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Op-Ed Contributor

A Slip of the Pen

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Correction Appended

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“THIS is one of those historic moments. The threat to our Republic posed by presidential signing statements is both imminent and real unless immediate corrective action is taken.”

That is what the head of the American Bar Association said last week as he unveiled a widely publicized report by an association panel criticizing presidential signing statements, by which a president announces his intention not to comply with a provision of a signed law because he believes it to be unconstitutional. The report catalogues President Bush’s highly questionable use of such statements, including his apparent intent to execute only selectively legislation he signed last year banning cruel treatment of prisoners in American custody.

Ultimately, however, the bar association report misdiagnoses the problem. It erroneously interprets the Constitution as forbidding the president — any president, in any circumstance — to declare, while signing a bill into law, that the bill has an unconstitutional provision that he will not enforce. Paradoxically, the report studiously avoids addressing the real problem, which is not the president’s right to act on his constitutional views, but that some of this president’s

constitutional views are fundamentally wrong.

Until the bar association panel issued its report, I had thought the matter was settled. Every modern president has agreed that there are circumstances in which the president may appropriately decline to enforce a statute he deems unconstitutional. There is, moreover, significant judicial approval of the practice, most notably the Supreme Court's 1926 decision in Myers v. United States, in which the Court sustained President Calvin Coolidge's refusal to comply with a law that would have restricted the executive's right to fire postmasters. Not a single member of the Court suggested the president had acted improperly in disregarding the statute.

A president's ability to decline to enforce unconstitutional laws is an important safeguard of both separation of powers and individual liberty. What if Congress enacted legislation requiring a president to forcibly seize a brain-dead patient and place her on artificial life support, contrary to her rights? Does the bar association panel really believe the president would have to comply?

Or suppose President Bush signed a law, passed by a lame-duck Congress, which prohibited the removal of the defense secretary for 10 years. If the next president complied with the statute, Secretary Donald Rumsfeld could remain in office against the wishes of the new president, and no one would have standing to challenge this violation in court.

If a president may decline to execute an unconstitutional law enacted before he assumed office, he should retain that right in the case of an unconstitutional provision of a bill he signs himself. Of course, if presented with a bill that is entirely unconstitutional, the proper response is a veto.

But most laws today are passed as part of multiprovision, omnibus legislation. Such measures may contain urgently needed appropriations, or have been passed by a fragile coalition or a Congress that has adjourned. When a bill with a thousand provisions includes one that is unconstitutional, the Constitution does not force the president to choose between two starkly unpalatable options: veto the entire bill or enforce an unconstitutional provision. A signing statement that announces the president's intention to disregard the invalid provision offers a valuable, and lawful, alternative.

The bar association panel's report states that its recommendations should not be viewed "as an attack on the current president." Yet it is precisely this administration's sweeping claims of unilateral executive power to disregard statutes that should be the focus of debate. Distracted by President Bush's abuse of signing statements, the panel failed to address the real and significant risk posed by the administration's extravagant claims of unilateral authority to govern.

In defending the legitimacy of President Bush's signing statements, senior administration officials have repeatedly, and correctly, cited a 1994 memorandum I wrote as head of the Justice Department's Office of Legal Counsel. They have largely ignored, however, the memorandum's cautionary guidelines.

A president, the memo stated, should presume laws are valid and accord great deference to Congress's view that its acts are consistent with the Constitution. A president should also recognize that, while the Supreme Court is not the sole arbiter of constitutionality, it plays a special role in resolving such questions.

In some instances, only a president's decision to refuse to execute a law will create the

opportunity for judicial review of the disputed issue. In other cases, the reverse may be true. Proper deference to the court, the memo suggested, generally favors whichever course of action facilitates the court's involvement.

If conscientiously followed, these principles reduce the risk that a president will assert a dubious claim of unconstitutionality in order to sidestep a law he simply doesn't like.

The Bush administration's frequent and seemingly cavalier refusal to enforce laws, which is aggravated by its avoidance of judicial review and even public disclosure of its actions, places it at odds with these principles and with predecessors of both parties.

It is a mistake, however, to respond to these abuses by denying to this and future presidents the essential authority, in appropriate and limited circumstances, to decline to execute unconstitutional laws. A president is right to use signing statements to explain how he intends to faithfully execute the law and uphold the Constitution.

Walter Dellinger, a law professor at Duke University, was the head of the Justice Department's Office of Legal Counsel from 1993 to 1996.

Correction

An Op-Ed article on Monday, about presidential signing statements, misidentified the president whose right to fire postmasters was upheld by the Supreme Court. It was Woodrow Wilson, not Calvin Coolidge.