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**RESOLVED, PRESIDENTIAL SIGNING
STATEMENTS THREATEN TO
UNDERMINE THE RULE OF LAW AND
THE SEPARATION OF POWERS**

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RESOLVED, presidential signing statements threaten to undermine the rule of law and the separation of powers

PRO: Peter M. Shane

CON: Nelson Lund

When the colonists drew up their list of grievances against King George in the Declaration of Independence, their first complaint was that “he has refused his Assent to Laws, the most wholesome and necessary for the public good.” Yet a decade later, when drawing up the new constitution in Philadelphia, the framers decided to give a veto power to the president, albeit in a qualified form. Only a few delegates—Alexander Hamilton, James Wilson, Gouverneur Morris—favored granting the president an absolute veto, but the convention very nearly required a vote of three-quarters of both houses to override a presidential veto. Only in the Constitutional Convention’s final days, by a narrow 6-4 vote, did the delegates consent to lower the override threshold from three-quarters to two-thirds.

James Madison (as well as George Washington) had been among the delegates who objected to this late change. Madison insisted that a three-quarters override would be necessary to “check legislative injustice and encroachments.” The diminutive Virginian shared Wilson’s fear that the gravest threat to the new American government would come not from executive aggrandizement but from the “legislature swallowing up all the other powers.” Madison and his allies may have lost the battle but they won the war. Since the Constitution’s ratification more than 220 years ago, Congress has succeeded in overriding a president’s veto on only 110 occasions. That is, only about 7 percent of the nearly 1,500 presidential regular vetoes have been overridden. And that leaves out of the equation the more

than 1,000 pocket vetoes that presidents have issued in the nation's history—which Congress cannot override.

At first, the veto was used sparingly. Washington vetoed only two bills and Adams and Jefferson none at all. In the nation's first half century the regular veto was exercised on only thirteen occasions and the pocket veto ten times—with Andrew Jackson accounting for about half of these vetoes. Since the Civil War, however, every president except James Garfield and Warren Harding, neither of whom served even a single term, has issued at least as many vetoes as Jackson did.

As use of the veto increased, so too did legislative efforts to override the president's veto. John Tyler, dubbed "His Accidency" by detractors, was the first president to have a veto overridden. Congress roughed up the ineffective Franklin Pierce, overriding five of his nine vetoes. But that was kid-glove treatment compared with what Congress handed out to Andrew Johnson, whose twenty-one vetoes were overridden an astounding fifteen times. Pierce and especially Johnson were anomalies, however. For the rest of the nineteenth and twentieth centuries, presidents fared very well in sustaining their many vetoes. Only one president who served during this 130-year time span had a success rate of less than 75 percent: Richard M. Nixon, whose twenty-six regular vetoes were overridden on seven occasions, or 27 percent of the time.

If the pattern of the modern presidency is many vetoes and few overrides, then the George W. Bush presidency is a puzzle. During his first term George W. Bush never vetoed a bill, not a regular veto or even a pocket veto. In his second term, particularly after 2006 when Democrats gained control of the Senate and the House of Representatives, Bush began to wield the veto more often, but at the end of his two terms Bush had used the pocket veto only once and the regular veto on only eleven occasions. One has to go all the way back to Warren G. Harding, who served for only two and one-half years, to find a president who issued fewer vetoes than Bush. And, equally striking, one has to go back to Andrew Johnson's presidency to find a president who was less successful than Bush in sustaining his vetoes—four of Bush's eleven regular vetoes (36 percent) were overridden by Congress.

What accounts for the Bush anomaly? Of course, a large part of the reason that Bush did not use the veto in his first term was that his party controlled the Senate and House. But that is not the whole story. After all, Jimmy Carter issued thirty-one vetoes during his time in the White House even though his party controlled both houses of Congress. Similarly, Lyndon Johnson had a Democratic Senate and House but still vetoed thirty-one bills. Perhaps part of the reason that Bush relied less on the veto is that he discovered an alternative to the veto: the presidential signing statement. During his eight years in office, Bush issued 161 signing

statements that challenged more than a thousand statutory provisions; 70 percent of these signing statements came in his first term.

