THE PRESIDENT'S SPHERE OF ACTION

NEOMI RAO*

To what extent can the President say what the law is? Throughout our history Presidents have asserted the power to disregard unconstitutional statutes. The exercise of this power has sometimes rankled the other branches and the public. President Andrew Johnson sought to remove his Secretary of War in violation of the Tenure in Office Act and was impeached and almost removed from office for it.[1] More recently, the ABA, the media, and a number of legal scholars have been exercised about President George W. Bush merely asserting in signing statements the right to disregard statutory constraints on executive powers.[2]

Although examples of executive review and disregard abound, the legality and appropriateness of such actions continue to be in dispute. A great deal of commentary has considered the theoretical basis for the President's review power and has focused primarily on the President's constitutional powers and duties and the corresponding powers of Congress and the Supreme Court.

Rather than focus on presidential *powers*, I propose here to examine the constitutional *limits* on the President's interpretive authority. The structural and institutional boundaries on the President's power provide a different way of getting at the question of executive review. We may be better able to judge the size of the President's sphere of action negatively—to examine the constitutional constraints rather than the positive grants of power.

* Assistant Professor of Law, George Mason University School of Law. I thank Nelson Lund and Saikrishna Prakash for helpful comments on an earlier draft. I am grateful to Willamette Law School and the *Willamette Law Review* for hosting this symposium on executive powers.

1. HANS L. TREFOUSSE, IMPEACHMENT OF A PRESIDENT: ANDREW JOHNSON, THE BLACKS AND RECONSTRUCTION 81–83, 165–67 (1999). Michael B. Rappaport, *The Constitutionality of "Signing and Not-Enforcing,"* 16 W M. & MARY BILL RTS. J. 113 (2007).

In our constitutional structure, limitations have more than theoretical significance. The Framers paid close attention to structural boundaries and to the problem of how each branch would defend against encroachments by the others. James Madison explained,

> It will not be denied, that power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary; the next, and most difficult task, is to provide some practical security for each, against the invasion of the others. What this security ought to be, is the great problem to be solved.[3]

Parchment barriers did not satisfy the Framers; rather, they specifically contrived "the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places."[4]

Accordingly, the Constitution provides government officials with

> the necessary constitutional means, and personal motives, to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man, must be connected with the constitutional rights of the place.[5]

The means of defense are inextricably linked to the powers of each branch as well as to the threats they face from the other branches. The Framers focused on structure, not man's better nature, to keep government within certain limits. The "interior structure of the government" provides important evidence about the proper scope of the legislative, judicial, and executive powers. The checks and balances tell us not only about the limits of power, but also about the *nature* of the power conferred.

Each branch faces a different mix of *ex ante* and *ex post* constraints on their ability to "say what the law is." The limitations on the branches, like the powers accorded to them, are both distinct

3. THE FEDERALIST NO. 48, at 256 (James Madison) (George W. Carey & James McClellan eds., 2001).

4. THE FEDERALIST NO. 51 (James Madison), *supra* note 3, at 267.

5. *Id.* at 268. *See also* THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 3, at 402 (discussing the capacity of the judiciary in comparison to the executive and legislature).

and overlapping. They relate to the particular functions of each branch and their institutional and structural strengths and weaknesses. Congress, the President, and the courts are equally bound to obey and follow the Constitution, but the Constitution establishes different types of constraints for each of the branches both before and after they interpret the Constitution. Moreover, each branch faces different prudential limits imposed by political opinion and concerns of institutional preservation.[6]

constitutionality of statutes, a consideration of affirmative powers has

the Constitution leaves open the possibility for, and perhaps even requires, independent presidential action. The President may choose to defer to the other branches in ordinary cases, but he can and sometimes must exercise his constitutional judgment against the other branches. The forms of constitutional accountability for the executive reflect his unique role in the constitutional structure as protector and preserver of the Constitution.

