

## CREATING PRECEDENTS THROUGH WORDS AND DEEDS

**UNTRODDEN GROUND: HOW PRESIDENTS INTERPRET THE CONSTITUTION.** By Harold H. Bruff.<sup>1</sup> Chicago: University of Chicago Press. 2015. Pp. 557. \$55.00 (cloth), \$35.00 (paper).

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Harold H. Bruff's book, *Untrodden Ground: How Presidents Interpret the Constitution*, is a must read for those interested in understanding the myriad dynamics that shape presidents' impact on constitutional interpretation. The author examines each administration in chronological fashion to shed light on our understanding of the U.S. Constitution. No other book to my knowledge has been so ambitious in assessing each president's contributions to constitutional interpretation, and few other books are infused with such lively prose.

Bruff summarizes well the influences that mold presidential interpretation of the Constitution: "the president's character, experience, and values; the incentives that the office and current politics create; the practical problems that must be solved; and an awareness of the actions of their own predecessors" (p. 457). From President George Washington's exercise of the treaty power to President Andrew Jackson's supervision over the executive branch, and from President Abraham Lincoln's view of his emergency powers to President Harry Truman's understanding of the Commander-in-Chief Clause, the book examines circumstances that forced presidents to take action or make statements reflecting interpretation of the Constitution. These include decisions implicating constitutional interpretation, such as the use of military force, as well as interpretations of the text as justifications to refuse to enforce laws or turn over

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information to Congress. Presidents affect our understanding of the Constitution by both words and deeds.

Judicial interpretation of the Constitution is studied in every law school and in many political science departments. Much ink has been spilled by legal academics and political scientists to generate theories on how judges should approach that critical task. Clashes between originalists and interpretivists take place on and off the bench. And, there are widely divergent views held by those in each interpretive camp. No consensus, for instance, has been reached as to the degree that originalism even is possible given the lapse of time or to whether interpretivism permits objective constraints.

Irrespective of the ongoing originalist/interpretivist debate, Bruff is correct that legal and political science scholars have devoted relatively sparse attention to how members of the coordinate branches interpret the Constitution.<sup>3</sup> As have others within the last generation,<sup>4</sup> Bruff rejects the conventional notion that constitutional interpretation is within the exclusive province of the judiciary. The author makes a strong case that presidential interpretation of the Constitution matters *more* in the real world than judicial decisions. (He brushes aside the parallel question of constitutional interpretation by members of Congress.) When presidents sign executive agreements or break treaties, in a sense they interpret the Constitution, as they do when they fire subordinates, exercise the recess appointment power, and impound funds. Accordingly, his book examines the issues arising in each administration that impact the Constitution's reach.

*Untrodden Ground* eschews a normative account of presidential interpretations. For instance, does it matter if the presidential interpretation is reflected in deed, such as in President Thomas Jefferson's Louisiana Purchase (pp. 68-72), or rather in a statement such as Jefferson's justification for

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3. For exceptions, see generally MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997); Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, 2000 SUP. CT. REV. 61; Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994) (justifying presidential power to interpret the law but not examining precedential role of prior interpretations); Trevor Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006).

4. Contemporary constitutional theorists, by and large, agree with Bruff. For examples, see sources cited *supra* note 3.

pardoning those convicted of Sedition Act violations (p. 64)? Should less precedential weight be accorded presidential actions manifesting constitutional positions as opposed to more reflective articulation of constitutional values? Possibly, but on the other hand, presidents are not judges, and they are held accountable by the people principally for their conduct in office, not their constitutional analysis.<sup>5</sup>

Moreover, should presidents defer to interpretations of coordinate branches and, if so, under what conditions? Should they defer to interpretations of prior presidents more than to coordinate branches? Does the extent to which the constitutional provision implicates presidential power as opposed to the rights of individuals matter? These and other questions can be studied by examining the steps presidents have in fact taken and what justifications they have used over time.

In the pages that follow, I tackle one piece of the puzzle, charting the degree to which presidents *should* factor in the prior actions and statements of predecessors implicating constitutional views. I argue, first, that such precedents matter, and second, perhaps more controversially, that contemporary constitutional justification of actions is more salient than either unexplained presidential actions bearing on constitutional interpretation or standalone executive interpretations of the Constitution untethered to particular presidential conduct. The union of word and deed cements the precedential force of the constitutional interpretation.

