WHY THE PRESIDENT MUST VETO UNCONSTITUTIONAL BILLS

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It has become customary for Presidents to sign bills they regard as unconstitutional. Modern Presidents often sign such bills into law and, somewhat incongruously, issue concurrent signing statements that decry one or more features of such bills as unconstitutional.[1] We can call this practice "Sign and Denounce."

Most defenses of Sign and Denounce perhaps rest on three claims. First, Sign and Denounce seems an entrenched feature of recent presidencies, so much so that the practice has added a gloss to the Constitution. Second, some assert that it would be impractical for the President to veto bills merely because one or more provisions were unconstitutional. Bills are often products of complicated and time-consuming legislative wrangling and compromise and frequently contain provisions that a President regards as necessary for the continued well-being and safety of the nation. It would be onerous and unrealistic to require the President to veto such bills when the bill's constitutional provisions are so critical.[2] Finally, some believe that if a bill contains unconstitutional provisions, those provisions are void by virtue of their unconstitutionality such that signing the entire bill is of no moment.[3] In other words, even if a President signs a bill containing unconstitutional provisions, such provisions have no legal effect precisely because they are unconstitutional.

In this short piece, I argue that the President has a duty to veto bills when he believes they contain provisions that are unconstitutional.[4] He acts contrary to his

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[1] *See* Memorandum from Walter Dellinger, Ass't Att'y Gen., to Bernard N. Nussbaum, Counsel to the President, The Legal Significance of Presidential Signing Statements, (Nov. 3, 1993) [hereinafter Dellinger Memorandum], *available at* http://www.usdoj.gov/olc/signing.htm; Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307 (2006) (discussing the practice under George W. Bush).

[2] *See* Bradley & Posner, *supra* note 1, at 360.

[3] *Id.* at 359.

[4] When I say that a provision is unconstitutional, I mean that the provision either requires an actor to take an unconstitutional action or permits the actor to take such an action. To take the simplest case, if a bill is unconstitutional in all of its applications, the President must veto the underlying bill. For instance, if a bill required the ouster of all Article III judges, the President must veto the bill.

But a bill's provisions need not be unconstitutional in all their applications for the President's duty to veto to apply. For instance, consider a statute that commanded the

constitutional obligations when he ushers into law bills that he regards as unconstitutional. He can no more Sign and Denounce then he can "Propose and Denounce," that is, propose unconstitutional legislation even as he denounces it as unconstitutional. Sign and Denounce is one of those practices that should be consigned to the ash heap of history, like communism and bell bottom pants.[5]

To see why this is so, we need some sense of the President's constitutional obligations. The duty to veto arguably arises from one of three sources. The first is a general, implicit sense, arising from the Constitution, that neither the President nor any other federal officer can violate the Constitution. The Constitution clearly creates law and any officer created pursuant to that supreme law is barred from acting contrary to the Constitution that helps legitimize his or her actions. For instance, the President could not raise an army on his own authority because the Constitution never grants him this authority. Indeed, it would be inconsistent for a President to take actions violative of the very document that creates and sustains the institution of the presidency. This implied obligation to refrain from violating the Constitution coheres with people's intuitions about the nature of constitutions and their understanding of the duty of agents more generally. Agents are not to transgress the very agreement or contract that creates them and gives rise to their duties as an agent.[6]

President to appoint all officers of the United States without the concurrence of the Senate. As applied to non-inferior officers, this provision is unconstitutional because the President needs the Senate's consent before appointing such officers. As applied to inferior officers, however, the provision is constitutional. Though the provision will be constitutional as applied to inferior officers, the duty to veto applies to this hypothetical bill because it conveys some power that Congress cannot grant. Congress clearly wanted the bill to apply to non-inferior officers, and if the President concludes as much and believes that aspect of the bill is unconstitutional, he must veto the entire bill.

