

# William & Mary Bill of Rights Journal

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Volume 16 (2007-2008)  
Issue 1 *Symposium: The Last Word? The  
Constitutional Implications of Presidential  
Signing Statements*

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Article 8

October 2007

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Nelson Lund, *Presidential Signing Statements in Perspective*, 16 Wm. & Mary Bill Rts. J. 95 (2007), <https://scholarship.law.wm.edu/wmborj/vol16/iss1/8>

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# PRESIDENTIAL SIGNING STATEMENTS IN PERSPECTIVE

Nelson Lund\*

Presidential signing statements that object to putatively unconstitutional statutory provisions, or interpret them to avoid constitutional difficulties, have long been common and occasionally controversial. After an outburst of sensational journalism last year,<sup>1</sup> the American Bar Association (ABA) followed up with a report accusing President Bush of using these statements to threaten what it called “the rule of law and our constitutional system of separation of powers.”<sup>2</sup> In this brief symposium contribution, I hope to indicate why the ABA’s position is analytically untenable and irresponsibly hyperbolic, and also to raise a more interesting set of questions about the similarities and differences between the ways that courts and Presidents do and should go about the task of interpreting the Constitution and laws.

## I. THE ABA REPORT

The key conclusion in the ABA Report is that the President has what the authors call a “constitutional obligation to veto *any* bill that he believes violates the

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\* Patrick Henry Professor of Constitutional Law and the Second Amendment, George Mason University School of Law. This piece is based on remarks delivered on February 3, 2007, at an exceptionally well-organized symposium—“The Last Word? The Constitutional Implications of Presidential Signing Statements”—co-sponsored by the *William & Mary Bill of Rights Journal* and the Institute of Bill of Rights Law. For helpful comments on an earlier draft, I am grateful to Michelle Boardman, John O. McGinnis, Lee Liberman Otis, and Michael B. Rappaport.

<sup>1</sup> See Charlie Savage, *Bush Challenges Hundreds of Laws*, BOSTON GLOBE, April 30, 2006, at A1.

<sup>2</sup> AM. BAR ASS’N, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE 5 (2006), available at [http://www.abanet.org/op/signing-statements/aba\\_final\\_statements\\_recommendation-report\\_7-24-06.pdf](http://www.abanet.org/op/signing-statements/aba_final_statements_recommendation-report_7-24-06.pdf). The passage from which the quoted words are drawn purports to warn the reader not to view the Report as an attack on the current President, but I do not believe that the document as a whole can reasonably be viewed as anything other than exactly that. *Id.* The Report’s description of President Bush’s practices is noticeably more censorious than its description of practices in previous administrations. See *id.* at 7–18. And the discussion of the current administration ends with several inflammatory quotations from a “learned commentator” who must be among the most uninhibited critics of Bush’s use of signing statements. See *id.* at 18 (quoting Phillip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 PRESIDENTIAL STUD. Q. 515, 530 (2005)).

The ABA House of Delegates adopted the Report’s recommendations. *The Clock is Ticking: House Decides Time is Right to Oppose ‘Misuse’ of Presidential Signing Statements*, A.B.A. J., Oct. 2006, at 59.

Constitution in whole *or in part*.”<sup>3</sup> When a President signs a bill but announces that he regards some provision in it as unconstitutional and unenforceable, or interprets the provision in a manner inconsistent with what the authors call “the will of Congress,” the Report contends that he is exercising an unconstitutional line-item veto.<sup>4</sup> The authors accuse President Bush of engaging in this lawless behavior on a massive scale.<sup>5</sup>

The Bush administration counters that the President is obliged to defend the Constitution against Congress and stresses its claim that Bush is not behaving differently in any significant way from many of his predecessors, including Bill Clinton.<sup>6</sup> This claim appears plausible, and it may well be true, but it is not easy to assess exactly how much continuity actually exists.<sup>7</sup> Comparing the Bush record with that of previous Presidents is a laborious undertaking, and some important data may not be publicly available.

Absent a detailed study of the evidence, one might be tempted to dismiss the Bush administration’s protestations as a lot of patently self-serving rhetoric, especially when one looks at the ABA Report’s star-studded roster of signatories: the dean of the Yale Law School; a former dean of Stanford Law School; a former chief judge of the United States Court of Appeals for the District of Columbia Circuit; a former Director of the FBI, who is also a former chief judge of a federal district court; a Harvard Law School professor; a professor from the George Washington University Law School; and a lecturer at Princeton University; along with a number of prominent practitioners and pundits.<sup>8</sup> Could so many highly regarded representatives of the elite legal establishment be completely off base? If so, is it perhaps possible that the ABA Report was driven primarily by political animus against Bush rather than by any real study of the Constitution or concern for the rule of law?

Maybe.<sup>9</sup> It is not just Bush administration spokesmen and their conservative allies<sup>10</sup> who have disputed the ABA Report. A number of prominent Democrats have

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<sup>3</sup> AM. BAR ASS’N, *supra* note 2, at 22 (emphasis added).

<sup>4</sup> *Id.* at 20, 22.

<sup>5</sup> *See id.* at 14–18.

<sup>6</sup> *The Use of Presidential Signing Statements: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Michelle Boardman, Deputy Assistant Att’y Gen.) [hereinafter Boardman Statement]; *Presidential Signing Statements Under the Bush Administration: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. (2007) (statement of John P. Elwood, Deputy Assistant Att’y Gen.).

<sup>7</sup> For a good discussion of these points, see Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 321–34 (2006).

<sup>8</sup> For the names and biographical sketches of the signatories, see AM. BAR ASS’N, *supra* note 2, at 29–34.