### I. DO PRESIDENTIAL PRECEDENTS MATTER?

As an initial matter, some may question whether presidents should care about *any* precedents—executive, judicial, or legislative—before taking action that manifests a particular interpretation of a constitutional provision. Under the Constitution, presidents must ensure that their actions are

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5. Randolph Moss has written that “the public may elect a President based, in part, on his view of the law,” Randolph Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303, 1327 (2000), but one would be hard-pressed to cite a campaign in which the presidential candidate’s constitutional interpretation had any salience, although the issue arose in the Lincoln-Douglas debates. See also Dawn Johnsen, *The Obama Administration’s Decision to Defend Constitutional Equality Rather Than the Defense of Marriage Act*, 81 FORDHAM L. REV. 599 (2012).

consistent with what they (and their advisors) believe to be the constitutional commands,<sup>6</sup> but need not be bound by what their predecessors believed. Nor, in fact, need presidents be bound—except perhaps in a particular case or controversy<sup>7</sup>—by how judges have interpreted the Constitution. Presidents, in other words, must use their best judgment in taking care to enforce the law and in acting as Commander-in-Chief based on their own understanding of the constitutional text. Indeed, President William H. Taft rightly insisted that a president “does not consider himself bound by the policies or constitutional views of his predecessors” (p. 206).

Nonetheless, as Professor Bruff implicitly asserts in the book, the precedents of prior presidents matter. George Washington famously related that “[t]here is scarcely any part of my conduct which may not hereafter be drawn into precedent.”<sup>8</sup> Thus, he knew that every step he took, from dispatching troops to quell the Whiskey Rebellion (p. 49) to announcing the Neutrality Proclamation (p. 42), likely would shape the conduct of future presidents by defining the scope of a president’s power under Article II. Many presidents thereafter self-consciously have defended their stances by referring to actions of predecessors. For instance, when President Andrew Johnson vetoed the Tenure in Office Act, he stated that a ban on any Senate role in removing executive branch officials was “settled by precedent, settled by the practice of the Government” (p. 169). When President Harry Truman resolved to intervene in Korea, he considered prior historical examples and, “impressed by the appearance of precedent” (p. 273), moved forward.<sup>9</sup> When President Richard Nixon vetoed the War Powers Resolution for infringing on his Commander in Chief powers, he decried Congress’s effort to take away “authorities which the President has properly exercised under the Constitution for almost 200 years” (p. 338), and he later asserted that he was following his predecessors in impounding funds (p. 344). And, when President George W. Bush more recently defended the NSA surveillance initiative, he stated that

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6. Presidents, of course, take an oath to uphold the Constitution. U.S. CONST. art. II, § 1, cl. 8.

7. Even that is controversial. For an argument that presidents need not be bound in particular cases and controversies, see Paulsen, *supra* note 3.

8. NORMAN J. SMALL, SOME PRESIDENTIAL INTERPRETATIONS OF THE PRESIDENCY 14 (1970).

9. Dean Acheson presented a formal defense based on those precedents (p. 275).

“previous Presidents have used the same constitutional authority I have” (p. 412). The references to precedents might reflect more of an effort to persuade a skeptical public than a belief that the precedent matters, but even the public invocation of the historical examples reflects the importance of the steps taken by prior presidents reflecting constitutional principles.<sup>10</sup> Presidents recognize the greater public acceptance from following precedents.

Caring about precedents reinforces stability of the presidency. A president will be seen as more legitimate if he or she follows the constitutional path set by predecessors. For one example, President Washington at the outset believed that the Constitution permitted him to exercise the veto power solely for egregious congressional actions, and he vetoed only two bills.<sup>11</sup> That precedent stood for years as neither President Adams used the veto power at all.<sup>12</sup> But, from the period of Andrew Jackson on, presidents exercised the veto power more aggressively, viewing the veto power under Article II as a permissible tool with which to influence domestic policy. Thus, when President Jackson broke ranks with his predecessors and utilized the veto twelve times, he was challenged for his adventurous exercise of the veto. (pp. 95-96). Breaking ranks, in other words, comes with a political price. President Jackson weathered the storm and, over time, presidential exercise of the veto became more routine and viewed as consistent with a conscientious executive.

