

SIGNING STATEMENTS: CONSTITUTIONAL AND PRACTICAL LIMITS

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A constitutional issue largely hidden, except among specialized scholars, reached the public in 2006 when Charlie Savage of the *Boston Globe* wrote that President George W. Bush “has quietly claimed the authority to disobey more than 750 laws enacted since he took office, asserting that he has the power to set aside any statute passed by Congress when it conflicts with his interpretation of the Constitution.”¹ Does the United States have two sets of laws, one performed publicly by Congress and the other conducted after the fact by executive officials? Is the second superior to the first?

A dramatic illustration of executive claims had already occurred some months earlier, on December 30, 2005, when President Bush signed a defense appropriations bill that included a provision prohibiting cruel, inhuman, or degrading treatment or punishment of persons held in U.S. custody.² The purpose of the legislation was to prohibit torture of detainees. In signing the bill, Bush stated that the provision would be interpreted “in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief.”³ In the U.S. constitutional system, what form of law is supposed to govern? The text of a statute or executive interpretations (necessarily done in secret) about how to interrogate detainees?

May a President, through a signing statement, nullify or dilute a bill that both Houses had just passed and presented to him? Does that assertion of authority give him, in effect, an item veto? What happens to the President’s constitutional obligation to “take Care that the Laws be faithfully executed”?⁴ If he found the bill constitutionally repugnant, why not veto it? Moreover, is this attention to signing statements excessive? Should not the focus be whether the President assures that the bill is

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¹ Charlie Savage, *Bush Challenges Hundreds of Laws; President Cites Powers of His Office*, BOSTON GLOBE, Apr. 30, 2006, at A1.

² Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680, 2739 (2005) (codified at 42 U.S.C.A. § 2000dd (West Supp. 2007)).

³ See Elisabeth Bumiller, *For President, Final Say on a Bill Sometimes Comes After the Signing*, N.Y. TIMES, Jan. 16, 2006, at A11.

⁴ U.S. CONST. art. II, § 3.

faithfully carried out? If it is, the President's remarks in a signing statement are of little interest or consequence. On the other hand, if the President said nothing in a signing statement but later prevented the statutory program from being carried out, the constitutional violation is no less serious. On all of these questions a variety of remedies have been offered, including legislation designed to push the dispute over signing statements into court for an ultimate solution. That approach offers little hope for reasons to be given.

This Article has four sections. Section I reviews the precedents established over the years that guide the President's duty to enforce the Take Care Clause.⁵ Courts and Attorneys General have been clear that Congress may direct executive officials to carry out certain "ministerial" acts that the President is constitutionally required to have faithfully implemented.⁶ In this area, executive officials look to the law, not to competing and potentially overriding presidential interpretations (whether in signing statements or elsewhere). Some statutes are mandatory. Others provide substantial discretion to the President, and his judgments are legally binding within the scope offered by the statutory language. Section II examines the range of positions offered on signing statements, by executive officials, scholars, and private groups. Section III looks at a very unique area: presidential implementation done not in public, as with signing statements, but in secret. This issue has emerged at various times, such as with the Iran-Contra affair, but this Section pays particular attention to the current controversy over the Terrorist Surveillance Program conducted by the National Security Agency after 9/11. Section IV evaluates pending legislation designed to remedy potential problems with signing statements.

I. JUDICIAL AND LEGISLATIVE GUIDANCE

Presidential signing statements have never been squarely and definitively addressed in court cases or congressional legislation, but numerous precedents over the years provide recognizable boundaries that both sanction and limit presidential discretion. As with most constitutional issues, executive latitude can be accommodated up to a certain point, after which it triggers resistance and opposition from the legislative and judicial branches.

A. Court Rulings

Early federal courts distinguished between presidential actions that allow for discretion and judgment and those that are mandatory. That fundamental distinction

⁵ *Id.* art. II, § 3 (requiring that the President "shall take Care that the Laws be faithfully executed").

⁶ *See infra* Part I.A.

appears in Chief Justice John Marshall's decision in *Marbury v. Madison* in 1803.⁷ Under the Constitution, the President "is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience."⁸ In such cases "no power [can] control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive."⁹

Marshall identified a separate category that limits presidential discretion. When "a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy."¹⁰ Obligatory duties on the part of the executive branch are called "ministerial," demanding loyalty to the law and not to the President. In this domain, executive officers act "under the authority of law, and not by the instructions of the President. It is a ministerial act which the law enjoins on a particular officer for a particular purpose."¹¹

The President's obligation to carry out the law as it is, rather than as he may wish it to be, is reflected in a circuit court decision in 1806.¹² Colonel William S. Smith had been indicted under the Neutrality Act for engaging in military actions against Spain.¹³ He claimed that his military enterprise "was begun, prepared, and set on foot with the knowledge and approbation of the executive department of our government."¹⁴ The court rejected his argument that a President or his assistants could authorize or condone military adventures that violated congressional policy as set forth in a statute.¹⁵ The court described the Neutrality Act as "declaratory of the law of nations; and, besides, every species of private and unauthorized hostilities is inconsistent with the principles of the social compact, and the very nature, scope, and end of civil government."¹⁶ The court found that no executive official, including the President, had any authority to waive statutory provisions.¹⁷ "If a private individual, even with the knowledge and approbation of this high and preeminent officer of our government [the President], should set on foot such a military expedition, how can he expect to be exonerated from the obligation of the law?"¹⁸ The President:

⁷ 5 U.S. (1 Cranch) 137 (1803).

⁸ *Id.* at 165–66.

⁹ *Id.* at 166.

¹⁰ *Id.*

¹¹ *Id.* at 158.

¹² *United States v. Smith*, 27 F. Cas. 1192 (C.C.N.Y. 1806) (No. 16,342).

¹³ *Id.* at 1229.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 1230.

¹⁸ *Id.*

cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids. If he could, it would render the execution of the laws dependent on his will and pleasure; which is a doctrine that has not been set up, and will not meet with any supporters in our government.¹⁹

Subsequent decisions elaborated on ministerial duties. In *Kendall v. Stokes*, the Supreme Court declared that “[t]o contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.”²⁰ The case involved the refusal of the Postmaster General to pay the claim of an individual who had contracted to carry the mail and then sought compensation for his services.²¹ The Court ruled that the Postmaster General had no authority to refuse payment, a “purely ministerial” action for which there could be no discretion.²² The Court’s mandamus to pay the amount did not seek “to direct or control the postmaster general in the discharge of any official duty, partaking in any respect of an executive character.”²³ “[I]t would be an alarming doctrine,” said the Court, to argue that Congress “cannot impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution.”²⁴ In other cases, the Court described the purpose of a mandamus as “only to compel the performance of some ministerial, as well as legal duty. . . . When the duty is not strictly ministerial, but involves discretion and judgment, like the general doings of a head of a department . . . no mandamus lies.”²⁵

Presidents were repeatedly advised by Attorneys General that certain duties assigned by law to inferior executive officers were mandatory and could not be interfered with by anyone in the executive branch, including the President. In 1854, Attorney General Caleb Cushing explained that when “laws define what is to be done by a given head of department, and how he is to do it, there the President’s discretion stops.”²⁶ Opinions by other Attorneys General alerted Presidents about substantial political and legal constraints if they tried to intervene in certain departmental and agency matters. The President is responsible for seeing that administrative officers faithfully perform their duties, “but the statutes regulate and prescribe these duties, and he has no more power to add to, or subtract from, the duties imposed upon subordinate

¹⁹ *Id.*

²⁰ 37 U.S. (12 Pet.) 524, 612 (1838).

²¹ *Id.* at 524.

²² *Id.* at 613.

²³ *Id.* at 609.

²⁴ *Id.*

²⁵ *Reeside v. Walter*, 52 U.S. (11 How.) 272, 290 (1850); *see also United States v. Price*, 116 U.S. 43 (1885); *United States v. Louisville*, 169 U.S. 249 (1898).

