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By Neil Kinkopf

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SIGNING STATEMENTS AND THE PRESIDENT'S AUTHORITY TO REFUSE TO ENFORCE THE LAW

*Neil Kinkopf**

Signing statements have been very much in the news lately. But this publicity has been as likely to engender confusion as understanding. In part this is because “signing statement” is used as a short-hand reference for two distinct issues: one issue has to do with whether and when the President may refuse to enforce a law that the President regards as unconstitutional; the other issue is whether the courts should take into account the views of the President when reviewing the legislative history of a statute. I propose to focus on the former issue because the current Bush Administration has so vigorously and frequently asserted the authority to refuse that the issue has taken on an immediate importance. For anyone interested in a full, scholarly treatment of the subject, I recommend Professor Dawn Johnsen’s outstanding article on the subject (“Presidential Non-Enforcement of Constitutionally Objectionable Statutes,” 63 L.& CONTEMP. PROBS. 7 (WINTER/SPRING 2000)), which has informed and influenced the discussion that follows.

Historically, signing statements have served a largely innocuous and ceremonial function. They are issued by the President to explain his reasons for signing a bill into law. A signing statement thus serves to promote public awareness and discourse in much the same way as a veto message. Controversy arises when a signing statement is used not to extol the virtues of the bill being signed into law, but to simultaneously condemn a provision of the new law as unconstitutional and announce the President’s refusal to enforce the unconstitutional provision. This refusal to enforce laws represents a controversial exercise of presidential power, but it is crucial to keep this controversy distinct from the vehicle by which that power is announced – the signing statement. There is nothing inherently wrong with or controversial about signing statements. Most do not contain an assertion of presidential power. For those that do, the signing statement itself ironically serves the laudable function of promoting accountability. Even if one rejects the idea that the President may refuse to enforce a law, at least the President is openly declaring what he plans to do. Put differently, if the President is to sign a bill into law with his fingers crossed, better that they be crossed where we can see them than that they be crossed behind his back. The controversy, then, is not over the use of signing statements but over the assertion of a non-enforcement power that is sometimes declared in signing statements.

The controversy over whether the President has the authority to refuse to enforce laws he views as unconstitutional has been sharpened during the current administration by the frequency with which it has asserted this authority. In a recent and important study, political science Professor Philip Cooper has analyzed the exercise of this non-enforcement power by the Bush Administration. (“George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements,” 35 PRES. STUD. Q. 515 (2005).) He found that President Bush has deployed the non-enforcement power with unprecedented breadth and frequency –

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over 500 times during the first term alone. The figures from the study were updated in an excellent article by *Boston Globe* reporter Charlie Savage, which puts the number at over 750, which is more than all of President Bush's predecessor's combined. "Bush Challenges Hundreds of Laws," BOSTON GLOBE, April 30, 2006, at A1. As a result, a front page article in *USA Today* cataloging the ways in which the Bush Administration has sought to expand presidential power listed presidential non-enforcement (using the label "signing statements") first. Susan Page, "Congress, Courts Push Back Against Bush's Assertions of Presidential Power," USA TODAY, June 6, 2006, at 1.

THE CONTROVERSY

The assertion of a presidential power to refuse to enforce a law stands in deep tension with the Constitution. As the Supreme Court has repeatedly recognized, the Take Care Clause – which provides that the President "shall take care that the Laws be faithfully executed" – establishes that the President does not hold the royal prerogative of a dispensing power, which is the power to dispense with or suspend the execution of the laws. The Take Care Clause, then, makes plain that the President is duty-bound to enforce all the laws, whether he agrees with them or not.

A presidential power to refuse to enforce the laws is also inconsistent with the constitutional process for the enactment of legislation. As the old Saturday morning cartoon literally illustrates, the Constitution provides that a bill cannot become a law unless the President gives his assent. This assent must be given or withheld in whole, as the Supreme Court recently emphasized in striking down a statutory line-item veto. *Clinton v. New York*, 524 U.S. 417 (1998). In *The Federalist*, James Madison describes the system of checks-and-balances. The President's principle weapon against legislative encroachments and against improvident legislation is his veto power. Under the Constitution's design, then, if the President regards a provision of a bill to be unconstitutional, the appropriate remedy is a veto.

