

# 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 9

October 2007

## The Unconstitutionality of "Signing and Not-Enforcing"

Michael B. Rappaport

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# THE UNCONSTITUTIONALITY OF “SIGNING AND NOT-ENFORCING”

Michael B. Rappaport\*

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## INTRODUCTION

Last year, President Bush signed a bill reauthorizing the USA PATRIOT Act. In his signing statement, however, the President announced that he would not follow various provisions in the Act that interfered with his executive and national security powers.<sup>1</sup> Throughout his presidency, President Bush has regularly engaged in this practice of signing a bill and stating that he will not-enforce the provisions in it that he considers unconstitutional.<sup>2</sup> But President Bush has not been alone. All recent Presidents of both political parties have engaged in this practice,<sup>3</sup> although President Bush appears to have done so more often than his predecessors.<sup>4</sup>

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\* Professor, University of San Diego School of Law. The author would like to thank for their comments Larry Alexander, Nelson Lund, John McGinnis, Sai Prakash, and Michael Ramsey as well as participants at the conference.

<sup>1</sup> Statement on Signing the USA PATRIOT Improvement and Reauthorization Act of 2005, 42 WEEKLY COMP. PRES. DOC. 425–26 (Mar. 9, 2006).

<sup>2</sup> See generally Phillip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 PRESIDENTIAL STUD. Q. 515 (2005) (examining how President Bush has chosen to use presidential signing statements).

<sup>3</sup> Memorandum from Walter Dellinger, Ass’t Att’y Gen., to Bernard N. Nussbaum, Counsel to the President (Nov. 3, 1993), available at <http://www.usdoj.gov/olc/signing.htm>.

<sup>4</sup> See Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 324 (2006). Bradley and Posner argue that President Bush “is on the high end but still not outside the historical norm” of his recent predecessors in terms of the number of bills per year for which he issues a signing statement expressing constitutional objections. *Id.* But the authors also argue that when President Bush expresses constitutional

The constitutionality of this practice is a matter of significant dispute. Some commentators view the President's actions as an unconstitutional assertion of a presidential power to ignore federal statutes. Others, however, defend it on the ground that the President is required to interpret and enforce the Constitution just as the courts are. One natural way to view the controversy is as turning on whether one believes that the President has the power to not-enforce. If one believes that the President can not-enforce laws he believes are unconstitutional, then he can sign and not-enforce. If he does not have this power to not-enforce, then he cannot sign and not-enforce.

In this Essay, I argue that the presidential practice of signing a bill when one intends to not-enforce part of it is always unconstitutional, irrespective of whether one believes the President has the power to not-enforce. If one believes that the President lacks the power to not-enforce unconstitutional provisions, then, of course, the President cannot "sign and not-enforce." But even if one believes that the President has this power to not-enforce, the President still cannot sign and not-enforce. If the President concludes that the Constitution forbids him from enforcing part of a bill, then he must also conclude that it forbids him from signing that bill. He cannot treat the Constitution as binding him when he enforces the law but as mere guidance when he decides whether to approve a bill. A decision to sign a bill and not-enforce part of it impermissibly treats the Constitution as a matter of presidential discretion rather than as supreme law that always binds the President.

In making this argument, I employ an originalist-formalist conception of law, which I believe provides the proper approach to the Constitution. Under such an approach, one attempts to discern the original meaning of the Constitution and does not seek to read the Constitution in a flexible manner in order to accommodate modern practices or what one might deem desirable results. In recent years, originalist-formalist theories have received greater scholarly attention and have had a significant influence on the Supreme Court.<sup>5</sup>

While I argue from an originalist-formalist perspective, I also briefly examine signing and not-enforcing under a nonoriginalist-functional approach. Because that approach tends to reject categorical rules in favor of flexible, multipart balancing tests, it is not surprising that it does not necessarily forbid all presidential decisions to sign and not-enforce. Yet, even under this flexible approach, I argue there is a strong case for reading the Constitution as largely, and perhaps as categorically, prohibiting signing and not-enforcing.

The Essay proceeds in several short parts. Part I explores the power to not-enforce a statutory provision that the President believes to be unconstitutional. While I do not

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objections to a bill, he objects to many more provisions in that bill than did his predecessors. *Id.*

<sup>5</sup> See, e.g., Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183 (2005) (discussing the theory's recent influence on criminal law).

take a position as to whether the President has this power, I do argue that if the President does have this power, it is a nondiscretionary power. Part II examines the President’s power to sign bills. Part III then brings these two parts together, arguing that the President cannot sign bills that he intends to not-enforce. Part IV examines the widely discussed ABA Report on signing statements. While the report reaches a conclusion similar to mine, I argue that it does so through seriously flawed reasoning. Part V briefly argues that a prohibition on signing and not-enforcing would not be undesirable. Part VI then examines the issue from a functionalist perspective and argues that functionalism might be viewed as generally condemning signing and not-enforcing.

Finally, to avoid being misunderstood, I should clarify the nature of my argument. There has been much criticism of President Bush’s practice of signing and not-enforcing.<sup>6</sup> Many of these criticisms—although certainly not all—have been made by strong and sometimes partisan opponents of the President. While there is a place for such critics, my aim here is not to attack President Bush, but to make a more nonpartisan assessment of a growing bipartisan presidential practice.

