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Presidential Signing Statements and Congressional Oversight

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Two thousand and six was the year of the presidential signing statement. This constitutional cause célèbre commenced on the penultimate day of 2005, when President George W. Bush signed a defense appropriations bill into law and simultaneously issued a signing statement cryptically declaring that the McCain Amendment—a provision in the bill prohibiting "cruel, inhuman, or degrading treatment" of any persons in U.S. custody anywhere[1]—would be construed "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief . . . [in order to] protect[] the American people from further terrorist attacks."[2] What did this mean? In response to press inquiries, senior administration officials confirmed that the purpose of the language was to reserve the right to authorize harsher methods of interrogation in situations concerning national security.[3] Thus, "never" became "maybe sometimes."[4] Professor Marty Lederman quipped that the President's December 30th signing statement was "the commander-in-chief version of 'I had my fingers crossed.'"[5] Senator McCain, among others, was not amused.[6]

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* Professor of Law, University of Cincinnati College of Law. I thank the Journal's editorial staff for inviting me to join in the February Symposium. My thinking on this subject benefitted enormously from the views expressed by my fellow participants. In addition, I am grateful for the countless helpful suggestions I received at both the Eighth Annual Ohio Legal Scholarship workshop at Capital University and a June work-in-progress lunch at the University of Cincinnati where I vetted earlier versions of this Essay. Finally, I thank Brennan Grayson for outstanding research assistance and the University of Cincinnati College of Law and the Harold C. Schott Foundation for generous financial support. Of course, all remaining errors are mine alone.

[1] Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act of 2006, 42 U.S.C.A. § 2000dd-0(1) (West Supp. 2007).

[2] Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act of 2006, 41 WEEKLY COMP. PRES. DOC. 1918, 1919 (Dec. 30, 2005).

[3] Charlie Savage, *Bush Could Bypass New Torture Ban*, BOSTON GLOBE, Jan. 4, 2006, at A1.

[4] *See id.* (noting that the purpose of the McCain Amendment was to "close every loophole") (internal quotation marks omitted).

[5] Rosa Brooks, *McCain to Bush: We Are All over You*, TULSA WORLD, Jan. 15, 2006, at G3.

[6] *See* Charlie Savage, *3 GOP Senators Blast Bush Bid to Bypass Torture Ban*, BOSTON

Four months later, the signing statement again made front page news (and was the focus of myriad op-ed pieces) after Charlie Savage published an extended article in *The Boston Globe* chronicling President Bush's apparently unprecedented use of constitutional signing statements.[7] In June, American Bar Association (ABA) President Michael Greco appointed a bipartisan, blue ribbon task force to review and report on the matter, which it in turn did near the end of July.[8] In the meantime, the Senate Judiciary Committee held a hearing at which the administration's use of signing statements was attacked by Republican and Democratic senators alike.[9] Then, in the immediate wake of the release of the ABA Task Force Report,[10] the Chair of the Senate Judiciary Committee, Arlen Specter, took to the Senate floor to introduce a bill (Senate Bill 3731) entitled the Presidential Signing Statements Act of 2006.[11]

Both the ABA Task Force's recommendations and Senator Specter's bill had as their centerpiece congressional creation of a cause of action for a federal court's declaratory judgment concerning the legal validity of future presidential signing statements.[12] The ABA Task Force Report, crafted by a bipartisan committee, proved contentious in a most bipartisan manner, drawing fire from not only the administration's stalwart allies but from its critics as well.[13] Although Senate Bill 3731 died with the 109th

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GLOBE, Jan. 5, 2006, at A3.

[7] Charlie Savage, *Bush Challenges Hundreds of Laws*, BOSTON GLOBE, Apr. 30, 2006, at A1. This essay focuses on constitutional signing statements, in which the President asserts that one or more provisions of a bill just signed into law are constitutionally problematic and will therefore be ignored or construed narrowly to avoid the constitutional problem. For an excellent overview of this subject, see Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 7. Constitutional signing statements are to be distinguished from rhetorical signing statements and interpretative signing statements. *See* Christopher S. Kelley, The Unitary Executive and the Presidential Signing Statement 45 (2003) (unpublished Ph.D. dissertation, Miami University), *available at* http://www.ohiolink.edu/etd/view.cgi?miami1057716977; *see also* The Legal Significance of Presidential Signing Statements, 17 Op. Off. Legal Counsel 131, 131 (1993) (distinguishing among different uses of presidential signing statements).

[8] *See* Charlie Savage, *Panel Chides Bush on Bypassing Laws*, BOSTON GLOBE, July 24, 2006, at A1; Mark Silva, *ABA Panel Urges Checks on Bush Power*, CHI. TRIB., July 24, 2006, at 1.