<sup>9</sup> For a thoughtful discussion of the mistakes that can arise when one carelessly assumes that public statements by legal scholars necessarily reflect either actual expertise or dispassionate analysis, see Neal Devins, *Bearing False Witness: The Clinton Impeachment and the Future of Academic Freedom*, 148 U. PA. L. REV. 165 (1999).

<sup>10</sup> *See, e.g.*, Douglas W. Kmiec, *The Separation of Powers: Hamdan v. Rumsfeld—The Anti-Roberts*, 34 PEPP. L. REV. 573, 585–90 (2007); Timothy E. Flanigan et al., *Separation*

attacked the Report as well—including Laurence Tribe and several former Clinton administration officials, the most prominent of whom is Walter Dellinger.<sup>11</sup> According to these critics, the ABA is fundamentally misguided in its claim that no President is permitted by the Constitution to declare that he will refuse to enforce unconstitutional provisions in bills that he signs into law. These critics regard the ABA Report's focus on signing statements as an attack on what Professor Tribe calls a "phantom target."<sup>12</sup>

So far as I am aware, the signatories of the ABA Report have not pointed out any flaws in the arguments of these Democratic critics. And I think it is safe to say that when Professors Tribe and Dellinger feel obliged to denounce an attack on the Bush administration, that attack probably occupies a region of ideological space populated by very few self-evident truths.<sup>13</sup>

The dominating error in the ABA Report, in my view and in that of the Democratic critics, is the notion that the President must either veto a bill that contains even one minor provision that he regards as unconstitutional or enforce the objectionable provision.<sup>14</sup> Which clause of the Constitution imposes this choice on the President? The ABA Report suggests two answers, neither of which can withstand scrutiny.

First, the Report appears to characterize a President's refusal to enforce unconstitutional provisions in statutes signed by himself as the exercise of a line-item veto and thus a violation of the Presentment Clause.<sup>15</sup> The Presentment Clause, however,

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*of Powers*, ABA Style: "Signing Statements" Report at Odds with Constitution, WASH. LEGAL FOUND. LEGAL BACKGROUNDER, Sept. 22, 2006, available at <http://www.wlf.org/upload/092206flanigan.pdf>; THE FEDERALIST SOC'Y, PRESIDENTIAL SIGNING STATEMENTS (2006), available at [http://www.fed-sac.org/doclib/20070321\\_PresidentialSigningStatements.pdf](http://www.fed-sac.org/doclib/20070321_PresidentialSigningStatements.pdf); Ed Whelan, *ABA Report on Presidential Signing Statements: A Critique*, NAT'L REV. BENCH MEMOS, July 24, 2006, <http://bench.nationalreview.com/post/?q=Mzk2NDY0OWY2YTdjZTYwZWVlMDg1MzJlMzljYTlhNDY=>.

<sup>11</sup> See Walter Dellinger, Op-Ed, *A Slip of the Pen*, N.Y. TIMES, July 31, 2006, at A17; Posting of Martin Lederman, *Untangling the Debate on Signing Statements*, to Georgetown Law Faculty Blog, [http://gulcfac.typepad.com/georgetown\\_university\\_law/2006/07/thanks\\_to\\_the\\_p.html](http://gulcfac.typepad.com/georgetown_university_law/2006/07/thanks_to_the_p.html) (July 31, 2006) (post co-written by eight former officials in the Department of Justice's Office of Legal Counsel); Posting of Laurence Tribe, *Larry Tribe on the ABA Signing Statements Report*, to Balkinization, <http://balkin.blogspot.com/2006/08/larry-tribe-on-aba-signing-statements.html> (Aug. 6, 2006, 8:00 PM).

<sup>12</sup> Tribe, *supra* note 11. Focusing on this "phantom" creates a distraction from what the Democratic critics regard as the real problem, which is that the *substance* of some of Bush's interpretations of the Constitution—especially those involving the scope of the President's constitutional powers—is, in their view, fundamentally and dangerously wrong.

<sup>13</sup> Whether the Democrats who have attacked the ABA Report are also right in their substantive disagreements with the Bush administration is, of course, a completely different question. Addressing that question would require an extended and detailed examination of the substantive issues involved, which I will not attempt here.

<sup>14</sup> See AM. BAR ASS'N, *supra* note 2, at 23–24.

<sup>15</sup> See *id.* at 18 (citing U.S. CONST. art. I, § 7, cl. 2). I agree with the ABA Report's claim that the line-item veto is unconstitutional. See Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 456 n.46 (1993). Unfortunately, the Report chose

simply gives the President the option of returning an unsatisfactory bill to Congress for reconsideration, along with two other options, namely approving the bill or doing nothing.<sup>16</sup> By its terms, the Presentment Clause imposes no obligation to veto any bill, whether for constitutional or policy reasons, and it says nothing at all about the existence, scope, or nature of a President's obligations with respect to the enforcement of enacted statutes.<sup>17</sup> The Presentment Clause does not tell us that signing a bill and then refusing to enforce an unconstitutional provision is an illegal line-item veto any more than it tells us that refusing to enforce an unconstitutional statute is an illegal executive repeal.

In what appears to be a second effort to ground its conclusions in the Constitution's text, the ABA Report proclaims, "[b]ecause the 'take care' obligation of the President requires him to faithfully execute *all laws*, his obligation is to veto bills he believes are unconstitutional. He may not sign them into law and then emulate King James II by refusing to enforce them."<sup>18</sup> Leaving aside the overwrought comparison of American Presidents to a deposed British monarch,<sup>19</sup> this statement confuses questions about the President's obligation to execute the laws with the question of whether he is obligated to veto bills he believes are unconstitutional. Like the Presentment Clause, the Take Care Clause by its terms imposes no obligation on the President to veto any bill.<sup>20</sup> Nor does the Take Care Clause purport to determine what the President should do when one law (say, a statute) conflicts with another (such as the Constitution).

