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Book Review: Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative. by Christopher N. May

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PRESIDENTIAL DEFIANCE OF “UNCONSTITUTIONAL” LAWS: REVIVING THE ROYAL PREROGATIVE. Christopher N. May.¹ Westport, CT: Greenwood Press. 1998. Pp. xiv, 215. Cloth, \$59.95.

*J. Randy Beck*²

No President should lightly disregard an Act of Congress. The Constitution, which vests authority in the President, also directs him to “take Care that the Laws be faithfully executed.”³ Pragmatic considerations reinforce the constitutional duty. Perceived disobedience to a statutory command carries significant legal and political risks, a point illustrated by Andrew Johnson’s impeachment on the charge that he violated the Tenure of Office Act.⁴

But does the Constitution require the President to honor legislation he reasonably believes to violate the Constitution?⁵ Is enforcement of an unconstitutional statute consistent with the President’s oath to “preserve, protect and defend the Constitution of the United States”?⁶ “Yes,” answers Professor Christopher N. May to both questions in *Presidential Defiance of “Unconstitutional” Laws: Reviving the Royal Prerogative*.

Presidential Defiance contributes to an ongoing debate over the legitimacy of a practice that Judge Frank Easterbrook has termed “presidential review”—the asserted power of the President to refrain from executing a statute deemed to overstep con-

1. James P. Bradley Professor of Constitutional Law, Loyola University, Los Angeles.

2. Assistant Professor, University of Georgia School of Law. I would like to thank Michael Stokes Paulsen and especially my colleague Dan T. Coenen for many helpful comments on this book review.

3. U.S. Const., Art. II, § 3.

4. William H. Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* 226-27 (William Morrow and Co., 1992). By one vote, the Senate failed to convict Johnson in the impeachment trial. *Id.* at 234-35; John F. Kennedy, *Profiles in Courage* 139-40 (Harper & Row, 1961).

5. Andrew Johnson’s defense in the impeachment trial rested in part on the claim that the Tenure of Office Act was unconstitutional. (pp. 59-60) The Supreme Court later agreed with Johnson’s position that the statute was unconstitutional. *Myers v. United States*, 272 U.S. 52, 176 (1926) (“the Tenure of Office Act of 1867, in so far as it attempted to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate, was invalid”).

6. U.S. Const., Art. II, § 1, cl. 8.

stitutional boundaries.⁷ Updating an article first published in the *Hastings Constitutional Law Quarterly*,⁸ May has produced a useful piece of scholarship, likely to be cited in future legal tests of the presidential review power. Particularly helpful is May's compilation of 145 instances between 1789 and 1981 in which presidents questioned the constitutionality of a statute, and his investigation of the outcome of each incident. (pp. 53-139)

May argues that the Founders intended the President to implement Acts of Congress, notwithstanding constitutional scruples. The asserted presidential review power was not exercised until long after the founding, May contends, and is foreign to the Framers' world view, which was shaped by the history of relations between the English Crown and Parliament. Only reluctantly does May posit a potentially justifiable use of the presidential review power, in cases where presidential "defiance" is the only means of bringing a statute's constitutional defects to the attention of the courts. (pp. 143-49)

Notwithstanding the valuable contribution made by May's historical research, this reader remains unpersuaded.⁹ May convincingly maintains that the Framers denied the President any general power to dispense with the execution of properly-enacted laws—a power arguably asserted by the Nixon administration, for instance, when it claimed constitutional authority to "impound" funds appropriated by Congress.¹⁰ May's argument loses steam, however, when applied to a President's good faith refusal to implement a statute on constitutional grounds. I will begin with a brief recitation of one argument for presidential review and then consider some of May's principal counter-arguments.

7. Frank H. Easterbrook, *Presidential Review*, 40 Case W. Res. L. Rev. 905 (1989-90).

8. Christopher N. May, *Presidential Defiance of 'Unconstitutional' Laws: Reviving the Royal Prerogative*, 21 *Hastings Const. L.Q.* 865 (1994).