[9] *See, e.g.*, *Senators Charge Bush with Disregarding Laws in Name of Security*, ST. LOUIS POST-DISPATCH, June 27, 2006, at A2.

[10] *See* AM. BAR ASS'N, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE (2006), *available at* http://abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf.

[11] *See* S. 3731, 109th Cong. (2006); 152 CONG. REC. S8271–72 (daily ed. July 26, 2006) (statement of Sen. Specter).

[12] S. 3731 § 5; AM. BAR ASS'N, *supra* note 10, at 1.

[13] *See, e.g.*, Walter Dellinger, Op-Ed., *A Slip of the Pen*, N.Y. TIMES, July 31, 2006, at A17; Laurence H. Tribe, *'Signing Statements' Are a Phantom Target*, BOSTON GLOBE, Aug. 9, 2006, at A9.

Congress, Senator Specter reintroduced a revised version of the bill during the 110th congressional session.[14] But the debate to date has largely side-stepped the wisdom of the proposed resort to federal judicial declaration. Indeed, the successful push in August 2006 at the ABA's annual meeting to amend the resolutions the Task Force proposed, prior to their adoption by the ABA's House of Delegates, left the fifth resolution undisturbed.[15] That resolution called upon Congress to authorize suits for declaratory judgments on the legal validity of future signing statements.[16]

This Essay argues, however, that the proposed legislation would be ill-advised and counter-productive. Worse, it would exacerbate the underlying institutional infirmities that have brought us to the present precipice. The inclination to facilitate immediate resort to the judiciary for resolution of a dispute between the political branches about the President's constitutional obligations is premised on an unidentified, unjustified (and in my view unjustifiable) assumption about the relative roles of Congress and the Court. Specifically, the fifth ABA resolution and Senate Bill 3731 share the premise that the Court, rather than Congress, is responsible for ensuring that the President remains subject to the rule of law.[17]

This premise has matters backwards. Congress has *far greater* competence *and* legitimacy than do the courts to undertake the awesome task of compelling presidential compliance with the Constitution and laws of the United States. It is the judicial role in so doing that can be best understood as incidental and sharply circumscribed by concerns about competence and legitimacy. Indeed, absent long-standing congressional neglect of its many powerful tools for disciplining the executive branch, routine and open presidential assertions of the intent to disregard statutory provisions just signed into law would be all but inconceivable. Were Congress to act on the fifth ABA resolution, the resulting legislation would further entrench this congressional neglect and atrophy the congressional muscles alone capable of resisting a truly lawless President. Ironically, the unintended but most significant long term consequence of the fifth ABA resolution would be to make all the more likely the kind of presidential usurpation of the lawmaking function that the ABA Task Force Report warned against.

I. CONGRESS'S "TAKE CARE" CLAWS

Alexander Hamilton observed that the federal courts "have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of [their] judgments."[18] Or as President Andrew Jackson

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[14] S. 1747, 110th Cong. (2007).

[15] Ronald A. Cass & Peter L. Strauss, *Presidential Signing Statements I*, ADMIN. & REG. L. NEWS, Winter 2007, at 2 (describing House of Delegates revision of resolutions proposed by the Task Force).

[16] *See* AM. BAR ASS'N, *supra* note 10, at 1.

[17] *See id.*; S. 3731.

[18] THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961);

allegedly retorted with regard to the Court's decision in *Worcester v. Georgia*,[19] Chief Justice "John Marshall has made his decision, now let him enforce it."[20] Unlike the judiciary, however, Congress has its own mechanisms for coercion. Most prominently, the Constitution's Framers counterpoised the powers of the purse and the sword in the legislative and executive branches respectively.[21] But Congress has numerous tools in addition to control over appropriations to bring a wayward chief executive to heel.

First, Congress enjoys an investigative authority at least as extensive as its legislative authority. Though the adversarial method effectively limits the judge to a passive, referee role, Congress's power to inform itself (and the country) is inquisitorial and, therefore, active. Rooted in seventeenth-century British Parliamentary practice, Congress first asserted its power to compel the production of relevant testimony and documentation in its 1792 inquiry into General St. Clair's failed military expedition to the Northwest territory.[22] In the intervening centuries, numerous Court rulings have established beyond peradventure that "although there is no express provision of the Constitution which specifically authorizes the Congress to conduct investigations and take testimony . . . the investigatory power of Congress is so essential to the legislative function as to be implicit in the general vesting of legislative power in Congress."[23] It is firmly established that Congress's inquisitorial power is at its zenith when probing "charges of misfeasance and nonfeasance" in the executive branch.[24] The Constitution clearly commits to Congress the task of ferreting out presidential disregard of the laws.