²⁶ 6 Op. Att’y Gen. 326, 341 (1854).

executive and administrative officers by the law, than those officers have to add or subtract from his duties.”²⁷

Other judicial rulings reinforced the principle that executive officers, including the President, are required to carry out certain acts specified in law. In 1971, President Richard Nixon signed a bill that contained the “Mansfield Amendment,” calling for the withdrawal of U.S. troops from Southeast Asia.²⁸ In his signing statement, Nixon insisted that he had no obligation to carry out the policy crafted by Congress: “To avoid any possible misconceptions, I wish to emphasize that section 601 of this act—the so-called Mansfield Amendment—does not represent the policies of this Administration.”²⁹ Although Section 601 expressed “a judgment about the manner in which the American involvement in the war should be ended,” the language was “without binding force or effect.”³⁰ Section 601 would “not in fact alter” the policy that Nixon planned to pursue.³¹

In litigation the following year, a federal district court instructed President Nixon that the law was what he signed, not what he said about it.³² There could be “no doubt” that Section 601 and comparable language in a separate bill “are law.”³³ When Nixon signed those bills into law they established U.S. policy “to the exclusion of any different executive or administration policy, and had binding force and effect on every officer of the Government, no matter what their private judgments of that policy, and illegalized the pursuit of an inconsistent executive or administration policy.”³⁴ No executive statement, even by the President, “denying efficacy to the legislation could have either validity or effect.”³⁵ The court observed that the legislation, although binding on the President, nevertheless offered “a very wide discretion.”³⁶

President Nixon encountered other setbacks in the courts. In 1974, an appellate court held that he had violated the law by refusing to carry out a statute governing federal pay.³⁷ Congress directed him to submit to the legislative branch either the pay

²⁷ 19 Op. Att’y Gen. 685, 686–87 (1890). For other opinions to Presidents on mandatory and ministerial actions, see 18 Op. Att’y Gen. 18 (1884); 13 Op. Att’y Gen. 28 (1869); 11 Op. Att’y Gen. 14 (1864); 10 Op. Att’y Gen. 526 (1863); 5 Op. Att’y Gen. 287 (1851); 4 Op. Att’y Gen. 515 (1846); 2 Op. Att’y Gen. 544 (1832); 2 Op. Att’y Gen. 507 (1832); 2 Op. Att’y Gen. 480 (1831); 1 Op. Att’y Gen. 706 (1825); 1 Op. Att’y Gen. 705 (1825); 1 Op. Att’y Gen. 678 (1824); 1 Op. Att’y Gen. 636 (1824); 1 Op. Att’y Gen. 624 (1823).

²⁸ Act of Nov. 17, 1971, Pub. L. No. 92-156, § 601, 85 Stat. 430.

²⁹ Statement on Signing the Military Appropriations Authorization Bill, 360 PUB. PAPERS 1114 (Nov. 17, 1971).

³⁰ *Id.*

³¹ *Id.*

³² *DaCosta v. Nixon*, 55 F.R.D. 145 (E.D.N.Y. 1972).

³³ *Id.* at 146.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Nat’l Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974).

plan proposed by a salary commission or his own alternative proposal. He did neither. The court ruled that Nixon had a constitutional duty to adhere to the law.³⁸ Having failed to do so, the court instructed him to grant the federal pay increase to be effective as of October 1972.³⁹ In other actions, as part of a strategy to curb spending, Nixon claimed broad authority to refuse to release funds appropriated or authorized by Congress.⁴⁰ He and his Cabinet heads were regularly ordered by federal courts to allocate and obligate funds that the administration had impounded.⁴¹

President Ronald Reagan met defeat in federal court when he attempted to nullify particular provisions of law to which he objected. In 1985, his administration challenged the Comptroller General's authority under the Competition in Contracting Act (CICA) of 1984 to determine "bid protests."⁴² Disappointed bidders of government contracts could appeal to the General Accounting Office (GAO) and have the award of the contract delayed pending a GAO study of the dispute.⁴³ No constitutional objections were raised when the bill was signed, but the Justice Department regarded the GAO as part of the legislative branch and therefore without authority to participate in executive duties. Attorney General William French Smith and Office of Management and Budget Director David Stockman instructed agencies not to comply with the bid-protest provision. Federal courts upheld the GAO's bid-protest powers as authorized by law, and they denied the President any type of item-veto authority to selectively enforce bills that he signs.⁴⁴ One of the decisions offered this observation:

Art. I, § 7 is explicit that the President must either sign or veto a bill presented to him. Once signed by the President, as CICA was on July 18, 1984, the bill becomes part of the law of the land and the President must "take care that [it] be faithfully executed." Art. I, § 7 does not empower the President to revise a bill, either before or after signing. It does not empower the President to

³⁸ *Id.* at 616.

³⁹ *Id.*

⁴⁰ See LOUIS FISHER, PRESIDENTIAL SPENDING POWER 175 (1975).

⁴¹ *Train v. City of New York*, 420 U.S. 35 (1975); *Berends v. Butz*, 357 F. Supp. 143 (D. Minn. 1973); see also FISHER, *supra* note 40, at 175–201.

⁴² LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 132 (5th ed. 2007).

⁴³ Amendments to the Federal Property and Administrative Services Act of 1949, Pub. L. No. 98-369, 98 Stat. 1175–85 (1984).

⁴⁴ See *Ameron, Inc. v. U.S. Army Corps of Eng'r*, 607 F. Supp. 962 (D.N.J. 1985), *modified*, 787 F.2d 875 (3d Cir. 1986), *cert. granted*, 485 U.S. 958 (1988), *cert. dismissed*, 488 U.S. 918 (1988). In response to a Justice Department request, the Supreme Court agreed to dismiss its writ of certiorari on the *Ameron* case. 488 U.S. 918 (1988). See also *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102 (9th Cir. 1988) (upholding the GAO's bid-protest authority).

employ a so-called “line item veto” and excise or sever provisions of a bill with which he disagrees. . . . The “line item veto” does not exist in the federal Constitution.⁴⁵

Although line-item authority does not exist in the Constitution, Congress often provides substantial discretion in statutes to give the President broad latitude in carrying out the law. It has a choice of mandating, for example, the appropriation of \$5,000,000 for a given activity and specifying “not less than” that amount, or it can make the expenditure discretionary by stating “up to” or “not exceeding” that dollar figure. Congress can make the expenditure of large lump-sums wholly contingent on the President’s judgment, such as a 1935 statute that appropriated \$4,880,000,000 in emergency relief to be used “in the discretion and under the direction of the President.”⁴⁶ The scope of discretion under such statutory terms is left to lawmakers and executive officials to negotiate and construct an acceptable agreement.

B. Political Accommodations

President Andrew Jackson sparked a controversy in 1830 when he signed a bill and simultaneously sent Congress a message that offered an independent interpretation of the meaning of the law. Congress appropriated \$8,000 for a road from Detroit to Chicago, but Jackson said that the bill appeared “to authorize the application of the appropriation for the continuance of the road beyond the limits of the Territory of Michigan.”⁴⁷ He wanted Congress to understand that in signing the bill it was his understanding that the road “is not to be extended beyond the limits of the said Territory.”⁴⁸ The House, which had recessed, could not immediately respond to his message. Years later it issued a report calling his action, in effect, an item veto of one of the bill’s provisions.⁴⁹ Jackson’s model was followed by President John Tyler in 1842. After signing a bill for the apportionment of Representatives according to the sixth census, President Tyler placed with the Secretary of State “an exposition of [his] reasons for giving to it [his] sanction.”⁵⁰ In that document he expressed misgivings about the constitutionality and policy of the entire statute.⁵¹ As with Jackson, a House select

⁴⁵ *Lear Siegler*, 842 F.2d at 1124.

⁴⁶ 49 Stat. 115 (1935); see FISHER, *supra* note 40, at 62–63.

⁴⁷ Letter from Andrew Jackson to the Senate and House of Representatives (May 30, 1830), in 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1046 (James D. Richardson ed., 1897).

⁴⁸ *Id.*

⁴⁹ H.R. REP. NO. 27-909 at 5–6 (1842).

⁵⁰ Letter from John Tyler to the House of Representatives (June 25, 1842), in 5 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 2012 (James D. Richardson ed., 1897).

⁵¹ *Id.* at 2012–13.

committee strongly objected that, under the Constitution, the President was limited to three options when he received a bill: sign it, veto it, or exercise a pocket veto.⁵² To sign a bill and add extraneous matter in a separate document could be regarded “in no other light than a defacement of the public records and archives.”⁵³

Appropriations bills often invite selective enforcement by the President. In 1861, Senator Stephen Douglas of Illinois explained how an appropriations act of 1857 had failed to benefit his state.⁵⁴ President James Buchanan, after quarreling with lawmakers from Illinois, decided to punish them by withholding funds from their districts.⁵⁵ The purpose of the money was for post offices and other public buildings.⁵⁶ In 1876, while signing a river and harbor bill, President Ulysses S. Grant said that if he had felt any obligation to spend all the funds in the bill he would have vetoed it.⁵⁷ He objected that certain projects were “of purely private or local interest, in no sense national,” and announced that “no public money shall be expended upon them.”⁵⁸ He offered a strange standard. Funds in a river and harbor bill are almost guaranteed to be assigned to some local interest, even if part of a more regional (or national) project.