The general inquiry is whether the President believes that the bill has unconstitutional applications as he best understands the bill and the Constitution. I do not believe that the President must veto every bill that is merely susceptible to an unconstitutional reading, for then he would be forced to veto every bill. *All* bills and statutes are susceptible to unconstitutional readings in the hands of a President or a Supreme Court bent on pursuing some agenda. When the concern is that future actors may misread the bill or statute and then take unconstitutional actions based on those misreadings, then the President, it seems to me, has a discretionary choice about whether to defend the Constitution against a more remote possibility. But if the President concludes that Congress intends that its bill have a wholly unconstitutional application (at least as the President understands the Constitution), then he must veto the bill.

[5] My colleague, Michael Rappaport, made similar arguments over a decade ago. *See* Michael B. Rappaport, *The President's Veto and the Constitution*, 87 NW. U. L. REV. 735, 766–76 (1993). He also makes comparable points in this symposium issue without committing himself to the view that Presidents must veto unconstitutional legislation. *See* Michael B. Rappaport, *The Unconstitutionality of "Signing and Not Enforcing,"* 16 WM. & MARY BILL RTS. J. 113 (2007).

[6] Restatement (Third) of Agency § 1.01 (2006).

The second possible source of a duty to veto is the President's unique oath to "preserve, protect and defend the Constitution."[7] Read narrowly, the oath forbids presidential transgressions of the Constitution. The President cannot violate the Constitution because he would be acting contrary to his express duty to defend it. This narrow reading of the oath reads it as establishing a presidential equivalent of the Hippocratic Oath: "Do no constitutional harm."

Going further, the oath may require more than avoiding constitutional violations and may require a defense of the Constitution, regardless of the source of the threat. In other words, the oath may impose on the President an affirmative obligation to thwart or prevent the constitutional violations of others. Using whatever constitutional and statutory powers at his disposal, the President should obstruct and thwart constitutional threats, whether they emanate from the states, foreign nations, private parties, or Congress. On this theory, the oath supplements the implied obligation to do no constitutional harm by expressly requiring the President to defend the Constitution from external and internal threats.

Finally, the third potential source of a duty to veto is the Faithful Execution Clause. The Clause requires that the President "take Care that the Laws be faithfully executed."[8] Because the Constitution purports to be law itself,[9] it is subject to the faithful execution duty. Hence, the President must see that the Constitution is faithfully executed no less than a tax or commerce statute. The Constitution is not faithfully executed when the President violates the Constitution himself, assists the violations of others, or remains passive while others violate it, or so the argument goes.

If one subscribes to either the broad theory of the implied prohibition against constitutional violations, or the narrow presidential oath-based theory of the President's obligation to do no constitutional harm, one should conclude that the President must veto unconstitutional legislation because the President violates the Constitution should he allow the unconstitutional bill to become law. That the legislation was generated elsewhere is of no consequence because, when it is presented to him, he has a choice to make. In particular, the President may either veto the legislation or allow it to become law.[10] If he chooses the latter path of inaction, the President has chosen to help usher in an unconstitutional law. Indeed, few would think that a dormant, passive President is absolved of all responsibility if an aide proposed an unconstitutional plan and told the President that she would carry it into execution unless the President expressly ordered her to desist. My

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[7] *See* U.S. CONST. art. II, § 1, cl. 8.

[8] *See id.* art. II, § 3.

[9] *See id.* art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land.").

[10] There are two ways in which the President allows a bill to become law, either by signing the bill or by doing nothing. Signing the bill makes it law immediately. If the President does nothing and lets ten days pass while Congress remains in session, the bill is likewise new law. *See id.* art. I, § 7, cl. 2.

intuition is that most would denounce the President who remained mute or who, worse yet, gave his sanction to the plan. The same rationale applies to Presidents who fail to veto unconstitutional legislation. By not vetoing such legislation, Presidents bear no small measure of responsibility for the provisions the bills contain, including the unconstitutional provisions.