## I. THE PRESIDENT’S DECISION TO NOT-ENFORCE UNCONSTITUTIONAL PROVISIONS

Let me start by discussing the more controversial of the President’s two actions when he signs and does not enforce: the President’s decision to engage in constitutional review of a statutory provision—what is sometimes called presidential review in contrast to judicial review. It is this power to not-enforce unconstitutional provisions that critics usually condemn. Here, I argue that there is no consensus about the power to not-enforce, and there are reasonable arguments supporting a President’s decision to either assert or not assert this power. My main claim in this Section is that if the power to not-enforce is asserted, the nature of the power requires that it be exercised in a nondiscretionary manner.

### A. Presidential Review

Those who claim that the President lacks the power of presidential review derive their position from the Supreme Court’s famous decision in *Marbury v. Madison*,<sup>7</sup> which upheld the power of judicial review. They argue that *Marbury* held that it is the province of the courts to decide the meaning of the Constitution and therefore presidential review usurps the judiciary’s power. The President should only refuse to enforce a statutory provision when the courts have already found it unconstitutional. Textually, this position holds that the President’s executive power does not include the power of constitutional review. While the Constitution continues to take priority over statutes,

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<sup>6</sup> See Charlie Savage, *Bush Signings Called Effort to Expand Power*, BOSTON GLOBE, Oct. 5, 2006, at A2.

<sup>7</sup> 5 U.S. (1 Cranch) 137 (1803).

it is simply not the job of the executive to determine that a statute actually conflicts with the Constitution.

Defenders of presidential review, however, also articulate a respectable view that allows the President to not-enforce unconstitutional provisions. Ironically enough, this view also derives from *Marbury v. Madison*. This reading of *Marbury* views the executive as occupying a role similar to that of the judiciary. Just as the judiciary should enforce the Constitution rather than a conflicting statute, so should the President. Far from involving a usurpation of the judicial power, this reading of *Marbury* sees the President's refusal to enforce an unconstitutional provision as his fidelity to the supremacy of the Constitution.<sup>8</sup> Textually, this reading views both the executive and judicial powers as properly including the authority to determine whether a statute conforms to the Constitution.

The two sides also disagree about another aspect of the dispute: the meaning of the Take Care Clause.<sup>9</sup> Critics of the power to not-enforce argue that the Clause was inserted to make clear that the President did not have the King of England's dispensing power to ignore statutes he did not like.<sup>10</sup> Therefore, the Clause requires that the President enforce all statutory provisions. By contrast, defenders of the power to not-enforce maintain that the Take Care Clause requires that the President follow applicable law. Because the Constitution takes priority over statutes, the President is required to enforce the law of the Constitution rather than unconstitutional statutory provisions.

Presidential review also has a long history. Endorsed by James Wilson—a drafter, ratifier, and Supreme Court Justice<sup>11</sup>—the power has been defended, and sometimes even asserted, in different forms by some of our most famed Presidents, including Thomas Jefferson<sup>12</sup> and Abraham Lincoln.<sup>13</sup>

The scope of presidential review will depend on to what extent the President follows the constitutional views of the courts. Under the strongest version of presidential review, the President has no obligation to follow the judiciary's views of the Constitution and therefore can refuse to enforce a statutory provision that he deems unconstitutional even though the Supreme Court has clearly held it to be

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<sup>8</sup> See, e.g., Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 919 (1990); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267 (1996); Michael S. Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

<sup>9</sup> U.S. CONST. art. II, § 3.

<sup>10</sup> Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 873–74 (1994).

<sup>11</sup> See PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787–1788, at 304–05 (John Bach McMaster & Frederick D. Stone eds., 1888).

<sup>12</sup> See Frank B. Cross, *Institutions and Enforcement of the Bill of Rights*, 85 CORNELL L. REV. 1529, 1591 (2000); Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707, 711–12 (1985).

<sup>13</sup> See Abraham Lincoln, *First Inaugural Address* (Mar. 4, 1861), in 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 262, 268 (Roy P. Basler ed., 1953).

constitutional.<sup>14</sup> A weaker version requires that the President give deference to judicial views but allows the President to depart from those views when he deems them clearly mistaken. An even weaker version requires that the President follow judicial views but permits him to not-enforce statutory provisions that judicial doctrine condemns rather than waiting for the courts to strike down the legislation.

The theory of presidential review also has implications for legislative powers—for Congress's power to pass bills and for the President's decision whether to veto bills. If the President is supposed to follow a supreme Constitution when enforcing the laws, then Congress and the President should also follow that Constitution when legislating. Thus, when they are deciding whether to pass a bill that contains a provision that would violate the Constitution, members of Congress should vote against that bill—and the President should veto it—rather than leaving it to the courts to strike it down. This more general position, which holds that each branch of the government—executive, legislative, and judicial—should engage in constitutional review, is often described as "departmentalism."<sup>15</sup>

Departmentalism does not merely derive from a particular reading of the constitutional text but also serves an important constitutional purpose. Just as judicial review helps ensure that the Constitution is actually followed, departmentalism provides even stronger protections to the Constitution from the executive and the legislature. Presidential review protects individuals against the enforcement of unconstitutional laws when there is no judicial review and from having to seek judicial protection when there is judicial review. Similarly, under legislative review, Congress's refusal to enact an unconstitutional law protects against the possibility that either the executive or the courts would attempt to apply that unconstitutional law were it enacted.