Occasionally lawmakers offered encouragement to selective enforcement of appropriations bills. In 1896, Senator John Sherman, second-ranking Republican on the Finance Committee, expressed regret that President Grover Cleveland had vetoed a river and harbor bill because of its size and scope.⁵⁹ Sherman regarded the appropriation bill as “merely permissive” and in no sense mandatory.⁶⁰ The statutory language read:

That the following sums of money be, and are hereby, appropriated, to be paid out of any money in the Treasury not otherwise appropriated, to be immediately available, and to be expended under the direction of the Secretary of War and the supervision of the Chief of Engineers, for the construction, completion, repair, and preservation of the public works hereinafter named.⁶¹

⁵² H.R. REP. NO. 27-909, at 1–2 (1842).

⁵³ *Id.* at 2.

⁵⁴ CONG. GLOBE, 36th Cong., 2d Sess. 1177 (1861).

⁵⁵ FISHER, *supra* note 40, at 165.

⁵⁶ CONG. GLOBE, *supra* note 54.

⁵⁷ Letter from U.S. Grant to the House of Representatives (Aug. 14, 1876), in 10 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 4331 (James D. Richardson ed., 1897).

⁵⁸ *Id.*

⁵⁹ 28 CONG. REC. 6030 (1896); Letter from Grover Cleveland to the House of Representatives (May 29, 1896), in 9 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 677 (James D. Richardson ed., 1897).

⁶⁰ 28 CONG. REC. 6030 (1896).

⁶¹ *Id.*

Sherman believed that the President had “complete control over all these various subjects.”⁶² If the President “should see proper to say, ‘That object of appropriation is not a wise one; I do not concur that the money ought to be expended,’ that is the end of it. There is no occasion for the veto power in a case of that kind.”⁶³ If used selectively and with restraint, presidential refusals to fund certain projects are generally tolerable to Congress. Applied in a heavy-handed, pugnacious manner that threatens the capacity of Congress to decide national priorities and protect its power of the purse, statutory restrictions will be enacted.⁶⁴

In 1910, Congress appropriated \$100,000 to finance a study into more efficient and economical ways of conducting the public business.⁶⁵ President William Howard Taft used the money to set up a five-member Commission on Economy and Efficiency, and in June 1912 he released the commission’s report, which called for a national budget to be initiated by the President.⁶⁶ In that same month he ordered department heads to prepare two sets of estimates: one for the customary “Book of Estimates” (a compilation of uncoordinated bureau estimates) and one for the national budget recommended by the commission.⁶⁷ Congress, passing legislation to prevent Taft from taking the second option, directed agency officials to prepare estimates only in the customary manner.⁶⁸

Taft regarded the legislation as unconstitutional, concluding that Congress could not tell him what he could and could not recommend for legislative action.⁶⁹ In his opinion, it was “*entirely competent for the President to submit a budget, and Congress can not forbid or prevent it.*”⁷⁰ Congress could not stop him from submitting a model budget along the lines proposed by the commission, but Congress had every power to ignore what he sent. And that is precisely what the legislative branch did.⁷¹

II. A RANGE OF EVALUATIONS

There has been no shortage of critiques, pro and con, on the President’s authority to issue statements while signing a bill. Justice Department officials, private organizations, professors, members of Congress, and committee hearings have explored

⁶² *Id.*

⁶³ *Id.* at 6031.

⁶⁴ FISHER, *supra* note 40, at 147–201.

⁶⁵ 36 Stat. 703 (1910). Congress subsequently granted the commission \$75,000 (36 Stat. 1364), \$10,000 (37 Stat. 643), and \$75,000 (37 Stat. 417).

⁶⁶ FISHER, *supra* note 40, at 29–30.

⁶⁷ *Id.* at 30.

⁶⁸ 37 Stat. 415 (1912).

⁶⁹ Frederick A. Cleveland, *The Federal Budget*, 3 PROC. ACAD. POL. SCI. 165, 168 (1912–1913).

⁷⁰ *Id.*

⁷¹ FISHER, *supra* note 40, at 29–31.

the constitutional issues.⁷² Signing statements provoked a flood of articles during the Reagan administration but the interest quickly died out.⁷³ In 1986, a young attorney in the Justice Department, Samuel A. Alito, Jr., wrote a six-page memo on signing statements.⁷⁴ The purpose of the Litigation Strategy Working Group he served on was “to ensure that Presidential signing statements assume their rightful place in the interpretation of legislation.”⁷⁵ Alito saw two advantages in making greater use of signing statements: “First, it would increase the power of the Executive to shape the law. Second, by forcing some rethinking by courts, scholars, and litigants, it may help to curb some of the prevalent abuses of legislative history.”⁷⁶ His candid admission that signing statements increase presidential power would be denied by Justice Department officials when they testified before Congress in 2006 and 2007.⁷⁷

A. *The Dellinger Memos*

On November 3, 1993, Assistant Attorney General Walter Dellinger prepared a memo on signing statements for White House Counsel Bernard N. Nussbaum.⁷⁸ Dellinger believed that these statements “may on appropriate occasions perform useful and legally significant functions.”⁷⁹ He singled out three benefits:

- (1) explaining to the public, and particularly to constituencies interested in the bill, what the President believes to be the likely effects of its adoption;
- (2) directing subordinate officers within

⁷² See Philip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 PRESIDENTIAL STUD. Q. 515–16 (2005).

⁷³ Frank B. Cross, *The Constitutional Legitimacy and Significance of Presidential “Signing Statements,”* 40 ADMIN. L. REV. 209 (1988); Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J. ON LEGIS. 363 (1987); Brad Waites, Note, *Let Me Tell You What You Mean: An Analysis of Presidential Signing Statements*, 21 GA. L. REV. 755 (1987); Marc N. Garber & Kurt A. Wimmer, *President’s Statements at Signings No Help to U.S. Judges*, NAT’L L.J., Sept. 8, 1986, at 15; Linda Greenhouse, *In Signing Bills, Reagan Tries to Write History*, N.Y. TIMES, Dec. 9, 1986, at B14; Douglas W. Kmiec, *Judges Should Pay Attention to Statements by President*, NAT’L L.J., Nov. 10, 1986, at 13.

⁷⁴ Memorandum from Samuel A. Alito, Jr., Deputy Ass’t Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to the Litig. Strategy Working Group (Feb. 5, 1986), available at <http://www.archives.gov/news/samuel-alito/accession-060-89-269/acc060-89-269-box6-SG-LSWG-AlitoLSWG-Feb1986.pdf>.

⁷⁵ *Id.*

⁷⁶ *Id.* at 2.

⁷⁷ See *infra*, Parts II.C, II.E.

⁷⁸ 17 Op. Off. Legal Counsel 131 (1993).

⁷⁹ *Id.*

the executive branch how to interpret or administer the enactment; and (3) informing Congress and the public that the Executive believes that a particular provision would be unconstitutional in certain of its applications, or that it is unconstitutional on its face, and that the provision will not be given effect by the executive branch to the extent that such enforcement would create an unconstitutional condition.⁸⁰

Regarding the first two categories as generally uncontroversial, Dellinger focused on the third. He thought that a President's refusal to enforce a provision was particularly justified when it encroached upon his constitutional powers.⁸¹ He recognized that the veto power could also be utilized for that purpose.⁸² Dellinger summed up his position: "In light of our constitutional history, we do not believe that the President is under any duty to veto legislation containing a constitutionally infirm provision, although of course it is entirely appropriate for the President to do so."⁸³

A year later, Dellinger wrote another memo, this one called "Presidential Authority to Decline to Execute Unconstitutional Statutes."⁸⁴ He referred to a number of examples where Presidents, by refusing to carry out a law, triggered litigation that helped clarify the reach and meaning of a statute.⁸⁵ A prominent case involved presidential opposition to the Tenure of Office Act and its limitation on the removal power of the President.⁸⁶ The standoff between the branches led to the Court's 1926 decision in *Myers v. United States*, upholding the President's authority to remove officials who carry out purely executive duties.⁸⁷ Dellinger also called attention to the obligation of the executive branch to identify unconstitutional provisions in pending bills and communicate its concern to Congress so that the provisions can be corrected.⁸⁸ He referred to earlier occasions where Presidents had been presented with "enrolled bills containing constitutional flaws that should have been corrected in the legislative process."⁸⁹ If the executive branch flags these issues early and Congress does not change the bill, a presidential signing statement may have greater credibility. When executive officials say nothing at any stage of the legislative process and raise constitutional objections only at the signing statement, credibility falls near or at zero.

