgetown. The measure specified that the funds were "to be expended according to the plans and estimates of Captain Meigs and under his superintendence."<sup>376</sup> President Buchanan signed the bill on June 25, but issued a statement objecting to the proviso that the monies had to be spent under the supervision of Montgomery C. Meigs, the Army captain who had designed the Aqueduct and who had overseen its construction from the outset. Because the proviso interfered with his authority as Commander-in-Chief, said Buchanan, he would treat it merely as an expression of Congress's "preference" and not as "intending to deprive the President of the power to order [Meigs] to any other army duty for the performance of which he might consider him better adapted."<sup>377</sup>

On September 1, 1860, after a long simmering quarrel between Meigs and Secretary of War John B. Floyd forced the President to choose between the two men, Meigs was relieved of his duties and sent to the Dry Tortugas in the Gulf of Mexico.<sup>378</sup> In February, 1861, after Floyd had resigned from the Cabinet, Meigs returned to Washington to resume charge of the Aqueduct project. During his six

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375. In considering whether anyone had standing to challenge the President's defiance, this part of the Article does not discuss possible suits by the House, the Senate, or their members. The potential for congressional standing is discussed in Part III.B., *infra*. Standing doctrine has evolved considerably over time. See Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, 'Injuries,' and Article III*, 91 MICH. L. REV. 163, 168-97 (1992). In the discussion here, standing is evaluated under the Court's current test which requires that a litigant have suffered an actual or imminent injury caused by the action complained of, and likely to be redressed by a favorable judgment; a court may also insist that a litigant assert only her own legal rights and that her grievance not be shared in substantially equal measure by all or a large class of citizens. See *Warth v. Seldin*, 422 U.S. 490, 498-500 (1975); *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992).

376. Statement of June 25, 1860, in 7 MESSAGES AND PAPERS, *supra* note 129, at 3128. Act of June 25, 1860, ch. 211, 12 Stat. 104. See S. MISC. DOC. NO. 83, 38th Cong., 1st Sess. 1-4 (1864).

377. Statement of June 25, 1860, in 7 MESSAGES AND PAPERS, *supra* note 129, at 3129.

378. RUSSELL F. WEIGLEY, *QUARTERMASTER GENERAL OF THE UNION ARMY: A BIOGRAPHY OF M.C. MEIGS* 78-112 (1959); S. EXEC. DOC. NO. 1, 37th Cong., 2d Sess. at 84 (1861).

months' absence, however, the Army had paid out more than \$150,000 of the funds Congress had insisted be spent only under Meigs' personal superintendence.<sup>379</sup>

Without doubt, Buchanan ignored a provision of law that he believed to be unconstitutional. In taking this step, he was supported by an opinion of his Attorney General, Jeremiah S. Black, who advised the President that the Meigs proviso was unconstitutional to the extent that it sought to deprive the Commander-in-Chief of the "right to decide according to [his] own judgment what officer shall perform any particular duty . . . ."<sup>380</sup> The Attorney General added that if the President wished, he could spend the Aqueduct funds and ignore the Meigs proviso "as if the paper on which it is written were blank."<sup>381</sup> While this was the course Buchanan ultimately pursued, it was contrary to the intent of Congress, which was to give the President the choice of spending the money under Meigs' supervision or not spending it at all.<sup>382</sup>

The Meigs proviso had not placed Buchanan in a situation where he was forced either to defy an act of Congress or surrender what he viewed as his constitutional authority as Commander-in-Chief. Congress had left him with the option of not undertaking work on the Aqueduct during the time Captain Meigs was not its supervisor.<sup>383</sup> While this alternative may sound unrealistic, the Aqueduct project was not one for which the administration had sought funding in 1860. Congress appropriated the money only at the Captain's request, for Meigs feared that without further work in the Washington area, Secretary Floyd might carry out threats to send him to a distant post. Meigs not only initiated the appropriation but was also the one who suggested a proviso that the funds had to be spent under his supervi-

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379. WEIGLEY, *supra* note 378, at 126-30; S. Ex. Doc. No. 1, 37th Cong., 2d Sess. 84-85, 89-91 (1861).

380. 9 Op. Att'y Gen. 463, 468-69 (1860). This opinion had been issued in July, 1860, after Meigs complained to the President that a War Department order had denied him his right to superintend the project; the claim was specious, as the opinion went on to point out. *Id.* at 470-73.

381. *Id.* at 470.

382. CONG. GLOBE, 36th Cong., 1st Sess. 3209 (1860) (statement of Sen. Davis); *id.* at 3210 (statement of Sen. Green); *id.* at 3211 (statement of Sen. Gwin); *id.* at 3213 (statement of Sen. Toombs).

383. Prior to leaving Washington for the Tortugas, Meigs sent the Aqueduct funds to the treasury and wrote notes to the Secretary of the Treasury and others, urging that they not pay any project expenses incurred during his absence. His recommendation was ignored. S. EXEC. DOC. NO. 1, 37th Cong., 2d Sess. 84-85 (1861).



sion.<sup>384</sup> The project thus does not appear to have been of great importance to the Buchanan administration. Since Congress had not insisted that the money be spent, the failure to do so would not have constituted a refusal to enforce the law through impoundment.<sup>385</sup>

Was Buchanan's action defensible on the basis that it was the only way to secure a judicial determination as to the Act's validity? While the President never sought to justify his conduct on this (or any other) basis, suppose that he had. If Buchanan had honored the proviso by spending the funds under Meigs' direction, it is difficult to see how anyone would have had standing to challenge the proviso in court. However, it was by no means clear that the prospects for judicial review were enhanced by noncompliance. Meigs was clearly upset at being shipped to the Tortugas, but he suffered no apparent loss in pay or rank as a result. Moreover, the Act gave him no right not to be reassigned. Congress implicitly recognized the President's authority to transfer Meigs, and merely provided that if he were sent to another post, the money was not to be spent. Meigs therefore lacked standing to challenge Buchanan's action. Spending the money in defiance of the proviso did not cause a discrete injury to anyone else who could have complained in court. The President would thus have had a hard time invoking the test-case defense here, particularly as there is no evidence that he sought to facilitate a legal challenge to the Act.

At the same time, the President's action did not have the effect of absolutely precluding judicial review. It might have, but for the fact that when Captain Meigs returned to Washington in February 1861, he refused to pay \$5,600 in claims for work performed on the Aqueduct in his absence, on the theory that the contracts were void because they were made in defiance of the law.<sup>386</sup> It would seem that these individuals might have sued in the Court of Claims, arguing that the statutory proviso was unconstitutional and that their contracts with the government were therefore valid and enforceable. If any such suits were filed, they were mooted by the Act of June 14, 1862, which was passed at Meigs' request and authorized payment of all of the outstanding claims.<sup>387</sup>

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384. WEIGLEY, *supra* note 378, at 101-04; 9 Op. Att'y Gen. 463, 467-68 (1860); *see also* CONG. GLOBE, 36th Cong., 1st Sess. 3210 (1860) (statement of Sen. Seward).

385. *See* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 259 n.13 (2d ed. 1988).

386. S. EXEC. DOC. 1, 37th Cong., 2d Sess. 85, 92-93 (1861).

387. Act of June 14, 1862, Res. 34, 12 Stat. 619; CONG. GLOBE, 37th Cong., 2d Sess. 1723 (statement of Rep. Calvert); H.R. EXEC. DO. NO. 1, 37th Cong., 3d Sess. 615 (1862).

b. Chester Arthur: Appointing the Chief Examiner

When Congress created the U.S. Civil Service Commission in January 1883, it provided for the position of a Chief Examiner, to be hired by the Commission itself.<sup>388</sup> President Arthur had signed the bill without objection on January 16, but on March 1 he sent a message to the Senate objecting to the manner in which the Chief Examiner was to be chosen.<sup>389</sup> Because of the nature of the position, said Arthur, "there is great doubt whether such examiner is not properly an officer of the United States," in which case the provision allowing him to be named by the Commission "is not in conformity with section 2, Article II of the Constitution."<sup>390</sup> Arthur noted that he was supported in this view by an opinion from his Attorney General.<sup>391</sup> Yet the Attorney General appears to have cautioned Arthur against trying to resolve the matter himself:

The question . . . is one which can not be settled by executive action. Whether the functions or duties and powers of the chief examiner constitute him an officer of the United States . . . is one that can only be authoritatively determined by the courts. But should the doubt appear well founded, it may be worthy of your consideration whether it is expedient to call the attention of Congress thereto.<sup>392</sup>

The President chose not to heed this admonition. While he did bring the matter to Congress's attention, his March 1 message to the Senate went considerably further. It concluded by "nominat[ing] Silas W. Burt, of New York, to be chief examiner of the Civil Service Commission."<sup>393</sup>

In this case, the President's decision to ignore a law he believed unconstitutional was in itself harmless, for it could have no effect unless the Senate acquiesced by ratifying Arthur's nominee. If the Senate had refused to do so, Congress might have prevented the President from defying the law and cleared the way for the Commis-

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388. Act of Jan. 16, 1883, ch. 27, §3, 22 Stat. 403, 404.

389. Message of March 1, 1883, in 10 MESSAGES AND PAPERS, *supra* note 129, at 4745.

390. *Id.*; Article II, §2 provides that officers of the United States must be appointed by the President with the advice and consent of the Senate unless Congress vests the appointment "in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. CONST. art II, § 2, cl.2.

391. 17 Op. Att'y Gen. 504 (Jan. 22, 1883).

392. *Id.* at 508-09. While this could be read as merely saying that any action the President takes may be subject to judicial review, the last quoted sentence appears to counsel against doing anything other than urging Congress to amend the statute.

393. Message of March 1, 1883, in 10 MESSAGES AND PAPERS, *supra* note 129, at 4745.

sion to make the appointment itself.<sup>394</sup> Instead, the Senate confirmed Arthur's nominee on March 3, 1883, at the same time passing a resolution which declared that

the Senate neither assent to nor dissent from the constitutional views concerning the appointment of an examiner, communicated by the President in his message of March 1, and consider its present action as affording no precedent for the future.<sup>395</sup>

The Senate may have avoided setting a precedent on the question of whether the Chief Examiner of the Civil Service Commission is an officer of the United States.<sup>396</sup> Yet it seems to have been unaware that it risked creating precedent on the much more significant question of whether Presidents may ignore the law whenever they think it is unconstitutional.

The Attorney General had suggested to President Arthur that the matter should be resolved judicially, rather than through executive action.<sup>397</sup> This could have been done by complying with the statute, letting the Civil Service Commission appoint a Chief Examiner, and then instituting quo warranto proceedings to decide whether the appointment was one which the Constitution allowed Congress to place in the hands of the Commission. This was therefore not an instance where it was necessary for the President to defy an allegedly unconstitutional law in order for the matter to be resolved judicially.

By taking the course he did, Arthur made it virtually impossible to test the law in court. Once the Senate confirmed the President's appointee, the only person with standing to raise the constitutional issue would have been someone appointed Chief Examiner by the Commission. If the government refused to pay the Commission's appointee for services rendered, he or she might have sued in the Court

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394. At the time Arthur sent his nomination to the Senate, the Commission had not begun to function. See 23 J. OF EXEC. PROC. OF U.S. SENATE 711 (1901); Charles Lyman Appointed Chief Examiner, N.Y. TIMES, May 11, 1883, at 1, col. 4; Chester A. Arthur, Executive Order, May 7, 1883, in 10 MESSAGES AND PAPERS, *supra* note 129, at 4748-53.

395. 23 J. OF EXEC. PROC. OF U.S. SENATE 723 (1901) (confirming Edward O. Graves as Chief Examiner). Silas Burt, the President's March 1 nominee, immediately declined the post. On March 2, Arthur named Graves in his place. *Id.* at 712; The Ejected Harbor Board: Its Claim to Hold Office—The Attorney General's Opinion, N.Y. TIMES, May 11, 1883, at 1, col.2, and 3, col. 1.

396. The Senate continued to acquiesce in the view that the Chief Examiner was an officer who had to be appointed in accord with Article II. See 24 J. OF EXEC. PROC. OF U.S. SENATE 146 (1901) (confirming President Arthur's appointment of Chief Examiner); 25 J. OF EXEC. PROC. OF U.S. SENATE 683 (1901) (confirming President Cleveland's appointment of Chief Examiner); see also 18 Op. Att'y Gen. 409 (1886) (advising President Cleveland that the Chief Examiner is an officer of the United States).

397. See 17 Op. Att'y Gen. 504, 508-09 (1882).

of Claims, forcing a judicial determination of which appointee—the President's or the Commission's—was entitled to the post. This improbable scenario never came about, no doubt because Civil Service Commissioners appointed by the President were unwilling to challenge the Chief Executive in this way. Thus, while the Senate might have prevented it, the President had the last word as to the constitutionality of this law.

c. William Howard Taft: The Presidential Budget

In his last week of office, President Taft refused to honor a law that prohibited him from submitting a national budget to Congress. In 1911, Taft had appointed a Commission on Economy and Efficiency whose final report, "The Need for a National Budget," was issued in June 1912.<sup>398</sup> The Commission in essence recommended that instead of having each executive department submit its own budget figures directly to Congress, they should report to the President who, after reviewing the numbers, would prepare and submit a coherent national budget.<sup>399</sup> Taft forwarded the report to Congress, urging that it amend the law to adopt the proposed procedure. But even without such a statute, he said, the President is constitutionally entitled to require information to be submitted to him in such form as he sees fit, and to then submit to Congress "a definite well-considered budget, with a message calling attention to subjects of immediate importance."<sup>400</sup> Taft meanwhile instructed each department to prepare two sets of budget estimates, "one in accordance with the present practise and one substantially in accordance with . . . the report of the Commission."<sup>401</sup> Congress responded by adding a rider to a pending appropriation bill directing that budget estimates be submitted "only in the form and at the time now required by law, and in no other form and at no other time."<sup>402</sup>

While Taft signed the measure in August, 1912, he defied the prohibition six months later by sending Congress a national budget along with budget figures in the form required by law. Taft defended his action on the basis that the President has a constitutional duty to send Congress "a regular statement and account of the receipts and ex-

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398. H.R. DOC. NO. 854, 62d Cong., 2d Sess. (1912); see Frederick A. Cleveland, *The Federal Budget: What the President is Trying to do by Way of Budget Making for the National Government*, 3 PROC. ACAD. POL. SCI. 165, 165-66 (1912-13).

399. See FISHER, *supra* note 319, at 189-90.

400. 48 CONG. REC. 8500-01 (1912).

401. Cleveland, *supra* note 398 at 118-20.

402. Act of Aug. 23, 1912, ch. 350, §9, 37 Stat. 360, 415.

penditures,” and to make such recommendations to Congress as “he shall judge necessary and expedient.”<sup>403</sup>

The President’s refusal to comply with the law was such that his action could have no effect without the affirmative approval of Congress. Though there was additional expense in having executive departments prepare budget data for both Congress and the White House, the statute did not bar the President from requesting or receiving such information; instead, it regulated only the manner in which the material was to be sent to Congress.<sup>404</sup> The legislators’ real concern was that Taft might propose a lower level of funding for projects in their districts than was sought by departmental budget estimates.<sup>405</sup> Yet no actual harm of this type could occur unless Congress voted to accept the President’s recommendations. The legislators were free to ignore Taft’s model budget, as they in fact did.<sup>406</sup>

As far as judicial review was concerned, had the President complied with the ban by not submitting his own budget, no one would appear to have had standing to challenge the ban’s validity in court.<sup>407</sup> By disregarding the prohibition, there was at least in theory the possibility of judicial review. If an agency or department learned in advance that the President was planning to recommend less funding than was sought in the departmental budget estimates, it might have gone to court to invoke the statutory ban as a basis for enjoining the White House from submitting its own budget figures. The President could then raise the constitutional issue as a defense, thereby affording the courts an opportunity to resolve the matter.

While this was perhaps a situation in which presidential defiance was necessary to secure judicial review, there is no evidence that Taft

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403. Message of Feb. 26, 1913, S. Doc. No. 1113, 62d Cong., 3d Sess. 5 (1913). See FISHER, *supra* note 319, at 189 (“The President does not have to await statutory authority to submit a budget.”).

404. The rider only regulated the form in which budget estimates were to be “prepared and submitted to Congress.” Act of Aug. 23, 1912, ch. 350, §9, 37 Stat. 360, 415. The rider was defended in Congress, however, on the basis that preparing figures for the President would divert executive officials from “their ordinary and pressing duties,” suggesting that Congress hoped to dissuade the President from even collecting the information. Cleveland, *supra* note 398 at 119 (quoting remarks by the Chairman of the House Appropriations Committee).

405. FISHER, *supra* note 134, at 30.

406. FISHER, *supra* note 319, at 189; FISHER, *supra* note 134, at 31.

407. If Taft wished to increase funding for an agency above that sought in the departmental estimates, but refrained from doing so due to the statutory bar, the agency might have had standing to challenge the constitutionality of the ban. However, this is an implausible scenario, for Taft’s goal was to decrease rather than increase the federal budget. See Message of Feb. 26, 1913, H.R. Doc. No. 1113, 62d Cong., 3d Sess. 9 (1913).

took any steps to facilitate this, such as by “leaking” details of his budget in advance. Though the President’s final budget was not submitted to Congress until a few days before Taft left office, it would seem that a test case could have been arranged earlier, in time to allow a court to rule on a request for injunctive relief.

d. Woodrow Wilson: The Termination of Treaties

Woodrow Wilson signed the Merchant Marine Act, or Jones Act, on June 5, 1920. The Act sought to strengthen the American shipping industry and enhance its ability to compete with foreign shipping interests. Section 28 of the Act authorized domestic interstate carriers to charge lower freight rates for goods imported in American ships than for goods imported in foreign vessels.<sup>408</sup> The United States had 32 treaties which barred such unequal treatment. However, §34 of the Act declared it to be the “judgment of Congress” that these treaties should be terminated to the extent they prohibited the United States from discriminating against foreign vessels or goods imported by them. Section 34 went on to state that “the President is hereby authorized and directed within ninety days” to notify the affected governments that our treaties with them would to this extent “terminate on the expiration of such periods as may be required for the giving of such notice by the provision of such treaties . . . .”<sup>409</sup>

On September 2, 1920, a day before the 90-day deadline was to run, Wilson advised his Secretary of State that he would not comply with §34 of the Jones Act. The matter, he said, was a “sacred” one, involving “[t]he binding force of treaties and the reciprocal obligation which treaties imply.” And, “inasmuch as it is clearly not the Constitutional right of Congress to direct the President to do anything whatever, particularly in regard to foreign affairs,” Wilson concluded that he “ought to stand stiff upon the prerogatives of the Presidential office.”<sup>410</sup> Three weeks later, the State Department announced that

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408. Merchant Marine Act, Pub. L. No. 261, ch. 250, §28, 41 Stat. 988, 999-1000 (1920). See JEFFREY J. SAFFORD, *WILSONIAN MARITIME DIPLOMACY, 1913-1921*, at 221-32 (1978).

409. Merchant Marine Act §34.

410. Letter from Woodrow Wilson to Bainbridge Colby (Sept. 2, 1920), in 66 *PAPERS OF WOODROW WILSON* 89 (Arthur S. Link ed., 1992). To the extent Wilson was claiming that the President may terminate a treaty without consulting Congress, the issue remains open. See *Goldwater v. Carter*, 444 U.S. 996 (1979) (dismissing, as nonjusticiable, challenge by members of Congress to President’s unilateral termination of treaty with Taiwan). If Wilson’s complaint was that Congress could not pass laws that violate U.S. treaty obligations, he was on weak ground. An act of Congress inconsistent with a prior treaty must still be given effect. See *The Chinese Exclusion Case*, 130 U.S. 581, 600 (1889); HENKIN, *supra* note 374, at 163-64. Moreover, Wilson’s complaint would then be with §28 of the

"The President . . . does not deem the direction, contained in Section 34 of the so-called Merchant Marine Act, an exercise of any constitutional power possessed by Congress."<sup>411</sup> His defiance produced "congressional rumblings of impeachment,"<sup>412</sup> but Congress was not in session at the time and by the time it reconvened in December, Wilson had only three months left in office.

The President's constitutional objection to section 34 of the Jones Act appears to have been an afterthought. He signed the bill in June without complaint, after having discussed it with the Cabinet.<sup>413</sup> Five years earlier he had approved the LaFollette Seamen's Act and complied with one of its provisions that "instructed and directed" him to send notices of treaty termination to 17 countries.<sup>414</sup> This apparent inconsistency illustrates the fact that constitutional objections are not invoked in a vacuum; they are invariably raised in order to accomplish some independent objective.<sup>415</sup> In the case of the Jones Act, its passage had triggered protests and threats of retaliation from countries around the world. By September 1920, Wilson had developed second thoughts about taking action which, according to the State Department, "would amount to nothing less than the breach or violation of said treaties."<sup>416</sup> Ironically, by refusing to send the notices required by section 34, the President potentially exacerbated this very problem. His refusal meant that, by engaging in the discrimination permitted by

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Act, not §34, for the giving of notice was intended to comply with, not violate, existing treaties. While Wilson did not implement §28, this was not a defiance of the law because §28 expressly allowed the Executive to suspend its enforcement.

411. Letter and Enclosure from Bainbridge Colby to Woodrow Wilson (Sept. 23, 1920), in 66 PAPERS OF WOODROW WILSON, *supra* note 410, at 136-37. The State Department also noted that the President believed compliance with §34 would amount to breaching the treaties in question. *Id.*

412. SAFFORD, *supra* note 408, at 237.

413. *Id.* at 229.

414. Seaman's Act of 1915, ch. 153, §16, 38 Stat. 1164, 1184; *see* Reeves, *supra* note 374, at 33, 37; CORWIN, *supra* note 104, at 220-21; *but see id.* at 479-480 n.66 (In a Dec. 8, 1919, letter to Senator Albert Fall, Wilson opposed a pending resolution which would have directed him to sever diplomatic relations with Mexico, stating that "the initiative in directing the relations of our Government with foreign governments is assigned by the Constitution to the Executive and to the Executive only.").

