

Oberlin

Digital Commons at Oberlin

Friends of the Libraries Excellence in Research
Awards

Oberlin College Libraries

1-1-2008

The Constitutional Significance of Presidential Signing Statements

Brian Holbrook
Oberlin College

Follow this and additional works at: https://digitalcommons.oberlin.edu/fof_research_awards

Recommended Citation

Holbrook, Brian, "The Constitutional Significance of Presidential Signing Statements" (2008). *Friends of the Libraries Excellence in Research Awards*. 25.

https://digitalcommons.oberlin.edu/fof_research_awards/25

This Paper is brought to you for free and open access by the Oberlin College Libraries at Digital Commons at Oberlin. It has been accepted for inclusion in Friends of the Libraries Excellence in Research Awards by an authorized administrator of Digital Commons at Oberlin. For more information, please contact megan.mitchell@oberlin.edu.

The Constitutional Significance of Presidential Signing Statements

In broad terms, the scope of the federal executive power in the law and politics of the United States has been increasing since the 1930s. During the New Deal era, the size and authority of the federal government expanded dramatically to meet the economic crisis, and the greater part of this authority ended up lodged firmly in the hands of the President, who controlled executive and administrative agencies that began to spring up like weeds during the '30s and into the post-war era. However, the dramatically expanded role of the President and the executive branch that he leads has had to contend with the reality that Congress was never eager to relinquish its role as the primary organ of national government, a role bestowed upon it by structure of the Constitution, framed by statesmen who feared above all things a strong executive authority and felt much more comfortable placing power in the hands of the many representatives of the people. This legislative primacy ingrained in the text and structure of the Constitution was in some ways challenged in the wake of the Civil War, which necessitated an expansion of government and a shift in the balance of federal power to the wartime executive, but Congress was able to respond fairly vigorously during the Reconstruction Era, doing much to frustrate the policies of the recalcitrant President Johnson. After the New Deal, however, the shift in power from legislature to executive became more pronounced, and Congress found its political scope of action at times limited to blocking Presidents' agendas rather than setting policy priorities of its own.

Of course, Congress never ceded the field. In laws passed every day, there are attempts by legislative policymakers to mandate resolutions to important questions of national importance. Congressional oversight is a critical tool by which legislators can investigate and punish conduct, whether by executive branch officials, private citizens, or even foreign countries, that it finds unlawful

or out of step with the national policy consensus. At the same time, the President pushes back. He can veto laws he finds objectionable, frustrating Congressional attempts to set policy in crucial areas. He can conduct the foreign affairs of the United States with a more-or-less free hand; he has great discretion in making the decision to commit American troops to battle. More subtly, he can issue executive orders and consult with cabinet heads and the administrators of executive agencies to promulgate his policies throughout the bureaucracy of the federal government. And at times, he can engage in direct confrontation with Congress outside the bounds of conventional constitutional and political procedures through the mechanism of Presidential signing statements.

The simplest definition of a signing statement is that it is a document issued by the White House upon the occasion of the President's signing a bill into law. There are innocuous signing statements of a type that have been issued since the relatively early days of the Republic, at least since the time of Andrew Jackson¹. These statements may fulfill a variety of purposes. They may offer the President's congratulations to Congress on passing some important or difficult piece of legislation. They may express the President's policy views on the substance of the legislation, either positive or negative. They may even attempt to argue for certain constructions of statutory terms, although this is a relatively recent innovation. The type of signing statement I will discuss here, however, is neither innocuous nor uncontroversial. A "refusal to enforce signing statement," as I will refer to it from here, announces the President's intent to use neither the inherent powers of his office nor those of the officials or agencies that report to him to execute a particular provision of a statute that the President otherwise approves of. Such signing statements are almost always accompanied by a constitutional rationale for the refusal to enforce. In essence, the President takes it upon himself to make a constitutional determination and to take action to put that determination into effect. A product of the Regan administration, the refusal to enforce signing statement has been controversial since its inception.

1 Fisher 132-3.

In this paper, I want to consider three important questions having to do with the constitutional significance of refusal to enforce signing statements. The first is a legal question—whether refusal to enforce signing statements should be considered to have legal force and effect under the Supreme Court's separation of powers precedents, or whether, conversely, they exceed the President's constitutional authority to execute the laws of the United States. My conclusion is mixed, simply because of the wide variety of constitutional conclusions and justifications that can be used in bolstering the authority of any given refusal to enforce signing statement, but my ultimate answer is that if a court does not agree with a President's constitutional justification for refusing to enforce certain sections of a validly enacted law, it is required to invalidate the signing statement under current case law. I also conclude that even where the President feels that a tenable constitutional argument can be made in support of a given refusal to enforce signing statement, the correct course of action is to take such constitutional disputes to court, rather than taking it upon himself to block the law's implementation. A second question I address is the practical significance of a legal judgment that refusal to enforce signing statements are invalid, in light of historical conflicts between the President and Congress. I conclude that neither the courts nor Congress, acting separately, are likely to be able to effectively compel the President to enforce laws he believes to be unconstitutional (or that he chooses to argue are unconstitutional). It is possible that the judiciary and Congress, acting in concert, can force the President to respect the constitutional separation of powers and enforce those laws which the other two branches deem to be constitutional. Finally, I briefly consider the bearing of constitutional theory on what I otherwise treat as the doctrinal and political question of refusal to enforce signing statements.

There is no single answer to the question of how federal courts are likely to treat challenges to the constitutionality of signing statements that announce a President's intention not to enforce one or more discrete provisions of a bill he signs into law, because the substantive grounds that the President offers for declining to enforce the law matter a great deal. In the case of pure policy disagreements without the slightest pretensions to constitutional objection (which are few and far between), and in the

case of refusals to enforce based on non-Article II constitutional grounds², federal courts are likely to have little sympathy with a President's argument that he is not bound to enforce provisions of a bill he has signed into law, for reasons I will discuss below. In such cases, the only judicial avenue available to a President who wishes to avoid enforcement of controversial provisions of duly enacted laws will be to convince the courts that his constitutional objections are well-founded; and he is unlikely to have the benefit of any particular weight accorded to his official pronouncements to that effect³. In other words, the President will be left in the position of any other litigant attempting to press a constitutional claim: his attorneys will be required to convince the court through arguments from constitutional text, judicial precedent, and the like.

