

**PRESIDENTIAL SIGNING STATEMENTS:  
WILL CONGRESS PICK UP THE GAUNTLET?**

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Presidential “signing statements” – formal expressions of the views of a President regarding legislation that he has just signed into law – are nearly as old as the Republic. Although previous Presidents issued signing statements, not until the Reagan Administration did they begin using such statements systematically to influence judicial interpretation or, most recently, to declare legislation non-binding on the Executive.

The use of presidential signing statements to influence judicial interpretation, pioneered by President Reagan, has proven ineffectual: Judges who look to legislative history at all place little weight on signing statements. The use of signing statements to deny effect to legislation, however, immediately alters the relationship between the Executive, on the one hand, and Congress and the judiciary, on the other.

Article I of the Constitution gives Congress the last word as to whether a law will take effect, subject to judicial review, by empowering Congress to override a presidential veto. When the President issues a signing statement refusing to give effect to a law, the President usurps the powers of Congress by circumventing the Constitution’s provision for overriding presidential vetoes, and by effectively asserting unilateral power to repeal and amend legislation.

Similarly, when the President denies effect to legislation because he considers it unconstitutional, the President displaces the judiciary as the final expositor of the Constitution and undermines the principle of judicial review that is crucial to our system of checks and balances. Finally, by reallocating power among the three branches, the President effectively amends the Constitution, a process in which the Constitution assigns him no role.

To be sure, under Article II, the President must “preserve, protect, and defend the Constitution” and “take Care that the Laws be faithfully executed.” But

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what presidential *powers* these duties imply is a different question. That the President must “preserve, protect, and defend” the Constitution does not necessarily signify that the President has power to determine constitutionality, displacing judicial review. That the President must “take care” that the laws be “faithfully executed” does not necessarily mean “faithful to the President’s reading of the Constitution.” The more natural reading is that the President must execute laws as enacted.

Under basic principles of interpretation, the specific governs over the general, and provisions of a document should be read, if possible, to agree, not disagree, with one another. These principles, standing alone, preclude reading the President’s general duties under Article II to trump the specific process for enacting legislation under Article I that gives Congress, not the President, the last word, and precludes reading those duties to displace the powers of the judiciary or the people.

Congress has the power to prevent the President from using signing statements in this unconstitutional manner. The only question is whether a Congress controlled by the President’s own party has the will to do so. As discussed below, an episode from the Reagan era, when Republicans ruled the Senate, demonstrates that it can.

### **A Brief History of the Presidential Signing Statement**

Every schoolchild knows – or should know – that under the Constitution, Congress makes the laws, the President enforces the laws, and the Judiciary superintends the constitutional design. *See Martin v. Hunter’s Lessee*, 14 U.S. 304, 329-30 (1816) (“The object of the constitution was to establish three great departments of government; the legislative, the executive, and the judicial departments. The first was to pass laws, the second to approve and execute them, and the third to expound and enforce them.”).

The Constitution, however, is “notoriously vague” about the “etiquette” of inter-branch relations. This vagueness is not a flaw in the constitutional plan. The Framers sought to constrain the national government by ensuring “a mutually exclusive struggle for power” among its branches that would often “result in a stalemate . . . with [no] side victorious.”<sup>1</sup>

Historically, the presidential signing statement has been “little more than an appendage to some bills the president signs into law.”<sup>2</sup> Presidents typically have used signing statements to thank supporters, explain their reasons for signing a bill into law, express displeasure with a law, and generally “promote public awareness and discourse in much the same way as a veto message.”<sup>3</sup> No longer. What once was principally a means of encouraging “a respectful, constitutional ‘dialogue’ between the Branches,”<sup>4</sup> today serves as “a systematic and effective weapon to trump congressional action.”<sup>5</sup>

The transformation of the signing statement from ceremonial ornament to political weapon is a legacy of President Nixon's failed effort to create an Imperial Presidency. His effort produced the opposite result – an Executive less powerful than at any time since Reconstruction. When President Reagan took office in 1981, he began to use signing statements to reclaim Executive power that Congress had supposedly seized from a President weakened by scandal. Later, President Clinton used signing statements to advance his Administration's policies in the face of a hostile Congress. President George W. Bush is now using signing statements to free the Executive from our system of checks and balances and build an Imperial Presidency beyond Nixon's fondest dreams.