415. *See* DONALD G. MORGAN, CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY 150 (1966) (noting that constitutional issues do not exist "in a political vacuum" and that the "accommodation of special interests is a common ingredient").

416. Letter and Enclosure from Bainbridge Colby to Woodrow Wilson (Sept. 23, 1920), in 66 PAPERS OF WOODROW WILSON, *supra* note 410, at 136. *See also* SAFFORD, *supra* note 408, at 232-39.

section 28, the United States would breach many treaties that might have been lawfully terminated by the giving of notice.<sup>417</sup>

However, besides refusing to comply with section 34, the administration also declined to implement section 28, the provision allowing domestic interstate carriers to discriminate against goods imported in foreign vessels. Section 28, by its terms, could be suspended by the Interstate Commerce Commission if the U.S. Shipping Board certified that there were not enough American ships to service the country's import needs. The Board invoked this authority four days after the Jones Act was passed, suspending section 28 for 90 days, ostensibly due to the inadequacy of American shipping facilities.<sup>418</sup> In July, the moratorium was continued through the end of the year; in December 1920, it was extended indefinitely.<sup>419</sup> While the Board cited the alleged inadequacy of U.S. shipping, it appears that section 28 was suspended due to the angry response it had provoked from foreign governments.<sup>420</sup> The section remained inoperative for the balance of Wilson's term and well into 1922, for President Harding likewise refused to comply with section 34,<sup>421</sup> though on the purely policy ground that it would "involve us in a chaos of trade relationships."<sup>422</sup>

The possibility for judicial review of President Wilson's action was virtually nonexistent. Because the enforcement of section 28 was not tied to compliance with section 34, persons who might have benefited from the implementation of section 28 could not claim to have suffered a legal injury because of Wilson's failure to honor section 34. A judgment ordering the administration to send treaty termination notices would not necessarily redress their injury, because the Ship-

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417. Reeves, *supra* note 374, at 37-38.

418. H.R. Doc. No. 227, 67th Cong., 2d Sess. 27 (1921). Because the Board suspended §28 several months before Wilson asserted any constitutional objection to the Jones Act, and because §28 and §34 were included in the Act at the instigation of the Shipping Board's chairman, it seems clear that the Board did not suspend §28 on constitutional grounds. See SAFFORD, *supra* note 408, at 229, 232.

419. H.R. Doc. No. 227, *supra* note 418, at 27-28; H.R. Doc. No. 407, 67th Cong., 3d Sess. 13 (1921); SAFFORD, *supra* note 408, at 233, 244.

420. See SAFFORD, *supra* note 408, at 233. Congress may not have expected §28 to take effect until treaty termination notices had been sent under §34, but had this been the Board's rationale for suspending §28, one would expect the suspension to have been limited to goods from nations with such treaty arrangements.

421. N.Y. TIMES, May 20, 1921, at 12, col. 7; Cabinet Takes Up Shipping Crisis, N.Y. TIMES, Oct. 8, 1921, at 4, col. 1; To Mend Marine Act That Hit Treaties, N.Y. TIMES, Nov. 26, 1921, at 10, cols. 3-4; President to Urge Tariff Bill Change, N.Y. TIMES, Dec. 2, 1921, at 5, col. 2; H.R. Doc. No. 407, *supra* note 419, at 13. In the 1920 presidential campaign Harding had criticized Wilson for not complying with §34. CORWIN, *supra* note 104, at 220.

422. N.Y. TIMES, Dec. 7, 1921, at 8, col. 3.



ping Board remained free to continue the suspension of section 28 until it decided that U.S. shipping facilities were adequate. The only harm caused by noncompliance with section 34 itself would be the treaty violations that would occur once section 28 was implemented. While this could give rise to suits by foreign governments and by those of its nationals who were protected by the treaties, the issue as to the constitutionality of section 34 would not arise in such proceedings. Nor could these foreign parties sue to enjoin the President from engaging in conduct that would result in a breach, for American courts will not "sit in judgment on the political branches to prevent them from . . . breaching a treaty."<sup>423</sup>

On the other hand, the prospects for judicial review would have been no better had Wilson complied with section 34. No one could have claimed injury from the mere transmittal of notices, as distinct from the enforcement of section 28.<sup>424</sup> The Jones Act episode thus illustrates the fact that there will be occasions when there may be no one who, under any plausible scenario, will be in position to trigger judicial review of a law the President claims is unconstitutional.

e. Dwight Eisenhower: The Agreement with Chile

Throughout most of the 1950s, there was a campaign to amend the Constitution to restrict the President's ability to make unilateral executive agreements with foreign governments, in lieu of treaties requiring ratification by the Senate. The fight came to an end in November 1958, when Senator John Bricker was defeated in his bid for reelection to Congress.<sup>425</sup> In June 1958, during the waning days of the Bricker Amendment crusade, Congress passed a bill creating the National Aeronautics and Space Administration (NASA).<sup>426</sup> The measure authorized the President to cooperate with other nations in the fields of aeronautics and space exploration, but section 205 mandated that any such international agreements be "made by the President

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423. HENKIN, *supra* note 374, at 171.

424. Sending notices might, as a practical matter, have cleared the way for enforcement of §28, causing injury to a plaintiff whose goods were discriminated against. But as the enforcement of §28 was not tied to the sending of §34 notices, a favorable ruling that the President was improperly forced to send termination notices might still not redress plaintiff's injury, for the notices might not be withdrawn, and even if they were, §28 might still be enforced.

425. See generally DUANE TANANBAUM, *THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER'S POLITICAL LEADERSHIP* (1988).

426. National Aeronautics and Space Act of 1958, Pub. L. No. 85-568, § 205, 72 Stat. 426.

with the advice and consent of the Senate.”<sup>427</sup> President Eisenhower had strenuously opposed the Bricker Amendment. He signed the bill but objected to section 205, explaining, “I regard this section merely as recognizing that international treaties may be made in this field, and as not precluding, in appropriate cases, less formal arrangements for cooperation. To construe the section otherwise would raise substantial constitutional questions.”<sup>428</sup>

Eisenhower ignored this statutory restriction on at least one occasion. Through an exchange of notes between the American Ambassador and the Chilean Minister of Foreign Affairs, the two countries entered into an agreement for a joint program of tracking and receiving radio signals from earth satellites and space vehicles. The agreement designated NASA as the U.S. cooperating agency. According to the State Department, the agreement took effect immediately.<sup>429</sup> There is no evidence that it was ever approved by the Senate as required by section 205.<sup>430</sup> By defying this law, the President cut off any possibility for judicial review, as it is doubtful anyone could claim a sufficient injury from the agreement to challenge its validity in court. If, on the other hand, Eisenhower had complied under protest by seeking Senate approval, there was at least a possibility of securing judicial review. For had the Senate rejected the agreement, NASA or the State Department might have brought suit against Chile for a declaratory judgment as to whether the agreement was binding despite its rejection by the Senate.<sup>431</sup>

#### f. Gerald Ford: The Power of Appointment

President Ford objected to and refused to comply with two different statutes that provided for the appointment of executive branch officials in a manner which he believed violated the Constitution. The first of these involved the Executive Director of the Commodity Futures Trading Commission. The 1974 law creating the Commission allowed it to appoint an executive director “with the advice and consent

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427. National Aeronautics and Space Act § 205.

428. Statement of June 29, 1959, *in* 1958 PUB. PAPERS 573 (1959).

429. Agreement on Tracking Stations, Feb. 19, 1958, U.S.-Chile, 10 U.S.T. 783-86.

430. The Congressional Record for 1959-1961 contains no reference to the agreement or to any Senate approval of it.

431. Such an action would have resembled *INS v. Chadha*, 462 U.S. 919 (1983), where the Court found a case or controversy to exist even though the executive branch agreed with its adversary that a statutory restriction Congress had placed on its ability to act was unconstitutional; the fact that the Executive was bound by the limitation sufficed to make a case or controversy.

of the Senate.”<sup>432</sup> In signing the bill, Ford objected that the Act violated the separation of powers by “providing for an executive branch appointment in a manner not contemplated by the Constitution.” He urged that the problem “be corrected by deletion of the request for Senate confirmation of the Executive Director.”<sup>433</sup>

In 1975 the President had corrective legislation introduced in Congress,<sup>434</sup> but the statute was not amended to provide for appointment by the Commission alone until 1978, well after Ford had left office.<sup>435</sup> In the interim, this portion of the law was not executed; no one was appointed to the Executive Director’s position. The role was instead filled by a series of “acting” directors, none of whose names was submitted to the Senate.<sup>436</sup>

This was another case where failure to comply with the law effectively precluded judicial review, for no one had standing to challenge the Commission’s refusal to appoint an Executive Director. As a study prepared for the House Appropriations Committee noted, if Ford had instead directed the Commission to submit a nominee to the Senate and the person had been confirmed, “actions of the appointee [might] be challenged as those of one not legally in office.”<sup>437</sup> Alternatively, the Attorney General might have brought a quo warranto proceeding to determine whether or not the Executive Director had been appointed in a constitutional manner.

The second statute to which President Ford objected because of its allegedly unconstitutional appointment provisions was a 1975 law creating the Japan-United States Friendship Commission.<sup>438</sup> In a signing statement, Ford observed that four of the commissioners were to be Members of Congress, whom the Constitution bars from serving in

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432. Commodity Futures Trading Commission Act of 1974, Pub. L. No. 93-463, §101(a)(5), 88 Stat. 1389, 1390.

433. Statement of Oct. 24, 1974, in 1974 PUB. PAPERS 462 (1975). Because Ford proposed having the appointment made by the Commission itself—a method not found in Article II, §2—he must have viewed the Executive Director as being neither an officer nor an inferior officer of the United States. See *Buckley v. Valeo*, 424 U.S. 1, 126 n.162 (1976) (finding Art. II not applicable to mere “employees” or “lesser functionaries”).

434. STAFF OF THE HOUSE COMM. ON APPROPRIATIONS, 95TH CONG., 2D SESS., INVESTIGATIVE STUDY ON THE COMMODITY FUTURES TRADING COMMISSION 30-31 (Comm. Print 1978) [hereinafter CFTC STUDY].

435. Act of Sept. 30, 1978, Pub. L. No. 95-405, §2, 92 Stat. 865.

436. H.R. REP. NO. 95-1181, 95th Cong., 2d Sess. 22 (1978); *Reauthorization of the Commodity Futures Trading Commission: Hearing Before the Subcomm. on Agricultural Research and General Legislation of the Senate Comm. on Agriculture, Nutrition, and Forestry*, 95th Cong., 2d Sess. 17, 22, 29-30 (1978); CFTC STUDY, *supra* note 434, at 30.

437. CFTC STUDY, *supra* note 434, at 30.

438. Japan-United States Friendship Act, Pub. L. No. 94-118, 89 Stat. 603 (1975).

any other office of the United States; therefore, he said, the congressional members of the Commission “will serve in an advisory capacity, as nonvoting members.”<sup>439</sup> Since its inception, the Friendship Commission has followed Ford’s directive, its by-laws providing that “[t]he four members of Congress appointed to the Commission shall not be entitled to vote.”<sup>440</sup> For all practical purposes, this action removed the congressional members from the Commission, contrary to the requirements of the statute.

The President’s action in refusing to honor this provision of law was not insulated from judicial review. The Senators and Representatives named to the Commission could have sued to overturn the by-law denying them the right to vote, arguing that it was inconsistent with the statute; the Commission would then have raised the constitutional issue as a defense, permitting the federal courts to resolve the issue. Yet it was not necessary for the President to defy this law in order to set up the possibility of judicial review. Instead, he might have allowed the Members of Congress to assume their positions as full voting members of the Commission and had the Attorney General institute a quo warranto proceeding to test their right to do so, thereby assuring that judicial review occurred.<sup>441</sup>

g. Jimmy Carter: Five Instances of Defiance

Jimmy Carter holds the distinction of having refused to comply with five different statutes which he signed but to which he raised constitutional objections. The first of these involved an attempt by Congress to protest the “complete and unconditional pardon” which Carter had extended to Vietnam-era draft resisters immediately upon taking office in early 1977.<sup>442</sup> That summer Congress attached a rider to the Fiscal Year 1978 appropriation bill, barring the Justice Department from using any of the funds to carry out the President’s par-

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439. Statement of Oct. 21, 1975, in 1975 PUB. PAPERS 1719 (1977). Article I, §6 states that “no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.” U.S. CONST. art. I, § 6.

440. Regulations of the Japan-United States Friendship Commission (adopted Oct. 5, 1976); Telephone interview with Eric J. Gangloff, Exec. Dir., Japan-U.S. Friendship Comm’n (Apr. 15, 1993).

441. Such a suit would not be barred by the Speech or Debate Clause, for Art. I, §6 shields members of Congress only with respect to “legislative acts.” See *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *United States v. Brewster*, 408 U.S. 501 (1972).

442. Proclamation No. 4483, 91 Stat. 1719 (1977). See 123 CONG. REC. 20835 (June 24, 1977) (statement of Sen. Dole noting that the amendment would have the “symbolic significance” of voicing objection to the pardon rather than much “practical effect”).

don.<sup>443</sup> While the bill was pending in the Senate, the President sought unsuccessfully to have the restriction removed.<sup>444</sup> Carter signed the measure on August 2, 1977, but issued a statement objecting that the bar was unconstitutional on the grounds that it interfered with the pardon power, constituted a bill of attainder, and denied due process of law.<sup>445</sup>

An executive order implementing the pardon required the Justice Department to dismiss pending indictments against the pardoned individuals, to terminate investigations concerning them, and to permit entry into the United States of aliens who were otherwise excludable for having violated the Selective Service laws.<sup>446</sup> By the time the bar took effect on October 1, 1977, the Justice Department had already dismissed all pending indictments and investigations.<sup>447</sup> However, the funding restriction was expected to have a severe impact on carrying out that part of the pardon involving the admission of aliens, many of them draft resisters who had left the country and renounced their citizenship.<sup>448</sup> It was first rumored that other funds might be available for these purposes, but the Justice Department later stated that the limitation would likely prevent it from processing reentry applications for those who had been pardoned.<sup>449</sup>

In the end, the Carter administration ignored the spending restriction.<sup>450</sup> On November 18, 1977, less than two months after the ban took effect, the Immigration and Naturalization Service announced reentry procedures for aliens seeking to take advantage of the President's pardon.<sup>451</sup> In May 1978, it was estimated that thousands of aliens may have been readmitted under the amnesty pro-

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443. Act of Aug. 2, 1977, Pub. L. No. 95-86, §706, 91 Stat. 419, 444.

444. Letter from Robert J. Lipshutz, Counsel to the President, to Sen. Mark Hatfield (June 23, 1977), in 123 CONG. REC. 20834-35 (1977).

445. Statement of Aug. 3, 1977, in 1977 PUB. PAPERS 1409-10 (1978).

446. Exec. Order No. 11,967, 50 U.S.C. app. § 462 (1988).

447. Senate Turns Down Funds to Carry Out Carter's Pardon Plan, N.Y. TIMES, June 25, 1977, at 1, col. 5, and at 7, col. 3; 123 CONG. REC. 20834 (1977).

448. 123 CONG. REC. 20834 (1977).

449. House Votes to Bar Funds to Carry Out Carter Pardon Plans, N.Y. TIMES, Mar. 17, 1977, at 15, col. 1; Senate Turns Down Funds to Carry Out Carter's Pardon Plan, N.Y. TIMES, June 25, 1977, at 1, col. 5, and 7 col. 3.

450. 54 *Interpreter Releases* 369 (Maurice A. Roberts ed.) (Oct. 19, 1977) (noting that despite the limitation stated in P.L. 95-86, the INS was still processing such cases).

451. 42 Fed. Reg. 59562-63 (1977).

gram.<sup>452</sup> There is no evidence that the Justice Department underwrote these activities with funds not subject to the funding bar.

By refusing to comply with the spending limitation, Carter effectively precluded judicial review of the spending restriction itself and of his action ignoring it.<sup>453</sup> Had the administration instead complied with the funding bar by refusing to process reentry papers for aliens who had been pardoned, the aliens would have had standing to seek a judgment declaring the statute unconstitutional and compelling the INS to carry out the President's pardon.<sup>454</sup> The government might have helped to facilitate the filing of a test case by advising the affected individuals of their right to sue.

The second statute that Carter declined to honor on constitutional grounds was the Public Telecommunications Act which amended the Public Broadcasting Act of 1967.<sup>455</sup> The President signed the measure on November 2, 1978, but suggested that §399, barring public radio and television stations from editorializing, was invalid because "public broadcasters should have the same first amendment rights as other broadcasters."<sup>456</sup> A suit challenging the ban was filed in federal court in October 1979. The Justice Department, stealing a leaf from Franklin Roosevelt's book,<sup>457</sup> notified Congress that it

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452. See *Daughtrey v. Carter*, 584 F.2d 1050, 1054-55 (D.C. Cir. 1978) (noting plaintiffs' counsel's assertion that thousands of aliens, including former citizens, may have reentered the country under the pardon).

453. A suit to enjoin implementation of the pardon on various grounds was dismissed for lack of standing. *Daughtrey v. Carter*, 584 F.2d 1050 (D.C. Cir. 1978). Plaintiffs included present and former military personnel, the child of a prisoner of war, a civilian, two military wives, and two Members of Congress. *Id.* at 1053. None was found to have alleged an injury sufficient to confer standing. *Id.* at 1058. While plaintiffs did not allege that implementation of the pardon violated the funding bar, such a claim would also have been dismissed for lack of standing.

454. While it is unclear to what extent aliens outside the United States have standing to invoke rights under the Constitution (see *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS OF THE UNITED STATES* § 721 cmt. b, § 722 cmt. m & reporter's note 16 (1987); Jules Lobel, *The Constitution Abroad*, in *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 167-75 (Louis Henkin, Michael J. Glennon & William D. Rogers eds., 1990)), an alien abroad should have standing to enforce rights expressly given her by a pardon. The situation is analogous to an overseas alien suing to enforce rights given her by a treaty. See *HENKIN, supra* note 374, at 416. In such a suit, the pardoned alien, like any other recipient of a pardon, should have standing to assert that a statute which seeks to defeat the pardon is invalid. See *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872).

455. Act of Nov. 2, 1978, Pub. L. No. 95-567, 92 Stat. 2405, amending Act of Nov. 7, 1967, Pub. L. No. 90-129, 81 Stat. 365.

456. Statement of Nov. 2, 1978, in 1978 *PUB. PAPERS* 1927-28 (1979). The provision was originally §399 of the Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365, and renumbered §399(a) by the 1978 statute.

457. See *supra* notes 338-342 and accompanying text.

would not defend the constitutionality of §399.<sup>458</sup> The district court concluded that the administration's hostility to the act went beyond a mere refusal to defend. The Federal Communications Commission "represented that it would seek to impose only the most minimal sanctions . . . . That willingness to enforce the statute solely for the purpose of test litigation indicates that otherwise the FCC will not enforce the statute. It is, to the Commission, a nullity."<sup>459</sup> The court dismissed the case on ripeness grounds and for lack of a justiciable controversy. Because there was a "distinct likelihood that the FCC will not seek to penalize a broadcaster that violates §399(a)," plaintiffs could not show that the provision caused them an injury in fact sufficient to confer standing.<sup>460</sup>

President Carter's apparent refusal to enforce this law thus effectively prevented the federal courts from reviewing its constitutionality. Ironically, it was only after the Reagan administration took office and announced that it would both enforce and defend the editorializing ban that the federal courts were finally able to entertain a challenge to §399.<sup>461</sup> The Supreme Court ultimately held that the statute was unconstitutional.<sup>462</sup>

The third law which President Carter ignored due to its alleged unconstitutionality was a provision in an appropriations bill that created the San Antonio Missions National Historical Park. The bill directed the Secretary of the Interior "to assure the protection and preservation of the historical and architectural values of the missions," either by acquiring the missions from the Catholic Archdiocese or by entering into agreements with the Church whereby the government would reconstruct and rehabilitate them.<sup>463</sup> When Carter signed the bill on November 10, 1978, he objected that this provision "would lead to unacceptable entanglements of the Federal Government in the operations of active churches," and advised the Secretary "to consider

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458. 125 CONG. REC. 35416 (1979); *Department of Justice Authorization and Oversight, 1981: Hearings Before the Senate Judiciary Comm.*, 96th Cong., 2d Sess. 853-54 (1980) (testimony of Alice Daniel, Ass't Att'y Gen); *FCC v. League of Women Voters*, 468 U.S. 364, 370-71 & n.8 (1984). The Senate then directed counsel to intervene as *amicus curiae*. *Id.*

459. *League of Women Voters v. FCC*, 489 F. Supp. 517, 519-20 (C.D. Cal. 1980).

460. *Id.* at 520.

461. *League of Women Voters v. FCC*, 547 F. Supp. 379, 382 (C.D. Cal. 1982); see Brady, *supra* note 145, at 976 n.21.

462. *FCC v. League of Women Voters*, 468 U.S. 364 (1984).

463. Act of Nov. 10, 1978, Pub. L. No. 95-629, §201, 92 Stat. 3635, 3636-39. Any agreements with the Catholic Archdiocese of San Antonio were to be submitted to the Justice Department "for a determination that [they] do not violate the constitutional provisions regarding the separation of church and state." §201(b), 92 Stat. 3637.

implementation of the portions of the bill relating to restoration and maintenance of the Missions only if they pass into secular ownership and use.”<sup>464</sup> The Secretary heeded the direction, informing a House committee that the administration opposed spending federal funds on the missions because “[t]he structures there are used currently and steadily and for the primary use of church services.”<sup>465</sup>

The administration gave some thought to acquiring the mission properties but nothing came of this.<sup>466</sup> In the meantime no federal money was spent on the missions. The matter was not finally resolved until after Carter left office. In 1983, a cooperative agreement was signed under which the Archbishop of San Antonio assumed full responsibility for maintaining the missions themselves, while the United States agreed to repair and maintain the secular buildings and the mission grounds.<sup>467</sup> The statutory scheme whereby the federal government itself was to restore and maintain the missions was never realized.

