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# Walter Dellinger: The Lawyer as Consummate Teacher

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# PRESIDENTIAL AUTHORITY TO DECLINE TO FOLLOW SUPREME COURT OPINIONS*

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*Walter Dellinger's 1994 Memorandum Opinion for the Office of Legal Counsel ("OLC") defining when the President may decline to enforce a law of Congress remains one of his lasting contributions to the theory and practice of the separation of powers. Despite articulating a departmentalist vision for relations between the political branches, however, the Memo accepts judicial supremacy as a given. It emphasizes that the Supreme Court has the final word on contested constitutional questions and that enforcement judgments must hew to judicial doctrine. For decades, scholars, officials, and advocates of various ideological stripes have challenged judicial supremacy, even as it has remained central to executive branch practice. Typically, these challenges underscore the authority and even primacy of Congress, the representative legislature, over constitutional meaning. But some critics have called on the President to reject judicial dominance, too. In this tribute to Dellinger's storied life and career, I offer a hypothetical follow-up opinion to his 1994 Memo, entitled* Presidential Authority to Decline to Follow Supreme Court Opinions. *I suggest how OLC might define the circumstances under which it would be permissible for the Executive to continue enforcing a law that the Supreme Court has declared unconstitutional on the ground that the Court got it wrong. Even for those who would regard such a call as implausible or dangerous, the varieties of resistance available to the President and the Executive Branch warrant attention as part of the larger debate over whose province and duty it is to say what the law means.*





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## INTRODUCTION

In his time as Assistant Attorney General for the Office of Legal Counsel ("OLC"), Walter Dellinger made a lasting imprint on the theory and practice of the separation of powers. His 1994 Memorandum Opinion, *Presidential Authority To Decline To Execute Unconstitutional Statutes* (the "Memo"), begins from a proposition at once straightforward to conceptualize and delicate to implement—that "there are circumstances in which the President may appropriately decline to enforce a statute that he views as unconstitutional."[1] The criteria the Memo lays out for identifying the rare moment when the President can assert his independent authority, not only to judge a statute unconstitutional, but also to refuse its application, remain guideposts for the most difficult legal questions faced within the Executive Branch.

The Memo also has had considerable influence outside of government, having been taught to generations of law students as a modern-day parallel to President Jackson's famous veto message asserting his own understanding of the Constitution, according to which Congress lacked the power to charter a national bank, notwithstanding the contrary views of Congress and the Supreme Court.[2] Constitutional law professors present the Memo as an elucidation of the concept of departmentalism—the understanding of the separation of powers according to which each branch has a duty to interpret and apply the Constitution by its own lights and in its own domains.[3] In articulating the President's authority to decline to enforce a duly enacted statute, including one the President himself may have signed,[4] the Memo treats its core

1. Presidential Authority To Decline To Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 199 (1994) [hereinafter Dellinger Memo]. This Memo builds on a longstanding OLC view regarding the President's duty to the Constitution. For an OLC memorandum that collects past precedent from the Office, see Issues Raised by Section 129 of Pub. L. No. 102-138 and Section 503 of Pub. L. No. 102-140, 16 Op. O.L.C. 18, 22–31 (1992).

2. *See, e.g.*, SANFORD LEVINSON, JACK BALKIN, AKHIL AMAR, REVA SIEGEL & CRISTINA RODRÍGUEZ, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 70–72 (8th ed. 2022). In rejecting the idea that the Court's determination of constitutionality of the national bank should guide his own judgment, Jackson says: "The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. . . . The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges." President Andrew Jackson, Veto Message (July 10, 1832), *reprinted in* 2 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 576, 582 (Washington, D.C., Gov't Printing Off. 1898).

3. For a discussion of judicial supremacy, departmentalism, and struggles over interpretive authority, see KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY 10–18 (2007).

4. The Memo itself addressed a relatively common dilemma faced by Presidents when signing legislation. The National Defense Authorization Act, an annual authorization by Congress of military and national security programs, has long been an omnibus-style piece of legislation that has been known to contain provisions of dubious constitutionality, not least because they appear to trench upon

proposition as "unassailable." But it also paints a picture of an authority that exists in rare circumstances and that must be approached by the President with great self-restraint.

On the one hand, the 1994 Dellinger Memo was bold. It addressed a more difficult and sensitive question than the one considered by President Jackson, namely whether the President should exercise his express constitutional authority to veto legislation on the ground that he believes a bill to be unconstitutional, even where the other branches have concluded otherwise. By defending the President's authority to disagree with Congress *after* a statute's enactment, the Memo articulates a more aggressive form of presidential independence. But the Memo stops short of embracing a complete conception of departmentalism; it accepts as a core premise the idea of judicial supremacy over the political branches. Even if the President's understanding of what the Constitution requires can supersede Congress's, the Memo emphasizes that the "Supreme Court plays a special role in resolving disputes about the constitutionality of enactments."[5] The decision to decline to enforce the law must always be made with a view to enabling the judiciary to resolve constitutional questions.[6]

Elaborations of the nonenforcement authority in scholarly work and by subsequent presidential administrations have largely left the opinion's embrace of judicial supremacy undisturbed, even though critiques of judicial supremacy are legion and longstanding.[7] Today, those critiques have taken center stage in contemporary debates over the Supreme Court's arguably outsized role in our political life—debates that helped precipitate President Biden's formation of

prerogatives of the Executive Branch. Such provisions present the President with a seemingly impossible bind—either veto vital legislation, most of which presents neither policy nor constitutional concerns, or sign and enforce a statute that by the President's estimation violates a higher law. The theory behind the Dellinger Memo and longstanding executive branch practice is that the President's duty to the Constitution authorizes signing the bill but declining to enforce its unconstitutional provisions. Dellinger Memo, *supra* note 1, at 200.