As to signing statements explicitly premised on Article II constitutional objections, the merits of the constitutional claim will again be the obvious touchstone. Critics of the technique might argue that the very act of signing a bill into law, rather than exercising the veto option, undercuts a President's legal argument that some provision of the law ought to be invalidated by the courts. By signing the bill, the argument runs, the President acquiesces in the implicit claim that Congress makes whenever it

-
- 2 Also unusual; signing statements often try to make the connection to Article II powers because this is (justifiably) considered to be the area in which the President has the greatest scope of authority to make constitutional judgments independent of judicial input, and because the Court has repeatedly suggested that the President is immune to inter-branch interference when he acts within the scope of his actual Article II powers, e.g. *United States v. Nixon*, 418 U.S. 683, 705 (acknowledging “the supremacy of each branch within its own assigned area of constitutional duties”); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (noting that the President's role as the “sole organ of the federal government in the field of international relations...does not require as a basis for its exercise an act of Congress,” but rather is only subject to “subordination to the applicable provisions of the Constitution”). However, the attempts by some signing statements to link substantive policy disagreements to Article II prerogatives sometimes strain credulity, as with President Ronald Reagan's assertion that the assignment of authority to rule on protests under federal law relating to contract procurement to the Comptroller General (technically a Congressional official, although generally considered to be outside the direct control of either the legislature or the executive) violated constitutional separation of powers by usurping executive authority (Ronald Reagan, Statement on Signing the Deficit Reduction Act of 1984, July 18th, 1984). Reagan's direction to executive branch agencies not to enforce the relevant provisions led to litigation and public controversy ably described by Cooper, at 225-7, the result of which was a declaratory judgment that the challenged provisions were constitutional, and a good deal of public wrangling over whether the Administration would treat that judgment as binding, which it eventually did.
- 3 To support my argument that courts are likely to limit Presidential signing statements interpreting constitutional text other than Article II to whatever persuasive force the President's arguments might have, I would point to classic statements of judicial supremacy such as *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (“the federal judiciary is supreme in the exposition of the law of the Constitution”), as well as the Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), which emphatically denied a claimed Congressional power to determine the substance of the Fourteenth Amendment's restrictions on the States under Congress's §5 enforcement power; *Boerne* contains no suggestion that the analysis would not also control for executive determinations of the scope of constitutional provisions considered to be beyond the scope of its special competence.

passes a law, namely that all of its provisions comport with constitutional requirements. Such critics might point to the prevalence of constitutional, rather than policy, objections in vetoes exercised by Presidents during the Republic's early days⁴. A task force appointed by the American Bar Association to study the signing statements issue recommended that the President veto bills which, in his opinion, contain unconstitutional provisions⁵, in keeping with the task force's interpretation of Article I, §7, which on its face requires the President to sign or reject bills in their entirety. But other scholars have noted that in the modern political environment, flat-out vetoes of large, complex “omnibus” bills, containing dozens of titles and hundreds of sections with only tenuous connections between one another are simply not a practical option for the President⁶. Defenders of those signing statements which announce an intention not to enforce on the grounds of infringement on a President's Article II powers might plausibly argue that Presidents should not have to choose between the erosion of what he perceives to be the proper prerogatives of his office and the heavy political costs that might attend vetoing a statute on the basis of a few unconstitutional provisions entrenched among hundreds of pages worth of uncontroversial and sometimes pressing national policy.

Refusal to enforce signing statement advocates generally fail to consider other options for dealing with omnibus bills with provisions that the President or his legal advisors believe to be clearly unconstitutional. There is no reason, in principle, why Presidents should be any more reluctant to submit claims that Congress is encroaching on powers assigned to the President in Article II to judicial scrutiny than they should be to submit, say, a claim that some provision of a law violates constitutional guarantees of equal protection⁷, or a claim that a provision violates free expression guarantees and

4 Fisher (120-2) describes how five of the first seven vetoes issued were on constitutional grounds.

5 "Recommendation of the Task Force on Presidential Signing Statements and the Separation of Powers Doctrine." American Bar Association. 27 April 2008 <http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf>.

6 Cooper, 211.

7 As with the reservations President Clinton expressed in his signing statement for the National Defense Authorization Act for Fiscal Year 1996 regarding provisions that would have required the discharge of all HIV-positive military service members. As Cooper describes at 217-8, the Administration chose to express clear constitutional objections in the signing statement, but declined to order nonenforcement, instead choosing to support attacks on the law in court, which

constitutes a bill of attainder⁸. These constitutional conflicts implicate values just as fundamental to the American political system as do disputes over the division of powers between Congress and the President, and yet Presidents have proven much more likely to take matters into their own hands through the tactic of refusing to enforce offending provisions in cases of the latter than in cases of the former. Of course, advocates of a departmentalist system of constitutional decision making⁹ have a ready answer for this discrepancy: it arises from an error on the part of those Presidents who have been willing to defer to judicial decisions outside of the Article II context. On a departmentalist theory which accepts the validity of refusal to enforce signing statements¹⁰, Presidents ought to decline to enforce *any* provision they believe to be inconsistent with the Constitution, judicial precedents notwithstanding. A First Amendment violation would be as valid a ground for refusing to enforce a given provision as would Congressional encroachment on the President's commander in chief powers.

Leaving aside the merits of the departmentalist view, those who do not subscribe to it are left with a difficult task in seeking to define a tenable distinction based solely on Article II grounds between situations in which the President should sign a law and refuse to enforce a provision he believes to be unconstitutional and situations in which he should sign a law, agree to enforce such a provision as the duly-enacted law of the land despite his view that it is unconstitutional, but decline to defend the provision in court, and hope for (and perhaps facilitate) a judicial determination of the

proved unnecessary when the provision was subsequently repealed.

- 8 Gussis (607-8) describes how President Roosevelt signed the Urgent Deficiency Appropriations Act of 1943 and announced his intention to enforce it in full, but instructed the Justice Department not to defend a particular provision of the law in court. The provision in question barred certain government employees, identified by name, from collecting government salaries after a certain date. The provision was clearly based on Congressional disapproval of the individuals' leftist political views. Ultimately, Congress hired a special counsel to defend the statute, but the Supreme Court invalidated it as a bill of attainder in *United States v. Lovett*, 328 U.S. 303 (1946).
- 9 Such as former Attorney General Edwin Meese, whose views on the authoritative nature of Supreme Court decisions and the duty of each branch to act in accordance with its own interpretation of the Constitution had a strong influence on the development of the Reagan administration's aggressive use of signing statements.
- 10 Which not all conceivable versions of departmentalism would. Meese certainly did accept and advocate the use of refusal to enforce signing statements, but given the theory's anti-judicial bent, which is often associated with a certain strain of conservative constitutional theory called "strict constructionism" which purports to take primary account of the Constitution's text and history in interpreting the document, it is not difficult to imagine a more intellectually consistent departmentalist rejecting refusal to enforce signing statements on formalist grounds, and insisting that a President veto legislation containing provisions that, in his view, are unconstitutional.

provision's unconstitutionality. To take an example mentioned above, President Clinton was content to allow federal courts to sort out the ban on HIV-positive individuals serving in the military, despite his view that the ban violated constitutional equal protection guarantees. Yet he repeatedly issued refusal to enforce signing statements in connection with provisions perceived to encroach upon the prerogatives of his office. The rationale Walter Dellinger of Clinton's Office of Legal Counsel provided for Clinton's decision *not* to refuse to enforce the HIV discharge provision contains no obvious basis on which to hang a principled Article II-based exception:

When the President's obligation to execute laws enacted by Congress is in tension with his responsibility to act in accordance with the Constitution, questions arise that really go to the very heart of the system. And the President can decline to comply with the law, in our view, only where there is a judgment that the Supreme Court has resolved the issue. And here the courts have not had an opportunity to resolve it, and the action the President is taking [declining to defend the provision in court], if [Congress] choose[s] to defend this provision, will ensure that the courts are presented with a full range of argument in making their determination¹¹.