Carter’s decision to disregard this provision of law did not automatically preclude a judicial resolution of the issue. The Archdiocese of San Antonio might have sued, once it became clear that the Interior Department would not agree to restore and maintain the missions. Instead, the Church acquiesced in the government’s action. However, judicial review would have been virtually assured had the administration implemented the statute. Every single taxpayer in the United States would then have had standing to challenge this expenditure of federal funds on the ground that it violated the First Amendment’s Establishment Clause.<sup>468</sup> By taking the course he did, the President sharply reduced the chances that judicial review would ever occur.

The fourth law with which President Carter refused to comply on constitutional grounds barred him from proceeding with plans to close

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464. Statement of Nov. 10, 1978, in 1978 PUB. PAPERS 2001 (1979).

465. *Department of the Interior and Related Agencies Appropriations for 1980: Hearings Before a Subcomm. of the House Appropriations Comm.*, 96th Cong., 1st Sess. 50 (Feb. 21, 1979).

466. See 45 Fed. Reg. 49689 (1980); *id.* at 84159 (1980) (San Antonio Missions Advisory Committee’s agenda includes item on “Status of Archdiocesan Proposal for Conveyance of Church Properties to National Park Service”).

467. Cooperative Agreement, Feb. 20, 1983, Clerk’s Office, Bexar County, Texas, file no. 627684, vol. 3901, at 562-69 (on file with the *Hastings Constitutional Law Quarterly*). Thanks to Robert C. Amdor, Superintendent, San Antonio Missions National Historical Park, for providing a copy of this agreement.

468. See *Flast v. Cohen*, 392 U.S. 83 (1968); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982).



ten United States Consulates abroad, and directed that if any had been closed they be reopened as soon as possible.<sup>469</sup> In a signing statement issued in August, 1979, Carter declared that because the provision interfered with the President's "right to decide when and where an Ambassador or Consul should be appointed," it would be treated "as a recommendation and not a requirement."<sup>470</sup> In early 1980, the administration closed 7 of the 10 protected consulates.<sup>471</sup> There was probably no one with standing to challenge this act of presidential defiance. If the closing of the consulate at Goteborg, Sweden was typical, the American personnel who worked there were all transferred to other posts. The only people to suffer any measurable injury were the foreign nationals who had been employed as chauffeurs, secretaries, and the like.<sup>472</sup> These individuals probably lacked standing to sue since the law requiring that the consulates remain open was surely not designed to protect their interests. Yet, had Carter honored the statute, it is equally difficult to imagine anyone who could have claimed an injury sufficient to have standing to challenge the law's requirement that the offices remain open.

The final instance in which the Carter administration elected not to implement a law on constitutional grounds involved the Advisory Council on Historic Preservation.<sup>473</sup> In a December 12, 1980, signing statement, the President declared that because some of the Council's members were not appointed in accord with the Appointments Clause, they "should participate only in the Council's advisory activities."<sup>474</sup> He was evidently troubled by the fact that while the President appointed 14 Council members, 5 seats were reserved for designated federal officeholders such as the Capitol Architect and the Secretary of the Interior.<sup>475</sup> The Council honored Carter's concern by treating the 5 as *ex officio* members.<sup>476</sup> In theory, the President's ac-

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469. Act of Aug. 15, 1979, Pub. L. No. 96-60, §108, 93 Stat. 395, 397.

470. Statement of Aug. 15, 1979, in 1979 PUB. PAPERS 1434-35 (1980).

471. 126 CONG. REC. 21515-16, 28513 (1980) (noting closure of consulates in Salzburg, Bremen, Nice, Turin, Goteborg, Mandalay, and Brisbane). In 1876, President Grant had issued a statement objecting to a provision directing that he close certain diplomatic offices abroad. Statement of Aug. 14, 1876, in 9 MESSAGES AND PAPERS, *supra* note 129, at 4331-32 (regarding Act of Aug. 15, 1876, ch. 288, 19 Stat. 170, 175). However, Grant immediately complied with the provision. Message of Dec. 5, 1876, in 9 MESSAGES AND PAPERS, *supra* note 129, at 4356.

472. See 126 CONG. REC. 28513 (1980).

473. Act of Dec. 12, 1980, Pub. L. No. 96-515, § 301, 94 Stat. 2987, 2998-3000.

474. Statement of Dec. 12, 1980, in 1980-81 PUB. PAPERS 2802-03 (1982).

475. See 94 Stat. 2998, § 301(a); ADVISORY COUNCIL ON HISTORIC PRESERVATION, 1981 ANN. REP. 20, 54.

476. ADVISORY COUNCIL ON HISTORIC PRESERVATION, 1981 ANN. REP. 20, 54.

tion was not insulated from judicial review. The ex officio members could have sued the Council claiming that the statute gave them a right to vote, forcing the Council to defend itself on the ground that the law was unconstitutional. But as a practical matter, these members had no incentive to sue, for the expense would far outweigh any conceivable benefit they might derive from becoming voting members of the Council. President Carter could have assured a judicial resolution of the issue if, instead of defying the law, he had ordered the Attorney General to institute quo warranto proceedings against the five members, asking the court to hold that their manner of selection violated the Appointments Clause.

Jimmy Carter's unprecedented willingness to disregard those parts of statutes that he thought were unconstitutional may have been influenced by his prior experience as Governor of Georgia, the first state to give its Chief Executive an item veto.<sup>477</sup> Yet, it is interesting to note that all of the earlier instances where a President signed but then refused to comply with a law arose in a setting where the opposition party controlled one or both Houses of Congress, thus limiting the administration's ability to cure any perceived defects in the legislation before passage. In Carter's case, this was not so, for the Democrats controlled the House and the Senate during all four years he was in office.<sup>478</sup>

Of the twelve incidents of executive noncompliance discussed here, in only two could it be said that such action was necessary to secure judicial review of the law in question.<sup>479</sup> Review did not occur in either case, however, in part because the White House did nothing to facilitate it. In three other instances, judicial review was possible whether or not the President honored the law, but in each case, the act of defiance severely reduced the likelihood that judicial review would occur.<sup>480</sup> In the seven remaining cases, the President's determination that the law was unconstitutional was insulated from judicial review with the result that his refusal to execute the measure amounted to an absolute veto. In two of these situations, no one would have had

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477. SPITZER, *supra* note 40, at 126, 158 n.6; GA. CONST. art. III, §V. Carter initially favored giving the President an item veto, but later had doubts about it. SPITZER, *supra* note 40, at 158 n.8.

478. See NORMAN J. ORNSTEIN ET AL., VITAL STATISTICS OF CONGRESS, 1991-1992, at 40-42 (1992).

479. See *supra* notes 386-387, 407 and accompanying text (regarding Presidents Buchanan and Taft).

480. See *supra* notes 441, 468, 476 and accompanying text (regarding Presidents Ford and Carter (2 incidents)).

standing to challenge the validity of the law, regardless of how the Executive had responded.<sup>481</sup> In the other five cases, the effect of presidential noncompliance was to foreclose review that might otherwise have been available.<sup>482</sup>

### C. Constitutional Objections to Statutes Enacted During A Prior Administration

Presidents have at times refused to honor a law adopted during an earlier administration and which they thus had no opportunity to veto or object to through a signing statement. Before examining these instances, it is important to note that Presidents may have options, short of noncompliance, for dealing with preexisting laws they believe to be unconstitutional. One is to ask Congress to repeal the measure. The Tenure of Office Act, passed in 1867 over Andrew Johnson's veto, was finally repealed in 1887 after Presidents Grant, Hayes, and Cleveland all pressed Congress to take this step.<sup>483</sup> Dwight Eisenhower secured the repeal of a committee approval requirement adopted during the Truman years, after repeated messages to Congress charged that the provision was unconstitutional.<sup>484</sup>

Another option, albeit one that has generated controversy, is for the White House to refuse to defend—or even join in the attack—when such a law is challenged in court.<sup>485</sup> During the Kennedy administration, the United States intervened in a suit attacking the 1946 Hill-Burton Act to the extent that it allowed the construction of hospitals on a separate-but-equal basis. Throughout the proceeding, the government joined plaintiffs in arguing that the law was unconstitutional.<sup>486</sup> The Department of Justice under President Carter refused to defend the constitutionality of a statute first adopted in 1905 which required the Secretary of the Army to sell firearms, at cost, to members of the National Rifle Association; the Department later declined to appeal the district court's decision holding the provision invalid.<sup>487</sup>

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481. See *supra* notes 423-424, 472 and accompanying text (regarding Presidents Wilson and Carter).

482. See *supra* notes 397, 431, 437, 453-454, 461-462 and accompanying text (regarding Presidents Arthur, Eisenhower, Ford, and Carter (2 incidents)).

483. See *supra* note 142; FISHER, *supra* note 319, at 60-61.

484. *Separation of Powers Hearings*, *supra* note 328, at 222.

485. See Brady, *supra* note 145; Miller & Bowman, *supra* note 124.

486. *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959, 962 (4th Cir. 1963) (en banc), *cert. denied*, 376 U.S. 1938 (1964).

487. *Gavett v. Alexander*, 477 F. Supp. 1035, 1039, 1043-44 & n.19 (D.C. Cir. 1979). Congress did not intervene and defend the law's constitutionality. *Id.* at 1044.

Finally, statutes may give a President discretion whether or not to use a constitutionally offensive provision, in which case the Executive may refrain from acting without being guilty of defying the law. Lyndon Johnson avoided committee veto and approval requirements contained in a number of statutes this way. Early in his administration Johnson objected to the constitutionality of such provisions.<sup>488</sup> Over the next few years he continued to challenge them by exercising his veto power,<sup>489</sup> by objecting in signing statements,<sup>490</sup> and by submitting legislation to repeal these clauses in existing statutes.<sup>491</sup> In none of these instances did he refuse to comply with the law.<sup>492</sup>

In mid-1966, however, Johnson announced that beginning in 1967, his administration would no longer undertake public works projects that were subject to congressional committee veto or approval requirements.<sup>493</sup> Four of the laws involved were on the books when Johnson took office. Each authorized rather than directed that the projects be pursued, and no funds were to be appropriated until after a proposal had been cleared by the designated committees.<sup>494</sup> Congress's use of permissive authorization language together with its failure to appropriate funds suggests that Johnson can not fairly be charged with having defied the law by not pursuing these projects.

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488. See, e.g., Statement of Dec. 31, 1963, in 1963-64 PUB. PAPERS, 104 (1965) (objecting to committee approval requirement in Public Works Appropriation Act).

489. See, e.g., Message of June 7, 1965, in 111 CONG. REC. 12669-70 (1965); S. Doc. No. 34, 89th Cong., 1st Sess. 1-2 (1965) (veto based on inclusion of committee approval requirement).

490. See Statement of July 17, 1964, in 1964 PUB. PAPERS 861-62 (1965); Statement of Oct. 8, 1964, in 1964 PUB. PAPERS 1249-51 (Oct. 8, 1964); Statement of Oct. 14, 1964, in 1964 PUB. PAPERS 1336; Statement of Oct. 26, 1965, in 1965 PUB. PAPERS 1082-84 (1966).

491. See Statement of Nov. 8, 1966, in 1966 PUB. PAPERS 1354 (1967); *Separation of Powers Hearings*, *supra* note 328, at 38, 108-09, 153-55, 214-15.

492. See *supra* Table 3; *Separation of Powers Hearings*, *supra* note 328, at 92.

493. See *Separation of Powers Hearings*, *supra* note 328, at 106-07; Statement of Nov. 8, 1966, in 1966 PUB. PAPERS 1354 (1967); S. REP. NO. 549, 91st Cong., 1st Sess. 14-15 (1969).

494. The four existing statutes were the: Bankhead-Jones Farm Tenant Act of 1937, ch. 517, 50 Stat. 522 (codified as amended at 7 U.S.C. §1011 (1980)); Watershed Protection and Flood Prevention Act of 1954, Pub. L. No. 83-566, ch. 656, 68 Stat. 666 (codified as amended at 16 U.S.C. §1002 (1985)); Small Reclamation Projects Act of 1956, ch. 972, 70 Stat. 1044, 1045 (codified as amended at 43 U.S.C. §422a (1988)); Public Buildings Act of 1959, Pub. L. No. 86-249, §7(a), 73 Stat. 479 (codified as amended at 40 U.S.C. §605 (1988)). On the Johnson administration's refusal to pursue projects authorized by these statutes, see *Separation of Powers Hearings*, *supra* note 328, at 81-138, 150-55, 214-15. A fifth law was signed by Johnson in 1965, at which time he issued a statement objecting to its committee approval requirement. Statement of Oct. 26, 1965, in 1965 PUB. PAPERS 1082-84 (1966) (regarding Flood Control Act of 1965, Pub. L. No. 89-298, 79 Stat. 1073); see *supra* notes 327-329 and accompanying text.

Instead, Johnson appears to have acted within the scope of the discretion given to him by statute.<sup>495</sup>

Yet not all Presidents chose one of these options, or if they did, they coupled them with a refusal to comply with the law. We turn now to a consideration of those cases.

### 1. *Grover Cleveland: The Civil Service Chief Examiner*

Grover Cleveland in 1886 confronted the same issue that President Arthur had faced a number of years earlier concerning the Chief Examiner of the Civil Service Commission. Cleveland's Attorney General reached the same conclusion that Arthur's had, namely that the Chief Examiner was an "officer" of the United States who could not constitutionally be appointed by the Commission itself.<sup>496</sup> Like his predecessor, Cleveland submitted his own nominee for the position to the Senate. The Senate once again acquiesced in this defiance of the statutory scheme, this time confirming the appointment without reservation.<sup>497</sup> And as before, the practical effect of the President's action was to foreclose the possibility of judicial review. Cleveland could have assured a judicial determination of the constitutional issue by directing the Attorney General to file a quo warranto proceeding against whomever the Commission appointed to the position.

### 2. *Woodrow Wilson: Removing a Postmaster*

On February 2, 1920, President Wilson fired Frank S. Myers from his position as postmaster at Portland, Oregon, prior to the expiration of Myers' four-year term.<sup>498</sup> By doing so, Wilson ignored an 1876 statute which provided that such postmasters could be removed by the President only "with the advice and consent of the Senate."<sup>499</sup> Wilson never notified the Senate, much less sought its consent.<sup>500</sup> Though he did not specify that this defiance of the 1876 Act was based on constitutional grounds, it is fair to assume that it was. Many of Wilson's predecessors, including Andrew Johnson, had opposed attempts by

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495. The issue is admittedly a close one. To the extent Johnson did submit projects to Congress which were then approved by the requisite committees, he was at that point clearly guilty of defying the law by refusing to spend the appropriated funds. See *infra* notes 512-517 and accompanying text.

496. 18 Op. Att'y Gen. 409-10 (1886).

497. 25 J. OF EXEC. PROC. OF U.S. SENATE 601, 683 (1901).

498. *Myers v. United States*, 58 Ct. Cl. 199, 199-200 (1923).

499. Act of July 12, 1876, ch. 179, §6, 19 Stat. 78, 80. This act was signed by President Grant without objection, even though he had urged Congress to repeal the Tenure of Office Act which imposed similar restrictions with respect to other offices.

500. *Myers*, 58 Ct. Cl. at 201-202.

Congress to restrict the President's removal power.<sup>501</sup> Several months after dismissing Myers, Wilson vetoed a budget bill because it made certain officers removable only by concurrent resolution of the House and Senate. His veto message declared that "Congress is without constitutional power to limit the appointing power and its incident, the power of removal derived from the Constitution."<sup>502</sup>

As was true of Andrew Johnson's violation of the Tenure of Office Act,<sup>503</sup> no one would have had standing to challenge the validity of the 1876 law unless the President defied it. The difference was that, in this case, judicial review occurred, though not due to any efforts on the part of the administration.<sup>504</sup> A month after Wilson left office, Myers sued for the balance of his salary in the Court of Claims. The Justice Department defended the case in part by challenging the validity of the 1876 Act. The Court of Claims ruled against Myers under the doctrine of laches.<sup>505</sup> The Supreme Court affirmed but on the ground that the statute was unconstitutional. In an opinion by Chief Justice Taft, the Court finally resolved the issue that had triggered the Johnson impeachment, holding that Congress may not reserve for itself a role in the process of removing federal officers.<sup>506</sup>

### 3. *Franklin Roosevelt: Removing a Commissioner*

The President's view as to the scope of his removal powers was the basis for another act of executive defiance, this time involving Franklin Roosevelt's refusal to comply with a 1914 law which provided that the President could remove a Federal Trade Commissioner from office only "for inefficiency, neglect of duty, or malfeasance in office."<sup>507</sup> In 1933, Roosevelt dismissed an FTC Commissioner, William E. Humphrey, who had been appointed by President Hoover.<sup>508</sup> Roosevelt made clear that his action did not reflect upon Humphrey or the quality of his services, and that the removal stemmed solely

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501. See *Myers v. United States*, 272 U.S. 52, 168-69 (1926).

502. Message of June 4, 1920, in 65 PAPERS OF WOODROW WILSON 1362 (Arthur S. Link ed. 1991); *Myers v. United States*, 272 U.S. 52, 169 (1926). Decades earlier, Wilson had written of the heads of departments: "Once installed, their hold upon their offices does not depend upon the will of Congress." WILSON, *supra* note 159, at 272.

503. See *supra* notes 189-232 and accompanying text.

504. The government might have guaranteed that judicial review would occur by bringing quo warranto proceedings against Myers when he refused to acknowledge the President's removal order. See *Myers*, 58 Ct. Cl. at 200, 202; *Myers*, 272 U.S. at 107.

505. *Myers*, 58 Ct. Cl. at 206.

506. *Myers*, 272 U.S. at 176.

507. Federal Trade Commission Act, ch. 311, §1, 38 Stat. 717, 718 (1914).

508. *Humphrey's Executor v. United States*, 259 U.S. 602, 619 (1935).

from a desire to fill the position with someone more supportive of the administration's policies.<sup>509</sup> Humphrey sued in the Court of Claims, which promptly certified the matter to the Supreme Court. There, the Justice Department argued that the restriction on the President's removal power was unconstitutional. However, the Court upheld the Act, distinguishing *Myers* on the basis that the office there was purely executive, whereas the FTC performs quasi-legislative and quasi-judicial functions.<sup>510</sup> As in *Myers*, this judicial resolution of the constitutional dispute between Congress and the President could not have occurred if the President had complied with the statute in question.<sup>511</sup>

#### 4. Lyndon Johnson: Impounding Watershed Funds

After President Johnson announced that he would no longer undertake public works projects that were subject to approval or veto by congressional committees,<sup>512</sup> his administration submitted proposals to Congress under the Watershed Protection and Flood Prevention Act of 1954, one of the statutes he had objected to because of its committee approval requirement.<sup>513</sup> A total of 96 of these projects were approved by the Agricultural Committees of the House and Senate, but the President then refused to proceed with them unless Congress amended the statute.<sup>514</sup> Because the effect of the committees' action was to make funds available for the approved projects, Johnson's failure to implement them constituted an impoundment of appropriated funds and a defiance of the law.

The President's action was not shielded from judicial review. Any of the local governmental or nonprofit organizations whose proposal had been approved might have sued the Secretary of Agriculture to compel release of the funds. The Secretary might then have raised the constitutional issue as a defense, arguing that because the appropriation was in effect made by two congressional committees rather than by Congress itself, no funds were legally available for the

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509. *Id.* at 618-19.

510. *Id.* at 627-32.

511. Though the administration apparently took no steps to facilitate judicial review, in these Depression years the fact that roughly \$50,000 was at stake probably made it certain that a lawsuit would be filed.

512. *See supra* notes 488-495 and accompanying text.

513. Watershed Protection and Flood Prevention Act of 1954, ch. 656, Pub. L. No. 83-566, 68 Stat. 666 (codified as amended at 16 U.S.C. §1001 (1985)); *Separation of Powers Hearings*, *supra* note 328, at 82-83, 108-10.

514. 115 CONG. REC. 5923-24 (1969); *Separation of Powers Hearings*, *supra* note 328, at 92, 138.

project.<sup>515</sup> It does not appear that any such suits were filed or that the administration did anything to encourage them. The Secretary might have triggered judicial review himself by filing a declaratory judgment action against one of these local applicants, asking the court to decide whether or not the purported appropriation was valid.<sup>516</sup> Nor was it even necessary for the President to defy the law in order to clear the way for judicial review. Instead, the administration might have urged the applicants whose proposals were not approved by the committees to bring suit against the Secretary of Agriculture to compel release of the funds, on the theory that the committee approval provision was unconstitutional.<sup>517</sup> As it was, no judicial review occurred. The funds were later released by President Nixon.<sup>518</sup>

##### 5. *Gerald Ford and Jimmy Carter: The War Powers Resolution*

Perhaps the best-known example of executive defiance of an allegedly unconstitutional law involves the War Powers Resolution enacted over Richard Nixon's veto in 1973.<sup>519</sup> Nixon's successors have uniformly adhered to his view that the resolution's consultation, reporting, and termination provisions infringe upon the President's authority as Commander-in-Chief to use the armed forces as he wishes. Chief Executives have sometimes complied with section 3 by consulting with Congress.<sup>520</sup> However, the reporting requirements have been ignored. Presidents Ford and Carter refused to notify Congress under section 4(a)(1) when introducing troops into hostilities, thereby avoid-

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515. See *Separation of Powers Hearings*, *supra* note 328, at 115 (statement of Philip S. Hughes, Deputy Director, Bureau of the Budget, making similar argument to a Senate subcommittee).

516. See 28 U.S.C. § 2201 (1988). Because a federal court would have had jurisdiction under 28 U.S.C. § 1331 (1993) over a suit by an applicant against the Secretary to compel compliance with the statute, it could have heard a declaratory action by the Secretary against the applicant. See *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 14-17 (1983).