5. *Id.*

6. For a leading defense of judicial supremacy, see Larry Alexander & Frederick Shauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1375–77 (1997).

7. Subsequent accounts of the nonenforcement authority either assume judicial supremacy as a background principle or discuss it in order to complicate the role that court precedent plays in executive interpretation. For some critical accounts of judicial supremacy, as well as judicial review altogether, see Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 86 (1998); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 775 (2002); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 128–44 (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 6–32 (1999); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 Yale L.J. 1346, 1348–53, 1401–06 (2006); Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1704 (2021); Nikolas Bowie & Daphna Renan, *The Supreme Court Is Not Supposed To Have This Much Power*, ATLANTIC (June 8, 2022), https://www.theatlantic.com/ideas/archive/2022/06/supreme-court-power-overrule-congress/661212/ [https://perma.cc/TR44-HXHL (staff-uploaded, dark archive)].

the Presidential Commission on the Supreme Court of the United States,[8] on which Dellinger served with distinction in the last year of his storied and expansive life.[9] The critiques typically emphasize the authority of Congress or the people themselves to determine the Constitution's meaning and lament the Court's displacement or trampling of more democratic forms of interpretation and action.

Given this ferment, might the Memo require an addendum? A follow-on statement of the President's independence from the Court? A memo that defends the President's authority to decline to follow Supreme Court opinions?[10]

I offer just such a hypothetical below. But before doing so, it will be valuable to consider the metes and bounds of Dellinger's 1994 Memo in a bit more detail. Identifying the constitutional theory that supports the Memo will help establish what would be continuous and what would be novel about a "declining to follow" addition to the genre of OLC opinions that define ex ante criteria to govern presidential assertions of constitutional meaning.

## I. THE PRESIDENT AND JUDICIAL SUPREMACY

The Memo grounds its claim that the President may decline to enforce unconstitutional laws enacted by Congress with the premise that, like Congress, "[t]he President is required to act in accordance with law." The Constitution is not just law, but higher law. The Memo then translates this principle into two distinct understandings of how the Constitution mediates the President's relationship with the other branches—a coequal relationship with Congress and a hierarchical relationship with the judiciary, especially the Supreme Court.

With respect to Congress, the Memo envisions a relationship of comity and equality. The Memo underscores that the President should treat Congress and its enactments with respect by not only presuming and construing congressional enactments to be constitutional,[11] but also by communicating any

8. One of the purposes of the Commission was to provide "an analysis of the principal arguments in contemporary public debate for and against Supreme Court reform." Exec. Order No. 14,023, 3 C.F.R. § 541 (2021).

9. I cochaired this Commission and worked closely with Walter, witnessing firsthand his wisdom, pragmatism, and deep commitment to serving the public interest. He and I did not discuss the nonenforcement issues I raise in this Essay, and the ideas expressed, along with their flaws and limits, are my own. For discussion of arguments in favor of an authority to decline to follow Supreme Court opinions, see *infra* notes 23–31.

10. For discussion of arguments made by scholars and activists concerning whether and how the President should refuse to implement or apply Supreme Court decisions he believes are wrong, see *infra* notes 26–31.

11. Dellinger Memo, *supra* note 1, at 200 (explaining that a presumption favoring enforcement respects the role each of the branches plays in our constitutional system and affords "great deference to the fact that Congress passed the law and believed it was upholding its obligation to enact constitutional legislation").

constitutional concerns the President might have in writing while legislation is pending.[12] This constitutional collegiality rests on a presumption of good faith—an assumption that Congress, too, understands itself to be bound by the higher law of the Constitution (comity). The President nonetheless retains independent judgment and the authority to decline to enforce a duly enacted law that he has determined is unconstitutional (equality), but only after a contextual analysis that carefully weighs the effects of enforcement on constitutional rights and executive branch power.[13] The Memo emphasizes that nonenforcement might be especially warranted to resist encroachments on presidential power, though historical examples of nonenforcement by no means have been limited to such contexts.[14] In its effort to integrate the principles of comity and equality, the Memo thus attempts to align a departmental vision with the obligations embodied in the Take Care Clause,[15] namely that the President is constitutionally assigned the duty to faithfully execute the laws Congress has enacted.[16] As Dawn Johnsen has put it in her writing on the question of nonenforcement: "[I]n making non-enforcement decisions, the President should be respectful of the functions and competencies of the other branches and should not seek to impose his own views *to the exclusion* of those in Congress and the courts."[17]

The way the Memo conceptualizes the Executive's relationship to the Supreme Court, however, embodies judicial primacy. The Memo doesn't just assume that the Court has acted in constitutional good faith or offered an

12. *Id.* at 202.

13. *Id.* at 200.

14. The classic and often-cited example of the President's refusal to enforce unconstitutional laws is President Jefferson's refusal to enforce the Sedition Act of 1789. In our contemporary era, the authority has been more theoretical than real, though recent administrations have been willing to refuse to defend in court those statutes the President has determined to be unconstitutional, even as the Executive continues to enforce them in order to ensure judicial resolution of the constitutional controversy. *See, e.g.*, Letter from Eric H. Holder, Jr., Att'y Gen., U.S. Dep't of Just., to the Hon. John A. Boehner, Speaker, U.S. House of Reps. (Feb. 23, 2011) ("[T]he President and I have concluded that classifications based on sexual orientation warrant heightened scrutiny and that, as applied to same-sex couples legally married under state law, Section 3 of DOMA is unconstitutional.").