I. CONGRESS

The Framers thought that Congress and its legislative powers would naturally predominate and therefore pose the greatest threat to liberty. James Madison explained that because the legislative power is "less susceptible of precise limits, it can, with the greater facility, mask under complicated and indirect measures the encroachments which it makes on the co-ordinate departments."[15] The natural strength of Congress required significant internal checks, such as dividing Congress into two houses, and external checks, such as the qualified veto.[16] Congress was not given an "equal power of self-defense" from the other branches in part because of its already significant powers.[17]

This Part describes the various non-legislative and legislative powers through which Congress can advance constitutional interpretation and explains the limits on the exercise of these powers. While Congress plays an important role as a co-equal branch in considering constitutional issues, it has few means of enforcing its view of the Constitution when its view is at odds with that of the President or the Supreme Court. Although Congress holds the ultimate constitutional checks of impeachment and amendment, the Constitution makes these powers difficult to exercise. For structural as well as practical reasons, Congress usually defers to the constitutional judgments of the other branches and exercises only limited independent constitutional interpretation.

15. THE FEDERALIST NO. 48 (James Madison), *supra* note 3, at 257.

16. THE FEDERALIST NO. 51 (James Madison), *supra* note 3, at 269.

17. *Id.*

A. Non-Legislative Powers: Amendment, Impeachment, and Confirmation

Congress may, by a two-thirds vote, propose constitutional amendments for ratification by the States.[18] The power to propose constitutional amendments gives Congress a chance to address a perceived constitutional deficiency or to respond to a Supreme Court decision with which it disagrees. Congress initiates amendments infrequently, no doubt in part because of the difficulty of receiving a two-thirds vote of both Houses and then of achieving ratification by the legislatures of three-fourths of the States. Article V erects a high hurdle to amendment; and Congress can initiate but cannot complete the process.

Another infrequently used but potentially significant opportunity for constitutional interpretation exists in the impeachment and removal powers. As Neil Katyal has argued, impeachment and removal present special opportunities for Congress to exercise a politically accountable form of constitutional interpretation.[19] In deciding the scope of "high Crimes and Misdemeanors,"[20] Congress is limited in part by constitutional text and history, but may also be guided, Katyal argues, by political considerations.[21] He explains that Congress, unlike the courts, "can say that the text, history, and structure do not provide a clear answer, and that constitutional meaning should reflect popular views and beliefs about whether a 'high Crime' has been committed."[22] A number of scholars have similarly argued that Congress, a democratic and politically accountable branch, has a distinct institutional competence and should interpret the Constitution in light of popular values and sentiments.[23]

Impeachment proceedings, like constitutional amendments, are relatively uncommon. There may be any number of reasons for this,

18. U.S. CONST. art. V.

19. Neil Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1382 (2001).

20. U.S. CONST. art. II, § 4.

21. Katyal, *supra* note 19, at 1382.

22. *Id.*

23. *Id.* at 1393 ("Having the Court adhere to strict construction of the . . . Constitution, while Congress makes determinations about contemporary values, might yield a better balance."); *see also* Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 419 (1993); *see generally* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

including that impeachment is a relatively blunt tool for punishing

consequently on its ability to put forward its own constitutional interpretations. The Framers deliberately made it difficult to enact legislation. As a large multimember body, Congress rarely acts quickly and must negotiate a number of hurdles before enacting legislation. Hamilton considered this proceduralism security against bad laws and noted that "[t]he injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones."[34] Accordingly, Article I requires bicameralism and presentment to the President before a bill can become a law.[35] Overriding the President's veto requires two-thirds of both houses.[36] As the Supreme Court has explained, this reflects "the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure."[37]

One of Congress's primary modes of constitutional interpretation occurs through legislation, but structural and procedural hurdles place significant *ex ante* limits on Congress's ability to make laws, and, by extension, also place limits on Congress's interpretive capacity.[38]

These constitutional procedures suggest reasons why, as a practical matter, even when faced with an opportunity, members of Congress may give short shrift to constitutional considerations. There are few political incentives for a senator or representative to hold up legislation on constitutional grounds. Constitutional deliberation is a kind of public good and individual legislators lack the capacity or incentive to monitor legislation for constitutional issues.kOali0Even a

conscientious legislator who wishes to raise constitutional issues may be unable to manage this within the rules and agenda of the House or Senate.[40]

