

TESTIMONY OF MICKEY EDWARDS
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES
JANUARY 31, 2007

Mr. Chairman, Mr. Smith, Members of the Committee:

Thank you for inviting me. It is good to see so many old friends here.

I think it's important to establish one very important point at the outset. This is not really about presidential "signing statements" as most of us have known them. Presidents typically accompany their signing of legislation with some comments, written or spoken, expressing an opinion about the bills they've just signed into law. The issue here is not whether or not Presidents have an equal right to be heard, and it's not really about whether or not the Courts should take a presidential opinion into account when considering the intent of a law, although I would think that to be a very iffy proposition and would hope the Courts would continue to think so, too.

The question here is much more fundamental than those. The question is whether or not the President of the United States is above the law. Because the moment he signs the legislation that is presented to him, it is not merely a proposal; it is the law, and it is binding upon every citizen, whether a taxi driver, a street sweeper, or the President of the United States, because when it comes to the law, we are all equal and we are all equally bound.

The powers of the President are clearly delineated in the Constitution. No President is required to approve of an act of Congress. No President is required to sign an act of Congress into law. He may sign it, making it law, but he may also refuse to sign it, to veto it, to refuse to have anything to do with making it the law. But those are his *only* choices, sign it (and be bound by it) or veto it, and hope his veto will not be overridden. The objection I would put before you is not to the use of presidential "signing statements" -- Presidents, like the rest of us, are free to say whatever they want whenever they want -- but to assertions that the President may choose whether or not to abide by the law.

Further, there is a view of the presidency, articulated by the current holder of that office, which considers the entirety of the Executive Branch of Government to be a single unit under the sole direction of the President. According to this theory of the "unitary executive", the legislative branch of government may not instruct executive branch agencies in the performance of their duties. Thus, when a President declares that he is not bound by the bills he signs into law, he is saying, in effect, that none of the executive agencies are bound, either. The Congress may require a federal agency to report on some matter, but at best that requirement would become simply a suggestion, and probably one that is not taken too seriously.

It has argued that the concerns some of us have expressed are exaggerated. Defenders of these presidential assertions claim that they know of no instance in which the President, having declared himself not bound by a law, has nonetheless refused to comply with it. To this there are two important responses.

The first is simple enough: if agencies refuse to inform the Congress -- as, indeed, the Attorney General has recently refused to do in regard to the Administration's purported agreements with the FISA court on the electronic surveillance of American citizens -- how can the Congress or the public know whether or not the law is being complied with?

But the second is even more important: a presidential assertion of the right to ignore the law must be challenged, and challenged forcefully, or it will become precedent. If the current President asserts that extra-constitutional authority, even though he may not himself fail to comply with the law, future Presidents may rely on that unchallenged assertion to disobey future laws. If that happens, the Congress of the United States will become irrelevant and the basic structure of American government will have been fundamentally changed. The voice of the people, as expressed by their representatives in Congress, will have been considerably diminished.

One final point: there is much discussion about the authority vested in the Congress or the powers vested in the Congress or the rights of

the Congress. But this is not a question of authority or powers or rights: it is a question of duty and of responsibility. Every member of Congress took an oath to fulfill very specific constitutional obligations. Under that Constitution, it is the obligation of the Congress to determine what shall be law and what shall not. It is the obligation of the Congress to act as a completely separate, completely independent, and completely equal branch of government, determining the law and ensuring that the law is obeyed.

This Congress must -- *must* -- block any attempt by any President to treat the peoples' representatives with contempt. This Congress must use its considerable powers -- to withhold appropriations, to conduct hearings and compel testimony under oath, to grant itself standing before the Courts -- to ensure that the United States does not devolve into the system the Founders feared and worked so hard and so long to avoid. Presidential signing statements may not sound like such a big deal, but they are declarations of the right of a President to be above the law, and that is a path that, once taken, will prove ultimately fatal to our democracy.