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Bar group is wrong; presidents can interpret laws they sign

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P residential signing statements are all the rage. For months, they have inspired the rage of members of Congress, columnists and most recently the American Bar Association, which has condemned them as "contrary to the rule of law and our constitutional system of separation of powers." But the outrage is misplaced. Signing statements are the proverbial paper tiger.

Take, for example, the anti-torture legislation that sparked much of this signing-statement frenzy. The president's signing statement indicated that he would interpret the act "in a manner consistent with the constitutional authority of the president to supervise the unitary executive branch and as Commander in Chief." Presumably, this means that if circumstances arose in which the law would prevent him from protecting the nation, he would choose the nation over the statute.

Whether the president's duty to protect the country ever authorizes (or compels) him to ignore the expressed will of Congress is a question that has interested presidents and scholars since the founding. But no one supposes that the answer to that question turns on whether the president has issued a signing statement reserving the right to do so. If the president may do so, it is for one reason alone: Because the Constitution so commands.

Giving notice is good

The presence of a signing statement only gives notice of the president's view of his constitutional commitment; and giving notice is usually thought to be a good thing.

The real question, then, is whether the president has the authority (or the responsibility) to decline to enforce statutes that he believes violate the Constitution.

The ABA believes the answer is "no." Instead, "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."

But this position fails to appreciate the complexity of the choices presidents face. Legislation does not always give precise commands. A statute might require the "promotion of diversity in government contracting," leaving it to the president to choose among the myriad ways to promote diversity.

Under such circumstances, it seems appropriate that the president would not veto the bill, even though some diversity-promoting measures would almost certainly violate the Constitution. Instead, the president would sign, but implement the statute, to use Bush's words, "in a manner consistent with the Constitution's guarantee of equal protection."

President gets a voice

Even when Congress gives clear direction, the president's duty may not be clear. Imagine that Congress passes a statute directing the president to award 15 percent of government contracts to minority-owned businesses. Yet the Supreme Court has rejected such quotas as violating equal protection. What is the president to do?

If he agrees with the Supreme Court that race-based quotas violate the Constitution's guarantee of color-blind treatment by government, then he should veto the law.

But what if he believes, as some do, that race-based set asides are actually constitutional, representing the best way to fulfill the Constitution's promise of equal opportunity for all persons? Couldn't the president then sign the legislation, thus offering the Supreme Court the only chance it might have to re-examine its prior ruling?

Either way, the president's independent vision of what the Constitution requires is critical. Denying the president a constitutional voice is the real threat to our system of separated powers.

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