#### **a. The Presidential Signing Statement in the Pre-Reagan Era**

Although at least one historian cites James Monroe, most historians credit Andrew Jackson with the first use of the "Constitutional" presidential signing statement. In that statement, Jackson objected to a provision in an 1830 appropriations bill providing for a road running from Detroit to Chicago – an "internal improvement" that Jackson opposed. Jackson signed the bill but in his signing statement directed that the road not extend beyond the Michigan border. The House "sharply criticized" Jackson for exercising what amounted to an "item veto," but Jackson – responsible for implementing the bill – had his way.<sup>6</sup>

A decade later, in a signing statement, President John Tyler ever so gingerly hinted at doubts about the constitutionality of certain apportionment legislation. The House responded with a "sharp and lengthy protest" and decreed that Tyler's statement should "be regarded in no other light than a defacement of the public records and archives."<sup>7</sup> The Supreme Court later recognized presidential signing statements as a proper means to "inform Congress by message of his approval of bills, so that the fact may be recorded,"<sup>8</sup> but the Court did not suggest that signing statements might serve more substantive functions, and Presidents used them only sporadically until the Reagan Administration.<sup>9</sup>

#### **b. The Presidential Signing Statement in the Reagan Era**

President Reagan came to office in 1981 seeking "nothing less than a revolution in government and in the nation, from fundamental values to public policy to institutional operations," and his administration girded itself "for a battle."<sup>10</sup> Reagan faced not only "a Congress whose senior members ranged from skeptical to overtly hostile"; he also faced what Reagan supporters considered the "legislative opportunism that arose out of the Watergate controversy [and a] Congress [that] had used this episode to expand its power in various ways *vis-à-vis* the executive branch."<sup>11</sup>

Among other strategies, Reagan sought to reclaim presidential power by filling the federal bench with conservatives and using signing statements to "play a more active and continuing role in judicial interpretation of statutes."<sup>12</sup> Reagan drew support for his approach from the Supreme Court's decision in *INS*

*v. Chadha*, 462 U.S. 919 (1983), which he read as recognizing the legitimacy of this use of signing statements, including his own.<sup>13</sup> Through careful preparation and deployment of signing statements, Reagan sought to make executive interpretations of new laws a meaningful and legitimate part of the legislative history of a statute. To effectuate that goal, Attorney General Edwin Meese III brokered a 1986 agreement with West Publishing Company to publish signing statements in the *U.S. Code Congressional and Administrative News*, ensuring that they would “be more accessible to both the Bench and the Bar.”<sup>14</sup>

When Reagan used a signing statement to deny effect to legislation, however, Congress fought back – and won. In 1984, Congress passed the Competition in Contracting Act.<sup>15</sup> Reagan signed the legislation with the caveat that he considered portions of it unconstitutional, and he ordered executive branch officials not to give them effect.<sup>16</sup> A losing bidder sued, and the law was held constitutional.<sup>17</sup> When the Administration refused to comply with the district court’s order, the Republican-controlled Senate, as intervenor, moved for summary judgment. The district court castigated the Administration, reminding the President that “[n]o man in this country is so high that he is above the law.”<sup>18</sup> Faced with this judicial rebuke, bipartisan condemnation by both Houses, and threats to eliminate funding for the attorney general – Reagan relented.<sup>19</sup>