Although legislation starts with a presumption of constitutionality, Congress may see its work undone in a number of ways. The President may veto the legislation on constitutional (or any other) grounds and an override faces a difficult two-thirds vote in both houses.[41] Even if the President signs a statute into law, he may indicate that he will not enforce provisions that he deems unconstitutional.[42] Individuals aggrieved by the statute may challenge it on constitutional grounds and the judiciary may invalidate it. The Supreme Court has boldly asserted final authority to judge the scope

a prohibition established early in our history when Chief Justice John Jay declined to answer a variety of questions posed by then-Secretary of State Thomas Jefferson.[51] The Court explained,

> [T]he lines of separation drawn by the Constitution between the three departments of the government[—there] being in certain respects checks upon each other, and our being judges of a court in

may well give an edge to the judgments of the political branches.[56]

These jurisdictional hurdles all serve to narrow the sphere of judicial review. The Court may invalidate unconstitutional statutes or find executive branch action unlawful—but it will have the chance to do so only in a small number of cases. These limits ensure that a significant amount of constitutional interpretation will be left to the political branches.

Once a case has cleared jurisdictional hurdles, a variety of canons and presumptions constrain the Court's decisionmaking. To begin with, the Court gives substantial deference to the constitutional judgments of the political branches.[57] Statutes enjoy a strong presumption of constitutionality, and invalidating a statute is an action that occurs relatively rarely.

As part of this general deference, the Supreme Court will often seek to avoid constitutional questions, deciding a case on statutory grounds when possible or choosing an interpretation of a statute that will avoid constitutional difficulties.[58] The standard rationale for this stems from the finality of judicial decisions and the "countermajoritarian difficulty" that arises when the Court invalidates the actions of the political branches.[59] Deference to Congress does not prevent the Supreme Court from invalidating statutes in appropriate cases, but, in theory, it leaves such invalidation for the rare case in which no other saving construction is possible.

56. *Id.* at 116–17 ("No doubt the T.V.A. and the Bank of the United States seemed less objectionable to the judges as established facts than they might have as abstract proposals. If this gives an edge to the decisions of the representative institutions, it is not difficult to deem it an acceptable one.").

57. *See* supra notes 31-33 and accompanying text; Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 319 (1985).

> Judging the constitutionality of an Act of Congress is properly considered the gravest and most delicate duty that this Court is called upon to perform, and we begin our analysis here with no less deference than we customarily must pay to the duly enacted and carefully considered decision of a coequal and representative branch of our Government.

Id. (internal citations and quotation marks omitted).

58. *See* Ashwander v. tvkueates.S1413(n)01 Tf-2.1127 -1.n

The Court extends similar deference to the executive branch. Many cases reviewing executive branch interpretation deal with administrative law. If a statute delegates lawmaking authority to an agency and is ambiguous, the Court will give some level of deference to a reasonable agency interpretation.[60] The Court has at times accorded significant deference to the executive in foreign affairs matters;[61] although in recent years the Court has overturned the judgments of both Congress and the President even with regard to the war powers.[62]

The limitations of the judicial power also serve to curb overreaching. The Court renders each decision with the knowledge that it cannot enforce its judgments. The inability to enforce its edicts must work as a strong tempering force for the Court, which must seek to conserve its institutional capital. It must be independent in its judgments, yet stay within boundaries that the political branches will accept. A web of constitutional and prudential limits constrains the Court in the process of constitutional interpretation.

B. Checking the Court

Once the Court has rendered a judgment, Congress and the President have a variety of *ex post* mechanisms for checking the Court. Most of these, however, are discretionary and rarely exercised.

As Hamilton recognized, the Court depends on the executive branch for the execution and enforcement of its judgments. Although the Supreme Court's judgments are almost always enforced by the President, the threat of non-enforcement remains. President Lincoln

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reputed to have said, "John Marshall has made his decision, now let him enforce it."[64] Actual non-enforcement of particular judgments, however, is rare and widely considered to be an abuse of the executive power.[65]

While the Court nearly always has the final word in a particular judgment, the same is not always true about broader constitutional rules established by a case. The President may follow a specific judgment but fail to accept the case as precedent in similar circumstances. He may direct executive branch officials to continue to litigate already decided issues or otherwise seek to undermine judicial precedent.[66] In criminal matters, the President may undo a conviction by issuing a pardon.[67]