### *B. The Prohibition on Discretionary Presidential Review*

There is, however, a serious question for defenders of presidential review: if Presidents claim the power of presidential review, why do they so rarely exercise it? Presidents regularly follow the precedents of the Supreme Court and the lower courts, even if they disagree with those decisions. Moreover, Presidents often enforce statutes that are probably unconstitutional even under judicial precedents. The failure of Presidents to regularly engage in presidential review is troubling, because the logic of presidential review implies that the President is *obligated* to not-enforce if he

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<sup>14</sup> See, e.g., Lawson & Moore, *supra* note 8; Paulsen, *supra* note 8.

<sup>15</sup> Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, LAW & CONTEMP. PROBS., Summer 2004, at 105, 106 (defining departmentalism as recognizing the "authority of each federal branch or 'department' to interpret the Constitution independently").

believes a statutory provision is unconstitutional. Presidential review is no more a matter of discretion for the President than judicial review is for the courts.<sup>16</sup>

One explanation is that Presidents believe that they can exercise presidential review only in limited circumstances. For example, one view holds that the President should not-enforce only when a statute unconstitutionally infringes on his power and the statute's constitutionality is not subject to judicial review.<sup>17</sup> While one might wonder what justifies limiting nonenforcement to these circumstances—ideally, this limitation should be derived from the Constitution itself—at least this approach does not grant the President discretion to decide which unconstitutional provisions he will choose to not-enforce. Once these conditions hold, the President is obligated to not-enforce.

Another view allows the President discretion to decide when to not-enforce. This view holds that the decision to not-enforce a particular statutory provision is an important one, and therefore the President should be permitted to decide whether to do so based on policy considerations. This view, though, illegitimately treats the Constitution as optional or as, at best, one factor to be balanced against other policy concerns. The Constitution, however, is supreme and binding law, and the President does not have discretion to determine whether it is good policy to follow it. Thus, a President who believes that he is authorized to not-enforce in certain circumstances is required to do so whenever those circumstances arise.<sup>18</sup>

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<sup>16</sup> Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (holding that courts “are bound by” the Constitution to treat an unconstitutional law as void).

<sup>17</sup> See *Constitutionality of Congress’ Disapproval of Agency Regulations Not Presented to the President*, 43 Op. Att’y. Gen. 231 (1980).

<sup>18</sup> One theory of presidential review that arguably violates this prohibition on discretionary nonenforcement is Michael Paulsen’s in *The Most Dangerous Branch*. See Paulsen, *supra* note 8. After sketching a version of presidential review that provides the President with enormous power, Paulsen concludes his paper with three principles of executive restraint, one of which, “the principle of accommodation,” raises serious problems. *Id.* at 331. Under this principle, the President must recognize that the other branches have different constitutional interpretations, and therefore he should sometimes follow their interpretations in the interests of compromise and avoiding conflict, even though he believes their interpretations are mistaken. *Id.* at 337–38. This principle raises two problems. First, it is not clear from where Paulsen derives this principle. Based on his approach, it would appear that this principle needs to derive from the Constitution for it to be legitimate because statutes or common law cannot constrain the executive’s constitutional obligations. Paulsen, however, provides only the weakest evidence for this principle—inferences from the design of a system and what would be desirable for the nation. Second, this principle seems awfully close to one that endorses discretionary non-enforcement. Paulsen argues that the principle “is not an absolute, but an attitude,” and that “[s]triking the proper balance in any given instance is a matter of judgment, dependent on context,” including the “substantive importance of the point in question to the nation” and “the likelihood that other major constitutional actors will support his position.” *Id.* at 338. This amounts to allowing the President to decide whether to enforce or not-enforce depending on how important he believes the issue is or what the political consequences will be. This power is essentially a discretionary power to decide whether to apply the Constitution and, therefore, appears to be inconsistent with the principle that the executive is commanded

Some might object to this analysis on the ground that the nature of executive power allows the President more discretion than the nature of judicial power allows the courts. The President may therefore have discretion to choose when to enforce the Constitution. While it is true that the President does have more discretion than the courts, this argument mistakes the nature of that discretion, which does not allow the President to decide when to enforce the Constitution.

The President has two principal types of discretion. First, Congress delegates statutory discretion to the President, such as discretion to say what a statute means or to set policy in a particular area.<sup>19</sup> Congress, however, cannot authorize the President to ignore constitutional constraints. Second, the Constitution confers certain discretionary powers on the President, such as the foreign affairs power or the power to nominate persons of his choosing to offices.<sup>20</sup> But these constitutional powers confer discretion in limited areas and do not purport to override constitutional requirements.<sup>21</sup> For example, the President's discretionary power to make nominations does not allow him to use an unconstitutional religious test.<sup>22</sup> Thus, while the President has more discretion than the courts, he has no more discretion to ignore applicable constitutional commands.

## II. THE PRESIDENT'S DECISION TO SIGN AN UNCONSTITUTIONAL BILL

This brings us to the other action that the President takes when he signs and does not enforce: signing the bill. While our ordinary understanding is that the President's

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and constrained by the Constitution.

