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John T. Pierpont Jr.

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## CHECKING EXECUTIVE DISREGARD

JOHN T. PIERPONT, JR.<sup>†</sup>

*"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."*

– James Madison<sup>1</sup>

*"It is emphatically the province and duty of the judicial department to say what the law is."*

– John Marshall<sup>2</sup>

There is seemingly little room for controversy in the Constitution on how a bill becomes a law: If a bill receives a majority of votes in both houses of Congress and the President signs it, the bill becomes law and the President enforces it. The President, however, may find himself in a precarious situation if Congress presents him a bill that contains a provision he believes to be unconstitutional.<sup>3</sup> Must he veto the bill? Or may he follow a theory of executive disregard and sign the statute into law but decline to enforce its unconstitutional provisions?<sup>4</sup> What if Congress overrides the President's veto?<sup>5</sup> The issue is more complicated where a subsequent President believes a law enacted

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<sup>†</sup> Senior Articles Editor, *St. John's Law Review*, J.D. Candidate, 2010, St. John's University School of Law; B.A., 2005, Cornell University. I would like to thank Prof. Rosemary Salomone and Prof. Robert Ruescher for their help on this Note. This Note is dedicated to my parents, whose love and support have always been there for me.

<sup>1</sup> James Madison, Veto Message (Mar. 3, 1817), in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 569, 569 (James D. Richardson ed., 1897).

<sup>2</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>3</sup> See U.S. CONST. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become[s] a Law, be presented to the President of the United States.").

<sup>4</sup> For a thorough defense of an unlimited power of executive disregard, see generally Saikrishna Bangalore Prakash, *The Executive's Duty To Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613 (2008).

<sup>5</sup> See U.S. CONST. art. I, § 7, cl. 2 ("If . . . two thirds of [one] House shall agree to pass the Bill, it shall be sent, together with the [President's] Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.").

before he assumed office is unconstitutional. Unlike the first instance, he never had the opportunity to veto it. May he decline to enforce it?

While in early American history executive disregard was a rare practice, the trend has changed. In recent history, signing statements—brief written statements issued by the President when he signs a bill into law<sup>6</sup>—have become the vehicle by which a President announces his intention to disregard a provision of a statute he believes is unconstitutional.<sup>7</sup> Rather than vetoing the bill, he signs it into law declaring, in a signing statement, his intention to not enforce the provision.<sup>8</sup> This practice has flourished since President Carter with each subsequent President issuing, on average, forty signing statements per year.<sup>9</sup> President George W. Bush issued an average of only twenty-five signing statements per year through his 2005 term.<sup>10</sup> He indicated that he would not enforce a provision of a bill based on his constitutional concerns, however, at a rate of twenty times per year, more than doubling the average rate of his predecessor.<sup>11</sup> Indeed, President George W. Bush objected to 1,496 provisions of various bills on constitutional grounds via

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<sup>6</sup> See, e.g., George W. Bush: Statement on Signing the Sarbanes-Oxley Act of 2002 (July 30, 2002), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=64514>.

<sup>7</sup> See Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 313–15 (2006).

<sup>8</sup> One striking example of this practice was President George W. Bush's decision (announced in a signing statement) to not report back to Congress when the executive branch used the Patriot Act to secretly search homes and seize private papers, as required by the law. TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS & THE SEPARATION OF POWERS DOCTRINE, AM. BAR ASS'N, RECOMMENDATION, 15–16 (2006), available at [http://www.abanet.org/op/signingstatements/aba\\_final\\_signing\\_statements\\_recommendation-report\\_7-24-06.pdf](http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf) [hereinafter TASK FORCE]. This practice is commonly known as "Sign and Denounce." See Saikrishna Prakash, *Why the President Must Veto Unconstitutional Bills*, 16 WM. & MARY BILL RTS. J. 81, 81 (2007).

<sup>9</sup> On average, President Reagan issued thirty-one per year, President George H.W. Bush issued fifty-seven per year, and President William Clinton issued forty-eight per year. See Bradley & Posner, *supra* note 7, at 323.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

signing statements.<sup>12</sup> President Barack Obama has continued this trend, objecting to and declaring five provisions of the Omnibus Appropriations Act of 2009 non-binding.<sup>13</sup>

In response, Senator Arlen Specter proposed the Presidential Signing Statements Act of 2006 in an attempt to curtail this growing trend.<sup>14</sup> Senator Specter subsequently reintroduced the legislation in 2007<sup>15</sup> and again 2009.<sup>16</sup> The bill would instruct courts not to consider signing statements as a part of legislative history and provide Congress the right to file an amicus brief as well as present oral arguments in a case where the construction or constitutionality of any act of Congress is in question.<sup>17</sup> This bill, however, only addresses signing statements and not executive disregard.

This Note contends that a President who signs a bill into law may not engage executive disregard. A President who has the opportunity to veto a bill with a provision he believes to be unconstitutional has a constitutional duty to do so. Failing to do so is an endorsement of the bill's constitutionality and the President is duty-bound to enforce it. This conclusion is less apparent, however, when one considers textual arguments surrounding: (1) a subsequent President who assumes office and believes the enforcement of the statute to be unconstitutional; and (2) a President whose veto has been overridden by Congress. In these instances, the text of the Constitution suggests that executive disregard is justifiable. This contention is also supported by the practice of Presidents in early American history. Thus, the Constitution may provide for a limited theory of executive disregard; however, substantial policy arguments against a limited theory of executive disregard remain. This Note urges that engaging in executive disregard, limited or

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<sup>12</sup> Neil Kinkopf & Peter M. Shane, *Signed Under Protest: A Database of Presidential Signing Statements, 2001-2009* (Ohio State Univ. Moritz Coll. Law, Working Paper No. 118, 2009), available at <http://ssrn.com/abstract=1485715>.

<sup>13</sup> Jonathan Weisman, *Signing Statements Reappear in Obama White House*, WALL ST. J., Mar. 12, 2009, <http://online.wsj.com/article/SB123688875576610955.html>.

<sup>14</sup> S. 3731, 109th Cong. § 6 (2006).

<sup>15</sup> S. 1747, 110th Cong. § 5 (2007).

<sup>16</sup> S. 875, 111th Cong. § 4 (2009). The substantive language of the three bills is nearly identical. Compare S. 3731 § 6, and S. 1747 § 5, with S. 875 § 4. This Note will cite to the 111th Congress's version of the bill, but use the legislative history surrounding all three bills interchangeably.

<sup>17</sup> S. 875 § 4.

otherwise, like any federal power must be subject to a check involving the other two branches of government.<sup>18</sup> And ultimately, the judiciary should determine whether a statute is constitutional.<sup>19</sup> To this end, Senator Specter's bill is a good start but does not fully address these concerns. This Note therefore proposes that Congress, via Senator Specter's bill or otherwise, grant itself standing to challenge a President's nonenforcement of a law in the judiciary.<sup>20</sup>

Part I of this Note more precisely defines executive disregard, its confluence with signing statements, and distinguishes executive disregard from executive discretion. Part II, through an analysis of the Constitution's text, case law, precedent, and policy, argues that executive disregard is a constitutionally impermissible act when the President disregarding the statute also signed it into law. Part III discusses the merits of a limited theory of executive disregard in the instances where the disregarding President did not sign the bill into law. Part IV discusses Senator Specter's bill and proposes further checks on executive disregard, specifically that Congress grant itself standing to challenge a President's nonenforcement of a statute.

### I. EXECUTIVE DISREGARD, SIGNING STATEMENTS, AND EXECUTIVE DISCRETION

When the President declines to enforce a statute on constitutional grounds, he is engaging in executive disregard. Scholars and professionals have recently criticized this practice;<sup>21</sup> however, their criticism has been (mis)directed toward the presidential practice of issuing signing statements.<sup>22</sup> This

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<sup>18</sup> See THE FEDERALIST NO. 51 (James Madison) (George W. Carey & James McClellan eds., 2001) ("[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means . . . to resist encroachment of the others.").

<sup>19</sup> See *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) ("[T]he federal judiciary is supreme in the exposition of the law of the Constitution . . .").

<sup>20</sup> See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring) ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before . . ."); see also CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW: POWERS AND LIBERTIES 80 (3d ed. 2009); *infra* Part IV.

<sup>21</sup> See TASK FORCE, *supra* note 8, at 2-3.

<sup>22</sup> *Id.*; see also Bradley & Posner, *supra* note 7, at 309.

misguided criticism stems largely from a conflation of the two distinct practices.<sup>23</sup> This Part both clarifies the difference between signing statements and executive disregard, and distinguishes executive disregard from executive discretion, the latter being an accepted presidential practice.<sup>24</sup>

Executive disregard and signing statements are two distinct practices. Executive disregard occurs when the President does not execute a statute or provision thereof because he believes it is unconstitutional. A signing statement is a short statement that the President issues when he signs a bill into law.<sup>25</sup> In essence, signing statements are nonbinding declarations of a President, while executive disregard is a presidential act of omission.