### **c. The Signing Statement under President George H.W. Bush**

George H.W. Bush came to power armed, to his mind, with “a mandate to carry on the Reagan Revolution.”<sup>20</sup> Like Reagan, President Bush sought to use signing statements to “protect[] the executive’s prerogatives.”<sup>21</sup> Bush worked with members of Congress to create legislative history, which he would then cite in a signing statement as the “guiding interpretation” to be followed by the executive branch.<sup>22</sup> Bush also used the signing statement as a form of presidential push-back. For example, Bush objected to a provision in the Dayton Aviation Heritage and Preservation Act of 1992 that purported to give executive powers to members of a commission without requiring their confirmation as executive officers of the United States.<sup>23</sup> Bush simply refused to appoint members of the commission until Congress amended the provision to meet his objection. Congress did so.<sup>24</sup>

### **d. The Signing Statement under President Clinton**

Bill Clinton used the signing statement to comment on the constitutionality of legislation and to further Administration policy in the face of a hostile Congress controlled by a militant opposition. Like his predecessors, Clinton was “willing to use the constitutional signing statement from the high profile to the mundane, often to achieve what could not be achieved after veto bargaining had taken place.”<sup>25</sup> Nevertheless, the extent of Clinton’s use of the statement to advance Administration policy was unprecedented. According to one scholar, Clinton issued signing statements for one out of every four bills he signed into law.<sup>26</sup>

In a widely-read memorandum, Clinton Assistant Attorney General Walter Dellinger maintained that the President is well within his authority to use the signing statement to declare provisions of a law unconstitutional and thus unenforceable.<sup>27</sup> Dellinger maintained that “the President is [not] under any duty to veto legislation containing a constitutionally infirm provision, although of course it is entirely appropriate constitutionally for the President to do so.”<sup>28</sup> What Dellinger found problematic, at least in principle, was Reagan’s use of the signing statement to influence judicial interpretation.<sup>29</sup>

Perhaps Clinton’s most high-profile use of the signing statement involved The National Defense Authorization Act for FY 1996. The act contained a provision that required discharge from the military of all HIV-positive service members.<sup>30</sup> After Clinton vetoed the bill because of the provision, Congress retooled the bill and returned it to him. Because of the urgent need to fund the military, Clinton had no choice but to sign the bill into law. However, he attached a statement asserting that the HIV provision was unconstitutional and directing the Attorney General not to defend it if challenged.<sup>31</sup> Before a lawsuit could be brought, Congress repealed the provision.

Clinton used the signing statement to advance Administration policy when he signed omnibus legislation that included funding provisions for the Department of the Interior. The provisions were criticized by members of both parties as being environmentally unsound, and although the provisions were ultimately included in the legislation, the Administration succeeded in having a “suspension provision” attached to the bill allowing the President to waive its provisions “based upon the public interest in sustainable environmental management or the protection of cultural, biological, or historic resources.”<sup>32</sup> Clinton exercised his suspension powers in his statement signing the bill into law.

#### **e. The Signing Statement under President George W. Bush**

Since 2001, President George W. Bush has objected on constitutional grounds to over 500 provisions in over 100 pieces of legislation,<sup>33</sup> a number approaching the 575 constitutional statements issued by all of his predecessors combined.<sup>34</sup> One scholar has identified eighty-two instances in which Bush has disputed a bill’s constitutionality on the basis that Article II does not allow Congress to interfere with the President’s “power to supervise the unitary executive,” seventy-seven instances in which Bush has claimed that, as President, he has “exclusive power over foreign affairs,” and forty-eight instances in which President Bush has claimed “authority to determine and impose national security classifications and withhold information.”<sup>35</sup>

Though some have suggested that Bush’s use of the signing statement is a response to post-9/11 legislation that could infringe the President’s national security and commander-in-chief authority, Bush has attached signing statements to a wide variety of legislation unrelated to the “War on Terror.”<sup>36</sup> Using boilerplate language, Bush has objected to legislative provisions establishing affirma-

tive action programs, statutes requiring statistical compilations by executive agencies, and legislation establishing basic qualifications for executive appointees.<sup>37</sup>

