Presidential Signing Statements

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Presidential Signing Statements

A presidential signing statement is a written statement the President makes when signing a bill into law. The President may use this statement to praise those involved in passing the bill, to explain to the public what impact he believes the law will have, to direct subordinate officers within the executive branch how to interpret and administer the law, including how to interpret it to avoid a constitutional problem, or to inform Congress and the public that he believes that a particular provision is unalterably unconstitutional and thus the executive branch will not enforce the provision.

The American Bar Association formed a special task force to study the use of such signing statements and recently issued a report highly critical of the practice. The task force concludes that the President's use of signing statements to indicate constitutional objections or concerns is itself unconstitutional. The ABA task force is wrong.

The ABA task force's report concludes that the President's only choice, when presented a bill with a provision that he believes is unconstitutional, is to veto the bill. This is simply wrong as a constitutional matter, and impractical as a policy matter. The President has an obligation to not enforce unconstitutional parts of statutes (and not to interpret them in ways that would render them unconstitutional) under the clause of the Constitution that requires him to "take Care that the Laws be faithfully executed," which includes the supreme law of the Constitution. That is true whether he has signed the law, whether it has been enacted in an override of his veto, or whether it was enacted before he became President. In those cases in which he is signing the law, a signing statement is one of the proper means of fulfilling his Take Care obligation.

An example is helpful. Assume that the President has signed into law an emergency defense appropriations bill that he believes essential for the national defense. One paragraph of the 100-page bill provides that the ABA president shall immediately be detained until he confesses that he is a partisan. The President recognizes that this provision is unconstitutional. Can anyone seriously maintain that the President's only constitutional option, once he has signed the bill, is to implement that provision until such time as some court rules it unconstitutional? In fact, that unconstitutional provision has no legal effect and is unenforceable.

The ABA task force acknowledges "the rare possibility that a President could think it unavoidable to sign legislation containing what he believed to be an unconstitutional provision." But it still maintains that it is unacceptable for the President to sign the bill and address the unconstitutional provision in a signing statement. This position is untenable. Sadly, all too many bills that reach the President's desk include one or more unconstitutional provisions. For example, virtually every appropriations bill contains a provision that violates the Supreme Court's holding in *INS v. Chadha*. Imagine the result if the President were required to veto every such appropriations bill.

Behind the guise of separation-of-powers rhetoric, the ABA task force report embraces the myth of judicial supremacy. Here's the most telling passage:

> "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*.... The President's constitutional duty is to enforce laws he has signed into being unless and until they are held unconstitutional by the Supreme Court or a subordinate tribunal. The Constitution is not what the President says it is."

It is of course true that the Constitution is not whatever the President says it is. But *Marbury* in no way establishes that the Supreme Court is the only expositor of the Constitution, much less that constitutional interpretation is the exclusive preserve of the courts. On the contrary, the President's oath of office, mandated in the text of the Constitution, by which he swears to "preserve, protect and defend the Constitution," necessarily requires that he form a judgment as to what the provisions of the Constitution mean.

When the courts have not yet ruled on a particular issue, the President must make the initial call on whether a provision—or application of it—is constitutional, and if he concludes that it clearly is not, he is free, indeed required, not to enforce it. Nor does it logically or legally follow that because the President may veto an entire bill that he must do so if a small portion of it is constitutionally questionable. Indeed, unless Congress specifies otherwise in a statute, the President and the courts apply a presumption that Congress would want only those provisions that are unconstitutional to be voided, and the rest of the statute to be saved. The presumption that saves most of a statute is deferential to Congress, which generally remains free to specify in advance that a statute is a seamless work that must be struck down in its entirety if any portion of it is found to be void.

The report makes arguments purportedly based on an originalist understanding of the Constitution—misplaced originalist arguments, but originalist arguments nonetheless—in support of its positions, but ignores the corollary that the Supreme Court's interpretations of the Constitution should be judged by the same test of originalism. The task force also seems to think that it would be a simple matter for the Administration to convey its views on legislation prior to passage, which reflects a telling lack of understanding of the realities of the legislative process, where amendments are often added without opportunity for executive branch review or comment before the bill is passed.

Given that the President has a duty under the Constitution not to enforce an unconstitutional provision of a bill, he ought to identify the unconstitutional portion. Indeed, it is hard to understand why anyone would prefer a President not to do so when signing a bill, and instead prefer later and less public ways for him to instruct the executive branch how to enforce (or not enforce) particular provisions. In specifying his intentions at the outset, he is not only meeting his constitutional obligation, he is doing so in the most transparent way possible. If Congress disagrees on the particular provisions that the President has drawn to its attention, is it not preferable for it to consider its options sooner rather than later?

On so many levels, the ABA task force has simply gotten it wrong.

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