White House Counsel Jack Quinn similarly emphasized the importance, even the primacy, of the judicial role in the process of determining a provision's constitutionality, arguing that “in circumstances where you don't have the benefit of...a prior judicial holding [that the provision is unconstitutional], it's appropriate and necessary to enforce it”¹².

One argument for those who would reconcile positions like those staked out by Dellinger and Quinn with refusal to enforce signing statements in the Article II context might be that Supreme Court precedents themselves accord co-equal branches of government substantial latitude in determining the scope of their constitutional powers and responsibilities. This is not a convincing summary of separation of powers case law, however. Time and again, the Court has stepped in to adjudicate disputes between Congress and the President, reaching the merits of the cases and making decisions based on the Court's own understanding of the constitutional principles at stake. Even in its most extreme statements of Presidential power, the Court never suggests it is deferring to Presidential

¹¹ Quoted at Cooper 218.

¹² *Ibid.*, at 217-8.

exertions of authority in discrete areas of policymaking or governance based on mere assertions by the President that such is the most advantageous or even most constitutionally correct way to apportion federal power. Rather, the Court always makes its own determinations, in light of ordinary interpretive principles, as to what the Constitution requires in any given separation of powers case¹³. Nor, of course, has the Court shied away from disagreeing with the President as to the scope of his authority and invalidating his actions as exceeding the powers of his office; and when the Court renders such a decision, it expects that the President will accept it as binding¹⁴. For these Clintonite moderates, who would sometimes sanction refusal to enforce signing statements and sometimes not, there really is no principled basis to be found within the Court's precedents to establish that separation of powers disputes between the President and Congress are somehow specially reserved for resolution by the President and Congress, with the stronger institution achieving recognition for its view of the proper balance of power under the Constitution by whatever means it finds expedient. The courts are the appropriate forum to resolve disagreements regarding the constitutionality of individual statutory provisions, regardless of the specific constitutional basis for the disagreement, unless advocates of a “moderate” approach to the refusal to enforce issue can demonstrate a sound basis for allowing the President to make binding constitutional determinations when the issue encompasses his own powers, but not when the issue concerns other constitutional provisions.

One question relating to refusal to enforce signing statements and the Constitution is interesting, but easily answered: how will courts treat refusal to enforce signing statements when they disagree with the substantive constitutional position that the statements represent? Under *Clinton v. New York*¹⁵ (the line item veto case), it appears clear that courts will not hesitate to invalidate refusal to enforce signing statements as exceeding the President's prescribed role in the lawmaking process. The merits

13 An excellent example is *United States v. Curtiss-Wright Export Corp.* Although the Court stakes out a claim for broad, even unlimited executive authority in the realm of foreign affairs, it engages in ordinary constitutional interpretation, considering text, principle, and constitutional history to arrive at its conclusion that “the President [is] the sole organ of the federal government in the field of international relations.” 299 U.S. at 320.

14 E.g. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *United States v. Nixon*.

15 524 U.S. 417 (1998)

issue begs the question of justiciability, however. Almost by definition, a refusal to enforce signing statement involves a *lack* of government action, and it preserves a status quo. Various Supreme Court decisions create hurdles to construing a denial of some government benefit, as opposed to the denial of a constitutionally secured right, as a concrete injury sufficient to establish Article III standing¹⁶. Moreover, *Raines v. Byrd*¹⁷, a false start in the ultimately successful legal battle to invalidate the line item veto, established that mere “institutional injuries” are not sufficient to establish constitutional standing, Congressional attempts to get the case into court notwithstanding. Standing in such cases is difficult, but clearly not impossible, to establish, as the result in the successful line item veto case demonstrates¹⁸. An additional procedural difficulty arises in the context of refusal to enforce signing statements that double as directives to executive agencies, as many do. The default posture of courts towards administrative agency decisions is deferential¹⁹, reflecting a judgment that agency decisions are more likely to be correct than judicial decisions where a “regulatory scheme is detailed and complex” and where “the agency consider[s] the matter in a detailed and reasoned fashion”²⁰. This depoliticized, technical conception of the administrative agency decision making process has dominated administrative law since the mid-1980s, but it does not account for the possibility that

16 E.g. *Dandridge v. Williams*, 397 U.S. 471 (1970) (declining to invalidate Maryland plan reducing welfare benefits, despite demonstrated over- and underinclusiveness). *Dandridge* did not involve questions of standing, but it does demonstrate the Court's hostility to construing the denial of government benefits to which a person appears to be entitled as judicially redressable injuries.

17 521 U.S. 811 (1997)

18 The Court noted that the President's action in canceling two items of direct spending (in both cases, actually reinstating tax claims that the statutes would have waived rather than denying the effect of actual expenditures) removed concerns about the ripeness of the dispute that had been central to the denial of standing in *Raines*; 524 U.S. at 430. The Court also rejected the government's claim that the respondents' injuries were too speculative because they depended on the effects of statutory provisions that, due to the President's exercise of his line item veto authority, never became law. The Court accepted the calling back into existence of a multibillion dollar contingent liability on the part of one party where a waiver of tax recoupment was reinstated by the President's action on the one hand, and the destruction of an economic bargaining chip due to the cancellation of a provision that would have allowed one respondent to defer tax liability on certain purchases on the other hand, as injuries with sufficient concreteness to establish Article III standing; 524 U.S. at 430-2.

19 The leading case is *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). “*Chevron* deference,” as the doctrine has become known, applies when a court finds that a relevant statute authorizing agency decisions in a certain area is ambiguous, or contains a gap that Congress intended the agency to fill, and furthermore if the court determines that the agency's interpretation of the statute is reasonable or permissible. If both conditions apply, deference to the agency's interpretation and actions based on that interpretation is the appropriate response for a reviewing court.

20 *Chevron*, 467 U.S. 837 at 865 (footnotes omitted).

agencies may be directly engaged by the political arm of the executive to support a Presidential administration's policy priorities at the expense of reasonable or even defensible interpretations of relevant Congressional statutes. This is precisely the situation at stake in the case of refusal to enforce signing statements which function as agency directives: they demand that agencies adopt a posture contrary to the text of statutes on the basis of a Presidential determination that following the statute would be unconstitutional. Under the circumstances, it would not be surprising if the courts were willing to create an exception to the general doctrine of administrative deference if necessary to subject controversial refusal to enforce signing statements to direct judicial review.