⁸⁰ *Id.*

⁸¹ *Id.* at 133–34.

⁸² *Id.* at 134.

⁸³ *Id.* at 135.

⁸⁴ 18 Op. Off. Legal Counsel 199 (1994).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ 272 U.S. 52 (1926).

⁸⁸ 18 Op. Off. Legal Counsel 199 (1994).

⁸⁹ *Id.* at 200.

B. The Constitution Project

On June 27, 2006, the Constitution Project released a study from its Coalition to Defend Checks and Balances. It acknowledged that signing statements “are nearly as old as the Republic,” and there is “nothing inherently troubling about them.”⁹⁰ Over the years, Presidents have used signing statements to express constitutional and other objections to provisions placed in bills and signed into law. President Bush, according to the coalition, “has further transformed the use of the presidential signing statement, using it on numerous occasions to challenge or deny effect to legislation that he considers unconstitutional.”⁹¹ Such statements function as a sort of item veto, without giving Congress the opportunity to vote for an override. Unilateral presidential announcements to ignore or materially change a provision also conflict with the President’s constitutional duty to “take Care that the Laws be faithfully executed.”⁹² The coalition urged the President “to immediately abandon these uses of the presidential signing statement” and asked Congress to adopt several means of retaliation if the President persisted: denying appropriations requested by the President, refusing legislation the President favors, and repealing legislation that the President has supported.⁹³

C. Senate Hearings in 2006

The Senate Judiciary Committee held hearings on June 27, 2006, to explore the issue of signing statements. Michelle E. Boardman, Deputy Assistant Attorney General of the Office of Legal Counsel, presented the administration’s position.⁹⁴ She placed her emphasis not on the Take Care Clause but on the President’s responsibility to “preserve, protect, and defend the Constitution,” making Presidents “responsible for ensuring that the manner in which they enforce acts of Congress is consistent with America’s founding document.”⁹⁵ Part of the President’s responsibility to defend the Constitution, however, is to see that the laws are faithfully executed.

Drawing from Dellinger’s analysis, Boardman explained that Presidents “have long used signing statements for the purpose of ‘informing Congress and the public that the Executive believes that a particular provision would be unconstitutional in

⁹⁰ THE CONSTITUTION PROJECT, STATEMENT ON PRESIDENTIAL SIGNING STATEMENTS BY THE COALITION TO DEFEND CHECKS AND BALANCES 1 (2006), available at http://www.constitutionproject.org/pdf/statement_on_Presidential_Signing_Statement.pdf.

⁹¹ *Id.*

⁹² *Id.* at 2 (quoting U.S. CONST. art. II, § 3).

⁹³ *Id.*

⁹⁴ *Presidential Signing Statements: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Michelle Boardman, Deputy Ass’t Att’y Gen.), available at http://judiciary.senate.gov/print_testimony.cfm?id=1969&wit_id=5479, at 1 [hereinafter Boardman Testimony].

⁹⁵ *Id.*

certain of its applications.”⁹⁶ At times the purpose of a signing statement, she said, is to express the President’s “intention to construe or administer a statute in a particular manner (often to save the statute from unconstitutionality).”⁹⁷ The tension here is evident: to “save” a statute from unconstitutionality the President may ignore his constitutional duties under the Take Care Clause.

Boardman called attention to signing statements that object to committee and subcommittee vetoes in violation of the Supreme Court’s decision in *INS v. Chadha*, striking down legislative vetoes.⁹⁸ She said that Presidents ordered executive branch officials merely to “notify” congressional committees, rather than seek their approval, but in fact agencies continue to seek committee and subcommittee *approval* regardless of what the Court decided and regardless of what Presidents order.⁹⁹ Here two levels of the executive branch say two different things. The President, the White House, and the Justice Department explain what would be acceptable under *Chadha*. Executive departments and agencies enter into political accommodations with committees and subcommittees as part of a practical, pragmatic arrangement. It is theory versus practice. In the case of post-*Chadha* activity, practice wins.

Later in her testimony Boardman states: “[W]here a provision attempts to condition future executive action on the approval of a congressional committee, the President and the courts, including the Supreme Court, will still be compelled to find that provision unconstitutional, and therefore unenforceable.”¹⁰⁰ That position is far too abstract. The resolution of post-*Chadha* legislative vetoes has nothing to do with anyone finding unconstitutionality or unenforceability. The matter has been left to agency-committee accommodations. There has been no litigation of these informal agreements.

It is difficult to overstate the tenacious hold of committee and subcommittee vetoes and why they survive long after *Chadha*. When I came to the Library of Congress in 1970, I began to study executive-legislative understandings that had built up over the years to monitor the shifting of funds within an appropriations account (reprogramming).¹⁰¹ Subcommittee staff showed me letters and documents that explained the procedures. Depending on the nature and magnitude of the shift, agencies may only be required to notify the committees and subcommittees of jurisdiction; on other occasions prior approval is required.¹⁰² These accommodations were carefully and painstakingly formalized and clarified in hearings, letters, committee reports, and agency directives.¹⁰³

⁹⁶ *Id.* at 2 (citing The Legal Significance of Presidential Signing Statements, 17 Op. Off. Legal Counsel 131, 131 (1993)).

⁹⁷ *Id.* (citing The Legal Significance of Presidential Signing Statements, 17 Op. Off. Legal Counsel 131, 132 (1993)).

⁹⁸ 462 U.S. 919 (1983).

⁹⁹ Boardman Testimony, *supra* note 94, at 1.

¹⁰⁰ *Id.* at 5.

¹⁰¹ FISHER, *supra* note 40, at 75–98.

¹⁰² *Id.* at 81.

¹⁰³ *Id.* at 81–86.

Committee and subcommittee vetoes ranged far beyond reprogramming to control other areas of federal activity, including public buildings and grounds, tax refunds, wartime construction, and real estate transactions.¹⁰⁴

In following these developments, it was clear to me that committee and subcommittee vetoes had a staying power that would survive adverse judicial rulings. In 1982, when the legislative veto was being challenged in the lower courts, I wrote: “But with or without the legislative veto, Congress will remain knee-deep in administrative decisions, and it is inconceivable that any court or any President can prevent this. Call it supervision, intervention, interference or plain meddling, Congress will find a way.”¹⁰⁵ For those who believe that the Supreme Court has the “last word” on the meaning of the Constitution, the decision in *Chadha* striking down the legislative veto should settle the matter. For those, like me, who see the Court as merely one of many participants in the making and shaping of constitutional law, the legislative veto would survive and thrive in some form. The Court’s decision in *Chadha* eliminated legislative vetoes when exercised as one-house and two-house vetoes, but committee and subcommittee vetoes remained essential mechanisms for reconciling the competing needs of agencies and Congress. The number of new legislative vetoes enacted after *Chadha* is well above two hundred.¹⁰⁶ The total from 1983 to the present, by my estimate, exceeds one thousand.

The committee-review procedures that continue after *Chadha* appear not merely in statutory provisions (objected to repeatedly by Presidents in signing statements) but in agency budget manuals as well.¹⁰⁷ Regardless of what Presidents and attorneys in the Justice Department say, executive departments and agencies find it both practicable and necessary to instruct executive officials and employees on the kinds of actions that require the approval of designated committees and subcommittees.¹⁰⁸ The Department of Defense (DOD) produces the most detailed instructions on reprogramming, identifying what may be done by notification and what requires committee or subcommittee approval.¹⁰⁹ DOD directives explain that under certain circumstances, approval is needed from the Appropriations, Armed Services, and Intelligence Committees.¹¹⁰

¹⁰⁴ FISHER, *supra* note 42, at 142–44.

¹⁰⁵ Louis Fisher, *Congress Can’t Lose on Its Veto Power*, WASH. POST, Feb. 21, 1982, at D1.