517. See *Separation of Powers Hearings*, *supra* note 328, at 92, 99 (noting that some projects were not approved by the committees). Cf. *INS v. Chadha*, 462 U.S. 919 (1983) (suit against executive agency to invalidate a law that prevented the INS from taking action favorable to plaintiff, where the INS agreed that law was unconstitutional).

518. FISHER, *supra* note 134, at 166.

519. War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified as amended at 50 U.S.C. §§ 1541-1548) (1988); see *supra* notes 277-283 and accompanying text.

520. John H. Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379, 1400 & n.63 (1988). Section 3 requires the President "to consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances . . . ." 50 U.S.C. § 1542 (1988).



ing section 5's command that the forces be withdrawn within 60 days unless Congress declared war or authorized a longer engagement. Ford and Carter either gave no formal notice to Congress or failed to specify that notice was being given under section 4(a)(1).<sup>521</sup> Ronald Reagan exhibited a similar disregard for the War Powers Resolution in making use of combat forces in Lebanon, Grenada, Central America, Libya and the Persian Gulf.<sup>522</sup>

It has been persuasively argued that the federal judiciary may hear challenges to a President's failure to comply with the resolution.<sup>523</sup> In the Ford and Carter cases, the uses of force were so brief that if any lawsuits had been filed challenging the Presidents' failure to start the 60-day clock, they would probably have been dismissed as moot.<sup>524</sup> To date, all such cases have been dismissed either as being nonjusticiable or under the doctrine of remedial discretion.<sup>525</sup> Judicial review of the War Powers Resolution is even less likely to occur if a President were to comply with its consulting and reporting provisions, for it is difficult to conceive of anyone who would then have standing to challenge their validity.

#### 6. Jimmy Carter: Issuing Vetoed Regulations

When Gerald Ford signed a 1974 omnibus education bill, he objected that several of its provisions subjected decisions of the Department of Health, Education, and Welfare to "various forms of

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521. Ely, *supra* note 520, at 1381 & n.8 (collecting authorities); Zablocki, *supra* note 283, at 579-87; Michael Ratner & David Cole, *The Force of Law: Judicial Enforcement of the War Powers Resolution*, 17 LOY. L.A. L. REV. 715, 742-44 (1984).

522. Ides, *supra* note 162, at 631-52; Zablocki, *supra* note 283, at 587-97; Ratner & Cole, *supra* note 521, at 744-50; *see also* DAVID L. HALL, *THE REAGAN WARS: A CONSTITUTIONAL PERSPECTIVE ON WAR POWERS AND THE PRESIDENCY* 156-59, 197-99, 225-27, 255-62 (1991) (noting that in some instances Reagan was not required to give notice under §4(a)(1)).

523. Ely, *supra* note 520, at 1406-17; Ratner & Cole, *supra* note 521, at 717.

524. *See* Zablocki, *supra* note 283, at 580-86 (describing incidents in which Presidents Ford and Carter employed military forces).

525. *See, e.g.,* Ange v. Bush, 752 F. Supp. 509 (D.D.C. 1990) (Operation Desert Shield - political question, ripeness and remedial discretion); Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990) (Operation Desert Shield - ripeness); Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987) (Persian Gulf War - political question and remedial discretion); Sanchez-Espinoza v. Reagan, 568 F. Supp. 596 (D.D.C. 1983), *aff'd*, 770 F.2d 202 (D.C. Cir. 1985) (Nicaragua - political question); Conyers v. Reagan, 578 F. Supp. 324 (D.D.C. 1984), *dismissed as moot*, 765 F.2d 1124 (D.C. Cir. 1985) (Grenada - remedial discretion); Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984) (El Salvador - political question).

Congressional review and possible veto.”<sup>526</sup> One of the provisions allowed Congress, by concurrent resolution, to block final regulations issued by HEW.<sup>527</sup> During Ford’s presidency, Congress never exercised this two-House legislative veto power. In 1980, however, the last year of Jimmy Carter’s presidency, Congress passed four concurrent resolutions disapproving regulations issued by the Department of Education.<sup>528</sup> On June 5, 1980, the Attorney General advised the Secretary of Education that the legislative veto provision was unconstitutional and that she was therefore “entitled to implement the regulations in question in spite of Congress’ disapproval.”<sup>529</sup> The Secretary followed the advice and placed all of the regulations into effect.<sup>530</sup>

The Attorney General justified his recommended defiance of the law partly on the ground that to honor the concurrent resolutions “might well foreclose effective judicial challenge to their constitutionality.”<sup>531</sup> Yet there was no assurance that anyone harmed by the disapproved regulations would sue to have them invalidated. Had the Secretary instead respected the law by withholding the regulations, those who would have benefited from them could have sued to have the legislative veto declared unconstitutional, freeing the Department to implement the regulations.<sup>532</sup> As in some of our earlier examples, the Secretary might even have encouraged the filing of such a lawsuit. Thus, while this was not a case where the administration’s defiance of the law precluded all judicial review, neither was it one where such action was necessary in order to make a legal challenge possible.

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526. Statement of Aug. 21, 1974, in 1974 PUB. PAPERS 35-37 (1975) (regarding Act of Aug. 21, 1974, Pub. L. No. 93-380, 88 Stat. 484).

527. Act of Aug. 21, 1974, §509, 88 Stat. 566-68 (amending §431 of the General Education Provisions Act, 20 U.S.C. § 1232(d) (1988)).

528. H.R. CON. RES. 318, 96th Cong., 2d Sess., 94 Stat. 3651 (1980); H.R. CON. RES. 319, 96th Cong., 2d Sess., 94 Stat. 3651; H.R. CON. RES. 332, 96th Cong., 2d Sess., 94 Stat. 3652; S. CON. RES. 91, 96th Cong., 2d Sess., 94 Stat. 3653.

529. 43 Op. Att’y Gen. No. 25, at 2 (1980); 4A Op. Off. Legal Counsel 21-22 (1980).

530. See 45 C.F.R. §§ 100d (Education Appeals Bd.), 134 (Grants for Educational Improvement, Resources, and Support), 161c (Arts Education Program), 161g (Law Related Education Program) (1980). These regulations were revised as of October 1, 1980, and were identical to those disapproved by Congress. See 45 Fed. Reg. 22634, 22742, 23602, 27880 (1980).

531. 43 Op. Att’y Gen. No. 25, at 11 (1980); 4A Op. Off. Legal Counsel 21, 29 (1980).

532. Three of the four sets of regulations provided for making educational grants to public and private nonprofit agencies or organizations. See *supra* note 530. Entities that were eligible to apply for funds could have sued to have the regulations put into effect.

#### D. 1789-1981: A Summary

When one looks at all of the instances where Presidents have objected to laws as being unconstitutional, the reality is that until quite recently, the rhetoric of objection has rarely been accompanied by actual defiance. In the nearly 200 years from 1789 to 1981, the Executive, through veto messages, signing statements, and other means, questioned the validity of laws on over 135 occasions.<sup>533</sup> In only 20 cases did the President fail to comply with the law.<sup>534</sup> The first of these incidents did not occur until 1860, three-quarters of a century after the Constitution was framed. This strongly reinforces the argument that the Founders did not intend the President to possess a power to suspend laws that he might think unconstitutional.<sup>535</sup> Contrary to Judge Easterbrook's claim that "every President in this century has used the power of presidential review to refuse to enforce statutes,"<sup>536</sup> Presidents McKinley, Theodore Roosevelt, Harding, Coolidge, Hoover, Truman, Kennedy and Nixon never disregarded a law on these grounds. As recently as 1966, Chief Executives had ignored allegedly unconstitutional laws on only 9 occasions. Not until the last two decades did executive defiance begin to reach significant proportions. Of the 20 incidents occurring between 1789 and 1981, half took place since 1974. Jimmy Carter alone was responsible for more than a third of the total.

This desultory record could hardly suffice to alter the constitutional limitations established by the Framers. Felix Frankfurter once suggested that "a systematic, unbroken, executive practice, long pur-

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533. This figure includes: 27 measures that were enacted over a President's constitutionally based veto, *see supra* Table 1 and Part II.A.; 93 laws objected to in signing statements, *see supra* Table 3; 7 instances of presidential defiance of laws adopted during prior administrations, *see supra* Part II.C.; and 10 instances where Presidents objected to previously adopted laws by seeking their repeal or by failing to defend them in court, *see supra* notes 483-495 and accompanying text.

534. This figure includes: Andrew Johnson's defiance of the Tenure of Office Act, *see supra* notes 189-233 and accompanying text; 12 cases where laws objected to in signing statements were ignored, *see supra* Table 4; and 7 instances where Presidents disregarded laws adopted during a prior administration, *see supra* Part II.C. . President Ford's failure to comply with the War Powers Resolution is treated as one instance of defiance even though he used the armed forces on several occasions. *See Zablocki, supra* note 283, at 580-84.

535. *Cf. Myers v. United States*, 272 U.S. 52, 174-76 (1926) (finding 73-year practice dating from 1789 entitled to great weight in determining meaning of Constitution); *Powell v. McCormack*, 395 U.S. 486, 547 (1969) ("The relevancy of prior [practices] is limited largely to the insight they afford in correctly ascertaining the draftsmen's intent. Obviously, therefore, the precedential value of these cases tends to increase in proportion to their proximity to the Convention in 1787.").

536. Easterbrook, *supra* note 8, at 923.

sued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on 'executive Power' vested in the President."<sup>537</sup> Presidential refusals to honor purportedly unconstitutional laws have been too few and far between to satisfy Frankfurter's prescription. Nor can Congress be deemed to have acquiesced. When Andrew Johnson defied the Tenure of Office Act, he was immediately impeached.<sup>538</sup> Woodrow Wilson's refusal to comply with a treaty termination provision might have led to impeachment had he not been on the eve of leaving office.<sup>539</sup> Lyndon Johnson's failure to implement public works projects that were subject to a committee approval requirement triggered congressional hearings,<sup>540</sup> as did Gerald Ford's and Jimmy Carter's disregard of the War Powers Resolution.<sup>541</sup> Other incidents, such as those involving the transfer, appointment or removal of minor federal officials, may have been deemed so inconsequential as not to warrant a response.<sup>542</sup>

Moreover, despite earlier suggestions to the contrary,<sup>543</sup> the modern Court has rejected the notion that either Congress or the President may revise the boundaries of the Constitution if the other branch has acquiesced.<sup>544</sup> In *INS v. Chadha*,<sup>545</sup> the Justices struck down the

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537. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring).

538. See *supra* text accompanying notes 189-233 .

539. See *supra* text accompanying note 412.

540. *Separation of Powers Hearings*, *supra* note 328.

541. See *War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation of Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident, 1975: Hearings Before The Subcomm. on Int'l Security & Scientific Affairs of the House Comm. on Int'l Relations*, 94th Cong., 1st Sess. (1975); *War Powers Resolution, 1977: Hearings on the Operation and Effectiveness of the War Powers Resolution Before the Senate Comm. on Foreign Relations*, 95th Cong., 1st Sess. (1977). After Jimmy Carter refused to honor the legislative veto of regulations issued by HEW, a Senate subcommittee insisted that the Attorney General defend "the Justice Department's assertion that it can deny the validity of Acts of Congress." Letter from Benjamin R. Civiletti to Senator Max Baucus (July 30, 1980), reprinted in *GAO bid protest hearings*, *supra* note 9, at 745.

542. See *supra* text accompanying notes 376-87 (aqueduct supervisor); *supra* notes 388-397, 496-497 (civil service examiner); *supra* notes 498-506 (postmaster); *supra* notes 432-441, 473-476, 507-511 (members of federal commissions). Cf. *Myers v. United States*, 272 U.S. 52, 170 (1926) (noting that even formal consent to a law or practice that violates the Constitution does not necessarily signify acquiescence but may reflect other considerations).

543. See, e.g., *Myers v. United States*, 272 U.S. 52, 170-76 (1926); *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-73 (1915).

544. See *INS v. Chadha*, 462 U.S. 919, 942 n.13, 944-45 (1983) (rejecting argument that presidential approval of hundreds of laws containing legislative vetoes could save a device that was otherwise unconstitutional); *Buckley v. Valeo*, 424 U.S. 1, 118-37 (1976) (holding that Congress had infringed upon the President's appointment power despite the President's consent to the statute by signing it into law). See also *Powell v. McCormack*, 395

legislative veto as being inconsistent with the clear intent of the Framers even though the device had been included in some 200 statutes most of which were approved by the Executive. Writing for the Court in 1992, Justice O'Connor declared unequivocally that "[t]he Constitution's division of power among the three Branches is violated where one Branch invades the territory of another, whether or not the encroached-upon Branch approves the encroachment."<sup>546</sup>

### E. Postscript: A De Facto Item Veto

This study has not attempted to canvass the extent to which Presidents Reagan and Bush ignored those statutes whose validity they questioned. However, it is clear that they at times did so. Ronald Reagan defied the 1984 Competition in Contracting Act,<sup>547</sup> after issuing a signing statement charging that it gave the Comptroller General, an officer of Congress, functions which could be performed only by executive officials.<sup>548</sup> Reagan specifically objected to an automatic stay provision which barred the award of government contracts while the Comptroller General investigated complaints that an agency had not followed competitive bidding procedures. At the Attorney General's direction, federal agencies disregarded the stay provision.<sup>549</sup> A series of lawsuits followed in which the federal courts uniformly rejected Reagan's claim that the law was unconstitutional.<sup>550</sup>

Reagan was also the first President in over a century and only the second in history to defy a statute that was enacted over his veto. The Comprehensive Anti-Apartheid Act was adopted in 1986,<sup>551</sup> despite Reagan's claim, set forth in his veto message, that it would "infringe on the President's constitutional prerogative to articulate the foreign

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U.S. 486, 546-47 (1969) ("That an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date.").

545. 462 U.S. 919 (1983).

546. *New York v. United States*, 112 S.Ct. 2408, 2431 (1992) (holding that states may not consent to departures from the constitutional plan by allowing Congress to exceed its authority).

547. Pub. L. No. 98-369, Title VII, 98 Stat. 494, 1199, 31 U.S.C. §§ 3551-3556 (1988).

548. Statement of July 18, 1984, in 1984 PUB. PAPERS 1053 (1987).

549. See H.R. REP. NO. 99-138, 99th Cong., 1st Sess. 3-8 (1985); *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102, 1104-06 (9th Cir. 1988). The Bush administration also ignored the fee-recovery provision of the Competition in Contracting Act, 31 U.S.C. § 3554(c) (1988), on the ground that it was unconstitutional. See *United States v. Instruments, S.A., Inc.*, 807 F. Supp. 811 (D.D.C. 1992).

550. *Ameron, Inc. v. United States Army Corps of Engineers*, 809 F.2d 979 (3d Cir. 1986), cert. dismissed, 488 U.S. 918 (1988); *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102 (9th Cir. 1988); *Parola v. City of Monterey*, 848 F.2d 956 (9th Cir. 1988).

551. Act of Oct. 2, 1986, Pub. L. No. 99-440, 100 Stat. 1086.

policy of the United States."<sup>552</sup> From 1986 until 1991 when the sanctions were formally lifted, the Reagan and Bush administrations exploited loopholes in the law and quietly permitted U.S. companies to trade with South Africa in violation of the Act's express prohibitions.<sup>553</sup> Reagan and Bush also refused to honor a series of laws barring the government from enforcing nondisclosure agreements with federal employees who had access to classified material,<sup>554</sup> claiming that these provisions impaired the President's duty to protect national security.<sup>555</sup>

These incidents of noncompliance may represent only the tip of an iceberg.<sup>556</sup> Ronald Reagan issued statements challenging the validity of 87 bills he had signed into law,<sup>557</sup> George Bush approved 116 laws that he found to be constitutionally objectionable.<sup>558</sup> Together, they assailed the validity of more than 200 statutes, half again as many as all of their predecessors combined.

Presidential rhetoric also took on a much bolder tone after 1981. When Congress in 1980 challenged Jimmy Carter's refusal to honor four legislative vetoes of Department of Education regulations, the Justice Department responded in a conciliatory vein. It acknowledged

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552. Message of Sept. 26, 1986, in 1986 PUB. PAPERS 1278-80 (1989).

553. LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW, IMPLEMENTATION OF THE COMPREHENSIVE ANTI-APARTHEID ACT OF 1986 (1988); Dan Stets, *Doing Business with S. Africa: Loopholes Hobble United States Sanctions*, PHILA. INQUIRER, May 13, 1990, reprinted in 136 CONG. REC. E2150-01 (June 26, 1990); 134 CONG. REC. H6917 (Aug. 11, 1988) (remarks of Rep. James L. Oberstar); WASH. POST, Aug. 20, 1989, at A12. President Bush formally lifted the sanctions in July 1991. N.Y. TIMES, July 11, 1991, at A1, col. 5.

554. Act of Dec. 22, 1987, Pub. L. No. 100-202, § 630, 101 Stat. 1329, 1329-432; Act of Sept. 22, 1988, Pub. L. No. 100-440, § 619, 102 Stat. 1721, 1756; Act of Nov. 3, 1989, Pub. L. No. 101-136, § 618, 103 Stat. 783, 820.

555. Ronald Reagan, Statement of Sept. 22, 1988, in 1988 PUB. PAPERS 204-05 (1991); Ronald Reagan, Statement of Nov. 3, 1989, in 1989 PUB. PAPERS 1448-49 (1990); L.A. TIMES, Sept. 24, 1988, at 2, col. 4; L.A. TIMES, Nov. 4, 1989, at A18, col. 2; National Fed'n of Fed. Employees v. United States, 688 F. Supp. 671 (D.D.C. 1988), vacated sub nom. American Foreign Service Ass'n v. Garfinkel, 490 U.S. 153 (1989) (per curiam); American Foreign Service Ass'n v. Garfinkel, 732 F. Supp. 13 (D.D.C. 1990). President Bush also refused to honor §102 of the Foreign Relations Authorization Act, Fiscal Years 1990 & 1991, Pub. L. No. 101-246, §102, 104 Stat. 15, 19 (1990), which barred spending funds to send a delegation to a negotiating session unless it included members of the Commission on Security and Cooperation in Europe; Bush claimed that the provision encroached on his appointment power. Barr, *supra* note 104, at 39.

556. For other allegedly unconstitutional laws that President Reagan refused to comply with, see Christine E. Burgess, *When May a President Refuse to Enforce the Law?*, Note, 72 TEX. L. REV. 631, 642 n.64 (1994).

557. See *supra* Table 2. In addition, one bill that Reagan objected to on constitutional grounds became law over his veto. Comprehensive Anti-Apartheid Act, Pub. L. No. 99-440, 100 Stat. 1086; see *supra* text accompanying notes 551-553.

558. See *supra* Table 2.

that “if executive officers were to adopt a policy of ignoring or attacking Acts of Congress whenever they believed them to be in conflict with the provisions of the Constitution, their conduct in office could jeopardize the equilibrium established within our constitutional system.”<sup>559</sup> The Attorney General conceded “that the Executive can rarely defy an Act of Congress,” suggesting that this was proper only when a law is “transparently inconsistent with the Constitution.”<sup>560</sup>

Five years later, when Congress inquired into the Reagan administration’s refusal to comply with the Competition in Contracting Act, the Justice Department made the sweeping claim that it is “the duty of the President to uphold the Constitution in the context of the enforcement of Acts of Congress,”<sup>561</sup> and declared that he may ignore any law that he deems to be contrary to the Constitution.

Unquestionably, the requirements of the Constitution prevail over any statute adopted by Congress. Therefore, in the case of a conflict between the Constitution and a statute, the President’s duty faithfully to execute the laws requires him not to observe a statute that is in conflict with the Constitution, the fundamental law of the land.<sup>562</sup>

While the Attorney General suggested that the case for defiance would be strengthened if a law encroached on the Presidency or where noncompliance might facilitate judicial review, neither of these was a prerequisite to the Executive’s right to ignore an allegedly unconstitutional law.<sup>563</sup>

The escalating rhetoric of presidential defiance coincides with White House efforts to grant the President an item veto. Presidents Ford, Carter, Reagan, and Bush, each of whom made heavy use of signing statements to challenge the constitutionality of bills they signed into law, favored giving the President the authority to veto por-

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559. 4A Op. Off. Legal Counsel 55, 56 (1980).

560. *Id.* at 55, 58. Though the Carter administration often ignored this standard in refusing to honor allegedly unconstitutional laws, what is significant here is the narrowness of the administration’s claimed right to disregard such measures.

561. *GAO Bid Protest Hearings, supra* note 9, at 434 (statement of William French Smith, Att’y Gen.).

562. *Id.* at 318 (statement of D. Lowell Jensen, Acting Deputy Att’y Gen.); *see also id.* at 299-300, 329. Fred F. Fielding, counsel to President Reagan, stated that:

There are times when the Administration has been accused of ignoring the law. But remember that the President is sworn to uphold both the Constitution and the laws. We seek to resolve the conflicts. Strong presidents especially are mindful of their responsibility to those who come after them, and seek to assure that they do not erode any executive prerogative.

N.Y. TIMES, Nov. 13, 1985, at A24, col. 3.

563. *GAO Bid Protest Hearings, supra* note 9, at 300-01, 322, 434-35, 438.

tions of a measure while accepting the rest. Reagan and Bush lobbied hard for a constitutional amendment to this effect.<sup>564</sup> The increasing resort to signing statements during the Reagan and Bush years may have been part of an "underhanded quest for a de facto item veto."<sup>565</sup> Until 1984 when he first urged giving the President an item veto,<sup>566</sup> Ronald Reagan averaged fewer than 6 constitutionally based signing statements a year; thereafter his average jumped to 14. Like water dripping steadily on a rock, the stream of White House statements noting constitutional defects in bills the President has signed may, with time, make a lasting impression. The phenomenon well illustrates Daniel Franklin's observation that

the rhetoric of the presidency has been used to assert the president's own interpretation of his administrative and emergency powers under the Constitution . . . . This kind of presidential rhetoric provides a justification for and lays the groundwork for future executive actions deemed proper pursuant to the president's own interpretation of the Constitution.<sup>567</sup>

As the public slowly becomes accustomed to the rhetoric of presidential defiance, the reality of executive nonenforcement may eventually pass unnoticed.