Congress also has several mechanisms to check the Court. First, it may seek to legislate around judgments with which it disagrees—either directly confronting the precedent,[68] or more carefully trying to step around it.[69] Second, it has the power to propose constitutional amendments.

faith disagreements about constitutional interpretation, despite occasional proposals to the contrary.[71]

Congress can also limit the appellate jurisdiction of the federal courts. Article III gives Congress power to establish "inferior Courts"[72] and creates appellate jurisdiction in the Supreme Court "with such Exceptions, and under such Regulations as the Congress shall make."[73] The Supreme Court has held that power to limit jurisdiction is plenary over the lower federal courts[74] and that Congress has broad authority to make exceptions to the Supreme Court's appellate jurisdiction.[75] Congress can thus punish overreaching courts by withdrawing jurisdiction in certain types of cases.[76] Such withdrawal occurs infrequently, although proposals to that effect continue to be made.[77] Congress could also punish the judiciary by limiting its budget, and cutting back on staff and resources.[78]

71. Throughout history legislators have called for the impeachment of judges with whom they disagree about constitutional interpretation, but such suggestions have not gone far. *See INAL6ls*

The availability of extreme checks such as non-enforcement of judgments or withdrawal of jurisdiction encourages the Court to exercise self-restraint both in asserting jurisdiction and in the manner in which it decides cases. Since *Marbury*, the judiciary has asserted its power to review the actions of the other branches, but has defined that power largely with reference to constitutional, prudential, and

President suggest that, by comparison to the other branches, the Constitution allows the President a fairly broad sphere of action.[85]

A. Ordinary Interpretation in the Executive Branch

Before reaching the more contentious cases, it may be helpful to consider briefly the ordinary aspects of executive branch interpretation. My discussion of this reflects personal experience working in the Office of the White House Counsel as well as the accounts of other former executive branch lawyers, who, at least at a descriptive level, largely agree about how things actually work.[86] Although much has been debated about the President's authority to disagree with Congress and the Supreme Court, such conflicts rarely occur. The executive branch does not regularly and aggressively seek to advance independent constitutional interpretation.

The President enforces virtually all statutes and defends them in court, even when there may be constitutional doubts about the statute's validity.[87] In the course of enforcing statutes, however, the executive must necessarily engage in statutory interpretation. To faithfully execute the laws, the President must ensure that various statutory policies and directives work together to create coherent government action. Generating such coherence from our myriad laws will often require detailed and sometimes creative interpretation.[88] Ordinarily such interpretations do not challenge the authority of the other branches.

Similarly, the executive branch virtually always enforces judgments of the Supreme Court[89] and treats judicial precedent as

85. There may be many reasons for the President not to exercise his interpretive power to the outer limits of his authority, and I do not address here how the President should properly exercise his interpretive powers, but note that most presidents have wisely restrained the use of such power and not asserted their prerogatives regularly.

86. *See, e.g.*, Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*,

binding.[90] Executive branch lawyers often consider proposed action in terms of whether it would be defensible in court, rather than whether it is constitutional.[91] Such deference may stem from widely accepted ideas about the Supreme Court's institutional advantages with regard to constitutional interpretation and also its greater independence from political pressures. While this court-centered perspective poses various problems,[92] in my experience, it accurately describes the prevailing mode of interpretation.

B. Ex Ante *Constraints*

As with the other branches, the primary *ex ante* constraints on the President are inherent in the nature of the executive power. As the Chief Executive, the President stands in a unique position—he represents the nation, oversees implementation of its laws, and preserves the nation's safety.[93] These responsibilities impose certain constraints on the President.

Power of the United States,' and a 'judicial Power' is one to render dispositive judgments.