What troubles critics of signing statements is not the signing statements themselves, but rather the theory of executive disregard that Presidents often announce in signing statements. Most of the criticism surrounding signing statements is focused on the growing number of signing statements that “alter[ ] the meaning of a statute”<sup>26</sup> and “nullifies what the Congress has done”<sup>27</sup> by raising constitutional concerns. This suggests the underlying concern derives not from the institution of signing statements, but rather, the President’s adherence to his declaration in a signing statement<sup>28</sup> when he

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<sup>23</sup> Signing statements actually have a rich history in this country dating back to President James Monroe; for a complete discussion of signing statements throughout American history, see generally Christopher S. Kelley, *The Unitary Executive and the Presidential Signing Statement* 57–68 (2003) (unpublished Ph.D. dissertation, Miami University—The Graduate School), available at <http://www.ohiolink.edu/etd/view.cgi?miami1057716977> (outlining the history of signing statements).

<sup>24</sup> See Bradley & Posner, *supra* note 7, at 310 (“[I]t is . . . widely recognized that the president has considerable authority to allocate enforcement resources by giving priority to some statutes and not to others.”).

<sup>25</sup> Scholars generally divide signing statements into three types: Political, Rhetorical, and Constitutional. See Kelley, *supra* note 23, at 45–50. Political signing statements are generally directives to other agencies in the executive branch. *Id.* at 46. Rhetorical signing statements are attempts at capturing public support by “means of public comments.” *Id.* at 49–50 (internal quotations omitted). “Constitutional signing statements are those statements that address constitutional defects in a section or sections of legislation. The president outlines what the defect is and what he intends to do about it.” *Id.* at 45.

<sup>26</sup> 153 CONG. REC. S8744 (2007) (statement of Sen. Specter).

<sup>27</sup> 155 CONG. REC. S4621 (daily ed. Apr. 23, 2009) (statement of Sen. Specter).

<sup>28</sup> *Cf.* Bradley & Posner, *supra* note 7, at 310 (“[T]he real concern is not with the institution of signing statements but with the Bush administration’s underlying views of executive power.”).

subsequently engages in executive disregard.<sup>29</sup> Thus, signing statements have become the vehicle by which a President announces his intention to disregard a provision of the statute, but are not themselves unconstitutional. Indeed, a President may issue a signing statement announcing his intention not to enforce a statute, yet later change his mind.<sup>30</sup> Or, the President may never announce his intention not to enforce a statute, but decline to enforce it anyway. It is, therefore, not signing statements, but executive disregard that, as critics contend, "threaten[ ] to render the legislative process a virtual nullity."<sup>31</sup>

Executive disregard should also be distinguished from executive discretion. The executive branch of government has only a limited amount of time and resources to dedicate to governance; thus, it is widely accepted that a President may "allocate [these] resources by giving priority to some statutes and not to others."<sup>32</sup> Similarly, statutes may also explicitly give the President wide latitude in enforcing a provision. This necessary discretion, explicitly or implicitly authorized, does not include executive disregard, which deals solely with the President's conscious decision not to enforce or comply with a bill that has been signed into law because he believes it is unconstitutional.

## II. THE UNCONSTITUTIONAL PRACTICE OF EXECUTIVE DISREGARD

This Part of the Note argues that a President who signed a bill into law may not later disregard one of the bill's provisions based on constitutional concerns. If the President believes a bill is unconstitutional at presentment, he has a duty to veto it.<sup>33</sup> By signing it into law, he affirms its constitutionality and cannot

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<sup>29</sup> See TASK FORCE, *supra* note 8, at 3 ("But [the Bush] Administration has taken what was otherwise a press release and transformed it into a proclamation stating which parts of the law the President *will* follow and which parts he *will* simply ignore." (emphasis added) (internal quotations omitted)).

<sup>30</sup> Cf. Bradley & Posner, *supra* note 7, at 332 ("[Were] the constitutional claims [of non-enforcement] mostly political rhetoric or [did] Bush act on them? Often he [said] (like other presidents) that he [was] not required to give notice to Congress about troop deployments but [did] when practicable.").

<sup>31</sup> *E.g.*, 153 CONG. REC. S8744 (statement of Sen. Specter).

<sup>32</sup> Bradley & Posner, *supra* note 7, at 310.

<sup>33</sup> See generally Prakash, *supra* note 8, for a comprehensive discussion on why the President must veto a bill he believes is unconstitutional.

later decline to enforce one of its provisions. Part A examines three clauses of the Constitution—the Presidential Oath Clause,<sup>34</sup> the Faithful Execution Clause,<sup>35</sup> and the Presentment Clause<sup>36</sup>—and argues these clauses together forbid a President from engaging in executive disregard after he has signed a bill into law. Part B contends that a President who disregards a provision of a statute that he has signed into law is undercutting the holding of *Clinton v. City of New York*,<sup>37</sup> and is, therefore, acting unconstitutionally. Part C examines the acts and writings of early American Presidents and concludes that the founding generation did not believe executive disregard was available to a President who signed a bill into law. Finally, Part D raises policy arguments contending that the practice of executive disregard takes power from the co-equal branches and thereby threatens the designated role of each federal branch of government as well as the Constitution’s underlying fundamental principles.

#### A. *Textual Arguments and Executive Disregard*

The text of the Constitution prohibits executive disregard because it requires a President who believes a bill is unconstitutional to veto it. Three clauses act in concert to impose this duty: the Presidential Oath Clause,<sup>38</sup> the Faithful Execution Clause,<sup>39</sup> and the Presentment Clause.<sup>40</sup> By signing a bill into law, the President necessarily approves of the bill’s constitutionality and therefore has the constitutional duty to enforce it.

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<sup>34</sup> U.S. CONST. art. II, § 1, cl. 7 (“Before [the President] enter on the Execution of his Office, he shall take the following Oath or Affirmation: ‘I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.’”).

<sup>35</sup> *Id.* art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed . . .”).

<sup>36</sup> *Id.* art. I, § 7, cl. 2 (“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections . . .”).

<sup>37</sup> 524 U.S. 417 (1998).

<sup>38</sup> U.S. CONST. art. II, § 1, cl. 7.

<sup>39</sup> *Id.* art. II, § 3.

<sup>40</sup> *Id.* art. I, § 7, cl. 2.



The Presidential Oath Clause, the cornerstone of any argument for or against executive disregard, requires that the President "preserve, protect and defend the Constitution of the United States."<sup>41</sup> At a minimum, this clause forbids the President from committing an affirmative act that violates the Constitution. Construed more broadly, however, this clause requires the President to defend affirmatively the Constitution. Indeed, if the President sat idly by and watched another branch, state, or foreign power violate the Constitution, he could not be said to be "defending" the Constitution as the Oath requires. To illustrate this point, imagine if a state entered into a treaty with a foreign nation<sup>42</sup> and the President did not intervene; his inaction could only be characterized as a violation of his Oath and therefore a violation of the Constitution. In this situation, the Constitution requires the President to actively intervene through any constitutional means at his disposal. Read this way, the Oath must supplement the minimum requirement that the President do no constitutional harm by imposing an affirmative duty to actively defend the Constitution from all threats.

Subscribing to either the broad or narrow view, however, one must conclude that the Oath Clause, in conjunction with the Presentment Clause, does not permit a President to sign into law an unconstitutional bill. The Presentment Clause allows the President, after a bill has passed both houses of Congress, to either sign the bill or return it to its originating house with his objections.<sup>43</sup> If Congress presents the President with a bill that contains a provision he believes is unconstitutional, the Oath Clause prohibits him from signing it into law. Reading his Oath broadly, the President has an affirmative duty to use all means necessary, including the veto power, to defend the Constitution and defeat the bill—he must veto it. A narrow interpretation of the Oath Clause yields the same result: signing the bill into law is an affirmative act that violates the Constitution—he may not sign it. According to the Presentment Clause, the only remaining option is to veto the bill.<sup>44</sup> Thus, irrespective of one's

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<sup>41</sup> *Id.* art. II, § 1, cl. 7.

<sup>42</sup> This is explicitly prohibited by the Constitution. *Id.* art I, § 10, cl. 1.

<sup>43</sup> *Id.* art. I, § 7, cl. 2.

<sup>44</sup> The President's failure to either sign or veto a bill is commonly known as a "pocket veto." See, e.g., *Okanogan v. United States (The Pocket Veto Case)*, 279 U.S. 655, 676 (1929). A discussion of the constitutionality and implications of this practice is beyond the scope of this Note.

interpretation of the Oath Clause, the President is left with only one option once he determines the bill is unconstitutional: he must veto the bill.<sup>45</sup>

A President who signs a bill into law must therefore have approved of its constitutionality. A failure by the President to veto a bill he believed to be unconstitutional is constitutionally impermissible. Therefore, the President's act of signing a bill into law necessarily reflects his belief that every aspect of the bill is constitutional.