The threat of politically costly exposure alone provides Congress with an important weapon for deterring presidential lawlessness. Should that deterrent fail, however,

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see also Richard H. Fallon, Jr., *Executive Power and the Political Constitution*, 2007 UTAH L. REV. 1, 22 (noting that "[b]ecause the judicial branch possesses no brute power to compel obedience to its judgments, if its orders are to be enforced, the enforcement must come from elsewhere" and that "the ultimate authority to enforce the Constitution against the President necessarily, inescapably resides in Congress").

[19] 31 U.S. (6 Pet.) 515 (1832).

[20] Fallon, *supra* note 18, at 8–9. On the apocryphal nature of the statement commonly attributed to Jackson, see Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 STAN. L. REV. 500, 524–25 (1969).

[21] THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 18, at 465.

[22] *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 163–64 (1997); TELFORD TAYLOR, GRAND INQUEST: THE STORY OF CONGRESSIONAL INVESTIGATIONS 7, 24 (1955). *See generally* M. NELSON MCGEARY, THE DEVELOPMENTS OF CONGRESSIONAL INVESTIGATIVE POWER (1940) (discussing congressional investigations in the early twentieth century).

[23] MORTON ROSENBERG, INVESTIGATIVE OVERSIGHT: AN INTRODUCTION TO THE LAW, PRACTICE AND PROCEDURE OF CONGRESSIONAL INQUIRY 3 (2003); *see, e.g.*, Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 504 (1975); Watkins v. United States, 354 U.S. 178, 187 (1957); McGrain v. Daugherty, 273 U.S. 135, 137 (1927).

[24] *McGrain*, 273 U.S. at 151. *See generally* ROSENBERG, *supra* note 23, at 4–5 (discussing origins of Congress's inquisitorial power).

Congress has an almost limitless capacity to pressure a reluctant President to do his constitutional duty to "take Care that the Laws be faithfully executed."[25] Impeachment constitutes the ultimate congressional discipline on the executive and judicial branches.[26] But far less draconian measures are available as well. In addition to withholding appropriations,[27] Congress can decline to (1) re-authorize executive departments, agencies, or programs; (2) confirm presidential appointments; (3) ratify treaties; or (4) take action on the President's legislative agenda.[28] In each case, because congressional *inaction* is sufficient to burden the incumbent administration, a minority in a single house of Congress may hold the President's program hostage, provided it controls at least one of the "veto gates" through which the desired congressional action must pass.[29] As Professor Michael Paulsen colorfully observed, "[i]n a

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[25] U.S. CONST. art. II, § 3.

[26] To be sure, as historian Clinton Rossiter observed nearly half a century ago, "[t]he power of impeachment is the 'extreme medicine' of the Constitution, so extreme . . . that most observers now agree with Jefferson that it is a 'mere scarecrow' and with Henry Jones Ford that it is a 'rusted blunderbuss, that will probably never be taken in hand again.'" CLINTON ROSSITER, THE AMERICAN PRESIDENCY 52 (2d ed. 1960). Even so, Professor Rossiter stressed that "rusted though the blunderbuss may be, it still endures, stacked away defiantly in the Constitution" and awaiting use if necessary. *Id.* at 53.

[27] It is commonplace that "[t]he power of the purse is among Congress's most potent weapons in its effort to control the execution of the laws." Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 84 (2006). Controversy exists about the extent to which modern Congresses can or will make aggressive use of this power, however. *Compare* Louis Fisher, *Congressional Abdication: War and Spending Powers*, 43 ST. LOUIS U. L.J. 931, 932 (1999) (concluding that "from World War II to the present, Congress has repeatedly abdicated fundamental . . . spending powers to the President"), *and* ROSSITER, *supra* note 26, at 51 (wryly noting that "[i]nstances in which Congress slapped a President, and hurt him, by withholding funds from schemes in which he had an intense personal interest do not come to mind in bunches"), *with* D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATIONS PROCESS 184–85 (1991) (asserting that Congress plays a significantly greater role in the appropriations process than some critics have argued), *and* Neal Devins, *Abdication by Another Name: An Ode to Lou Fisher*, 19 ST. LOUIS U. PUB. L. REV. 65, 74 (2000) ("Congress very much cares about its power to reward constituents through appropriations.").

[28] *See generally* WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 297–303 (6th ed. 2004) (discussing authorization, appropriations, and confirmation as mechanisms for effecting congressional oversight); ROSSITER, *supra* note 26, at 49–56 (discussing congressional powers capable of constraining the President).