¹⁰⁶ See Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, LAW & CONTEMP. PROBS., Autumn 1993, at 273.

¹⁰⁷ LOUIS FISHER, CONG. RESEARCH SERV., REPORT FOR CONGRESS: COMMITTEE CONTROLS OF AGENCY DECISIONS (2005), available at <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-7932:1>.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 26–29.

¹¹⁰ *Reprogramming of DOD Appropriated Funds*, DOD FINANCIAL MANAGEMENT REGULATION 6-1 to -20 (2000), available at http://defenselink.mil/comptroller/fmr/03/03arch/03_06.pdf.

Other agency directives, less elaborate, are just as clear in specifying when approval is required from designated committees and subcommittees.¹¹¹

Boardman objected to the argument that signing statements allow the President to concentrate power and change the balance between the executive and legislative branches:

To the charge that constitutional signing statements are a “power grab” and encroach on Congress’s power to write the law, these examples reveal two flaws. First, the signing statements do not diminish congressional power, because Congress has no power to enact unconstitutional laws. This fact is true whether the President issues a constitutional signing statement or not. Second, the statements do not augment presidential power. Where Congress, perhaps inadvertently, exceeds its own power in violation of the Constitution, the President is bound to defer to the Constitution. The President cannot adopt the provisions he prefers and ignore those he does not; he must execute the laws as the Constitution requires.¹¹²

This presentation is exceedingly mechanical, bringing to mind Justice Roberts’s observation that the duty of the Supreme Court in deciding constitutional questions is “to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.”¹¹³ The effort by Congress to place limits on coercive methods of interrogation, included in the torture bill submitted to President Bush in 2005, does not raise such clear questions of constitutionality that Bush was forced to subordinate statutory language to his own interpretation. The bill language was not obviously “unconstitutional,” nor can it be argued that Bush was “bound to defer to the Constitution” instead of to the statute.¹¹⁴ Second, the remarks by Bush in his signing statement did “augment presidential power”¹¹⁵ and were intended to do so. Third, picking up language from Boardman, the statements by Bush regarding the torture bill were meant to “adopt the provisions he prefers and ignore those he does not.”¹¹⁶

Finally, Boardman analyzed some of the concerns raised in signing statements about bill language that appears to limit the President’s constitutional authority to recommend to the consideration of Congress “such Measures as he shall judge

¹¹¹ *E.g.*, U.S. DEP’T OF ENERGY, BUDGET EXECUTION MANUAL ¶ V.1(a) (1995), available at <http://www.directives.doe.gov/pdfs/doetext/neword/135/m1351-1.pdf>.

¹¹² Boardman Testimony, *supra* note 94, at 3.

¹¹³ *United States v. Butler*, 297 U.S. 1, 62 (1936).

¹¹⁴ Boardman Testimony, *supra* note 94, at 3.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

necessary and expedient.”¹¹⁷ By her count, President Bush raised that concern approximately sixty times in his 110 constitutional signing statements.¹¹⁸ She quotes from a Clinton signing statement: “Because the Constitution preserves to the President the authority to decide whether and when the executive branch should recommend new legislation, Congress may not require the President or his subordinates to present such recommendations.”¹¹⁹

That position is far too broad. Depending on the legislation, Congress can constitutionally require the President to make a recommendation.¹²⁰ In *National Treasury Employees Union v. Nixon*, Congress had established commissions to recommend the rates of compensation for members of Congress, Justices of the Supreme Court, federal judges, and certain high-ranking government officials.¹²¹ The President, after receiving those recommendations, was required by law to submit to Congress proposals for salary adjustments.¹²² If he did not like the commission proposals he could recommend an alternative plan, but he had no constitutional authority to ignore the statutory requirements and recommend nothing.¹²³ After receiving the commission studies, the President’s obligation to adjust pay under the statute “was mandatory, involving no discretion.”¹²⁴ The D.C. Circuit directed President Nixon “to effectuate the pay raise.”¹²⁵

D. ABA Task Force

In August 2006, a task force of the American Bar Association (ABA) released its study on presidential signing statements. The study said:

That the American Bar Association opposes, as contrary to the rule of law and our constitutional system of separation of powers, the issuance of presidential signing statements that claim the authority or state the intention to disregard or decline to enforce all or part of a law the President has signed, or to interpret such a law in a manner inconsistent with the clear intent of Congress.¹²⁶

¹¹⁷ *Id.* at 6 (quoting U.S. CONST. art. II, § 3, cl. 1).

¹¹⁸ *Id.* at 7.

¹¹⁹ *Id.* (citing Statement on Signing the Shark Finning Prohibition Act, 3 PUB. PAPERS 2782 (Dec. 21, 2000)).

¹²⁰ *Nat’l Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 601.

¹²⁵ *Id.* at 616.

¹²⁶ AM. BAR ASS’N, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE 1 (2006), available at http://www.abanet.org/op/signing-statements/aba-final-signing-statements-recommendation-report_7-24-06.pdf.

That statement sweeps too much. If there is disagreement about the “clear intent”¹²⁷ of Congress, as is often the case, the President and executive officials retain considerable discretion in how to interpret and apply the law. This first resolution adopted by the ABA attempts to close the door but immediately opens it.

The second resolution “urges the President, if he believes that any provision of a bill pending before Congress would be unconstitutional if enacted, to communicate such concerns to Congress prior to passage.”¹²⁸ That is an entirely appropriate procedure. The third resolution requests the President “to confine any signing statements to his views regarding the meaning, purpose and significance of bills presented by Congress, and if he believes that all or part of a bill is unconstitutional, to veto the bill.”¹²⁹ This is plausible advice but unlikely to be followed as a general policy.

The fourth resolution asks Congress:

[T]o enact legislation requiring the President promptly to submit to Congress an official copy of all signing statements he issues, and in any instance in which he claims the authority, or states the intention, to disregard or decline to enforce all or part of a law he has signed, or to interpret such a law in a manner inconsistent with the clear intent of Congress, to submit to Congress a report setting forth in full the reasons and legal basis for the statement; and further requiring that all such submissions be available in a publicly accessible database.¹³⁰

There is nothing unreasonable about that resolution, but it conflicts with the first three resolutions that urge the President not to use signing statements to void objectionable provisions but instead to veto the bill as a whole. Moreover, signing statements are public now. What the ABA recommends, in addition, is an analysis that provides detailed legal reasoning now missing in truncated signing statements.¹³¹

The fifth ABA resolution urges Congress:

[T]o enact legislation enabling the President, Congress, or other entities or individuals, to seek judicial review, to the extent constitutionally permissible, in any instance in which the President claims the authority, or states the intention, to disregard or decline to enforce all or part of a law he has signed, or interprets such a law in a manner inconsistent with the clear intent of Congress, and

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

urges Congress and the President to support a judicial resolution of the President's claim or interpretation.¹³²

Again, this process seems triggered only when the President's refusal to carry out a provision is inconsistent "with the clear intent of Congress."¹³³ What if it is not "clear"? The procedure does not apply? Why would courts want to take a case like this? Courts decide for themselves whether someone has standing and whether a dispute is, constitutionally, a case or controversy. It would be entirely discretionary on the part of a district judge to take this type of case. The judge is likely to find the case to be nonjusticiable, either by finding no injury to the plaintiff or by avoiding the merits because there was no "clear intent" of Congress.

If a judge did take the case and decided that the President's interpretation is inconsistent with the intent of Congress, what then? Order the President to enforce the provision as understood by the judge? The government would appeal. After rounds of litigation, what would be gained? The Justice Department has sufficient lawyers, and sufficient incentive, to litigate as many of these cases as district and appellate courts are willing to hear. The task force offered this hope: "It would be expected that one case before the Supreme Court would put to rest the constitutionality of a signing statement that announces the President's intent not to enforce a provision of a law or to do so in a manner contradictory to clear congressional intent."¹³⁴ At most, this type of ruling might dispose of a particular case where there is clear intent but would leave in doubt all other disputed statutory provisions.

The ABA study followed the same method of analysis as Ms. Boardman in her testimony before the Senate Judiciary Committee.¹³⁵ It assumed that an issue is settled within the executive branch by a presidential signing statement, instead of looking at what happens *after* the statement. Thus, "Clinton followed his predecessors in repudiating and refusing to enforce the series of legislative vetoes declared illegal in 1984 [1983] by the Supreme Court that Congress nevertheless continued to attach to legislation."¹³⁶ Regardless of what Clinton or other Presidents have said in their signing statements after *Chadha*, the committee and subcommittee vetoes are enforced.