For another example, when President Reagan vetoed legislation incorporating a legislative veto, he referred to a long line of presidents before him who had challenged that legislative arrangement.<sup>13</sup> Those precedents reinforced the legitimacy in the public eye of his robust view of executive powers, and his views ultimately found support in *INS v. Chadha*,<sup>14</sup> which invalidated

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10. Similarly, when President Obama issued an executive order outlawing discrimination based on same sex marriage, he explained why he deemed discrimination on that basis so inimical to the nation’s spirit and history, and he did so citing the examples of FDR and Eisenhower in banning racial discrimination in at least parts of the federal workforce. Exec. Order 13672, July 21, 2014.

11. At the convention, the veto power in large part was justified on the basis of the need to fend off legislative encroachment. See, e.g., STEPHEN SKOWRONEK, THE POLITICS THAT PRESIDENTS MAKE: LEADERSHIP FROM JOHN ADAMS TO BILL CLINTON (Cambridge 1993).

12. HAROLD J. KRENT, PRESIDENTIAL POWERS 18 (2005).

13. Stuart Taylor, *Legislative Vetoes Face Legal Attack*, N.Y. TIMES, March 19, 1981.

14. 462 U.S. 919 (1983).

the legislative veto. Bruff persuasively asserts that “[t]he ongoing arguments take place in a framework created by what has happened and what issues have been opened or closed by developments in our national life” (p. 458). Executive precedent matters.<sup>15</sup>

## II. PRECEDENT BY WORDS AND DEEDS?

Professor Bruff does not distinguish between presidential interpretations reflected in words and deeds. And, of course, he is right that presidents affect interpretation of the Constitution whether dispatching troops, appending a signing statement to legislation, or giving a speech. The institution of the presidency gains stability the more that presidential interpretation is viewed as consistent. This is not to suggest that presidents can be boxed in by interpretations of their predecessors, but rather that perceived departures in constitutional interpretation carry with them a price of explanation and justification in the public eye.

Three contexts arise. First, many presidential actions are unaccompanied by any statement or justification, such as dispatch of troops or utilization of surveillance methods. Second, presidents, particularly in signing statements and indirectly through Attorney General Opinions, address the constitutionality of particular courses of action. Finally, presidents at times justify conduct contemporaneously by reference to the Constitution.

### 1. ACTION

Although presidents in the heat of decision-making doubtfully consider whether to defer to executive precedents, some precedents are more salient than others. At one end of the spectrum, consider action unaccompanied by any justification. How are the public and future presidents to know even whether the presidential action embodied a constitutional interpretation? The president may have called for surveillance or sent troops to quell a disturbance without any concern as to whether the action was consistent with the Fourth Amendment or Commander in Chief Clause. Or, the president may have fired a subordinate in a fit of rage without paying heed to the niceties of the president’s

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15. And, as Justice Frankfurter famously stated in *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring), judges as well consider history as a gloss on the constitutional text.

assumed removal authority under Article II. There is a latent ambiguity, in other words, as to whether particular deeds even encompass an intended constitutional interpretation. In this context, actions may not speak louder than words.

Nonetheless, although others have not focused on the precedential value of actions unaccompanied by public justification,<sup>16</sup> such actions serve to shape the course of future presidents' views of the Constitution. Actions, over time, can embody or reflect constitutional interpretation. Consider presidents' use of executive agreements throughout history. When presidents initially signed such agreements, perhaps it was out of necessity with no consideration as to the constitutionality of the practice. And, even if the use of executive agreements over time can be seen to express a view of the president's Article II power over foreign affairs, the grounds are murky. Does the use of executive agreements comport with Article II because the treaty power is not exclusive or because executive agreements are less important than treaties? Is the use of executive agreements consistent with Article II as long as Congress has the opportunity afterwards to ratify them? Despite the ambiguity, the repeated use of executive agreements over many presidential administrations builds legitimacy.<sup>17</sup> The same dynamic holds true for presidential decisions to commit troops abroad without prior congressional authorization,<sup>18</sup> and for presidential exercise of the removal authority.<sup>19</sup> Presidential actions create a form of precedent that helps channel the conduct of future presidents.