Furthermore, if one believes that either the presidential oath or the Faithful Execution Clause[11] requires an active defense of the Constitution, then the case for reading the Constitution as requiring a veto of unconstitutional legislation is clearer still. If either provision requires a defense of the Constitution, even when the threat emanates from others, it surely requires a presidential veto of unconstitutional legislation, because the President clearly has the ability to forestall unconstitutional legislation with the veto. While there may be practical limits to the President's affirmative obligation to thwart the unconstitutional acts of others, surely the veto presents an easy case. Putting aside political and policy considerations, the President can veto with little difficulty. To refrain from vetoing unconstitutional legislation seems an abject act of presidential nonfeasance.

Consider the argument from a different perspective. Imagine a President who is given an option by a state governor. The governor says that he will take some action that the President regards as unconstitutional unless the President tells him to refrain from the action. Whatever the extent of the duty to preserve, protect, and defend the Constitution, the decision to remain mute in the face of the governor's option is surely inconsistent with even a minimal view of the President's obligation to defend the Constitution.

The idea that the Constitution imposes a duty to veto unconstitutional legislation does not merely rest on a bare reading of text. Rather, early Presidents shared the belief that the Constitution imposed upon them a duty to veto unconstitutional bills.

To begin with, consider George Washington's letter to Alexander Hamilton regarding the Bank of the United States. In that letter, Washington noted that the constitutionality of the proposed bank had been criticized by some of its opponents.[12] He noted, "[i]t therefore becomes more particularly my duty to examine the ground on which the objection is built."[13] Evidently, Washington thought that he had a duty to examine the constitutionality of the bank once it became clear that its constitutionality had been plausibly contested. Presumably, Washington did not believe that he had a mere duty to examine the constitutionality of the bank bill without more. Arguably, there would be little point in Washington conducting an extensive consideration of the constitutional question if he did not believe that he had to veto the bill if he ultimately concluded that it was unconstitutional. In other words, if

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[11] *See id.* art. II, § 1, cl. 8; *id.* art. II, § 3.

[12] Letter from George Washington to Alexander Hamilton (Feb. 16, 1791), *in* 31 WRITINGS OF GEORGE WASHINGTON 215 (John C. Fitzpatrick ed., 1939).

[13] *Id.* at 216.

Washington believed that he had discretion to veto (or not veto) bills he regarded as unconstitutional, he would have been quite mistaken in supposing that he had a "duty" to consider the constitutionality of a statute. It seems that Washington understood that his duty to the Constitution encompassed an obligation to examine the constitutionally of the bill and a complementary duty to veto it if he concluded that it was unconstitutional. Consistent with this claim, there is no instance of Washington allowing a bill containing unconstitutional provisions to become law. To the contrary, one of his two vetoes was issued solely for constitutional reasons.[14]

Thomas Jefferson's opinion on the Bank of the United States seems of the same view. Jefferson argued that the veto "is the shield provided by the constitution to protect against the invasions of the legislature [of] 1. the rights of the Executive 2. of the Judiciary 3. of the states and state legislatures."[15] While it is possible to view Jefferson as merely arguing that the President could choose to veto unconstitutional statutes, the better reading is that Jefferson believed that the Constitution required the President to use his shield to protect the Constitution.[16] Indeed, the very fact that all three opinions Washington received—from Jefferson, Hamilton, and Edmund Randolph—only considered the constitutionality of the bank perhaps suggests that these gentlemen understood that Washington had no choice if he found the bank

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[14] *See* George Washington, Veto Message (Apr. 5, 1792), *in* 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 124, 124 (James D. Richardson ed., 1896) [hereinafter MESSAGES AND PAPERS].

[15] *See* Thomas Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank (Feb. 15, 1791), *in* 3 THE FOUNDERS' CONSTITUTION 245, 247 (Philip B. Kurland & Ralph Lerner eds., 1987).

