Taking Care that Laws be Faithfully Executed

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Michael Blanco · a month ago

Did I catch it correctly that Professor Amar stated that one of the ways the President could demonstrate his view that a law was unconstitutional was to not enforce that law? If I have this correct, I find the statement confusing in light of the Article II provision that the President must "take Care that the Laws be faithfully executed." I understand that, of course, a President who believes a bill is unconstitutional can veto it, and I also understand that once a bill is passed over his veto (or a law already on the books), the President has some discretion in the manner in which he enforces a given law. For example, if a President didn't believe that federal drug statutes were constitutional, he could easily direct the AG to make other crimes more of a priority given that enforcement is always limited by resources. But to declare that he's not going to enforce a law seems to be beyond the pale. Any insights? Again, perhaps I misunderstood Professor Amar, so let me know if I just have my facts wrong (I only have time to listen to lectures onces).

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Joel Kovarsky · a month ago

As I understand it, the president can decide not to enforce a law he/she (one day) believes is unconstitutional: http://www.justice.gov/olc/nonexcut.htm . One case cited appears to be Myers v. United States. From that site, discussing the case:

"In that case, President Wilson had defied a statute that prevented him from removing postmasters without Senate approval; the Supreme Court ultimately struck down the statute as an unconstitutional limitation on the President's removal power. Myers is particularly instructive because, at the time President Wilson acted, there was no Supreme Court precedent on point and the statute was not manifestly unconstitutional. In fact, the constitutionality of restrictions on the President's authority to remove executive branch officials had been debated since the passage of the Tenure of Office Act in 1867 over President Johnson's veto. The closeness of the question was underscored by the fact that three Justices, including Justices Holmes and Brandeis, dissented in Myers. Yet, despite the unsettled constitutionality of President Wilson's action, no member of the Court in Myers suggested that Wilson overstepped his constitutional authority -- or even acted improperly -- by refusing to comply with a

statute he believed was unconstitutional. The Court in Myers can be seen to have implicitly vindicated the view that the President may refuse to comply with a statute that limits his constitutional powers if he believes it is unconstitutional."

There is more discussion here: http://www.bhba.org/Foundation/Presidential-Non-Enforcement-and-the-Rule-of-Law.pdf . It appears that the president must issue a "signing statement" explaining the reasons behind a decision not to enforce: http://www.law.georgetown.edu/library/research/guides/presidentialsigningstatements.cfm .

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Michael Blanco · a month ago

Joel - Thanks for the thoughtful response, particularly the links. I read the first one in its entirety, though I can't say I understood it entirely. I really hadn't thought through the Oath Clause in the way the article suggests, i.e., that because the President swears an oath to uphold the Constitution and the Constitution is the supreme law of the land, he has an obligation to uphold, on the basis of his oath, the Constitution over a specific statute. I'm still not sure about legislator standing nor whether Congress together with the Court can trump that oath. If he still believes the statute is unconstitutional, doesn't his oath trump Congress and the Court? Neither Congress nor the Court have executive power, only the President. On the other hand, it seems to me that non-enforcement is a "super-veto" that a President can exercise over a statute during his term in office. I wonder whether anyone in Philadelphia thought of that (probably, but also probably hard to find). Anyway, thanks so much.

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Joel Kovarsky · a month ago

Michael,

I am fairly certain that I do not understand many of the papers I find the first time through. And maybe longer. I just keep reading. For those who are not attorneys, this is a new language and often a different mind-set. The TA's do not have time to respond to all these things, but it is not so bad to root around and be left to our own devices, with the guidance of the lectures and books.

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Ray Strong · a month ago

To Michael, Joel and Alec:
In addition to the links provided by Joel (and Alec on another thread) I ran across this article on the Georgetown law Journal site that I am working my way through. It is lenghty but thorough in its treatment of the Subject.