9. I should admit the potential for bias on my part, which arises from a nine-month stint with the Justice Department's Office of Legal Counsel (OLC). OLC deals frequently with questions of presidential power and has provided much of the legal advice underlying recent claims that the President may refuse to enforce unconstitutional statutes. See, e.g., U.S. Dept. of Justice, *Legal Opinion from the Office of Legal Counsel to the Honorable Abner J. Mikva* (Nov. 2, 1994) (reprinted in 48 *Ark. L. Rev.* 313 (1995)). Having been steeped in the outlook and culture of OLC at an impressionable age, I may find the theory of presidential review more inherently plausible than other readers.

10. Note, *Impoundment of Funds*, 86 *Harv. L. Rev.* 1505, 1512-16 (1973).

I

The theory of presidential review bears a strong family resemblance to judicial review, its doctrinal sibling. Consequently, one standard argument for presidential review tracks the justification for judicial review offered in *Marbury v. Madison*.¹¹ Chief Justice Marshall, in the final pages of his *Marbury* opinion, considers the sources of "law" a court may consult in resolving particular cases or controversies. A court may, of course, look to acts of the legislature that appear to govern the dispute. But does the Constitution also supply "law" applicable in judicial proceedings?

Marshall concludes that the Constitution represents "paramount law."¹² The Constitution is an act of the sovereign people, by which the powers of the legislature are defined and limited. Principles expressed in the document are therefore fundamental.¹³ In case of a conflict between a statute and the Constitution, the latter necessarily prevails. "[A]n act of the legislature, repugnant to the constitution, is void."¹⁴

Just as the courts must determine the applicable "law" in fulfilling their judicial functions, the President must undertake a parallel inquiry to perform his executive duties. The Constitution requires the President to "take Care that *the Laws* be faithfully executed."¹⁵ But which "laws" come within the President's constitutional duty of faithful execution? If we adhere to the reasoning of *Marbury*, then the Constitution itself contains "law" that the President must faithfully execute. Since "a legislative act contrary to the constitution is not law,"¹⁶ the President's duty of faithful execution does not extend to an unconstitutional statute.

Marshall buttresses his argument for judicial review by noting that a judge takes an oath to support the Constitution.

11. 5 U.S. (1 Cranch) 137 (1803). For arguments analogizing presidential review to judicial review, see Easterbrook, 40 Case W. Res. L. Rev. at 919-20 (cited in note 7); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Georgetown L.J. 217, 244-45, 257-62 (1994); Gary Lawson and Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 Iowa L. Rev. 1267, 1306 (1996).

12. *Marbury*, 5 U.S. (1 Cranch) at 178.

13. *Id.* at 176.

14. *Id.* at 177.

15. U.S. Const., Art. II, § 3 (emphasis added).

16. *Marbury*, 5 U.S. (1 Cranch) at 177.

This oath certainly applies, in an especial manner, to [judges'] conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!¹⁷

The same considerations would seem no less applicable to the President, who takes an oath to “preserve, protect and defend the Constitution of the United States.”¹⁸ According to advocates of presidential review, it would be equally immoral—and no less anomalous—to require a President who swears to “preserve, protect and defend the Constitution”¹⁹ to execute an unconstitutional statute.²⁰

II

In rejecting a presidential review power, May draws upon a history of conflict between the English Crown and Parliament prior to the founding of this country. Over the centuries, British monarchs asserted a prerogative power to “suspend” a statute—interrupting its legal effect—or to grant “dispensations,” which permitted designated persons to ignore the law. The courts upheld such assertions of executive power, concluding that Parliament lacked authority to restrict the royal prerogative.²¹

The dispute over these royal prerogatives reached a crisis when King James II began granting dispensations and suspen-

17. *Id.* at 180.

18. U.S. Const., Art. II, § 1, cl. 8.

19. *Id.*

20. In response to the argument based on the Oath Clause, May quotes David Strauss:

It is perfectly plausible to say that the Constitution sometimes requires the president to enforce a law that he considers, on balance, to be unconstitutional. If that is what the Constitution requires, then the oath requires the president to enforce the law—not to defy the law in pursuit of his own interpretation of the Constitution.