Once having cleared the hurdle of standing, a litigant hoping to obtain declaratory and injunctive relief against the use of a refusal to enforce signing statement finds a significantly easier task before him or her. Under the controlling opinion in *Clinton v. New York*, a formalist analysis of the lawmaking process is the correct approach. In *Clinton*, the Court confronted the results of the Line Item Veto Act²¹, which provided, in relevant part, that “the President may, with respect to any bill or joint resolution that has been signed into law pursuant to Article I, section 7, of the Constitution of the United States, cancel in whole-(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit,” provided that he took certain minimal procedural steps. Upon the President's use of this authority, the Court held²² that the Line Item Veto Act violated the Presentment Clause of the Constitution²³.

The Court's formalist analysis placed primary emphasis on the point that the version of the bill that eventually became law was not, in fact, the same version of the bill that had been passed by the Senate and the House of Representatives, because it omitted the two sections which the President ultimately decided to cancel. Moreover, it noted that the President's action in the challenged case did

21 2 U.S.C. §697 *et seq.*

22 524 U.S. at 448.

23 Article I, §7 provides that “[e]very bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated...”

not fit neatly into either of the two options provided in the Presentment Clause, either signing or “returning” (vetoing). Instead, the Line Item Veto Act authorized what was, in the Court's view, an impermissible blend of signing and vetoing: portions of the bill were signed and became law, while the two offending provisions were canceled. Although the canceled provisions could be re-enacted by simple majority vote of both houses of Congress, the President retained his constitutional authority to veto this re-enactment as if it were a separate bill. It was clear in both formal and practical terms that this procedure was not the same as that set forth in the Presentment Clause. The interesting functionalist question that the Court explicitly declined to address²⁴ was whether the procedure set forth by the Line Item Veto Act might be considered a valid “delegation” of legislative authority to the executive—in other words, whether or not Congress was authorized to “consent” to the diminution of its constitutionally prescribed authority to require that the President sign or veto bills in their entirety.

Under the majority's analysis, the constitutional issue at stake with regard to refusal to enforce signing statements would be collapsed into simple categories. Is the effect of the President's action, the *Clinton* majority would inquire, to cause a different bill from that passed by the House and the Senate to become law? If the answer is yes, there is a Presentment Clause violation, and the President's action is unconstitutional. It seems clear from the text of the many refusal to enforce signing statements issued over the past twenty-eight years that if the Court takes seriously these statements' contentions that they have legal force, and that the President intends to make use of his formal constitutional authority to carry his judgments on the validity of the various statutory provisions into execution, then the effect is to alter the text and the meaning of the statutes from what has been enacted by Congress. There can be little doubt that under a strict formalist analysis, the President is without authority to issue refusal to enforce signing statements or to sign a bill into law and then decline to enforce provisions he disagrees

24 524 U.S. at 447-8: “[A]lthough appellees challenge the validity of the Act on alternative grounds, the only issue we address concerns the “finely wrought” procedure commanded by the Constitution. We have been favored with extensive debate about the scope of Congress' power to delegate lawmaking authority, or its functional equivalent, to the President... Thus, because we conclude that the Act's cancellation provisions violate Article I, § 7, of the Constitution, we find it unnecessary to consider the District Court's alternative holding that the Act ‘impermissibly disrupts the balance of powers among the three branches of government.’” (Citations omitted.)

with or believes to be unconstitutional. If, on the other hand, the Court does not agree with the President's contention that the signing statements themselves have legal effect—that they do, in and of themselves, alter the text of the statute—then an actual refusal to enforce would not necessarily implicate the Presentment Clause or a formalist analysis. Instead, the question would be whether or not the President is fulfilling his responsibilities under the Take Care Clause²⁵. This would be a fact-sensitive question, and the evidence that a refusal to enforce signing statement would itself provide of an administration policy to decline to enforce certain sections of a duly enacted law might well persuade the Court that the President had abdicated his constitutional duties²⁶. A situation like this would stray into the territory of traditional separation of powers questions, where bright line rules based on the constitutional text itself are difficult to come by, and structuralist or functionalist analyses come into play. One of the most obvious tests that could conceivably be applied in a case in which the Court declines to adopt the President's position that refusal to enforce signing statements change the actual substance of a law is the standard articulated in Justice Jackson's *Youngstown* concurrence²⁷. A situation such as this clearly falls into his third category, which Jackson warned meant that “Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution,

25 Article II, §3 provides that the President “shall take care that the Laws be faithfully executed.”

26 I stress again that this descriptive analysis of the Court's likely response to a challenge to a refusal to enforce signing statement assumes that the Court *disagrees* with the President's constitutional analysis, and believes the provisions that the President has declared his intention not to enforce to be constitutionally unproblematic. In a case in which the Court agrees with the President, the question of the manner in which the President went about his duties would likely be set aside in favor of a judgment on the merits of the case (as to the validity of the challenged statutory provisions).

27 Justice Jackson lays out three categories of analysis for exercises of Presidential power: First, “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum.” Second, “[w]hen the President acts in the absence of either a congressional grant or denial of authority...there is a zone of twilight.” Third, “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb...Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject.” 343 U.S. at 635-7. As to the last quoted statement by Jackson, it is not self-evidently clear, nor does Jackson attempt to explain, why the Court should only sustain executive action in defiance of Congressional policy only if it concludes that Congress has no authority over the subject. In the context of the middle category (no express grant or denial of authority), Jackson acknowledges the possibility of areas in which the President and Congress may have “concurrent authority,” *ibid.* at 637, causing further confusion as to why this situation might not apply to a third category situation, where the Justices might justifiably weigh the degree to which the Constitution authorizes the President or Congress to address a certain issue, and arrive at a conclusion on the basis of such a balancing analysis, without arriving at any categorical conclusions that would entail “disabling” either institution from acting in some manner on the issue in the future.

for what is at stake is the equilibrium established by our constitutional system”²⁸. This alternate route likely leads to no better an outcome for the refusal to enforce signing statement; although there is less case law on the subject by far, there is at least some indication that the old maxim regarding strict scrutiny being “strict in theory, but fatal in fact” applies with equal force to the review of exercises of executive authority falling within Justice Jackson's third category²⁹.

