

Questions for the Record for Justice Joan Larsen
Submitted by Senator Richard Blumenthal
September 13, 2017

In 2006, you wrote an opinion piece for the *Detroit News* entitled “Bar group is wrong; presidents can interpret laws they sign,” defending President Bush’s use of signing statements. You argued that these signing statements are not necessary—they simply serve to put the public on notice that the President may execute a law differently from the way Congress wrote if he determines that “the Constitution so commands.”

1. Please provide a few examples of situations in which it would be appropriate for a President to determine that the “Constitution so commands” that he “ignore the express will of Congress.”

As I noted in my 2006 *Detroit News* article, the question whether the President may ever decline to enforce a statute he believes to be unconstitutional is one that has long interested Presidents and scholars. See Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 201–11 (1994); The Legal Significance of Presidential Signing Statements, 17 Op. O.L.C. 131, 132–35 (1993); Christopher N. May, *Presidential Defiance of “Unconstitutional” Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 904–86 (1994). I myself took no position on that issue except to note that its answer could be governed by only one source: the Constitution. As such a question might come before me in litigation, I cannot take a position on it consistent with my ethical obligations. See Canon 3(A)(6), Code of Conduct for United States Judges (“A judge should not make public comment on the merits of a matter pending or impending in any court.”); cf. also Canon 1, Commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”). I can say that if a case came before my court, I would evaluate any allegation that the President had failed to faithfully execute a law passed by Congress by applying the relevant Supreme Court precedent on the topic, Justice Jackson’s three-part typology in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

2. What remedies are available to the other two branches of government if a President has exceeded his constitutional authority in ignoring the express will of Congress? Are these remedies adequate?

No person—including the President—is above the law. The founders established a system of separated powers and checks and balances. An independent judiciary is an indispensable part of this system. If confirmed, I would not hesitate to hold that any President had exceeded his constitutional authority if the law so commanded. The Constitution gives checks to Congress as well. Some of those include the power of the purse, U.S. CONST. art. I, § 9, cl. 7; U.S. CONST. art. I, § 8, cl. 1; the power to override vetoes, U.S. CONST. art. I, § 7, cl. 2; the power to issue articles of impeachment, U.S. CONST. art. I, § 2, cl. 5; and the power to try such impeachments, U.S. CONST. art. I, § 3, cl. 6. Whether the remedies provided by the Constitution are adequate is a political debate upon which I cannot ethically comment. See Canon 5, Code of Conduct for

United States Judges (“A Judge Should Refrain from Political Activity.”); Canon 1, Commentary (“The Code is designed to provide guidance to judges and nominees for judicial office.”).