The case against a presidential power of non-enforcement seems quite powerful. Yet Presidents of both parties have over the course of many years refused to enforce unconstitutional laws, including laws they themselves have signed into existence. How can this be? The explanation has both pragmatic and formal elements. As a practical matter, some legislation cannot be vetoed. Especially as Congress turns more and more to the use of omnibus legislation which encompasses many indispensable provisions – funding for the military, for example – it becomes practically impossible for even the most scrupulous President to veto a bill simply because one minor and obscure provision is unconstitutional. As a formal matter, Presidents do not typically assert the power to refuse to enforce a law. Rather, Presidents note that because the Constitution is also a law, they must enforce the Constitution by refusing to enforce an unconstitutional law. To take an uncontroversial example, the Supreme Court ruled all legislative vetoes unconstitutional in *INS v. Chadha*, 462 U.S. 919 (1983). After the *Chadha* decision, no one has criticized the Presidents (of both parties) who have refused to enforce the thousands of legislative vetoes that remain on the books. Moreover, as Louis Fisher has pointed out, Congress has enacted hundreds of

legislative vetoes since *Chadha*, and not even members of Congress expect the President to veto such legislation or to enforce the patently unconstitutional legislative veto provisions. The President complies with, rather than violates, his Take Care Clause duty by adhering to the Constitution's requirements and by refusing to apply the incompatible and unconstitutional law. The principled and fairly consistent (between the political parties) position of the executive branch boils down to this: where a statute is unconstitutional, it is the President's duty to refuse to enforce the unconstitutional statute.

The executive branch's position raises a difficult question: when is a statute unconstitutional? It is surely the case that when a statute is definitively determined to be unconstitutional, such a statute should not be enforced. But there are many occasions where a law's constitutionality is indeterminate. For example, a statute may raise a question that has not been squarely addressed by the courts. Or, if squarely addressed, the President may nevertheless believe that he can convince the court in a subsequent case to draw a distinction or overrule its precedent – as President Franklin Roosevelt did with respect to his New Deal legislation. What is the President to do when he regards a law to be unconstitutional, but for one reason or another, there is no definitive resolution to the question? This is the most difficult aspect of the controversy.

RESOLVING THE CONSTITUTIONAL TENSIONS

Some commentators take an absolutist position: until a statute's unconstitutionality is definitively established, the President must enforce the statute. The absolutist position is contrary to longstanding and consistent executive branch practice dating at least to 1860. Moreover, the absolutist position fails to account for the complexities of how constitutional meaning is established. For example, the President's determination that he will enforce a law that he regards as unconstitutional will sometimes deprive the judiciary of the opportunity to rule on the question. Imagine, for example, that Congress enacts a statute (overriding the President's veto) that forbids the Justice Department to pursue any investigation or prosecution of Tom Delay or William Jefferson. The President would almost certainly regard this statute as an unconstitutional encroachment on the prosecutorial discretion of the executive branch, but there is not sufficient precedent on the subject to predict with confidence what the Supreme Court would ultimately say. If the President were to order the Justice Department to comply with the statute and cease prosecution, there would be no occasion for the judiciary to rule on the constitutional question of whether the statute violates the constitutional powers of the executive. Similarly, had President Woodrow Wilson enforced the provisions of the Tenure in Office Act, there would have been no apparent basis for the lawsuit, *Myers v. United States*, 272 U.S. 52 (1926), in which the Supreme Court ultimately declared the Act unconstitutional. Thus, the absolutist position can actually lead to a situation in which unconstitutional laws are enforced with no meaningful opportunity for judicial review.

If absolute enforcement is unacceptable, we must determine when it is appropriate for a President to decline to enforce a statute because the president regards the statute as

unconstitutional. Walter Dellinger, writing as the head of the Justice Department's Office of Legal Counsel, set forth the classic treatment of this question in a memorandum for then-White House Counsel Abner Mikva, "Presidential Authority to Decline to Execute Unconstitutional Statutes," 18 OP. O.L.C. (1994). Dellinger concluded that "[a]s a general matter, if the President believes that the Court would sustain a particular provision as constitutional, the president should execute the statute, notwithstanding his own beliefs about the constitutional issue. If, however, the President, exercising his independent judgment, determines both that a provision would violate the Constitution and that it is probable that the Court would agree with him, the President has the authority to decline to execute the statute."

But Dellinger emphasized that this authority does not represent an unbounded discretion. Rather, in determining how to act, the President must pursue the course of action that takes account of and advances all the relevant aspects of constitutional structure. The decision will inevitably be dependent on the context of the specific case. In deciding whether to enforce a statute, the President should be guided by: "a careful weighing of the effect of compliance with the provision on the constitutional rights of affected individuals and on the executive branch's constitutional authority. Also relevant is the likelihood that compliance or non-compliance will permit judicial resolution of the issue." The decision is to be guided by close consideration of the effect of enforcement on individual rights, the constitutional balance of power between the branches, and the Supreme Court's "special role in resolving disputes about the constitutionality of enactments."

So formulated, the President does not enjoy a power to decline to enforce a law whenever he sees fit, or whenever he can articulate a constitutional objection (which practically may amount to the same thing). Take the application of the Dellinger principles in the Clinton Administration. In 1996, Congress passed as part of the annual military appropriation bill a provision requiring the discharge from military service of anyone with human immunodeficiency virus (HIV). The President believed that the HIV provision was unconstitutional but signed the bill into law because he could not deprive the military of the money it needed to operate (this coming on the heels of two government shutdowns). President Clinton decided to follow a two-pronged strategy. He would seek the repeal of the HIV provision and, failing repeal, he would enforce the provision in order to secure a judicial resolution of the controversy. Threatened with the prospect of judicial rebuke, Congress repealed the HIV provision.