Apart from the *Clinton* majority's formalist separation of powers analysis, there is also the more flexible functionalist and structuralist approach adopted by the dissenters in the line item veto case. Scalia's dissent identifies the primary question in the case not as a Presentment Clause issue, but as a non-delegation issue³⁰. He places primary emphasis on historical practice to conclude that in the narrow context of spending decisions, the Line Item Veto Act is a permissible delegation of legislative authority to the President to expend up to a certain amount of funds authorized for a specified purpose³¹. It is plain, however, that for Scalia the twin factors of Congressional authorization for the President's action and the specific context of expenditure of authorize funds are critical in determining his vote. Indeed, he explicitly states that “Article I, § 7 of the Constitution obviously prevents the President from canceling a law that Congress has not authorized him to cancel”³². Indeed, refusal to enforce signing statements are completely outside the non-delegation doctrine context, because they do not involve Congressional delegation to the executive, but rather executive defiance of Congress's will. Although Scalia may have preferred a more flexible approach to a situation in which Congress and the

28 *Ibid.*, at 648.

29 The preferred route for upholding an executive act that might appear to conflict with Congressional policy appears to be shoehorning the situation into a different Jackson category. In *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the majority took what was an apparent instance of Jackson's second category, that of Congressional non-action, and fit it into Jackson's first category by claiming Congressional “acquiescence” to executive policy by lining up an array of statutes relating to a general issue (executive claims settlement for disputes between U.S. nationals and foreign governments), and construing them to speak to a specific one (suspension of claims filed in U.S. courts). Although not a case involving the third, most suspect Jackson category of executive action, *Dames & More* is an excellent example of the malleability of Jackson's categories, and the tools a future Court might have at its disposal in declining to reach the conclusion that a challenged refusal to enforce certain portions of a duly enacted statute is what it appears to be— Presidential action in defiance of the will of Congress.

30 *Clinton*, 524 U.S. 417, 465 (Scalia, J., dissenting).

31 *Ibid.*, at 465-9.

32 *Ibid.*, at 464.

President sought to collaborate to bring innovation to the lawmaking process, there is no indication that he sanctions unilateral alterations to that process to the benefit of one branch and the detriment of the other. Under Scalia's moderate functionalist separation of powers analysis, it seems clear that refusal to enforce signing statements would not withstand constitutional scrutiny.

Justice Breyer's dissent lays out an even more flexible standard of evaluation for changes to the exact constitutional procedure prescribed for the enactment of laws. Yet even under this analysis, refusal to enforce signing statements cannot withstand scrutiny. First, Breyer rejects the majority's formalist Presentment Clause analysis, reasoning that cancellation in accordance with Congressional approval is neither an amendment nor a repeal of a statute, and thus that cancellation does not in any way implicate the Presentment Clause or the broader “finely-wrought procedure”³³ for enacting laws that the majority seeks to preserve³⁴. Breyer also includes a defense of the Line Item Veto Act on both practical³⁵ and constitutional³⁶ grounds—he is the Act's most unabashed defender in the *Clinton* line-up, reflecting his belief that “the genius of the Framers' pragmatic vision” provides wide scope for mutually agreed-on innovative arrangements for governance and power-sharing between Congress and the President³⁷. What Breyer does not account for, and what is clearly far from his mind in analyzing the issues as he does, is that a similar result (the invalidation or “cancellation” of a provision of a properly enacted federal law) might be obtained by executive fiat, in the teeth of Congressional opposition, which is precisely what occurs in the case of refusal to enforce signing statements. Breyer explicitly prefaces his analysis by noting that the Court “need not here referee a dispute among the

33 *Ibid.*, at 440 (majority opinion, quoting *INS v. Chadha*, 462 U.S. 919, 951).

34 *Ibid.*, at 473-80 (Breyer, J., dissenting).

35 *Ibid.* at 470-1, arguing that the nation's expanded size and the scope of its budget now require that Congress take a procedural short cut such as the Line Item Veto Act rather than accomplish the same goal by sending each and every appropriation to the President as a separate bill. Breyer finds the concern for responsible spending and divided appropriations authority to be “constitutionally proper” objectives, *ibid.* at 470.

36 Beyond rejecting the majority's Presentment Clause analysis, Breyer explores the less clear-cut side of separation of powers doctrine, considering whether Congress has attempted to assign the President non-executive authority, whether it has given him what must be exclusively reserved as legislative authority, and whether it has allocated him excessive authority generally, in violation of the nondelegation doctrine. On each of these issues, he finds that the Line Item Veto Act remains within the broad contours of the Court's separation of powers law, *ibid.* at 480-96.

37 *Ibid.* at 472.

other two branches”³⁸. He does not dwell on this point, as in *Clinton* it is an obvious one, with both the Executive and Congress vigorously defending the statute's constitutionality before the Court. But of course, it is a crucial caveat when considering how Breyer's analysis would apply to a case challenging the constitutionality of a refusal to enforce signing statement, which does present just such a dispute between the President and Congress.

In applying the substance of Breyer's analysis to the signing statement situation, we can essentially discard the discussion of the nondelegation doctrine, which, while interesting in its own right, has little bearing on a case in which no actual delegation by Congress to the executive branch has occurred. The nondelegation doctrine is concerned with situations in which Congress seeks to abdicate its proper role in the constitutional structure to the President for the sake of convenience or administrative ease; there is little analogy to signing statements, except inasmuch as it is possible to say that those powers which Congress is not free to delegate may also not simply be appropriated by the President. Since the Line Item Veto Act is the only case in which Congress ever attempted to delegate a power resembling a refusal to enforce signing statement to the President, and since the majority did not reach the nondelegation issue, there is little basis for saying with certainty what the state of binding case law is on the question of whether the effective cancellation of discrete statutory provisions is delegable authority. In any event, the portions of Breyer's opinion having the most direct bearing on the question of the constitutionality of refusal to enforce signing statements are those in which he analyzes whether the Line Item Veto Act imbues the President with authority that is distinctively “non-executive,” thus violating the implicit command of the Article II that the President's powers be restricted to executive functions, and in which he considers whether the power given is distinctively

38 *Ibid.* at 472. Breyer also highlights the importance of Justice Jackson's *Youngstown* categories, which call for maximal judicial deference when the President acts according to the will of Congress. The majority conspicuously fails to address *Youngstown* and the Jackson concurrence at all, possibly because the analysis in the *Youngstown* majority and lead concurring opinions is highly functionalist, thus not fitting in with the *Clinton* majority's project to present the line item veto issue as a clear-cut instance of a conflict between a statute and the plain text of the Constitution, or possibly because the *Youngstown* result and Jackson's three-category system in particular cut in the exact opposite direction from the result the *Clinton* Court reaches.