[29] *See* McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, LAW & CONTEMP. PROBS., Winter/Spring 1994, at 3, 7 (naming the numerous choke points in the legislative process "veto gates"); *see also* ROSSITER, *supra* note 26, at 54 ("The real power of Congress to check or persuade a President lies in none of [its] positive weapons . . . , for the real power of Congress over him is essentially negative in character"—i.e., the power to refuse to cooperate with the President's agenda). In addition to the capacity to leverage the powers catalogued in Article I are the more informal mechanisms for congressional oversight of the executive branch that emerged over the centuries to fill the constitutional

bare-knuckled brawl, Congress can reduce the President to little more than a bureaucrat drawing a fixed salary, vetoing bills, granting pardons, and receiving foreign ambassadors—but without funds for hosting a state dinner (or even taking the ambassador to McDonald's)."[30]

To be sure, the President has his own, powerful mechanisms to force congressional action. Moreover, recalcitrant congressional opposition can have its own, profound political costs, as the anti-Republican backlash to the 1995 governmental shutdowns demonstrated.[31] Tailoring the congressional punishment to the scope and severity of the presidential crime and then publicly making the case for such resistance, requires the very best political judgment and skill. But where ought we look for our most talented politicians if not in the halls of Congress?

Congress also enjoys a far greater political legitimacy than do the federal courts. As the people's representatives in a republic, members of Congress are free to challenge the wisdom of an underlying presidential policy distorting the interpretation or frustrating the execution of existing statutes. As an appointed judiciary accorded life tenure, the federal courts refrain from open, policy-based disagreements with either of the political branches. An informal, but nonetheless controlling, norm forbids jurists from defending their judgments with extrajudicial commentary; congressmen, not judges, frequent the media circuits. Moreover, federal judges are vulnerable to credible charges of naïveté, disengagement, and obsolescence.[32] As past confrontations demonstrate, the judiciary is ill-suited to stand against a resolute, popular President, especially in a time of perceived crisis.[33] It is worth recalling the verdict of the distinguished

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interstices. *See* OLESZEK, *supra* note 28, at 299 (observing that "executive officials are routinely in frequent contact with committee members and staff" and "[s]uch informal contacts enable committees to exercise policy influence in areas in which statutory methods might be inappropriate or ineffective"; and opining that "[i]nformal methods of program review are probably the most prevalent techniques of oversight"); ROSSITER, *supra* note 26, at 51 (noting "the vast web of informal contacts and friendships and understandings between the old hands in Congress and the old hands in the civil service, . . . which are rarely publicized [and] are maintained in blithesome disregard of the stated policies of the President—but he, after all, is only passing through").

[30] Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 322 (1994); *see also* ROSSITER, *supra* note 26, at 56 (reminding the reader "of the President's reliance on Congress for support of even his most splendid prerogatives").

[31] For discerning, if one-sided, descriptions of the political fallout from the 1995 federal budget stand-off, see BILL CLINTON, MY LIFE 682–83, 695 (2004).

[32] *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 348 (1998) (observing that during the New Deal, the Supreme Court "was criticized for being behind the times . . . and the Court and its members were even subjected to open ridicule" (citations omitted)).

[33] *See, e.g.*, Dennis J. Hutchinson, *"The Achilles Heel" of the Constitution: Justice Jackson and the Japanese Exclusion Cases*, 2002 SUP. CT. REV. 455, 489–90 (discussing Justice Jackson's doubts about the Court's ability to compel the President to abandon the Japanese

historian, Professor Clinton Rossiter, who wrote: "We delude ourselves cruelly if we count on the Court at all hopefully to save us from the consequences of most abuses of presidential power."[34] The judiciary, he concluded, provides "one of the least reliable restraints on presidential activity," and whatever "restricting powers" it wields "are a delusive shadow compared with the sweep of" congressional authority to cabin presidential overreaching.[35] By accelerating judicial review of presidential signing statements, the ABA's proposal would place an enormous weight on a slender reed.

In short, Congress enjoys extensive institutional advantages relative to the judiciary in any contest against the President. This evident reality makes it puzzling that the ABA and Senator Specter seek judicial intervention in lieu of leveraging the many powers of Congress. In fact, Specter was initially inclined to pursue such a course. A month before he introduced Senate Bill 3731, he speculated that the Senate might constrain the President's use of signing statements by connecting the issue to "the confirmation process or budgetary matters."[36] But since the ABA Task Force issued its report, Specter focused instead on devising a mechanism whereby Congress could sue the President.[37] In this way, the false hope of a judicial salvation has already diverted one pivotal senator's efforts away from a potentially more effective response.

More importantly, this shift is a microcosm of the more general effect the proposed legislation would have if enacted. However inferior to Congress the judiciary may be in terms of its capacity to govern Presidents, the balance between the political branches would not be much altered so long as Congress continued to exercise its constitutional prerogatives. In that case, the proposed cause of action might be justified as a supplement to, not a substitute for, congressional oversight. But this defense ignores the adverse effect lawsuits would have on congressional vigor in superintending the executive branch. For the reasons developed below, the inhibitory effect of a litigation option would likely be a dramatic one.