The President, after signing a bill into law, must therefore enforce the entire statute pursuant to the Faithful Execution Clause, which requires the President to "take Care that the Laws be faithfully executed."<sup>46</sup> While scholars have argued that this clause does not apply to laws that the President believes are unconstitutional,<sup>47</sup> a President who has signed the "unconstitutional" bill into law plainly cannot make this argument.<sup>48</sup> Proverbially, such a President is "having his cake and eating it too." By signing the bill, the President has already affirmed that the bill, in its entirety, is constitutional; he cannot then decline to enforce a provision of the bill because he believes it to be unconstitutional. A President is therefore duty-bound to execute all bills he signs into law.

### B. *Executive Disregard and Clinton v. City of New York*

This Section contends that the practice of executive disregard is irreconcilable with *Clinton v. City of New York*,<sup>49</sup> in which the Court held that line-item vetoes are unconstitutional because they do not follow the formalities prescribed by the Constitution.<sup>50</sup> Executive disregard, in effect, circumvents these formalities. Subsection 1 of this Section illustrates how executive disregard conflicts with the Court's holding in *Clinton* and discusses how the differences between the line-item veto and executive disregard strengthen the argument that executive

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<sup>45</sup> See Prakash, *supra* note 8, at 84 ("To refrain from vetoing unconstitutional legislation seems an abject act of presidential nonfeasance.").

<sup>46</sup> U.S. CONST. art. II, § 3.

<sup>47</sup> See, e.g., Prakash, *supra* note 4, at 1631.

<sup>48</sup> Instances involving a President who inherits a law he considers unconstitutional will be discussed later in this Note. See discussion *infra* Part III.A.

<sup>49</sup> 524 U.S. 417 (1998).

<sup>50</sup> *Id.* at 448.

disregard is unconstitutional. Subsection 2 rebuts the general criticism that this argument conflates the line-item veto and executive disregard.

### 1. *Clinton's Holding and Executive Disregard*

In 1998, the Supreme Court decided that line-item vetoes were unconstitutional.<sup>51</sup> The Line Item Veto Act of 1996 gave the President the power to cancel individual provisions of a bill relating to spending that he had just signed into law.<sup>52</sup> The effect of the cancellation was clear: it prevented the item "from having legal force or effect."<sup>53</sup> President Clinton, on August 11, 1997, exercised this power and the would-be beneficiaries of the spending immediately challenged the line-item veto's validity.<sup>54</sup> During its analysis, the Court carefully distinguished between the President's constitutional veto power and the line-item veto; specifically, the Court noted that "the constitutional [veto occurs] *before* the bill becomes law," while the line-item veto takes effect afterwards.<sup>55</sup> The Court reasoned that the Constitution's silence "on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes . . . [was] equivalent to an express prohibition."<sup>56</sup> Ultimately, the Court struck down the act by holding that a bill becomes law only

after three procedural steps [are] taken: (1) a bill containing its exact text was approved by a majority of the Members of the House of Representatives; (2) the Senate approved precisely the same text; and (3) that text was signed into law by the President. The Constitution explicitly requires that each of those three steps be taken before a bill may "become a law." If one paragraph of that text [is] omitted at any one of those three stages . . . [the law is not] validly enacted.<sup>57</sup>

Allowing a line-item veto "would authorize the President to create a different law—one whose text was not voted on by either House of Congress."<sup>58</sup> In essence, if Congress has not approved

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<sup>51</sup> *Id.*

<sup>52</sup> *See id.* at 463.

<sup>53</sup> *Id.* at 437 (internal quotations omitted).

<sup>54</sup> *See id.* at 423–27.

<sup>55</sup> *Id.* at 439.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 448 (citing U.S. CONST. art. I, § 7).

<sup>58</sup> *Id.*

every aspect of a bill, "it is surely not a document that may 'become a law' pursuant to the procedures designed by the Framers . . . of the Constitution."<sup>59</sup>

Applying these principles from *Clinton* to executive disregard, one must conclude that a President who signs a bill into law but declines to enforce an individual provision has acted unconstitutionally. Similar to the line-item veto, executive disregard is a unilateral presidential action without foundation in the Constitution, which prevents the disregarded provision "from having legal force or effect."<sup>60</sup> It thereby "repeals or amends" a duly enacted statute.<sup>61</sup> Thus, when a President declines to enforce a provision of the statute, he "create[s] a different law," specifically "one whose text was not voted on by either House of Congress."<sup>62</sup> According to the Court in *Clinton*, it should therefore be prohibited.<sup>63</sup> In sum, by declining to enforce a provision of the statute, the President has, in effect, changed the text of the statute to exclude the provision without approval of both houses of Congress. This is exactly the type of behavior the Court in *Clinton* condemned.<sup>64</sup>

The distinctions between executive disregard and the line-item veto strengthen the argument that executive disregard is unconstitutional. Unlike the line-item veto, which was limited to spending items,<sup>65</sup> executive disregard is applicable to any provision of any statute. If the Court struck down the line-item veto as unconstitutional, applicable only in a limited capacity, executive disregard, a broader power because of its applicability in any context, must be, a fortiori, unconstitutional.

Comparing the line-item veto to executive disregard in light of Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*<sup>66</sup> also strengthens the

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<sup>59</sup> *Id.* at 449.

<sup>60</sup> *See id.* at 437 (internal quotations omitted).

<sup>61</sup> *See id.* at 439.

<sup>62</sup> *See id.* at 448.

<sup>63</sup> *Cf. id.*

<sup>64</sup> *Cf. TASK FORCE*, *supra* note 8, at 22 ("To sign a bill and refuse to enforce some of its provisions because of constitutional qualms is tantamount to exercising the line-item veto power held unconstitutional by the Supreme Court in *Clinton v. New York*." (emphasis added)).

<sup>65</sup> *Clinton*, 524 U.S. at 436.

<sup>66</sup> 343 U.S. 579, 635-36 (1952) (Jackson, J., concurring). The Court has subsequently used Justice Jackson's concurrence to test and limit the boundaries of

conclusion that executive disregard is unconstitutional. In *Youngstown*, Jackson described a test to determine whether a presidential act is constitutional, arguing that presidential powers fluctuate “depending upon their disjunction or conjunction with those of Congress.”<sup>67</sup> In sum, Jackson believed presidential powers could be laid out on a spectrum: Presidential power to act is strongest where the President acted with Congress’s consent and weakest where the President acted despite congressional objection.<sup>68</sup> In the case of the line-item veto, Congress expressly authorized the President to cancel spending provisions of a statute by passing the Line Item Veto Act.<sup>69</sup> Thus, the President acted pursuant to “an express . . . authorization of Congress” and, according to Justice Jackson, his authority to enforce the statute was “at its maximum.”<sup>70</sup> Despite this, the Court still struck down the law as unconstitutional in *Clinton*.<sup>71</sup> In the case of executive disregard, however, the President acts unilaterally, necessarily frustrating congressional intent by declining to enforce a provision that a majority of both houses approved.<sup>72</sup> Therefore, “his power is at its lowest ebb” and “must be scrutinized with caution.”<sup>73</sup> Given that the line-item veto could not survive “the strongest of

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executive power. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 661, 668–69 (1981).

<sup>67</sup> *Steel Seizure*, 343 U.S. at 635.

<sup>68</sup> *Id.* at 635–39.

<sup>69</sup> Pub. L. No. 104-130, 110 Stat. 1200, 1202 (1996), *declared unconstitutional by Clinton v. City of New York*, 524 U.S. 417 (1998).

<sup>70</sup> *Steel Seizure*, 343 U.S. at 635 (Jackson, J., concurring). Justice Jackson went on to suggest that a statute “executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation.” *Id.* at 637.

<sup>71</sup> *Clinton v. City of New York*, 524 U.S. 417, 448 (1998). In his concurrence in *Steel Seizure*, Jackson explained that if the President acts with the consent of Congress, as here, and “his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power.” *Steel Seizure*, 343 U.S. at 635–37 (Jackson, J., concurring).

<sup>72</sup> Explicit evidence of the President acting against Congress’s wishes can be found in Senator Specter’s introduction of S. 875, in which he condemns constitutional signing statements by arguing that they “override the legislative language and defy congressional intent.” 155 CONG. REC. S4625 (daily ed. Apr. 23, 2009). This bill will be discussed at length. See discussion *infra* Part IV.

<sup>73</sup> *Steel Seizure*, 343 U.S. at 637–38 (Jackson, J., concurring). Jackson justified this assertion by noting that “what is at stake is the equilibrium established by our constitutional system.” *Id.* at 638.

presumptions and the widest latitude of judicial interpretation,”<sup>74</sup> executive disregard, which, in contrast, frustrates congressional intent, certainly could not withstand the heightened scrutiny prescribed by Justice Jackson.