<sup>19</sup> See *United States v. Mead Corp.*, 533 U.S. 218 (2001) (affirming Congressional delegation of power to the executive to interpret statutes); *Mistretta v. United States*, 488 U.S. 361 (1989) (affirming Congressional delegation of power to the executive to make policy determinations).

<sup>20</sup> U.S. CONST. art. II, § 2, cl. 2; Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 233–35 (2001).

<sup>21</sup> One type of discretion possessed by the executive is prosecutorial discretion. Traditional prosecutorial discretion might be viewed as either statutorily or constitutionally conferred. But in neither case would such discretion allow the executive to ignore constitutional requirements, including the requirement of enforcing constitutional laws. Suppose that the President concludes that a law does not fall within the category of laws that must be vetoed and not-enforced. The President, then, must enforce the law and cannot use his traditional prosecutorial discretion to decline to bring prosecutions out of constitutional concerns. While the executive could choose not to prosecute individual cases based on traditional grounds, such as the difficulty of proving a hard case or the belief that resources should be spent on other individuals who had committed worse offenses, the executive could not base his decision not to prosecute on his view that the law was unconstitutional. Since the President has concluded that it was not his job to not-enforce this category of laws, he has to treat such laws as constitutional. Of course, it might be difficult in practice to determine the reason why the executive chose not to bring an action, but that is a question of evidence, not legality.

<sup>22</sup> U.S. CONST. art. VI, cl. 3.



decision to sign or veto a bill is discretionary—that the Constitution largely allows the President to make this decision as he wishes—there is an exception when the President would not-enforce part of the bill that he signs. The President is then required to veto the bill.

We normally assume that the President has wide discretion to choose whether to sign or veto a bill.<sup>23</sup> First, the President may decide whether to sign or veto a bill for policy reasons. Like a legislator, it is part of the President's job to vote on bills based on whether he believes they constitute good policy.

Second, the President also has wide discretion—with the one exception discussed below—to sign or veto bills that are unconstitutional. The argument here, though, depends on whether the President claims the power of presidential review. A President who does not assume the power to not-enforce can certainly choose to veto an unconstitutional bill. Because he can veto the bill for policy reasons, he can also veto it based on its unconstitutionality on the grounds that it is bad policy to enact unconstitutional laws. This same President can probably also sign an unconstitutional bill. A President who does not claim the power of presidential review can claim that, just as it is not his job to refuse to enforce unconstitutional statutes, it is also not his job to veto unconstitutional bills. While he can choose to veto them on policy grounds, he is not required to do so.

A President who asserts the power of presidential review can also veto an unconstitutional bill. He can claim not only that unconstitutional laws are bad policy but also that it is his job to prevent unconstitutional laws from being enacted.

### III. THE PRESIDENT'S DECISION TO SIGN AND NOT-ENFORCE

While these considerations help to explain our normal understanding that Presidents are largely free to sign or veto bills, they do not apply in one limited instance: when the President would not-enforce an unconstitutional provision in the very bill he is signing. In this circumstance, the President is obligated to veto the bill. If the President is required to follow the Constitution rather than a conflicting statute when enforcing the laws, then he has the same obligation to follow the Constitution over a conflicting bill when deciding whether to sign it. What could possibly allow the President to sign the bill in this situation?

First, one might argue that the President could sign the bill and then not-enforce it on the grounds that the President's legislative power is less subject to constitutional

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<sup>23</sup> One reason why the President's veto decision might be thought to be discretionary is that courts are extremely reluctant to order the President either to sign or veto a bill. This explanation, however, confuses judicial review with legal obligation. That the courts would not intervene does not allow the President to ignore the law. He is still bound by his independent obligation to follow the Constitution, an obligation which is a core principle of departmentalism. *See supra* note 15 and accompanying text.

constraints than his executive power. After all, the President is ordinarily free to sign or veto a bill on policy grounds but is usually proscribed from ignoring statutes for policy reasons. But this distinction concerns policy decisions rather than constitutional requirements. That the Constitution allows the President to consider policy when deciding whether to veto a bill, but often not when deciding whether to enforce a law, does not suggest that the President's legislative decisions are free of constitutional constraints. The Constitution limits both legislative and executive power, and there is no more reason to believe it can be ignored concerning legislative power than executive power. The President is no more allowed to take eleven days to decide whether to veto a bill (legislative power)<sup>24</sup> than he is allowed to appoint principal executive officers without the consent of the Senate (executive power).<sup>25</sup>

Second, one might contend that a presidential decision to sign and not-enforce is proper because the unconstitutional provision in the bill is void and unenforceable.<sup>26</sup> Thus, the President's decision to sign the bill is harmless and does not violate the Constitution. This argument, however, is mistaken on both practical and theoretical grounds. As a practical matter, the President's decision to sign an unconstitutional bill can result in the unconstitutional provision being enforced. A future President might think the provision is constitutional and enforce it. Alternatively, a future President might conclude he does not possess the power of presidential review and enforce it. Further, the courts might believe the provision is constitutional and apply it in specific cases. By contrast, a presidential veto may prevent the provision from being enacted and thereby avoid these possibilities.