The Constitution calls upon the president to explain a veto, but it is silent about what a president should do when signing a bill; it neither requires nor forbids a president from issuing a signing statement. The origins of this practice can be traced all the way back to the early nineteenth century, but it was only in the Reagan administration that signing statements began to be seen as a way for the president to shape the way the law would be interpreted, at least by executive officials if not judges. Not until George W. Bush's administration, however, did this practice generate widespread public comment, including a sharply critical 2006 report by an American Bar Association (ABA) task force that concluded that signing statements posed "a serious threat to the rule of law."

Nelson Lund and Peter M. Shane agree that Bush made unprecedented use of the signing statement, but they differ on whether this development is healthy or pernicious for American democracy. Lund takes to task the ABA task force report for its faulty constitutional analysis and insists that signing statements, properly understood, are neither unconstitutional nor dangerous. Shane, in contrast, like the ABA, views heavy reliance on signing statements as bad for both representative democracy and the rule of law. Whatever side one takes in this debate, it is a safe bet that future presidents will be reluctant to relinquish such a promising source of power and control.

CON: Nelson Lund¹

In 2006, a task force of the American Bar Association declared that presidential signing statements—especially those issued by George W. Bush—threaten “the rule of law and our constitutional system of separation of powers.”² Although the ABA report was signed by several prestigious members of the elite legal establishment, its position is analytically untenable and irresponsibly hyperbolic.

The key conclusion in the ABA report is that a president violates the Constitution when he announces that he regards some provision in a bill he signs as unconstitutional and unenforceable, or interprets the provision in a manner inconsistent with what the report calls “the will of Congress.”

The dominating error in the ABA report is the notion that the president has a “constitutional obligation to veto any bill that he believes violates the Constitution in whole or in part,” and that he therefore must either veto a bill or enforce all of its provisions. Which part of the Constitution imposes this choice on the president? The ABA report offers two answers, based on different provisions of the Constitution. Neither answer can withstand scrutiny.

PRESENTMENT CLAUSE

The Constitution specifies how a bill may become a law:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated [and the veto may be overridden by a two-thirds vote of each House]. If any

Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the same shall be a Law, in like manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

This clause offers no support for the ABA's claim that the president has a "constitutional obligation to veto any bill that he believes violates the Constitution in whole or in part." The presentment clause simply gives the president the option of returning a bill with his objections (of whatever nature they may be) for reconsideration, which may result in an override of the veto. He also has two other options. He can sign the bill; or he can do nothing, which has the same effect as signing it except when the so-called pocket veto provision is applicable. The presentment clause does not tell the president which bills to veto. Nor does it say anything at all about the existence, scope, or nature of a president's obligations with respect to the enforcement of enacted statutes (whether they were enacted during his administration or at some earlier time).

The ABA, however, claims that a president's refusal to enforce unconstitutional provisions in statutes that he has signed is actually an illegal line-item veto, that is, a decision by the president to veto part of a bill while signing the rest of the bill into law. The report is correct that the president has no authority to exercise a line-item veto. Similarly, the president is not permitted to repeal statutes unilaterally. But an announcement that the president will not enforce a provision because he regards it as unconstitutional is not the same as a veto.

Most significantly, other legal actors (including the courts and future presidents) may disagree with the president's interpretation of the Constitution. They will then treat the provision as valid, and enforce it. This cannot happen with a bill that the president has vetoed (unless, of course, his veto was overridden by Congress). For the same reason, a president's refusal to enforce statutes that he believes are unconstitutional is not the same as repealing them.

TAKE CARE CLAUSE

The ABA's second effort to justify its denunciation of signing statements is based on the constitutional provision requiring the president to "take Care that the Laws be faithfully executed." According to the ABA, "[b]ecause the 'take care' obligation of the President requires him to faithfully execute all laws, his obligation is to veto bills he believes are unconstitutional."

