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SEPARATION OF POWERS, ABA STYLE: "SIGNING STATEMENTS" REPORT AT ODDS WITH CONSTITUTION

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The conclusions and recommendations of the American Bar Association's Task Force on Presidential Signing Statements and the Separation of Powers Doctrine ("ABA Task Force") are deeply flawed. They are grounded in a vision of the Presidency that is unsupported by either the Constitution's text or history. Presidential signing statements, including those making clear the Chief Executive's determination not to enforce provisions he considers to be unconstitutional, are a legitimate – and beneficial – part of our governmental system. President Bush, and his successors, should disregard these recommendations, and the ABA resolutions they prompted.

The Task Force's principal conclusion was that signing statements, indicating that the President will "disregard or decline to enforce all or part of a law the President has signed, or to interpret such a law in a manner inconsistent with the clear intent of Congress," are "contrary to the rule of law and our constitutional system of separation of powers." This paradigm is based on the incorrect premise that the President's refusal to implement or enforce particular provisions of a law he considers to be unconstitutional is the legal and practical equivalent of an unconstitutional "line-item veto."

In fact, a President's decision to ignore unconstitutional provisions, or to interpret them so as to meet the Constitution's requirements, is part and parcel of his overarching constitutional obligation to "take Care that the laws be faithfully executed." The Constitution, of course, is the United States' fundamental law, and it trumps all other legislative commands.

Signing Statements. As the ABA Task Force itself conceded, Presidents have long used signing statements to articulate their views on both the constitutionality and wisdom of legislation, as well as a convenient means to indicate how the Executive Branch intends to implement a particular provision in practice. Both Democrat and Republican Administrations have viewed this practice as lawful and legitimate. As noted early in President Clinton's first term by Professor Walter Dellinger, then serving as Assistant Attorney General for the Office of Legal Counsel: "Many Presidents have used signing statements to make substantive legal, constitutional or administrative pronouncements on the bill being signed. Although the recent practice of issuing

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signing statements to create "legislative history" remains controversial, the other uses of Presidential signing statements generally serve legitimate and defensible purposes."[1]

These purposes included, as Professor Dellinger noted, the use of signing statements as one means of conveying the President's belief that a particular law, or its portions, implicated constitutional concerns. In addressing such provisions, the President can indicate that the legislation "would be unconstitutional in certain applications," state that he will interpret legislation in a particular manner so as to save it from unconstitutionality, or announce his intent not to enforce that part of a law he considers to be unconstitutional on its face. Because "the President may properly decline to enforce a law, at least when it unconstitutionally encroaches on his power," Dellinger concluded that these types of signing statements are constitutional.[2]

Professor Dellinger did not reach a conclusion regarding the use of presidential signing statements as a means of creating a judicially cognizable "legislative history." However, within the legislative history domain, presidential signing statements are not second-class citizens. In this regard, although the Constitution vests "[a]ll legislative Powers herein granted" in Congress, the President has a critical role in lawmaking. First, under the "Presentment Clause," no bill can become law without being presented for the President's signature: "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, who shall . . . proceed to reconsider it. If after such Reconsideration two-thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law."[3] Only if the President receives a bill and does not return it – assuming the originating House remains in session – within ten days, does it become law without a supermajority or his signature.

Second, Article II, section 3 requires the President to recommend to Congress "such Measures as he shall judge necessary and expedient." In practice, of course, the most important exercise of presidential power under this provision is the Executive Branch's annual budgeting process, although Presidents also regularly submit numerous bills involving other areas of federal concern for Congress' consideration. These "administration bills" often form the basis of legislation. Executive Branch officials also play a major role in congressional hearings, and the President regularly communicates with Congress as a bill is considered. Signing statements are but a part of these broader executive-congressional legislative interactions. The use of such materials in interpreting a law is as valid as other types of legislative history. Indeed, although not all judges share Justice Scalia's skeptical attitude towards legislative history, there certainly is a widespread recognition that most congressional materials related to a bill's enactment constitute no more than the views of individual legislators (or even their staff), and are often neither contemporaneous nor accurate reflections of what actually transpired in the lawmaking process. By contrast, when the President participates in legislative activities, whether through signing statements or other communications to Congress, he speaks for an entire coordinate branch of government. To the extent legislative history is to be considered in the interpretation and application of statutes, the President's role in lawmaking certainly gives his view at least as much importance and validity as that of individual members of Congress debating and voting on a bill before it becomes law.[4]

The President's "Veto" Power. Despite the long history of presidential signing statements – including their use, at least since the Monroe Administration, to note constitutional concerns – the ABA Task Force concluded that such statements were unconstitutional based on what it called the President's "constitutional obligation to veto any bill that he believes violates the Constitution in whole or in part."[5] In any case, under the Task Force's logic, a President must enforce any surviving provision that has not formally been declared unconstitutional by the courts. Refusing to enforce such provisions, they conclude, amounts to an impermissible line-item veto.