As a matter of theory, this argument—that the President is not obligated to veto a provision that is a nullity—is also mistaken. That the President deems the unconstitutional provision void and unenforceable does not necessarily mean that it will turn out to be void. As I have just shown, the President's approval of a bill places it on the books and therefore creates the risk that it will be enforced by executive and judicial officials who believe it is constitutional or enforceable. Because the provision is not necessarily a nullity, the President's obligation to follow the Constitution requires that he veto the provision and not take the risk it will be enforced. We recognize this principle in other situations. For example, it would not be acceptable for an administrative agency that has statutory authority allowing it to issue regulations to promulgate a regulation not authorized by the statute on the grounds that it is unenforceable. It is the agency's obligation not to pass illegal regulations. Similarly, it is the President's obligation not to enact illegal statutory provisions.

Perhaps the strongest argument for allowing the President to sign a bill he does not intend to enforce arises when there is a single unconstitutional provision in an

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<sup>24</sup> See U.S. CONST. art. I, § 7, cl. 2.

<sup>25</sup> See *id.* art. II, § 2, cl. 2.

<sup>26</sup> Nelson Lund, *Presidential Signing Statements in Perspective*, 16 WM. & MARY BILL RTS. J. 95 (2007) (raising this objection).

otherwise constitutional bill. Does the President really have to veto a sizeable bill because one small provision in it is unconstitutional? Does he even have to veto a large spending bill that is necessary to fund the government?

In a word, yes. The President cannot avoid his constitutional responsibilities simply because the Constitution obligates him to exercise a burdensome veto. Like all constitutional actors, the President's powers are limited, and he cannot expand them out of convenience. The power of presidential review arises because the President claims that the Constitution precludes him from enforcing an unconstitutional provision. The President cannot make that claim while at the same time arguing that he can sign such a provision into law because it would be burdensome to veto it. The President must accept the bitter and the sweet of his powers.

There is, moreover, nothing peculiar about the President having to incur this burden, because it is uncontroversial that he must bear similar burdens in other situations. Suppose Congress presents a large bill to the President that contains a single provision that the President strongly opposes on policy grounds. It is absolutely clear that the President cannot item-veto the provision he dislikes simply because vetoing the bill would be burdensome.<sup>27</sup> It is recognized that the President must either accept or veto the entire bill because the nature of his veto requires it.

Similarly, imagine that the President discovers a provision in an old, important statute that he believes is unconstitutional and therefore decides to not-enforce it. But if that provision is not severable from the remainder of the statute—if Congress had not intended that the statute continue to function without that one provision<sup>28</sup>—then the President's decision to not-enforce the one provision will require that he not-enforce the entire law, even though that may be burdensome. This limitation on the President's power is shared by the Supreme Court which, if it found that same provision unconstitutional, would also be required to hold the entire statute unenforceable.<sup>29</sup>

These considerations should confirm that the nature of the power of presidential review requires that the President veto a bill that contains a provision he intends to not-enforce. It is essential, however, to recognize the precise limitation that this argument imposes on the President. The argument asserts that when the President will refuse to enforce a provision in a bill, he must veto that bill. Thus, it is the President's *signing* of the bill that is wrongful, not his refusal to enforce the unconstitutional provision. Consequently, if the President refuses to enforce a provision in a bill that he did not sign—if the bill was enacted before he took office or over his veto—then my argument supplies no reason why he cannot refuse to enforce the provision. Moreover, if the President signs a bill, believing it is constitutional, and later changes his mind, he could then choose to not-enforce a provision in the

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<sup>27</sup> See Michael B. Rappaport, *The President's Veto and the Constitution*, 87 NW. U. L. REV. 735, 786 (1993).

<sup>28</sup> See *Buckley v. Valeo*, 424 U.S. 1, 108 (1976).

<sup>29</sup> See John Copeland Nagle, *Severability*, 72 N.C. L. REV. 203, 207 (1993).

resulting law without impropriety. Further, even if the President signs a bill that contains a provision he intends to not-enforce, one cannot argue that the President is necessarily precluded from not-enforcing the provision. Once he signs the bill, his wrongful action is completed. If he were to enforce the unconstitutional provision, one might even argue that he commits a further constitutional violation.

Moreover, the constraints on the President that my argument imposes are even broader than the requirement that he veto bills that contain provisions that he intends to not-enforce. A President who believes he should not-enforce in certain circumstances is obliged to do so whenever those circumstances arise.<sup>30</sup> And that obligation extends, we have seen, to vetoing bills. Thus, if the President believes he should not-enforce in certain circumstances, he must always veto bills in those circumstances, even if he prefers to enforce the unconstitutional provision in that particular case.

Finally, Professor Nelson Lund, another symposium participant, criticizes my argument initially on the ground that it is narrow.<sup>31</sup> While my argument is narrow, that is not necessarily a defect. My argument is broad enough to contest an important practice: presidential decisions to sign and not-enforce. Showing that this practice cannot even be justified assuming the essential premise of its proponents—that the President has the power to not-enforce—is work enough for a law review essay.

Lund's other criticisms are also misplaced. He correctly observes that my argument does not condemn a President who does not enforce a bill that he signed if he recognized the constitutional problem only after signing it.<sup>32</sup> This leads him to wonder "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."<sup>33</sup> But Lund misunderstands my position here. I do not argue that the President cannot not-enforce provisions in bills that he signs but rather that the President cannot sign bills that he intends to not-enforce. Thus, the enforceability of a statute does not turn on whether the President signs it. But even if the President were forbidden from enforcing statutes he signed, there would still be a reason to distinguish between

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<sup>30</sup> See *supra* notes 16–18 and accompanying text.