The ABA Report's claim that Presidents are constitutionally required faithfully to execute *all laws*, moreover, has some strange implications. Were Presidents Adams and Jefferson, for example, constitutionally obligated to enforce the Sedition Act of 1798 against critics of the government? Was President Andrew Johnson constitutionally

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to rely for this proposition on the Supreme Court's dubious opinion in *Clinton v. City of New York*, 524 U.S. 417 (1998), which in my view was convincingly refuted by the dissenting opinions (especially Justice Breyer's). It is possible to imagine a dishonest President attempting to approximate a line-item veto by pretending to have constitutional objections to a statutory provision to which he actually objects only on policy grounds. It is unlikely that any disinterested observer would defend such conduct, but the ABA Report is clearly not addressed to this special, and one hopes only hypothetical, case.

<sup>16</sup> Doing nothing may result either in the bill becoming law or being subjected to the so-called pocket veto. *See Pocket Veto Case*, 279 U.S. 655 (1929) (defining a pocket veto as one in which the President neither signs nor vetoes the bill, and the bill does not become law because the congressional term ends within ten days of presentment).

<sup>17</sup> *See* U.S. CONST. art. I, § 7, cl. 2.

<sup>18</sup> AM. BAR ASS'N, *supra* note 2, at 19 (emphasis added); *see also* U.S. CONST. art. II, § 3 (requiring that the President "shall take Care that the Laws be faithfully executed").

<sup>19</sup> For a useful discussion comparing the prerogative power to suspend statutes that British monarchs once claimed with the American practice of presidential refusals to enforce some statutes on constitutional grounds, *see* J. Randy Beck, Book Review, 16 CONST. COMMENT. 419 (1999) (reviewing CHRISTOPHER N. MAY, *PRESIDENTIAL DEFIANCE OF "UNCONSTITUTIONAL" LAWS: REVIVING THE ROYAL PREROGATIVE* (1998)).

<sup>20</sup> *See* U.S. CONST. art. II, § 3.

obligated to comply with the Tenure of Office Act? The ABA Report appears to be quite equivocal about such issues. Contradicting the statement about “all laws” quoted above,<sup>21</sup> the Report elsewhere leaves open the possibility that it would be permissible “if the President, *in the absence of a signing statement*, nevertheless fails to enforce a law enacted under his or an earlier administration.”<sup>22</sup> Do the authors really mean to suggest that it is impermissible for the President to say that he has the right to refrain from enforcing a statute, even if he never exercises that right, but that it is permissible for him actually to refuse to enforce a statute that he signed so long as he has not announced that he is going to do so in a signing statement? If the ABA Report did not mean to adopt so absurd a position, it failed to explain how the inference can be avoided.<sup>23</sup>

Furthermore, do the authors of the ABA Report truly believe that the President must “veto *any* bill he believes would violate the Constitution in *any* respect”?<sup>24</sup> As Edward Hartnett points out, this seems to mean that if President Washington believed that section 13 of the Judiciary Act of 1789 was unconstitutional in certain applications, as *Marbury* later held,<sup>25</sup> he was required to veto the bill.<sup>26</sup> The Report does refer at one point to what it calls the “rare possibility” of urgent legislation containing an unconstitutional provision.<sup>27</sup> How rare? The Report’s only example, given immediately after the allusion to a “rare possibility,” consists of a reference to “the many bills” containing unconstitutional legislative vetoes.<sup>28</sup> Whatever its authors mean by “rare,” the ABA Report recommends that in such circumstances the President and Congress cooperate “in obtaining timely judicial review regarding the provision in dispute.”<sup>29</sup>

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<sup>21</sup> AM. BAR ASS’N, *supra* note 2, at 19.

<sup>22</sup> *Id.* at 27 (emphasis added); *cf. id.* at 20 (urging President Bush to “cease the practice of using presidential signing statements to *state his intention* to disregard or decline to enforce a law or to interpret it in a manner inconsistent with the will of Congress” (emphasis added)).

<sup>23</sup> Nor was I able to advance my understanding of this aspect of the ABA Report during a discussion I had at the Symposium with Mark Agrast, one of the Report’s signatories. See Podcast: William & Mary Bill of Rights Journal Symposium: The Last Word? Constitutional Implications of Presidential Signing Statements (Feb. 3, 2007) (<http://www.wm.edu/so/borj/symposium/symposium07.html>) [hereinafter Symposium Podcast] (colloquy beginning at about 1:08:40).

<sup>24</sup> AM. BAR ASS’N, *supra* note 2, at 22 (emphasis added).

<sup>25</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). President Washington, I should note, could easily have believed that section 13, properly interpreted, was perfectly consistent with Article III of the Constitution, properly interpreted.

<sup>26</sup> Edward A. Hartnett, *Modest Hope for a Modest Roberts Court: Deference, Facial Challenges, and the Comparative Competence of Courts*, 59 SMU L. REV. 1735, 1747 & n.67 (2006).

<sup>27</sup> AM. BAR ASS’N, *supra* note 2, at 23.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* As discussed below, the Supreme Court has declared legislative vetoes unconstitutional, yet Congress continues to pass “many bills” containing these devices. The authors of the ABA Report do not explain why they think, or appear to think, that the President is required

The ABA Report's reference to judicial review as a solution to the problem of disagreements between Congress and the President brings us to the questions that I would like to examine a little more closely. Do Presidents approach the task of interpreting the Constitution in a way that is fundamentally different from the approach of the courts? And should they?