## 2. Rebutting Criticisms of Using *Clinton* To Analyze Executive Disregard

Scholars defending executive disregard often argue that characterizing it as a line-item veto conflates two distinct concepts.<sup>75</sup> Generally these critics have a point; some have gone too far and argued executive disregard is tantamount to a line-item veto.<sup>76</sup> This Note, however, has emphasized the differences between a line-item veto and executive disregard and does not suggest that executive disregard is the same as a line-item veto, but rather that executive disregard circumvents the holding of *Clinton*.<sup>77</sup>

Proponents of executive disregard also allege that “Congress has the ability to eliminate this supposed line-item veto problem” as it relates to executive disregard.<sup>78</sup> Specifically, Congress may bar executive disregard of a part of a statute by simply enacting statutes with provisions mandating that anytime the President chooses not to enforce a provision of the statute, the entire scheme is unenforceable.<sup>79</sup> “In this way, Congress could preclude exercises of Executive Disregard even appearing like a line-item veto.”<sup>80</sup> This argument is susceptible to one glaring flaw: The President may disregard that specific provision of the statute and therefore still be free to choose to enforce whichever provision he wishes. Congress would be back where it started, without recourse.

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<sup>74</sup> *Id.* at 637.

<sup>75</sup> *See, e.g.,* Prakash, *supra* note 4, at 1635.

<sup>76</sup> *See, e.g.,* TASK FORCE, *supra* note 8, at 22. This is an extreme position. *Cf.* Nelson Lund, *Presidential Signing Statements in Perspective*, 16 WM. & MARY BILL RTS. J. 95, 98 (2007) (criticizing the ABA Task Force by noting, “[t]he Presentment Clause does not tell us that signing a bill and then refusing to enforce an unconstitutional provision is an illegal line-item veto”).

<sup>77</sup> *See supra* Part II.B.1.

<sup>78</sup> Prakash, *supra* note 4, at 1636.

<sup>79</sup> *Id.* at 1636–37.

<sup>80</sup> *Id.* at 1637.

C. *The Founding Generation and Executive Disregard*

An examination of the founding generation's view further supports the notion that a President who has signed a bill into law may not engage in executive disregard. Insight into this generation's views on the veto and constitutionality of statutes helps to shed light on the Founders' intent when designing the Constitution, and, ultimately, provides guidance on how to interpret the Constitution.

Early Presidents, including George Washington, shared the belief that they had a constitutional duty to veto unconstitutional bills.<sup>81</sup> President Washington wrote a letter to Alexander Hamilton about a bill sponsoring the Bank of the United States that had recently passed both houses but not without criticism on constitutional grounds.<sup>82</sup> Washington believed he had a "duty to examine the ground on which the [constitutional] objection [was] built."<sup>83</sup> If Washington had believed he had discretion to sign into law an unconstitutional statute, there would have been no reason to infer a "duty" to examine the bill's constitutionality.<sup>84</sup> By ultimately signing it into law, he approved of its constitutionality.<sup>85</sup>

Thomas Jefferson made similar observations. He noted that the veto "is the shield provided by the [C]onstitution" to prevent the legislature from infringing upon "1. the rights of the Executive 2. of the Judiciary 3. of the states and state legislatures."<sup>86</sup> There is no reason to assume such a defense was optional, especially in light of the Presidential Oath's Clause.<sup>87</sup>

James Madison—who has often been called the "Father of the Constitution"—perhaps best encapsulates the founding generation's view of the veto. In 1811, believing a bill to be

<sup>81</sup> For an indepth historical analysis, see *id.* at 1648–72. See also Prakash, *supra* note 8, at 84–87.

<sup>82</sup> Letter from George Washington to Alexander Hamilton (Feb. 16, 1791), in 31 THE WRITINGS OF GEORGE WASHINGTON 215 (John C. Fitzpatrick ed., 1939).

<sup>83</sup> *Id.* at 216.

<sup>84</sup> See Prakash, *supra* note 8, at 84–85.

<sup>85</sup> Indeed, one of his two vetoes was based purely on constitutional concerns. *Id.* at 85.

<sup>86</sup> Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank* (Feb. 15, 1791), reprinted in 3 THE FOUNDERS' CONSTITUTION 245, 247 (Philip B. Kurland & Ralph Lerner eds., 1987).

<sup>87</sup> U.S. CONST. art. II, § 1, cl. 8. This becomes especially convincing when considered in conjunction with Jefferson's decision to not enforce the Alien and Seditions Acts. See discussion *infra* Part III.

unconstitutional, he declared that he “could not have otherwise discharged [his] duty” than by vetoing it.<sup>88</sup> Six years later, despite supporting the underlying policies of an internal improvements bill, he vetoed the bill on constitutional grounds. “I am constrained,” he began, “by the insuperable difficulty I feel in reconciling the bill with the Constitution of the United States to return it with that objection.”<sup>89</sup> He had “no option” but to veto it.<sup>90</sup> James Monroe and Andrew Jackson also believed that the executive had the duty to veto any bills believed to be unconstitutional.<sup>91</sup>

These early Presidents shared the belief that if a President believed a bill was unconstitutional he was *required* to veto it. Indeed, there is not one example of a President from this era of American history signing a bill into law with provisions he believed were unconstitutional. It stands to reason that each of these Presidents was confident of every bill’s constitutionality they signed it into law and that each would have vetoed any bill that they believed contained an unconstitutional provision.

#### D. Policy Arguments

Substantial policy arguments support the argument that a President who has the opportunity to veto an unconstitutional bill must do so, and, by extension, that a President who signs a bill into law believes it is constitutional. These same arguments illustrate that executive disregard is a dangerous practice that is at odds with many of the fundamental principles behind the Constitution, such as the theory of checks and balances. This Section outlines these arguments from the perspective of the executive, legislature, judiciary, as well as the general public, and concludes that each branch can more fully realize its constitutionally designated role when a President only signs into law bills he believes are constitutional.

If a President only signs constitutional bills into law, Congress is more able to fulfill its obligations imparted by the Constitution. To begin, consider Congress’s role in the

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<sup>88</sup> Letter from James Madison to the Baptist Churches on Neal’s Creek and on Black Creek, North Carolina (June 3, 1811), in 2 LETTERS AND OTHER WRITINGS OF JAMES MADISON 511, 511 (1865).

<sup>89</sup> Madison, *supra* note 1.

<sup>90</sup> *Id.* at 570.

<sup>91</sup> See Prakash, *supra* note 8, at 86–87.



constitutional process. If a President declines to enforce an aspect of a bill based on its constitutionality, Congress will no longer be compelled to consider whether its acts are constitutional—what would be the point? From Congress's perspective, the President will or will not enforce provisions of a bill based on his belief of its constitutionality, irrespective of congressional beliefs. It would therefore be much more efficient to pass legislation with questionable provisions and let the President sort it out.<sup>92</sup> In effect, legislative power would shift from Congress to the President. If, on the other hand, Congress is aware that once a President signs a bill into law it will be enforced in total, Congress will tread more lightly and consider the constitutionality of a bill more thoroughly. Congress's power to consider a bill's constitutionality would thereby remain meaningful.

The President also benefits from vetoing bills he believes are unconstitutional and refraining from executive disregard. The President runs a serious risk by signing into law a provision of a statute he does not think is constitutional. If his nonenforcement results in harm to a third party and the judiciary finds for the third party, the President will have no choice but to enforce the statute.<sup>93</sup> Had the President vetoed or threatened to veto the bill, he could have ensured that his constitutional views were reflected in the law. Having failed to do so, he would be forced to enforce a statute he believes is unconstitutional.

Further, executive disregard weakens the influence of the President's veto power. Congress is less likely to take a President's veto threats seriously if, instead of ever using that power, the President just disregards a part of the statute he believes is unconstitutional. Congress may include the provision anyway and hope that a subsequent President enforces the provision in question. If the President threatens to veto or vetoes that same bill, he can assure that no future President will enforce that particular provision. Further, members of Congress

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<sup>92</sup> Cf. Prakash, *supra* note 8, at 88 ("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 . . .").

<sup>93</sup> *Id.* at 90. *But see Morrison v. Olson*, 487 U.S. 654, 711 (1998) (Scalia, J., dissenting) ("[T]he executive can decline to prosecute under unconstitutional statutes . . .").

are more likely to take his constitutional concerns seriously if the President has a record of vetoing bills he believes are unconstitutional, thus the President may legitimately gain more influence over the legislative process.<sup>94</sup>

Executive disregard also diminishes the role of the judicial branch of government. Since Chief Justice Marshall heralded in the age of judicial review over two hundred years ago by declaring “[i]t is emphatically the province and duty of the judicial department to say what the law is,” the judiciary has been considered the final arbiter on a statute’s constitutionality.<sup>95</sup> If a President declines to enforce a statute based on its constitutionality, in effect, he transfers that power to the executive and thereby reduces the power of the judiciary.<sup>96</sup>

Further, the judiciary is better suited for making constitutional decisions. The judiciary has more than two hundred years of experience declaring laws unconstitutional and numerous mechanisms in place for ensuring they do so sparingly.<sup>97</sup> Perhaps most obvious is the “case or controversy” requirement of the Constitution.<sup>98</sup> In *Flast v. Cohen*,<sup>99</sup> the Court declared that paramount in a court’s decision to hear a case was “the clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of

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<sup>94</sup> The President and his aides are intimately involved with nearly every step of a bill’s progression, and could easily convey any constitutional concerns the President might have. See Prakash, *supra* note 8, at 88 n.27 (“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.”).