II. OVERSIGHT BY JUDICIARY

Though intended as a supplement, if not also a spark, to congressional oversight, creation of an action for a declaratory judgment on the validity of signing statements would likely have the unintended and undesirable effect of supplanting, and thus stifling, Congress's proper role in the matter. The potential availability of an immediate proceeding promising judicial declaration on the abstract validity of a signing statement

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exclusion and internment policies). Indeed, the ABA Task Force Report obliquely acknowledges this reality by announcing that "[i]t is to be hoped that the President would obey any constitutional declaration of the Supreme Court." AM. BAR ASS'N, *supra* note 10, at 26.

[34] ROSSITER, *supra* note 26, at 58.

[35] *Id.* at 59, 56.

[36] *See Senators Charge Bush with Disregarding Laws in Name of Security*, *supra* note 9 (quoting Senator Specter).

[37] *See supra* notes 10–11, 13 and accompanying text.

would do this for numerous reasons.[38] It would exacerbate Congress's unfortunate tendency to neglect its oversight role, risk the perception that Hill proceedings were aimed at influencing pending cases, muzzle public debate about the underlying policy controversy, reduce the richness of a political question to the sterility of a legal one, thrust judges into a politically charged dispute, replace a cooperative and conciliatory (albeit contentious) effort with an adversarial one, unwittingly vindicate presidential defiance of the laws, and create a dangerously false sense of constitutional security. In other words, it seems like a bad idea.

Whether due to political cowardice, fatigue, or disinterest, Congress has often neglected its oversight function. Indeed, congressional neglect is often cited as the reason an alternative vehicle, such as judicial review, is necessary to secure presidential compliance with the law.[39] But any unfortunate tendency by senators and representatives to disregard this aspect of their constitutional duty would only be aggravated by the availability of a plausible claim that the dispute was pending judicial resolution. Though Congress was once earnest in the execution of its independent obligation to construe the Constitution conscientiously, this sense of constitutional responsibility has ebbed over the course of the twentieth century as our elected representatives have increasingly perceived that task as the exclusive province of the courts.[40] This attitude

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[38] The rejection of the ABA's proposal would not, of course, exclude the Court from passing on a constitutional claim embodied in a presidential signing statement, if and when the claim arose in litigation challenging the legality of governmental action. But this possibility does not justify privileging judicial determination of these inter-branch clashes above all other constitutional methods for their resolution.

[39] For example, during the third panel discussion at this symposium, Mark Agrast, a member of the ABA Task Force, acknowledged that "Congress has a lot of weapons at its disposal; we wish it would use them." Mark Agrast, Remarks at Panel III of William & Mary Bill of Rights Journal Symposium, The Last Word? The Constitutionality of Presidential Signing Statements 21 (Feb. 2, 2007) (transcript on file with *William & Mary Bill of Rights Journal*). He continued:

> Failing to use them, certainly unless they show some sign that they're going to use the power of the purse or any of the other forms of leverage they have, . . . it is really only the courts that are equipped to assess the validity of decisions by the executive branch, that the Constitution permits or even compels the President to disregard or decline to enforce the laws.

Id.; *see also id.* at 38 ("I don't see even this Congress marshalling the will to take more aggressive steps.").

[40] *See* Jay S. Bybee, *The Tenth Amendment Among the Shadows: On Reading the Constitution in Plato's Cave*, 23 HARV. J.L. & PUB. POL'Y 551, 570 (2000) (noting "the conscientious efforts of the members [of the first Congresses], over a broad array of subjects, to understand the extent and the limits of Congress's authority," then arguing "[b]ut congressional interest in the Constitution waned substantially over the next century, apparently because members of Congress knew that the Court would cure their constitutional excesses" (citation omitted)); Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. Rev. 587, 587 (1983) ("For the most part, legislative debate does not explore the

arguably does much to explain the existing lethargy with which Congress confronts a President's more strained constitutional justifications for declining to enforce provisions in a bill he himself just signed into law. Legislation shifting to the judiciary the power and duty to superintend executive branch compliance with the laws can be expected to compound existing congressional constitutional carelessness. Moreover, in addition to using the pendency of judicial proceedings as an excuse for avoidance of responsibility, genuine questions about the propriety of congressional action on the subject of a lawsuit might chill any remaining congressional willingness to undertake the apparently unpalatable task of energetic oversight.[41]

This chilling effect will extend beyond Capitol Hill to dampen the ardor of public debate about the underlying, policy-based controversies. Rather than exercising their access to, and facility with, media outlets to chastise the President and make the case for his duty to honor the existing statutes, members of Congress will be tempted to point to the existence of judicial proceedings as a reason to decline comment. They will adopt a "wait and see" approach as the litigation works its way toward a final appellate court ruling, a process that ordinarily consumes years. Instead of focusing national attention on the controversy, litigation will reduce rich political questions into dry legal ones that are less likely the subject of the kind of democratic deliberation essential to mobilizing opposition to a lawless administration.