In fact, no such veto obligation exists in the Constitution, and the ABA Task Force cites little authority beyond the Presentment Clause's supposedly "plain" language to support this extraordinary claim. That

[1]The Legal Significance of Presidential Signing Statements, 1993 OLC LEXIS 11, *18 (Nov. 3, 1993) [hereinafter "Dellinger Opinion I"]. The ABA Task Force cites this, and a second Dellinger opinion, *infra* note 7, but never confronts or answers his analysis.
[2]*Id.* at *10.
[3]U.S. CONST. ART. I, § 7, cl. 2.
[4]Courts have given weight to the President's views so expressed. *Supra* note 1 at *16.
[5]ABA Task Force Report 22 (Aug. 2006).

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language, however, calls for the President to sign a bill "[i]f he approve" – an inherently subjective, and therefore discretionary, test that makes no distinction between constitutional and policy considerations, giving the President the right, but no obligation, to veto a bill. To hold otherwise would produce the absurd result of obliging the President to veto all bills he disapproves of, regardless of the reason. In fact, as suggested by Hamilton in *Federalist No. 73*, the President may exercise his veto for constitutional *or* for policy reasons: "The primary inducement to conferring the power in question upon the Executive is, to enable him to defend himself; the secondary one is to increase the chances in favor of the community against the passing of bad laws, through haste, inadvertence, or design." His only legal obligation is to explain his objections upon the bill's return to its house of origin. Moreover, although it appears that some of the Framers believed that the President would be required to veto a bill he considered to be unconstitutional, this belief was never translated into a binding constitutional practice.[6] And, more to the point, there is little evidence that the Framers generally believed that the President would be required to accept the will of Congress simply because it determined to diminish the authority of his office by a two-thirds majority passing unconstitutional legislation over his veto. The veto is but one line of defense. The President can also refuse to enforce an unconstitutional law.

The President's Authority Not to Enforce Unconstitutional Statutes. At the core of the current signing statements controversy is the question whether the President is required to execute laws he believes to be unconstitutional. The answer to this question is no. Under Article II, the President's obligation is not to take care that "the laws be executed," but that "the laws be *faithfully* executed." This text, which is replicated in the President's oath to "faithfully execute the Office of President," suggests that he cannot act as a congressional automaton, but must exercise his own judgment with respect to the legality of his own actions. In this context, the President's key duty is ensuring that his actions comport with the Constitution's requirements. Complying with statutes that violate the Constitution flouts this duty.

Significantly, the Supreme Court has approved presidential refusals to enforce on constitutional grounds statutory provisions. In *Myers v. United States*, 272 U.S. 52 (1926), the Court upheld Woodrow Wilson's action in removing a United States postmaster despite a statute, enacted more than forty years earlier, purporting to forbid just such presidential removals. As pointed out by Professor Dellinger in an OLC opinion dated November 2, 1994, "despite the unsettled constitutionality of President Wilson's action, no member of the Court in *Myers* suggested that Wilson overstepped his constitutional authority – or even acted improperly – by refusing to comply with a statute he believed was unconstitutional."[7]

This also was the view of President Carter's Attorney General, Benjamin Civiletti, who described the import of *Myers v. United States* as follows: "Myers holds that the President's constitutional duty does not require him to execute unconstitutional statutes; nor does it require him to execute them provisionally, against the day that they are declared unconstitutional by the courts."[8]

The ABA Task Force, of course, suggests the opposite rule – that a President must enforce laws he believes to be unconstitutional unless and until he obtains a judicial determination to that effect. This may sometimes be a prudent course of action, but it is not legally required and – depending on the strength of a President's conviction that the law actually is unconstitutional – may well constitute a violation of his oath to faithfully execute his office.

Finally, even interpreting either the Presentment Clause, or the "Take Care" Clause, as requiring the President to veto an unconstitutional bill would not provide an effective check on congressional overreaching. An unconstitutional bill can be passed over the President's veto in the very same manner as a constitutional one – by a two-thirds vote in each House of Congress.