The Executive's Duty to Disregard Unconstitutional Laws
http://georgetownlawjournal.org/files/pdf/96-5/Prakash.PDF..
Some areas in Chapter II relevant to our discussions from the Table of Contents:

THE FOUNDATIONS AND CONTOURS OF AN EXECUTIVE DISREGARD

DUTY

CONSTITUTIONAL TEXT

1. Why Text Favors the Duty To Disregard

2. Textual Objections to the Duty To Disregard

a. The Faithful Execution Clause as an Explicit Bar
b. The Presentment Clause as an Implicit Bar
i. The Veto as the Sole Means of Acting upon Constitutional Objections
i. Executive Disregard as a Forbidden Line-Item Veto

CONSTITUTIONAL STRUCTURE

1. Why Structure Favors the Duty To Disregard .

2. Structural Objections to the Duty To Disregard

DISTINGUISHING EXECUTIVE DISREGARD FROM JUDICIAL REVIEW

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Michael Blanco · a month ago

Albert - Terrific. Thank you.

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+ Comment

Joe Caro · a month ago

I suggest that what you see in action is the separation of powers and checks and balances built into the constitution.

The president's first line of defense would be his veto should he consider a piece of legislation to be unconstitutional. If overridden he could go further and violate the law and have the dispute tried in federal court for final adjudication.

Should the ultimately lose before the Supremes, yet still violate the law, then.....what?
Impeachment?

In the Meyers case, Wilson's actions were ultimately upheld, no? So whatever the merits of the case WE may agree or disagree with, the situation was resolved according to the constitution.

The same line of reasoning can be said for the ACA, despite the tortured logic of Roberts to create a rule that it was a taxing authority and not an arguably illegal extension of the commerce clause as was debated in the case. Again, agree or disagree, bad decision or not, the dispute followed the constitution.

Even that is not the final say as issues can be reheard in other cases in the future. Plessey v Ferguson, a 7 to 1 arguably a disgraceful decision, overturned some 55 to 60 years later, or Korematsu v United States, a 6 to 3 decision, upholding the Japanese detention camps, egregious examples of technically "constitutional" decisions in that they followed all of the prescriptions of the law, corrected by later actual constitutional decisions.

My brother the lawyer points out that we have a legal system in the United States, not necessarily a "justice" system.

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Joel Kovarsky · a month ago

Joe,

I wonder how many large countries like ours have a "justice" system (or even most smaller ones), given certain fuzzy ethical implications of the phrase. Maybe it is better that we have a legal system. The best one can likely hope for (even if we fall short of the ideal, which we will), is equal protection under the law. Some would argue that is also a justice system, to a point, however imperfect.

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Michael Blanco · a month ago

My lawyer friend says, "Never confuse justice with the law. My domain is the law. God's domain is justice."

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Joel Kovarsky · a month ago

Nice bumper-sticker line, but depending on varied interpretations of "God's justice," there is no clean interpretation.

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Michael Blanco · a month ago

No doubt about that. Just ask Job.

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Joe Caro · a month ago

Joel, I believe your "equal protection under the law " is the crucial point and the rule of law and not men is what separates us from the banna republics. This, to me, means, that the government itself must be constrained by its own laws and NOT have different standards for some with respect to HOW or WHETHER their own laws are "faithfulle executed". This to me is at least as crucial as the fairness of the laws themselves. Therin lies our exceptionalism.

Without this we areno different than any tin pot, two bit dictatorial government.

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 Alec D. Rogers · a month ago

In another thread I linked to the advice given Bill Clinton by his White House Counsel, Abner Mikva. Mikva was a former federal judge and one of the 20th century's most respected lawyers. In essence, his view was that once the Court gave some reason to believe it would uphold the law it should be enforced even if the President had his doubts.

It strikes me as a very 20th century view on the role of the Court as the final arbiter of what the Constitution means. Interestingly, I see thinking on such issues swaying back to the 18th and 19th century view that accorded more respect to other branches, allowing them co-equal interpretory authority so far as it affects their own branches.

As Albert's link above indicates this is a very unsettled question, and one I hope we never have to litigate. At the end of the day, it may come to impeachment as being the only real remedy if you have a President willing to deft the Court.

In the meanwhile, the issue of when and under what circumstances the President can delay / suspend laws that he has no constitutional objection to are on the front burner. Interesting times and lots to talk about....

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Joel Kovarsky · a month ago

Chapter Six of our current book (for the first six weeks) has quite a bit of discussion regarding the growing authority of SCOTUS.