The Reagan administration acknowledged the link between signing statements and the item veto, explaining that the Executive's objection to selected parts of statutes was designed to rectify alleged congressional inroads on the veto power. The administration's principal spokesperson on this issue was Douglas Kmiec who worked in, and for a time headed, the Office of Legal Counsel during the Reagan years. The OLC drafts signing statements for the President. Kmiec explained that:

The importance of the signing statement initiative grew as Congress continued the practice of lumping together numerous unrelated provisions in omnibus bills, often inserting the most controversial provisions in emergency appropriations measures

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564. See *Line-Item Veto Hearing*, *supra* note 148, at 1-3; SPITZER, *supra* note 40, at 121, 158 n.8; FISHER, *supra* note 319, at 131; 1984 Republican Party Platform, *1984 Cong. Q. Almanac* 43-B (1985); 1988 Republican Party Platform, *1988 Cong. Q. Almanac* 50-A (1989); George Bush, 1989 PUB. PAPERS 1053-54, 1055 (1990); George Bush, 1990 PUB. PAPERS 1014, 1035, 1526, 1533, 1548 (1991). Reagan and Bush also explored the possibility that they already possessed an inherent item veto power but the Office of Legal Counsel twice rejected the contention. Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 455-58 & nn. 46-47 (1993); Douglas W. Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337, 353-59 (1993); Barr, *supra* note 104, at 35.

565. H.R. REP. NO. 138, 99th Cong., 1st Sess. 16 (1985).

566. *Line-Item Veto Hearing*, *supra* note 148, at 1.

567. FRANKLIN, *supra* note 123, at 66-67.



passed at, or after, the fiscal deadlines. This practice effectively denied the President his constitutionally provided veto authority.<sup>568</sup>

The "increasing impracticability of a veto," he said, caused the White House to "place[ ] renewed emphasis upon presidential signing statements to articulate constitutional concerns."<sup>569</sup> In point of fact, the practice of which the Reagan administration complained was 400 years old and was a well-recognized means of restricting the Executive's ability to exercise the veto power.<sup>570</sup>

Yet since President Reagan viewed the signing statement as the equivalent of an item veto rather than as merely a rhetorical device, it is not surprising that the administration apparently made a practice of refusing to comply with statutory provisions to which the President had objected. According to Kmiec:

The approval of legislation with constitutional reservations *necessarily* means that executive action will not be immediately taken to enforce the suspect provisions. If such non-enforcement is challenged, whether the president's judgment is ultimately vindicated . . . will depend on the considered judgment of the Judiciary.<sup>571</sup>

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568. Kmiec, *supra* note 210, at 53; see also Douglas W. Kmiec, *Of Balkanized Empires and Cooperative Allies: A Bicentennial Essay on the Separation of Powers*, 37 CATH. U.L. REV. 73, 81 (1987).

569. Kmiec, *supra* note 568, at 81. President Bush's Attorney General similarly argued that the use of signing statements was appropriate where "it would be politically impossible simply to veto a bill." Barr, *supra* note 104, at 38-39. See also Burgess, *supra* note 556, at 663-65 (arguing that Presidents must be able to deny enforcement to provisions that invade their domain since it may not be feasible to veto needed laws that make only minor encroachments upon executive power).

570. See 2 STUBBS, *supra* note 10, at 570-75; CATHERINE D. BOWEN, *THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE* 33-34 (1957) (noting that in the late 1600s, the Commons began using the preamble of money bills to set forth "certain preliminary conditions to their money grant, a haybag dangled before the hungry monarchical nose"); Michael B. Rappaport, *The President's Veto and the Constitution*, 87 Nw. U. L. REV. 735, 746-56, 762-66 (1993). From the outset, Congress used omnibus legislation, and riders were commonplace after the Civil War. Charles J. Cooper, *The Line-Item Veto: The Framers' Intentions*, in PORK BARRELS AND PRINCIPLES: THE POLITICS OF THE PRESIDENTIAL VETO 29, 33-46 (National Legal Center for the Public Interest ed. 1988); Louis Fisher, *The Presidential Veto: Constitutional Developments*, in PORK BARRELS AND PRINCIPLES: THE POLITICS OF THE PRESIDENTIAL VETO, *supra*, at 17, 22. But see Sidak & Smith, *supra* note 9, at 469-72 (arguing that Framers contemplated the use of omnibus legislation but might not have disapproved of the selective veto as a response to it); Kmiec, *supra* note 564, at 353-59 (arguing that prior presidential acquiescence in congressional use of omnibus bills and legislative riders cannot estop later Presidents from invoking an item veto against unconstitutional provisions).

571. Kmiec, *supra* note 306, at 13 (emphasis added). Though the Reagan administration at times acknowledged the conclusive role played by the judiciary, compliance with

The connection between signing statements and the item veto was also emphasized by the Justice Department in defending Ronald Reagan's defiance of the Competition in Contracting Act. The Attorney General noted that while the "President's veto power is usually adequate to express and implement his judgment that an Act of Congress is unconstitutional," at times "the exercise by the President of his veto power may not be feasible."<sup>572</sup> Another Justice Department spokesperson referred to nonenforcement as a way to deal with measures Congress "has made effectively veto-proof."<sup>573</sup> David Stockman, whose Office of Management and Budget issued the final directive to ignore the Competition in Contracting Act, bluntly told a House subcommittee, "We would not be here today if we had a line item veto, because these two provisions would have been stricken from the act when we signed it."<sup>574</sup>

In disregarding the allegedly invalid sections of a law, the President, through self-help, exercises a negative considerably more powerful than the proposed item veto. In its most commonly suggested form, the latter may only be used against line items in an appropriations bill; moreover, the item veto is subject to congressional override.<sup>575</sup> When the Executive refuses to honor the allegedly unconstitutional provisions of law, it wields a surgical veto which can be applied to any type of law and which is absolute in nature.<sup>576</sup>

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lower federal court rulings was not always forthcoming. *See* Kmiec, *supra* note 210, at 54; *GAO Bid Protest Hearings*, *supra* note 9, at 326-27.

572. *GAO Bid Protest Hearings*, *supra* note 9, at 434.

573. *Id.* at 334. *See*, Kmiec, *supra* note 564, at 355 ("In modern practice, presidents, aided and abetted by OLC itself, have exercised a de facto item veto, at least in those limited circumstances where provisions of enrolled bills are manifestly unconstitutional or they encroach upon executive power.")

574. *GAO Bid Protest Hearings*, *supra* note 9, at 254.

575. *See* American Enterprise Institute for Public Policy, *Proposals for Line-Item Veto Authority* (1984), reprinted in *Line Item Veto Hearing*, *supra* note 148, at 102-36. *See also* Rappaport, *supra* note 570, at 770-71 (noting differences between a selective veto and the refusal to enforce provisions in a bill).

576. *See* Sidak & Smith, *supra* note 9, at 460-61 (The refusal to comply with allegedly unconstitutional provisions of law amounts to a "power of 'constitutional excision'" that "effectively vetoes legislation without giving Congress an opportunity to override that veto . . .").

Thus, even if the use of riders and omnibus bills did constitute a novel and unforeseen practice that illegitimately restricts the veto power (*see supra* note 570 and accompanying text), this would still not justify the Executive's defiance of unconstitutional laws, for such conduct heavily overcompensates for any congressional inroads on the veto power. It may be that the Constitution should at times be construed metaphorically rather than literally, "translating" constitutional principles so as to remain faithful to the Framers' original conception. *See* Lawrence Lessig, *Fidelity in Translation*, 71 *TEX. L. REV.* 1165 (1993); Abner S. Greene, *Checks and Balances in an Era of Presidential lawmaking*, 61 *U. CHI. L. REV.*

Unlike a veto, the claimed authority to ignore unconstitutional laws is limited in that the President's objection cannot rest merely on policy grounds. Yet it is not difficult to clothe almost any disagreement in constitutional garb. The Justice Department's Office of Legal Counsel reviews all enrolled bills for possible constitutional defects.<sup>577</sup> Its scrutiny is not always neutral, for OLC serves partly as an advocate for the President's policies.<sup>578</sup> According to a former head of the office during the Reagan years, OLC "was asked to include draft signing statements for the President that would be consistent with administration policy. This we did . . . ."<sup>579</sup> Another member of the office at the time denied that there was a "simple answer" to the question of "to what extent OLC's decisions reflect Administration policy considerations." The reason was that while the Office "strongly resisted the temptation to allow political pressures to affect its ability to render the best possible legal advice," at the same time "good lawyers know or soon learn . . . that sophisticated clients will not continue to seek advice from an attorney whose loyalty is questionable or who fails to employ legal skills creatively to address the client's legal problems . . . ."<sup>580</sup>

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123, 129-30 (1994). Yet, as applied in this context, "translation" would allow use of a selective veto only if (1) the offending provision of law was passed as a rider or as part of an omnibus bill, and (2) Congress is afforded the opportunity to override the Executive's action through a two-thirds vote of each House. No President who has claimed the authority to ignore unconstitutional laws has suggested that the power should be limited in either of these ways.

577. Robert B. Shanks, *Office of Legal Counsel—The President's 'Outside' Law Firm*, in 2 DEP'T OF JUSTICE MANUAL, 1-36, 1-43 (1990-1 Supp. 1991); NANCY V. BAKER, *CONFLICTING LOYALTIES: LAW AND POLITICS IN THE ATTORNEY GENERAL'S OFFICE, 1789-1990*, at 10-11 (1992).

578. See BAKER, *supra* note 577, at 67-125; DANIEL J. MEADOR, *THE PRESIDENT, THE ATTORNEY GENERAL, AND THE DEPARTMENT OF JUSTICE* 25-43 (1980); ROSENFELD, *supra* note 8, at 150-51; Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513, 514, 523 (1993) (OLC needs better procedures "to protect its legal judgments from the winds of political pressure and expediency" and to check "its own eagerness to please."); *GAO Bid Protest Hearings*, *supra* note 9, at 42 (statement of Sanford Levinson noting that OLC opinions sometimes reflect "a process whereby a politically appointed assistant attorney general writes a memorandum that is designed to accord with an already adopted position of the President"); *id.* at 52 (statement of Mark Tushnet); *id.* at 276 (statement of Steven R. Ross and Charles Tiefer). *Contra*, Barr, *supra* note 104, at 34-37 (denying that Office of Legal Counsel tempers its legal advice based on political considerations).

579. KMIEC, *supra* note 210, at 52. Kmiec was the head of OLC, and earlier its principal deputy, under Attorney General Edwin Meese. *Id.* at xi.

580. Shanks, *supra* note 577, at 1-42. *Accord*, Lund, *supra* note 564, at 486-505 (OLC has strong incentive to shape its legal advice according to the interests and desires of the President lest the President turn elsewhere for legal advice); McGinnis, *supra* note 29, at 420-35 (OLC faces central dilemma between giving advice that is congenial to both the

A perusal of the more than 200 constitutionally-based statements issued by Presidents Reagan and Bush illustrates how creative and accommodating the Office of Legal Counsel can be. In many instances, OLC made it possible for the President to assert the invalidity of multiple sections of a law; in one case, the number of constitutional flaws detected reached ten.<sup>581</sup> This is not to say that the White House will necessarily refuse to carry out each of these provisions. But a loyal and resourceful Justice Department can create an array of options for executive noncompliance, to be exercised by the President as he sees fit.<sup>582</sup>

### III. Restraining Presidential Defiance

If we assume that the Constitution did not give Presidents the authority to suspend the laws whenever they believe them to be unconstitutional, and if the record of historical practice is not such as to alter this formal understanding, is the Executive ever justified in refusing to comply with such measures? This Part suggests that presidential noncompliance with allegedly unconstitutional laws is proper only if four conditions are satisfied. Because it is far from certain that Presidents will adhere to these or any other limitations on their authority,<sup>583</sup> I recommend that Congress fashion a number of safeguards to both discourage, and provide redress for, unwarranted executive defiance of the law.

#### A. Principles Governing Executive Noncompliance

One can make a strong argument from the text of the Constitution and the intent of the Framers that a President may never refuse to

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White House and the Attorney General, and at the same time trying to maintain its reputation as an elite and politically independent institution).

581. See, e.g., Ronald Reagan, Statement of Oct. 27, 1986, in 1986 PUB. PAPERS 1450-51 (1989) (4 provisions); Ronald Reagan, Statement of Nov. 14, 1986, in 1986 PUB. PAPERS 1557-58 (1989) (6 provisions); Ronald Reagan, Statement of Sept. 29, 1987, in 1987 PUB. PAPERS 1096-97 (1989) (4 provisions); George Bush, Statement of Nov. 29, 1989, in 1989 PUB. PAPERS 1599-1600 (1990) (10 provisions); George Bush, Statement of Nov. 30, 1989, in 1989 PUB. PAPERS 1609-11 (1990) (4 provisions).

582. Presidents may also raise constitutional objections on their own, or based on legal advice from other sources such as White House Counsel. BAKER, *supra* note 577, at 6-7, 11-15. And see ANTIEAU, *supra* note 135, at 89-90 ("Presidents have not ordinarily been trained in law, and with the exceptions of Taft and Wilson, it is doubtful if any of them could properly claim expertise in constitutional law.").

583. See Monaghan, *supra* note 74, at 8-9 ("In the environment in which Presidents must operate, it is not surprising that 'law' of any kind (the Constitution included) can easily become merely one more factor to be considered, or even an obstacle to be overcome.").

enforce a law on the ground that it is unconstitutional.<sup>584</sup> As was demonstrated in Part I of this Article, the Executive was not granted a power to suspend the laws even if he believes that a particular measure is invalid. The Constitution gave the President other means of dealing with this situation, most notably by allowing him to exercise a qualified veto.

Yet the Framers at the same time realized that unconstitutional laws might be enacted. They provided for judicial review as a check against just such a malfunctioning of the legislative process.<sup>585</sup> It would therefore not be incompatible with the original scheme for a President to ignore a clearly unconstitutional law if there is no other way for judicial review to occur.<sup>586</sup> The legislature could otherwise ignore the Constitution with impunity, a danger the Founders feared and expressly sought to avoid.<sup>587</sup>

Presidential defiance under these narrow circumstances would operate as a safeguard against legislative tyranny, without raising the specter of executive autocracy. Unlike the rejected suspending power, the President's refusal to execute the law would be subject to immediate judicial review. Should the courts uphold the statute the Executive would be obliged to enforce it, regardless of the President's own views as to its merits or validity.<sup>588</sup> On the other hand, if a lower federal court were to rule that the law was unconstitutional, a President would then be justified in disregarding the provision until the

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584. See, e.g., WILLOUGHBY, *supra* note 52, at 1502-04; CORWIN, *supra* note 104, at 71-72; Letter from Arthur S. Miller to Rep. Jack Brooks, Feb. 27, 1985, reprinted in *GAO Bid Protest Hearings*, *supra* note 9, at 497-98; Gressman, *supra* note 124.

585. See *supra* note 115 and accompanying text.

586. This is similar to the position taken by Andrew Johnson at his impeachment trial, though Johnson's attorneys limited the right of defiance to situations where a law impairs the President's powers. See *supra* text accompanying notes 199-201. John Norton Pomeroy and Chief Justice Salmon P. Chase also endorsed this position. See *supra* text accompanying notes 202-204, 210-213. See also Lee, *supra* note 124, at 1015. Cf. BERGER, *supra* note 191, at 307-09 (President may ignore laws that infringe on his constitutional powers in order to have law tested but not limiting this to cases where judicial review would otherwise be unavailable); Gressman, *supra* note 124, at 383 & n.17 (arguing that there are usually "better methods of securing judicial review of those provisions . . . than by an executive refusal" to execute the law).

587. See THE FEDERALIST NO. 48 (Madison); *id.* Nos. 71, 73 & 78 (Hamilton); WOOD, *supra* note 112, at 403-13, 474, 507.

588. See *supra* note 8; Merrill, *supra* note 8, at 46-47 ("[T]here is widespread agreement that the executive has a legal duty to enforce valid final judgments rendered by courts, regardless of whether the executive agrees with the legal analysis that forms the basis for the judgment."); see also *infra* note 666.

decision was overturned on appeal or a contrary ruling was handed down by a higher court.<sup>589</sup>

If the Executive does possess a limited right of noncompliance, to be invoked properly four principles would have to be satisfied. First, the unconstitutionality of the law must be clearly indicated from the text of the Constitution, the intent of the Framers, or prior rulings of the Supreme Court. Second, the President must have exhausted all avenues for redressing the problem through the legislative process. Third, defiance of the law must for all practical purposes be the only way to bring the question of its constitutionality before the courts. And fourth, the Executive must take all possible steps to assure that judicial review actually occurs. Without these safeguards, the narrow privilege of noncompliance could easily become a modern equivalent of the suspending power. Each of the four conditions will be discussed in turn.

### 1. *A Clearly Unconstitutional Law*

When a President opts to veto a bill on the ground that it is unconstitutional, he acts in a legislative capacity.<sup>590</sup> Like any member of the House or Senate, he may cast his vote against the measure because of genuine doubts as to its validity.<sup>591</sup> But when the Executive refuses to enforce a statute because it is unconstitutional, he is no longer functioning as a lawmaker. Since there is no independent basis in the executive power for refusing to carry out such a law, the President's sole justification for noncompliance is that it will enable the courts to exercise judicial review. Just as "the judiciary has always given to congressional enactments a presumption of validity,"<sup>592</sup> so

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589. The government could thus acquiesce in the decision by giving the ruling of unconstitutionality effect beyond the immediate parties to the suit, even though it might not be required to do so. *See United States v. Mendoza*, 464 U.S. 154 (1984) (federal government is not subject to nonmutual offensive collateral estoppel); *TRIBE*, *supra* note 385, at 26-29 & n.11.

590. *See Zinn*, *supra* note 48, at 207, 214-15; *SPITZER*, *supra* note 40, at 18.

591. *See* 49 CONG. REC. 4291-92 (1913) (President Taft's message vetoing Webb-Kenyon Act); WILLIAM H. TAFT, *OUR CHIEF MAGISTRATE AND HIS POWERS* 19-23 (1916); *SPITZER*, *supra* note 40, at 25-70; *MASON*, *supra* note 39, at 129-31; *CORWIN*, *supra* note 104, at 319.

592. *Katzenbach v. Morgan*, 384 U.S. 641, 670 (1966) (Harlan, J., dissenting); *see also United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 & n.4 (1938); *INS v. Chadha*, 462 U.S. 919, 944 (1983); *GAO Bid Protest Hearings*, *supra* note 8, at 39 (statement of Sanford Levinson). The presumption of constitutionality may of course be overcome. Thus, if a litigant establishes a prima facie case of racial discrimination, there arises a presumption of unconstitutionality. *See Washington v. Davis*, 426 U.S. 229, 241 (1976); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 208-11 (1973).

should the Executive. Unless the grounds for believing a law to be invalid are strong, the President should execute the measure even though nonfrivolous arguments can be marshalled against it.<sup>593</sup> Without such a presumption, the White House—assisted by creative minds in the Justice Department—could refuse to honor an endless array of statutes even though there is little or no chance of their later being overturned by the courts.

Counsel for various Presidents, including Andrew Johnson, Woodrow Wilson, Jimmy Carter, and Ronald Reagan, have asserted that the Executive may ignore a law that is patently or clearly unconstitutional.<sup>594</sup> This view has also found support in academic circles.<sup>595</sup> The trick is figuring out a way to make the condition a meaningful one. One possibility is to insist that the Executive publicly explain the basis and legal authority supporting its belief that a law is unconstitutional,<sup>596</sup> on the theory that this might discourage Presidents from advancing tenuous constitutional objections. However, if this entailed nothing more than obtaining a written opinion from the Office of Legal Counsel, the requirement would be reduced to a mere formality. As Arthur S. Miller observed, “Government lawyers always can be found . . . to create a counterpane of putative legality over any action the President desires.”<sup>597</sup> The Justice Department thus assured Congress that the Competition in Contracting Act was “in clear con-

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593. The requirement that a law be clearly unconstitutional, based on the text of the Constitution, the Founders’ intent, or Supreme Court precedent, amounts to a rejection, in this context, of the position that a President has total autonomy to interpret the Constitution for himself. *See supra* note 8. *Cf.* Strauss, *supra* note 8, at 127-35 (rejecting executive autonomy view and arguing that the President should act as though he were a Supreme Court Justice especially where, as here, there is a constitutional disagreement between Congress and the executive branch).

594. *See, e.g.*, Letter from Attorney General William French Smith to Rep. Peter W. Rodino, Jr. (Feb. 22, 1985), *reprinted in GAO Bid Protest Hearings, supra* note 8, at 432, 434-35 (quoting and endorsing position taken by Andrew Johnson’s defense counsel); Letter from Attorney General Benjamin R. Civiletti to Senator Max Baucus (July 30, 1980), *reprinted in GAO Bid Protest Hearings, supra* note 9, at 745, 746 n.\*, 749; 31 Op. Att’y Gen. 475, 489 (1919). Andrew Johnson’s attorneys also appeared to argue that even a law of “doubtful” validity could be defied by the President. *See supra* note 199.

595. *See, e.g.*, *GAO Bid Protest Hearings, supra* note 9, at 50 (statement of Sanford Levinson); *id.* at 50, 55 (statement of Mark Tushnet); Rappaport, *supra* note 570, at 769-70; Kmiec, *supra* note 564, at 347 n.37 (“[O]ccasions for nonenforcement must be strictly limited to serious constitutional flaws, not policy disagreements . . .”); McGinnis, *supra* note 29, at 387-89 (Once a bill becomes law, “the executive branch’s constitutional review should become at least as deferential as the ‘clearly unconstitutional’ standard once suggested for judicial review of legislation.”).