The possibility of a later judicial challenge is also no answer. Judicial review is only available where the passage or implementation of an unconstitutional law would create a case or controversy justiciable in the courts. As there is no general right permitting anyone – including the President – to challenge a law simply because they

[6]Dellinger Opinion I, *supra* note 1, at *12.
[7]Presidential Authority to Decline to Execute Unconstitutional Statutes, 1994 OLC LEXIS 67 *7 (Nov. 2, 1994) [hereinafter "Dellinger Opinion II"].
[8]The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55, 59 (1980), *quoted in* Dellinger Opinion II, *supra* note 7, at *8.

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consider it to be unconstitutional, and standing is limited to those who have suffered an individualized legal injury, many unconstitutional laws would not be subject to judicial review. Indeed, unconstitutional statutes that operate to restrict the President's constitutional powers may also raise political questions that put them beyond judicial determination.[9]

Thus, if the ABA Task Force recommendations are heeded, the President would become little more than a cipher – a glorified clerk carrying out the directions of Congress regardless of their legality. This role, of course, would be inconsistent with the President's own Article II legal obligations to "take Care that the Laws be *faithfully* executed."[10]

The President's Role as an Independent and Co-equal Branch of Government. Of course, the President of the United States does not work for Congress. In fact, the Constitution's Framers made the President an independent and co-equal branch of government both to ensure good governance and as a fundamental check on the legislative power. As James Madison explained during the 1787 Constitutional Convention, "[e]xperience had proved a tendency in our governments to throw all power into the Legislative vortex" and "[a] dependence of the Executive on the Legislature, would render it the Executor as well as the maker of laws; & then according to the observation of Montesquieu, tyrannical laws may be made that they may be executed in a tyrannical manner."[11]

In some sense, the ABA Task Force's vision of legislative supremacy suggests that its members mistook the United States Congress for an Americanized version of the British Parliament. Parliament is, of course, supreme. This is because, both in theory and practice in the 18th century and today, it embodies the entire British political nation. As Sir William Blackstone explained: "the king and these three estates [the lords spiritual, the lords temporal, and the commons], together, form the great corporation or body politic of the kingdom."[12] The United States Congress, by contrast, is but one of several institutions that play vital and distinctive roles in American constitutional governance; and it is in no sense the senior branch of the Federal Government.

In this connection, the ABA Task Force's effort to inflame the signing statement debate with a detour into the history of Britain's "Glorious Revolution," is also inapposite. The use of signing statements does not involve a "suspending" or "dispensing" power. The authority to suspend statutes generally, or to dispense with them in individual cases, was asserted in 17th Century England as part of the highly indeterminate Royal Prerogative, and, as such, could be exercised for any reason the king thought sufficient. In one famous example from 1687, James II "out of our princely care and affection unto all our loving subjects that they may live at ease and quiet, and for the increase of trade and encouragement of strangers . . . thought fit by virtue of our royal prerogative . . . ."[13] to issue his Declaration of Indulgence, relieving Catholics and other religious dissenters from England's penal laws.

By contrast, the President's authority to refuse to enforce statutes extends only to those that are inconsistent with the Constitution itself. It merely involves application of the Constitution's own dictates over those of a statute. George W. Bush is not a king; he has not acted like a king; and he has not claimed regal powers, directly or indirectly. Claims to the contrary by the ABA and other critics are ideological rhetoric, masquerading as historical analysis.

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[9]The political question doctrine, elaborated in the leading case of *Baker v. Carr*, 369 U.S. 186, 210-11(1962), requires Article III courts not to decide disputes that implicate issues, demonstrably committed, under Article I or II, to the political branches, or that would require the courts to ascertain issues that are incapable of judicial discernment. In general, the limitations on justiciability of structural separation of powers issues reflect the Framers belief that most of these disputes can only be properly resolved through the political means. This, in turn, means that any solutions are transitory and similar types of Executive-congressional disputes reoccur throughout American history.
[10]U.S. CONST. ART. II, § 3 (emphasis added).
[11]Notes of Debates in the Federal Convention of 1787 Reported by James Madison 311-12 (Adrienne Koch ed. 1966).
[12]1 William Blackstone, *Commentaries on the Laws of England* 149 (1765-1769) (facsimile ed., intro. by Stanley N. Katz 1979).
[13]English Historical Documents, 1660-1714, 399, 400 (Andrew Browning, ed. 1953).