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Michael Blanco · a month ago

I understand why you say you hope a given presidential's refusal to enforce a given statute, due to his belief that a given statute is unconstitutional, will never be brought to the Court. It undoubtedly would precipitate a constitutional crisis, and one or two of these is good enough for a lifetime. But what an interesting case it would be, especially if it ever went to impeachment and trial. Imagine a president, supposedly standing on principle and his oath of office, pitted against Congress charging him with high crimes and misdemeanors and, just to make the story juicier, a Supreme Court decision affirming the law (could that even happen if a president refused to enforce?), with the Chief Justice presiding (let's also pretend that the Chief wrote the affirming decision). I too hope it never happens but it boggles the mind to even think about it.

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 Alec D. Rogers · a month ago

Reading lecture 4-4 (Judges and Juries 2) I see the professor hedges a bit on the question of enforcement of a law the President believes to be unconstitutional - "certain" law and "at least until a case materializes." This implies to me the question might turn out differently once there's an adjudication by the courts.

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Michael Blanco · a month ago

I noticed the same thing, but then wondered why? I can see a given president saying, "Look, I swore an oath. I respectfully disagree with the Court, and I'm the president. I'm given the job of enforcement, the Court is giving the job of making decisions. For me to enforce a law I don't believe is constitutional would mean breaking my oath, and I'm not going to do that." I have it in mind that Lincoln split the difference in Dred Scott. He would allow the decision to stand for Scott (who, thankfully, was manumitted 3 months later) but wouldn't enforce it otherwise.

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 Alec D. Rogers · a month ago

I think there's a strong case to be made for that POV.

A counter might be that a faithless President would simply use that to justify non-enforcement of any laws (e.g. high taxes on capital gains being a "taking" or some such) and therefore giving a constitutional reason for non-enforcement an absolute pass might be subject to abuse.

Still, there seems to be some consensus that the Supreme Court's role might have reached an apex and it is time for others to take more responsibility. For instance, Stanford Law prof (and former Dean) Larry Kramer's book and from the opposite end of the spectrum Michael

Franck's Against the Imperial Judiciary.

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Michael Blanco · a month ago

I agree that the Court should come down a few notches. Call me crazy, but Antonin Scalia's smile is just a little too smug for me.

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Joe Caro · a month ago

This has nothing to do with the role of the court, as it has a constitutional duty to perform. Remember folks, it is a CO-EQUAL BRANCH, with its proscribed duties. Each branch is equal in the authority it holds over the DIFFERENT aspects of government as laid out in the constitution. From time to time, each of these branches can be questioned with respect to its motives, competence, and proper exercise of its role in the sense that it neither gives deference or subservience to the other branches, nor is inclined to exceed its authority. Should the court, for example, "legislate from the bench" it is the duty of the legislature to reassert its role and write specific legislation either affirming the decision or (better to my way of thinking) specifically dismantling a court ruling through legislation, as is proper to do, and directly challenge the court in a constitutional manner. Likewise, when a president does not like a law, it is his duty to try to convince the legislature to see it his way and pass legislation in a constitutional manner. If he feels the law is not constitutional, then challenge it in court, according to constitutional procedure, rather than just refusing to enforce it (an arguably unconstitutional process.)

But overstepping ones bounds, or failure to do its duty, or incompetence, I submit, arises from the failings of the people holding the respective jobs, and NOT the structure set up by the authors of the constitution. Should one branch seek to exceed its authority, it is the responsibility of the others to assert theirs properly and NOT ALLOW it. I suggest that attempts to ignore the rule of law by one branch or the other arises from the inability of that branch to exercise leadership with respect to its duties. It is so easy for an incompetent to simply get frustrated that the others do not see it their way and take unilateral action. I would go so far that efforts to do so is evidence of poor leadership skills as clearly the authors intended that all three branches work together and that NONE be more equal than the other. In the end, the genius of the constitution wins out, not the self serving arrogance of the office holders attempting to circumvent it.

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Michael Blanco · a month ago

I agree, though I also think the Constitution is not a perfect document (excellent, but not perfect). The way for the Court to come down a notch is for the other branches to assert their authority. When a President refuses to enforce a statute, even a statute that the Court has

upheld, he is asserting his constitutional prerogative. I'm not actually sure Andrew Jackson ever said, "They have made their decision, now let them enforce it," but that's what he did. I think he made a terrible mistake by not following the Court in this case, but I think he was within his rights to do so. Elections matter.