Moreover, once litigation commences, neither congressional leaders nor the President will have much incentive to achieve a compromise settlement that more truly reflects the position of the median voter. Instead, their respective positions will harden as they seek a total victory from adversarial litigation. But as a general matter, the constitutional balance among the political branches is better preserved by a negotiated resolution of differences in which all related matters can be considered together and the relative intensity of competing commitments can be registered. For the same reasons that litigation of private disputes is often appropriate only after mediation efforts have been exhausted, peremptory resort to suit for a declaratory judgment will frequently interrupt productive inter-branch dialogue that would have, in due course, achieved a more meaningful and stable settlement than a judicial ruling can be expected to provide.[42]

Ironically, referring to the judiciary a President's assertion of an intent to disregard federal law may serve to legitimate the claim in the eyes of the public even if the courts ultimately reject it. So long as the President's argument meets the minimum

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constitutional implications of pending legislation; and, at best, Congress does an uneven job of considering the constitutionality of the statutes it adopts.").

[41] *See* Beermann, *supra* note 27, at 93–99 (discussing separation of powers problems raised when Congress undertakes action that might be perceived as intended to influence pending litigation).

[42] *Cf.* Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 757–59 (1984) (contrasting binary, adversarial, and problem-solving approaches to dispute resolution).

good faith threshold customarily required of litigating positions, even the most outlandish constitutional claim will gain a modicum of respectability. The dispute between the branches is recast from a presidential refusal to honor the law, or even a profound disagreement about contending policy objectives, into grounds for an arcane debate within a specialized segment of the legal profession. The President's moral obligation to see that the laws be faithfully executed is reduced to, at best, a requirement to avoid patently frivolous arguments and honor any final adverse judicial decision. The availability of a routine process for obtaining a judicial ruling on presidential claims to act in contravention of the law will make such claims appear commonplace and, therefore, may be expected to increase their regularity. At the same time, when a President has constitutional reservations to a statutory provision, but doubts the likelihood of prevailing in litigation, rather than asserting the claim in an effort to encourage legislative accommodation, he will likely be tempted to keep secret his decision to resist the provision. By making signing statements the trigger for perhaps unwanted litigation, the ABA's proposal may decrease the instances of signing statements without decreasing the frequency of presidential misconduct.

Finally, and most seriously, the existence of a path to a judicial declaration will lull both Congress and the public into a misplaced assurance that the courts alone will be sufficient to police presidential misconduct. The legislative process is everywhere constrained by acute scarcity of time and resources, and however rare or inadequate congressional oversight may be today,[43] it will be that much rarer and poorer if it is perceived as unnecessarily duplicating judicial efforts to the same end. As the exercise of the oversight function becomes progressively infrequent, judicial review of signing statements will become the primary, and eventually the exclusive, mechanism to keep their use in check. But history teaches that the courts cannot be depended upon to resist presidential overreaching. Only Congress has the electoral legitimacy, the self-informative capacity, and the practical machinery to withstand the withering force of sustained presidential opposition. When faced with the prospect of open defiance of their rulings,[44] the Justices have sought to align themselves with the chief executive to avoid confrontations they almost certainly would have lost.[45] Thus, the fifth ABA resolution would replace a functional, albeit presently underperforming, constraint on the President in the form of congressional oversight with a chimerical

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[43] *See generally* JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT (1990) (challenging the assumption that contemporary Congresses grossly neglect their oversight function); Joel D. Aberbach, *What's Happened to the Watchful Eye*, 29 CONG. & PRESIDENCY 3 (2002) (updating the book's analysis).

[44] For a discussion of historical "cases of presidential resistance" to judicial rulings, see Fallon, *supra* note 18, at 7–10; *see also* A. Christopher Bryant & Carl Tobias, Quirin *Revisited*, 2003 WIS. L. REV. 309, 322 (discussing the Justices' awareness that President Roosevelt had announced an intent to execute Nazi saboteur defendants regardless of how the Court ruled on their pending appeals).

[45] *See, e.g.*, Hutchinson, *supra* note 33, at 489–90.

control in the form of an impotent judicial declaration. The rule of law would survive at the pleasure of the chief executive, and the ABA's proffered remedy would have facilitated the very ills it was meant to prevent. If, as it seems to many, the structural Constitution's allocation of authority has been distorted, then that structure needs study and repair. A superficial fix would only mask the underlying weaknesses as they grow unchecked.