## II. PROFESSOR RAPPAPORT'S OBJECTIONS TO CONSTITUTIONAL SIGNING STATEMENTS

Before taking up those questions, I should note that it is possible to criticize Presidents for the way they have used signing statements without treating judicial review as the best solution to serious inter-branch disputes. At the Symposium, Professor Michael Rappaport argued that it is always unconstitutional for a President to sign a bill and then refuse to enforce it.<sup>30</sup> As I understood him, Professor Rappaport began with the premise that a President can refuse to enforce a statute only if *he believes* that the Constitution *forbids* him to do so.<sup>31</sup> Given that premise, Professor Rappaport concluded that it is inconsistent for a President to approve a bill creating a law that he believes it would be illegal for him to enforce.<sup>32</sup>

This is an interesting argument, one of whose most salient features is how narrow it is. On the one hand, it seems to leave open the possibility that the Constitution does not in truth compel the President to refuse to enforce or comply with statutes that he believes are unconstitutional. But if a President is mistaken in believing he is forbidden to enforce certain statutes, it is hard for me to see what would be gained by demanding that he make other decisions consistent with this mistaken belief. On the other hand, Professor Rappaport's argument leaves Presidents free to refuse enforcement of unconstitutional statutes that they did not sign, perhaps including statutes that they allowed to be enacted without their signature. But why should it be important to distinguish with respect to enforcement or non-enforcement among statutes depending on who signed them or what procedural route they took through the formalities of enactment? I also think that Professor Rappaport's argument must leave a President free to enforce a statute he approved in cases where he recognizes the constitutional problem with the statute only after he has signed it into law. Here again, I cannot see why an identical statute should be enforceable or not depending on whether a President recognizes its unconstitutionality before or after he signs it into law.

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to ask the courts to repeat themselves over and over again about the unconstitutionality of the legislative veto.

<sup>30</sup> See Michael B. Rappaport, *The Unconstitutionality of "Signing and Not Enforcing,"* 16 WM. & MARY BILL RTS. J. 113 (2007); see also Michael B. Rappaport, *The President's Veto and the Constitution*, 87 NW. U. L. REV. 735, 771-76 (1993).

<sup>31</sup> Rappaport, *The Unconstitutionality of "Signing and Not Enforcing,"* *supra* note 30, at 114.

<sup>32</sup> *Id.* at 119-20.

Furthermore, even if one accepted the claim that it is unconstitutional for a President to sign a bill that he believes is unconstitutional, it does not follow that it is unconstitutional for him to refuse to enforce it. If the Constitution forbids the President to enforce an unconstitutional statute, that command could not be revoked by virtue of the President's previous constitutional mistake in signing the bill. The second wrong would not make the first one right. And the first wrong could not make the second one obligatory. Thus, the putatively unconstitutional initial mistake would seem to be at worst a harmless error as far as that President's behavior is concerned.

Thus, Professor Rappaport's claim is extremely narrow: a President who believes that it is unconstitutional for him to enforce unconstitutional statutes is forbidden by the Constitution to sign any bill that he believes he will be required on that ground to refrain from enforcing. Notwithstanding how narrow this conclusion is, it seems to me to be mistaken. A President could take the plausible formalist position that an unconstitutional statutory provision is not a law no matter who may have purported to enact or approve it. A President's signature on a piece of paper purporting to create an unconstitutional statute would then have no necessary legal effect, and the President would, in my view, be guilty of no inconsistency if he announced in a signing statement that some provision of a bill he signed was unconstitutional and therefore a nullity.<sup>33</sup>

### III. JUDICIAL REVIEW AND CONSTITUTIONAL ACCOMMODATIONS

Reflecting what I think is the conventional view, the ABA assumes that the President and the courts have fundamentally different roles in dealing with constitutionally problematic statutes. Its report proclaims, as though rehearsing the obvious: "Definitive constitutional interpretations are entrusted to an independent and impartial Supreme Court, not a partisan and interested President. That is the meaning of *Marbury v. Madison*."<sup>34</sup> This faith in judicial virtue, or at least in the virtue of judicial supremacy, may explain why the authors of the Report are so offended by the thought that the President might have what they call "the last word" on which statutes will go unenforced because they are unconstitutional.<sup>35</sup>

Things cannot be quite this simple, and the conventionally reflexive invocation of judicial supremacy deserves closer scrutiny than it sometimes receives. The

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<sup>33</sup> Professor Rappaport also suggested that practical considerations support a rule requiring Presidents to veto every bill that they believe contains an unconstitutional provision. *See id.* at 126–27. For reasons that I will sketch out later in Part III, I do not agree that practical considerations justify a blanket rule of this type.

<sup>34</sup> AM. BAR ASS'N, *supra* note 2, at 23.

<sup>35</sup> *Id.* at 20; *see also* Richard A. Epstein, *The Problem with Presidential Signing Statements*, CHL TRIB., July 16, 2006, at 5 ("Modern understanding of judicial review requires the executive branch to take its marching orders from the Supreme Court. Signing statements, I fear, could be the opening wedge to a presidential posture that judicial decisions may limit the President's ability to use courts to enforce his policies, but cannot stop him from acting unilaterally.").

Constitution nowhere says that “definitive constitutional interpretations” are entrusted to the Supreme Court. The Constitution nowhere says that only the Court may have “the last word” about the meaning of the Constitution. And there is no reason at all to assume a priori that judges are more impartial and disinterested than Presidents when it comes to deciding how much power they think the Constitution gives them. If anything, the self-evident fact is that Supreme Court Justices are *not* impartial angels incapable of overreaching with respect to their own power.