## 2. PRESIDENTIAL WORDS

Presidential statements about the Constitution also form precedent. Statements by themselves can impact future presidencies and, at times, their influence on others can be just as great as action.<sup>20</sup> Presidential statements about the unacceptability of discrimination based on race, for instance, have

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16. See, e.g., John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375, 398-99 (1993); Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448 (2010).

17. KRENT, *supra* note 12, at 96-102.

18. *Id.* at 112-15.

19. *Id.* at 39-46.

20. For a more theoretical exploration, see Hillary Putnam, *The Meaning of "Meaning"*, in MIND, LANGUAGE AND REALITY 215-71 (1975).

had a huge role in changing others' view of the constitutional text.<sup>21</sup> In contrast to the uncertainty that may be left by an action implicating constitutional interpretation, a president's articulation of a constitutional interpretation less ambiguously articulates a view of the Constitution to be followed in the future.<sup>22</sup>

Many presidential statements on the meaning of the Constitution can be found in writings of the President's chief lawyer, the Attorney General. Congress created the Office of Attorney General in 1789, and directed the Attorney General to provide a learned opinion on questions of law when asked by the President.<sup>23</sup> The very format of *written* opinions reinforces that the opinions should be available for public review and possibly serve as precedent for the future. Moreover, written opinions generally take into account more details and circumstances than would oral advice. Attorney General Opinions may not reflect the view of presidents directly but, given that presidents select and remove Attorney Generals, the Opinions converge with those of the presidents themselves.<sup>24</sup>

Attorney General opinions long have addressed issues of constitutional concern, many of which would not likely arise in a court challenge, such as the scope of the pardon power.<sup>25</sup> Attorney General Opinions not only cite but also largely follow prior executive precedent even when the Attorneys General might have reached a different constitutional interpretation had

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21. FDR in Executive Order 8802 prohibited racial discrimination in the national defense industry, stating that "it is the policy of the United States to encourage full participation in the national defense program by all citizens of the United States, regardless of race, creed, color, or national origin, in the firm belief that the democratic way of life within the Nation can be defended successfully only with the help and support of all groups within its borders." Exec. Order No. 8802 (June 25, 1941).

22. Indeed, President Madison, despite his doubts about the constitutionality of the Bank of the United States, signed a reauthorization bill during his term because, in his view, the constitutionality of the bank had been settled by practice (p. 40), and the impact of consistent practice has been widely noted. The precedents referred to likely included those of past presidents as well as the courts.

23. The Judiciary Act of 1789, ch. 20, 1 Stat. 73, 92–93.

24. Presidents, of course, may remove Attorneys General from office for any policy disagreement.

25. Individuals likely lack standing to question presidential exercise of the pardon power. For an Attorney General Opinion on the pardon power, see, for example, Pardoning Power of the President, 5 Op. Att'y Gen. 579 (April 22, 1852) (Hon. John Crittenden).

the issue not been addressed previously.<sup>26</sup> Attorney General Wirt, for instance, wrote that “it would be laborious, indecent, and unsettling to review the previous decisions of the executive.”<sup>27</sup> In opining that interest on particular claims against the government would not be allowed, Attorney General John Crittenden wrote that the previously expressed interpretation “has ever since been followed; and . . . such a precedent and construction must be considered as established and settled in this instance.”<sup>28</sup> As Dean Trevor Morrison has summarized, “Attorneys General typically looked to the opinions of their predecessors not just as sources of useful experience but as authoritative precedents.”<sup>29</sup> Executive interpretation may involve different analytical steps and considerations than that by judges,<sup>30</sup> but the opinions, whether on the scope of the recess appointment authority<sup>31</sup> or the power to commit troops abroad,<sup>32</sup> create a type of precedent, even though in no way binding.<sup>33</sup> Precedent shapes presidents’ interpretation of the constitutional text.