These pragmatic considerations should weigh heavily against creation of the proposed cause of action. But ultimately, the proposal is problematic for an even more fundamental reason. The fifth ABA resolution is predicated on highly contestable assumptions about the proper role of the judiciary in our constitutional design that are nowhere in its report even acknowledged, let alone defended. The remainder of this Essay first exposes and then challenges these assumptions.

III. JUDICIAL EXCLUSIVITY

The ABA Task Force implicitly assumed that the judicial power to say "what the law is"[46] requires that the judiciary lay exclusive claim to that function. This assumption explains the odd supposition that a President willing to openly disregard the clear command of a statute enacted into law under his signature would cease defiance when confronted with the same words in a judicial declaration. In a statute, the words are merely hortatory unless and until incorporated into a declaratory judgment, at which point they become talismans brooking no presidential opposition, constitutionally based or otherwise. Whether this accurately predicts potential presidential behavior, it clearly assigns a pre-eminent role to the courts. This designation of the judiciary as ultimate arbiter is predicated on the view that "law" is what the courts, not Congress or the President, say it is.[47] Under this conception, judicial supremacy entails more than the demand that judicial decisions, once rendered, be deemed final.[48] Rather, this more muscular version of judicial supremacy presumes that judicial review provides both an indispensable checking function on the political branches[49] and a necessary

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[46] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[47] *But see* Louis Fisher, Remarks at Panel IV of William & Mary Bill of Rights Journal Symposium, The Last Word? The Constitutionality of Presidential Signing Statements 32–33 (Feb. 2, 2007) (transcript on file with *William & Mary Bill of Rights Journal*) (rejecting the claim that *Marbury* stands for the proposition that saying what the law is is the exclusive province of the judiciary).

[48] *See* Robert Justin Lipkin, *Which Constitution? Who Decides?*, 28 CARDOZO L. REV. 1055, 1071 (2006) ("Roughly speaking and as a slogan only, judicial review plus finality equals judicial supremacy.").

[49] *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 86 (5th ed. 2005) (noting the argument that judicial review "rest[s] on the broader ground that the Supreme Court was accorded a distinctive role as the guarantor of the supremacy of the federal Constitution as against the states and the federal legislature").

means for conclusive settlement of discord between them,[50] in effect producing what might more aptly be termed judicial exclusivity[51] or judicial sovereignty.[52]

Nowhere are these views more evident than in the ABA Task Force Report's treatment of potential Article III impediments to obtaining immediate judicial review of signing statements. The report laments that "[a]t present, the standing element of the 'case or controversy' requirement of Article III of the Constitution frequently frustrates any attempt to obtain judicial review of" a presidential signing statement announcing an intent not to enforce or comply with a law. [53] Acknowledging (regrettably?) that "Congress cannot lessen the case or controversy threshold," the ABA Task Force nevertheless urged Congress to "dismantle barriers above the constitutional floor."[54] In particular, legislation authorizing suit on behalf of Congress—or a house or a member or an agent thereof—might circumvent these restrictions by allowing a claim of injury to Congress's lawmaking authority.[55] Moreover, both the President and Congress should advance the cause of judicial resolution of their dispute "by avoiding non-constitutional arguments like the political question doctrine or prudential standing."[56] Were all this to be done, "[i]t would be expected that one case before the Supreme Court would put to rest the constitutionality of a signing statement that announces the President's intent not to enforce a provision of a law or to do so in a manner contradictory to clear congressional intent."[57] In the eyes of the ABA Task Force, the standing and political question[58] (to make no mention of the ripeness or mootness) doctrines are awkward irregularities frustrating the need for a judicial pronouncement.

A different view, of course, would be that the these legal doctrines protect core structural values by circumscribing the role of the judiciary in attempting resolution of precisely the kinds of highly politicized and policy-sensitive disagreements likely to be reflected in presidential signing statements.[59] This view, in turn, rests on an

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[50] *See* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1371 (1997) (arguing that a strong version of judicial supremacy is necessary to fulfill the "law's settlement function").

[51] *See* Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 84–85 (1998) (discussing, and resisting, the arguments for judicial exclusivity in interpretation of the Constitution).

[52] *See* Larry D. Kramer, *The Supreme Court, 2000 Term: Foreword: We The Court*, 115 HARV. L. REV. 4, 13 (2001) ("There is . . . a world of difference between having the *last* word and having the *only* word: between judicial supremacy and judicial sovereignty.").

[53] AM. BAR ASS'N, *supra* note 10, at 25.

[54] *Id.*

[55] *Id.* at 25–26.

[56] *Id.* at 26.

[57] *Id.*

[58] *See generally* Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002) (discussing the decline of the political question doctrine).