<sup>95</sup> Compare *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”), with *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (“[*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution . . .”).

<sup>96</sup> There, of course, remains the possibility of enjoined enforcement, but given at least Justice Scalia’s opinion of executive disregard, standing on these grounds may be difficult to achieve. See *Morrison*, 487 U.S. at 711 (Scalia, J., dissenting).

<sup>97</sup> Some examples are the doctrines of standing, ripeness, and mootness. For an in-depth discussion of these doctrines see MASSEY, *supra* note 20, at 69–98. The Court also engages in differing levels of deference, as well as various levels of constitutional scrutiny, depending on the circumstances. See *id.* at 608–09 (discussing the presumption of validity, minimal scrutiny, and strict scrutiny).

<sup>98</sup> U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . [and] to Controversies . . .”).

<sup>99</sup> 392 U.S. 83 (1968).

adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests.’”<sup>100</sup> In other words, the “case or controversy” requirement assures “zealous advocacy for both sides of the question.”<sup>101</sup> A President engaging in executive disregard, on the other hand, has the benefit of no such advocacy.<sup>102</sup> Indeed, “[t]he President can conclude that a law is unconstitutional without even a murmur of citizen concern or protest.”<sup>103</sup> Because of the Constitution’s “case or controversy” requirement, the judiciary, therefore, is better equipped than the executive to make a decision on a statute’s constitutionality based on the information presented before the court.<sup>104</sup>

The general public also benefits when a President vetoes a statute he believes contains unconstitutional provisions. An elected official’s political accountability to the governed is a fundamental principle of the federal system of government,<sup>105</sup> and engaging in executive disregard dilutes this principle. After an unconstitutional bill becomes law, the voter will have difficulty determining whom to punish for its passage if it is not enforced. The President can simply say he had no intention of enforcing it and it was Congress’s idea to pass the bill. Congress may retort that they knew the President would not enforce it. If the President, however, vetoes a bill he believes is unconstitutional, the old adage “the buck stops here” becomes applicable. Voters who agree with the President can punish Congress with their votes and those who disagree can punish the President.

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<sup>100</sup> *Id.* at 96–97 (quoting *United States v. Fruehauf*, 365 U.S. 146, 157 (1961)).

<sup>101</sup> *MASSEY*, *supra* note 20, at 68.

<sup>102</sup> Proponents of executive disregard concede this point. *See Prakash*, *supra* note 4, at 1646.

<sup>103</sup> *Id.*

<sup>104</sup> *Cf. id.* (“If one believes that robust debates enable constitutional truths to come to the surface, the lack of such clashes may make the Executive’s constitutional judgments less worthy of confidence.”).

<sup>105</sup> For example, political accountability is the major justification for the limited procedural immunity granted to the states from encroachment by the federal government. *See generally* *Printz v. United States*, 521 U.S. 898 (1997) (deciding Congress cannot coerce executive officers of a state to implement their policy to preserve accountability to the people of the state); *New York v. United States*, 505 U.S. 144 (1992) (deciding Congress cannot coerce the states into accepting their legislative agenda to preserve accountability to the people of the state).

Perhaps the strongest policy argument against executive disregard is the lack of sufficient checks on the power.<sup>106</sup> Within each branch of government there is an inherent hydraulic pressure to exceed the outer limits of its power.<sup>107</sup> Because of the executive's "raw constitutional powers," the pressure that motivates the executive to accumulate power arguably presents the greatest danger.<sup>108</sup> "The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of *unchecked disregard* of the restrictions that fence in even the most disinterested assertion of authority."<sup>109</sup> Indeed, the federal government has many built-in checks to guard against such accretions.<sup>110</sup> The greatest problem with executive disregard is the exclusion of any other branch to truly be able to check the President's failure to enforce a statute he believes is unconstitutional. This is not to say there are no checks. A President could lose an election for his failure to enforce a statute.<sup>111</sup> However, this cannot be the check that Madison had in mind when he talked of "giving to those who administer each department the necessary constitutional means . . . to resist encroachments of the others."<sup>112</sup> Congress may hold hearings or ultimately impeach the President, though, given the history of the United States, this latter option seems unlikely.<sup>113</sup> And the judiciary may be able to enjoin enforcement,

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<sup>106</sup> See Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217, 321 (1994) ("The most serious objection to executive [disregard] is not to its congruence with constitutional text, structure, and political theory . . . but to its possible consequences in practice.").

<sup>107</sup> *INS v. Chadha*, 462 U.S. 919, 951 (1983).

<sup>108</sup> See Paulsen, *supra* note 106.

<sup>109</sup> *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 594 (Frankfurter, J., concurring) (emphasis added). In this case, the restrictions would be the strict formalism prescribed by the Constitution as described in *Clinton*. See discussion *supra* Part II.B; see also *Clinton v. City of New York*, 524 U.S. 417, 448 (1998).

<sup>110</sup> See generally THE FEDERALIST NO. 51 (James Madison), *supra* note 18.

<sup>111</sup> Or, perhaps, because of enforcing a statute the public believed to be unconstitutional, as in the case of John Adams and his execution of the Sedition Act. See GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM* 71 (2004).

<sup>112</sup> THE FEDERALIST NO. 51 (James Madison), *supra* note 18, at 321–22.

<sup>113</sup> *But see* Paulsen, *supra* note 106, at 323 ("It is frequently argued that impeachment is a mere 'scarecrow.' If so, it is a pretty effective scarecrow." (internal citations omitted)).

provided a third party can assert standing.<sup>114</sup> Even proponents of executive disregard, however, concede that “[t]hese various checks are not perfect in the sense that there still will be instances when individuals will conclude that the President has wrongfully disregarded some statute . . . [and] the external checks will not operate to dissuade the President from continuing to disregard the statute.”<sup>115</sup> In the end, Congress may hold all the hearings it wants, but a determined President does not need to budge on enforcement, and absent an impeachment or a third party having standing, there is very little either branch can do to check the President’s executive disregard.<sup>116</sup>

### III. A LIMITED THEORY OF EXECUTIVE DISREGARD?

Despite these arguments, a closer examination of the textual arguments and historical precedent surrounding executive disregard may reveal that the Constitution provides limited exceptions to the general rule that executive disregard is unconstitutional. This Note has argued that Presidents who had the opportunity to veto a bill but chose to sign it into law cannot later decline to enforce a provision of it on constitutional grounds; that is, by signing a bill into law the President has approved of its constitutionality.<sup>117</sup> But what of a subsequent President who is faced with the prospect of enforcing an already existing law that he believes is unconstitutional? Or a President who has had his veto overridden? May he decline to enforce it? Section A of this Part discusses the textual arguments favoring a duty to disregard in these limited circumstances by examining the

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<sup>114</sup> A court order has not always stopped a President from engaging in an act of questionable constitutional character. Indeed, President Jackson infamously ignored the Court’s decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), by deciding to forcibly remove the Cherokee Indians from Florida. See Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1814 n.79 (2009). President Lincoln did the same by suspending habeas corpus despite a court order not to in *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861). See Goldsmith & Levinson, *supra*.

<sup>115</sup> Prakash, *supra* note 4, at 1682.

<sup>116</sup> What recourse, for example, does Congress have if a President decides not to enforce a provision of a defense appropriations act that included a provision banning all United States personal from inflicting cruel, inhuman, or degrading treatment on any prisoner held in the United States on constitutional grounds? See Charlie Savage, *Bush Could Bypass New Torture Ban: Waiver Right Is Reserved*, BOSTON GLOBE, Jan. 4, 2006, at A1.

<sup>117</sup> See discussion *supra* Part II.A.

Presidential Oath Clause<sup>118</sup> as well as the Faithful Execution Clause.<sup>119</sup> Section B examines historical precedent favoring executive disregard, notably, Thomas Jefferson's decision not to enforce the controversial Alien and Sedition Acts. Section C discusses the numerous shortcomings of a limited theory of executive disregard, specifically, how it both conflicts with the Court's holding in *Clinton* and does not alleviate any policy concerns.

### A. *Textual Arguments*

This Note previously argued that three clauses—the Presidential Oath Clause,<sup>120</sup> the Faithful Execution Clause,<sup>121</sup> and the Presentment Clause<sup>122</sup>—not only gave rise to a Presidential duty to veto unconstitutional bills, but a constitutional duty to fully enforce them once signed into law.<sup>123</sup> The argument was premised on the President having the opportunity to veto the bill. If an earlier President signed a bill into law that a subsequent President never had a chance to veto, the subsequent President did not approve of its constitutionality. In other words, by removing the Presentment Clause from the analysis, the textual arguments favoring executive disregard look more compelling.

The Presidential Oath Clause may impose a duty on a President to disregard a statute he believes is unconstitutional if he never had the chance to veto the statute or had his veto overridden. The Presidential Oath Clause, as noted above, at a minimum, can be interpreted as a mandate to do no constitutional harm.<sup>124</sup> At a maximum, it mandates an active defense of the Constitution.<sup>125</sup> Either way, if a President, who did not have the chance to veto the statute, enforces it, he is acting in violation of his oath. Reading the Oath Clause broadly, he fails to defend the Constitution by not doing everything in his power, including nonenforcement, to protect the Constitution. Read narrowly, the President harms the Constitution by

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<sup>118</sup> U.S. CONST. art. II, § 1, cl. 7.

