

Signing Statements and the Independent Power of the Executive to Interpret Constitutional Law

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My construction of the Constitution is . . . that each department is truly independent of the others and has an equal right to decide for itself what is the meaning of the Constitution in the cases submitted to its action; and especially where it is to act ultimately and without appeal.¹

Although the system of judicial review of constitutional interpretations is perhaps the most important U.S. contribution to constitutional developments around the world, the idea of an independent and inherent presidential power to interpret the United States Constitution also has a long pedigree. Not only did Thomas Jefferson assert this presidential prerogative, but presidents throughout U.S. history have at times asserted their independent power to interpret the Constitution in the face of contrary interpretations adopted by the other two branches of the federal government.

Aspects of this presidentialist view manifest themselves today in the increasingly controversial practice of presidential signing statements asserting the authority to refuse to execute laws that, in the President's own judgment, are unconstitutional. The contemporary debate over signing statements of this type, extending through the Bush Administration and into the new Obama Administration, suggests that an executive power to independently interpret constitutional law remains a contested and important question.

As a matter of constitutional text and the original understanding of the U.S. Constitution, this position is perfectly defensible. Nothing in the Constitution's text explicitly grants to any branch of the federal government the power of constitutional interpretation, nor does any provision explicitly make one branch the supreme arbiter of the Constitution's meaning. Members of all three branches, for instance, are required to take the same oath swearing to uphold the Constitution but nothing in these provisions indicates that one branch has a special authority or obligation. The President also is obliged to "Take Care" that all the laws are faithfully executed, while the Supreme Court and federal courts are granted the "judicial power" without any explication of the nature of this power.

Indeed, it is this lack of explicit textual authority for judicial review of constitutional questions that makes Chief Justice John Marshall's opinion in *Marbury v. Madison*² such a remarkable

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¹ Thomas Jefferson to Spencer Roane, 1819. ME 15:214

² 5 U.S. (Cranch 1) 137 (1803)

achievement. Lacking both political support and textual authority, Marshall nonetheless laid the foundations for judicial review of constitutional questions, an idea that would in time become an enormously influential and powerful global trend. Although there is historical support for judicial review of constitutional questions, the idea was hardly uncontroversial, and indeed, remains somewhat controversial among modern constitutional scholars.

Yet even after *Marbury*, U.S. presidents continued to assert their independent right to interpret the Constitution. Although they generally agreed to be bound by the Court's interpretation in any case to which it was a party, presidents continued to argue that they had the authority to adopt different interpretations from the Court in other circumstances. As President Andrew Jackson famously asserted in his veto message of the Charter for the Second Bank of the United States,

The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.³

The Court has never explicitly rejected this position, although it came closest to doing so in the 1958 decision of *Cooper v. Aaron*, when it asserted the Court's supreme authority over constitutional interpretations vis a vis state governments. Citing Article VI of the U.S. Constitution, which makes the Constitution supreme over state law, and *Marbury*, the Court declared that the principle that "the federal judiciary is supreme in the exposition of the law of the Constitution,[] has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."⁴

Cooper's confident declaration of judicial supremacy has been criticized by scholars as an overstatement of the consensus on this principle. Presidential administrations, for instance, have never fully acquiesced in the idea of judicial supremacy, at least vis-à-vis the executive branch. The most recent manifestation of presidential resistance to judicial supremacy can be found in the presidential assertions of the power to refuse to execute laws that, in the president's own judgment, are unconstitutional. Such assertions have been commonly made in the context of statements attached to presidential signatures of new legislation.

For example, President Obama recently attached the following "signing statement" to legislation objecting to provisions that directed his officers to advocate for certain views when participating in the governance of international financial institutions.

[Such provisions] would interfere with my constitutional authority to conduct foreign relations by directing the Executive to take certain positions in negotiations or discussions with international organizations and foreign governments, or by requiring

³ Andrew Jackson, Veto Message Regarding the Second Bank of the United States, 1832.

⁴ *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

consultation with the Congress prior to such negotiations or discussions. I will not treat these provisions as limiting my ability to engage in foreign diplomacy or negotiations.⁵

Like presidents before him, President Obama is asserting a right to simply refuse to follow statutes that he believes are unconstitutional. Although the provisions in the bill in question plainly required the Secretary of the Treasury to adopt certain positions during activities at the International Monetary Fund, President Obama simply declared that he would treat those provisions as nonbinding due to their interference in his inherent constitutional authority. He did so without relying on any Supreme Court precedent for his views.

Such signing statements, especially those attached by President George W. Bush during his presidency, drew substantial criticism (including from then-candidate Obama). For instance, the American Bar Association adopted a report in 2006 sharply criticizing the use of such statements, especially by President Bush on questions of constitutional interpretation.⁶ The New York Times similarly criticized President Obama's statements, especially those that asserted the independent presidential power to interpret the Constitution. If he wants to assert such a power, the paper editorialized, "then he should be able to point to court decisions or he should find a way to get the issue into court so the judiciary can make a call."⁷ Indeed, House of Representatives has demonstrated its displeasure with President Obama by voting by an overwhelming margin to take away funding for areas over which the President asserted his independent constitutional authority.⁸

Although judicial review of constitutional questions remains the most famous American constitutional innovation, contemporary assertions of an independent presidential power to interpret the Constitution demonstrate that the Jefferson-Jackson tradition lives on today in both Democratic and Republican administrations.

⁵ Statement on Signing the Supplemental Appropriations Act of 2009, June 24, 2009.

⁶ Task Force on Presidential Signing Statements and Separation of Powers, Recommendations, August 2006.

⁷ "On Signing Statements," The New York Times, March 17, 2009.

⁸ Walter Alarkson, "House Overwhelmingly Reject Signing Statements," The Hill, July 9, 2009.