15. U.S. CONST. art. II, § 3 ("[H]e [the President] shall take Care that the Laws be faithfully executed.").

16. Critiques of the "duty to enforce" and the related "duty to defend" are well known and rely heavily on a theory of departmentalism. According to Devins and Prakash, the supposed duties mute a crucial check on unconstitutional laws—a check justified in part by the President's election by a national constituency. On their view, nothing in the Constitution anoints one branch the supreme expositor of the Constitution. Unconstitutional laws are void, and the Take Care Clause does not obligate the President to enforce them. *See* Neal Devins & Saikrishna Prakash, *The Indefensible Duty To Defend*, 112 COLUM. L. REV. 507, 522 (2012); Saikrishna Bangalore Prakash, *The Executive's Duty To Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1640 (2008).

17. Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7, 12 (2000) [hereinafter Johnsen, *Presidential Non-Enforcement*] (emphasis added).

interpretation of the Constitution entitled to respect. Instead, according to the Memo, "the Supreme Court plays a special role in resolving disputes about the constitutionality of enactments."[18] The President must abide by the Court's precedents, and if he thinks it probable the Court would sustain a statute, he should enforce it.[19] The President may decline to enforce where a statute is *plainly* unconstitutional, but he can never countermand Supreme Court precedent. The only discretion the President might have in relation to Supreme Court opinion is to fill in gaps in its jurisprudence or predict what the Supreme Court's judgment might be on an evolving question, not to assert a counter-constitutional understanding: for example, if the President can determine it probable that the Court would agree a statute is unconstitutional, he can decline to enforce.[20] This understanding of the President's relationship with the Court ultimately emanates from the view that constitutional questions should be resolved by the courts[21]—a principle that justifies the presumption in favor of enforcement in order to ensure constitutional questions come before the courts for their final word.

The Memo's articulation of the relationship between the Executive and the judiciary has not gone uncritiqued. Johnsen, for example, has argued that the Memo ties the nonenforcement decision too closely to predictions about the Court's future decision-making to the exclusion of other probative factors.[22] Where the Court's ultimate view may be unknown or the subject of reasonable disagreement, she argues, the President ought to consider these other factors in the course of exercising his independent judgment. But again, this critique and its implication (that the President might decline to enforce a law he believes is unconstitutional in the absence of clear support from Supreme Court case law) still focuses on the Executive-congressional relationship and the Supreme Court's mediation of it, not the Executive's direct relationship with the Court itself.

In thinking through the President-Court relationship, we might begin from a bedrock rule of law premise, articulated by Tom Merrill in this way: that "[t]here is widespread agreement that the executive has a legal duty to enforce valid final judgments rendered by courts, regardless of whether the executive agrees with the legal analysis that forms the basis for the judgment."[23] But how

18. Dellinger Memo, *supra* note 1, at 200.

19. *Id.*

20. *Id.*

21. *Id.* at 200–01.

22. Johnsen, *Presidential Non-Enforcement*, *supra* note 17, at 45–46.

23. Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 46 (1993). The extent to which executive branch actors comply with court decrees as an empirical matter is another matter. *See, e.g.*, Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685,

far does this obligation extend? Does it require only respect for the judgment as it applies to the parties in the case, or is the Executive also bound in other similar instances by the interpretation or reasoning advanced by the Court in its opinion supporting the judgment?[24] Other scholars, such as Larry Kramer, point to instances in American history in which the Executive simultaneously has abided by court judgments as to the parties in a case but eschewed the Court's reasoning as general guidance.[25]

Clarion calls to rethink the lock held by judicial supremacy on the Executive Branch appear periodically, from across the ideological spectrum. James MacGregor Burns, for example, concludes his history of President Franklin D. Roosevelt's ("FDR") confrontation of the Supreme Court through the Court-packing plan with a broadside against judicial supremacy and the Court's invalidation of congressional statutes. Writing from the vantage point of Barack Obama's election to the presidency, he calls for political leadership to confront a Supreme Court that "has far more often been a tool for reaction, not progress."[26] He argues further that none of the Court-curbing measures debated throughout history and that would require Congress to act have blunted the rise of judicial supremacy—not threats to tinker with the number of justices, not

687–89 (2018) (documenting "imperfect" and "fraught" compliance by agencies with court orders and finding that courts will issue contempt citations, but that imposition of monetary fines is less likely).

24. *Cf.* Merrill, *supra* note 23, at 57–58.

> [T]he allocation of power [to federal courts] to decide cases and controversies could be consistent with a variety of understandings. It could mean that judicial judgments will be enforced by the other branches only if they agree with the legal and factual basis of those judgments. . . . Or, it could mean that judicial judgments are binding on other branches, but judicial precedents are not. Or, it could mean that both judgments and precedents are binding on the other branches. . . . The point is that any one of these three possibilities is consistent with the allocation of power to the judiciary to decide cases and controversies. The effect of that allocation of power must be resolved by means other than an analysis of constitutional text.

*Id.*

25. *Presidential Commission on the Supreme Court of the United States* 5–6 (2021) (statement of Larry Kramer, President, William & Flora Hewlett Foundation) (describing existing tools to resist judicial supremacy as including "the Executive's power to refuse to enforce judicial mandates—not in the particular case but as general guidance, as with Andrew Jackson's 1832 bank veto, and Abraham Lincoln's issuing passports to free Blacks despite *Dred Scot*'s holding that Blacks could not be citizens"). The one known historical example of a President asserting authority to ignore a court judgment is President Lincoln's refusal to accept the judgment in *Ex parte Merryman*, 17 F. Cas. 144 (1861), in which Justice Roger Taney, while sitting as a circuit judge, held that the President did not have the power to suspend the writ of habeas corpus or authorize a military official to do so, and that a person arrested by the military must be turned over immediately to civil authorities. For a discussion of this episode, see Michael Stokes Paulsen, *The* Merryman *Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 88–99 (1993); Seth Barrett Tillman, Ex Parte Merryman*: Myth, History, and Scholarship*, 224 MIL. L. REV. 481, 481–506 (2016).