[16] To counter Jefferson's statement that the President is obligated to veto a bill on constitutional grounds, the Office of Legal Counsel notes that Jefferson signed a bill that appropriated funds for the Louisiana Purchase even though he doubted the constitutionality of the purchase. *See* Dellinger Memorandum, *supra* note 1. But this fails to understand that Jefferson perhaps viewed himself as violating the Constitution by negotiating and ratifying the Louisiana treaty. As Jefferson would explain later, "A strict observance of the written laws is doubtless *one* of the high duties of a good citizen, but is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation." Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), *in* 11 THE WORKS OF THOMAS JEFFERSON 146, 146 (Paul Leicester Ford ed., 1905). In other words, Jefferson believed that sometimes the Constitution ought to be violated if such violation served the purpose of self-preservation. Having violated the Constitution by ratifying the Louisiana Purchase (at least in his own mind), Jefferson was hardly going to veto an appropriation designed to carry the Treaty into execution. One violation inexorably begat another, all justified by a belief that sometimes constitutional dictates are trumped by more practical considerations. Hence, Jefferson had the view that sometimes it was okay for practical considerations to trump constitutional obligation and did not subscribe to the alternate view that the President had no constitutional obligation to defend the Constitution against unconstitutional law. Therefore, in signing the Louisiana Purchase and its ancillary legislation, Jefferson did violate the Constitution, at least as he understood it.

unconstitutional.[17] None of them opined that the President could choose to sign the bank bill even if he regarded parts of it unconstitutional.

Presidents James Madison, James Monroe, and Andrew Jackson held the view that Presidents were obliged to veto legislation containing unconstitutional provisions. Even though he supported the policy goals of an internal improvements bill, James Madison asserted that he had "no option" but to veto it because it was unconstitutional.[18] "I am constrained by the insuperable difficulty I feel in reconciling the bill with the Constitution of the United States to return it with that objection," he wrote.[19] In another context, Madison said that he "could not have otherwise discharged [his] duty" except by vetoing a bill that he believed violated the Establishment Clause.[20]

James Monroe held the same view of constitutional obligation. In his veto message of the Cumberland Road bill, Monroe wrote:

> [I]t is with deep regret, approving, as I do, the policy, that I am compelled to object to its passage, and to return the bill to the House of Representatives, in which it originated, under a conviction that Congress do [sic] not possess the power, under the constitution, to pass such a law.[21]

And in his famous veto of a Bank of the United States bill, Andrew Jackson considered it a duty of the President to veto bills that he regarded as unconstitutional.[22]

Notwithstanding the textual and historical arguments against Sign and Denounce, three arguments might be thought to justify the practice.[23] The first, and perhaps most potent for some, is that unbroken recent practice arguably demonstrates

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[17] *See* Alexander Hamilton, Opinion on the Constitutionality of the Bank (Feb. 23, 1791), *in* 3 THE FOUNDERS' CONSTITUTION, *supra* note 15, at 247; Edmund Randolph, Opinion on the Constitution of the Bill for Establishing a National Bank (Feb. 12, 1791), *available at* http://memory.loc.gov/mss/mgw/mgw2/032/0940094.jpg.

[18] *See* James Madison, Veto Message (Mar. 3, 1817), *in* 1 MESSAGES AND PAPERS, *supra* note 14, at 584, 585.

[19] *Id.* at 584.

[20] *See* Letter from James Madison to Baptist Churches (June 3, 1811), *in* 2 LETTERS AND OTHER WRITINGS OF JAMES MADISON 511, 511 (1865).

[21] James Monroe, Message to the House of Representatives (May 4, 1822), *in* 15 U.S. HOUSE JOURNAL 560 (1822).

[22] *See* Andrew Jackson, Veto Message (July 10, 1832), *in* 2 MESSAGES AND PAPERS, *supra* note 14, at 567, 582, 591 (claiming that "[i]t is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision" and noting that by vetoing the bill he had fulfilled his "duty" to the nation).