The Framers deliberately chose a unitary executive because, as Hamilton explained, "unity is conducive to energy. . . Decision, activity, secrecy, and despatch, will generally characterize the proceedings of one man, in a much more eminent degree than the proceeding of any greater number."[94] In addition to energy in the executive, unity promotes both visibility and responsibility. Because the President alone commands the executive branch, the public can identify the source and author of bad policies. As Hamilton explained, the "two greatest securities" the people have in the faithful exercise of the executive power are the restraint of public opinion and the "opportunity of discovering with facility and clearness the misconduct of the persons they trust"[95] so that censure or punishment may follow.[96]

Similarly, Madison noted that the executive power has a narrower scope than the legislative power and is "more simple in its nature."[97] Accordingly, he argued, "projects of usurpation . . . would immediately betray and defeat themselves."[98] By their nature, the President's actions are usually visible, and this visibility provides accountability.[99]

The President's visibility substitutes for more concrete *ex ante* constraints on the exercise of his powers. Execution of the laws usually generates public awareness of the President's actions and triggers the possibility of political and judicial review. This

and other executive and judicial officers are bound by oath simply "to support this Constitution." U.S. CONST. art. VI., § 3.

94. THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 3, at 363.

95. *Id.* at 367.

96. By contrast, a plural executive "tends to conceal faults, and destroy responsibility." *Id.* at 366.

97. THE FEDERALIST NO. 48 (James Madison), *supra* note 3, at 257–58.

98. *Id.*

99. *See* Korematsu v. United States, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting).

> If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.

Id.

A number of commentators have examined how secrecy in the executive might undermine accountability. *See, e.g.*, Mark J. Rozell, *Restoring Balance to the Debate over Executive Privilege: A Response to Berger*, 8 WM. & MARY BILL RTS. J. 541 (2000); Heidi Kitrosser, *Congressional Oversight of National Security Activities: Improving Information Funnels*, 29 CARDOZO L. REV. 1049, 1062 (2008) (considering the balance between presidential secrecy and political accountability).

arrangement maximizes energy in the executive by leaving accountability largely to follow after the fact of executive action.

Finally, although most of the constitutional constraints on presidential powers occur after he acts, the availability of *ex post* checks on the President (discussed in the next part) will affect presidential deliberation and decision-making. Executive branch lawyers regularly consider the possible legislative and judicial responses to proposed action. As the Founders envisioned, constraints were often designed to be internalized—they might have

Congress may also hold the President accountable. Congress possesses a number of ordinary tools to sanction the executive, such as reducing or eliminating funding for presidential excursions both at home and abroad. Congress can cut off or threaten to cut off funding in order to cajole the President to change his policies. Congress may also use oversight hearings to make executive branch officials account for alleged misdeeds. Such hearings may draw public attention to actions within the White House or executive branch agencies that have otherwise gone without notice.

In extreme cases, Congress may vote to impeach and remove the President and disqualify him from holding any other federal office. This significant power was given to Congress, as opposed to the Court, after much debate during the drafting of the Constitution.[106] Impeachment serves as a significant check on the President and other high-ranking officials. Hamilton argued that the presidency preserves republican values because the President is subject to reelection every four years and remains liable for impeachment and removal and disqualification from other office.[107] Moreover, even after removal from office, a President may be criminally liable for his actions.[108] The President's pardon power does not extend to impeachment,[109] and it is generally considered that there would be no judicial review of impeachment. Congress thus possesses an2dj0.151sses Alk 316.38 449.9(n449.9(niebetions8c0.151

own constraints. For example, Supreme Court review may take years. A number of controversial decisions by the executive may never be subject to judicial review, because there is no appropriate party with standing, or because of other jurisdictional hurdles. The Court may decline to hear political questions or choose to avoid constitutional questions raised by the President's actions.[110]

Congress's checks on the President also have inherent limitations. Impeachment is a blunt tool for addressing presidential wrongdoing. It requires significant political will to receive two-thirds of senators present to remove the President.[111] Historical practice as well as the nature of this remedy have generally confined impeachment to egregious cases of overreaching or wrongdoing by the President.

Electoral pressures on the President face similar limits. The President will be up for reelection at most once. While voters may be outraged by particular actions, these will have to be judged in the context of a President's broader service to the country. There is no national plebiscite on particular issues.

Furthermore, all of these accountability mechanisms are diffuse and depend on discretionary actions by the other branches or the people to check the President. The slow, ponderous, and majoritarian methods of holding the President accountable leave a significant space in which the President may act unimpaired. The nature of the checks on the President strongly supports the claim of independent executive review power and suggests that such power may, at times, have a significant scope.