(p. 17) (quoting David A. Strauss, *Presidential Interpretation of the Constitution*, 15 *Cardozo L. Rev.* 113, 121-22 (1993)). Of course, a similar response could be made to Chief Justice Marshall's argument in *Marbury*. If we read the Constitution as requiring judges to apply even laws they deem unconstitutional, then to do so would not violate the judge's oath. Marshall, however, saw no room for this accommodation, at least with respect to the judicial oath. Perhaps one could distinguish the executive from the judiciary based on the Take Care Clause (pp. 16-18), but it is not clear why the presidential oath should be treated as fundamentally different from the oath taken by judges.

21. See, e.g., *Godden v. Hales*, 89 Eng. Rep. 1050, 1051 (K.B. 1686) (the court concluded “that the Kings of England were absolute Sovereigns; that the laws were the King's laws; that the King had a power to dispense with any of the laws of Government as he saw necessity for it; that he was sole judge of that necessity; that no Act of Parliament could take away that power”).

sions of legislation directed against Catholics and Protestant dissenters. The result was the abdication of James II, the coronation of William and Mary and the promulgation of the English Bill of Rights.²² (pp. 3-8) Accusing James and his "evil counselors, judges, and ministers" of an attempt to "subvert and extirpate the protestant religion, and the laws and liberties of this kingdom," the English Bill of Rights abolished the suspending power and limited the dispensing power to situations where it was authorized by statute.²³

This English restriction of the royal prerogative, according to May, makes it improbable that the Framers intended to create a presidential review power. He outlines the argument in the first paragraph of chapter 1:

When the president refuses to honor a law on the ground that it is unconstitutional, he exercises a power indistinguishable from the royal suspending and dispensing powers—two of the most formidable prerogative powers once wielded by the British Crown. From the Middle Ages through the late seventeenth century, the kings and queens of England routinely suspended or dispensed with laws, often on the ground that a law was unconstitutional. After centuries of struggle between the Crown and Parliament, the suspending and dispensing powers were forever stripped from the English Crown by the Bill of Rights of 1689. In the United States, however, as the twentieth century draws to a close, presidents have increasingly claimed that they now possess the virtually identical power to ignore allegedly unconstitutional laws. (p. 3)

May contends that the Constitution grants no explicit power of presidential review and should not be read to create an implied executive power that was denied the British monarch. Therefore, argues May, the President has no power to refuse enforcement of the laws, even if he believes them to be unconstitutional. (pp. 11, 21)

The flaw in May's argument lies in the premise that the royal suspending and dispensing prerogatives are "indistinguish-

22. George Burton Adams, *Constitutional History of England* 351-61 (J. Cape, 1948). See generally Carolyn A. Edie, *Revolution and the Rule of Law: The End of the Dispensing Power, 1689*, 10 *Eighteenth Century Stud.* 434 (1977); Donald E. Wilkes, Jr. and Matthew Kramer, *The Glorious Revolution of 1688* (visited Feb. 12, 1999) <<http://www.lawsch.uga.edu/~glorious/>>. I would like to thank my colleague, Donald E. Wilkes, Jr., for lending me his collected research materials on the suspending and dispensing powers.

23. 1 W & M, Sess. II, ch. 2 (1689).

able” from or “virtually identical” to a power of presidential review.²⁴ The English suspending and dispensing prerogatives were general powers that could be exercised as the monarch saw fit in the name of the public good.²⁵ As one defender of these prerogatives argued, “there must be some Power always in being, to Suspend, or Dispense with such Law, or Laws, as *Publick-Good, the Safety of the People, or emergent Necessity require.*”²⁶ Thus, the suspending and dispensing prerogatives gave the Crown broad power to supersede policy judgments of Parliament on policy grounds. By contrast, defenders of presidential review make no claim that the President may ignore a statute because of a difference of opinion with the legislature. Rather the President must honor a congressional enactment unless it contains an identifiable constitutional violation. The theoretical justification for presidential review limits its application to instances where Congress purports to exercise authority it does not possess. Thus, even if we reject (as we surely should) a sweeping presidential power to suspend or dispense with laws on policy grounds, it does not follow that we must reject the very different and far narrower power to refuse execution of unconstitutional statutes.

To prove the point, we need only revisit our analogy to judicial review. The Founders did not intend the federal courts to exercise a general power of suspending or dispensing with statutes for reasons of policy.²⁷ Nevertheless, assuming *Marbury* is rightly decided, the Founders *did* intend the courts to exercise the lesser power of judicial review. We thus may agree with May

24. See Lawson and Moore, 81 Iowa L. Rev. at 1306 (cited in note 11) (critiquing an earlier version of May's work by distinguishing a general power of suspension from a presidential review power limited to unconstitutional statutes).