[23] *See supra* notes 2–3 and accompanying text.

that the President does not violate the Constitution when he signs bills containing unconstitutional provisions. This can be couched as a claim about the Constitution's meaning—the Constitution's text is not currently read as barring Sign and Denounce, whatever that text might have meant at some earlier time. Or the claim could just be that the Constitution, broadly understood to include the established practices of government, rather clearly does not bar Sign and Denounce. Either argument can be seen as a claim about the possibility of an evolving Constitution. Whatever the Constitution might have provided for in the past, it now countenances the Sign and Denounce practice because Presidents have engaged in that practice for some time with rather little dissent. Although there would be some that might deny that Sign and Denounce has become a generally accepted feature of our constitutional regime, I choose not to contest the claim that recent practice has added a new and shiny gloss to the Constitution.

Instead, I will consider the second and third claims. Recall that the second claim supposes that it is unrealistic to require the President to veto bills merely because one or more of their provisions are unconstitutional.[24] Bills may be hundreds or thousands of pages long, containing numerous constitutional measures that often are quite necessary from the point of view of government officials and private parties. Indeed, the President will sometimes review bills that contain measures that he has long championed. That being the case, it would be impractical to require the President to veto such bills merely because they contain one provision that the President regards as unconstitutional.[25]

This narrow focus on the President's decision at presentment is itself unrealistic because it adopts a static and cramped view of the legislative process.[26] It supposes that if the President vetoes a bill because one provision is unconstitutional, then the many constitutional, quite popular, and needed provisions will never see the light of day. But nothing in our system dictates this unpalatable binary choice. To begin with, Congress might, in response to a veto, enact amended legislation that omits the portions that the President regards as unconstitutional. Hence the vital provisions might yet become law, albeit with a short delay. So Presidents need not necessarily

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[24] Bradley & Posner, *supra* note 1, at 341; *see also* posting of David Barron et al. to Georgetown Law Faculty Blog, Untangling the Debate on Signing Statements, http://gulcfac.typepad.com/georgetown_university_law/2006/07/thanks_to_the_p.html (July 31, 2006).

[25] This argument seems akin to the criminal defense of justification. Because the President has really good reasons to sign the bill, his signature should not be regarded as an unconstitutional or improper decision. The argument perhaps implies that where some bill is not really necessary or highly prized, the justification defense would not be available. If a bill is full of unnecessary public works spending and also contains an unconstitutional provision, maybe the justification defense is unavailing. *Cf.* Barron et al., *supra* note 24, (claiming that if the entire bill is facially unconstitutional the President does have to veto it).

[26] *See* Rappaport, *supra* note 5.

face the dilemma of choosing between defending the Constitution or securing necessary legislation.

More realistically, the President may help shape legislation prior to presentment. Through Statements of Administration Policy,[27] staff and presidential discussions with members of Congress, and public statements, the President may influence legislation. Among other things, he can threaten to veto legislation that contains unconstitutional measures, just as he threatens to veto legislation that contains provisions that he objects to on policy grounds. Should the President issue veto threats before presentment, he has the ability to convince or coerce Congress to remove the provisions that he regards as unconstitutional. And if he succeeds in persuading Congress, there will be no constitutionally based veto at the presentment stage.

Interestingly, to the extent that the President is willing to sign into law provisions that he regards as unconstitutional, that willingness makes it *more likely* that Congress will pass provisions that the President regards as unconstitutional. If members of Congress know that the President has a history of ultimately signing bills that contain provisions that the President regards as unconstitutional, they may well scoff at the President's concerns about the constitutionality of proposed legislation. In particular, members will know that, at the end of the day, the President is not typically going to allow constitutional objections to come in the way of a bill the President wants for other reasons. Hence, it may well be that the President has far less influence or sway when it comes to provisions that he deems unconstitutional because members of Congress can predict that the President will typically sign a bill rather than veto it.[28]

Of course, one must admit that whenever the President vetoes legislation (or threatens a veto during congressional debate), there is a chance that whatever provisions the President (and society) favors might not make their way into another law in the foreseeable future. On certain occasions, the provisions that the President regards as unconstitutional may be seen by members of Congress as absolutely necessary

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[27] In Statements of Administration Policy (SAPs), the administration conveys the views of the President's advisors on the desirability of legislation considered by Congress. These SAPs often contain veto threats. If the legislation contains provisions fervently opposed by the President's administration, the advisors will recommend that the President veto the bill. Or if the legislation fails to contain provisions demanded by the President, the advisors will likewise recommend a veto.