<sup>31</sup> Lund, *supra* note 26, at 100.

<sup>32</sup> *Id.* at 101.

<sup>33</sup> *Id.* at 101. Lund also suggests that there is no impropriety if the President does not sign an unconstitutional bill but merely allows it to become law without his signature. *Id.* at 100–01. In my view, a President allowing a bill to become law without his signature is, for these purposes, indistinguishable from a President signing it. The Constitution presents the President with two basic choices: to sign or veto a bill. While the Constitution does mention the possibility of the President not signing a bill, it does so not to give the President an opportunity to avoid taking responsibility for a bill, but instead to specify the legal effects of the President failing, due to oversight or intention, to exercise his powers under the Constitution. See U.S. CONST. art. I, § 7, cl. 2 (providing that if the President fails to act on a bill in ten days, it becomes law if the Congress is in session but does not become law if Congress is not in session). Thus, a President who intends to not-enforce a bill is no more allowed to purposefully let it become law without his signature than he is allowed to sign it.

unconstitutional bills he signed and did not sign. In the latter case, the President attempted to conform to the governing principles of the power he exercised. In the former case, he violated those principles. When the President chooses to follow the Constitution selectively, his exercise of power is far more problematic, because it is not constrained by rules or consistency.<sup>34</sup>

#### IV. THE ABA REPORT ON SIGNING STATEMENTS

My position in this Essay can be further illuminated by comparing it to the widely noticed Report of the ABA Task Force on Signing Statements (the Report).<sup>35</sup> The Report argues that the President cannot announce in a signing statement that he will not-enforce a provision that he believes is unconstitutional.<sup>36</sup> While the Report adopts a position similar to mine, it is deeply flawed and betrays a basic misunderstanding of the issues. The fundamental problem with the Report is that it attempts to criticize “signing and not-enforcing” without adequately grappling with “not-enforcing.”

The Report’s main argument against a signing statement that announces a decision to not-enforce is that it is essentially an unconstitutional line-item veto.<sup>37</sup> A line-item veto, which permits the President to sign part of a bill while vetoing another part, is unconstitutional because it departs from the lawmaking process specified in the Constitution. That process requires that the President sign or veto an entire bill.<sup>38</sup> The Report reasons that the President’s signing of a bill while announcing that he will

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<sup>34</sup> Lund also uses the fact that I do not take a position on whether the President is obligated to not-enforce unconstitutional laws to found an argument against my reasoning. Lund writes that since a President might actually be mistaken that he has an obligation to not-enforce, then “it is hard for me to see what would be gained by demanding that he make” veto decisions consistent with this “mistaken belief.” Lund, *supra* note 26, at 100. I find this to be a curious argument. We often show that a position is mistaken by assuming its premises and deducing problematic conclusions from them, even though we do not necessarily accept those premises. It is no defense of the criticized position that those conclusions would be acceptable under different premises. Or to put the point more concretely, Lund’s argument seems analogous to me to the following situation: suppose that the Supreme Court were to fail to strike down an unconstitutional law because it liked the law on policy grounds. Lund’s argument seems to suggest that if someone were not sure whether the Constitution allows judicial review, then it is problematic for him to criticize the Supreme Court’s unprincipled action because the Court’s action might have been justified if there was no judicial review.

<sup>35</sup> AM. BAR ASS’N, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE (2006), available at [http://www.abanet.org/op/signing-statements/aba\\_final\\_signing\\_statements\\_recommendation-report\\_7-24-06.pdf](http://www.abanet.org/op/signing-statements/aba_final_signing_statements_recommendation-report_7-24-06.pdf).

<sup>36</sup> *See id.*

<sup>37</sup> *Id.* at 22.

<sup>38</sup> *See Clinton v. City of New York*, 524 U.S. 417 (1998) (holding the Line Item Veto Act unconstitutional because it violated the Presentment Clause).

not enforce part of it is similar enough to the line-item veto to render the President's action unconstitutional.<sup>39</sup>

This argument, however, is extremely weak because signing and not-enforcing is not a line-item veto, and its constitutionality turns on different constitutional clauses than the line-item veto. The line-item veto is a solely legislative act, and therefore its unconstitutionality is shown by the fact that it conflicts with the Constitution's veto provision. By contrast, the decision to sign and not-enforce involves two acts: the legislative decision to sign a bill and the executive decision to not-enforce part of it.<sup>40</sup> To assess the constitutionality of the decision to not-enforce, one must look not at the President's veto powers, but instead at his executive power.

Perhaps to avoid this criticism, the Report focuses solely on the situation when the President's decision to not-enforce is made in a signing statement.<sup>41</sup> In this way, the Report seems to be criticizing solely legislative decisions. After all, signing a bill and issuing a signing statement are plausibly viewed as legislative acts. But this focus on the announcement to not-enforce in a signing statement does not improve the Report's arguments. If the Report's objection is merely to the announcement of a decision to not-enforce in the signing statement, this implies that the President would not act improperly if he were to announce the decision to not-enforce in a separate document, either at the time that he signs the bill or afterward. The document would be directed to the executive branch and would not constitute a legislative act. In addition, the Report's position would clearly allow the President to sign the bill and to decide to not-enforce without announcing his decision. Of course, this last possibility has an absurd consequence. Even critics of the practice of signing and not-enforcing—including the Report itself—admit that the rule of law is much better served if the President openly announces his decision to not-enforce, since that provides notice to both the public and Congress.