“legislative,” thus violating Article I. Writing sparingly, Breyer concludes that the authority conveyed to the President is “the right kind of power”³⁹ (that is, it can fairly be characterized as executive power), and that the fact that it resembles legislative power is no bar to the President taking it on, inasmuch as Court precedent establishes that the same kinds of powers (such as rule making or claim adjudication) can properly be vested in different branches simultaneously⁴⁰. Having concluded there is no valid conceptual objection to the scheme of shared powers provided by the Line Item Veto Act, he goes on to consider whether the Act violates a “significant separation-of-powers objective”⁴¹. It is here that his analysis clearly forecloses a claim to his vote in favor of refusal to enforce signing statements, because he notes expressly that one such objective is “to maintain the tripartite structure of the Federal Government-and thereby protect individual liberty by providing a 'safeguard against the encroachment or aggrandizement of one branch at the expense of the other’”⁴². It seems clear that refusal to enforce signing statements constitute just such an “encroachment” of the executive branch upon the powers of both the legislative and judicial branches; legislative by vitiating the complex political negotiations that take place in Congress to arrive at the final text of a bill, which only represents the will of the people's representatives if its separate parts are treated as an indivisible whole; judicial by usurping the courts' role in determining the constitutionality of specific statutory provisions and deciding whether a constitutional violation requires that the law be invalidated in whole or in part. Breyer's further distinctions between the Line Item Veto Act and an action that would violate this principle of non-encroachment all cut against refusal to enforce signing statements: he notes that Congress retains significant options to restrict the use of the line item veto power granted in the Act (while it retains almost no power to limit the President's use of signing statements, which by definition occur after the legislative process for a given bill has terminated); he notes the weight of historical precedent in favor

39 *Ibid.* at 480.

40 *Ibid.* at 481.

41 *Ibid.*

42 *Ibid.* at 482 (quoting *Buckley v. Valeo*, 424 U.S. 1, 122).

of allowing Congress to grant the President what he characterizes as “discretionary authority over spending”⁴³ (in contrast to the case of the signing statement, in which the weight of precedent falls on the side of vetoing unconstitutional bills or signing them but declining to defend them in court); and he avers that Act's procedure does not unduly aggrandize the President's authority because it is limited to the budget context (whereas signing statements are issued with regard to all sorts of laws and provisions). Refusal to enforce signing statements fail each and every one of the conditions that Breyer places on actions which respect the principle that separated and divided powers in the Constitution have the primary objective of preventing the concentration of excessive authority in one branch. The signing statement, coupled with the unitary executive theory, is the essence of executive aggrandizement at the expense of its co-equal branches.

Although the opinions written in *Clinton* certainly do not represent the full spectrum of opinion on the constitutionality of the Line Item Veto Act in particular or executive cancellation or repeal authority generally, they do represent a reasonable cross-section of the debate on these important questions. One reason I spent more time on Breyer's more nuanced separation of powers analysis than the majority's strained formalist reasoning is that I believe Breyer's approach represents the dominant tradition in the Court's separation of powers law⁴⁴, abandoned by the Court's majority for a day in *Clinton* to appeal to a broader range of public support for a controversial result by appearing to return to constitutional first principles. Thus, I think it at least as likely that a hypothetical case challenging a refusal to enforce signing statement would be litigated within the functionalist paradigm represented by most of the Court's cases in the separation of powers context as that it will be presented as an argument between competing cramped formalist rationales, despite the fact that *Clinton* is the case most

43 *Ibid.* at 483.

44 *Youngstown* (both the majority and concurring opinions), *Nixon*, *Dames & Moore*, and even *Curtiss-Wright* all incorporate functionalist analyses, to varying degrees; all contain discussion as to the reasons why, in practical and political terms, and with reference to our nation as it is today, a particular challenged practice either did or did not comport with broad separation of powers principles laid out by the Constitution. In contrast, the *Clinton* majority completely neglects to consider what the practical effect of the Line Item Veto Act would be, and refuses to give weight to the evidence of executive-legislative cooperation. The Court fixates on an exact form of procedure and uses deviation from that form as sufficient grounds to invalidate the scheme.

obviously on point. That is why it is so important to recognize that even under the dissenters' analysis, the sort of unilateral appropriation of governing power represented by refusal to enforce signing statements cannot withstand constitutional scrutiny. They fly in the face of bedrock principles of separation of powers of law concerned with the preservation of a balance of power between the three branches of government, arming each department with an appropriate arsenal of tools to defend its own indispensable role in the constitutional structure. For these reasons, I think it unlikely that refusal to enforce signing statements and actions based on their legal force and effect would survive constitutional challenges.

Although it is possible that future conflicts over refusal to enforce signing statements will be played out mostly or primarily in the courts, that has not been the case so far. Article III standing requirements, discussed above, are probably the largest single barrier to effective litigation against refusal to enforce signing statements. Whatever the exact reasons, the conflict over signing statements, which has intensified and become bound up with broader issues of executive power during the current Bush administration, has mostly played out through the political process, at the level of rhetoric. In what follows, I hope to examine options Congress (the institution most affected by the increasing prevalence of refusal to enforce signing statements) has to address the issue in keeping with an understanding of separation of powers that is based in constitutional text and history. I will briefly consider two separate (recent) historical cases in which Congress has directly clashed with the President regarding the contested border between executive and legislative power, examine the constitutional significance of both of these conflicts in the context of the political and practical results actually achieved, and reason by analogy to the case of refusal to enforce signing statements. The two cases are the war powers case and the legislative veto case⁴⁵.

In the case of war powers, Congressional frustration with executive claims of inherent

45 Unlike the war powers case, legislative vetoes were less a political issue in and of themselves; the issue was with the results achieved using this procedural tactic. The legislative veto battle ended up being fought out in the courts, where the focus was very much on the legitimacy of the procedure itself.

constitutional authority to deploy troops abroad and essentially involve the United States in conflicts very much resembling out-and-out wars had been building since the 1950s, when President Truman claimed new authority as commander in chief to dispose of the U.S. armed forces as he saw fit in his effort to contain the spread of Communism⁴⁶. During the Cuban Missile Crisis, President Kennedy acted on what he perceived as his own constitutional authority to protect the security of the United States by imposing a naval blockade and threatening to interdict weapon shipments to Cuba; he did not seek preemptive Congressional approval, although a joint resolution expressing support for the President's actions to manage the crisis did pass both houses of Congress⁴⁷. Vietnam was partially authorized⁴⁸, but as the war dragged on it was generally agreed in Congress that Presidents Johnson and Nixon vastly exceeded the authority originally delegated. The War Powers Resolution was, in part, a response to the immediate events of the expansion of the war in Southeast Asia, coupled with simultaneous claims of broad executive privilege in connection with the Watergate scandal. As Fisher notes, Congress's success in overriding Nixon's veto of the War Powers Resolution was as much a function of partisan political resentments as it was of considered response to the issue of the increasingly unilateral manner in which post-World War II Presidents of both parties interpreted their constitutional authority to order military action irrespective of Congressional authorization or approval⁴⁹. The Resolution, as passed, purported to require Presidential consultation with Congress prior to committing military forces, and to require Presidential notification of Congress within 48 hours of committing troops, and to require the President to withdraw troops within 90 days of the initial commitment if Congress either fails to authorize the action or passes a concurrent resolution requiring the President to begin withdrawal (in which case withdrawal is to begin immediately). However, due to

46 Fisher, 276-7.

47 *Ibid.*, 278.