Presidents have also issued countless signing statements manifesting their view of the constitutionality or potential constitutionality of the proffered legislation. The signing statements differ from Attorney General Opinions in several respects. They are less scholarly, make no pretense of creating precedent, reflect the President’s view as opposed to that of the Attorney General, and focus more narrowly on the legislation to which they are attached. Nonetheless, the signing statements as

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26. Jerry L. Mashaw & Avi Perry, *Administrative Statutory Interpretation in the Antebellum Republic*, 2009 MICH. ST. L. REV. 7, 44 (“Reliance on past precedent may have been the only interpretive rule about which every Attorney General under consideration appears to have been equally dogmatic.”).

27. HOMER CUMMINGS & CARL MCFARLAND, FEDERAL JUSTICE: CHAPTERS IN THE HISTORY OF JUSTICE AND THE FEDERAL EXECUTIVE 84 (1937).

28. Power of the Secretary of the Treasury Respecting Certain Florida Claims, 5 Op. Att’y Gen. 333, 353 (1851).

29. Morrison, *supra* note 16, at 1474.

30. See McGinnis, *supra* note 16, at 398–99.

31. Edmund Randolph, *Edmund Randolph’s Opinion on Recess Appointments* (July 7, 1792), in 24 THE PAPERS OF THOMAS JEFFERSON 165, 165–67 (John Catanzariti ed., 1990).

32. *Authority to Use United States Military Force in Somalia*, 16 Op. Off. Legal Counsel (1992).

33. For an analysis of precedent in Office of Legal Counsel decisions, see Morrison, *supra* note 16. The Office itself released guidelines suggesting that its opinions should receive “due respect” from successors. *Id.* at 1453. Attorney Generals have delegated opinion writing to OLC, and OLC opinions, to a large extent, reflect the views of the Attorney General and the President.

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well as the Attorney General Opinions have some force as precedent.

President George W. Bush controversially issued statements to challenge over 1000 provisions of 172 laws he signed.<sup>34</sup> President Obama has followed the practice, but less aggressively. For instance, in signing the National Defense Authorization Act of Fiscal Year 2013, he objected that “[c]ertain provisions in the Act threaten to interfere with my constitutional duty to supervise the executive branch,” namely by “requir[ing] a subordinate to submit materials directly to the Congress without change, and [the Act] thereby obstructs the traditional chain of command.”<sup>35</sup> Such statements plainly reflect the president’s constitutional views, but they can best be thought of as presidential dicta or a type of advisory opinion. We are not sure whether the subordinate will submit to Congress any materials at all or whether the president will insist upon the right to preview and alter materials before they are sent.<sup>36</sup>

President Obama’s Article II objection above echoes that of his predecessors. President George W. Bush as well criticized legislation requiring executive branch officers to issue recommendations directly to Congress. For instance, in signing the Maritime Transportation Security Act of 2002,<sup>37</sup> he stated, “[m]oreover, to the extent such provisions of the Act would require submission of legislative recommendations, they would impermissibly impinge upon the President’s constitutional authority to submit only those legislative recommendations that

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34. See, e.g., Karen Tumulty, *Obama Circumvents Laws with “Signing Statement,” A Tool He Promised To Use Lightly*, WASH. POST (June 2, 2014), [https://www.washingtonpost.com/politics/obama-circumvents-laws-with-signing-statements-a-tool-he-promised-to-use-lightly/2014/06/02/9d76d46a-ea73-11e3-9f5c-9075d5508f0a\\_story.html](https://www.washingtonpost.com/politics/obama-circumvents-laws-with-signing-statements-a-tool-he-promised-to-use-lightly/2014/06/02/9d76d46a-ea73-11e3-9f5c-9075d5508f0a_story.html).

35. Statement on Signing the National Defense Authorization Act for Fiscal Year 2013, 2013 DAILY COMP. PRES. DOC. 4 (Jan. 2, 2013).

36. Similarly, in signing the Omnibus Appropriations Act of 2009, H.R. 1105, President Obama defended his right “to indicate when a bill that is presented for Presidential signature includes provisions that are subject to well-founded constitutional objections.” In part, he stated that “[n]umerous provisions of the legislation purport to condition the authority of officers to spend or reallocate funds on the approval of congressional committees. These are impermissible forms of legislative aggrandizement in the execution of the laws other than by enactment of statutes.” This and other signing statements from 2001 to the present are available at <http://www.coherentbabble.com/> (last visited Sept. 9, 2016).