In any event, the authors of the ABA Report are wrong about *Marbury v. Madison*, which nowhere made the sweeping claim of judicial supremacy attributed to it by the Report.<sup>36</sup> If anything, *Marbury* actually undermines the ABA’s attack on presidential signing statements. The most logically powerful argument for judicial review in *Marbury* is this: faced with a conflict between the Constitution and a statute, courts have no choice except to give effect to the more authoritative of the two laws.<sup>37</sup> That logic applies to the President every bit as much as it applies to the Court.

But perhaps even more significantly, nobody on the Supreme Court has ever actually accepted the implications of *Marbury*’s powerful logic. Any Justice who did so would have to conclude that conflicts between the Constitution and judicial precedent must *always* be resolved by giving effect to the Constitution, not the precedent. After all, if statutes enacted by the people’s representatives are always trumped by the Constitution, it would seem to follow a fortiori that mere judicial opinions—which are not even mentioned in the Supremacy Clause as a source of law<sup>38</sup>—must also be trumped by the Constitution every time. However logically compelling this conclusion may appear to be, I do not believe any Justice has ever accepted it, at least not consistently.

In practice, the Supreme Court has developed a very complex and flexible approach to the exercise of judicial review. There is almost no one who would seriously maintain today that the courts are obliged by the Constitution to give effect to unconstitutional statutes. But it is also true that very few would seriously maintain that courts are *always* obliged to strike down statutes they think are unconstitutional, even in the face of thoroughly settled precedent and notwithstanding the enormous reliance interests that are often based on such precedents.<sup>39</sup>

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<sup>36</sup> The ABA Report could have cited *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) Cooper states that *Marbury* “declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.” Citing *Cooper*, however, would not have made the ABA’s interpretation of *Marbury* less wrong.

<sup>37</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803).

<sup>38</sup> See U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .”).

<sup>39</sup> Cf. Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 194 (2001) (“[Michael Stokes Paulsen] and I are among

Presidents, it seems to me, do and should take the same general position that the courts have taken. In principle, Presidents always have the option of refusing to enforce or comply with statutes they consider unconstitutional. But they are not obliged to ignore or defy *every* such statute, and the same goes for Congress. While its individual members may have a duty to refrain from voting for bills they regard as unconstitutional,<sup>40</sup> the body has no obligation to seek relentlessly to impose its own constitutional views on either of the other branches of the federal government or the states.

One might think that leaving the President, the Court, and Congress with concurrent authority to decide on the meaning of the Constitution is an invitation to constitutional crises and, ultimately, to chaos. History demonstrates that this is not so, and the ABA Report's example of the legislative veto provides a useful illustration.<sup>41</sup>

An early controversy over the legislative veto occurred in 1941 when Congress passed the Lend-Lease bill.<sup>42</sup> This gave the President certain new powers but provided that those powers would terminate if both houses of Congress passed a concurrent resolution declaring that the President no longer needed the powers for the defense of the nation. Attorney General Robert Jackson believed that the provision at issue could be regarded as a perfectly permissible limitation by which the new powers would expire on the contingency of a concurrent resolution, just as new powers can (and indeed in this case did) expire on a certain date. President Roosevelt disagreed, believing the provision authorized the repeal of a statute by concurrent resolution and thus constituted an unconstitutional congressional effort to evade the President's veto power.

Roosevelt badly wanted the new powers conferred by the Lend-Lease bill and did not want to veto it. Furthermore, he was in an awkward political position because the bill's opponents in Congress had claimed the legislative veto made the bill unconstitutional while the President's supporters had taken the opposite position. If Roosevelt had publicized his view of the legislative veto, it would have embarrassed his supporters and given his opponents a political windfall. In the end, the President signed the bill. But he also overruled the Attorney General, signed his own legal opinion declaring the legislative veto unconstitutional, and solved his immediate political problem by keeping this presidential legal opinion a secret.

The subsequent history of the legislative veto reflects continuing disagreements over its constitutionality. Congress continued to include the device in many bills, and Presidents continued to denounce it on constitutional grounds.<sup>43</sup> The Carter and

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the tiny handful of academics who think it is affirmatively unconstitutional for federal courts to rely on precedent in constitutional cases.”).

<sup>40</sup> I express no opinion on this question.

<sup>41</sup> See AM. BAR ASS'N, *supra* note 2, at 9–14.

<sup>42</sup> The story summarized below is told in Robert H. Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353 (1953).

<sup>43</sup> For a review of the history, see Christopher S. Yoo et al., *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601 (2005).

Reagan administrations mounted a legal challenge, which came to fruition when *INS v. Chadha* struck down the legislative veto by a divided vote.<sup>44</sup> Congress, however, has stubbornly refused to accept the Supreme Court's decision and has routinely included legislative veto provisions in bills presented to the President.<sup>45</sup> Presidents, in turn, have refused to accept the views of Congress and have routinely employed signing statements to declare these provisions unenforceable.<sup>46</sup>

Each of the three branches of government has a plausible legal argument to support its position, and each branch has stuck to its guns. And yet, there has been no constitutional crisis, let alone constitutional chaos. Why not? The answer is that all of the actors involved have thought that the issue was important enough that they should not surrender their claims but not so important that they should provoke a serious confrontation.