[28] To be sure, the President may denounce certain provisions as unconstitutional and refuse to enforce them. Yet these provisions still arguably have the status of law, and the courts and future Presidents might enforce them. Indeed, the very same President who complains about the constitutionality of a bill's provision might yet enforce it, as happened during the Clinton administration. *See* Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 7, 13 (discussing how Clinton planned to enforce a provision he regarded as unconstitutional but did not have to because Congress repealed the provision).

components of any legislation. Hence, if the President vetoes a bill (or threatens its veto during congressional deliberations), the provisions he desires may never become law.

Even admitting this, however, there remains the question of whether the President can escape censure for failing to veto an unconstitutional bill merely because he thinks the remainder of the bill is highly desirable. If there is an implicit necessity justification such that the President does not transgress his constitutional obligations by failing to veto an unconstitutional bill, there is no reason to think that this justification applies only to the presentment context. Instead, if there is a necessity or exigent circumstances justification, it should be equally applicable to all sorts of executive decisions. For instance, imagine a President who locks up people for very compelling reasons, even though they have not been convicted of anything and even though the Congress has not suspended habeas corpus. If we accept the necessity justification, this President has done nothing wrong because the necessity of the situation makes what would ordinarily be a constitutional violation a wholly justifiable constitutional action. Or consider a President who believes that funds must be immediately expended without a congressional appropriation because the security of the United States is threatened. Under the necessity justification, the President does nothing wrong by making an unauthorized Treasury withdrawal, because the situation excuses his conduct such that he has not violated the Constitution at all.[29]

I think the Constitution is better understood as generally providing rules that cannot be circumvented even in emergencies.[30] As a matter of supreme law, the President cannot withdraw funds from the Treasury without a congressional appropriation.[31] When he does so, he acts unconstitutionally. Should he have extremely good reasons for his Treasury raid, Congress (and those it represents) may excuse his violation. But their excusal or willingness to look the other way would not mean that the President has not violated the Constitution. It would only suggest an entirely understandable failure to hold the President accountable for his violation.

To go back to the practice of Sign and Denounce, it may well be that after having threatened to veto a bill because it contains an unconstitutional provision, the President may feel compelled to sign the final bill because it contains vital funding for a war or a national disaster. By failing to veto the bill, the President has violated his oath to defend the Constitution. It would then be up to the people and their Congress to decide whether any punishment was appropriate for the President.[32] The

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[29] *But see* Jefferson, *supra* note 16, at 147 (describing how Congress retroactively excused Jefferson's expenditure of funds in the absence of an appropriation).

[30] *See generally* Saikrishna Prakash, *The Constitution as Suicide Pact*, 79 NOTRE DAME L. REV. 1299 (2004) (arguing that suspending protections even during emergencies is the first step towards constitutional suicide).

[31] U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

[32] *See id.* art. II, § 4; *id.* art. I, § 3, cl. 6.

more often the President invokes the necessity justification for Sign and Denounce, the more the public would be wary of the claim that each of the bills the President signed and denounced are actually necessary. I suspect that many of the bills signed and then denounced by recent Presidents were hardly necessary, even giving these Presidents the benefit of any doubt. It has become too easy to Sign and Denounce, thus making it unnecessary to stand on constitutional principle and veto bills that contain unconstitutional provisions.