<sup>119</sup> *Id.* art. II, § 3.

<sup>120</sup> *Id.* art. II, § 1, cl. 7.

<sup>121</sup> *Id.* art. II, § 3.

<sup>122</sup> *Id.* art. I, § 7, cl. 2.

<sup>123</sup> See discussion *supra* Part II.A.

<sup>124</sup> See discussion *supra* Part II.A.

<sup>125</sup> See discussion *supra* Part II.A.

enforcing a law that violates the Constitution. The same may be said of a President who has had his veto overridden. Despite the bill becoming a law over his objection, the clause still imposes a duty on him to protect the Constitution. He cannot enforce a statute he believes is unconstitutional and still be in compliance with his oath.

The Faithful Execution Clause does not vitiate this duty. The clause requires that the President "take Care that the Laws be faithfully executed."<sup>126</sup> "Laws" as used throughout the Constitution, however, are assumed to be constitutional laws. For example, the Constitution grants Congress the power "to provide and maintain a Navy" by passing all laws necessary and proper to do so.<sup>127</sup> One would not argue that pressing civilians who criticize the government into the Navy in furtherance of this end would be constitutional.<sup>128</sup> Thus, the necessary and proper laws to which Article I, Section 8 of the Constitution refers must be implicitly constitutional. Subscribing to that view, "Laws" in the Faithful Execution Clause can no more encompass unconstitutional laws than those in the Necessary and Proper Clause.<sup>129</sup> The Faithful Execution Clause, therefore, puts no duty on a President to enforce a statute he believes is unconstitutional, provided he has not signed it into law.<sup>130</sup>

Considering the Faithful Execution Clause in conjunction with the Supremacy Clause<sup>131</sup> bolsters the conclusion that a President who has not signed a bill into law has no duty to enforce an unconstitutional statute. The Supremacy Clause states, "[the] Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land."<sup>132</sup> If one accepts that the Supremacy Clause, in effect, makes the

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<sup>126</sup> U.S. CONST. art. II, § 3.

<sup>127</sup> *Id.* art. I, § 8, cl. 13.

<sup>128</sup> See Prakash, *supra* note 4, at 1631 ("Congress cannot argue that the power to make bankruptcy laws is the power to make unconstitutional bankruptcy laws, such as a bankruptcy law that gives those who speak in favor of government policies a special liquidation preference.")

<sup>129</sup> *Cf. id.* at 1632 ("At a minimum, critics of Executive Disregard must do more to show that the Faithful Execution Clause somehow compels the President to enforce unconstitutional laws.")

<sup>130</sup> Again, this argument is plainly not available to a President who has signed the bill into law; he has already opined on its constitutionality by signing it into law. See discussion *supra* Part II.A.

<sup>131</sup> U.S. CONST. art. VI, cl. 2.

<sup>132</sup> *Id.*

Constitution federal law, it is the President's job to faithfully enforce it pursuant to the Faithful Execution Clause.<sup>133</sup> By enforcing an unconstitutional statute, he has failed to faithfully execute the Constitution, and thereby failed to abide by the Faithful Execution Clause. Because the President cannot be put in the untenable position of enforcing both the Constitution and an unconstitutional law, he must err on the side of the Constitution and not enforce the unconstitutional statute.<sup>134</sup>

Proponents of a President's duty to disregard also argue that the Constitution simply does not require a President to enforce unconstitutional statutes. Put succinctly, "given the absence of a duty to enforce unconstitutional statutes and the lack of any constitutional power to enforce such laws, the President is powerless to enforce unconstitutional statutes."<sup>135</sup> In other words, the President can no more enforce unconstitutional statutes than he can directly tax the population; that power is nowhere enumerated.<sup>136</sup> A President who never signed the unconstitutional bill into law—either because it was previously enacted or due to an override—never approved the constitutionality of the statute. If he truly believes the statute unconstitutional, he may not have the enumerated power to enforce it.

### *B. Historical Arguments Favoring Limited Executive Disregard*

Substantial historical arguments also favor a theory of limited executive disregard. A significant example is President Thomas Jefferson's decision upon becoming President not to enforce the Alien and Sedition Acts, which had been signed into law by President John Adams years earlier.<sup>137</sup>

Thomas Jefferson became President in 1801 after defeating incumbent John Adams, who had signed into law the Sedition Act.<sup>138</sup> President Jefferson had so opposed the Act that, after it

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<sup>133</sup> See Prakash, *supra* note 4, at 1632.

<sup>134</sup> See *id.*

<sup>135</sup> See *id.* at 1629.

<sup>136</sup> See *id.* For a President who has signed into law this statute, however, this argument plainly is not applicable; he has necessarily approved of its constitutionality by signing it into law. See discussion *supra* Part II.A.

<sup>137</sup> Prakash, *supra* note 4, at 1664–65.

<sup>138</sup> Proponents of Executive Disregard have mapped these series of events very closely. This Note discusses this topic only in brief. For a much fuller discussion of Thomas Jefferson and his executive disregard of the Sedition Act, see *id.* at 1665–72.



had passed, he drafted the Kentucky Resolves of 1798 arguing that the law was “altogether void, and of no force.”<sup>139</sup> Though the bill, by its terms, expired the day after Jefferson took office, it did “not prevent or defeat a prosecution and punishment of any offence against the law” while the law was in force.<sup>140</sup> In other words, despite the statute’s expiration, offenders could still be punished for crimes they committed while the law had been in effect. Further, there were ongoing prosecutions when Jefferson took office.<sup>141</sup>

Jefferson had to decide whether to enforce a statute he believed was unconstitutional—the very dilemma that this Section of the Note contemplates. After being sworn in to office, he ordered his attorneys to discontinue the prosecutions, in essence, to cease the execution of the law.<sup>142</sup> He left no doubt as to the rationale for his decision: he believed the Sedition Act to be “contrary to the very letter of the Constitution . . . and consequently . . . void.”<sup>143</sup> He expounded further in a letter to Abigail Adams, who complained he had “liberate[d] a wretch”<sup>144</sup> who had slandered her husband:

I discharged every person under punishment or prosecution under the Sedition law, because I considered and now consider that law to be a nullity as absolute and palpable as if Congress had ordered us to fall down and worship a golden image; and that it was as much my *duty* to arrest it’s [sic] execution in every stage, as it would have been to have rescued from the fiery furnace those who should have been cast into it for refusing to worship their image.<sup>145</sup>

Jefferson also observed that he discontinued its enforcement because of the “obligations of [the] oath to protect the

<sup>139</sup> Thomas Jefferson, Kentucky Resolutions of 1798 and 1799, *reprinted in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 540, 541 (photo reprint 1987) (Jonathan Elliot ed., 2d ed. 1888).

<sup>140</sup> Sedition Act of 1798, ch. 74, § 4, 1 Stat. 596 (repealed 1801); Prakash, *supra* note 4, at 1664.

<sup>141</sup> Prakash, *supra* note 4, at 1665.

<sup>142</sup> *See id.*

<sup>143</sup> Letter from Thomas Jefferson to William Duane (May 23, 1801), *in* 8 THE WRITINGS OF THOMAS JEFFERSON 54, 56 n.4 (Paul Leicester Ford ed., 1897).

<sup>144</sup> Letter from Abigail Adams to Thomas Jefferson (July 1, 1804), *in* 1 THE ADAMS-JEFFERSON LETTERS 271, 273 (Lester J. Cappon ed., 1959).

<sup>145</sup> Letter from Thomas Jefferson to Abigail Adams (July 22, 1804), *in* 1 THE ADAMS-JEFFERSON LETTERS, *supra* note 144, 274, 275 (emphasis added).

constitution.”<sup>146</sup> Much later, Jefferson reflected that the prosecutions under the Act were to be dismissed as a matter of duty.<sup>147</sup> In sum, Jefferson believed he had the duty under the Constitution not to enforce a statute passed by a prior President that he believed was unconstitutional. Thus, both the text of the Constitution as well as history seem to suggest that a President who did not sign a statute he believes to be unconstitutional into law has a constitutional duty to not enforce it.

### C. *Shortcomings of Limited Executive Disregard*

Despite these arguments in favor of a limited theory of executive disregard, there remain substantial shortcomings. Though the theory is founded in the Constitution, it does not alleviate many of the concerns raised earlier in this Note.<sup>148</sup> If anything, it raises new concerns, such as the implications for Congress’s override power.