Let us start with the executive branch. Notwithstanding many presidential declarations that legislative vetoes are legally inoperative, administrations of both parties have almost certainly complied with the overwhelming majority of these provisions.<sup>47</sup> And that should not be surprising when one considers the extremely powerful informal tools that Congress can and does use to enforce its will.<sup>48</sup> Those on the Hill, for their part, have little reason to care overly much what Presidents say about the legislative veto so long as they comply in fact with congressional dictates. And the Justices have been careful, in *Chadha* and elsewhere, to refrain from interfering with the powerful informal mechanisms that Congress routinely uses to enforce the legislative vetoes that it really cares about.<sup>49</sup>

With respect to who gets the "last word" on the meaning of the Constitution and other laws, the simple fact is that each branch of government sometimes gets the last word and sometimes does not. The courts, for example, have all kinds of devices by which they avoid trying to become the last word on everything. Obvious examples include a plethora of doctrines involving such matters as standing, advisory opinions, the political question doctrine (a version of which can be found in *Marbury* itself),<sup>50</sup>

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<sup>44</sup> 462 U.S. 919 (1983).

<sup>45</sup> See Neal Devins, *How Constitutional Law Casebooks Perpetuate the Myth of Judicial Supremacy*, 3 GREEN BAG 2d 259, 261 (2000) (noting that more than three hundred legislative vetoes have been enacted since *Chadha* was decided).

<sup>46</sup> According to one count, for example, the current President pointed to legislative vetoes in 47 of the first 110 signing statements in which he raised constitutional objections. Boardman Statement, *supra* note 6.

<sup>47</sup> See, e.g., Neal Devins, *Congressional-Executive Information Access Disputes: A Modest Proposal—Do Nothing*, 48 ADMIN. L. REV. 109, 115 (1996).

<sup>48</sup> For a good discussion of congressional enforcement methods, see Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, LAW & CONTEMP. PROBS., Autumn 1993, at 273, 284–91.

<sup>49</sup> See, e.g., *Chadha*, 462 U.S. at 955 n. 19.

<sup>50</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

*Chevron* deference,<sup>51</sup> various decisions involving executive and legislative immunities, and countless rulings that give the so-called political branches broad discretion to decide how far they should go in exercising vaguely worded powers like those conferred in the Sweeping Clause of Article I<sup>52</sup> and the Vesting Clause of Article II.<sup>53</sup>

Presidents have behaved much like the Court, though in a somewhat less conspicuous way. Over the years, the Justice Department has developed an elaborate internal jurisprudence that largely follows, and even mimics, the Supreme Court. That jurisprudence displays a certain amount of independence, especially with respect to matters directly touching on the President's institutional interests, such as the scope of his Article II authority. But the jurisprudence is memorialized in written legal opinions that take judicial decisions very seriously and treat them as dispositive on many issues. In addition, interpretive techniques that have sometimes generated controversy when used by the Executive—such as the practice of construing statutes so as to avoid constitutional difficulties—are generally borrowed directly from the courts.<sup>54</sup> Nor is it obvious that Justice Department opinions and presidential signing statements are more likely than Supreme Court opinions to employ far-fetched, result-oriented legal analysis.<sup>55</sup>

It is important to keep in mind that these Justice Department opinions are purely advisory so far as the President is concerned. He is free to ignore or overrule them, as President Roosevelt did in 1941,<sup>56</sup> and as other Presidents have sometimes done since that time. And perhaps most important, Presidents have not felt compelled to exercise every right they believe they have.<sup>57</sup> There is a fundamentally important distinction

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<sup>51</sup> See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

<sup>52</sup> U.S. CONST. art. I, § 8, cl. 18 (giving Congress power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”).

<sup>53</sup> *Id.* art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”).

<sup>54</sup> For some justifiably controversial examples of the Supreme Court's use of the “avoidance canon,” see *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440 (1989); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979).

<sup>55</sup> See Craig S. Lerner & Nelson Lund, *ABandoning the Constitution: Judging the President and Justices on Executive Power*, NAT'L REV. ONLINE, Aug. 10, 2006, available at <http://mason.gmu.edu/~nlund/Pubs/NatlRevOnlineSigningStatements.pdf>.

<sup>56</sup> See *supra* text following note 42.

<sup>57</sup> This is not to say, of course, that Presidents *never* refuse to enforce or comply with statutes they consider unconstitutional. But actual defiance appears to be historically rare. See, e.g., Nelson Lund, *Lawyers and the Defense of the Presidency*, 1995 BYU L. REV. 17, 47–48 (discussing Appointments Clause issue in the National and Community Service Act of 1990); Christopher N. May, *Presidential Defiance of “Unconstitutional” Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 945–69 (1994) (discussing twelve episodes from 1860 to 1981); Christopher S. Kelley, *A Comparative Look at the Constitutional Signing Statement: The Case of Bush and Clinton*, at 12–13, 22–24, available at <http://mpsa.indiana>

between claiming the authority to do something and actually doing it. President Bush himself grasps the difference, perhaps better than some of his supposedly more sophisticated critics. That much, at least, is suggested by his extemporaneous comment at a public press conference:

I signed the appropriations bill with the McCain [anti-torture] amendment attached on because that's the way it is. I know some have said, well, why did he put a qualifier in there? And one reason why presidents put qualifiers in is to protect the prerogative of the executive branch. You see, what we're always doing is making sure that we make it clear that the executive branch has got certain responsibilities. Conducting war is a responsibility in the executive branch, not the legislative branch.

But make no mistake about it, the McCain amendment is an amendment we strongly support and will make sure it's fully effective.<sup>58</sup>

We all need to keep President Bush's commonsense point in mind when evaluating alarmist rhetoric like that found in the ABA Report. Bush may be using his signing statements to *articulate* a very expansive view of presidential power somewhat more aggressively and systematically than his predecessors did, especially in connection with national security matters. But how much of this is limited to expressing his administration's constitutional views, and how much of it has led to actual defiance of statutes?<sup>59</sup> When I did a detailed study of the George H.W. Bush

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.edu/conf2003papers/1031858822.pdf (unpublished manuscript, presented to the Midwest Political Science Association on April 3–6, 2003, discussing two examples from the George H.W. Bush administration and one arguable example from the Clinton administration).