48 Pub. L. No. 88-408 (1964), "Joint Resolution to promote the maintenance of international peace and security in southeast Asia," popularly known as the Gulf of Tonkin Resolution.

49 Fisher describes (280-1) how some Representatives who had initially opposed the bill itself joined their colleagues in the successful veto override attempt, some of them arguing in explicitly partisan terms that the vote would represent a rebuke to the Nixon administration, regardless of the resolution's merits.

various procedural vagaries the consultation provision has been rendered advisory, and the deadlines relating to notification and troop withdrawals generally require explicit Congressional action (by means of concurrent resolution) to trigger them; the deadline provisions have never actually caused a withdrawal in and of themselves, whether because the President has obtained preemptive or *post hoc* authorization for troop commitments, or because Presidents have avoided triggering the deadline provisions by declining to report the military engagements under a particular section of the law⁵⁰. Moreover, after *Chadha* and the invalidation of legislative vetoes, the validity of the alternative procedure to force withdrawals, a simple concurrent resolution, is suspect⁵¹.

In practical terms, the War Powers Resolution failed to reverse the trend of greater concentration of the power to decide when and where American troops would be committed in conflict situations in the hands of the President. Moreover, since it was passed in 1973, there have been no international conflicts involving American troop commitments in which sustained political opposition has emerged before the fact of the commencement of troops deployments. Thus, most post-1973 conflicts have proceeded with express Congressional authorization, and in the few cases where it has not been obtained⁵², the lack of authorization has not altered the President's disposition of forces in any meaningful sense. Since Nixon, all Presidents of both parties have maintained that the War Powers Resolution is unconstitutional, on the grounds that it interferes with the President's constitutional authority as commander in chief of the nation's armed forces⁵³. This claim has never been tested in the courts; like the dogged attempts to challenge the Johnson and Nixon administrations' Vietnam policies⁵⁴, no court has taken up the invitation to rule on the constitutionality of the present conflict in

50 *Ibid.*, 281-3.

51 *Ibid.*, 283; *Chadha* is discussed *infra* at 21-2.

52 Trimble discusses one example, the 1994 U.S. invasion of Haiti. The Clinton administration did not seek Congressional pre-approval, and despite some debate within Congress about the prerogatives of the legislative branch in authorizing and controlling such a military action, neither house ultimately acted to either ratify or disapprove of the invasion (86).

53 Fisher, 285.

54 Most dramatically in *Holtzman v. Schlesinger*, 414 U.S. 1304 (1973), in which the Court declined to vacate a stay issued on a district court's order to stop the bombing campaign in Cambodia on the grounds that the President was required to seek a declaration of war against Cambodia. The Court never reached the merits of the constitutional questions related to

Iraq, whose inception was not accompanied by a formal declaration of war. The case of war powers is one in which Congressional attempts to restore or maintain the balance of power mandated by the Constitution in a particular issue area, in this case foreign affairs the power to engage in international conflict, have failed for political (reluctance to cut off military funds while troops remain in the field) and practical (the armed forces report to, and take orders from, the President; Congress has no independent power to control the actions of the military) reasons. It is doubtful that in an area as fraught with politics as issues of ongoing wars that the courts could effectively referee this dispute between the executive and legislative branches (and indeed, the judiciary has uniformly declined to deal with such questions); the result of the status quo has been that Congress has seen its traditional authority to be consulted in matters of war and peace eroded. The analogy to refusal to enforce signing statements is clear: in the absence of a judicial intermediary, in both cases the President essentially controls the result and arguably usurps Congressional power for the simple reason that the officials charged with putting the policy into action (military in the war powers case, generally administrative in the refusal to enforce signing statements case) report to him and not to Congress.

In the case of the legislative veto, what started as an accommodation mutually agreed upon between Congress and the President ended by becoming a thorn in the President's side that was eventually removed. Fisher describes how it was President Hoover's desire to acquire greater freedom of action in the face of a hostile Congress that prompted him to suggest an early species of legislative veto, in which Congress would delegate broad authority to reorganize the government to the President subject to the disapproval of either house⁵⁵. This procedure failed to produce satisfactory results for Hoover, whose political support had evaporated in the face of the Great Depression⁵⁶. But his successor, Franklin Delano Roosevelt, managed to use the carrot of legislative veto power (in the form

Vietnam, and circuit courts also kept the lid on such politically-charged litigation efforts.

⁵⁵ Fisher 142.

⁵⁶ After losing the election of 1932 in a landslide to Franklin Roosevelt, Hoover submitted eleven of these special kinds of executive orders, which would have consolidated a great variety of government activity; the House of Representatives rejected all his proposed reforms (Fisher 142-3).

of a concurrent resolution) to convince Congress to grant him the authority Hoover had previously sought⁵⁷. Although executive branch officials and lawyers raised constitutional concerns about legislative vetoes as impinging on executive authority even in these early days, Roosevelt and his successor were generally willing to accept legislative veto provisions when they suspected it was the only way to obtain the broad delegated authority that they sought from Congress. Later, the procedural device was extended both on the executive side (encompassing the actions of the extensive federal administrative bureaucracy that began to form during the New Deal era) and on the legislative side (extending down to Congressional committees, rather than concurrent resolutions or even one-house vetoes⁵⁸). Opposition to both of these developments was more strenuous than was opposition to the generic legislative veto, and eventually it was expressed in the form of court challenges, which judges met with circumspection for the most part⁵⁹.

INS v. Chadha, however, was not a particularly circumspect decision. The Supreme Court, squarely confronting the issue of the constitutionality of legislative vetoes for the first time, found that one-house legislative vetoes were unconstitutional, violative of the Bicameralism and Presentment Clauses. Although the Court's language and holding repeatedly emphasized the "one-house" feature of the case, the arguments relating to the Presentment Clause, the concern for the President's authority in the face of alleged encroachment by Congress, and the insistence that Congress utilize the "single, finely wrought and exhaustively considered, procedure"⁶⁰ that it was claimed the Constitution provided for taking legislative action all strongly suggested that the *Chadha* rationale might readily be applied to two-house legislative veto provisions. That has not occurred; instead, Congress has continued to pass two-house legislative veto provisions and has even retained the committee veto device by means of informal agreements with executive agencies⁶¹. *Chadha's* bearing on the refusal to enforce signing

57 *Ibid.* 143-4.

58 *Ibid.* 145-9.

59 *Ibid.* 149-52.