The limited theory of executive disregard still violates the Court’s holding in *Clinton*.<sup>149</sup> In *Clinton*, the Court carefully described how a bill becomes a law and emphasized that the bill had to meet the formalities prescribed by the Constitution.<sup>150</sup> “[A]uthoriz[ing] the President to create a different law—one whose text was not voted on by either House of Congress or presented to the President for signature” is invalid.<sup>151</sup> While not the same in practice as a line-item veto, this is what, in effect, executive disregard, limited or otherwise, achieves. Proponents of executive disregard offer no rebuttal to this argument.<sup>152</sup>

The limited theory of executive disregard *may* survive historical scrutiny.<sup>153</sup> The lone instance of a subsequent President coming to power questioning the constitutionality of a law during early American history was Thomas Jefferson. He decided not to enforce the statute.<sup>154</sup> President Jefferson,

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<sup>146</sup> *Id.* at 276.

<sup>147</sup> Prakash, *supra* note 4, at 1667.

<sup>148</sup> See discussion *supra* Parts II.B–D.

<sup>149</sup> See discussion *supra* Part II.B.1.

<sup>150</sup> *Clinton v. City of New York*, 524 U.S. 417, 448–49 (1998).

<sup>151</sup> *Id.*

<sup>152</sup> See discussion *supra* Part II.B.2.

<sup>153</sup> See discussion *supra* Part II.C.

<sup>154</sup> See discussion *supra* Part III.B. Indeed, scholars have speculated that Presidents Washington and Adams would have done the same. See Prakash, *supra* note 4, at 1660–64.

however, was a complex figure, and there is some debate as to whether his subsequent failure to dismantle the Bank of the United States, an institution he believed to be unconstitutional, casts doubt on the topic.<sup>155</sup> At best, historical arguments demonstrate that the founding generation was ambivalent towards a limited theory of executive disregard.

The policy arguments most undermine the validity of a limited theory of executive disregard.<sup>156</sup> Executive disregard, limited or otherwise, is still not properly checked and remains an accretion of power in the executive.<sup>157</sup> And the judiciary is still better equipped to handle constitutional decisionmaking.<sup>158</sup>

Further, limited executive disregard raises entirely new policy arguments. Specifically, if after a President has had his veto overridden and he can still decline to enforce the statute, the role of the congressional override is greatly diminished. Congress simply has no recourse if a President objected to a bill on constitutional grounds and vetoed it. Even if Congress overrides his veto, the outcome would be the same—the President would decline to enforce the statute. Proponents of executive disregard hasten to point out that this duty to disregard is only triggered when the President truly feels a statute is unconstitutional,<sup>159</sup> but this provides little recourse for Congress, which can do nothing but hope a third party will challenge the President's nonenforcement.<sup>160</sup>

#### IV. CHECKING EXECUTIVE DISREGARD

Despite textual arguments for a narrow application of executive disregard, as noted, many of the policy arguments against allowing the executive to retain this power remain. Principally, executive disregard takes power from the judiciary and is insufficiently checked.<sup>161</sup> Further, Presidents are engaging in executive disregard, limited and otherwise, regardless of its

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<sup>155</sup> See Prakash, *supra* note 4, at 1670–72.

<sup>156</sup> For a more complete discussion on why executive disregard, limited or otherwise, casts this doubt, see discussion *supra* Part II.D.

<sup>157</sup> *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring).

<sup>158</sup> See discussion *supra* Part II.D.

<sup>159</sup> See Prakash, *supra* note 4, at 1634.

<sup>160</sup> See discussion *supra* Part II.D.

<sup>161</sup> Even proponents of executive disregard recognize the need to tread lightly with this power. See Paulson, *supra* note 106, at 320.

constitutionality, in situations when a check is most needed.<sup>162</sup> This Part addresses these problems largely through a discussion of Senator Arlen Specter's proposed bill.<sup>163</sup> The bill, in essence, would allow for Congress to intervene in litigation where constitutional nonenforcement of a provision is in question.<sup>164</sup> Section A discusses the bill, its aims, and how the bill begins to address the policy concerns surrounding executive disregard. Section B examines the bill's shortcomings, specifically its focus on signing statements rather than executive disregard, as well as its failure to grant Congress standing to challenge executive disregard. Section C suggests that a modified version of this bill could better address the policy concerns surrounding executive disregard.

#### A. *Senator Specter's Bill*

Senator Specter proposed his bill in response to the growing use of signing statements, specifically by President George W. Bush.<sup>165</sup> Senator Specter believes their use is unprecedented and that, under the guise of protecting the Constitution, the President is actually just selectively enforcing provisions of a statute.<sup>166</sup> Thus, the purpose of the bill is to "make sure that [signing statements] are not being used in an unconstitutional manner; a manner that seeks to rewrite legislation, and exercise line-item vetoes."<sup>167</sup>

Specter's bill attempts to curb the influence of signing statements in two ways. First, it instructs courts to ignore

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<sup>162</sup> Perhaps our Congressional representatives are not entitled to have a say on whether United States personnel are permitted to inflict cruel, inhuman, or degrading treatment on any prisoner held in the United States, *but cf.* 153 CONG. REC. S8744 (2007) (statement of Sen. Specter), but surely that is not for the President alone to decide.

<sup>163</sup> S. 875, 111th Cong. § 4 (2009).

<sup>164</sup> *Id.*

<sup>165</sup> *See* 153 CONG. REC. S8744 (statement of Sen. Specter); 155 CONG. REC. S4625 (statement of Sen. Specter) (daily ed. Apr. 23, 2009).

<sup>166</sup> *See* 153 CONG. REC. S8744 (statement of Sen. Specter) ("The President cannot use a signing statement to rewrite the words of a statute nor can he use a signing statement to selectively nullify those provisions he does not like."); 155 CONG. REC. S4625 (statement of Sen. Specter). ("These signing statements are outrageous, intruding on the Constitution's delegation of 'all legislative powers' to Congress . . .").

<sup>167</sup> 153 CONG. REC. S8744 (statement of Sen. Specter).

signing statements when trying to ascertain a bill's purpose.<sup>168</sup> Thus, if the President issues an order via a signing statement to an executive agency on how he wants a bill enforced, the courts would not be allowed to consider that directive in determining whether the agency acted appropriately.<sup>169</sup> Second, it allows Congress the right to file an amicus brief and present an oral argument regarding the purpose of the bill.<sup>170</sup> Thus, if a third party had already challenged the President's method of enforcement—including nonenforcement—Congress would have the right to intervene and present evidence to the court as to what their intent was when passing the bill. The bill explicitly does not grant Congress standing directly.<sup>171</sup>

This proposed legislation addresses many issues, but specific to this Note, it begins to address some of the major policy concerns raised by the limited theory of executive disregard. Most notably, the bill would provide an additional congressional check on executive disregard aside from impeachment and hearings. Rather than just the President's attorney arguing congressional intent in front of a court, Congress would have the opportunity to discuss its intent in enacting the legislation. It also detracts any weight courts give to signing statements when interpreting bills.<sup>172</sup> This, in effect, "prevents the President from issuing a signing statement that alters the meaning of a statute,"<sup>173</sup> and thereby precludes use of the signing statement as a means of engaging in executive disregard.

<sup>168</sup> S. 875 § 3 ("In determining the meaning of any Act of Congress, no Federal or State court shall rely on or defer to a presidential signing statement as a source of authority.").

<sup>169</sup> *But see* Bradley & Posner, *supra* note 7, at 310 ("[The President] certainly does not need a signing statement to [issue an order to his subordinates]; he could just write a memorandum . . .").

<sup>170</sup> S. 875 § 4(a).

In any action, suit, or proceeding . . . regarding the construction or constitutionality, or both, of any Act of Congress in which a presidential signing statement was issued, . . . the United States Senate, . . . or the United States House of Representatives, . . . or both, [can] participate as an amicus curiae, and . . . present an oral argument on the question . . .

*Id.*

<sup>171</sup> *Id.* ("Nothing in this section shall be construed to confer standing on any party seeking to bring, or jurisdiction on any court . . .").

<sup>172</sup> Indeed, justices have used signing statements in discussing the legislative history of a bill. *See, e.g.,* Hamdan v. Rumsfeld, 548 U.S. 557, 666 n.5 (2006) (Scalia, J., dissenting).

<sup>173</sup> 153 CONG. REC. S8744 (2007) (statement of Sen. Specter); *see also* 155 CONG. REC. S4621 (2009) (statement of Sen. Specter) ("What we have found is that

### B. Shortcomings

While this bill is a good attempt at effectuating a check on executive disregard, it still has shortcomings. The first is an overemphasis on signing statements. What seems to vex Senator Specter about presidential signing statements is their ability to “alter[] the meaning of a statute.”<sup>174</sup> By altering the meaning, the statements “threaten[] to render the legislative process a virtual nullity, making it completely unpredictable how certain laws will be enforced.”<sup>175</sup> The solution he proposes is to allow congressional intervention in questions of a statute’s construction or constitutionality.<sup>176</sup> From these assertions, it does not seem the signing statements are what trouble Senator Specter, but rather the impact the President has on a statute when he acts on his declaration in a signing statement to engage in executive disregard.<sup>177</sup> By narrowly focusing on signing statements, he misses the larger picture, specifically, that the President’s nonenforcement of a statute or provision thereof is what “threatens to render the legislative process a virtual nullity.”<sup>178</sup> Put succinctly, the signing statement is not responsible for the underlying maladies that Senator Specter’s bill seeks to remedy, but rather the practice of executive disregard that is often announced in a signing statement.<sup>179</sup>

Another shortcoming of the bill is its failure to allow Congress to directly check executive disregard. This bill provides two checks on the executive: (1) Congress is guaranteed that courts will hear its view on a statute’s constitutionality rather than just the President’s; and (2) whatever statement a President issues when signing the bill is not to be considered a part of legislative history. The bill on its face, however, does not affect standing.<sup>180</sup> In essence, Congress must wait for another party

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Presidents are now cherry-picking the parts they like and the parts they don’t like.”).