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Devin Watkins · a month ago

I got to say I was very happy to see Professor Amar give a full throated endorsement of presidential review. Presidential review has a long history in this country starting with President Jefferson. He wrote this at the time: "Succeeding functionaries have the same right to judge of the conformity or non-conformity of an act with the constitution, as their predecessors who past it. For if it be against that instrument it is a perpetual nullity, uniform decisions indeed, sanctioned by successive functionaries, by the public voice, and by repeated elections would so strengthen a construction as to render highly responsible a departure from it. On my accession to the administration, reclamations against the Sedition act were laid before me by individual citizens, claiming the protection of the constitution against the Sedition act. Called on by the position in which the nation had placed me, to exercise in their behalf my free and independent judgment, I took the act into consideration, compared it with the constitution, viewed it under every aspect of which I thought it susceptible, and gave to it all the attention which the magnitude of the case demanded, on mature deliberation, in the presence of the nation, and under the tie of the solemn oath which binds me to them & to my duty, I do declare that I hold that act to be in palpable & unqualified contradiction to the constitution, considering it then as a nullity, I have relieved from oppression under it those of my fellow-citizens who were within the reach of the functions confided to me. In recalling our footsteps within the limits of the Constitution, I have been actuated by a zealous devotion to that instrument, it is the ligament which binds us into one nation. It is, to the national government, the law of it's existence, with which it began, and with which it is to end. Infractions of it may sometimes be committed from inadvertence, sometimes from the panic, or passions of a moment, to correct these with good faith, as soon as discovered, will be an assurance to the states that, far from meaning to impair that sacred charter of it's authorities, the General government views it as the principle of it's own life."

Now it is true any president who decides that a statute passed by congress is unconstitutional (not to be done lightly!) and as such refuses to enforce that statute, also opens himself up to the charge that he failed to faithfully execute the laws of the united states as is his duty. That is potentially an impeachable offense, and if a 2/3 majority (the amount needed to override his veto) of congress disagrees with the president he can be removed from office. The constitution was designed to prevent arguably unconstitutional laws from being used against the American people, and this was just one more way of doing that. Frankly although I am a conservative, I don't think President Obama went far enough with DOMA, if he truly believed it violated the constitution he should have refused to enforce the statute not just refused to defend it. Now the supreme court agreed with Obama so its a moot point at this time.

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Ray Strong · a month ago

But as a reminder and an example of the the advice given Bill Clinton by his White House Counsel, Abner Mikva that Alec cited above, it is not a theoritical exercise as we have a recent Precedent: DOMA.

It was the law, passed by Congress, President Obama declined to enforce or defend it in court, and the Supreme Court subsequently overturned the law (however close the vote) declaring the law unconstitutional.

So in that instance would not the President have been faithful in his duty to defend and uphold the Constitution?

As Devin suggests on this thread, Congress, as we all know, can pass an unconstitutional law which (in certain Poly Sci. theories) is deemed no law at all because (again in theory as I noted on a similiar thread) the enumerated powers do not include passing unconstitutional laws. I think that was Devin's point.

So we see that in fact it is a threeway game in which each player has a part, and I don't think it is fair to dismiss the right of each of the branches to work to overturn what they deem as unconstitutional laws. Its good we have a 3 part system so we don't end up with any ties votes.

I don't mean to imply all 2 to one votes would solve the matter, as the President and the Congress can work together to pass an unconstitutional law....that is a more frequent occurrance...and one would think that Judicial Review would be the stronger hand as a general rule. It is a very difficult puzzle to solve.

IMHO

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Devin Watkins · a month ago

Almost right, you got the part about acts of congress not really being law even if signed by the president if they are unconstitutional. But then you say: "Its good we have a 3 part system so we don't end up with any ties votes." Its not really if 2 of the branches believe its constitutional and one doesn't that the two can overrule the 3rd. Our constitution requires all 3 branches to agree that it is constitutional or it wont be enforced. If just the supreme court thinks its unconstitutional they can stop the other branches from enforcing it, if just the congress thinks its unconstitutional they can remove the statute over the veto of the president, if just the president thinks its unconstitutional he can refuse to enforce it.