25. There were certain exceptions to the suspending and dispensing powers. For instance, the monarch could not dispense with a prohibition against an act *malum in se*. (p. 6); Sir Matthew Hale, *The Prerogatives of the King* 178 (D.E.C. Yale, ed., Selden Society, 1976); Richard Langhorne, *Considerations Touching the Great Question of the King's Right in Dispensing with the Penal Laws* 1 (Garland Publishing, Inc., 1976); Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown; and the Relative Duties and Rights of the Subject* 95-96 (J. Butterworth and Son, 1820). But such exceptions in no way altered the basic character of the suspending and dispensing powers, which, when they were applicable, afforded the Crown a general authority to disregard laws as a matter of discretionary judgment.

26. Langhorne, *Considerations Touching the Great Question of the King's Right in Dispensing with the Penal Laws* at 3 (cited in note 25) (emphasis added).

27. Alexander Hamilton anticipated that the judiciary would “take no active resolution whatever” in the creation of policy, exercising “neither force nor will but merely judgment.” Federalist 78 (Hamilton) in Wilmoore Kendall and George W. Carey, eds., *The Federalist* 464 (Arlington House, 1966).

that the Framers denied the President a general power to suspend or dispense with statutes on policy grounds, without accepting his conclusion that they thereby foreclosed a *Marbury*-like power of presidential review.

In any event, while May is surely correct that the relationship between the Crown and Parliament influenced the Framers' deliberations regarding the powers of the President, we must guard against too readily transplanting the rules of one constitutional system into the other. The United States Constitution, after all, departs in significant respects from the British model. One critical difference is that the unwritten British constitution rests upon a principle of "Parliamentary sovereignty," under which no one may review a properly-enacted statute. As explained by a standard treatise on English Constitutional Law:

The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament [defined as "the Queen, the House of Lords, and the House of Commons . . . acting together"] has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.²⁸

Under this principle, no one may invalidate an act of Parliament because every person in England occupies a position inferior to Parliament in the constitutional hierarchy. There is no power of executive review in England for precisely the same reason that, in that nation, there is no power of judicial review. In our system, by contrast, judicial review is a vigorous institution. This fact alone casts a shadow over the historical and analogical argument based on English practice.

The deeper point is that the American Constitution reflects a fundamentally different political philosophy than its English forerunner. The United States Constitution implements a principle of *popular*, rather than parliamentary sovereignty. In this country, neither Congress nor any other collection of government officials is sovereign. "We the people" are. The institution of presidential review, like the institution of judicial review, flows from this principle of popular sovereignty. When the courts refuse to apply an unconstitutional statute, they are

28. A.V. Dicey, *Introduction to the Study of the Law of the Constitution* 39-40 (Macmillan, 10th ed. 1959).

merely honoring the constitutional directives of the sovereign people. It is for this reason, as Hamilton explains in Federalist No. 78, that recognition of a judicial review power does not “suppose a superiority of the judicial to the legislative power.”²⁹ As he explains:

It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.³⁰

By the same token, the people hold sovereignty over the executive. For this reason, in carrying out his executive functions, the President owes a higher allegiance to the will of the people expressed in the Constitution than to the will of Congress expressed in a statute. In short, the difference between the British principle of Parliamentary sovereignty and the American principle of popular sovereignty provides a powerful theoretical justification for recognizing a presidential review authority under our constitutional structure.