The ABA report claimed that it was not singling out President George W. Bush for criticism by saying, "Our recommendations are not intended to be, and should not be viewed as, an attack on the current President. His term will come to an end and he will be replaced by another President, who will, in turn, be succeeded by yet

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 26.

¹³⁵ See *supra* text accompanying notes 94–97.

¹³⁶ AM. BAR ASS'N, *supra* note 126, at 14 (citing Neil Kinkopf, Signing Statements and the President's Ability to Enforce the Law 3–4 (2006), <http://www.acslaw.org/files/kinkopf-signing%20statements%20and%20President's%20Authority.pdf>).

another.”¹³⁷ However, it states that “[s]cholars have noted that it is a hallmark of the Bush II signing statements that the objections are ritualistic, mechanical, and generally carry no citation of authority or detailed explanation.”¹³⁸ In fact, the records of presidential signing statements before Bush are similarly ritualistic, mechanical, and rarely provide any citation of authority or detailed explanation.

E. House Hearings in 2007

The House Committee on the Judiciary held hearings on January 31, 2007, to explore the impact of presidential signing statements on the system of checks and balances and the rule of law. John P. Elwood, Deputy Assistant Attorney General of the Office of Legal Counsel, presented the position of the Justice Department. He advised the committee: “It is important to establish at the outset what presidential signing statements are not: an attempt to ‘cherry-pick’ among the parts of a duly enacted law that the President will choose to follow, or an attempt unilaterally to re-define what the law is after its enactment.”¹³⁹ The first half of the sentence seems literally what a signing statement *does* consist of, even if “cherry-pick”¹⁴⁰ implies that the action lacks objectivity and professionalism. As to “unilaterally . . . redefin[ing]”¹⁴¹ the law after enactment, I suppose it could be argued that the administration identified the illegality or unconstitutionality before it reached the President’s desk, but it is unilateral nonetheless.

According to Elwood, signing statements are not “an attempt to ‘override’ duly enacted laws. . . . Many constitutional signing statements are an attempt to preserve the enduring balance between coordinate Branches of Government, but this preservation does not mean that the President will not enforce the provision as enacted.”¹⁴² If the provision is to be carried out in conformance with statutory language, why issue a signing statement? Why would Bush sign the Defense Appropriations Bill on December 30, 2005, with the anti-torture provision, and imply that he will carry it out in accordance with his own independent constitutional duties?¹⁴³

Using a signing statement to signal that a law will not be carried out as written by Congress seems clearly intended in a bill signed by Bush on October 4, 2006.¹⁴⁴ He objected to new statutory qualifications for the Administrator of the Federal

¹³⁷ *Id.* at 5.

¹³⁸ *Id.* at 17.

¹³⁹ *Presidential Signing Statements: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 2 (2007) (statement of John P. Elwood, Deputy Ass’t Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice) [hereinafter Elwood Testimony].

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680, 2739 (2005) (codified at 42 U.S.C.A. § 2000dd (West Supp. 2007)).

¹⁴⁴ *See* Act of July 13, 2006, Pub. L. No. 109-295, § 503(c)(2), 120 Stat. 1377 (2006).

Emergency Management Agency (FEMA).¹⁴⁵ The bill states that “the Administrator shall be appointed from among individuals who have (A) a demonstrated ability in and knowledge of emergency management and homeland security; and (B) not less than 5 years of executive leadership and management experience in the public or private sector.”¹⁴⁶ The congressional purpose was to avoid the kind of amateurish and ineffective responses by FEMA leadership to the Katrina disaster in New Orleans. Bush, however, objected that the legislative qualifications ruled out “a large portion of those persons best qualified by experience and knowledge to fill the office” and announced that the executive branch would construe the statutory language “in a manner consistent with the Appointments Clause of the Constitution.”¹⁴⁷

There is nothing in the text of the Appointments Clause and precious little in its intent by Framers to guide the President or anyone.¹⁴⁸ What is the constitutional objection? That Congress cannot require a minimum of five years experience in leadership and management? That Congress cannot insist on a nominee’s demonstrated ability in emergency management? Does the signing statement mean that a President may send up someone with two years experience? Obviously a President can send up anyone he wants, but just as obviously the committee of jurisdiction can refuse to hold hearings on a nominee who falls short of statutory qualifications. What does the President gain from this confrontation, other than insisting that he is at liberty to ignore the law and propose an under-qualified nominee?

No matter what a President says in a signing statement about statutory qualifications for a nominee, he is likely to comply with the law unless the requirements are wholly unreasonable, which the FEMA provisions are not. If the purpose is to demonstrate that a President may ignore statutory qualifications for nominees and go his own independent way, does that mean he can recommend someone to be Attorney General who is not “learned in the law,” a qualification that dates back to 1789?¹⁴⁹ Perhaps nominate as Attorney General someone who runs a fruit and vegetable stand? The answer is he may, if he does not mind public and congressional ridicule. May the President nominate someone to be Surgeon General who is not a medical doctor or recommend someone to be on the Council of Economic Advisers who is not an economist? Many federal positions are highly technical and demand proficiency and experience in a given profession.

Elwood elaborates on the department’s position:

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Statement on Signing the Department of Homeland Security Appropriations Act, 2007, 42 WEEKLY COMP. PRES. DOC. 1742 (Oct. 4, 2006).

¹⁴⁸ *See* U.S. CONST. art. II, § 2, cl. 2.

¹⁴⁹ An Act to Establish the Judicial Courts of the United States, 1 Stat. 93 (1789) (“And there shall also be appointed a meet person, learned in the law, to act as attorney-general for the United States.”).

In the Appointments Clause context discussed below, Congress sometimes attempts to place undue restrictions on the pool from which the President may select appointment candidates. As a mandatory directive to the President, such restrictions violate the Appointments Clause, U.S. Const., art. II, § 2, as each of the past four Presidents has noted in signing statements.¹⁵⁰

To refer to four Presidents who objected to statutory requirements is no evidence of a violation of the Appointments Clause. What precisely is the constitutional problem? Elwood continues:

If construed as a recommendation from Congress, however, these appointments provisions are constitutional and are often routinely followed. A constitutional signing statement on this issue, therefore, is not a declaration that the President will not follow the appointments provisions, but that he remains free to abide by them as a matter of policy. And it is commonly the case that Presidents do abide by such appointment provisions.¹⁵¹

Yet Presidents abide by statutory qualifications not merely on grounds of policy but on grounds of law. In creating an office, Congress has from the very beginning stipulated the qualifications of appointees. In the 1926 *Myers* removal decision, in a dissenting opinion, Justice Brandeis prepared a long list of requirements that Congress had placed on the President's selection of nominees, including: citizenship; being a "resident of the United States; of a State; of a particular State; of a particular district; of a particular territory; of the District of Columbia; of a particular foreign country . . . specific professional attainments, or occupational experience;" test by examinations; requirements of age, sex, race, property, or habitual temperance in the use of intoxicating liquors; selection on a nonpartisan basis; and representation by industrial or geographic criteria.¹⁵² Those are legal requirements, not mere policy preferences. If Congress creates a nonpartisan commission and stipulates that no more than three out of five commissioners may be from the same political party, the President is not at liberty to nominate four or five from the same party.¹⁵³ To do so would constitute a statutory violation.

Elwood objected to the continuation of committee vetoes because of the "clearly controlling Supreme Court decision" of *INS v. Chadha*.¹⁵⁴ The decision might be

¹⁵⁰ Elwood Testimony, *supra* note 139, at 2.

¹⁵¹ *Id.*

¹⁵² *Myers v. United States*, 272 U.S. 52, 265–74 (1926) (Brandeis, J., dissenting).

¹⁵³ LOUIS FISHER, *THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE* 155–59 (1998).