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Joe Caro · a month ago

Aren't you guys forgetting that no matter what the Prez believes, he is still subject to the constitution? When he refuses to enforce a law he IS violating his oath of office. Now, the opportunity for judicial review is always present, and almost assuredly the action of the Prez will come before the courts somewhere and sometime, so I suppose there is an argument that the Prez CAN refuse to do his constitutional duty in seeing that it is faithfully executed, then get challenged in court, the court ultimately determining if he is correct.

BUT, lets advances the argument. Say the Supremes rule against the president and he STILL refuses to enforce the law. What then? The above argument that the prez can properly oppose enforcement because he disputes the constitutionality goes out the window. Can the prez STILL refuse to do his constitutional duty even AFTER the constitutional process has been done?

I argue that he MUST enforce the law, like it or not, and should then exercise leadership in trying to convince the Congress to CHANGE the law in a manner acceptable to him. It is NOT up to the president to make legislation, he MUST convince the legislature. Otherwise the whole "rule of law thing" goes out the window, which may be acceptable to those who agree with the presidential position on the issue. THAT is a most dangerous situation. We are either a nation of laws, or we are not. If we wish to go the banana republic route, well I submit that it is NOT up to us to wish to do so, and it is up to our institutions to see to it that we do NOT go that route and not just sit by watching the constitution become eroded.

It is said that Benjamin Franklin, when asked what kind of government they had crafted replied," a Republic, if you can keep it."
The "jury" is STILL out on whether we can keep it, and it is up to every generation to fight to keep it, as it is every generation's ability to lose it.

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Devin Watkins · a month ago

You say "When he refuses to enforce a law he IS violating his oath of office." That is true if it is a law, but an act of congress which is in violation of the constitution is not a law, congress doesn't have the authority or power to pass laws which violate the constitution. So when the president refuses to enforce an act of congress he believes to be unconstitutional he is actually enforcing the law as he sees it, he is enforcing the higher law of the constitution which is the Supreme Law of the Land and any congressional statute to the contrary is invalid, void, and not a law.

Now congress may disagree with the president, and if they do think it is a law and the president is therefor failing to faithfully execute the laws of the united states, they can impeach him for that, but that is all they can do, that is all anyone can do. The supreme court doesn't have the power to order the president to do something, it can order him NOT to do something (to not hold someone prisoner for instance), but it cannot force affirmative action by the president. These are co-equal branches of government, the supreme court can no more force

the president to do something then the president can order the supreme court to do something. Its the idea of "John Marshall has made his decision; now let him enforce it!" The supreme court has neither the sword (the executive), nor t he purse (the legislative), it rules merely by opinion which is why it is the least powerful branch of government.

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Joe Caro · a month ago

A bill passed by the legislative branch is LAW.

It is true that there is no physical means any branch can use to enforce its decisions upon the other. There is, however, the moral authority of the Constitution and its provisions.

There is only the impeachment process for enforcement, and it is essentially a "civil" enforcement at best, as any criminal jeopardy is specifically forbidden. For the republic to endure the occupiers of the various constitutional offices must adhere to the constitution, or, let's face it, what is the point of any of this.

If we wish to maintain our form of government, with the protections the constitution provides us, then it is essential that responsible and sober people hold these offices, essential that those we elect, and those appointed by those we elect have the honor and integrity to fulfill their constitutional duties. Otherwise we are Venezuela,

It really is up to US to see that our office holders do their duty and hold them responsible. If we do not, if we allow them to do whatever THEY wish, then we no longer have our form of government.

There is no WEAKER branch of government as you suggest. Each branch is given their authority and power in the constitution. I suggest that should it be necessary for any branch exert physical power over any other to exercise this authority it is the weaker one. Should this ever be necessary we can kiss our form of government goodby and all become Chavistas. That is why it is up to US to see to it that our "leaders" do their duty, whether we agree with the details or not. Failure by us to do so will result in the failure to maintain the Republic.