III

May’s argument from English history is supplemented by inferences from the drafting and ratification of the United States Constitution. His strongest argument rests on the Framers’ conception of the President’s veto power. The Framers viewed the veto as the primary shield that protected the President against constitutional encroachments by Congress. (p. 13) Nevertheless, they rejected James Wilson’s proposal for an absolute veto, unmoved by his argument that “without such a Self-defence the Legislature can at any moment sink [the Executive] into non-existence.”³¹ (p. 13)

Although the Framers intended the veto to protect against unconstitutional acts of the legislature, they purposely qualified the veto power. The constitutional override mechanism permits Congress, by a two-thirds vote in each house, to reject any constitutional argument supporting a presidential veto.³² May ar-

29. Federalist 78 at 468 (cited in note 27).

30. Id. at 467-68.

31. Quoting 1 Max Farrand, *The Records of the Federal Convention of 1787* at 98 (1966).

32. U.S. Const., Art. I, § 7, cl. 2.

gues that recognition of a presidential review power would effectively give the President an absolute veto over acts deemed unconstitutional, despite the Framers' rejection of an absolute veto power. (pp. 11-15)

May's veto-power argument runs into much the same problem that undermined his argument based on the royal prerogative. The historical materials establish nothing more than a decision by the Framers to reject an absolute presidential veto applicable to all legislation. Yet presidential review authority is significantly less intrusive on lawmaking powers than such an absolute veto. Gary Lawson and Christopher Moore, responding to an earlier version of May's work, suggest two bases on which an absolute veto can be distinguished from a presidential review power.³³ First, the President may only ignore laws that he in good faith believes to be unconstitutional. An absolute veto would permit the President to negate legislation for any reason whatever.³⁴ Second, if a President ignores a statute, believing it to be unconstitutional, it remains on the books and might be enforced upon election of a subsequent President with differing constitutional views. An absolute veto would deny the legislation any possible future effect. To these arguments we may add a third significant difference between presidential review and an absolute veto. The President may only exercise a veto power with respect to a complete bill. Presidential review permits the President to act more surgically, ignoring only particular provisions of a statute that violate the Constitution while otherwise implementing the legislation. Since an absolute veto is a much greater intrusion on the lawmaking power than a presidential review power, the Framers' rejection of the former does not imply rejection of the latter.³⁵

33. Lawson and Moore, 81 *Iowa L. Rev.* at 1306 (cited in note 11).

34. While the Framers viewed the veto as an important protection against unconstitutional legislation, this is not its only purpose. It can also be exercised on policy grounds. As Hamilton explained, the President's veto serves "to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority" of Congress. *Federalist* 73 at 443 (cited in note 27).

35. Indeed, it could be that one basis for rejecting an absolute veto was the expectation that the President would ignore statutes encroaching on his constitutional authority, though I am aware of no direct evidence to support this view. The availability of a presidential review power answers the concern expressed by James Wilson that Congress could "at any moment sink [the Executive] into non-existence." See *supra* text accompanying note 31. Wilson subsequently gave a speech in the Pennsylvania ratifying convention indicating that the proposed Constitution would include a presidential review power, permitting the President to "shield himself" from unconstitutional statutes. Merrill Jensen, ed., 2 *Documentary History of the Ratification of the Constitution* 450-52

May's search for the Framers' views on presidential review is hindered by the paucity of discussion of the issue in the founding generation. The only direct evidence—contained in a speech by James Wilson at the Pennsylvania ratifying convention—cuts against May's position. As Wilson, a member of the Constitutional Convention and later a Justice of the Supreme Court, explained:

[T]he legislature, when acting in that capacity, may transgress the bounds assigned to it, and an act may pass, in the usual *mode*, notwithstanding that transgression; but when it comes to be discussed before the judges—when they consider its principles and find it to be incompatible with the superior power of the Constitution, it is their duty to pronounce it void. . . . *In the same manner, the President of the United States could shield himself and refuse to carry into effect an act that violates the Constitution.*³⁶

May dismisses Wilson's comments as "a voice in the wilderness."³⁷ (p. 27) This characterization appears, ironically, in the course of an argument that the absence of a presidential review power should be inferred from "the *silence* of the Anti-Federalists," a silence "overwhelming in its implications." (pp. 26-29) (emphasis added) Because the Anti-Federalists sought to portray the President as an elected monarch, May reasons, they would have seized on any credible argument for presidential review as a reason to oppose the Constitution.³⁸ (p. 28) But even a solitary statement by James Wilson, one of the constitutional Framers, seems a stronger basis for drawing inferences about the meaning of the document than the silence of the Constitution's opponents. Wilson's parallel advocacy of judicial review and presidential review offers contemporaneous evidence that such an executive power comports with the work of the Framers.

(Worzalla Publishing Co., 1976); see *infra* text accompanying note 36.