26. JAMES MACGREGOR BURNS, PACKING THE COURT: THE RISE OF JUDICIAL POWER AND THE COMING CRISIS OF THE SUPREME COURT 252 (2009).

failed efforts to amend the Constitution to allow popular votes on recalling Supreme Court decisions, not "dead-on-arrival" proposals to end life tenure.[27] To meaningfully challenge judicial supremacy, he argues, the President should act. The President should declare when he does not accept the Supreme Court's verdicts and pledge in those instances to "faithfully execute" those laws that the Court has invalidated, unless and until the Constitution has been amended to expressly call for judicial supremacy.[28] Judicial supremacy is not in the Constitution, MacGregor Burns emphasizes, and it is "emphatically the province and duty of the American people . . . to say what the [law] means," *pace* John Marshall.[29]

In a recent "open letter to President Biden" published on a legal blog, Aaron Belkin, a vocal critic of today's Supreme Court, and Mark Tushnet, a longtime academic critic of judicial supremacy, call on the President to ignore "gravely mistaken" interpretations of the Constitution, contending that the threat of the current "MAGA" justices is so extreme as to justify bypassing congressional participation in resisting the Court's pronouncements, including on the ground that accountability ultimately will be with the people.[30] In his testimony before the Supreme Court Commission, Michael Stokes Paulsen synthesizes his academic work on the subject and emphasizes that the most important way to reform the Court is not to weaken it as an institution, but rather for the other branches to assert themselves. In principle, he argues, it is legitimate for the Executive Branch to decline to follow judicial decisions that conflict with the Executive's "good faith" understanding of the Constitution.[31]

27. *Id.* at 252–53.

28. *Id.* at 253.

29. *Id.* at 259.

30. *See* Aaron Belkin & Mark Tushnet, *An Open Letter to the Biden Administration on Popular Constitutionalism*, BALKINIZATION (July 19, 2023), https://balkin.blogspot.com/2023/07/an-open-letter-to-biden-administration.html [https://perma.cc/Z2TT-RKVU]. For a defense of this letter and a further elaboration of the history behind executive disobedience of the Supreme Court, see Ryan Doerfler & Samuel Moyn, *We Are Already Defying the Supreme Court*, DISSENT, Winter 2024, at 109–16 [hereinafter Doerfler & Moyn, *Already Defying*] ("Conservatives and liberals alike . . . have contributed to a popular narrative of a 'norm of compliance' across U.S. history, a narrative that functions to make disobedience seem unthinkable. But this narrative is false. It obscures the reality of ordinary noncompliance that has, past and present, defined the scope of judicial authority.").

31. *See Presidential Commission on the Supreme Court of the United States* 4–5 (2021) (testimony of Michael Stokes Paulsen, Distinguished University Chair, University of St. Thomas School of Law). Among other sources of support for this proposition, Stokes Paulsen cites Federalist 78 and its observation that the efficacy of judicial judgments depends on the cooperation of the executive arm, which might be withheld, implying the prospect of the Executive's nonimplementation of Supreme Court judgments based on *constitutional* (not judicial) supremacy. *See* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217, 245–52 (1994); *see also* Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1321–24 (1996) (noting that "judicial judgments have never been regarded as absolutely final by the courts themselves" and that the power of the president to refuse to enforce judgments has

## II. PRESIDENTIAL AUTHORITY TO DECLINE TO FOLLOW SUPREME COURT OPINIONS—A HYPOTHETICAL MEMO

But what, exactly, would an OLC memo entitled *Presidential Authority To Decline To Follow Supreme Court Opinions* look like? Consider the following (brief) formulation, intended to accomplish the feat of Dellinger's nonenforcement memo. This hypothetical memo would begin from an "unassailable premise" that the Supreme Court is equal but not supreme in its interpretations of the Constitution. It might then proceed to fashion a set of criteria to govern "declining to follow" that would make it a rare practice in order to preserve interdepartmental stability while still asserting as a basic part of our understanding of the Constitution the idea that all branches, not least the political ones, have authority to say what the Constitution means. To mirror the 1994 Memo, I structure this hypothetical one around the enforcement of congressional statutes, attempting to define the circumstances that would justify what MacGregor Burns advocates—an Executive that continues to enforce a law that the Court has declared unconstitutional. But, as I explore in conclusion, presidential resistance to the Supreme Court could also take other, less aggressive forms.

* * *

> Memorandum Opinion for Counsel to the President, Presidential Authority To Decline To Follow Supreme Court Opinions (2024).
>
> As we have established in the past, "[t]he President's office and authority are created and bounded by the Constitution; he is required to act within its terms. Put somewhat differently, in serving as the executive created by the Constitution, the President is required to act in accordance with the laws—including the Constitution, which takes precedence over other forms of law." Presidential Authority To Decline To Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 200 (1994). The President is also bound to "take Care that the Laws be faithfully executed." U.S. Const., art. II, § 3. These complementary obligations mean that the President should simultaneously presume that Congress acts in constitutional good faith when it legislates and assess the laws the Executive enforces for their consistency with the Constitution.

historical antecedents); Prakash, *supra* note 16, at 1674 (critiquing the Memo's "unwarranted exaltation of the Supreme Court" and arguing that "the Constitution never makes the president . . . second fiddle to the Supreme Court; nor does it suggest that the only way the President can raise constitutional objections is through constitutional filters and doctrines announced by the Judiciary").

