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Presidential signing statements

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Tomorrow or Tuesday, the American Bar Association House of Delegates, meeting in Honolulu, is likely to approve a unanimous report and resolution by a task force declaring it is "contrary to the rule of law and our constitutional system of separation of powers" for the president to claim authority to disregard, or to decline to enforce, all or part of a law he has signed, or to interpret that law in a manner inconsistent with the intent of Congress, because he believes it to be unconstitutional. According to the task force, the president has but two options: he may veto the entire bill, or enforce it in full.

The ABA report largely ignored the *real* problem, which for the last 35 years has been legislative usurpation of presidential power -- often by attaching unconstitutional "riders" to important legislation that is difficult to veto. And, sadly, while all members of the task force are certainly honorable and able, most have been frequent contributors to the Democratic Party or its candidates, and at least one of the two Republicans included was a known critic of the use of signing statements at the time of his appointment.

By failing to include anyone with a contrary perspective on the panel, the ABA has served neither its members nor the public.

It is true, as the task force notes, that the president has a constitutional duty to "take Care that the Laws be faithfully executed." It is also true that Chief Justice John Marshall's landmark 1803 opinion in *Marbury v. Madison* established, in the words of the task force, that "definitive constitutional interpretations" are entrusted to the Supreme Court. No one questions that.

But the Constitution also requires the president to take an oath of office that he will "preserve, protect and defend the Constitution of the United States," to the best of his ability. And in *Marbury*, Chief Justice Marshall also proclaimed "a legislative act contrary to the Constitution is *not law*."

Obviously, when confronted by a statute he believes usurps his powers or otherwise violates the Constitution, the president's constitutional duties must prevail over any imposed by mere statutes. Presidents have been refusing to implement unconstitutional provisions of statutes since James Monroe was president, and the issuance of formal signing statements either to identify provisions that are inherently unconstitutional that will not be enforced, or to instruct the executive branch how an ambiguous provision is to be interpreted to avoid constitutional difficulties, has a long pedigree, having been by done by Abraham Lincoln, Woodrow Wilson, Theodore and Franklin Roosevelt, Jimmy Carter, Bill Clinton (who used them far more often than did Ronald Reagan), and many other presidents.

It is true use of such statements has become more common in the post-Vietnam era; the explanation is not "lawbreaking" presidents, but rather a Congress that sometimes acts as

if it believes it is the supreme sovereign authority of the nation rather than one of three co-equal, independent branches of government serving the sovereign American people. The recent outrage expressed by the bipartisan House leadership over the FBI serving a judicial search warrant in a Capitol Hill office is but further evidence of this alarming belief that Congress is "above the law."

It is also important to recall that Marbury established another important principle, that the president is entrusted by the Constitution with certain important powers "in the exercise of which he is to use his own discretion." Marshall explained, "there exists, and can exist, no power to control that discretion" -- giving as an example that, in establishing the Department of Foreign Affairs (now the State Department), the First Session of the First Congress simply instructed the secretary to carry out "the will of the president."

The following year, President Thomas Jefferson confirmed this understanding in a letter to Treasury Secretary Albert Gallatin, noting that, from the Founding of the country, "it has been the uniform opinion and practice that the whole foreign fund was placed by the Legislature on the footing of a contingent fund, in which they undertake no specifications but leave the whole to the discretion of the president."

Since Vietnam, Congress has enacted hundreds if not thousands of statutory provisions that either direct the president how he must exercise this discretion or actually seek to exercise directly power entrusted by the people exclusively to the Executive. This problem is particularly acute when Congress seeks to interfere with matters involving diplomacy, intelligence or military operations, which men like George Washington, James Madison, Thomas Jefferson and Alexander Hamilton recognized were part of the "executive Power" vested in the discretion of the president by Article II, Section 1.

As Washington wrote in his diary on April 27, 1790 -- after discussing the issue with Jefferson, Madison and Chief Justice John Jay -- the Senate has "no constitutional right to interfere" in the day-to-day business of diplomacy. The Supreme Court reaffirmed this principle in the landmark 1936 Curtiss-Wright decision, declaring the Senate and Congress were "powerless to invade" the field of diplomatic negotiation. Yet, since Vietnam, Congress has passed "laws" instructing the president what terms must or may not be negotiated.

Presidents Eisenhower, Nixon, Ford and Carter each used signing statements to declare they would not recognize unconstitutional "legislative vetoes" -- a practice finally held unconstitutional by the Supreme Court in the 1983 Chadha case.

To its credit, the ABA task force took note of the hundreds of legislative vetoes that have been enacted by Congress since the court declared them unconstitutional, and acknowledged "it is not far-fetched to suppose that members of Congress could persist in enacting unquestionably unconstitutional provisions" even after the use of a veto. But this flagrant legislative *lawbreaking* doesn't seem to trouble the ABA task force nearly as much as the idea President Bush believes his constitutional duty to "defend the Constitution" is more important than "faithfully executing" a statutory provision that the Supreme Court has *already* held is not "law."

Some legislation simply cannot be vetoed. During World War II, President Franklin Roosevelt elected not to veto the Urgent Deficiency Appropriation Act of 1943 that provided emergency funds for food and ammunition for U.S. forces on the front lines of Europe and the Pacific, though the bill included a flagrantly unconstitutional rider barring expenditure of appropriated funds to pay the salaries of three named government

employees.

But in a signing statement, Roosevelt denounced the provision as "unconstitutional," declaring it was "thus not binding on the Executive or Judicial branches." Three years later, without dissent, the Supreme Court in the Lovett case held the rider an unconstitutional "bill of attainder."

Does this mean there are no grounds for criticizing any of President Bush's more than 100 signing statements declaring various statutory provisions unconstitutional or interpreting them narrowly to avoid constitutional difficulties? Certainly not.

But the problem of legislative usurpation is serious, and in my view the president deserves our gratitude for his vigilant efforts to restore and preserve the powers vested in his office by the American people through the Constitution, so that they might be passed intact to his successor.

And for the ABA to suggest the doctrine of separation of powers requires that the president simply ignore congressional assaults upon his constitutional powers when a provision is ambiguous -- or when it is unreasonable to veto a critically important bill because one relatively minor provision is unconstitutional -- makes no sense either as a matter of constitutional law or public policy.

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