36. Jensen, ed., 2 *Documentary History of the Ratification of the Constitution* at 450-52 (cited in note 35) (emphasis added).

37. Of course, the original "voice in the wilderness"—John the Baptist—may have been lonely, but he was also *right*, according to the New Testament accounts. See, e.g., Matthew 3:1-3, 11:11-14.

38. May cites no evidence that the Anti-Federalists offered such an argument in the Pennsylvania Convention, after James Wilson made his explicit case for presidential review.

IV

Assuming May is correct that a president must obey an unconstitutional statute, the surprise villain of May's book is President Jimmy Carter. In the chapters of the book devoted to presidential practice, May documents 145 instances between 1789 and 1981 in which a president objected to legislation on constitutional grounds. (pp. 127-31) He concludes that the president actually refused to comply with the law in only 20 cases. (p. 127) Of these 20 acts of presidential defiance, seven of them—over a third of the total—occurred during the four years of Carter's presidency.³⁹

In all probability, however, Carter takes top honors for presidential defiance only because 1981 was the terminal date for May's detailed research. For the years 1981-97, May collected data on the number of presidential signing statements raising constitutional objections to legislation, but he did not investigate the subsequent course of conduct in those years to see whether the president had complied with the challenged statute. May's figures on constitutionally-qualified signing statements suggest that Carter was probably outdistanced by both Presidents Reagan and Bush in the category of presidential defiance. Carter averaged 7.5 constitutionally-qualified signing statements in each year of his presidency, compared with 10.9 annually for Reagan and 29 annually for Bush.⁴⁰ (p. 74) If there is any connection between a president's constitutional rhetoric and his conduct in office, it seems likely that Reagan and Bush ignored statutory provisions on constitutional grounds even more frequently than Carter.

One conclusion May draws from his research into presidential practice is that no president defied a statute on constitutional

39. By May's reckoning, the Carter administration refused on constitutional grounds to honor (1) a statute interfering with Carter's pardon of Vietnam draft resisters (pardon power), (2) a ban on editorials by public broadcasters (freedom of speech), (3) a statute requiring restoration of certain San Antonio missions (Establishment Clause), (4) the War Powers Resolution (Commander-in-Chief powers), (5) a statute forbidding the closing of certain consulates abroad (power to appoint consuls), (6) a statutorily-authorized two-house veto of HEW regulations (presentment), and (7) a statute concerning the Advisory Council on Historic Preservation (Appointments Clause). May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative* at 111-15, 124-25, 129 (cited in note 5).

40. Over the course of his first term, President Clinton matched Carter's average of 7.5 constitutionally-qualified signing statements per year. (p. 74) It would be interesting to see whether Clinton's constitutional objections increased after the election of a Republican majority to Congress in 1994.

grounds until 1860. The first such offender, according to May, was James Buchanan, who ignored a statute requiring assignment of Captain Montgomery Meigs to supervise construction of a Washington, D.C. aqueduct (violating the President's Commander-in-Chief powers). (pp. 101-02, 127) May characterizes the practice of presidential defiance as a recent phenomenon. (pp. 101, 127-30)

May, however, can make this argument only by adopting a minimalist view of what counts as presidential "defiance." By May's criteria, for instance, President Thomas Jefferson did not "defy" the Sedition Act when he refused to enforce it. After assuming the office of President, Jefferson pardoned persons convicted of sedition and dismissed the pending sedition prosecution of William Duane, even though Duane's prosecution had been initiated at the request of the Senate.⁴¹

These acts were motivated entirely by Jefferson's view that the sedition law was unconstitutional.⁴² Jefferson explained his conduct in a letter to Abigail Adams (whose husband had been the target of allegedly seditious publications):

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 as 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 its 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 the image. It was accordingly done in every instance, without asking what the offenders had done, or against whom they had offended, but whether the pains they were suffering were inflicted under the pretended sedition law.⁴³

An exercise of the pardon power does not necessarily "defy" the law under which the recipient of the pardon was convicted. Nor does an exercise of prosecutorial discretion necessarily amount to "defiance" of congressional authority. But here, the pardons and the withdrawal of charges under the Sedi-

41. James Morton Smith, *Freedom's Fetters: The Alien and Sedition Laws and American Civil Liberties* 301, 305 (Cornell U. Press, 1956).