D. The President's Means of Defense

The President has powerful tools with which to defend his considerable sphere of action against Congress and the Court. Although enforcement of statutes and adherence to Supreme Court precedent is the ordinary course, the President retains the power to act against the constitutional judgments of the other branches. If after careful review the President determines that a statute is

110. See *supra* text accompanying notes 54–58.

111. U.S. CONST. art. I, § 3, cl. 6.

unconstitutional, he may decline to enforce it.[112] The President may also decide not to follow Supreme Court precedent, and in the rare instance, may decide against enforcement of a particular judgment.[113]

Thomas Jefferson explained that the Constitution created independence in each of the three branches, and each branch was furnished with the means for protecting itself from "enterprises of force attempted on them by the others."[114] Although each branch has its means, the Constitution gives the "most effectual and diversified means [] to the executive."[115] The "practical security"[116] given to the President to fend off invasion from the other branches reflects both the significant scope of his powers and the dangers thought to emanate from Congress (and also possibly the courts).

Of the three branches, the President has the most formidable tools for protecting his autonomy. The nature of the executive power allows the President to act unilaterally and quickly—execution of the laws does not require the assistance of the other branches. Moreover, the tools he possesses—including the veto, the pardon, and the non-enforcement power—may all be used to ward off encroachments by the other branches.

By contrast, as discussed above, Congress cannot legislate without concurrence from the President (although it can overrule a veto with two-thirds of each house). Similarly, the Supreme Court cannot decide issues *sua sponte*, but must wait for an appropriate case in which it has jurisdiction. Both Congress and the Supreme Court

112. *See* Dellinger Memorandum, *supra* note 83 ("[T]here are circumstances in which the President may appropriately decline to enforce a statute he views as unconstitutional."); The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A OP. OFF. LEGAL COUNSEL 55 (1980).

> I do not believe that the prerogative of the Executive is to exercise free and independent judgment on constitutional questions presented by Acts of Congress. At the same time, I think that in rare cases the Executive's duty to the constitutional system may require that a statute be challenged; and if that happens, executive action in defiance of the statute is authorized and lawful if the statute is unconstitutional.

Id.

113. *See supra* notes 63–66 and accompanying text.

114. Letter from President Thomas Jefferson to George Hay (June 17, 1807), *in* 10 THE WORKS OF THOMAS JEFFERSON 404 (Paul L. Ford, ed. 1905).

115. *Id.*

116. THE FEDERALIST NO. 48 (James Madison), *supra* note 3, at 256. Similarly, Madison observed that "it is not possible to give to each department an equal power of self-defense" because the types of power are also different and unequal. THE FEDERALIST NO. 51 (James Madison), *supra* note 3, at 269.

require coordinated majorities before acting. Moreover, they require the executive to fulfill their directives. The legislative and judicial powers are not designed for quick action—rather such "energy" belongs with the executive.[117]

In the exercise of his duties, the President has an obligation to ascertain constitutional requirements. Identifying the scope of the President's independent interpretive authority does not mean legitimizing broad and abusive uses of presidential power. Rather, recognition of the breadth of executive power highlights the important constitutional duties of Congress and the Supreme Court to reign in overreaching by the President when necessary.[118] Even if the President decides not to enforce a statute or judgment on constitutional grounds, the Court, Congress and the people may disagree with the President and hold him accountable for his actions—an accountability that ensures an energetic executive subject to the rule of law.

* * *

Both Congress and the Supreme Court face important structural impediments before engaging in their primary activities of legislating and adjudicating. By contrast, the President acts with few impediments. He may say what the law is simply by executing the laws in a manner he determines to be consistent with the Constitution.

117. THE FEDERALIST NO. 70 (Alexander Hamilton), *supra* note 3, at 362.

> Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks: it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.

Id.

118. In a similar context, Michael Paulsen explains that the constitutional power of

Unlike Congress and the Supreme Court, the President can act alone in his judgment of what the Constitution requires. Judicial review,

varied means of self-defense support a powerful and independent authority for the President to say what the law is.