In general, Bush has used the presidential signing statement to implement the doctrine of the “unitary executive.” This doctrine posits that all three branches of government are co-equals when it comes to interpreting and enforcing the Constitution. The doctrine cites Madison’s statement in *The Federalist* 49, and similar statements by the Framers, that “the several departments being perfectly coordinate by the terms of their common commission, none of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers.” The doctrine, however, disregards the “finely wrought” scheme of the Constitution, in which Congress, through its power to override a presidential veto, is given final say as to whether a bill becomes law, and laws are subject to judicial review.<sup>38</sup> To deny a law effect through a signing statement preempts this process by avoiding congressional override and judicial review.

Bush recently attempted to create legislative history to cite in a signing statement as part of an effort to influence the Supreme Court’s forthcoming decision in *Hamdan v. Rumsfeld*. That case tests the lawfulness of the military commissions that Bush established to try Guantanamo detainees charged with war crimes. Working with friendly Senators, Bush created legislative history indicating that Congress intended the Detainee Treatment Act of 2005 – which limits the jurisdiction of the federal courts over actions by detainees<sup>39</sup> – to apply to pending cases, including *Hamdan*. The plan backfired, however, when Hamdan’s counsel discovered that a key colloquy between the Senators that purportedly occurred on the Senate floor moments before the vote on the conference report in fact was inserted into the record, unheard and unseen, seconds before the vote.<sup>40</sup>

## Legal Discussion

### 1. The President violates the Constitution when he denies effect to legislation

#### a. The President usurps the powers of Congress.

When the President signs a bill into law but declares that he will not give effect to it, he is effectively vetoing the law without affording Congress the opportunity, under Article I, § 7, cl. 2, to override the veto. In effect, the President has unilaterally repealed the legislation. Similarly, when the President announces that he will not give effect to particular provisions of a law that he has signed, he is, in effect, amending the law by repealing a portion of it. Only Congress, however, may repeal legislation. The President may not. *Clinton v. City of New York*, 524 U.S. 417, 438-40 (1998).

### **b. The President usurps the powers of the Judiciary.**

The President also exceeds his authority when he declares that he will not give effect to a law because he considers it unconstitutional. “No doubt, the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text.” *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000). “It is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). See also *United States v. Nixon*, 418 U.S. 683, 703 (1974).

### **c. The President usurps the power to amend the Constitution.**

When the President assumes the power of the other branches, he revises the constitutional design. In effect, he is amending the Constitution. Under Article V, however, the Constitution may be amended only by an amendment (1) proposed by two-thirds vote of each House or a convention called by two thirds of the states, and (2) ratified by three-fourths of the states. Article V assigns the President *no* role in the amendment process. If the President is to assume powers currently assigned by the Constitution to Congress and the Judiciary, “such change must come not by legislation but through the amendment procedures set forth in Article V of the Constitution.” *Clinton v. City of New York*, 524 U.S. at 449 (citation omitted).

As authority for such signing statements, Presidents have cited their duty to “preserve, protect, and defend that Constitution,” art. II, § 1, cl. 8, and to “take Care that the Laws be faithfully executed,” *id.* § 3. However, as mentioned, Article I, § 7 gives Congress the last word as to whether a law will take effect, subject to judicial review, by empowering Congress to override a presidential veto. As discussed earlier, basic rules of constitutional interpretation preclude a reading of the generally-worded provisions of Article II that enables the President to trump the specific plan of Article I, § 7, for making enacting legislation, or to displace judicial review. See *Cohens v. Virginia*, 19 U.S. 264, 393-99 (1821) (Marshall, C.J.) (discussing rules of constitutional interpretation). “[U]nder the sanction of the constitution, [the President] might defeat the constitution itself; a construction which would lead to such a result cannot be sound.” *Martin v. Hunter’s Lessee*, 14 U.S. 304, 329 (1816) (Story, J).