[59] *Cf.* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT

alternative understanding of the judicial role under our Constitution. The judicial power to say "what the law is" is indispensable only because it is incidental to the judiciary's central task of resolving discreet disputes in accord with the law. The Supreme Court was required to rule on the constitutionality of section thirteen of the Judiciary Act because that question was itself a component of the inquiry into whether Mr. Marbury was entitled to that Court's order granting him his undelivered commission.[60] The Court did not entertain Mr. Marbury's suit in order to permit it to rule on the constitutionality of the Judiciary Act. If Mr. Marbury goes away, so too does the Court's law-announcing function. The ABA Task Force, however, treats the latter function as an end in its own right. In doing so, the ABA probably acts in conformity with the assumptions of most of its present-day constituents.[61] But even so, it ignores a substantial and compelling minority position to the effect that it is just as emphatically the power and duty of the President and Congress to say "what the law is."[62] Indeed, this debate has perhaps never before been joined so vigorously as it has been in recent academic literature,[63] making the ABA Task Force's neglect of the subject all the more surprising. More importantly, this minority view has the significant advantage of fitting far better with the language and history of *Marbury*[64] and, indeed, of the Constitution itself.

CONCLUSION

The ABA Task Force correctly characterizes recent use of presidential signing statements as a threat to the rule of law.[65] Unfortunately, its proposed remedy would

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AT THE BAR OF POLITICS (2nd ed. 1962) (explaining the uneasy intersection between politics and the Court).

[60] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 172 (1803).

[61] *See* Kramer, *supra* note 52, at 6–7 (asserting that "as a descriptive matter, judges, lawyers, politicians, and the general public today accept the principle of judicial supremacy—indeed, they assume it as a matter of course"); Michael Stokes Paulsen, *The Irrepressible Myth of* Marbury, 101 MICH. L. REV. 2706, 2706–07 (2003) (describing the prevalent assumption of judicial supremacy in constitutional interpretation).

[62] *See, e.g.*, Fisher, *supra* note 47, at 32–33; Paulsen, *supra* note 30, at 221.

[63] *See* Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, LAW & CONTEMP. PROBS., Summer 2004, at 105 ("One of the vibrant constitutional debates at the turn of the twenty-first century concerns enduring questions about the appropriate role of nonjudicial entities—especially Congress and the President—in the development of constitutional meaning."); *see, e.g.*, LARRY D. KRAMER, THE PEOPLE THEMSELVES (2004); Kramer, *supra* note 52; Symposium, *The People Themselves: Popular Constitutionalism and Judicial Review*, 81 CHI.-KENT L. REV. 809 (2006); Symposium, *Theories of Taking the Constitution Seriously Outside the Courts*, 73 FORDHAM, L. REV. 1341 (2005).

[64] *See* Paulsen, *supra* note 61, at 2710 (arguing that *Marbury* "cannot bear a judicial supremacist reading").

[65] *But see* Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and*

enhance the danger. Creation of a legal cause of action to challenge the claims made in a presidential signing statement is both unnecessary, as Congress is well equipped to respond on its own behalf, and positively harmful, as it would likely dampen congressional vigor.

Constitutions and statutes are, of their own force, merely words on paper. The U.S. Constitution's Framers doubted the ability of mere parchment protections to preserve liberty.[66] As Professor Rossiter remarked, "paper limitations, even those in the Constitution, need the support of living people and going institutions if they are to be of any force."[67] Only ambition will check ambition, and the primary check on a lawless administration must be ambitious, and therefore bold, members of Congress. To be sure, in recent decades Congress has arguably failed to fulfill its oversight function. If so, then sustained inquiry into the causes and possible remedies for this neglect should be our focus (and should have played a greater role in the ABA Task Force's study). To instead place our reliance on the courts at once accords the judiciary a power far exceeding its just claims to legitimacy and also demands of it a fortitude far exceeding what its composition should lead us to expect.

After Archibald Cox was fired as the Watergate special prosecutor, he issued a one-sentence press release reading: "Whether ours shall continue to be a government of laws and not of men is now for Congress and ultimately the American people."[68] What was true then is no less so today.

Executive Power, 23 CONST. COMMENT. 307, 310 (2006) (finding "[t]he attack on the institution of signing statements [to be] puzzling").

[66] *See* Mark A. Graber, *Enumeration and Other Constitutional Strategies for Protecting Rights: The View From 1787/1791*, 9 U. PA. J. CONST. L. 357, 362–63 (2007).

[67] ROSSITER, *supra* note 26, at 49.

[68] *See* KEN GORMLEY, ARCHIBALD COX: CONSCIENCE OF A NATION 358 (1997); *cf.* Fallon, *supra* note 18, at 22–23.