60 462 U.S. 919, 951

61 Fisher 155-7.

statements issue is notable in two major respects. First, it, like *Clinton* (which of course drew on *Chadha* directly for authority) relies on a cramped, formalist version of constitutional separation of powers to invalidate what was essentially a mutually agreed-upon compromise between the executive and legislative branches. In both cases, we see the pattern of the Court apparently standing in the way of governmental efficiency in defense of a rigid adherence to constitutional provisions whose inherent wisdom and value seems open to question inasmuch as a modern Congress and President have found an arrangement that works better for all parties involved. Second, in *Chadha* we see that the Court is essentially unable to force the other branches to accept its formalism as binding. The President wants discretionary authority for executive agencies, and knows Congress will not give it to him without the safeguard of a legislative veto provisions; thus he accepts the “catch” in some sense, although such bills are frequently accompanied by refusal to enforce signing statements that purport to interpret legislative veto provisions as anything more than advisory. In practice, however, Congress gets the veto authority it wants because it has more cumbersome ways (such as appropriations for very limited periods of time) to reign in the President if he does not acquiesce to the legislative veto procedure⁶². Would the result in terms of the practical effect of a hypothetical ruling by the Court against refusal to enforce signing statements be different, given that in such a case the Court would be allying itself with Congress against the President, rather than blocking schemes that both of the political branches have agreed to? It is difficult to say—as always, the issue turns on who has *effective* control of the government actors in question, and the answer in the context of signing statements is generally the President.

I would like to close with a brief nod to constitutional theory and what it has to say about what I have essentially presented as a doctrinal and political-constitutional issue. Tushnet's popular constitutionalist perspective, calling for increased constitutional decision making outside the court system, is perhaps the most interesting perspective out of major constitutional theorists on the signing

⁶² *Ibid.*155-6.

statements question. But it strikes at a weak joint in his approach, what one might call an “undertheorized” aspect of his approach to the ideal political society operating under the U.S. Constitution. Tushnet believes that structural safeguards within the Constitution are generally sufficient to protect minority rights and channel policymaking in positive directions that are respectful of liberal democratic and civil libertarian principles. But his theory has but little to say about what happens when one of the political branches, in this case the executive branch, essentially thumbs its nose at its co-equal branches and decides to ignore or radically change the interpretation of constitutional safeguards. The constitutional structure assumes that no one branch will be able to aggrandize its power unduly at the expense of the other two branches, because the latter two will combine to check the abuse of authority. Insisting on a strictly limited role for the judiciary in constitutional decision making tends to cause this system to break down by removing the authority and legitimacy that has, in the past, given one political branch or the other the political cover and legal authority it requires to resist genuine encroachments on its sphere of constitutional authority. The fault may not lie entirely with Tushnet, however; even if one allows for a robust role for judicial constitution decision making, as is the status quo, as I've frequently argued throughout this paper, the legitimacy provided by a court ruling may not be enough to overcome the President's advantage of direct control over executive and administrative agencies, which may give him the scope of action he needs to execute refusal to enforce signing statements despite resistance from Congress and the disapproval of the courts. Regardless, popular constitutionalism needs to better account for where the primary authority to enforce the procedural safeguards established by the Constitution resides, if not in the courts.

Ultimately, theory and practice combine to create doubts about the ability of the courts, Congress, or a mystical reverence for the legal and political traditions of the United States to constrain future Presidents from issuing and acting on refusal to enforce signing statements. It is a relatively quiet way to thwart domestic initiatives that the President cannot or does not wish to veto outright. Presidents from both parties have essentially embraced the tool and come to rely on it more and more

Copyright 2008 Brian Holbrook

during the last two Presidential administrations, which makes unilateral disarmament during the next administration seem unlikely. The extent to which conflicts such as this, in which ordinary legal traditions and the Constitution stand on one side and the practical implications of the office of the President stand on the other, the inertness of raw principle, or even principle backed by legislative and judicial institutional muscle (such as it is) can seem an indictment of the entire idea of constitutional government. In the end, however, perhaps it is behavioralists and political scientists who have the best answer to the dilemma posed by refusal to enforce signing statements: the most effective way to prevent their use is to build a public consensus against their use, and undermine the political support of Presidents who use them at all, or at least who use them to excess. In attempting to achieve that goal, legal and constitutional arguments can be powerful means of building a public consensus against a practice that has unsettling implications for the constitutional separation of powers.

I affirm that I have adhered to the Oberlin College Honor Code on this assignment.
-Brian Holbrook

Bibliography

- American Bar Association. "Recommendation of the Task Force on Presidential Signing Statements and the Separation of Powers Doctrine." American Bar Association. 27 April 2008. <http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf>.
- Brownell, Roy E. II. "The Unnecessary Demise of the Line Item Veto Act: The Clinton Administration's Costly Failure To Seek Acknowledgment of 'National Security Rescission.'" 47 *Am. U.L. Rev.* 1273 (1998)
- Bruff, Harold H. "Presidential Power and Administrative Rulemaking." *The Yale Law Journal*, Vol. 88, No. 3 (Jan., 1979), pp. 451-508.
- Carroll, Kristy L. "Whose State Is It Anyway?: Why and How Courts Should Use Presidential Signing Statements When Interpreting Federal Statutes." 46 *Cath. U.L. Rev.* 475 (1997)
- Cooper, Phillip J. By Order of the President: The Use and Abuse of Executive Direct Action. Lawrence, KS: University Press of Kansas, 2002.
- Fisher, Louis. Constitutional Conflicts Between Congress and the President. 4th ed. Lawrence, KS: University Press of Kansas, 1997.
- Gerhardt, Michael, Stephen Griffin, and Thomas Rowe, Jr. Constitutional Theory: Arguments and Perspectives. 3rd ed. Newark, NJ: LexisNexis, 2007.
- Gussis, Chrysanthe. "The Constitution, the White House, and the Military HIV Ban: A New Threshold For Presidential Non-Defense of Statutes." 30 *U. Mich. J.L. Reform* 591 (1997)
- Johnson, Dawn E. "Presidential Non-Enforcement of Constitutionally Objectionable Statutes." *Law and Contemporary Problems*, Vol. 63, No. 1/2, The Constitution under Clinton: A Critical Assessment (Winter - Spring, 2000), pp. 7-60.
- Kelley, Christopher S., "The Law: Contextualizing the Signing Statement" . *Presidential Studies Quarterly*, Vol. 37, No. 4, December 2007 Available at SSRN: <http://ssrn.com/abstract=1081185>
- Kelley, Christopher S. The Unitary Executive and the Presidential Signing Statement. (Unpublished dissertation.) Available at http://rave.ohiolink.edu/etdc/view?acc_num=miami1057716977
- McGinnis, John O. "Presidential Review as Constitutional Restoration." *Duke Law Journal*, Vol. 51, No. 3, Thirty-First Annual Administrative Law Issue (Dec., 2001), pp. 901-961.
- Meese, Edwin III. "The Law of the Constitution." 61 *Tul. L. Rev.* 979 (1987)
- Trimble, Phillip R. "The 1994 U.S. Action in Haiti: The President's Constitutional Authority to Use Limited Military Force." 89 *A.J.I.L.* 84 (Jan. 1995)