37. Pub. L No. 107-295, 116 Stat. 2064 (2002).

he judges to be necessary and expedient.”<sup>38</sup> President Clinton also stated that he would interpret Section 4422 of the Balanced Budget Act of 1997<sup>39</sup> “in light of my constitutional duty and authority to recommend to the Congress such legislative measures as I judge necessary and expedient, and to supervise and guide my subordinates, including the review of their proposed communications to the Congress.”<sup>40</sup>

President Obama in the 2013 Authorization Act also objected that “Section 1025 places limits on the military’s authority to transfer third country nationals currently held at the detention facility in Parwan, Afghanistan ... and could interfere with my ability as Commander in Chief to make time-sensitive determinations about the appropriate disposition of detainees in an active area of hostilities.”<sup>41</sup> The president’s views of the Commander in Chief powers were just that – views. The president did not necessarily contemplate any change in the status of detainees in the Parwan facility. President Obama renewed a similar concern the following year in a signing statement responding to the Fiscal Year 2014 National Defense Authorization Act’s restriction on transferring third country nationals held at Guantanamo Bay: “the restrictions on the transfer of Guantanamo detainees in sections 1034 and 1035 operate in a manner that violates constitutional separation of powers principles.” More specifically, Obama stated that “[t]he executive branch must have the flexibility to act swiftly in conducting negotiations with foreign countries regarding the circumstances of detainee transfers.”<sup>42</sup>

Unlike the Attorney General Opinions, the signing statements do not of their own terms reference prior signing statements. No explicit form of precedent exists. Nonetheless, the constitutional interpretation reflected in the statements often follows that previously articulated and creates a form of precedent. Presidents Clinton, Bush, and Obama all signed laws expressing constitutional skepticism over Congress’s ability to direct executive branch officials to communicate with Congress

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38. Statement on Signing the Maritime Transportation Security Act of 2002, 2 PUB. PAPERS 2132 (Nov. 25, 2002).

39. Pub. L. No. 10-33, 111 Stat. 251, 414 (1997).

40. Statement on Signing the Balanced Budget Act of 1997, 2 PUB. PAPERS 1053, 1054 (Aug. 5, 1997).

41. *Supra* note 35.

42. *Id.*

directly without the involvement of supervisors in the executive branch. Like the Attorney General Opinions, the signing statements resemble Advisory Opinions to a limited extent, expounding on how to interpret the Constitution in circumstances that may never arise. Although the Attorney General Opinions more consciously create precedent, both are sources from which can be discerned executive interpretation of the Constitution.

### 3. BACKING UP INTERPRETATION WITH CONDUCT

President Obama's constitutional views as reflected in the 2013 and 2014 signing statements took on a new dimension when he subsequently transferred detainees from Guantanamo to Qatar without first notifying Congress as required in the 2014 Authorization Act. He ordered the transfer to complete an agreement for the release of Bowe Bergdahl, the sole remaining U.S. military prisoner of war in Afghanistan.<sup>43</sup> In other words, he acted on what he had threatened in the signing statement – ignoring Congress's insistence on being notified before any such transfer. President Obama, moreover, publicly defended his decision to circumvent Congress in arranging for the detainee swap.<sup>44</sup> Words merged with deeds, deepening the precedential force of his previously stated constitutional concerns for ensuring executive branch flexibility in transferring foreign detainees.

Precedents are most powerful when presidents justify conduct contemporaneously through constitutional interpretation. Indeed, Attorneys General themselves have noted the greater strength of executive interpretive precedents when the interpretations have been followed in practice.<sup>45</sup> The justification serves as a limited check to ensure that the president (or staff) has considered the impact of the interpretation on future conduct. Much like Congress considering the prospective impact of legislation or a court considering how a rule might be applied in the future, such presidential reasoning assures that action has been preceded by at least some discussion and assessment of what presidents might do in the future.

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43. See Tumulty, *supra* note 34.

44. Stephanie Condon, *Obama: "I Make Absolutely No Apologies" for Bergdahl Prisoner Exchange*, CBS NEWS (June 5, 2014), <http://www.cbsnews.com/news/obama-i-make-absolutely-no-apologies-for-bergdahl-prisoner-exchange/>.