Thus, the Report provides no basis to criticize the practice of signing and not-enforcing. The central problem with the Report is that it is never willing to acknowledge clearly that the power to not-enforce is an executive power. Recognizing that fact is the first step to understanding the practice of signing and not-enforcing, but unfortunately one that the Report never takes.

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<sup>39</sup> AM. BAR ASS'N, *supra* note 35, at 22.

<sup>40</sup> The power to not-enforce differs from the line-item veto in other ways as well. The power to not-enforce rejects part of a bill on constitutional grounds, whereas a line-item veto rejects part of a bill on policy grounds.

<sup>41</sup> Thus, the Report only discusses the situation when the President signs a bill and issues a signing statement that announces a portion of the bill is unconstitutional. Yet, the Report is only half-willing to acknowledge the limits of its discussion. The Report announces that it does not take a position on "what should be done if the President, in the absence of a signing statement, nevertheless fails to enforce a law enacted under his or an earlier administration." AM. BAR ASS'N, *supra* note 35, at 27. Thus, the Report suggests—without real argument—that not enforcing is unconstitutional, but then focuses on the case of signing statements, presumably to allow its line-item veto analogy to proceed.

## V. DESIRABILITY

It might be thought that forbidding the President from signing and not-enforcing is undesirable. Because the desirability of this prohibition is complicated and my focus is on constitutional meaning, I cannot fully address this objection. Instead, I will merely mention in brief some of the strong arguments for the desirability of the prohibition.

First, to appreciate the full benefits of a prohibition on signing and not-enforcing, it is important to recognize that a presidential decision to veto an unconstitutional bill will operate differently in a world where the prohibition is established than it does under our existing arrangements, which appear to allow the President to sign and not-enforce. For example, under existing arrangements, a President's warning that he is planning to veto a large or important bill because it contains a single unconstitutional provision may often be met with surprise and incredulity. After all, because Presidents now can choose to sign and not-enforce, they rarely veto laws based simply on a constitutional objection and therefore their warning may not be taken seriously. But once the prohibition is established and it is understood that the President is required to veto bills containing provisions he intends to not-enforce, his warnings would have more credibility. When the President threatens to veto a bill on constitutional grounds, Congress would be more likely to believe his threat and to remove the offending provision. Thus, Congress would pass constitutionally objectionable bills less often once the prohibition is generally followed.

Second, the practice of signing and not-enforcing provides the President with an incentive to adopt excessively broad constitutional interpretations of his powers, while a prohibition on the practice gives him an incentive to adopt more moderate interpretations. Under a prohibition, the President would bear costs for reading his constitutional powers broadly. Because he must veto laws that infringe on his asserted constitutional powers, the more broadly he interprets his powers, the more likely it is that he will have to veto bills, including those bills which he might otherwise prefer to sign because they contain desirable provisions or are popular. The practice of signing and not-enforcing eliminates this moderating incentive. If a bill conflicts with a broadly asserted constitutional power, the President does not need to veto it. Instead, he can simply sign the bill while announcing he will not-enforce the unconstitutional provision.<sup>42</sup> Thus, the practice of signing and not-enforcing is connected to another criticism of the presidential power to not-enforce: that Presidents interpret their powers too broadly when making nonenforcement decisions.

Finally, one may contest what is probably the strongest policy argument against a prohibition on signing and not-enforcing: the prohibition would often create the undesirable situation where the President would be confronted with an important bill that

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<sup>42</sup> In addition, if political criticism of his announcement to not-enforce is costly, the President can reduce that cost by announcing that he will voluntarily comply with the statute.

contained an unconstitutional provision and therefore would have to choose between vetoing the important bill or enforcing the unconstitutional provision. But the two arguments in the previous paragraphs suggest that this situation will occur much less often once a prohibition on signing and not-enforcing is established. First, under a prohibition, the President's interpretations of his constitutional powers will tend to be narrower and thus be less likely to conflict with the bills that Congress passes. Second, a presidential warning that he will veto a bill because it contains an unconstitutional provision is more likely to lead Congress to remove the provision from the bill and therefore avoid the need for a veto. Together, these forces make it far less likely that the President will face an important bill that contains an unconstitutional provision. While the President will sometimes be presented with such a bill, the advantages of prohibiting signing and not-enforcing—including more moderate constitutional interpretations from the President and Congress's passage of fewer bills containing unconstitutional provisions—might reasonably be regarded as being of greater importance.

#### VI. THE POWER TO SIGN AND NOT-ENFORCE UNDER FUNCTIONALISM

Although my argument assumes an originalist-formalist approach to constitutional law and the separation of powers, it is useful to consider whether the power to sign and not-enforce might be asserted under a nonoriginalist-functional approach. The originalist-formalist seeks to find categorical rules in the original meaning of the Constitution, whereas the nonoriginalist-functional attempts to develop flexible standards that will produce good results in the present. This nonoriginalist-functional approach to signing and not-enforcing has been well developed in the scholarly literature by Professor Dawn Johnsen.<sup>43</sup> While Johnsen generally recommends against signing and not-enforcing, she does leave some room for the practice in exceptional cases.<sup>44</sup> I argue, however, that a functionalist might adopt an even more general condemnation of signing and not-enforcing.