596. *Cf.* Rappaport, *supra* note 570, at 779-83 (urging use of such opinions when a President vetoes a bill on constitutional grounds).

597. Miller, *supra* note 104, at 405.

travention of the Constitution,”<sup>598</sup> yet CICA was subsequently upheld by every federal court to rule on the question.<sup>599</sup> Perhaps the Solicitor General would be a more trustworthy source for such legal opinions, as that office has a reputation for greater political independence from the White House than the Attorney General.<sup>600</sup>

It is unlikely that this first requirement, by itself, can serve as a significant restraint on the Executive’s ability to ignore allegedly unconstitutional statutes. The line between laws that are patently invalid and those that are only arguably so will often reflect one’s convictions as much as one’s ability to decipher the Constitution.<sup>601</sup> To suggest, as some have, that the Executive may, without more, disregard any statute that is “plainly unconstitutional”<sup>602</sup> would in effect give the President carte blanche to defy the law. The requirement that a law be clearly invalid must be viewed as only the first of several conditions, all of which must be met before the Executive may disregard an act of Congress.

## 2. *Exhausting Legislative Avenues of Redress*

Before a President may take the extreme step of refusing to execute a statute on the ground that it is unconstitutional, all other available means for redressing the situation through the lawmaking process must have been exhausted. This follows from the fact that the only justification for executive defiance of the law is as an adjunct to judicial review. It has often been recognized that federal courts should

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598. *GAO Bid Protest Hearings*, *supra* note 9, at 334-35.

599. *Ameron, Inc. v. U.S. Army Corps of Eng’rs*, 809 F.2d 979 (3d Cir. 1986), *cert. dismissed*, 488 U.S. 918 (1988); *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102 (9th Cir. 1988); *Parola v. City of Monterey*, 848 F.2d 956 (9th Cir. 1988); *Universal Shipping Co. v. United States*, 652 F. Supp. 668 (D.D.C. 1987).

600. *See GAO Bid Protest Hearings*, *supra* note 9, at 42-43 (statement of Sanford Levinson) (noting that before 1951, the Justice Department’s official opinions were prepared by the Solicitor General rather than by the Attorney General).

601. On occasion, the distinction may be apparent. After *INS v. Chadha*, 462 U.S. 919 (1983), most would agree that a statute containing a one- or two-House legislative veto is clearly unconstitutional; *but see Ely*, *supra* note 520, at 1395-97 (arguing that veto provision in War Powers Resolution is not necessarily invalid under *Chadha*). Most lawyers would also probably agree that the statute barring the President from closing the Navy’s dairy farm at Annapolis was not patently unconstitutional, despite Lyndon Johnson’s claim that it interfered with his powers as Commander-in-Chief. *See supra* text accompanying notes 362-363.

602. *GAO Bid Protest Hearings*, *supra* note 9, at 50 (statements of Mark Tushnet and Sanford Levinson); *and see Ameron, Inc. v. U.S. Army Corps Eng’rs*, 787 F.2d 875, 889 n.11 (3d Cir. 1986) (stating that President might have duty to refuse to execute “a patently unconstitutional law”).



decide constitutional questions only as a matter of last resort.<sup>603</sup> Unless the Executive is governed by a similar principle, the Judiciary could be placed in the position of having to review statutes whose constitutional defects might have been redressed by other means.

The White House may be able to prevent an allegedly unconstitutional provision from being enacted into law by using its influence to have the bill amended or defeated in Congress.<sup>604</sup> If these efforts fail and the President genuinely believes the measure to be unconstitutional, he has the option of exercising the veto power.<sup>605</sup> While the White House in recent years has claimed that exercise of the veto is often impractical,<sup>606</sup> such policy-based concerns should not suffice to outweigh a serious constitutional objection. Even in the worst case scenario, where the offending provision is part of an omnibus bill or is tacked as a rider to an urgent end-of-the-session appropriations package, a President committed to the Constitution might still employ the negative while at the same time submitting a new bill that meets his objections; if necessary, Congress could be called into special session to consider the substitute measure.

These efforts may of course fail.<sup>607</sup> Nor are the options of working with Congress or employing the veto available to a President when the law was passed during a previous administration. In this event, the avenues for legislative redress narrow. The Executive may, however, urge that Congress amend or repeal the allegedly invalid statute,

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603. See *Siler v. Louisville & Nashville R.R.*, 213 U.S. 175 (1909) (federal courts must refrain from deciding federal constitutional issues if case might be disposed of based on state law); *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring) (noting that Court has developed a series of rules to avoid unnecessarily deciding constitutional questions); *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 500 (1941) (federal courts should abstain from deciding federal constitutional issues that turn on as yet unsettled questions of state law); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 154-55 (1951) (Frankfurter, J., concurring) (Federal courts "do not review issues, especially constitutional issues, until they have to. . ."); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974) (noting policy of "judicial restraint from unnecessary decision of constitutional issues"). See generally *TRIBE*, *supra* note 385, at 67-72.

604. See *supra* text accompanying notes 133-134.

605. Cf. *Rappaport*, *supra* note 570, at 771-76 (arguing that if a President is prepared to deny enforcement to an allegedly unconstitutional law, the President is obligated to veto the measure if he has the opportunity to do so); *Burgess*, *supra* note 556, at 646, 649-53 (arguing that the President may refuse to enforce a law that violates definitive Supreme Court precedents involving nonstructural issues only if the offending bill was enacted over his veto).

606. See, e.g., *GAO Bid Protest Hearings*, *supra* note 9, at 434 (statement of William French Smith, Att'y Gen.); and see *supra* text accompanying notes 568-569.

607. See *supra* Table 1.

an approach which has sometimes met with success.<sup>608</sup> If no response is immediately forthcoming, the President may have to repeat the request before he can be deemed to have exhausted this option.<sup>609</sup>

### 3. *Defiance as the Sole Route to Judicial Review*

The President is justified in refusing to comply with a law that he believes to be unconstitutional only when judicial review of the measure would otherwise be virtually impossible. Except in the rare instances where this requirement is satisfied, the Executive must honor or enforce the law. It is up to those who may be harmed by the measure to challenge it, either by filing suit or by raising the constitutional issue defensively. The administration can encourage such challenges by notifying potential litigants of their right to sue and the grounds for doing so. Once the matter is in court, the Executive might decline to defend the law or join in seeking to have it held unconstitutional.<sup>610</sup> The President may not even have to depend on others to initiate the challenge. In the case of an allegedly invalid appointment procedure, for example, the government might honor the statutory scheme but then bring a quo warranto proceeding to test the officeholder's right to the position.<sup>611</sup> In other instances, the Executive may be able to seek a declaratory judgment that a law with which it is presently complying is unconstitutional.<sup>612</sup>

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608. See *supra* text accompanying notes 142-143.

609. Where compliance with the allegedly unconstitutional law does not cause serious harm, the requisite exhaustion period may stretch over many years. It took 20 years of requests by several Presidents before the Tenure of Office Act was repealed. See *supra* notes 142 and 483, and accompanying text. Lyndon Johnson sought the repeal of various committee approval requirements for 3 years before deciding not to pursue any further projects under the laws in question. See *supra* text accompanying notes 488-495. While Johnson arguably met this second requirement, the case did not satisfy the third condition, for judicial review was available without executive defiance.

610. See Brady, *supra* note 145; Miller & Bowman, *supra* note 124. For examples of such action, see *supra* notes 338-361, 457-460 and accompanying text. As long as the government intends to honor the statutory provision despite its belief that it is unconstitutional, the action would not qualify as "a friendly, non-adversary proceeding" requiring that it be dismissed as a collusive suit. *INS v. Chadha*, 462 U.S. 919, 939 (1983); *Bob Jones Univ. v. United States*, 461 U.S. 574, 585 n.9 (1983). See *TRIBE*, *supra* note 385, at 73-74.

611. See *supra* text accompanying notes 397, 437, 441, 476 AND 497.

612. See *supra* text accompanying note 431 (noting Eisenhower's refusal to comply with restriction on signing executive agreements), and text accompanying note 516 (noting Lyndon Johnson's refusal to carry out approved watershed projects). And see *infra* notes 656-660 and accompanying text.

Defiance is appropriate only where it is truly an avenue of last resort.<sup>613</sup> Presidents may readily claim that noncompliance is necessary to facilitate judicial review, but such assertions must be closely scrutinized. The Carter administration, in refusing to honor the legislative veto of Department of Education regulations, stated that without such action a court challenge to the veto provision might be foreclosed.<sup>614</sup> In fact, those who would have benefited from the vetoed programs could have sued to compel the Department to implement the regulations.<sup>615</sup> Similarly, the Reagan administration sought to justify its defiance of the Competition in Contracting Act on the basis that judicial review was otherwise unlikely to occur.<sup>616</sup> As numerous critics pointed out, this assertion was utterly without merit.<sup>617</sup>

There have been occasions when defiance of the law was the only route by which judicial review might have occurred.<sup>618</sup> This was true of the refusals by James Buchanan, Andrew Johnson, Woodrow Wilson, and Franklin Roosevelt to comply with statutes limiting their ability to transfer or remove certain individuals from office.<sup>619</sup> The requirement was also met with respect to the law barring President Taft from submitting an executive budget to Congress.<sup>620</sup>

Where noncompliance is indispensable to securing judicial review, the scope of defiance should be no broader than necessary to attain this goal.<sup>621</sup> Thus, for example, even if it had been true that the

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613. See *GAO Bid Protest Hearings*, *supra* note 9, at 273 (statement of Steven R. Ross & Charles Tiefer, noting that the "law must be one which everyone agrees cannot be tested any other way").

614. 43 Op. Att'y Gen. No. 25, at 11 (1980); 4A Op. Off. Legal Counsel 21, 29 (1980). See *supra* text accompanying note 531.

615. See *supra* note 532 and accompanying text.

616. Meese, *supra* note 104, at A26, col. 1 (letter to editor); *GAO Bid Protest Hearings*, *supra* note 9, at 300-01, 322-23 (statement of D. Lowell Jensen, Deputy Att'y Gen.); *id.* at 438 (statement of Attorney General William French).

617. H.R. REP. NO. 99-138, 99th Cong., 1st Sess. 17 (1985); *GAO Bid Protest Hearings*, *supra* note 9, at 52, 81-82 (statement of Eugene Gressman); *id.* at 56 (statement of Mark Tushnet); *id.* at 274-75 (statement of Steven R. Ross & Charles Tiefer); Letter from Peter W. Rodino to William French Smith (Jan. 31, 1985), reprinted in *GAO Bid Protest Hearings*, *supra* note 9, at 431. And see *infra* note 657.

618. See *GAO Bid Protest Hearings*, *supra* note 9, at 273 (statement of Steven R. Ross & Charles Tiefer). A President who has complied with a law and whose efforts to have others challenge the measure have failed might at some point legitimately claim that defiance is the only means of obtaining judicial review; however, these conditions have never before been met.

619. See *supra* text accompanying notes 199-205, 386-387, 503-504, 511.

620. See *supra* text accompanying note 407.

621. For suggestions that the President may defy a law to the extent necessary to have its constitutionality tested in court, see, e.g., Letter from Chief Justice Salmon P. Chase to Gerrit Smith (April 19, 1868), *supra* note 213 and accompanying text; *Pentagon Papers*

Competition in Contracting Act could not be challenged unless the Reagan administration ignored the statute, this could have been done in a few selected instances so as to produce a test case, rather than on an across-the-board basis affecting virtually all government contracts.<sup>622</sup>

#### 4. *Assuring That Judicial Review Occurs*

Even if the three conditions discussed above have all been met, a President is still not justified in refusing to honor an allegedly unconstitutional law unless he faithfully takes all steps necessary to secure a judicial ruling as to the measure's validity. In the eyes of at least some members of Congress, it was here that Andrew Johnson fell short in his defiance of the 1867 Tenure of Office Act, for while there was no other way to bring about a test case, Johnson's attorneys failed to pursue any of the several routes available for obtaining judicial review.<sup>623</sup>

In order to satisfy this requirement, it may be possible for the Executive to initiate a suit that will raise the constitutional issue. This could occur, for example, if a lower level federal official balked at carrying out the President's order to disobey the law.<sup>624</sup> In the Tenure of Office Act setting, Andrew Johnson's Attorney General might have

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*Hearings*, *supra* note 155, at 381 (statement of William H. Rehnquist, Ass't Att'y Gen.); BERGER, *supra* note 104, at 309; *GAO Bid Protest Hearings*, *supra* note 9, at 272-74 (statement of Steven R. Ross & Charles Tiefer).

622. H.R. REP. NO. 99-138, 99th Cong., 1st Sess. 21 (1985); *GAO Bid Protest Hearings*, *supra* note 9, at 273-74 (statement of Steven R. Ross & Charles Tiefer). The Bush administration may have adhered to this principle in testing another section of the Competition in Contracting Act, *i.e.*, the fee-recovery provision, 31 U.S.C. § 3554(c) (1988). Rather than paying fees to two disappointed bidders as mandated by the Act, the Justice Department sued the bidders for a declaratory judgment that § 3552(c) was unconstitutional. While noncompliance was perhaps necessary to securing judicial review, it is unclear whether the Executive's defiance was limited to these two cases; yet even if it was, noncompliance was improper under our second proposed principle, for Congress was at the time considering a curative amendment to the statute. *See United States v. Instruments, S.A., Inc.*, 807 F. Supp. 811, 816 (D.D.C. 1992) (dismissing declaratory action, on ripeness and prudential grounds, noting *inter alia* that "Congress itself has been addressing the issue").

623. *See supra* text accompanying notes 221-232. There is also a question as to whether the first of our requirements was met, for not until 1926 did the Supreme Court rule that such restrictions on the removal of executive officers were unconstitutional. *Myers v. United States*, 272 U.S. 52 (1926).

624. In the Competition in Contracting Act scenario, for example, the Attorney General or the Office of Management and Budget, both of which issued orders requiring federal agencies to ignore the Act's stay provisions, might have sued a government department that refused to defy the law. Such intra-branch disputes are justiciable. *See United States v. Nixon*, 418 U.S. 683, 692-97 (1973).

but failed to institute quo warranto proceedings against the Secretary of War after Stanton refused to give up the office.<sup>625</sup>

If the Executive itself is not in a position to trigger judicial review, the President must make every effort to assure that other persons with standing to sue or who are in a position to raise the constitutional issue in fact do so. In the Tenure of Office Act case, the attorney whom Johnson hired to represent General Thomas could thus have challenged the Act's validity either by raising it as a defense to the pending criminal action, or by filing for habeas corpus.<sup>626</sup> Neither of these avenues was pursued. It may be necessary for the Executive to notify the affected individuals that they can sue to enforce their rights under the statute the President has defied. Woodrow Wilson and Franklin Roosevelt, both of whom dismissed appointees whose positions were protected by law might have advised these individuals that they could challenge their termination in the Court of Claims.<sup>627</sup> In the context of executive defiance of the War Powers Resolution, this fourth requirement would dictate that the Executive encourage—rather than attempt to dismiss—lawsuits brought to ensure compliance with the Resolution's consultation, notification and troop withdrawal provisions.<sup>628</sup>

It is possible that, despite the Executive's efforts to bring about judicial review, no one with standing to sue in fact does so. Is the President then free to continue defying the law indefinitely? One might argue that the fact no one has sued means that any injury caused by the noncompliance is *de minimis* and hence of no concern.<sup>629</sup> Yet there may be good reasons why a genuinely aggrieved individual has not sued, such as the cost of litigation or secondary consequences like the loss of privacy. While Congress may act to alleviate some of these factors, it can not eliminate all of them. The issue is a debatable one, but the burden should remain on the Executive to assure that a test case is filed; if none is brought within a reasonable

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625. See *supra* text accompanying notes 227-229.

626. See *supra* text accompanying notes 226-229.

627. See *supra* notes 498-511 and accompanying text.

628. See *supra* note 525 and accompanying text.

629. Cf. *Papasan v. Allain*, 478 U.S. 265, 300 (1986) (Powell, Burger & Rehnquist, JJ., concurring in part and dissenting in part) (arguing that Equal Protection Clause is not concerned with *de minimis* variations in treatment); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 736 (1982) (Powell & Rehnquist, JJ., dissenting) (arguing that inability to attend nursing school near one's home is too inconsequential to trigger violation of Equal Protection Clause).

time, presidential defiance of the law should end.<sup>630</sup> Were the rule otherwise, the White House might not take seriously its obligation to make certain that judicial review occurs, thereby giving itself the final word on whether or not an act of Congress will be enforced.

##### 5. *Presidential Practice and the Principles Governing Noncompliance*

Unless all four of these conditions are met, a President may not legitimately refuse to comply with a law, even if he believes it to be unconstitutional. When measured against these standards, few of the historical incidents of defiance discussed in Part II of this Article were proper. Even if we assume *arguendo* that the first two requirements were met in all of these cases—that the law was clearly unconstitutional and that the Executive made every effort to obtain redress through the legislative process<sup>631</sup>—in only four instances was defiance necessary to allow for judicial review.<sup>632</sup> Review occurred in two of these cases—Woodrow Wilson's firing of Postmaster Myers, and Franklin Roosevelt's removal of Commissioner Humphrey.<sup>633</sup> In the other two, involving Andrew Johnson's dismissal of the Secretary of War and Taft's submission of a budget to Congress, the Executive failed to take steps to assure that the constitutional issue would be resolved by the courts. Johnson ignored three avenues that would have yielded a test case.<sup>634</sup> Taft overlooked a chance to obtain judicial review by not giving advance notice to those who might be adversely

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630. If, on the other hand, Congress and its members have standing in virtually all cases where the White House refuses to enforce an allegedly unconstitutional law (*see infra* notes 676-681 and accompanying text), Congress should share the burden of bringing about a test case; if it fails to do so, a President might be justified in continuing to ignore the law in question.

631. Under a strict reading of the second requirement, the 12 cases involving presidential signing statements discussed in Part II.B.4., *supra*, were improper because the President failed to object to the measure by exercising the veto power.

632. The 4 instances were: James Buchanan's transfer of Captain Meigs; Andrew Johnson's dismissal of Secretary of War Stanton; Woodrow Wilson's firing of Postmaster Myers; Franklin Roosevelt's removal of Commissioner Humphrey. *See supra* notes 199-205, 386-387, 503-504, 511, and accompanying text.

633. *Myers v. United States*, 272 U.S. 52 (1926) (invalidating act barring President from removing postmasters without Senate's consent); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (upholding statute limiting grounds upon which President could remove FTC Commissioner). While it is unknown whether the Wilson and Roosevelt administrations made any efforts to assure that these lawsuits were filed, from the nature of the claims involved it is unlikely that special notice was necessary to apprise the aggrieved individuals of their rights.

634. *See supra* text accompanying notes 226-229.

affected by his budget recommendations.<sup>635</sup> As a result, no lawsuits were filed in either case.

Under the proposal advanced here, presidential noncompliance with an act of Congress is warranted only if it is essential to creating an opportunity for judicial review. If review will be precluded whether or not the Executive honors the law, defiance is unjustified. Of the 20 instances of noncompliance noted in Part II, 4 probably fell into this category: Woodrow Wilson's refusal to send notices of treaty termination,<sup>636</sup> Jimmy Carter's closure of the U.S. consulates,<sup>637</sup> and the failure of Gerald Ford and Jimmy Carter to comply with the War Powers Resolution.<sup>638</sup> In each of these cases, the President's defiance in effect suspended the provision in question and amounted to an absolute veto that could not be overturned either by Congress or by the courts.

This proposal rejects two criteria that are sometimes urged as being sufficient to warrant presidential noncompliance with the law. The first involves statutes that are said to intrude upon executive powers.<sup>639</sup> In defending its defiance of the Competition in Contracting Act, the Reagan administration argued that the President "has a constitutional duty to protect the Presidency from encroachment by other branches."<sup>640</sup> While failure to comply with such laws would be warranted if all four of our requirements were met, the fact that a statute is perceived as infringing on executive power cannot be sufficient by itself. If it were, one of the principal reasons for giving the President a veto power would be rendered largely superfluous.<sup>641</sup> Moreover, this would open the door wide to selective defiance of the law, for during the period from 1789 to 1981, 80% of the constitutional objections

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635. See *supra* text accompanying note 407.

636. See *supra* text accompanying notes 423-424.

637. See *supra* text accompanying notes 469-472.

638. See *supra* text accompanying notes 523-525.

639. See, e.g., POMEROY, *supra* note 202, at 444-45; Rappaport, *supra* note 570, at 769-70; Barr, *supra* note 104, at 39 (taking position that the President may refuse to enforce any part of a law that encroaches on executive authority); Burgess, *supra* note 556, at 645-46 & n.86, 657-65 (arguing that the President may refuse to enforce any law that he in good faith believes encroaches upon executive power).

640. GAO *Bid Protest Hearings*, *supra* note 9, at 434-35 (statement of William French Smith, Att'y Gen.); see also *id.* at 299-300, 322 (statement of D. Lowell Jensen, Deputy Att'y Gen.).

641. See *supra* text accompanying notes 49-51. One might argue that the veto would not be entirely superfluous, for it would still be used where a law as a whole violates rights of the Executive, while selective defiance would be used against omnibus bills and legislative riders. However, proponents of the position that a President may ignore any provision that encroaches on the executive domain do not restrict the power to these situations.

raised in signing statements claimed that there had been a legislative encroachment on the executive domain.<sup>642</sup> Finally, as Sanford Levinson has observed, it is in this area that we should “be least willing to trust independent presidential decisionmaking, since there is no reason at all to view the President as a genuinely disinterested party.”<sup>643</sup>

A second suggested criterion which this proposal does not adopt is one that would allow the President to disregard a law whenever it is perceived as violating basic individual rights.<sup>644</sup> Though intuitively appealing, the justification for executive defiance is at its weakest in this class of cases, for judicial review is virtually always available when such statutes are enforced. At the same time, presidential noncompliance in this setting is especially likely to be immune from judicial scrutiny, as the Carter administration found when it declined, on First Amendment grounds, to enforce a ban against editorializing by public radio stations.<sup>645</sup> Unless the four conditions outlined above are met, the proper course is for the Executive to comply with the law, while taking all steps necessary to assure that those whose rights may be infringed can promptly challenge the measure in court.<sup>646</sup> In the rare case where execution of such a statute might cause irreparable harm, the individuals affected should be able to obtain immediate injunctive relief from the courts.<sup>647</sup>

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642. See *supra* Table 3 and text accompanying notes 318-319. See also Burgess, *supra* note 556, at 647-48 & n.92 (estimating that from 1981 through 1991, at least 75% of all constitutionally-based signing statements claimed an infringement upon executive power).