Once again, the ABA has confused questions about the president's obligation to execute the laws with the question of whether he is obligated to veto bills he believes are unconstitutional. The take care clause says nothing at all about an obligation of the president to veto any bill. In addition, the ABA fails

to recognize that the Constitution itself is one of the “Laws” that the president is obliged to execute. The take care clause does not purport to determine what the president should do when one law (such as a statute) conflicts with another (such as the Constitution). That is an important question, but it is not answered by the take care clause.

THE PRESIDENT AND THE COURTS

For these reasons, the ABA is wrong to claim that the Constitution imposes a rule requiring the president to “veto any bill he believes would violate the Constitution in any respect.” Not only is this rule absent from the Constitution, it is silly. And the ABA seems to realize that it cannot work. In a somewhat confusing passage, the report acknowledges that there may be exceptions to the ABA’s rule. One example mentioned in the report is a bill that contains “insignificant [though unconstitutional] provisions in omnibus emergency-relief or military-funding measures, enacted as Congress recesses or adjourns, [that] would seem not to merit a veto.”

Another exception that shows the unworkability of the ABA’s rule involves the persistent inclusion by Congress of unconstitutional provisions in its bills. The report admits that Congress includes unconstitutional provisions in many bills and suggests that presidents may be free to sign some of these bills and treat the unconstitutional provisions as nullities. The report, however, confines this exception from its “veto or enforce” rule to a narrow class of unconstitutional provisions, namely those that the courts have already said are unconstitutional.

Some such exception would certainly be necessary to salvage the ABA’s rule from unworkability. But why should this exception apply only in cases where the courts have already declared a certain type of statute unconstitutional? Or, in other words, why should presidents be obliged to enforce unconstitutional statutes that have not yet been litigated? The report explains: “Definitive constitutional interpretations are entrusted to an independent and impartial Supreme Court, not a partisan and interested President. That is the meaning of *Marbury v. Madison*.”

Perhaps because of this faith in judges, the ABA is extremely offended by the thought that the president might have what the report calls “the last word” on which statutes will go unenforced because they are unconstitutional. But whatever the reason for the report’s statement, it is wrong.

First, the Constitution nowhere says that “[d]efinitive constitutional interpretations” are entrusted to the Supreme Court, and the Constitution nowhere says that the Supreme Court must always get “the last word” about the meaning of the Constitution. Furthermore, there is no reason at all to assume that judges are more impartial and disinterested than presidents when it comes to

deciding how much power they think the Constitution gives them. If anything, the self-evident fact is that Supreme Court justices are *not* impartial angels incapable of overreaching with respect to their own power. Like presidents, judges may sometimes be able to get away with exercising powers the Constitution does not give them. But the mere fact that some people claim that the Constitution gives them final authority doesn't make it so. That goes for judges, just as it does for presidents.

In any event, the ABA is wrong about the famous Supreme Court decision in *Marbury v. Madison*, which nowhere made the sweeping claim to judicial supremacy attributed to it by the report. If anything, *Marbury* actually undermines the ABA's attack on presidential signing statements. That case held that the Supreme Court is authorized to refuse to enforce unconstitutional statutes. The most logically powerful argument in *Marbury* for that conclusion is this: faced with a conflict between the Constitution and a statute, courts have no choice except to give effect to the more authoritative of the two laws, namely the Constitution. That logic applies to the president every bit as much as it does to the Supreme Court.

Significantly, however, nobody on the Supreme Court has ever actually accepted all the implications of *Marbury's* logic. Any justice who did so would have to conclude that conflicts between the Constitution and judicial precedent must always be resolved by giving effect to the Constitution, not the precedent. After all, if statutes enacted by the people's representatives are always trumped by the Constitution, it would seem to follow by inexorable logic that mere judicial opinions must also be trumped by the Constitution. According to the Constitution itself, the "supreme Law of the Land" includes the Constitution, statutes enacted pursuant to the Constitution, and treaties. Conspicuously absent from the list is any mention of judicial opinions.

In practice, the Supreme Court has developed a very complex and flexible approach to the exercise of constitutional review. There is almost nobody who would seriously maintain today that courts are obliged by the Constitution to enforce unconstitutional statutes. But it is also true that very few would seriously maintain that courts are *always* obliged to strike down statutes they think are unconstitutional, even in the face of thoroughly settled judicial precedent.

Presidents take the same general approach that the Supreme Court has taken, and properly so. In principle, presidents always have the option of refusing to enforce or comply with statutes they consider unconstitutional. But they are not obliged to ignore or defy *every* such statute. And the same goes for Congress. The Constitution nowhere imposes on the legislature an obligation to relentlessly impose its own constitutional views on other branches of government.

POLITICAL SELF-RESTRAINT

One might think that leaving the president, the Supreme Court, and the Congress with concurrent authority to decide on the meaning of the Constitution is an invitation to constitutional crises and ultimately to chaos. History demonstrates that this is not so. With respect to who gets “the last word” on the meaning of the Constitution and other laws, the simple fact is that each branch of government sometimes gets the last word, and sometimes does not.

The Supreme Court, for example, has all kinds of devices by which it avoids trying to become the last word on all constitutional questions. These include many doctrines under which the justices frequently decline to issue any decision at all, as well as countless rulings that give the so-called political branches broad discretion in exercising various constitutional powers.

Like the courts, presidents have also sought to minimize conflicts with the other branches. Over the years, for example, the president’s legal advisers in the Justice Department have developed an elaborate internal jurisprudence that largely adheres to Supreme Court precedents. That jurisprudence displays some independence from the views of the judiciary, especially with respect to matters directly touching on the president’s institutional interests, such as the scope of his executive authority. But the jurisprudence is memorialized in written legal opinions that take judicial decisions very seriously and treat them as dispositive on many issues. In addition, the interpretive techniques—such as the practice of interpreting statutes so as to avoid constitutional difficulties—whose use has sometimes generated controversy in both these Justice Department opinions and presidential signing statements are generally borrowed directly from the Supreme Court.

It is important to keep in mind that these Justice Department legal opinions are purely advisory so far as the president is concerned. The president is free to ignore or overrule them, and presidents sometimes do just that. Perhaps most important, presidents have not felt compelled to exercise every right they believe they have, or that the Justice Department tells them they have. There is a fundamentally important distinction between claiming the authority to do something and actually doing it.

George W. Bush himself grasped the difference, and perhaps better than some of his supposedly more sophisticated critics. That much, at least, is suggested by the following extemporaneous comment during a public press conference at which he was asked about one of his most controversial signing statements:

I signed the appropriations bill with the McCain [anti-torture] amendment attached on because that’s the way it is. I know some have said, well,

why did he put a qualifier in [the signing statement]? And one reason why presidents put qualifiers in is to protect the prerogative of the executive branch. You see, what we're always doing is making sure that we make it clear that the executive branch has got certain responsibilities. Conducting war is a responsibility in the executive branch, not the legislative branch. But make no mistake about it, the McCain amendment is an amendment we strongly support and will make sure it's fully effective.

We all need to keep President Bush's commonsense point in mind when evaluating alarmist rhetoric like that found in the ABA report. Bush may have used his signing statements to *articulate* a relatively expansive view of presidential power somewhat more aggressively and systematically than his predecessors did, especially in connection with national security matters. But how much of this was limited to expressing his administration's constitutional views, and how much of it led to actual defiance of statutes? When I did a detailed study of the George H. W. Bush administration's jurisprudence of presidential power, I found that the first Bush had been quite aggressive in publicly claiming constitutional authority and extremely *timid* about actually exercising the powers he claimed to have. Could the same thing have been true of his son, George W. Bush?

After the Democrats took control of Congress in 2007, they directed the Government Accountability Office to conduct a study of the Bush administration's treatment of statutory provisions to which the president had objected in his signing statements. The most striking result of this research project was the GAO's inability to find evidence that the Bush administration failed to comply with even a single statutory provision as a result of objections articulated in a presidential signing statement.³

Like many others who study the Supreme Court, I think it has often misinterpreted the Constitution, sometimes badly and even inexcusably. I also disagree with a number of interpretations of the Constitution set forth in Justice Department opinions and presidential signing statements. And I believe that Congress has passed more than a few unconstitutional statutes, some of which have been signed by presidents and upheld by the Supreme Court. There is lots of room for reasonable debate about these issues, and about such questions as how much deference each branch of government should give to constitutional decisions reached by the others. But such debates are not usefully advanced either by the ABA report's shoddy legal analysis or by its hysterical claim that President Bush's signing statements constituted a threat to "the rule of law and our constitutional system of separation of powers."

Suppose that a president really did seriously abuse his power by, for example, systematically using dishonest interpretations of the law as a fig leaf for efforts to

approximate the exercise of an unconstitutional line-item veto or to suspend valid existing statutes by executive fiat. That might trigger a truly serious constitutional confrontation, and if it did there can be little doubt about which branch would have the last word. Congress, after all, still has the power of impeachment.

In fact, Congress has been very cautious about using this power to enforce its interpretations of the Constitution, and the impeachment of Andrew Johnson suggests why. He was accused of violating the Constitution by refusing to comply with a statute that interfered with his control over the military. Many decades later, in *Myers v. United States* (1926), the Supreme Court decided (and correctly so, I believe) that the statute was an unconstitutional infringement on the president's legitimate authority. Johnson's trial in the Senate may also serve as a useful reminder of what a real constitutional crisis looks like. Had he been convicted and removed from office, what the ABA calls "our constitutional system of separation of powers" might indeed have been profoundly altered.

THE FUTURE OF SIGNING STATEMENTS

Those who signed the ABA report no doubt found President Bush's constitutional views highly offensive, and they no doubt strongly disagreed with his policies on national security and other matters. But offending your political opponents, or an organized interest group like the ABA, is not quite the same as threatening the rule of law and the separation of powers.

Even if one assumes that Bush was wrong about some of the specific statutory provisions that he claimed were unconstitutional, it does not follow that these mistakes posed any real danger to the Republic. Fortunately, President Barack Obama has refused to be stampeded by the ABA and other critics of Bush. While hinting that he intended to use signing statements more cautiously than his predecessor, Obama announced on March 9, 2009, that they "serve a legitimate function in our system, at least when based on well-founded constitutional objections." Two days later, Obama issued a signing statement objecting to numerous provisions in an appropriations bill and declaring that he would either ignore them or interpret them to be consistent with his own views of his constitutional authority. As this book went to press, Obama had issued several more such signing statements, all of which contained constitutional objections just like those that Bush had been excoriated for raising.

If the ABA's overwrought attack on signing statements has any significance at all, perhaps it is this: by crying wolf about President Bush, the ABA and the prestigious authors of its report have made it less likely that they will be taken seriously if they ever have occasion to warn the nation about a genuine threat to the constitutional order.

CON

1. A more detailed version of the argument presented here can be found in Nelson Lund, “Signing Statements in Perspective,” *William & Mary Bill of Rights Journal* 16 (2007): 95, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=995930.
 2. American Bar Association, “Report of the American Bar Association Task Force on Presidential Signing Statements and the Separation of Powers Doctrine,” August 2006, www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf.
 3. See “Presidential Signing Statements Accompanying the Fiscal Year 2006 Appropriations Acts” (memo no. B-308603 from the U.S. Government Accountability Office to Sen. Robert C. Byrd and Representative John Conyers Jr., June 18, 2007), www.gao.gov/decisions/appro/308603.pdf. For my analysis of the memo’s findings, see Lund, “Signing Statements in Perspective,” 107–110.
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