The third and final claim said to justify the Sign and Denounce practice consists of the argument that because no consequences arise from an unconstitutional provision of a statute, there is no harm in signing a bill that contains such provisions. The claim is that the unconstitutional provision, if it really is unconstitutional, is void ab initio such that it never gets enforced or acted upon.[33]

This argument misfires for three reasons. First, consider the courts. Parties injured by the President's refusal to enforce a supposedly unconstitutional statute may go to court and try to obtain an injunction requiring the administration to enforce the provision the President regards as unconstitutional. If the court disagrees with the President's conclusion, it will enjoin members of the executive branch to enforce the statute. Given traditional understandings of judicial power and the President's implied duty towards judgments, the President will honor such an injunction and his administration will be forced to execute a statutory provision that the President regards as unconstitutional. In most situations, the President could have prevented this possibility by vetoing the bill; his failure to do so could lead to him executing a provision that he regards as wholly unconstitutional.

Second, later Presidents may well disagree with the current President's constitutional views such that a future administration may enforce provisions that were formerly regarded as unconstitutional.[34] Imagine a President dedicated to civil rights who allows some legislation curbing civil liberties to become law with the understanding that his administration will not treat the provision as law. His law and order successor may well use the statute to vigorously curb civil liberties. Or imagine a President opposed to affirmative action provisions that require the federal government to hire using racial goals and timetables. Even though this President may ignore the provisions that he signed into law on the grounds that they are unconstitutional, a future President with a different constitutional approach may implement those affirmative action provisions with gusto.

Third, even a President who believes that some statutory provision is void may decide that he should enforce it out of a sense that the issue should be resolved by the courts. For example, even though President Clinton thought that a provision

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[33] *See* Bradley & Posner, *supra* note 1, at 339; Rappaport, *supra* note 5, at 773.

[34] Rappaport, *supra* note 5, at 774.

related to HIV testing was unconstitutional, he nonetheless pledged to enforce it as a means of securing a judicial decision on the provision's unconstitutionality.[35]

Put simply, Sign and Denounce does not necessarily imply that the current President "Sign, Denounce, and Ignore" the unconstitutional provisions. And even if it did, the President cannot guarantee that the unconstitutional provision will never be enforced by his administration or his successors. All this suggests that when a President signs some bill into law that contains unconstitutional provisions on the grounds that those provisions are void and thus provide no reason to veto the entire bill, the President generates a situation fraught with constitutional danger. The risk is that the President's views regarding the Constitution will not be vindicated because in signing an unconstitutional bill into law, the President essentially allows others an opportunity to opine on the provision's constitutionality. And giving these other actors an opportunity to opine might mean that either the President will have to enforce a statute he regards as unconstitutional or future Presidents will enforce a statute that the current President thinks is unconstitutional.

Another means of evaluating the common defenses of Sign and Denounce is to apply those defenses to other situations and gauge whether the implications of the Sign and Denounce practice withstand scrutiny in these other contexts. First, consider members of Congress. If Sign and Denounce is constitutional for the reasons given, it seems that it would be permissible for members to vote for legislation that they believed contained unconstitutional measures on the grounds that the rest of the legislation is really important and that the unconstitutional provisions are void anyway. Moreover, it would be constitutionally permissible for members of Congress to vote for a bill whose entire contents they regard as unconstitutional because the entire bill should be understood as void ab initio and, hence, of no consequence. In effect, voting for such a bill is like voting for a non-binding "sense of the Senate" resolution. Such hypotheticals may not trouble defenders of Sign and Denounce, for many of them may suppose that members of Congress already engage in this kind of pragmatic calculus. If members think this way, we are all the worse off for it, for, as noted earlier, it increases the likelihood that bills and statutes will contain provisions that many members regard as unconstitutional.