42. *Id.* at 305. Indeed, Jefferson instructed the prosecutor to determine whether any other law could form the basis for prosecution. *Id.*

43. Letter from Thomas Jefferson to Abigail Adams (July 22, 1804), reprinted in Andrew A. Lipscomb and Albert Ellery Bergh, eds., 11 *The Writings of Thomas Jefferson* 42, 43-44 (Thomas Jefferson Memorial Association, 1904).

tion Act were explicitly based on Jefferson's decision to treat the statute as a legal nullity. This was a deliberate refusal to execute a law passed by Congress. While these acts by Jefferson were probably unreviewable, that does not resolve the question of whether he complied with his constitutional duty to faithfully execute the laws. It is difficult to argue that Jefferson did so unless one acknowledges that a president may properly refuse to execute an unconstitutional statute. Jefferson's conduct presents a clear, early assertion of a presidential review power and counters May's conclusion that presidential review is a recent innovation.⁴⁴

V

If a President may ignore an unconstitutional statute, may he also ignore a Supreme Court decision that misinterprets the Constitution or exceeds the Court's authority? Most advocates of presidential review have declined to push the theory this far, acknowledging some form of judicial supremacy, particularly in the context of Article III cases and controversies.⁴⁵ As a practical matter, then, the legitimacy of presidential review is an issue that will probably be resolved (if at all) in court. If the Supreme Court ever rejected the presidential review power, the President would likely acquiesce. On the other hand, if the Court sided

44. May discusses the pardons issued by Jefferson, but does not address Jefferson's refusal to prosecute under the sedition law. (pp. 22-23, 39)

45. Easterbrook, 40 Case W. Res. L. Rev. at 926 (cited in note 7); *Legal Opinion*, 48 Ark. L. Rev. at 315 (cited in note 9) (suggesting president should comply with a statute he believes the Supreme Court would view as constitutional, notwithstanding his own beliefs to the contrary). On the other hand, Michael Paulsen has argued that the President may act upon his constitutional principles, even to the extent of refusing to carry out a contrary court judgment. Paulsen, 83 Georgetown L.J. at 276-84 (cited in note 11). Paulsen's rejection of judicial supremacy echoes the position of Thomas Jefferson in another letter to Abigail Adams:

You seem to think it devolved on the judges to decide on the validity of the sedition law. But nothing in the Constitution has given them a right to decide for the Executive, more than to the Executive to decide for them. Both magistrates are equally independent in the sphere of action assigned to them. The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment; because the power was placed in their hands by the Constitution. But the executive, believing the law to be unconstitutional, were bound to remit the execution of it; because that power has been confided to them in the Constitution. That instrument meant that its co-ordinate branches should be checks upon each other. But the opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the legislature and executive also, in their spheres, would make the judiciary a despotic branch.

Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), reprinted in Lipscomb and Bergh, eds., 11 *The Writings of Thomas Jefferson* at 49, 50-51 (cited in note 43).

with the President on the existence of such a power, the debate could be expected to shift from its legitimacy to its appropriate scope.⁴⁶

Professor May's work previews some of the arguments and evidence likely to play a role if that future court test ever comes to pass. While I was not persuaded by Professor May's analysis, *Presidential Defiance* is a book that merits serious attention by those interested in the current debate over presidential review authority.

46. Four Supreme Court Justices signed onto a concurring opinion recognizing the existence of a presidential review power. *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 906 (1991) (Scalia, J., concurring). In an earlier case, a panel of the Ninth Circuit rejected the existence of a presidential review power, but the en banc court withdrew and replaced that portion of the panel opinion. *Lear Siegler, Inc., Energy Prods. Div'n v. Lehman*, 842 F.2d 1102, 1121-26 (9th Cir. 1988), withdrawn and replaced in part en banc, 893 F.2d 205 (9th Cir. 1990); see also *Ameron, Inc., v. U.S. Army Corps of Engineers*, 787 F.2d 875 (3d Cir.), modified, 809 F.2d 979 (3d Cir. 1986). In an alternative scenario, the decisive test of presidential review power could arise in an impeachment proceeding.