¹⁵⁴ Elwood Testimony, *supra* note 139, at 2.

clearly controlling as taught in law schools, but it is not clearly controlling as received by executive agencies and congressional committees that decide to honor an accommodation that worked well before *Chadha* and works well afterward. The Constitution, says Elwood, “prohibits conditioning executive branch action on the approval of congressional committees.”¹⁵⁵ Shocking as it may seem, decisions by the Supreme Court do not control everything. There are often sound reasons for giving room to political accommodations that do not comply in every respect to judicial rulings.¹⁵⁶

Elwood reiterates Boardman’s position that signing statements are not a “power grab.”¹⁵⁷ “Signing statements do not expand the President’s authority: The President cannot adopt the provisions he prefers and ignore those he does not; he must execute the law as the Constitution requires. Nor do signing statements diminish congressional power.”¹⁵⁸ That assessment is far too mechanical. The Appointments Clause, the Commander-in-Chief Clause, and other constitutional provisions cited in signing statements do not guide the President’s hand in some sure, neutral, objective way. Interpretations are necessary, and they routinely and naturally favor executive power over legislative power.¹⁵⁹

III. SECRET EXECUTIVE OBJECTIONS

In his prepared statement, Elwood referred to the tension between statutory law and constitutional law: “A President that places the statutory law over the constitutional law . . . would fail in his duty faithfully to execute the laws.”¹⁶⁰ The discretion this viewpoint gives to the President to set aside statutory law in favor of what he and his advisers consider to be constitutional law is always of concern when done in the open. When done in secret, however, the cost to constitutional government and the rule of law is severe and of great damage.

A. *Iran-Contra*

In 1984, Congress adopted the “Boland Amendment” to prohibit federal assistance of any kind to the Contra rebels in Nicaragua.¹⁶¹ The all-embracing language read:

¹⁵⁵ *Id.* at 3.

¹⁵⁶ Neal Devins & Louis Fisher, *Judicial Exclusivity and Political Instability*, 84 VA. L. REV. 83, 84–85 (1998).

¹⁵⁷ Elwood Testimony, *supra* note 139, at 3.

¹⁵⁸ *Id.*

¹⁵⁹ *See, e.g.*, Statement on Signing the Department of Homeland Security Appropriations Act, 42 WEEKLY COMP. PRES. DOC. 1742 (Oct. 4, 2006); Statement on Signing the 21st Century Department of Justice Appropriations Authorization Act, 38 WEEKLY COMP. PRES. DOC. 1971 (Nov. 2, 2002).

¹⁶⁰ Elwood Testimony, *supra* note 139, at 5.

¹⁶¹ Boland Amendment, Pub. L. No. 98-473, § 8066(a), 98 Stat. 1935 (1984).

During fiscal year 1985, no funds available to the Central Intelligence Agency, the Department of Defense, or any other agency or entity of the United States involved in intelligence activities may be obligated or expended for the purpose or which would have the effect of supporting, directly or indirectly, military or paramilitary operations in Nicaragua by any nation, group, organization, movement, or individual.¹⁶²

When President Ronald Reagan signed the bill, he made no statement expressing any constitutional or policy objection to this provision. Nor were constitutional objections ever voiced publicly by the White House, the Justice Department, or any other agency of the United States. In March 1985 and again in April 1985, an executive official testified before congressional committees that the administration knew the meaning and intent of the Boland Amendment and would comply with it in full.¹⁶³

At the very moment that this executive official assured Congress that there would be strict compliance with the amendment, other officials within the administration were busy soliciting funds from private individuals and foreign governments to assist the Contras militarily.¹⁶⁴ Also, the Reagan administration sold arms to Iran and hoped, in return for that assistance, to free American hostages held in Tehran.¹⁶⁵ The administration's intervention in Nicaragua violated statutory law; the decision to give weapons to Iran broke the administration's public policy to remain neutral in the war between Iraq and Iran and to deny any concessions or support to terrorists. When the Iran-Contra story surfaced in a newspaper in Beirut, Congress began an intensive investigation, and Independent Counsel Lawrence E. Walsh prosecuted public officials and private citizens involved in the scheme.¹⁶⁶ Congress passed legislation in 1991 to reduce the likelihood of future illegal and unconstitutional actions on the part of the executive branch.¹⁶⁷

B. NSA Surveillance

Although much needs to be learned about the Bush administration's secret surveillance program by the National Security Agency (NSA) after 9/11, it appears

¹⁶² *Id.*

¹⁶³ *Security and Development Assistance: Hearing on S.559, S.560, S.660, and S.656 Before the S. Comm. On Foreign Relations, 99th Cong. 908–10 (1985)* (statement of Ambassador Langhorne Motley, Ass't Sec'y, Inter-American Affairs, U.S. State Dep't); *Dep't of Defense Appropriations: Hearing on H.R. 3629 Before the S. Comm. on Appropriations, 99th Cong. (1985)*.

¹⁶⁴ LOUIS FISHER, *PRESIDENTIAL WAR POWER* 250–59 (2d ed. 2004).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 250–55.

¹⁶⁷ *Id.* at 256–57.

that the administration decided to subordinate a statute to a highly classified program created within the executive branch. The dispute began in December 2005 when the *New York Times* published a story that President Bush had secretly authorized the NSA to listen to international calls involving Americans and others inside the United States without a court-approved warrant.¹⁶⁸ The initiative violated a congressional statute, the Foreign Intelligence Surveillance Act of 1978 (FISA).¹⁶⁹ An essential part of that statute was the creation of a special Article III court, the Foreign Intelligence Surveillance Court (FISC), to provide a neutral magistrate to monitor foreign intelligence surveillance.¹⁷⁰ Contrary to executive branch arguments that the President possessed certain “inherent” constitutional authorities to order warrantless foreign intelligence surveillance,¹⁷¹ the 1978 statute provided that its procedures “shall be the exclusive means” for conducting such surveillance.¹⁷² FISA was amended repeatedly over the years, including after the terrorist attacks of 9/11,¹⁷³ and yet at no time had an administration claimed that the statute interfered with inherent presidential power and could be subordinated to executive-made law.

Yet precisely that argument was made once the NSA program became public. On December 17, 2005, President Bush acknowledged that he had authorized the NSA, “consistent with U.S. law and the Constitution, to intercept the international communications of people with known links to Al Qaeda and related terrorist organizations.”¹⁷⁴ His program was, in fact, inconsistent and in violation of FISA by dispensing with any need to obtain orders and approval from the FISA Court.¹⁷⁵ It became clear that when President Bush and other administration officials referred to “U.S. law” or “authorit[y],” they meant law created solely within the executive branch, whether contrary to statutory law. Bush underscored what he considered to be his independent constitutional powers: “The authorization I gave the National Security Agency after Sept. 11 helped address that problem [of combating terrorism] in a way that is fully consistent with my constitutional responsibilities and authorities.”¹⁷⁶

¹⁶⁸ James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

¹⁶⁹ Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered sections of 50 U.S.C.).

¹⁷⁰ *Id.* at 1788.

¹⁷¹ Press Briefing by Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Dir. for Nat’l Intell. 2 (Dec. 19, 2005) [hereinafter Gonzales & Hayden], available at <http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html>.

¹⁷² 92 Stat. 1797.

¹⁷³ See Act of Dec. 28, 2001, Pub. L. No. 107-108, § 314(a), 115 Stat. 1402 (codified as amended in scattered sections of 50 U.S.C.).

¹⁷⁴ *Bush on the Patriot Act and Eavesdropping*, N.Y. TIMES, Dec. 18, 2005, at 30.

¹⁷⁵ David E. Sanger, *In Address, Bush Says He Ordered Domestic Spying*, N.Y. TIMES, Dec. 18, 2005, at 1.

¹⁷⁶ *Bush on the Patriot Act and Eavesdropping*, *supra* note 174.

In a news conference on December 19, he stated: “As President and Commander in Chief, I have the constitutional responsibility and the constitutional authority to protect our country. Article II of the Constitution gives me that responsibility and the authority necessary to fulfill it.”¹⁷⁷ Also on December 19, Attorney General Alberto Gonzales and General Michael Hayden held a press briefing on the NSA program, claiming that “the President has the inherent authority under the Constitution, as Commander-in-Chief, to engage in this kind of activity.”¹⁷⁸ When Hayden appeared before the Senate Intelligence Committee on May 18, 2006, to testify on his nomination to be Director of the Central Intelligence Agency, he defended the legality of the NSA program on constitutional grounds.¹⁷⁹ Recalling his service as NSA Director at the time of 9/11, he testified: “I had two lawful programs in front of me, one authorized by the President, the other one would have been conducted under FISA as currently crafted and implemented.”¹⁸⁰ In other words, two avenues lay before him: one authorized by statutory law, the other in violation of it. He told one Senator: “I did not believe—still don’t believe—that I was acting unlawfully. I was acting under a lawful authorization.”¹⁸¹ He meant a presidential directive issued under Article II, even if against the exclusive policy set forth in FISA. Hayden implied that he was willing to violate statutory law in order to carry out presidential law.¹⁸² After 9/11, CIA Director George Tenet asked whether as NSA Director he could “do more” to combat terrorism with surveillance. Hayden answered: “[N]ot within current law.”¹⁸³ In short, the administration knowingly and consciously decided to act against statutory policy and to do so in secret.