Johnsen argues that whether the President should exercise the power to not-enforce in a particular case turns on a variety of factors that she derives from governmental practice, the roles of government entities, and desirable results.<sup>45</sup> In general, she argues that the President should not-enforce only in limited circumstances, such as

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<sup>43</sup> See Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 7. A functionalist approach to the issue was also formulated by Professor Walter Dellinger in an influential Office of Legal Counsel opinion. See *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 OP. OFF. LEGAL COUNS. 199 (1994) (memorandum from Assistant Attorney General Walter Dellinger). Johnsen's article builds upon Dellinger's approach.

<sup>44</sup> Johnsen, *supra* note 43, at 22.

<sup>45</sup> *Id.* at 10–12.



when it would be necessary to create a justiciable controversy or when the executive branch is more expert on the matter than the other branches.<sup>46</sup>

Johnsen also places limits on the President's ability to sign unconstitutional bills. In general, she argues that it is better to veto an unconstitutional bill because it may prevent the bill from being placed on the books, and that stand-alone provisions that are unconstitutional should normally be vetoed.<sup>47</sup> But she acknowledges that, when an unconstitutional provision is part of an omnibus bill, the President may be allowed to sign it.<sup>48</sup> Then, if the circumstances are appropriate, the President may be able to not-enforce an unconstitutional provision in the bill.<sup>49</sup> Thus, Johnsen allows a limited role for signing and not-enforcing. If the President is justified in signing an omnibus bill that contains an unconstitutional provision, and if that provision is the type that justifies nonenforcement, the President may sign and not-enforce.<sup>50</sup>

While Johnsen allows a limited role for signing and not-enforcing, her argument can be criticized on two distinct grounds. First, her rejection of a prohibition against signing and not-enforcing largely follows from her functionalist approach, which eschews categorical rules that might be derived from the Constitution. While many legal scholars follow this approach, formalists believe that it lacks legitimacy because it largely imposes the views of the theorist rather than the decisions of the legitimate lawmakers. In addition, the approach is undesirable because it allows the President to exercise significant discretion—after all, it involves a balancing of multiple factors<sup>51</sup>—and Presidents are unlikely to exercise that discretion in the way that Johnsen recommends.

Second, even if one accepts a functionalist approach, one might still argue that signing and not-enforcing should be prohibited. While it is true that there are inconveniences from requiring the President to veto an omnibus bill because it contains an unconstitutional provision, I have tried to show that these inconveniences would be considerably smaller once a prohibition on signing and not-enforcing was established.<sup>52</sup> Under such a prohibition, Presidents would interpret their powers more narrowly, and Congress would place unconstitutional provisions in bills less often. These benefits, however, require that the President follow a prohibition consistently.<sup>53</sup> Thus, even a functionalist approach would have a strong reason for categorically prohibiting signing and not-enforcing.

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<sup>46</sup> *Id.* at 12.

<sup>47</sup> *Id.* at 33.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 35.

<sup>50</sup> *See id.*

<sup>51</sup> *Id.* at 13.

<sup>52</sup> *See supra* Part V.

<sup>53</sup> For example, if Congress knew that the President could sometimes sign and not-enforce, it would have less incentive to remove provisions in bills that the President views as unconstitutional. Similarly, the President would have much less incentive to interpret his powers narrowly if he had discretion to sign and not-enforce.

In the end, while one can make a functionalist argument for prohibiting signing and not-enforcing, my impression is that most functionalists would, like Johnsen, allow at least some room for the practice. But that may say less about the signing and not-enforcing than it does about the attitude of functionalists towards categorical rules.

#### CONCLUSION

It is easy to understand why Presidents assert the power to sign and not-enforce. The power allows them to eliminate provisions that they regard as unconstitutional without having to forego provisions that they like or to incur blame for vetoing the bill. In many cases, the decision to not-enforce is not judicially reviewable, especially in the near term, so the President does not have to worry about the courts reversing him.

But political attractiveness is not constitutionality. While the President can plausibly claim the power of presidential review, he cannot claim discretion over whether to enforce the Constitution. Not-enforcing a duly enacted statute is an extraordinary power that the Framers and their English forbears regarded with deep suspicion. The Framers specifically placed the Take Care Clause in the Constitution to ensure that the President could not use the King of England's dispensing power of not enforcing laws he disliked.<sup>54</sup> While presidential review can be distinguished from the dispensing power on the ground that the supreme law of the Constitution forbids the enforcement of an unconstitutional statute, the President's refusal to veto an unconstitutional bill would belie his claim to be acting at the Constitution's command. Thus, it is crucial that a President who does not enforce unconstitutional provisions consistently veto the bills that contain those provisions. For it is this action that distinguishes a law-abiding executive who is protecting the Constitution from a lawless one who is undermining it.

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<sup>54</sup> May, *supra* note 10, at 873–74; *see* U.S. Const. art. II, § 3.