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Ray Strong · a month ago

I offer this without wanting to yet take sides in this discussion. But there is a Precedent of a President to defy the court, in addition to Jefferson's declining to enforce the Sedition Laws the SCOTUS had ruled Consitutional.

Once widely quoted it man not be a true quote. However wobbly it might be -- it correspoonds with Prof. Amar's picture of the week of "King Andrew".

copied from a historical website:

Jackson allegedly defied the Supreme Court over *Worcester v. Georgia* (1832), announcing, "John Marshall has made his decision now let him enforce it." The case revolved around Georgia's attempt to apply state laws to Cherokee lands. The Court had ruled against Georgia's authority to do so and Jackson, dedicated to Indian removal, allegedly challenged Marshall. Although there is little evidence to support the above quotation, it certainly sounds like Jackson. Nonetheless, the case required nothing of Jackson and was ultimately settled out of court. The fact remained, however, that in this case and in *McCulloch v. Maryland* (1819), when it was ruled that the Bank of the United States was in fact constitutional, Jackson challenged the Court's authority as the final arbiter. As president, Jackson believed that his authority to deem what was constitutional equaled the Supreme Court's.

http://www.gilderlehrman.org/history-by-era/age-jackson/essays/andrew-jackson-and-constitution

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Joe Caro · a month ago

I submit that the challenging that went on IS part of the process. What should NOT be is the outright defiance that Jackson was allowed to get away with. If the legislature, for example, strongly felt he was violating the constitution they they should have impeached him.

My point is not that the challenging is a problem, I believe it is a right and proper tactic, but it is important for EACH branch to assert its authority as provided for. That there were those who saw Jackson as an Imperial ruler is not the point in my mind. It was that JACKSON saw himself as an Imperial ruler, and that it was the responsibility of the legislature, for example, to not allow this.

I believe that what Jackson did was to NOT USE the Bank of the United States for government transactions and deposits. True, Its existence was ruled constitutional, but that did not mean Jackson had to use them. Also remember that when the re charter of the bank came up he VETOED it, and the veto was sustained. Ultimately all part of the constitutional process I would argue.

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Devin Watkins · a month ago

You say "A bill passed by the legislative branch is LAW." I completely disagree with that, even if that bill is signed by the president it does not become law if it is unconstitutional. And I refer you to the very end of Marbury v. Madison which shows why:

"in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned, and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank.

Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written Constitutions, that a law repugnant to the Constitution is void, and that courts, as well as other departments, are bound by that instrument."

An act of congress signed by the president is void if it violates the constitution and ALL departments (what we would now call "branches" of government) are bound to follow the constitution over any act of congress. Now congress may disagree with the president and impeach him for refusing to faithfully executing the law as he is required to do, that is within the power of congress if they decide to do that.

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Joe Caro · a month ago

Sounds good, but what you have is justifying his decision for judicial review. Establishing the right of the court to rule on the constitionality of a law.

The question is at what point is a bill passed by congress and signed into law unconstitional? What the fact is that this is establishing the right of the court to review a law challenged on constitional grounds. An act of congress becomes a law when passes by congress and signed by the prez.

The law must be a law to be challenged. Your interpretation would make every act of congress lie in a suspension file until the court deems it constitional? That simply is not the case.

What

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Devin Watkins · a month ago

Once the congress expresses its view that the law is constitutional by passing it, and the president expresses its view that the law is constitutional by signing and enforcing it, that's two of the three branches agreeing, and then the executive hauls someone before the court to faces charges and once the judiciary signs off that the judiciary believes the law is constitutional then the person goes to jail for violating it. So yes you can say in the normal course of things the judiciary can "make" a law unconstitutional by declaring it so (or at least that's how the federal government will act), but things get a lot more tricky if a congress passes a statute that is signed, and then latter on a new congress/president that thinks the old law is unconstitutional comes into office. Its wrong to say the new president or congress is

incorrect as to the constitutionality of the law because it was passed/signed/upheld, they can make the federal government act as if it is unconstitutional. Now the normal course of things is also to say that any statute passed by congress and signed by the president is the law, which usually it is because unconstitutional statutes are unusual, and we do have a presumption of constitutionality. Also an individual must be careful about violating a signed statute because we might not know for sure what the judiciary will think. But if someone wants to make the argument that the law is unconstitutional people should listen to that, because maybe they are right, just saying "its the law therefor it cant be unconstitutional" isn't quite correct.