## **2. Only Congress can remedy the constitutional violation.**

Under Article III, the federal judiciary’s power to compel the Executive branch to give effect to legislation is limited to those circumstances in which the legislation has created judicially enforceable rights or interests. Thus, for example, the Administrative Procedure Act, 5 U.S.C. § 706(1), allows aggrieved parties to sue to “compel agency action unlawfully withheld or unreasonably delayed.” See *Costle v. PLF*, 445 U.S. 198, 220 n.14 (1980).

Individual members of Congress, and members of the public asserting a “generalized grievance,” would lack standing to challenge Presidential contumacy. See *Raines v. Byrd*, 521 U.S. 811, 829-30 (1997); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216-27 (1974). Moreover, even if Congress could sue to compel the President to give effect to a law – for example, to order him to enforce the McCain legislation banning the use of torture without exception – a federal court would confront, among other issues, “the difficulty of fashioning relief.” See, e.g., *Nixon v. United States*, 506 U.S. 224, 236 (1993). In deciding whether to adjudicate the claim, a court would also be influenced by the availability of means by which Congress itself can secure the requested relief. See *Raines*, 521 U.S. at 829-30.

This, however, is not a wrong without a remedy. In any number of ways, Congress can make it costly for the President to refuse to give effect to legislation. It can use its power of the purse to deny the President appropriations that he has requested; it can refuse to advance legislation that the President favors; or it can repeal legislation authorizing programs that the President supports. Congress must make unmistakably clear the link between the President’s use of a signing statement and the price he must pay if he does so.

In short, Congress must be willing to play hardball with the President. This might seem unlikely when the President’s own party controls Congress, or when the President has public opinion on his side. During the Reagan Administration, however, as discussed, a Republican-controlled Senate, joined by House Republicans and Democrats, forced President Reagan to give effect to legislation that, in a signing statement, he had announced that he would ignore. Congress should show similar resolve today, when the danger posed by the President’s use of signing statements is far greater. An acquiescent Congress cannot complain of presidential overreaching.

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<sup>1</sup> Brad Waltes, *Note, Let Me Tell You What You Mean: An Analysis of Presidential Signing Statements*, 21 GA. L. REV. 755, 755–56 (1987).

<sup>2</sup> Christopher Kelley, *The Unitary Executive and the Presidential Signing Statement 1* (June 1, 2006), available at <http://www.users.muohio.edu/kelleycs/conproject.pdf>.

<sup>3</sup> Neil Kinkopf, *Signing Statements and the President’s Authority to Refuse to Enforce the Law 2* (June 15, 2006), available at <http://www.acslaw.org/node/2965>.

<sup>4</sup> U.S. Dep’t of Justice, *Presidential Signing Statements 2*.

<sup>5</sup> Phillip J. Cooper, *By Order of the President: The Use and Abuse of Executive Direct Action* 201 (2002).

<sup>6</sup> Christopher S. Kelley, *A Comparative Look at the Constitutional Signing Statement: The Case of Bush and Clinton*, at 5-6, presented at the 61st Annual Meeting of the Midwest Political Science Association (Apr. 3, 2003), available at <http://mpsa.indiana.edu/conf2003papers/1031858822.pdf>.

<sup>7</sup> *Id.* at 6. This is what earned Tyler his sharp rebuke:

In approving this bill I feel it due to myself to say, as well that my motives for signing it may be rightly understood as that my opinions may not be liable to be misconstrued or quoted hereafter erroneously as a precedent, that I have not proceeded so much upon a clear and decided opinion of my own respecting the constitutionality of policy of the entire act as from respect to the declared will of the two Houses of Congress.

<sup>8</sup> *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 454 (1899).

<sup>9</sup> See Walter Dellinger, *Memorandum for Bernard N. Nussbaum, Counsel to the President*, 48 ARK. L. REV. 333, 342–46 (1995) (describing signing statements issued by Presidents Johnson, Wilson, Roosevelt, Truman, