IN DEFENSE OF PRESIDENTIAL SIGNING STATEMENTS

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Forthcoming in Debating the Presidency: Conflicting Perspectives on the American Executive, Richard J. Ellis & Michael Nelson, eds. (CQ Press, 4th ed.)

In 2006, a task force of the American Bar Association (ABA) 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.”

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. How does the Constitution impose 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 presentment 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 is not bound by a provision that he regards 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 absurd. And the ABA seems to realize that it is unworkable. 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 a touching 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 addition, the ABA is wrong about the famous Supreme Court decision in *Marbury v. Madison* (1803), 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 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 to interpret their own 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 both in these Justice Department opinions and in 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, perhaps better than 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 did use 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.  

2 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 (GAO) 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 systematically using dishonest legal interpretations 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 executive 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 endorsed the ABA report were highly offended by President Bush’s signing statements, 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.

Barack Obama also denounced Bush’s use of signing statements during his 2008 campaign. Shortly after assuming office, however, President Obama began issuing signing statements that were indistinguishable from Bush’s statements
about similarly worded statutory provisions. On March 9, 2009, the new president announced that signing statements "serve a legitimate function in our system, at least when based on well-founded constitutional objections." Two days later, he 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.

President Obama has continued to issue signing statements with constitutional objections just like the ones Bush was excoriated for raising. The ABA, however, has not issued any reports castigating Obama as a threat to "the rule of law and our constitutional system of separation of powers." Why not? Was its attack on Bush nothing but a partisan smear? Because the ABA’s report offered nothing but transparently defective legal analysis, it is hard to avoid that conclusion.

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.

President Obama has issued fewer signing statements than his predecessor.4 Obama, however, has gone far beyond Bush in actually defying Congress. Consider just a few examples. A statute enacted in 2003 required the State Department to honor requests from U.S. citizens born in Jerusalem to record Israel as the place of birth on their passports. The Obama administration refused to comply. While the Senate was holding formal sessions in 2012, President Obama made three "recess appointments," which are permitted by the Constitution only when the Senate is not in session. In 2011, the Obama administration continued to bomb Libya after a federal statute (the War Powers Resolution) required it to withdraw from hostilities. When Congress rejected

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President Obama’s proposal to grant amnesty and work permits to millions of illegal aliens, he unilaterally implemented his program without congressional authorization.

In some cases, President Obama may have been within his constitutional rights, and in some cases perhaps he was not. Under the ABA’s legal theory, however, these actual violations of “the congressional will” must be much graver threats to “the rule of law and our constitutional system of separation of powers” than President Bush’s mere statements about his constitutional rights. The ABA, however, has not called Obama a threat to the constitutional order, which confirms that its legally nonsensical denunciation of Bush was just a politically motivated canard.

5 A divided Supreme Court upheld Obama’s position on passports, and unanimously rejected his position on recess appointments. See Zivotofsky v. Kerry (2015); NLRB v. Noel Canning (2014). The Court has not ruled on the Libya bombing or immigration issues.