For instance, I think Obamacare is unconstitutional, it was passed by congress, signed by the president and upheld by the supreme court, but I have also read the opinion of the court, I know why Roberts flipped his vote and it wasn't for constitutional reasons, so I believe it is unconstitutional act of congress, and I hope others will agree with me and vote in appropriate new members to congress to overturn this unconstitutional act. Is it the law? Not if its unconstitutional, then it cant be! But that doesn't meant I wont be careful to avoid violating it, I know the federal government currently deems Obamacare constitutional, but we have a government of men not angels, sometimes they get things wrong.

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 Alec D. Rogers · a month ago

I agree with Devin's important point regarding the presumption of Constitutionality of laws duly passed. The courts owe some deference to the elected branches when it comes to their views of the Constitution given that they are elected. How much deference is open to debate and something my thinking is evolving on a bit given how Congress seems to take the attitude that "that's the court's job" when asked about the constitutionality of some of the laws they pass.

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Joe Caro · a month ago

Delvin's post was an excellent summation of the process. The "presumed constitutionality of a statute" is an apt description of what goes on here. Should someone deem that they have been made subject to a law that they believe to be unconstitutional there is a remedy for that. I submit to you that the care that SHOULD be taken, that any legislation should be constructed carefully so that it is constitutional (an admirable hope) is not taken in the modern congress. Many pieces seem to take the position of throwing crap against the wall and THEN see if the Supremes will allow it to stick.

Alec, you point about the Congress' attitude that it is the Court's job to determine the constitutionality is an interesting point. I agree with you that the notion of "open to debate" (I would add the term SERIOUS and THOUGHTFUL debate) is lost in our current congress. It has always been part of the process to bottle bills up in committee, not allow a vote even at

that level, and simply AVOID any discussion on many (now most?) issues. Done for political purposes, to keep Reps and Senators from having to take a stand, it has greatly diminished the purpose of Congress as a place to debate public issues and giving careful consideration before passing stuff. That consideration for making a bill constitutional before passing it has all but vanished in favor of raw political purposes has diminished the role, and commensurately the respect of the public of the congress.

I hope it is that even we the people, whom they seem to consider as dummies, can see that congress is avoiding their responsibilities. And I hope that it is NOT so much because of their agreement or disagreement with the outcomes, but the shallow and self serving process congress exhibits.

It used to be possible to have the attitude that when one disagrees with the outcome you could at least say at least my side got a fair hearing, at least they considered the options and gave reasoned arguments for their actions. Today, not so much. Those on the losing side are thinking tht they just got screwed. This not healthy. It is the role of leadership to win at least grudging acceptance from the opposition and not just stick it to the losers. The reason being, that you will certainly have to come back to these folks for help and support for something else you want in the future. THAT is just not going on with the Federal government today at the Congressional and Executive level.

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 Alec D. Rogers · a month ago

After the 2010 election, there was a renewed interest in ensuring the constitutionality of legislation. Here is an interesting summary of what was proposed and actually occurred when House rules were amended to require that each bill have a statement justifying its constitutionality:

http://www.politifact.com/truth-o-meter/promises/gop-pledge-o-meter/promise/665/require-bills-to-inc...

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Lawmakers abiding by new constitutional-justification rule
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Updated: Friday, March 18th, 2011 | By Abby Brownback, Louis Jacobson
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During the 2010 campaign, many Republicans pledged their loyalty to the U.S.
Constitution and said that President Barack Obama and the Democrats had strayed
too far from the vision of the Founding Fathers.
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> Tea Party Express chair Amy Kremer called the Constitution "our armor. And that is what enables us to stand up here and fight for what we believe in." Mike Lee, a Utah Republican who ousted a sitting GOP senator, declared, "I hereby pledge to you that I will not vote for a single bill I can't justify by the text and original understanding of the Constitution."
>
> Other Republicans made the same promise, and it became part of the GOP platform. House party leaders said they would require that all bills "include a clause citing the specific constitutional authority upon which the bill is justified."
>
> After the election, they quickly took action to fulfill the promise. They scheduled seminars in December 2010 to teach congressional aides how to submit the constitutional justifications with new bills. Then, in January, the House Republicans adopted a rule requiring it for all bills.
>
> We had rated the promise In the Works based on the training sessions. At the request of several readers, we've examined the Republicans' actions since then and are updating our rating. We find the Republicans' have fulfilled the promise, although it's worth noting that experts say the requirement to include a constitutional justification is not particularly meaningful.