IV. LEGISLATIVE REMEDIES

In 2002, Congress added language to the Justice Department authorization bill in an effort to regulate presidential signing statements. It directed the Attorney General to submit to Congress a report of any instance in which the Attorney General or any officer of the Justice Department “establishes or implements a formal or informal policy to refrain from enforcing, applying, or administering any provision of any Federal statute, rule, regulation, program, policy, or other law whose enforcement” is within

¹⁷⁷ The President’s News Conference, 41 WEEKLY COMP. PRES. DOC. 1885 (Dec. 19, 2005).

¹⁷⁸ Gonzales & Hayden, *supra* note 171, at 2.

¹⁷⁹ *Nomination of General Michael V. Hayden, U.S.A.F., to be Director of the Central Intelligence Agency: Hearing Before the S. Select Comm. on Intelligence*, 109th Cong. 1 (2006) (statement of General Michael Hayden, Principal Deputy Dir. for Nat’l Intelligence).

¹⁸⁰ *Id.* at 66.

¹⁸¹ *Id.* at 104.

¹⁸² *Id.* at 66, 104.

¹⁸³ *Id.* at 54.

the responsibility of the Justice Department, “on the grounds that [the] provision is unconstitutional.”¹⁸⁴ The statute established deadlines for these reports.¹⁸⁵

Ironically, President Bush identified in a signing statement what he conceived to be problems with the statute. He announced that the executive branch would construe the statutory directive “in a manner consistent with the constitutional authorities of the President to supervise the unitary executive branch and to withhold information the disclosure of which could impair foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive’s constitutional duties.”¹⁸⁶ The result? Congress enacted legislation to limit signing statements, and the President used a signing statement to limit the statute.

Several bills were introduced during the 109th Congress in an effort to restrict presidential signing statements. House Bill 5486 relied on the power of the purse:

None of the funds made available to the Executive Office of the President, or to any Executive agency . . . from any source may be used to produce, publish, or disseminate any statement made by the President contemporaneously with the signing of any bill or joint resolution presented for signing by the President.¹⁸⁷

What is “contemporaneous”? Within a day of the bill’s enactment? A week later? Would this language prevent the President, in a signing statement, from praising the bill’s sponsors? Apparently so. Even if this funding restriction worked, the Justice Department, the Office of Management and Budget, and other agencies could prepare memos after the bill is signed into law that challenge the constitutionality of certain provisions in a law. Objections would be raised not by the nation’s top enforcement officer—the President—but by agency personnel.

The second section of House Bill 5486 provides: “For purposes of construing or applying any Act enacted by the Congress, a Federal entity shall not take into consideration any statement made by the President contemporaneously with the President’s signing of the bill or joint resolution that becomes such Act.”¹⁸⁸ This seems to imply that the first section of the bill will not stop Presidents from making signing statements. Also, instead of issuing a signing statement the President can easily release memos or other documents to instruct agencies how to implement the law contrary to text and congressional intent.

¹⁸⁴ 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 202(a), 116 Stat. 1771 (2002) (codified as amended at 28 U.S.C. § 530D (Supp. II 2002)).

¹⁸⁵ *Id.* at 1773.

¹⁸⁶ Statement on Signing the 21st Century Department of Justice Appropriations Authorization Act, 38 WEEKLY COMP. PRES. DOC. 1971 (Nov. 2, 2002).

¹⁸⁷ H.R. 5486, 109th Cong. § 1 (2006).

¹⁸⁸ *Id.* § 2.

House Joint Resolutions 87 and 89 were designed to require the President to notify Congress if he makes a determination to ignore an enacted provision of law.¹⁸⁹ Nothing new is added by this provision. Members of Congress and their staffs already know the content of signing statements. They are regularly included in the *Weekly Compilation of Presidential Documents* and posted on the White House website. The joint resolutions also established expedited procedures for the consideration of legislation in the House in response to a presidential determination,¹⁹⁰ but it is not clear from the joint resolutions what the legislation would do. The joint resolutions are silent on the purpose of legislation to be given expedited treatment. They would authorize any House member to ask the House General Counsel to prepare a report describing any legal action that may be brought to challenge the President's refusal to carry out a statutory provision.¹⁹¹

Senate Bill 3731 from the 109th Congress is intended to regulate the judicial use of presidential signing statements.¹⁹² The bill states that "judicial use of presidential signing statements is inappropriate, because it in effect gives these statements the force of law."¹⁹³ That does not seem accurate. When courts look to legislative history, no one argues that what a member says on the floor or in a committee report has the force of law. Courts merely examine those sources in an effort to determine the meaning or intent of the law. The bill objects to the "sporadic and unpredictable" reliance by courts on presidential signing statements.¹⁹⁴ Sometimes courts look at the statements, sometimes not. The bill says that this "inconsistency has the unfortunate effect of rendering the interpretation of Federal law unpredictable."¹⁹⁵ The same can be said about judicial efforts to determine legislative intent. Moreover, what constitutional authority does Congress possess to prohibit federal courts from relying on presidential signing statements? Probably none. The Senate bill attempts to give Congress standing in court to obtain a declaratory judgment on any presidential signing statement.¹⁹⁶ Congress can grant statutory standing but not Article III constitutional standing. The latter is left to federal judges. They decide what constitutes a case or controversy.

CONCLUSIONS

It is important to look less at what Presidents *say* in a signing statement and more at what they *do*. Objections in a signing statement may be pure bluster and represent some sort of theoretical, impractical protest created by imaginative attorneys in the

¹⁸⁹ H.R.J. Res. 87, 109th Cong. (2006); H.R.J. Res. 89, 109th Cong. (2006).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² S. 3731, 109th Cong. (2006).

¹⁹³ *Id.* § 2.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* § 5.

Justice Department or the White House. If the statutory purpose is carried out, as with committee vetoes, there is no practical effect. One would like to see comparable zeal and energy among agency attorneys in ferreting out and publicizing unconstitutional and illegal actions within the administration.

A signing statement has merit in the sense that a President publicly flags a controversy, and observers can see if he faithfully implements the statutory provision. Of greater concern are Presidents who say nothing at a bill signing but later send signals to have the provision violated. That was the case with the Competition in Contracting Act under President Reagan.¹⁹⁷ Nothing was said when signing the bill but soon executive officials were ordering agencies not to comply with the bid-protest procedure.¹⁹⁸ The same problem occurred with the Boland Amendment and Iran-Contra.¹⁹⁹ Similarly, no accountability was available when the administration of George W. Bush decided to order the National Security Agency after the terrorist attacks of 9/11 to conduct warrantless surveillance without seeking approval from the FISA court. The program, stripping the key judicial check from FISA, was not publicly known until the December 2005 stories by the *New York Times*.

Presidents will continue to say what they like in signing statements, or rather the Justice Department and other executive officials will continue to put in signing statements objections that are almost always above the comprehension, knowledge, and appreciation of the President who dutifully adds his name to the statement. His comments and observations are relatively harmless if the statutory purpose is fulfilled. By themselves, the statements are nearly impossible to understand and analyze because they are couched in abstract references to the Appointments Clause, the Presentment Clause, the Commander-in-Chief Clause, the Recommendations Clause, and other shortcut citations that offer no analysis. If those cursory remarks were supplemented by a more fully developed legal analysis, written in plain English, some light might be shed.

The problem with signing statements that identify hundreds and hundreds of provisions that are regarded as non-binding by the executive branch is that they encourage the belief that the law is not what Congress puts in public law but what the administration decides to do later on. To the extent that the statutory law is general and depends on subsequent rulemaking by agencies, no harm is done. But if the volume of signing statements gradually replaces Congress-made law with executive-made law and treats a statute as a mere starting point on what executive officials want to do, the threat to the rule of law is grave. To curb this type of executive abuse and arrogance, close and continuing scrutiny is needed by Congress, the courts, private organizations, and the public.

¹⁹⁷ See *supra* notes 42–45 and accompanying text.

¹⁹⁸ *Id.*

¹⁹⁹ FISHER, *supra* note 164, at 250–55.