<sup>174</sup> 153 CONG. REC. S8744 (statement of Sen. Specter).

<sup>175</sup> *Id.*

<sup>176</sup> S. 875 § 4(a)(2).

<sup>177</sup> See *supra* notes 21–22 and accompanying text.

<sup>178</sup> 153 CONG. REC. S8744 (statement of Sen. Specter); see also *supra* notes 21–22 and accompanying text.

<sup>179</sup> See Bradley & Posner, *supra* note 7, at 310 (“[T]he real concern is not with the institution of signing statements but with the [President’s] underlying views of executive power.”).

<sup>180</sup> See S. 875 § 4(a) (“Nothing in this section shall be construed to confer standing on any party . . .”).

to challenge the nonenforcement before it can intervene. Thus, both of these checks are completely dependent on the President's nonenforcement already having given rise to a "case or controversy"; absent a third party having standing, these checks are completely ineffective. This Note has discussed the difficulties and shortcomings of third-party standing as an effective means of checking executive disregard.<sup>181</sup>

### C. *A Modified Approach*

It is clear that Senator Specter's bill is a good start; it provides two potential checks against executive disregard, but needs more bite. This Section suggests a few modifications that might help to further Senator Specter's cause and analyzes the policy problems under this modified approach. Specifically, the bill should focus on executive disregard rather than signing statements and Congress should grant itself standing to challenge executive disregard.

The major aim of the bill should not be signing statements. Signing statements have a rich history in our country and often times serve a useful purpose.<sup>182</sup> Senator Specter implicitly recognizes this by explaining that his bill only targets "signing statements that override the legislative language and defy congressional intent."<sup>183</sup> It is not, however, the signing statement itself that alters the meaning of a statute; it is the President's adherence to his declaration in the signing statement.<sup>184</sup> This is not to suggest that the solution is to introduce a bill that targets presidential adherence to signing statements; this would only dissuade a President from discussing his belief regarding a statute's constitutionality. Rather, the bill should allow for intervention in all cases of executive disregard, announced or otherwise. In this way, executive disregard is addressed directly and signing statements, something of a red herring,<sup>185</sup> are discounted.

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<sup>181</sup> See discussion *supra* Part II.D. Further, when James Madison spoke of "giving to those who administer each department the necessary constitutional means . . . to resist encroachments of the others," he certainly did not mean that one department had to wait until a private citizen challenged the other before intervening. THE FEDERALIST NO. 51 (James Madison), *supra* note 18.

<sup>182</sup> See discussion *supra* Part I.

<sup>183</sup> 155 CONG. REC. S4625 (2009) (statement of Sen. Specter).

<sup>184</sup> See discussion *supra* Part IV.B.

<sup>185</sup> See Bradley & Posner, *supra* note 7, at 310–11.

Congress should also be able to intervene directly rather than wait for a third party to assert standing; it should grant itself standing by defining a “case or controversy” where none existed before, and thereby, check executive disregard directly.<sup>186</sup> To do so, “Congress must at the very least identify the injury [to be] vindicate[d] and relate the injury to the class of persons entitled to bring suit.”<sup>187</sup> There is, of course, “an outer limit to the power of Congress to confer rights of action.”<sup>188</sup> In the case of legislative standing, this outer limit is marked by two cases: *Raines v. Byrd*<sup>189</sup> and *Coleman v. Miller*.<sup>190</sup>

In *Raines*, the Court ruled that six members of Congress who had voted against the Line Item Veto Act<sup>191</sup> did not have standing to challenge its validity because they could not demonstrate sufficient harm.<sup>192</sup> The Court discussed and distinguished *Coleman*, where previously the Court had concluded that state legislatures had standing to challenge the ratification of an amendment after a tie vote resulted in the Lieutenant Governor casting a vote.<sup>193</sup> The legislatures in *Coleman* argued that the Lieutenant Governor was not a member of the legislature and, therefore, could not cast the tiebreaking vote.<sup>194</sup> The Court determined that legislatures had “a plain, direct and adequate interest in maintaining the effectiveness of their votes.”<sup>195</sup> The Court continued:

[W]e find no departure from principle in recognizing in the instant case that at least the twenty senators whose votes, if their contention were sustained, would have been sufficient to

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<sup>186</sup> *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring) (“Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before . . .”).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> 521 U.S. 811 (1997).

<sup>190</sup> 307 U.S. 433 (1939).

<sup>191</sup> Pub. L. No. 104-130, 110 Stat. 1200, 1202 (1996), *declared unconstitutional* by *Clinton v. City of New York*, 524 U.S. 417 (1998). *Raines*, 521 U.S. 811, was the predecessor of *Clinton*, 524 U.S. 417. *See* discussion *supra* Part II.B.

<sup>192</sup> *See Raines*, 521 U.S. at 824 (“They have not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated. In the vote on the Act, their votes were given full effect. They simply lost that vote.”).

<sup>193</sup> *Coleman*, 307 U.S. at 436–38.

<sup>194</sup> *See id.* at 436.

<sup>195</sup> *Id.* at 438.



defeat the resolution ratifying the proposed constitutional amendment, have an interest in the controversy which, treated by the state court as a basis for entertaining and deciding the federal questions, is sufficient to give the Court jurisdiction to review that decision.<sup>196</sup>

In sum, if their contention was correct, their votes were "completely nullified."<sup>197</sup> This was quite different from *Raines*, where their votes had been given full effect; they just simply lost the vote.<sup>198</sup>

Using these cases as a guideline, Senator Specter's bill or a variation thereof could grant legislative standing directly to Congress to challenge a President engaging in executive disregard. The effect of executive disregard on a legislature's vote more closely resembles *Coleman* than *Raines*. Unlike *Raines*, when a President engages in executive disregard the congressmen's votes have been stripped of their value because provisions upon which they voted have not been enforced. In this manner, executive disregard is quite similar to *Coleman*: congressmen have "a plain, direct and adequate interest in maintaining the effectiveness of their votes."<sup>199</sup> Their votes lose effectiveness when provisions of the bill that have been signed into law, for which a majority of both houses voted, are not enforced. Thus, legislative standing in this situation would conform to the Constitution.

If Congress had standing to challenge executive disregard, most of the policy concerns mentioned in this Note would cease to be problematic.<sup>200</sup> The President, in an effort to stem congressional litigation against him, would use executive disregard much more sparingly. As a result, he would be more inclined to announce his constitutional problems with a bill before signing it into law. From Congress's perspective, it would continue to reflect on the constitutionality of a bill before it becomes law, lest the President exercise his veto power—now more meaningful as the President's primary mode of enforcing his constitutional beliefs. The branch best equipped to deal with a bill's constitutionality—the judiciary—would remain the final

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<sup>196</sup> *Id.* at 446.

<sup>197</sup> *Raines*, 521 U.S. at 823.

<sup>198</sup> *Id.* at 824.

<sup>199</sup> *See Coleman*, 307 U.S. at 438.

<sup>200</sup> *See discussion supra* Part II.D.

arbiter of a bill's constitutionality, and not only when a third party has standing. Therefore, Chief Justice Marshall's old maxim would remain the law.<sup>201</sup> From the perspective of the public, voters would see clearly which side favors the bill and each side would remain accountable. Most importantly though, there would be a direct check on executive disregard by the other branches of government, comporting with the underlying philosophy behind the Constitution.<sup>202</sup>

## V. CONCLUSION

In sum, a President may not engage in executive disregard when the President declining to enforce the statute also signed it into law. Not only does the Constitution prohibit executive disregard, but it also threatens the principles of separation of powers and checks and balances, principles fundamental to our system of government. There are two potential exceptions when the duty to enforce, stemming from the Constitution, becomes less clear—specifically, if a President did not sign a bill into law, either because his veto was overridden or because a previous President signed the bill. Irrespective of what one believes about executive disregard, limited or otherwise, considering and implementing a check on all instances of executive disregard is of paramount importance. Presidents are engaging in executive disregard with a frequency that is growing at an alarming rate and in situations when checks are most needed. As a result, the executive branch, arguably the most dangerous branch of government, is taking power from the coequal branches of government. In essence, the President is gaining unchecked power in violation of the Constitution. Accordingly, executive disregard, at a minimum, must be checked. To this end, Senator Specter's bill is a good start, but only by addressing the issue squarely and granting Congress standing can a check effectively be imposed on executive disregard.

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<sup>201</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

<sup>202</sup> See THE FEDERALIST NO. 51 (James Madison), *supra* note 18.

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