45. See Morrison, *supra* note 16 (noting that "the precedential weight of those opinions was a function not just of the opinions themselves but also of the extent to which relevant executive officials acted in conformity with them").

Presidential veto statements, for another example, unite words and deeds. When President Jackson vetoed the National Bank, he explained why he believed that the national government lacked constitutional authority under the Necessary and Proper Clause to centralize the financial system in that manner (p. 97).<sup>46</sup> The union of action and deed permits the public to see at least one concrete consequence of the constitutional interpretation. The same held true for President Woodrow Wilson in vetoing the first Budget and Accounting Bill based on Congress's decision to retain for itself a role in removing the Comptroller General and Assistant Comptroller General: "It has, I think, always been the accepted construction of the Constitution that the power to appoint officers of this kind carries with it, as an incident, the power to remove. I am convinced that Congress is without constitutional power to limit the appointing power and its incident, the power of removal derived from the Constitution. The section referred to not only forbids the Executive to remove these officers, but undertakes to empower the Congress, by a concurrent resolution to remove an officer."<sup>47</sup> And, when President Obama instructed the Department of Justice to abandon reliance on the Defense of Marriage Act in litigation over federal benefits to married gays and lesbians, he did so on the ground that the Act violated the constitutional principle of equality (p. 455).<sup>48</sup>

Presidential accountability within our system of separated powers, after all, leans heavily upon transparency. Constitutional interpretation needs to be vetted publicly for a meaningful check to arise. The check is imperfect, but presenting constitutional justification to the public forces at least consideration of future circumstances and the judgment of history. Indeed, the heated controversy during the Bush II administration over release of the DOJ's so-termed torture memo—defending the propriety of at least some forms of torture—suggests the critical step of public

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46. Veto Message from Andrew Jackson to the Senate (July 10, 1832), in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, 576, 581-82 (1907).

47. SMALL, *supra* note 8, at 137. Wilson's statements would gain judicial sanction in *Bowsher v. Synar*, 478 U.S. 714 (1986) (invalidating Congress's role in removing a Comptroller General from office). President Jefferson's pardon of those convicted under the Alien and Sedition Acts, *supra* text accompanying note 5, is to similar effect—the president, in essence, gave legal effect to his constitutional views.

48. See also Johnsen, *supra* note 5, at 599.

scrutiny. Attorney General Alberto Gonzalez withdrew the memo after the outcry (p. 421). Of course, the publicity need not persuade the president to desist. When an angry Senate demanded papers from President Cleveland as to why he fired a particular United States Attorney, Cleveland refused on the ground that it was none of the Senators' business under the Constitution and directed the Senate to focus rather on whether to confirm the individual nominated as a replacement. Unpersuaded, Congress issued a resolution of censure condemning the administration's refusal to supply the papers. In response, Cleveland wrote, "[T]he important question then, is whether it is within the constitutional competence of either House of Congress to have access to the official papers and documents in the various public offices of the United States." He answered that Congress had no right "to sit in judgment upon the exercise of my exclusive discretion and executive function" in replacing the U.S. Attorney.<sup>49</sup> By making his constitutional positions on the removal authority and presidential privilege public, President Cleveland contributed to the stature of the presidency.<sup>50</sup> Contemporaneous justification of action through constitutional interpretation creates the most compelling form of presidential precedent.

## CONCLUSION

In short, although Bruff persuasively argues that precedent matters, not all precedent is of the same weight. Presidential actions and statements both alter the terrain, but presidential actions that are justified publicly have the most force. Such contemporaneous justification removes the ambiguity caused by unexplained presidential actions and increases the salience of presidential expression of constitutional views that are not offered in the context of a concrete presidential action. And, while presidents do not and should not afford formal deference to prior actions, the word and deeds of their predecessors greatly influence the choices they make.

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49. See Harold J. Krent, *What Would Grover Cleveland Do? Alberto Gonzales Should Have Learned A Thing Or Two from President Cleveland*, NAT'L L. J., April 16, 2007.

50. The fact that President George W. Bush did not issue any contemporary constitutional justification for NSA surveillance, in contrast, eroded public support.