Next, consider the President. Under the logic of the Sign and Denounce defenses, may the President propose legislation containing provisions that he regards as unconstitutional? For instance, can the President propose omnibus legislation that, among other things, authorizes the Secretary of Defense to appoint the Secretary of State, in violation of the implicit constitutional requirement that the President nominate and the Senate confirm all non-inferior officers? It may seem that under these defenses, he may propose such legislation when it would be crucial to securing the votes of members of Congress necessary to secure passage of a bill that contained other provisions that the President deems vital. Moreover, the President, like members

[35] *See* Johnsen, *supra* note 28, at 13.

of Congress, may propose legislation that he regards as entirely unconstitutional because every provision will be void ab initio. The President need not feel guilty about his advocacy of such a bill precisely because the unconstitutional provisions are void. Without hesitation, he can advocate such legislation to burnish his public image even though he regards the legislation as unconstitutional.

Moreover, as noted earlier, the necessity defense cannot be cabined to the presentment context. If it is true that the President does not violate the Constitution when he signs an unconstitutional bill because the necessity of the bill's other provisions are an excuse, then this necessity defense applies equally to all manner of presidential actions in other contexts. Many presidential actions that seem unconstitutional may actually be entirely proper if necessity cures or excuses the seeming constitutional violation.

Lastly, consider the courts. If Sign and Denounce is constitutional because of the necessity justification, the Supreme Court (and other courts) can likewise issue judgments and opinions that admit that some statute is unconstitutional, but nonetheless enforce the statute on the grounds that the statute's enforcement is crucially important. Indeed, one can imagine a Supreme Court Justice concurring in a judgment (and providing the crucial fifth vote for the judgment), even as she agrees with a dissent that a particular statute, upon which the judgment is based, is wholly unconstitutional. Her concurrence is constitutional even as she knowingly helps enforce an unconstitutional statute because the necessity of the thing justifies her concurrence.

CONCLUSION

It is easy to see why many have few qualms about Sign and Denounce. First, many have grown accustomed to the idea that the courts play the primary, if not the exclusive, role in defending the Constitution. Indeed, some perhaps suppose that Presidents and Congresses intrude upon the judiciary's bailiwick if they even opine on constitutional matters. Given the sense that constitutional defense is the judiciary's job, it almost seems unnecessary for the President to take vigorous stands against congressional legislation.

Second, Sign and Denounce has a "have your cake and eat it too" dimension. The President gets to denounce certain portions of an act as unconstitutional but does not risk losing those portions of the act that are constitutional. He gets to pose as a constitutional defender while doing the bare minimum when it comes to such defense.

Finally, there are other values besides constitutional principle, and it may seem unwise, even foolish, to sacrifice significant policies and goals at the altar of constitutional principle. Presidents who do not veto a bill containing provisions they regard as unconstitutional clearly prefer the rest of the bill even if they have to enforce provisions they regard as unconstitutional.

Still this understandable attitude about the costs associated with standing on constitutional principle does little to justify the very different claim that the Constitution actually sanctions decisions that seem to countenance constitutional violations on the grounds that those violations are necessary or the claim that attempted constitutional violations are automatically void and therefore of no moment.

I am leery of arguments that claim that constitutional actors do not violate the Constitution when they have extremely good reasons for taking actions that ordinarily would violate the Constitution. And I am likewise wary of the excuse that government officials can propose, vote for, advocate, and sign into law unconstitutional provisions of law because those provisions are void anyway and hence such actions are not censurable.

Far better for Presidents who sign bills containing provisions that are unconstitutional to just admit that their signature (and their corresponding failure to veto) does violate the Constitution and then throw themselves at the mercy of the public. That kind of necessity excuse—one that does not deny a violation—is far more consistent with the Constitution. And it might also have the salutary effect of limiting decisions to violate the Constitution to situations where it can truly be said that there actually were exigent circumstances that might justify Sign and Denounce. As it stands now, the rather unconstrained use of Sign and Denounce allows Presidents to pay lip service to the Constitution while exhibiting rather little fealty to it. The now all-too-familiar scenario of Presidents who chastise Congresses while simultaneously signing unconstitutional bills into law does little to inspire constitutional confidence.