<sup>58</sup> Press Conference of the President, Jan. 26, 2006, *transcript available at* <http://www.whitehouse.gov/news/releases/2006/01/print/20060126.html>. What Bush called a “qualifier” was a pretty mild reservation, in which he noted that he would construe the McCain Amendment “in a manner consistent with the constitutional authority of the President . . . as Commander in Chief [to] assist in achieving the shared objective of the Congress and the President . . . of protecting the American people from further terrorist attacks.” Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918, 1919 (Dec. 30, 2005).

<sup>59</sup> In recent decades, lawyers involved in providing advice to Republican Presidents (and academics who had previously been so involved during Republican administrations) have generally taken a broader view than their Democratic counterparts of the President's constitutional *authority* to refuse to enforce statutes because of constitutional objections. For a review of the literature, see Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 7. Democratic and Republican Presidents, however, do not appear to have differed markedly in their willingness to engage in *actual* non-enforcement.

administration's jurisprudence of presidential power, I found that the President had been quite aggressive in publicly *claiming* constitutional authority and extremely *timid* about actually exercising the powers he claimed to have.<sup>60</sup> Could the same thing be happening today?

#### IV. THE GAO REPORT ON BUSH ADMINISTRATION COMPLIANCE PRACTICES

After the Democrats took control of Congress in 2007, the chairmen of the House and Senate Appropriations Committees asked the Government Accountability Office (GAO) to conduct a study of the current administration's treatment of statutory provisions to which the President had objected in his signing statements.<sup>61</sup> The most striking result of this important research project was the GAO's inability to find that the Bush administration failed to comply with even a single statutory provision as a result of objections articulated in a presidential signing statement.<sup>62</sup>

After collecting 160 provisions in fiscal year 2006 appropriations acts to which President Bush had raised constitutional objections in signing statements, the GAO identified a sample of nineteen provisions for further investigation.<sup>63</sup> The GAO then queried the relevant executive branch agencies in order to determine whether the administration had complied with the provisions, and if not, why not.<sup>64</sup> Unlike prior researchers, the GAO has the power to compel agencies to answer such queries.

The GAO study does have some methodological limitations. Most important, the authors did not attempt to assess compliance with certain categories of statutory provisions, including those in which national security or foreign relations concerns would have made it difficult even for the GAO to acquire the necessary information.<sup>65</sup> Because President Bush's most controversial and potentially significant claims of constitutional authority have often involved these areas, it is possible that particularly numerous or important instances of executive non-compliance with statutory commands may have been shielded from the GAO's scrutiny.

Another potential shortcoming involves the method by which the nineteen provisions were chosen for detailed study. The GAO appears to have tried to select a representative sample by choosing at least one provision from each appropriations act and at least one presidential objection from each of several substantive categories.<sup>66</sup>

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<sup>60</sup> See Lund, *supra* note 57, at 83–86.

<sup>61</sup> See U.S. GOV'T ACCOUNTABILITY OFFICE, PRESIDENTIAL SIGNING STATEMENTS ACCOMPANYING THE FISCAL YEAR 2006 APPROPRIATIONS ACTS (2007), *available at* <http://www.gao.gov/decisions/appro/308603.pdf>.

<sup>62</sup> See *id.* at 9, 20.

<sup>63</sup> *Id.* at 1.

<sup>64</sup> *Id.* at 15.

<sup>65</sup> *Id.* at 14.

<sup>66</sup> *Id.* at 15.

This may have produced a representative sample, but a more reliable approach would have been to randomize the selection process.<sup>67</sup>

Even with these limitations, the GAO study adds very considerably to what had previously been a literature based almost entirely on anecdotes and relatively un-systematic forms of research. As noted above, the GAO was unable to identify any instances where the constitutional objections articulated in a presidential signing statement could be shown to have caused an executive agency to refuse to comply with a statutory provision.<sup>68</sup> Among the nineteen provisions that were examined, the GAO did conclude that six of them were not executed by the relevant agency in accordance with the statute's written terms.<sup>69</sup> Judging from the GAO's discussions of these six provisions,<sup>70</sup> however, I believe it is unlikely that the agencies' behavior was affected by the President's constitutional objections.

In one of the six cases, the GAO report seems to have misclassified the agency's behavior as a failure to comply. In response to a statutory provision purporting to require approval from the appropriations committees before certain funds could be transferred from one use to another, the agency followed a longstanding practice of notifying the committees of an intent to make the transfer absent committee objections.<sup>71</sup> It seems fairly apparent that this procedure resulted in implicit approval from the committees and, therefore, that the agency in fact did comply with the statutory dictate.

Although less clear, one other case may also have involved implicit approval. A statutory provision required the agency to obtain committee approval before incurring obligations above a specified level.<sup>72</sup> On three separate occasions during the fiscal year, the agency exceeded the specified level after notifying the committees of its plans to do so.<sup>73</sup> The repetitive pattern suggests that the committees were implicitly approving the agency's decisions.

In a third case, an agency was seventeen days late in filing a report to Congress "due to a delay in staffing."<sup>74</sup> Such bureaucratic failures to meet deadlines are probably quite common, and nothing in the GAO report suggests that any constitutional principle was involved in this case.

In two cases, agencies appear to have concluded, quite possibly with the informal agreement of the relevant committees, that complying with certain statutory requirements was impracticable and/or inconsistent with the spirit of the statute. In one of

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<sup>67</sup> The GAO report does not explain why the provisions were not chosen at random, but it is easy to imagine that the choice of methodology may have been driven by resource constraints. *See id.* at 13–15.