643. GAO *Bid Protest Hearings*, *supra* note 9, at 44.

644. See, e.g., GAO *Bid Protest Hearings*, *supra* note 9, at 44, 50 (statement of Sanford Levinson); *id.* at 55 (statement of Mark Tushnet); *Ameron, Inc. v. U.S. Army Corps. of Eng'rs*, 787 F.2d 875, 889 n.11 (3d Cir. 1986) (dictum); Geoffrey P. Miller, *The President's Power of Interpretation: Implications of a Unified Theory of Constitutional Law*, LAW & CONTEMP. PROBS., Autumn 1993, at 35, 59 (arguing that the President may refuse to enforce a law that he believes violates personal liberties or property rights).

645. See *supra* text accompanying notes 455-462. The same was true of Carter's refusal, on Establishment Clause grounds, to restore the San Antonio Missions (see *supra* text accompanying note 468), and of his failure, on due process and bill of attainder grounds, to honor a statute barring the use of funds to implement his pardon of Vietnam-era draft resisters (see *supra* text accompanying notes 453-454).

646. Franklin Roosevelt pursued this route in response to an appropriations bill rider barring the government from continuing to employ three named individuals. See *supra* text accompanying notes 338-342. As long as the Executive agrees that it is obliged to follow the law despite its belief that the measure is unconstitutional, the action should not be dismissed as a friendly or collusive action. See TRIBE, *supra* note 385, at 74 n.8.

647. It is usually impossible to enjoin a pending criminal case, for “the cost anxiety, and inconvenience of having to defend against a single criminal prosecution alone do not constitute ‘irreparable injury,’” *Kugler v. Helfant*, 421 U.S. 117, 124-25 (1975), but injunctive relief may be available before prosecution if plaintiff can show irreparable harm and likely



## B. The Need for Congressional Action

The mere articulation of principles governing executive enforcement of the law will unlikely have much of an effect on the White House. Our experience during the past half century has, to paraphrase Madison, "evinced a powerful tendency in the [Executive] to absorb all power into its vortex."<sup>648</sup> Four hundred years ago in England, Parliament triumphed over the Crown by at last stripping the king of his prerogative to suspend the laws. In this country today, the Executive is seeking to establish a similar power for itself. Unless Congress creates effective deterrents and remedies for presidential defiance of "unconstitutional" laws, we may soon discover that history has come full circle.

The problem is fortunately a bipartisan one. In this century, nine Presidents have refused to comply with allegedly unconstitutional laws; five of them were Republicans, four were Democrats.<sup>649</sup> The issue is one that transcends party. It is a question of preserving a finely wrought balance between the legislative and executive branches.

If Congress fails to act, the problem is unlikely to go away. During his campaign for the Presidency, Bill Clinton asked for an item veto,<sup>650</sup> a power which he previously enjoyed as governor of Arkansas.<sup>651</sup> Like some of his recent predecessors who favored the device, Clinton, too, may exercise a *de facto* item veto. There is no assurance that the Supreme Court will take care of the matter by expressly resolving the question of whether the President may ignore an allegedly unconstitutional law. Of the 20 incidents of presidential defiance that occurred between 1789 and 1981, only 2 resulted in judicial review. In neither instance did the Court address the issue of the President's refusal to comply with the law; instead, it simply ruled on the validity of the statute in question.<sup>652</sup> While it is possible that an occa-

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success on the merits. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975) (granting preliminary injunction against future enforcement of state criminal law).

648. 2 FARRAND, *supra* note 24, at 74 (Madison noted that, at the state level following the Revolution, it was the Legislature rather than the Executive that demonstrated this tendency). On the aggrandizement of presidential power, see SCHLESINGER, *supra* note 6.

649. The Republicans were Taft, Eisenhower, Ford, Reagan and Bush; the Democrats were Wilson, Franklin Roosevelt, Johnson, and Carter.

650. Rappaport, *supra* note 570, at 740 n.12.

651. ARK. CONST. art. 6, § 17.

652. *Myers v. United States*, 272 U.S. 52 (1926) (invalidating act, defied by Woodrow Wilson, barring removal of postmasters without consent of Senate); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (upholding law, defied by Franklin Roosevelt, barring removal of FTC Commissioner). *See Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102, 1122

sion will arise where the Judiciary must resolve the underlying question of the Executive's right to ignore "unconstitutional" laws, this has so far proven unnecessary.<sup>653</sup>

Detailed discussion of the remedies available to Congress is beyond the scope of this Article, but there are three levels at which the problem might be approached. First, Congress should consider enhancing the Executive's access to judicial review of a disputed law, thereby reducing a President's incentive to engage in noncompliance.<sup>654</sup> This could include a statute allowing the Attorney General to bring quo warranto proceedings against federal officeholders to determine whether the procedure by which they were named to office squares with the requirements of Article II.<sup>655</sup> The absence of such an express statutory remedy may help explain the Presidents' failure to

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n.14 (9th Cir. 1988), *withdrawn in part on other grounds*, 893 F.2d 205 (9th Cir. 1989) (en banc). The Carter administration argued that the Court's silence on this issue constituted recognition of the President's right to refuse to comply with laws he believes to be unconstitutional. Letter from Benjamin R. Civiletti, Att'y Gen., to Sen. Max Baucus (July 30, 1980), *reprinted in GAO Bid Protest Hearings, supra* note 9, at 750.

653. See *GAO Bid Protest Hearings, supra* note 9, at 326-27, 338 (statement of D. Lowell Jensen, Deputy Att'y Gen., suggesting that "the Supreme Court has never been called upon, and is not likely ever to rule" on this question). In *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102, 1121-26 (9th Cir. 1988), sustaining the constitutionality of the Competition in Contracting Act, the court held that the President may not ignore an allegedly unconstitutional law and ruled that his having done so constituted "bad faith," entitling plaintiff to the recovery of attorneys' fees. This part of the decision was later withdrawn after the Court of Appeals ruled that because plaintiff was not a "prevailing party" it was unnecessary to resolve the "bad faith" issue. 893 F.2d 205 (9th Cir. 1990) (en banc).

654. Presidents Andrew Johnson, Carter, and Reagan defended their refusal to comply with the law on the basis that this would help secure a judicial ruling as to the measure's constitutionality. See *supra* text accompanying notes 3-4, 199-201, 531-532, 616-617.

655. It is generally recognized that, in a quo warranto proceeding, "[t]he inquiry may go to the extent of determining the constitutionality of the act creating an office . . ." W.F. BAILEY, *A TREATISE ON THE LAW OF HABEAS CORPUS AND SPECIAL REMEDIES* 1281 (1913) (citing only state cases); see also, CHESTER J. ANTIEAU, *THE PRACTICE OF EXTRAORDINARY REMEDIES: HABEAS CORPUS AND THE OTHER COMMON LAW WRITS* 593 (1987). Unlike many states where quo warranto proceedings are authorized by the constitution or by statute, see ANTIEAU, *supra*, at 592, 619, the only federal law dealing with the subject is in the District of Columbia Code and does not mention suits to challenge the validity of the appointment procedure. *D.C. Code Ann.* §§ 16-3501 to 16-3503 (1989) (District Court for the District of Columbia may issue a quo warranto "in the name of the United States against a person who within the District of Columbia . . . unlawfully holds or exercises . . . a public office of the United States, civil or military."). Before 1963, these provisions appeared at 28 U.S.C.A. §§ 377a-377c. See 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* 86-87 (1987). The writ is also said to be one which federal courts may issue under the All Writs Act, 28 U.S.C. § 1651(a) (1988). ANTIEAU, *supra*, at 619; FORREST G. FERRIS & FORREST G. FERRIS, JR., *THE LAW OF EXTRAORDINARY LEGAL REMEDIES* 135 (1926). Rule 81(a)(2) of the Federal Rules of Civil Procedure also recognizes the federal courts' ability to hear quo warranto proceedings, stating that the Rules apply to them. Yet quo warranto has rarely been used to chal-

use quo warranto in any of the five cases of defiance that rested on the appointments clause. Congress might also explore the possibility of permitting the executive branch to seek a declaratory judgment<sup>656</sup> as to the validity of laws the President believes unconstitutional.<sup>657</sup> While one might object that this would make it too easy for the Executive to attack legislative enactments,<sup>658</sup> through signing statements,

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lenge an individual's right to hold federal office, and appears never to have been used to attack the constitutionality of a federal statutory appointment procedure.

656. As with quo warranto, this remedy might be covered by existing law, but not in express terms. See 28 U.S.C. § 2201 (1988) ("In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought . . ."). In *United States v. Instruments, S.A., Inc.*, 807 F. Supp. 811 (D.D.C. 1992), the Department of Justice on behalf of the United States sought a declaratory judgment that the fee-recovery provision of the Competition in Contracting Act of 1984, 31 U.S.C. section 3554(c) (1988), was unconstitutional; the district court dismissed the case on ripeness and prudential grounds after expressing doubt as to whether it had jurisdiction to hear the suit under the Declaratory Judgment Act.

657. The Executive could obtain a declaratory judgment as to the validity of a law it is reluctantly enforcing by suing one or more of the persons who could have sued the government if the President had instead defied the law. Federal courts may grant declaratory relief in cases over which they would have had subject matter jurisdiction had one of the parties instead sued the other for damages or injunctive relief. *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 19 (1983); 10 WRIGHT & MILLER, *supra* note 655, at § 2767 (1983). A suit for damages or injunctive relief by a private party against the government based on the Executive's refusal to honor a law would arise under the federal law in question and would thus fall within the jurisdiction of the district courts or the Claims Court. 28 U.S.C. §§ 1331, 1491 (1988). The court could therefore hear the Executive's suit for declaratory relief.

Under this rationale, the Reagan administration, rather than defying the Competition in Contracting Act, might have honored the Act's stay provision and at the same time sued one or more of the companies that filed bid protests, seeking a declaratory judgment that the provision was unconstitutional. Declaratory relief would have been proper since the defendant companies could have sued the government in federal court for injunctive relief if the administration had instead defied the stay requirement, as the companies in fact did. See *supra* notes 547-550 and accompanying text.

An executive declaratory relief remedy would be of use in other settings where it is possible to identify those who will be harmed if the government were to ignore the law. Had the procedure existed, it could have been invoked by Andrew Johnson, Woodrow Wilson, and Franklin Roosevelt to challenge statutory limitations on their ability to remove certain individuals from office. See *supra* text accompanying notes 189-233, 498-504. The Attorney General might have brought an action against the officeholders whom the President wished to dismiss, asking the court to declare the removal restriction unconstitutional. Under the declaratory procedure, Lyndon Johnson might have obtained a ruling as to the validity of the committee-approval requirement for watershed and flood prevention projects by filing a suit for declaratory relief against one or more of the project applicants. See *supra* text accompanying note 516.

658. See Miller & Bowman, *supra* note 124, at 70-80 (arguing that neither the President nor the Justice Department may attack the constitutionality of federal statutes). One might also contend that rather than making it easier for the Executive to judicially chal-

recent Presidents have already been challenging the constitutionality of laws at a rate of nearly 30 per year.<sup>659</sup> An expanded declaratory remedy has the potential to shift these disputes from the White House, where the President has the last word, into an arena where the Executive's claims will be subject to review.<sup>660</sup>

Second, because the mere creation of mechanisms whereby the President can seek judicial review offers no assurance they will be used, Congress should explore ways of deterring executive officials

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lenge acts of Congress, we should rely on the deterrent effect of remedies such as withholding funds, impeachment, and civil damages actions. *See infra* notes 661-665 and accompanying text. However, because most of these remedies are effectively unavailable against the President, it is necessary to encourage presidential compliance in settings where the President could otherwise defy a law on his own without needing to secure the cooperation of other executive officials. *See infra* note 663.

659. *See supra* Table 2.

660. A federal court could hear such a suit only if the plaintiff has standing. The President would need to show that by enforcing the allegedly unconstitutional law, he suffers a concrete injury that is distinct from that felt by citizens at large. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992). The mere awareness or observation of unconstitutional conduct does not constitute an "injury in fact," even if plaintiff's distress is real. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 485 (1982). However, when the Executive carries out an "unconstitutional" law, he suffers an injury that is far more personal than that incurred by a citizen bystander. When faced with a law that he genuinely believes is invalid, the Chief Executive is put in a difficult position. He can not defy the measure without violating his constitutional duty as President. Yet by honoring the statute he suffers an injury of conscience, for he has taken an oath to "preserve, protect and defend the Constitution of the United States." U.S. CONST., art. II, § 1, cl. 8. Such a Hobson's choice gives the President a unique stake in the outcome of the litigation. *See Board of Educ. v. Allen*, 392 U.S. 236, 241 n.5 (1968) (School board members have standing to seek declaratory judgment that a state law they were required to enforce violated the First Amendment because "they are in the position of having to choose between violating their oath [to support the Constitution] and taking a step—refusal to comply with [the law]—that would be likely to bring their expulsion from office and also a reduction in state funds for their school districts."); JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 87-88 (4th ed. 1991). *But see City of Lake Tahoe v. California Tahoe Regional Planning Agency*, 449 U.S. 1039, 1039-42 (1980) (White & Marhsall, JJ., dissenting) (noting with disapproval that some Courts of Appeals have refused to follow *Allen*). Moreover, to the extent that a law usurps executive power, compliance causes a unique injury to the Presidency. Though the Framers did not view either of these injuries as sufficient to warrant executive defiance of the law, these injuries should suffice to give the President standing to challenge the measure in court.

In such a proceeding, because the executive branch would be asking to have an act of Congress declared unconstitutional, the task of defending the law must fall to others. While the private defendant has an interest in seeing the statute upheld, she may lack the resources or incentive to mount a vigorous defense. The court should therefore notify the House and the Senate of the pendency of the suit, giving them an opportunity to intervene for the purpose of defending the law. *See Brady, supra* note 145; *INS v. Chadha*, 462 U.S. 919, 929-30 n.5 (1983) (allowing House and Senate to intervene in action to defend validity of legislative veto provision after executive branch agreed with plaintiff that law was unconstitutional).

from carrying out orders to defy the law. One possibility is to withhold or cut off funds to executive departments that direct or engage in noncompliance.<sup>661</sup> The House and Senate could also announce by concurrent resolution that the deliberate refusal of a government official to comply with a statute is an impeachable offense.<sup>662</sup> In addition, Congress might make federal employees and officials<sup>663</sup> personally liable in damages to anyone injured by their willful failure to comply with a federal law.<sup>664</sup> In both the impeachment and civil liability settings, an official who seeks to defend herself on the ground that the

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661. In the wake of the Reagan administration's defiance of the Competition in Contracting Act, a House committee recommended cutting funding for the Office of Management and Budget and for the Justice Department (the two agencies responsible for the directives not to comply) until they agreed to enforce the Act. H.R. REP. NO. 99-138, 99th Cong., 1st Sess. 39-40 (1985). The report also proposed that appropriations for procurement by all executive departments be conditioned on their compliance with the Competition in Contracting Act procedures. *Id.*

662. It would then be imperative that Congress invoke the impeachment remedy in appropriate cases; otherwise, the desired deterrent effect would quickly vanish.

663. This remedy may not be available against the President who might have an absolute constitutional immunity from civil damages liability. *See Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (recognizing President's absolute immunity from damages liability and implying that this is required by separation of powers). *But see* TRIBE, *supra* note 385, at 272-74, NOWAK & ROTUNDA, *supra* note 660, at 234 (arguing that Congress could make the President civilly liable for damages). In *Harlow v. Fitzgerald*, 457 U.S. 800, 812-13 (1982), the Court suggested that the same absolute immunity might cover presidential aides "entrusted with discretionary authority in such sensitive areas as national security or foreign policy," but it later ruled that the Attorney General did not enjoy absolute immunity in ordering warrantless "national security" wiretaps. *Mitchell v. Forsyth*, 472 U.S. 511, 520 (1985). Other executive officials, including department heads, have at most a qualified immunity that shields them only if they demonstrate that there were reasonable grounds for believing their conduct to have been lawful. *See ERWIN CHERMERINSKY, FEDERAL JURISDICTION* 402-19 (1989). The Court has suggested that this qualified immunity is not constitutionally based and that Congress could make such officials absolutely liable. *Harlow*, 457 U.S. at 818 n.31.

664. There is no general cause of action against federal officials who violate a person's rights under federal law. This contrasts with 42 U.S.C. §1983 (1988), which creates a cause against state officials who violate a person's federal rights. Nor have courts been particularly willing to imply a private right of action where none is conferred by statute. *See CHERMERINSKY, supra* note 663, at 315-22, 453-58. They have been especially reluctant to imply a private right of action for statutory violations by federal officials, in contrast to statutory violations by private parties and constitutional violations by federal officials. *Compare Wheeler v. Wheeler*, 373 U.S. 647 (1963) (refusing to imply cause of action for statutory violation by federal official) *with Herman & MacLean v. Huddleston*, 459 U.S. 375 (1983) (implying cause of action against private party for violation of Securities Exchange Act of 1934); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (implying private cause of action for constitutional violation by federal officials). When a federal law is violated, damages are sometimes recoverable from the United States itself, *see CHERMERINSKY, supra*, at 475-88 (discussing damages remedies under the Federal Tort Claims Act and the Tucker Act), but this avenue is not available in most cases where federal officials refuse to carry out a law; nor do remedies against the

law was unconstitutional should be required to show that the law was previously invalidated by a federal court, or that noncompliance was pursuant to a presidential order that satisfied the four principles described above.<sup>665</sup>

Third, Congress might expand the availability of judicial review where a President defies a statute on the ground that it is unconstitutional.<sup>666</sup> Before such a lawsuit can be filed, the public must know of the President's decision to ignore the law.<sup>667</sup> Accordingly, the Executive might be required<sup>668</sup> promptly to inform Congress whenever<sup>669</sup> it

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government discourage noncompliance as effectively as the threat of damages actions against federal officials themselves.

665. Congress could also make it a crime for an executive official to defy the law, for with the possible exception of the President, executive officials enjoy no immunity from criminal suit. *See* TRIBE, *supra* note 385, at 268-69. However, the Justice Department is unlikely to prosecute officials for having followed a presidential directive that was likely based on the Department's own conclusion that the law was unconstitutional. While independent counsel might be used in such cases, the Attorney General would still have ultimate control over whether or not prosecution occurs. *See* Ethics in Government Act of 1978, 28 U.S.C. § 592 (1988); *Morrison v. Olson*, 487 U.S. 654, 694-96 (1988) (upholding use of independent counsel partly on basis that they may be named only at the Attorney General's request, whose decision not to use such counsel is unreviewable).

666. Even the Reagan administration agreed to abide by a final judicial determination; however, in the case of the Competition in Contracting Act, the administration said it would not abandon its defiance of the statute based merely on adverse lower court rulings, but insisted that the matter be litigated through the appellate courts. *GAO Bid Protest Hearings*, *supra* note 9, at 327-28 (statement of D. Lowell Jensen, Deputy Att'y Gen.); H.R. REP. NO. 99-138, 99th Cong., 1st Sess. 3 38 (1985); Meese, *supra* note 104, at A26, col. 1.

667. This notice is distinct from the President's having merely announced his constitutional disagreement with the law, for the fact that the Executive may have indicated in a veto message or signing statement that he believes the measure to be invalid does not necessarily mean the White House will defy the law. (*See supra* Table 1 and Table 3).

668. There is precedent for imposing such a notice obligation. *See, e.g.*, Act of Aug. 22, 1972, Pub. L. No. 92-403, 86 Stat. 619, 1 U.S.C. § 112b (1988) (executive agreements); War Powers Resolution of 1973, Pub. L. No. 93-148, 87 Stat. 555, 50 U.S.C. §§ 1541, 1543 (1988) (use of armed forces); Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297, 2 U.S.C. §§ 683, 684 (1988) (impoundment of funds). Similarly, the Justice Department is under a duty to notify Congress if it decides not to comply with an allegedly unconstitutional law. This requirement, which applies also to decisions not to defend a law, has been included in Justice Department appropriations acts since 1978. *See, e.g.*, Act of Nov. 9, 1978, Pub. L. No. 95-624, §13, 92 Stat. 3464; Act of Nov. 30, 1979, Pub. L. No. 96-132, §21, 93 Stat. 1049; Act of Oct. 28, 1991, Pub. L. No. 102-140, §102(a), 105 Stat. 791. It was under these provisions that the Reagan administration notified Congress that it would not comply with or defend the Competition in Contracting Act. *GAO Bid Protest Hearings*, *supra* note 9, at 429; H.R. REP. NO. 99-138, 99th Cong., 1st Sess. 16 (1985). The duty should be made permanent and should be broadened to apply to every executive department.