1 · flag

Joe Caro · a month ago

Love it. Too bad it is all B.S. our representatives have only one justification which consists of two rules, the first is to win re-election, and the second is to raise enough money to ensure rule one. Think I am being too harsh, may I refer you to the approval ratings of our congress.

2 · flag

+ Comment

Michael Blanco · a month ago

I think the biggest factor in what you say above is that the Constitution has gremlins in it. It's one of the greatest documents in history, but it still has flaws. Think of how much easier it would be to interpret the 2nd Amendment if the Framers had put a "Because" in front of the militia proviso or, on the other hand, eliminated it altogether? So, on the one hand, the President takes an oath to preserve, protect, and defend the Constitution. On the other hand, the Constitution says he President shall take care that laws be faithfully executed. Did anyone in 1788 see the potential conflict there? If I take an oath to do something, doesn't that mean that I have to use my own judgment as to what that something is? So, let's say I think you're a really smart guy and you tell me that I've got it wrong, that it's really OK to do

something I don't think is right. Should I do it just because you tell me to do it? Isn't it more honorable to tell you that while I respect your opinion, since it's my job to do and not yours, and since I respectfully disagree with you, I have to follow my own judgment?

Elections matter. When we elect a President, we elect his judgment. I think that Professor Amar's point is that since the Constitution is a higher law than a specific statute, the President is obligated to "execute" the Constitution over a particular law if he thinks they conflict. The Supreme Court is to be respected, but no where does the Constitution state that they are the final arbiters of the meaning of the Constitution.

↑ 2 ↓ · flag

Joe Caro · a month ago

Michael, I believe that the authority given to the Supremes is the final arbiter of the constitution with respect to the case in front of them. If they affirm, a future case involving the same law can be brought, and the courts will determine what the issue is with respect to THAT case. If they deny, then the legislature can re write the law and address the constitutional objection. So, in the larger scheme, the Court is never the FINAL arbiter of an issue because the circumstances can change, and/or the law itself can be adjusted.. They are, however, the final arbiter of the CASE in front of them.

↑ 0 ↓ · flag

Michael Blanco · a month ago

I actually used to take your position and, for the most part, I'm glad we do it your way. The way we do it, with SCOTUS being the final arbiter, is so much more efficient and neater. I'm glad Marshall did what he did in *Marbury*, and I'm glad SCOTUS is typically the default for settling constitutional matters. However, I don't think that's what the Constitution proscribes. I don't see it any where in the Constitution that SCOTUS is the final arbiter, and at times I think they have stepped beyond their boundaries. such as in Florida in 2000. I'm also glad that the Constitution allows a President, when appropriate, to stand against the Court. It's good that most of the time Presidents don't do so, but at times it might be necessary, such as in Dred Scott.

↑ 1 ↓ · flag

 Susan Ye Laird Signature Track · 19 days ago

Elections only matter if we also elect ourselves to check every and each day that our official is doing what they promise to carry out on their campaign trail once they are in the office. The trouble I see is that 'middle' and free minded people are shrinking ever so much without our representatives realizing it. If our Framers written Constitution provided us with a 'Trinity' extended structure, it is up to us to do the work of Holy ghost. In that regard, I don't put my bet with any godly man who easily like to believe it is their duty to save me or forsake me for the sake of His Re-public.

0 · flag

+ Comment

 Susan Ye Laird Signature Track · a month ago

I came across this alarming study 'Policing for profit' about the abuse of Civil Asset Forfeiture Act. It saddens me that the law of the land can be perverted to such extend. http://nunia.freeshell.org/pdf/assetforfeituretoemail.pdf 'Taking care that laws be faithfully executed' is forever a challenge for all citizens.

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