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ABAnonding the Constitution
Judging the president and justices on executive power.

By Craig S. Lerner & Nelson Lund

The Constitution requires every president to take an oath in which he pledges that he will “to the best of my ability, preserve, protect and defend the Constitution of the United States.” The American Bar Association has suddenly decided that presidents are required to ignore that oath, and has denounced this president for seeking to defend the Constitution.

What’s the issue? After Congress passes a bill, the president can sign it or veto it. Assume that he concludes that the bill accomplishes important objectives, but one or more parts of the bill are either clearly unconstitutional or might be unconstitutional if a provision, ambiguous as written, is read to mean one thing rather than another. The president signs the bill, but issues a “signing statement” that he will not enforce or comply with unconstitutional provisions and he will construe ambiguous provisions in a way that renders them constitutional.

Presidents have been doing this for at least 150 years. The ABA is troubled by the practice, however, and wants you to be troubled, too. This week, its House of Delegates voted to denounced the use of this kind of signing statement. After all, the ABA’s task force explained, the president should know his place: He must enforce all the provisions of a statute “unless and until they are held unconstitutional by the Supreme Court or a subordinate tribunal.” The theory seems to be that only judges are qualified to interpret the Constitution.

Although endorsed by the dean of the Yale Law School and by a former dean of Stanford, this was a little much, even for numerous Clinton administration officials, including Walter Dellinger, a former top official in the Justice Department. Criticizing the ABA’s task force report, they have focused the issue where it belongs. According to these Democratic lawyers, signing statements are perfectly proper, but many of the constitutional arguments made by President Bush in his signing statements are patently wrong.

Fair enough: Let’s examine the constitutional interpretations generated by President Bush in his signing statements. But why stop there? Let’s compare his interpretations with those adopted by the putative top professionals — Supreme Court justices. Here’s our proposal: Let’s apply the same standard of interpretative plausibility to the president’s signing statements and to those found in the opinions of the Supreme Court. Who fares better?

First consider a presidential interpretation. The Constitution provides that the president “shall be commander in Chief of the Army and Navy.” In 2005, the so-called McCain amendment to a spending bill provided that no military detainee shall be subject to cruel and inhumane treatment. President Bush signed the 2005 bill, and tepidly noted that he would construe this amendment “in a manner consistent with the constitutional authority of the President . . . as Commander in Chief [to] assist in achieving the
shared objective of the Congress and the President . . . of protecting the American people from further terrorist attacks.” In 1998, President Clinton had offered a far more emphatic reservation when signing a bill that would have restricted participation by the U.S. military in U.N. peacekeeping missions. Clinton wrote that such restrictions would “unconstitutionally constrain . . . my authority as Commander in Chief, and I will apply them consistent with my constitutional responsibilities.”

Now let’s turn to the Supreme Court. The Constitution provides that neither the federal government nor any State may “deprive any person of life, liberty, or property, without due process of law.” The Supreme Court has interpreted that provision to create constitutional rights to homosexual sodomy and abortion. Can anyone really believe that this is less far-fetched than the interpretations of the commander-in-chief clause by Bush and Clinton?

Or consider another supposedly illegitimate arrogation of power by the executive: President Bush, again just like President Clinton, has issued statements in connection with bills requiring the production of documents to Congress. Again referring to his commander-in-chief authority, the president has indicated that he might refrain from producing documents that would jeopardize national security.

Compare that with the Supreme Court’s interpretation of the 1964 Civil Rights Act, which says: “No person in the United States shall, on the ground of race, color, or national origin, be . . . subjected to discrimination under any program or activity receiving Federal financial assistance.” The Supreme Court has interpreted this to permit universities that receive federal funds to discriminate against whites and Asians (and Hispanics of Cuban descent). And President Bush is the one who is accused of preposterous interpretations of the law?

Ironically, the same ABA that now condemns supposedly broad interpretations of executive power was singing a different tune 20 years ago, in a notorious case that involved the ABA itself. A public-interest group requested information about the ABA’s internal deliberations about federal judicial nominees. A statute guaranteed such access to any group “utilized by the President,” and everyone acknowledged that the President used the ABA to vet prospective judicial nominees.

An easy case? Not according to the Supreme Court. The Court, at the urging of the ABA, noted that the Constitution provides that the President “shall nominate and . . . shall appoint” Supreme Court justices. Affording public access to the ABA’s internal deliberations about judicial nominees might run afoul of this executive power (the Court wasn’t sure on this point), and the Court therefore “construed” the statute in a way that avoided any possible unconstitutionality. The Court concluded that “utilize” could mean something other than “use,” though the Court never bothered to explain what other meaning the word could have.

The ABA was grateful that the Court accepted its argument that the words of a statute should be mangled beyond recognition to avoid any possible unconstitutionality, even if this semantic torture meant a glorified vision of executive power that conveniently sheltered the ABA’s own deliberations from public scrutiny. George Bush has never come close to interpreting any statute in the ludicrous way that the ABA and Supreme Court did in this case. Maybe Bush’s problem is that he didn’t go to law school, where some people lose all shame when it comes to concocting zany interpretations of the law that serve their own interests.

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