DISREGARD FOR THE CONSTITUTION

The Bush Administration's approach is in stark contrast with the Clinton Administration's. Far from a careful, contextual weighing of disparate constitutional factors framed by a respect for the special role of the Supreme Court in resolving constitutional issues, the Bush Administration has operated with a careless disregard for constitutional structure and has asserted its own raw power with contempt for the role of the Supreme Court. This is dramatically illustrated by the frequency with which the Bush Administration has articulated its intention not to enforce laws. The Bush Administration has not fought for

the repeal of the more than 700 provisions it has identified as unconstitutional, much less has it carefully weighed the facts and circumstances of each of those instances. Indeed, a review of these objections shows that they are treated in a mechanical fashion, with boilerplate objections phrased over and over again in signing statements.

The contempt of the Bush Administration for constitutional limits on its own power is nowhere more evident than in the statement accompanying the signing of the McCain Amendment. The McCain Amendment forbids United States personnel from engaging in cruel, inhuman, and degrading treatment of detainees, adding these prohibitions to the existing prohibition on the use of torture. Upon signing the McCain amendment into law, President Bush issued a statement declaring that the executive branch would interpret the McCain Amendment “in a manner consistent with the constitutional authority of the president to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power” The President cannot have concluded that his view would likely be vindicated by the Court. The “unitary executive” view of presidential power is an extreme construction that lacks judicial sanction. Moreover, it is precisely this view that supported the Administration’s infamous torture memo, which the Bush Administration itself pointedly refused to defend, and ultimately repudiated, after it became public.

It is even more remarkable that the language of the McCain Amendment signing statement is itself boilerplate. This “power to supervise the unitary executive” objection was raised, essentially verbatim, against 82 separate provisions of law during the first term of the Bush Administration alone, according to Professor Philip Cooper’s study. This simply cannot be the result of a careful balancing of constitutional considerations. Moreover, the clinching phrase about the constitutional limitations of the judicial power speaks volumes about the Administration’s contempt for the judiciary’s role in constraining executive power, coming as it did on the heels of the Supreme Court’s declaration in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) at 536, that “a state of war is not a blank check for the President”

These problems are not limited (if 82-and-counting occurrences can be called limited) to the President’s construction of his own power as unitary executive. President Bush’s arsenal includes boilerplate language for objecting to laws that he recommend legislation to Congress, that he disclose information to Congress or the public, that set qualifications for federal officeholders, or that so much as mention race. For example, the President signed into law a bill establishing an Institute of Education Sciences. The signing statement pertaining to this law raised a constitutional objection in what seems like a laudable and unobjectionable goal for the new institute: “closing the achievement gap between high-performing and low-performing children, especially achievement gaps between minority and nonminority children and between disadvantaged children and such children’s more advantaged peers.” The signing statement questions this provision’s conformity with “the requirements of equal protection and due process under the Due Process Clause of the Fifth Amendment.” There is no judicial precedent that would question the validity of this law under the Fifth – or any other – Amendment. Only under a radical and unsupported

reconceptualization of the idea of equality could working to eliminate the achievement gap be considered constitutionally suspect. This is not the Dellinger paradigm of a President wrestling to resolve a conflict between statutory and constitutional law. The posture of the Bush Administration is that of an Administration that is wrestling to create conflicts in order to support the assertion of a power to dispense with the execution of the laws.

Because President Bush has found constitutional problems with statutes so readily and because he takes such a radically expansive view of his own power, President Bush's position amounts to a claim that he is impervious to the laws that Congress enacts. This amounts to the view articulated in President Richard Nixon's notorious dictum, "If the President does it, that means it is not illegal." Precisely to guard against such claims, Congress has enacted a law that requires the Attorney General to "submit to the Congress a report of any instance in which the Attorney General or any officer of the Department of Justice . . . establishes or implements a formal or informal policy to refrain . . . from enforcing, applying, or administering any provision of any Federal statute . . . whose enforcement, application, or administration is within the responsibility of the Attorney General or such officer on the grounds that such provision is unconstitutional." Subsection (e) of that statute extends this reporting obligation to the head of each executive agency or military department that implements such a policy of "constitutional noncompliance." Such a report must be made within 30 days after the policy is implemented, and must "include a complete and detailed statement of the relevant issues and background (including a complete and detailed statement of the reasons for the policy or determination)."

But President Bush apparently regards this reporting requirement, like so many others, to raise serious constitutional concerns. As such, he may be refusing to comply with it. If so, this represents a serious assault on the constitutional system of checks and balances. That system is premised on the idea that the President is not above the law but is, like all other citizens, bound to obey the law. The primary check that Congress has on the President is its power to legislate rules that govern everyone, including the President himself. This is the preeminent power in our constitutional system and explains why James Madison famously regarded Congress to be the most dangerous branch under our Constitution. If the President may dispense with application of laws by concocting a constitutional objection, we will quickly cease to live under the rule of law.