> When the Supreme Court has determined by its own lights that an enactment of Congress violates the Constitution and must therefore give way to fundamental law, its decision is entitled to respect and consideration by the other coequal branches of government. But the President's own duties to the Constitution supersede this comity. Where the President determines that the Supreme Court has made a clear or egregious error in its application of the Constitution to a statute duly enacted by the political branches, he must nonetheless enforce the Court's judgment as to the parties in the case. Abiding by judicial orders in this respect is a cornerstone of the rule of law, as much for the President as for any other executive branch official. But where the President has determined that the Court has made a clear and egregious error in its constitutional understanding, he may decline to follow the Court's opinion as precedent and continue to enforce, in other cases, the law both he and Congress have determined in their considered judgment conforms with the Constitution.
>
> We believe the Court's error must be clear and egregious not because reasonable disagreement over the meaning of the Constitution is rare, nor because the Supreme Court has a superior capacity to the Executive Branch or Congress to discern the Constitution's requirements. Instead, the stability of the legal system depends upon the branches working together cooperatively. This stability also requires the Executive Branch, which alone has the power to apply the law's coercive effects, to respect the constraints of law as imposed by an independent judiciary. Just as we would expect the Court to grant Congress a presumption of good faith in its application of the Constitution to its legislative enactments, the President should approach Supreme Court judgments with a presumption of good faith and refrain from rejecting the Court's considered conclusions merely because they do not accord with the President's preferred understanding of constitutional meaning. *See* Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 Law & Contemp. Probs. 7, 12 (2000) (arguing that nonenforcement should be justified not just by the President's preferred interpretation but by an "objective" reading of the Constitution). Indeed, scholars who have defended the President's authority to refuse to follow Supreme Court opinions in certain contexts argue that such authority should be cabined with a demanding standard of proof—that to decline to follow the Supreme Court, the President must conclude that the Court's judgment was "constitutionally erroneous." *See* Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 Iowa L. Rev. 1267, 1325 (1996). In declining to follow certain Supreme Court opinions that meet such a standard, the President not only gives voice to his own understanding of the Constitution, but also shows respect for the conclusions of the co-

equal branch of Congress, which the Executive long has presumed operates in constitutional good faith, too. *See* 18 Op. O.L.C. at 200.

While the general proposition that in some situations the President may decline to follow Supreme Court opinions is unassailable, it does not offer sufficient guidance as to the appropriate course in specific circumstances. We offer the following propositions to guide the inquiry into whether the Supreme Court has made a clear and egregious error that justifies the President "declining to follow," and continuing to enforce, for your consideration:

1. Declining to follow might be warranted where the Supreme Court's invalidation of a statute is based on a novel legal theory that rejects longstanding precedent or approaches the interpretation of the Constitution in unconventional ways.

2. Where concrete and strong evidence of Congress's particular understandings of its constitutional authority for enacting a statute exists, especially when it is contemporaneous to the statute's enactment, the President may find greater cause for privileging Congress's understandings over the Court's.

3. Where members of the contemporary Congress express strong opposition to the Supreme Court's invalidation of its own enactments or the enactment of a prior Congress, particularly by holding hearings or debating responsive legislation on the matter, the President may take special heed of those views, including because they may also reflect considered public opinion on the question.

4. As an alternative to declining to follow and continuing to enforce, the President may prioritize collaboration with Congress to develop legislation to respond to the Court's invalidation of a statute. Where the challenge to the Court's constitutional holdings comes from both political branches working together, the stability of the system is more likely to be preserved, and the resulting constitutional understanding more likely to derive legitimacy.

5. Short of new legislation, the President and executive branch officials may wish to identify unsettled aspects of or unresolved questions within the Supreme Court's analysis and bring their own understandings of the Constitution's reach to bear in the implementation of their duties. Much as we have said that the President may decline to enforce a law when he has concluded that new developments in Supreme Court doctrine would

> support his own constitutional interpretation, 18 Op. O.L.C. at 200, there may be circumstances in which it would be appropriate for executive branch officials, in consultation with the Attorney General or the President, to apply novel constitutional understandings to the implementation of statutory provisions, including to save them from likely invalidation by the Court.
>
> Because enforcing a law that the Supreme Court has declared unconstitutional surely would lead to conflict in the courts and would produce confusion with the public, this exercise of the President's constitutional authority likely would be appropriate only in very limited circumstances. The comity on which our system of separated powers depends calls for efforts short of continuing to enforce whenever possible to articulate good faith disagreement over the meaning of our fundamental law.

* * *

For an opinion of this sort ever to come into being, the President and other high-level officials would have to make high-stakes political calculations. The White House would have to choose to ask OLC for such an analysis—a risky political proposition. To avoid an opinion that reasserts OLC's longstanding acceptance of judicial supremacy, backdoor talks of some sort would have to occur—not to elicit a precommitment from OLC but to assess the Office's openness to tempering its obeisance to the courts.

More to the point, the genre of an OLC opinion is unlikely to suit the sort of President who would contemplate declining to follow by continuing to enforce a law the Court has declared invalid. A President prepared to take such bold action may not want or even heed the sort of legalistic and cautious advice OLC is likely to produce, not least because the decision to take enforcement action contrary to the Supreme Court would be difficult to justify or manage through the application of lawyerly criteria susceptible to consistent application across cases. Actually declining to follow also would require the President to make a fraught prediction about public confidence not typically in the domain of constitutional lawyers *qua* lawyers. Determining whether the public would support his vision and regard the continued enforcement of the law as legitimate, or instead be horrified by his rejection of the constraints imposed by the judiciary on executive and congressional authority demands judgment, not analysis, from the President.[32] The historical examples commentators invoke to

32. *Cf.* Doerfler & Moyn, *Already Defying*, *supra* note 30, at 115 ("[D]efiance, both as a notion and as a tactic, is a site of moral judgment and political struggle.").

support presidential defiance of the Supreme Court arose during presidencies that we now understand as having confronted existential threats to the constitutional and political order—FDR during the Great Depression or Lincoln during the Civil War. The eventual "resolution" of these conflicts underscores that aggressively taking on the Court depends upon moral leadership and credibility, not lawyerly line drawing.