<sup>68</sup> *See id.* at 9, 20.

<sup>69</sup> *Id.* at 9.

<sup>70</sup> *Id.* at 10.

<sup>71</sup> *Id.* at 31.

<sup>72</sup> *Id.* at 28.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 27.

these cases, the statute required the Defense Department to include in the President's budget submission cost estimates for a variety of ongoing military operations.<sup>75</sup> The agency did provide such estimates for some operations but did not comply in two instances where it believed that a timely estimate "would have been flawed" because of battlefield uncertainties.<sup>76</sup> In another case, the Federal Emergency Management Agency failed to provide a certain type of proposal and expenditure plan because the agency did not operate the kind of program to which such plans are pertinent.<sup>77</sup> In both of these cases, it seems that the agency would have behaved as it did whether or not the President had constitutional objections to the statutory provisions in question.

The sixth case is the one most likely to have involved some sort of deliberate defiance of congressional will, but even here the agency probably behaved exactly as it would have behaved in the absence of the President's constitutional objections to the statutory requirement. The appropriations statute provided that the "Border Patrol shall relocate its checkpoints in the Tucson sector at least once every seven days in a manner designed to prevent persons subject to inspection from predicting the location of any such checkpoint."<sup>78</sup> Although the agency appears to have had no objection to the goal of this provision, and noted that it does relocate checkpoints frequently, it concluded that adhering to the rigid statutory timetable would in some cases prove counterproductive.<sup>79</sup> The agency also noted that relocating checkpoints was sometimes impossible because no alternative sites had been coordinated with state authorities,<sup>80</sup> and its response to this situation is interesting. According to the agency, these checkpoints were "often shut down for a 'short period in an endeavor to satisfy the advisory provision'" of the statute.<sup>81</sup> The use of the term "advisory provision" in referring to statutory language that was plainly mandatory suggests that the agency was aware that the President's signing statement so characterized the provision. But it is also quite possible that the agency adopted the President's characterization only in the course of responding to the GAO's inquiry, rather than in the course (months earlier) of deciding how to respond to the statute itself. This seems to be the likely explanation when one considers the fact that the agency carried out brief, operationally insignificant shutdowns in an attempt to comply with the literal meaning of the statute. Such pro forma compliance would have been quite unnecessary if the agency were relying on the President's "advisory provision" theory, and it almost certainly would have been useless in satisfying those in Congress who wanted to impose the

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<sup>75</sup> *Id.* at 24.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 28–29.

<sup>78</sup> *Id.* at 34.

<sup>79</sup> *Id.* at 35.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

seven-day relocation rule. For these reasons, it seems unlikely that the President's constitutional objections to the mandatory seven-day rule played any part at all in the agency's decisions about how to respond to the statutory language.

Thus, these six examples are all quite consistent with the proposition that executive failures to comply with statutory directives are almost never dictated by the President's constitutional reservations and with the expectation that such failures will rarely even be influenced by such reservations. Further research may some day paint a different picture about the effects of presidential signing statements, but the evidence currently available suggests that much ado is being made about a practice that amounts in practical terms to very little.

### CONCLUSION

Like many others who follow the Supreme Court, I think it has often misinterpreted the Constitution, sometimes badly and even inexcusably. I also disagree with a number of interpretations of the Constitution set forth in Justice Department opinions and presidential signing statements. And I believe that Congress has passed more than a few unconstitutional statutes, some of which have been signed by Presidents and upheld by the Supreme Court. There is much room for reasonable debate about these issues and about such issues as how much deference each branch of government should give to constitutional decisions reached by the others. But such debates are not usefully advanced either by the ABA Report's shoddy legal analysis or by its hysterical claim that President Bush's signing statements constitute a threat to "the rule of law and our constitutional system of separation of powers."<sup>82</sup>

Let us suppose that a President really did seriously abuse his position, for example by systematically using dishonest interpretations of the law as a fig leaf for the exercise of an unconstitutional line-item veto or for the exercise of a power to repeal existing statutes by executive fiat. That might trigger a truly serious constitutional confrontation, and if it did there can be little doubt who would get "the last word." Congress, after all, still has the power of impeachment. But Congress has been very cautious about using this power to enforce its interpretations of the Constitution, and the impeachment of Andrew Johnson suggests why this caution is quite appropriate.<sup>83</sup> Johnson's trial in the Senate may also serve as a useful reminder of what a real constitutional crisis looks like. Had he been convicted, what the ABA calls "our constitutional system of separation of powers" might indeed have been profoundly altered.

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<sup>82</sup> AM. BAR ASS'N, *supra* note 2, at 5.

<sup>83</sup> President Johnson was impeached purportedly for removing an executive officer in defiance of the Tenure of Office Act, and he narrowly escaped conviction in the Senate. Decades later, the Supreme Court concluded (rightly, in my view) that President Johnson had interpreted the Constitution correctly. *Myers v. United States*, 272 U.S. 52, 175-76 (1926).

The eminentoes who signed the ABA Report, and many others as well, no doubt find President Bush's constitutional views and his signing statements highly offensive. But offending your political opponents, or an organized interest group like the ABA, is not quite the same as threatening the rule of law and the separation of powers. And even if one assumes that some of Bush's critics have the purest motives and the better of some of the arguments, it does not follow that the mistakes Bush may be making are any real danger to the republic. If this episode suggests that there is any threat at all to anything important, perhaps it is this: by crying wolf about presidential signing statements, the ABA and its prestigious enablers have made it less likely that they will be taken seriously if they ever have occasion to warn the nation about a genuine threat to the constitutional order.