669. Reporting requirements have at times been problematic. For one thing, a President may simply refuse to comply with them. This was true of the 1972 Case Act, requiring the Secretary of State to report executive agreements to Congress. Act of Aug. 22, 1972, Pub. L. No. 92-403, 86 Stat. 619, 1 U.S.C. § 112b (1988). To improve compliance, Congress

resolves not to implement a law.<sup>670</sup> Once notice is given, anyone injured or threatened with imminent harm by the President's action could sue in federal court<sup>671</sup> for declaratory and injunctive relief to

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broadened the scope of the reporting duty and added a funding cut-off mechanism. FISHER, *supra* note 319, at 241-43. There were similar failures to report under the War Powers Resolution. See *supra* text accompanying notes 521-522. At the other extreme, compliance with notice requirements may be so extensive as to overwhelm Congress. See TRIBE, *supra* note 385, at 260 n.17 (noting this problem with the notice requirement in the Impoundment Control Act of 1974, Pub. L. No. 93-344, 2 U.S.C. §§ 683-85 (1988), which gave Congress the opportunity to respond to the report by passing a resolution requiring expenditure of the impounded funds).

In the present setting, even if adherence to the requirement were incomplete, some disclosure is better than none. Nor is the opposite danger likely to occur, for even during the peak years of the Bush administration the number of constitutionally based signing statements remained within manageable limits. See *supra* Table 2. The most constitutionally-based signing statements issued in one year was 40. See *U.S. Code Cong. & Admin. News* (1992) Table 4A (listing 80 statements, of which half were constitutionally based). Even if a large number of reports were submitted, Congress need not take specific action on them; rather, the goal is to provide public disclosure, enabling those who may have standing to seek judicial review. The situation thus contrasts with the Impoundment Control Act, where a major purpose of the reporting requirement was to give Congress an opportunity to pass a resolution compelling expenditure of the impounded funds.

670. The requirement should cover all cases of noncompliance, not just those based on the Constitution. A President could otherwise evade the reporting requirement by claiming that defiance rested on nonconstitutional grounds. See Ely, *supra* note 520, at 1404-05 (noting similar problems under the War Powers Resolution). The notice should identify the reasons for the decision. If the Executive contends that the provision is unconstitutional, its report should: (a) explain the basis for that conclusion and the authority supporting it; (b) describe any efforts that were made to cure the defect through the legislative process; (c) indicate whether and why defiance is necessary to secure judicial review of the provision; and (d) set forth the steps the administration plans to take to assure that judicial review occurs. By insisting on disclosure of this specific information, Congress will make clear that it recognizes only a narrow right of noncompliance, dispelling any inference that it has ratified a broad presidential power to suspend the laws. See Letter from Arthur S. Miller to Rep. Jack Brooks (Feb. 27, 1985), reprinted in *GAO Bid Protest Hearings*, *supra* note 9, at 498 (opposing notice requirement as conceding power to the Executive). But see H.R. REP. NO. 99-138, 99th Cong., 1st Sess. 16 n.31 (1985) (stating that the reporting requirement "was in no way intended to ratify that practice").

671. The Administrative Procedure Act (APA) allows judicial review in cases brought by "person[s] suffering legal wrong because of agency action" where it is claimed that a federal "agency or officer or employee thereof acted or failed to act in an official capacity or under color of legal authority . . ." 5 U.S.C. § 702 (1988). Subject matter jurisdiction exists in such cases because plaintiff's claim arises under federal law. 28 U.S.C. § 1331 (1988); see *Parola v. Weinberger*, 848 F.2d 956, 958 (9th Cir. 1988). However, the APA does not authorize judicial review of presidential action where it is claimed that the President has abused his statutory authority. *Dalton v. Specter*, 114 S. Ct. 1719, 1725-27 (1994); *Franklin v. Massachusetts*, 112 S. Ct. 2767, 2775-76 (1992). Constitutional claims are not precluded by the APA, *Franklin*, 112 S. Ct. at 2776, but not "every action by the President . . . in excess of his statutory authority is *ipso facto* in violation of the Constitution." *Dalton*, 114 S. Ct. at 1726. One would hope that a President's flat refusal to execute a law would not be categorized as a mere abuse of statutory discretion. Yet, to assure the availability of judicial review where the President rather than some other executive officer is

halt further defiance.<sup>672</sup> To encourage such suits, Congress might allow plaintiffs to recover attorneys fees whether or not they prevail on the merits.<sup>673</sup> Nevertheless, there will be times when no private plaintiff has suffered a sufficient injury from executive noncompliance to meet normal standing requirements.<sup>674</sup> Congress might provide that any citizen may sue a federal agency or official who refuses to comply with an "invalid" law, with a victorious plaintiff entitled to a cash bounty, as well as costs and attorneys fees.<sup>675</sup>

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directly responsible for failing to honor an allegedly unconstitutional law, Congress should expressly authorize such suits by statute. *See Dalton*, 114 S. Ct. at 1728 ("[O]ur conclusion that judicial review is not available . . . follows from our interpretation of an Act of Congress . . ."); *Franklin*, 112 S. Ct. at 2775 ("We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion.").

672. These suits differ from the damages remedy discussed above in two respects. First, the purpose of the declaratory or injunctive action is to prevent a federal officer from continuing to violate the law; no damages are sought. Second, it is a complete defense to this suit that the law is invalid. Thus, in contrast to the damages remedy, these actions are likely to resolve the issue of the law's constitutionality. A damages action is unlikely to yield such a ruling because to prevail, a defendant must show that all four conditions of noncompliance were met. In many instances a court could dispose of the case by finding that defiance was unnecessary to securing judicial review, or that the President did not exhaust legislative avenues of redress, thereby avoiding the question of whether the law was constitutional.

673. Under existing law, even a prevailing plaintiff would not necessarily recover attorneys fees in an action of this type. *See* 28 U.S.C. §§ 2412(b), 2412(d)(1)(A) (1988); *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102, 1115-26 (9th Cir. 1988), *withdrawn in part*, 893 F.2d 205 (9th Cir. 1989). Because the goal is to bring the constitutional issue before the courts, a plaintiff who accomplishes this by bringing a nonfrivolous action should recover attorneys fees even if the statute is held to be valid. Without such a provision, potential plaintiffs might not risk suit, particularly given the uncertainty that surrounds most constitutional issues. To further discourage executive officials from carrying out presidential directives to defy the law, such fees might be paid out of funds appropriated for the department or agency in question. *See* Equal Access to Justice Act, 28 U.S.C. § 2412(d)(4) (1988) (attorneys fees payable from agency appropriations). Congress might also provide that actions of this type shall not be dismissed on discretionary grounds such as ripeness or exhaustion of remedies. *See* CHEMERINSKY, *supra* note 663, at 98-109; TRIBE, *supra* note 385, at 77-82.

674. This was probably true, for example, of Woodrow Wilson's refusal to terminate certain treaties, and of Jimmy Carter's decision to close seven protected U.S. consulates. *See supra* text accompanying notes 423-424, 472.

675. The modern Supreme Court has rejected the citizen suit even where it has been authorized by Congress. *See, e.g.,* *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974); *Whitmore v. Arkansas*, 495 U.S. 149, 160 (1990); *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2142-46 (1992). Yet the Court has noted that the defect in such actions is that plaintiff is "seeking relief that no more directly and tangibly benefits him than it does the public at large . . ." *Id.* at 2143. *See also Ex parte Levitt*, 302 U.S. 633, 634 (1937); *United States v. Richardson*, 418 U.S. 166, 171, 176-77 (1974). By awarding a cash bounty to a successful plaintiff, her interest in the outcome of the case becomes tangible and distinctive. The Court in *Lujan* acknowledged that "providing a cash bounty for the



Judicial review could be further facilitated if Congress were to authorize its individual members to challenge executive defiance of "unconstitutional" laws.<sup>676</sup> While standing may be statutorily conferred only on those who have suffered a "distinctive concrete harm,"<sup>677</sup> this requirement would be met here. When the Executive

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victorious plaintiff" will "create[ ] a concrete private interest in the outcome of a suit." 112 S. Ct. at 2143. Though the Court spoke of a cash bounty in the context of "a suit against a private party," the defendant's identity does not alter plaintiff's interest in the outcome of the case. The Court has indicated that its antipathy to citizen suits also stems from a separation of powers concern that federal judges not "become virtually continuing monitors of the wisdom and soundness of Executive action," *id.* at 2145 (internal quotation marks and citations omitted), but it has recognized that judges may oversee and compel executive compliance with the law in cases where plaintiff has met the concrete injury requirement, *id.* at 2137-42, as is the case when a cash bounty is at stake. See Sunstein, *supra* note 375, at 231-34 (urging use of cash bounties to create standing in the wake of *Lujan*). This remedy builds directly on early American precedents allowing "stranger suits" and "informers' actions," in which citizens who lacked a direct personal stake were allowed to sue government officials on behalf of the public to enforce compliance with the law. Sunstein, *supra* note 375, at 170-79; Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1394-1417 (1988); Raoul Berger, *Standing to Sue in Public Actions: Is It a Constitutional Requirement*, 78 YALE L.J. 816 (1969); Louis L. Jaffe, *Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265, 1269-82 (1961). There is probably no need in such actions to award plaintiffs attorneys fees regardless of the outcome of the suit, for the promise of a bounty and the fact that the class of potential plaintiffs includes millions of people virtually assure that someone will sue. As in the private action for declaratory and/or injunctive relief, Congress might provide that any bounty or attorneys fees be paid from funds allocated to the offending executive department or agency.

676. The Supreme Court has not yet ruled on the propriety of congressional standing. See, e.g., *Burke v. Barnes*, 479 U.S. 361, 364 n.\* (1987) (assuming "*arguendo*, that a House of Congress suffers a judicially cognizable injury when the votes it has cast . . . have been nullified by action on the part of the Executive Branch"); *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) ("We . . . need not consider the standing issue as to . . . Members of Congress" because others have standing.); *INS v. Chadha*, 462 U.S. 919, 929-30 n.5 (1983) (ruling that the House and Senate were proper parties to defend the validity of a statute, but without addressing the standing issue); *Pressler v. Blumenthal*, 434 U.S. 1028, 1028-29 (1978) (Rehnquist, J., concurring) (Summary affirmance of a district court decision dismissing suit by Member of Congress on the merits could either reflect the Court's agreement with the ruling on the merits or "our conclusion that appellant lacked standing to litigate the merits . . ."). See generally, Brady, *supra* note 145, at 985-89; Jonathan Wagner, Note, *The Justiciability of Congressional-Plaintiff Suits*, 82 COLUM. L. REV. 526 (1982); Raul R. Tapia et al., Note, *Congress Versus the Executive: The Role of the Courts*, 11 HARV. J. ON LEGIS. 352 (1974); CHEMERINSKY, *supra* note 663, at 90-95.

677. *Lujan*, 112 S. Ct. at 2145 (Congress may not "convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts . . ."). Prior to *Lujan*, the enactment of a statute conferring standing sufficed to allow those parties to sue. *Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("The . . . injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . .'" (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973))); *Ely, supra* note 520, at 1413. Once the injury requirement was thus met, "persons to whom Congress has granted a right of action . . . may have standing to seek relief on the

suspends an allegedly invalid law, it causes unique harm to Senators and Representatives by undermining their vote as legislators.<sup>678</sup> Congress might also provide that the House or the Senate may permit suit to be brought on behalf of either body<sup>679</sup> for the purpose of challenging the President's refusal to honor an allegedly "unconstitutional"

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basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim." *Warth*, 422 U.S. at 501.

678. Lower federal courts have held that Members of Congress have standing to challenge presidential conduct that has the effect of nullifying or denying their legislative vote. *See, e.g.*, *Dellums v. Bush*, 752 F. Supp. 1141, 1147-48 (D.D.C. 1990); *Goldwater v. Carter*, 617 F.2d 697, 702 & n.12 (D.C. Cir.) (en banc) (distinguishing between a "past vote" and a right to vote in the future), *vacated on other grounds*, 444 U.S. 996 (1979); *Kennedy v. Sampson*, 511 F.2d 430 (D.C. Cir. 1974); *see also* *Ely*, *supra* note 520, at 1412-13; *Brady*, *supra* note 145, at 986-89; *TRIBE*, *supra* note 385, at 150-54. Courts have held that members of Congress lack standing to challenge executive improprieties in the interpretation or administration of a statute. *See, e.g.*, *Daughtrey v. Carter*, 584 F.2d 1050, 1057-58 (D.C. Cir. 1978); *Harrington v. Bush*, 553 F.2d 190, 213-15 (D.C. Cir. 1977).

A President's refusal to honor an "unconstitutional" law undermines a legislator's vote in two senses. First, it amounts to an absolute veto, depriving members of their vote to override the President's action. *See* *Sidak & Smith*, *supra* note 9, at 454. Such action is technically distinct from a formal veto in that the Executive may later decide to enforce the provision; moreover, the refusal is not subject to override by Congress and is often applied only to parts of a bill. Yet a Member of Congress may still claim that presidential action having the same effect as a veto must comport with Art. I, §7 procedures, and that the failure to do so causes her an injury that is distinct from that suffered by others. Second, the flat refusal to comply with a statute is tantamount to a unilateral repeal, denying Members of Congress their vote on the question of rescinding the measure. *See* *GAO Bid Protest Hearings*, *supra* note 9, at 51 (statement of Eugene Gressman). While this is not literally a repeal, because the President could later decide to enforce the provision, the practical effect is the same. However, one court has held that while congressional plaintiffs have standing to sue the Executive for a declaratory judgment that a law is constitutional, if the law is upheld, they lack standing to obtain an injunction forcing compliance with the law, on the ground that their "interest in its enforcement is no more than that of the average citizen." *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 787 F.2d 875, 888 (3d Cir. 1986).

679. Congress has authorized the Comptroller General to bring a civil action in federal court against an executive officer or agency to force the expenditure of funds the President has impounded. 2 U.S.C. §687 (1988). It has also permitted Senate Legal Counsel "to intervene or appear as amicus curiae in the name of the Senate . . . in any legal action . . . in which the powers and responsibilities of Congress under the Constitution . . . are placed in issue," but this provision does not permit suit to be initiated by the Senate. 2 U.S.C. § 288e(a) (1988). The House has employed counsel on a case-by-case basis to represent it as an intervenor or amicus. *Brady*, *supra* note 145, at 971 n.3.

Even if both Houses are given standing to sue, it is still important that individual members also have standing, as it may be difficult to persuade a majority of either House to confront the Executive if the President's party controls Congress or if the issue is politically charged. *See* *Ely*, *supra* note 520, at 1412; *Brady*, *supra* note 145, at 996-97 n. 94. The Senate thus took no action on a recommendation that it intervene in *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir.), *vacated*, 444 U.S. 996 (1979), a suit that was filed by a number of individual Senators.

law.<sup>680</sup> Though congressional standing is not free of difficulties,<sup>681</sup> it would be well worth exploring in this setting.

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680. For standing to exist, it is necessary to show that the House or Senate suffered a distinct harm. This requirement is met in two respects. See Brady, *supra* note 145, at 986-89. First, when the Executive disregards all or part of a law, it nullifies the vote of both Houses of Congress, each of which gave its corporate approval to the measure. In at least one case where individual Senators claimed standing to challenge presidential action that allegedly nullified their votes, the Justice Department conceded that the Senate as a whole would have standing in such a case. Kennedy v. Sampson, 511 F.2d 430, 434 & n.13 (D.C. Cir. 1974). Second, such noncompliance represents an attempt by the Executive "to increase its own powers at the expense of the [Legislative] Branch," Morrison v. Olson, 487 U.S. 654, 694 (1988), thereby injuring the House and Senate in their institutional capacities. In INS v. Chadha, 462 U.S. 919, 929-30 n. 5 (1983), the Court noted and did not question the fact that the House and Senate were allowed to intervene as parties in a suit challenging the validity of a legislative veto. The injury there was direct, for if the law were struck down, each House would lose the veto conferred on it by the act. Yet the Court suggested that a broader standing principle was at work, stating that "Congress is the proper party to defend the validity of a statute when [the government] agrees with plaintiffs that the statute is inapplicable or unconstitutional." *Id.* at 940. If the House and Senate have standing as defendants to protect a law against a claim that it is unconstitutional, they should also have standing to protect that law as plaintiffs if the Executive has refused to honor it. The lower federal courts have thus allowed the House and Senate to intervene as plaintiffs in suits challenging executive refusals to comply with an allegedly unconstitutional law. See, e.g., Ameron v. U.S. Army Corps of Eng'rs, 607 F. Supp. 962, 963 (D. N.J. 1985), *aff'd*, 787 F.2d 875, 880 (3d Cir.), *aff'd*, 809 F.2d 979 (3d Cir. 1986), *cert. dismissed*, 488 U.S. 918 (1988) (suit to compel compliance with Competition in Contracting Act); Lear Siegler, Inc. v. Lehman, 842 F.2d 1102, 1105 (9th Cir. 1988), *withdrawn in part on other grounds*, 893 F.2d 205 (9th Cir. 1989) (same).

681. There are several potential obstacles to suits by members of Congress. One is the doctrine of equitable or remedial discretion under which courts will dismiss a suit if "a congressional plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute." Riegle v. Federal Open Market Comm., 656 F.2d 873, 881 (D.C. Cir. 1981). See CHEMERINSKY, *supra* note 663, at 93-94. This should pose no problem here, for even if a legislator could persuade Congress to reenact (perhaps over the President's veto) the same statute that the Executive refused to enforce, the President would presumably still refuse to comply, again claiming that the law was unconstitutional. See Ely, *supra* note 520, at 1414-16.

A second doctrine, ripeness, should not be the obstacle here that it has been in some other suits by members of Congress. See, e.g., Dellums v. Bush, 752 F. Supp. 1141, 1149-52 (D.D.C. 1990) (dismissing suit by members of Congress to compel presidential compliance with War Powers Resolution as not ripe because neither Congress nor the President had taken formal action to create a constitutional impasse); Goldwater v. Carter, 444 U.S. 996, 997-98 (1979) (Powell, J., concurring) (dismissing suit by members of Congress challenging President's unilateral termination of a treaty as not ripe because neither House nor Senate had officially rejected the President's claimed authority). By contrast, the posture of the cases at issue here assures that they are ripe because Congress and the President will have formally confronted each other on the issue before the court, *i.e.*, the validity of the law in question. Congress, by approving the law, implicitly concluded that it was constitutional. Legal Tender Cases, 79 U.S. (12 Wall.) 457, 531 (1871); PAUL BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 44-45 (1975). The President, in refusing to comply with the measure, has pronounced it unconstitutional. Where the "political branches [have thus]

## Conclusion

In recent years, American Presidents have asserted that they have the right to disregard any statute that they believe to be unconstitutional. Through these claims, the White House seeks to resurrect for its own use the royal prerogative of suspending the laws, a prerogative that was abolished in England, after centuries of struggle, by the Bill of Rights of 1689.

The Constitution does not expressly deny this authority to the President, yet it is clear that the Founders did not intend to confer such a power on the Chief Executive of the United States. The President's duty to insure that the laws are "faithfully executed," the assumption in Article I, §9 that the suspending power belongs to Congress, the Convention's decision to give the President a qualified rather than an absolute veto, the Framers' concept of the "executive power," and the fact that not even the Antifederalists insisted upon including a ban against the suspending power in the Bill of Rights, all support the conclusion that the Constitution did not give the Executive a power to suspend the laws.

For nearly three-quarters of a century, Presidents respected this original understanding; while the Executive at times suggested that a statute was unconstitutional, it nevertheless performed its duty faithfully to execute the law. During the ensuing years, Presidents occasionally refused to carry out an "unconstitutional" law. Yet as recently as 1971, such noncompliance had occurred on only 10 occasions. In the last two decades, however, both the rhetoric and the reality of presidential defiance have escalated dramatically. From

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reach[ed] a constitutional impasse," *Goldwater v. Carter*, 444 U.S. 996, 997-98 (1979) (Powell, J., concurring), a case is ripe.

Finally, while suits by Congress or its Members against the executive branch literally involve interbranch disputes, they should rarely present a political question. The issue before the court will not be whether a President may refuse to comply with an allegedly unconstitutional law, but rather the more common one of whether the law the Executive has refused to honor is constitutional. *See supra* text accompanying notes 652-653. The issue is identical to that which would be posed if the case had been filed by a private plaintiff. The identity of the parties, while relevant to the existence of standing, in no way alters the nature of the question presented. *See* *Tapia et al.*, *supra* note 676, at 398-99; Douglas R. Prince, Note, *Should Congress Defend Its Own Interests Before the Courts*, 33 *STAN. L. REV.* 715, 730-32 (1981). Thus, if a suit by a defense contractor to compel enforcement of the Competition in Contracting Act does not pose a political question, *see* *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102 (9th Cir. 1988), *withdrawn in part*, 893 F.2d 205 (9th Cir. 1989) (adjudicating claim by private defense contractor against Secretary of Navy to compel compliance with Competition in Contracting Act), neither should the same suit filed by a Member of Congress. Political questions may occasionally be involved, but no more often than in ordinary constitutional litigation.

1789 through 1971, Presidents objected to the validity of roughly 80 statutes. In the 20-year period between 1971 and 1991 they challenged the constitutionality of more the 250 laws. Of the 20 incidents of actual defiance that occurred in the period from 1789 to 1981, half occurred during the final ten years.

If the President is ever justified in ignoring an allegedly unconstitutional law, it is only in rare cases where a statute is patently invalid and where noncompliance is the only way to bring about judicial review. Few of the historical incidents of defiance satisfied these conditions.

Unless Congress takes steps to check presidential refusals to honor "unconstitutional" laws, we may find that through a subtle process of accretion, the Executive has acquired a suspending power that is both selective and absolute. There are several avenues Congress might pursue, including: providing the Executive with improved means of obtaining judicial review as an alternative to defiance, discouraging lower level executive officials from carrying out directives to ignore the law, and increasing access to the courts for those who wish to challenge noncompliance when and if it occurs.

The Constitution gives to Congress the power to suspend the laws; if a statute is to be abrogated, the same procedure must be followed that led to its enactment. The Executive's efforts to usurp this power will surely continue unless Congress takes steps to protect its authority. As Justice Jackson once wrote, "If not good law, there was worldly wisdom in the maxim attributed to Napoleon that 'The tools belong to the man who can use them.' We may say that power . . . belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers."<sup>682</sup>

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682. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).