From the perspective of OLC and the Department of Justice as a whole, the declining-to-follow proposition would immediately raise a host of practical questions that might stymie efforts to develop a framework for the opinion at the outset. What as a matter of actual practice would it mean to continue to enforce laws declared invalid by the Supreme Court? In the case contemplated by the 1994 Memo—of declining to enforce a statute that remains on the books—the Executive simply would refrain from bringing prosecutions or enforcement actions, which might prompt congressional hearings and political controversy but not significant conflict on the ground; individuals simply would not be caught up in the law's application.[33] But enforcement or implementation of a law declared unconstitutional requires the participation of governmental bureaucracies and institutions, including the courts themselves, in the application of legal requirements or sanctions that the judicial branch has declared illegitimate. An administration that chose to continue operating as if the Supreme Court had not ruled would become embroiled in conflict in the lower courts the minute predictable challenges arose to the refusal to follow. Perhaps the ensuing litigation could aim to change the Court's mind and give shape to the constitutional dialogue scholars advocating departmentalism often prize. But the prospect of the Court's change of heart would seem dim in the near to medium term, and the credibility of the Department of Justice (and other involved enforcement agencies) could be severely damaged amidst the inevitable cries of constitutional crisis and executive despotism from congressional hearing rooms and the media.[34]

The calls for the Executive to openly reject Supreme Court precedent also raise challenging questions about the meaning and scope of the departmentalist

33. A nonenforcement judgment could unsettle reliance interests; if private actors continue in behavior that under the law would be subject to prosecution, once a new administration with a different conception of the statute or nonenforcement arises, those actors may face heightened liability.

34. Burns acknowledges these risks but defends the refusal to follow nonetheless as a "test of leadership, of the President's ability to mobilize followers behind a transformational goal," in service of a "long, boisterous, and perhaps confusing debate on [the Court's] role in twenty-first-century Americ[a]." BURNS, *supra* note 26, at 254. According to one arguably cynical view of the duty to enforce, OLC and the Department of Justice invoke it regardless of an administration's substantive worldviews in order to insulate the government and its lawyers with an account of their role as apolitical and bound by law, making them harder to attack or criticize. *See* Devins & Prakash, *supra* note 16, at 545–49. For a (hopefully) less cynical exploration of the institutional interests of the United States government as reflected in its commitment to consistency in legal opinions, see LEVINSON ET AL., *supra* note 2, at 32–39.

theory of constitutional interpretation, first and foremost whether defiance of the Court is better and more legitimate coming from Congress than the Executive. Put slightly differently, it is one thing for Congress to respond to the Court's invalidation of one of its statutes with a reenactment of the measure, or to reject the Court's reading of a constitutional right by protecting that same right as a matter of statutory law. But it is quite another to have the President decide to privilege the status quo ante and to go about enforcing the law as if the Supreme Court had never spoken. After all, critiques of judicial supremacy typically revolve around the Court's usurpation of the representative legislature given its role as the agent of the people themselves.[35] In his oft-cited response to the Supreme Court's *Dred Scott* decision, Abraham Lincoln defended the constitutional judgment of *Congress* against "irrevocably fix[ing]" the Constitution's meaning by decisions of the Supreme Court, offering that this form of judicial supremacy would mean that "the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal."[36] Legislative defiance of the Court would entail open and ongoing deliberation by myriad government officials, significant coalition building across parties and constituencies, and the buy-in of the President. But presidential defiance could occur by the fiat of a small cadre of officials, or after extensive, but largely hidden, deliberation within the walls of the White House and the Department of Justice.

The prospect of a President continuing to enforce laws the Supreme Court has invalidated thus implicates a critical separation of powers question of our time: whether we have more to fear from the risk of presidential lawlessness, or even despotism, than from a Supreme Court bent on curbing the powers of the political branches. Implicit in the Memo's acceptance of judicial supremacy is a view that an assertive Executive might be a greater danger than an overpowerful Court—a view expressed more explicitly in subsequent congressional testimony signed by Dellinger and other veteran OLC attorneys during Congress's investigation of the Bush administration's assertion of inherent executive

35. Prakash and Devins, of course, based their argument in favor of nonenforcement on the premise that the President is elected by a national constituency. *See* Devins & Prakash, *supra* note 16, at 509–10. A large literature contests the claim that the President represents a national, as opposed to local, electorate and challenges the claim that the Executive Branch through elections is uniquely accountable. For representative examples, see Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2076–83 (2005); Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1265–77 (2009).

36. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 5, 9 (James D. Richardson ed., 1897); *see also id.* ("I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions must be binding in any case upon the parties to a suit as to the object of that suit, while they are also entitled to a very high respect and consideration in all parallel cases by all other departments of the Government.").

authority and justifications for torture.[37] A President declining to follow a Supreme Court opinion by continuing to enforce a popular law might claim the mantle of public resistance or fury, but that same fury could easily be distorted or misrepresented to advance a despot's agenda. And debates about the consequences of previous forms of presidential defiance of the Court remain very much alive; debates over whether FDR's very explicit confrontation with the Court through his political appeals and proposed Court-packing legislation saved or doomed his political project suggest uncertainty about the tactic, alongside the appetite (or nostalgia) for direct confrontation.[38]

## III. VARIETIES OF RESISTANCE

Even if we think it dangerous to contemplate the drafting of a "declining-to-follow" memo along the lines suggested above, the President can still infuse the work of the Executive Branch with his own constitutional vision short of the pointed confrontations that would come from declining to follow (an idea captured in hypothetical point five above).[39] Other forms of constitutional resistance and meaning-making remain possible through the way the President and executive officials exercise their multifarious forms of authority.

Dellinger himself described how the President speaks to the Court about "issues of social controversy" through the Solicitor General, who can take new positions on unresolved or ongoing debates when a new administration takes office,[40] using the lawyer's version of the bully pulpit that also remains available

37. *Restoring the Rule of Law*: *Hearing Before S. Comm. on the Judiciary*, 110th Cong. 29–31 (2008) (testimony of Walter Dellinger, Visiting Professor of Law, Harvard Law School) ("Under [the Bush] Administration, lawyers in the Executive Branch have wildly misinterpreted what the Constitution says about the extent of presidential authority, and as a result the President has erroneously claimed the authority to disregard laws that he is obligated to follow. . . . The Bush Administration . . . has repeatedly misused and abused the avoidance canon, twisting the meaning of statutes beyond recognition.").

38. *See* LAURA KALMAN, FDR'S GAMBIT: THE COURT PACKING FIGHT AND THE RISE OF LEGAL LIBERALISM, at x (2022) (challenging "conventional wisdom" by arguing "that hubris did not explain Roosevelt's actions" and that he could have anticipated some success for his Court-packing proposal); *see also Court Packing as History and Memory: Hearing Before the Presidential Comm. on the Supreme Court* 29 (2021) (testimony of Laura Kalman) (arguing that when considering measures such as Court enlargement, Presidents should proceed somewhat cautiously and "make sure the Court was not sending signals it was already shifting direction, to consult widely, take key Congressional leaders into his confidence, frankly explain himself to the public, prevent the opposition from framing the debate, and line up his interest groups").

39. *See* LEVINSON ET AL., *supra* note 2, at 40–48.

40. *See* Maureen Mahoney, Drew S. Days III, Walter E. Dellinger III, Seth Waxman & Theodore Olson, *Solicitors General Panel on the Legacy of the Rehnquist Court*, 74 GEO. WASH. L. REV. 1171, 1181 (2006); *see also* Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363, 366–67 (2003) (describing the Reagan administration's pursuit of a strong and independent presidential voice in the "development of the law" through strategies that included DOJ lawyers writing reports offering constitutional views and critiques

to the President himself to challenge Supreme Court judgments he believes to be wrong.[41] Relatedly, the government might find ways around, and through, Supreme Court opinions it considers to be overbroad or constitutionally unsound, including by adapting constitutional arguments it makes in lower courts to limit the reach of Supreme Court holdings,[42] or by advancing new interpretations of legal authorities in order to pursue an administration's own political and constitutional vision.[43] In response to Court decisions invalidating congressionally created structures designed to secure independence on the part of executive officials—a trend of late—the Executive might adopt its own internal accountability structures and seek to strengthen them through

of Supreme Court precedent they believed to be wrong). For my own account and defense of this practice, see Cristina M. Rodríguez, *Regime Change*, 135 HARV. L. REV. 1, 11–39 (2021).

41. For a recent example, see the White House statement responding to the Supreme Court's decision in *Students for Fair Admissions v. Harvard*, 600 U.S. 181 (2023). Press Release, White House, Fact Sheet: President Biden Announces Actions to Promote Educational Opportunity and Diversity in Colleges and Universities (June 23, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/29/fact-sheet-president-biden-announces-actions-to-promote-educational-opportunity-and-diversity-in-colleges-and-universities/ [https://perma.cc/AAD4-D5SP] ("Today, the Supreme Court upended decades of precedent that enabled America's colleges and universities to build vibrant diverse environments where students are prepared to lead and learn from one another. Although the Court's decision threatens to move the country backwards, the Biden-Harris Administration will fight to preserve the hard-earned progress we have made to advance racial equity and civil rights and expand educational opportunity for all Americans."). For another recent example, consider President Biden's rebuke of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), during his 2024 State of the Union Address. White House, Remarks of President Joe Biden–State of the Union Address as Prepared for Delivery (Mar. 7, 2024), https://www.whitehouse.gov/briefing-room/speeches-remarks/2024/03/07/remarks-of-president-joe-biden-state-of-the-union-address-as-prepared-for-delivery-2/ [https://perma.cc/3MDY-T2HR] ("In its decision to overturn Roe v. Wade, the Supreme Court majority wrote, 'Women are not without electoral or political power.' No kidding. Clearly, those bragging about overturning Roe v. Wade have no clue about the power of women in America.").

42. One potential example is presented by 8 U.S.C. § 1226(a), (c), which authorizes detention of noncitizens convicted of certain crimes pending the completion of their removal hearings. Lower courts, interpreting the Supreme Court's precedent in *DeMore v. Kim*, 538 U.S. 510 (2003), have held that prolonged detention under this mandatory provision in some circumstances violates the Due Process Clause. *See, e.g.*, Chavez-Alvarez v. Warden York Cnty. Prison, 783 F.3d 469, 474–75 (3d Cir. 2015); Reid v. Donelan, 819 F.3d 486, 502 (1st Cir. 2016), *opinion withdrawn on reconsideration*, No. 14-1270, 2018 WL 4000993 (1st Cir. May 11, 2018). These holdings could help justify a decision by the Executive Branch to provide bond hearings for detainees whose ongoing detention comes up against these arguable due process limits. For additional examples, see sources cited *infra* note 42. *See also* Peter L. Strauss, *The President and the Choices Not To Enforce*, 63 LAW & CONTEMP. PROBS. 107, 114–15 (2000) ("[A]s judicial definition is taking shape, there is nonetheless substantial legitimate room for the executive branch to assert and persist in its own readings of legal authority," but "[o]nce the courts have said what the Constitution means, an executive acts at his peril in taking actions, including enforcing statutes, that are inconsistent with that holding.").

43. *See* Rodríguez, *supra* note 40, at 48–58 (discussing recent examples from the Biden administration). For discussion of other forms of "defiance" of or "noncompliance" with the Supreme Court's decisions, see Doerfler & Moyn, *Already Defying*, *supra* note 30, at 110–11 (describing "everyday, ordinary noncompliance," including pursuit of workarounds in response to judicial decisions limiting executive authority, "political" enforcement, and bargaining with courts over the scope of remedies).

regulations and other entrenching devices.[44] Finally, the practices of so-called administrative constitutionalism embody a soft version of the departmentalist vision—a version of presidential and executive influence that can shape the law's interpretation in the absence of direct judicial review, or even in its shadow.[45] This form of constitutionalism reflects the Executive developing its own relationship with the Constitution that need not involve direct confrontation of a "gravely" or "egregiously" wrong Supreme Court opinion, but that might still entail the president and executive officials enforcing the Constitution by their own lights in circumstances where the Court has not opined or where the law might be in flux, including through narrow interpretations of the reach of the Court's judgments.[46]

44. One example of recent vintage is the adoption of regulations by the Department of Justice regarding the appointment and supervision of special counsels, promulgated to ensure a modicum of independence from presidential appointees in investigations of executive branch officials, in response to the lapsing of the independent counsel statute (upheld by the Supreme Court but subject to withering attack since *Morrison v. Olson*, 487 U.S. 654, 696–97 (1988)). It is perhaps naive to think that the President himself will fetter his authority, if the Court has struck down a statute in defense of it. *See* 28 C.F.R. § 600 (2023). After *Collins v. Yellen*, 141 S. Ct. 1761, 1788–89 (2021), invalidated the congressionally created structure of a single agency head insulated from removal by for-cause protections in the case of the FHA, a conclusion the Biden administration opposed in the Court, President Biden nonetheless chose to fire the head of another similarly structured agency on the authority of the Supreme Court's opinion. But further down the "chain," so to speak, instances of internal insulation from politics abound. *See* Constitutionality of the Commissioner of Social Security's Tenure Protection, 45 Op. O.L.C. *passim* (2021).

45. For foundational literature on this subject, see generally Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 167 U. PA. L. REV. 1699, 1706 (2019) (tracing how administrative agencies have served as primary interpreters and implementers of the Constitution throughout United States history, with the scale and scope of their "administrative constitutionalism" shifting over time, including by becoming less wide-ranging as judicial review rises). Specific examples of agencies' influence over constitutional meaning include the development of conceptions of privacy under the Fourth Amendment through post office policy, *see* Anuj C. Desai, *Wiretapping Before the Wires: The Post Office and the Rebirth of Communications Privacy*, 60 STAN. L. REV. 553, *passim* (2007), and the development of novel antidiscrimination rules by the FCC, *see* Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 804 (2010) (showing that "administrators are guided, but not always bound, by court doctrine"). For a defense of such practices, see Blake Emerson, *Affirmatively Furthering Equal Protection: Constitutional Meaning in the Administration of Fair Housing*, 65 BUFF. L. REV. 163, 169 (2017) ("Agencies can embrace the formal rules of constitutional jurisprudence, while deploying those rules in such an expansive or novel way that the justification for those rules is called into question. Administrative action then not only reflects but also refracts our constitutional order, shedding new light on our most basic legal commitments. Administrative practice can in such cases serve as a zone of constitutional experimentation."). For a critique, see Mila Sohoni, *The Administrative Constitution in Exile*, 57 WM. & MARY L. REV. 923, 970–73 (2016) (arguing that the inability of courts to opine on shifts in administrative constitutional norms or to channel public values in decision-making, combined with administrative law's "lack of public salience" all "place administrative constitutional change beneath the radar of public notice and public input" and harm the legitimacy of this practice).

46. For instance, not long after the Supreme Court struck down the affirmative action policies employed by Harvard and the University of North Carolina, the Departments of Justice and Education

And as suggested in my hypothetical OLC memo, a still more direct form of resistance to the Supreme Court in which the President might participate but that would not raise the specter of a freelancing despot remains available: expending political capital to help formulate a legislative response to the Court. Such legislation may still precipitate conflict in the lower courts and the public arena. But it is far more likely to be backed by public confidence than a presidential enforcement judgment standing alone, precisely because of the conjunction of the political branches in the response.

Neither this legislative approach, nor the more interstitial forms of resistance described above, would be as pointed or satisfying as calls for the President to ignore the Supreme Court, not least because a statutory response would be exceedingly difficult to achieve, particularly during times of divided, polarized, and dysfunctional government. But these are the ways, through the actual operations of government, that departmentalism might work. Perhaps a "declining-to-follow" memo that asserts the legitimacy of the practice but defines its availability in all but the rarest of circumstances would provide meaningful intellectual support for the departmental vision, and for that reason alone would be worth the effort. At the very least, we should continue to think as Dellinger did—about how to infuse into theory and practice a political conception of the Constitution that empowers all of the branches and the constituencies they represent to give the document its meaning for our time.

issued joint guidance to universities on how to continue building diverse student bodies, citing the calls by the President and Vice President after the Supreme Court's decision to "colleges, universities, and other stakeholders to seize the opportunity to expand access to educational opportunity for all students and to build diverse student bodies," and declaring that the Departments stood "ready to support institutions that recognize that such diversity is core to their commitment to excellence, and that pursue lawful steps to promote diversity and full inclusion." Letter from Kristen Clarke, Assistant Att'y Gen., U.S. Dep't of Just., and Catherine E. Lhamon, Assistant Sec'y for Civ. Rts., U.S. Dep't of Educ. 1 (Aug. 14, 2023), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20230814.pdf [https://perma.cc/F28G-3A4P (staff-uploaded archive)]. Though this "Dear Colleague" letter implicitly acknowledges the limits the Court placed in *SFFA v. Harvard* on the means universities can adopt, it nonetheless articulates powerfully the administration's support of constitutionally worthy (and even necessary) goals that the Supreme Court denigrated in its decision by dismissing them as unmeasurable. *See id.* at 2 ("Schools can consider the ways a student's background, including experiences linked to their race, have shaped their lives and the unique contributions they can make to campus. Students should feel comfortable presenting their whole selves when applying to college.").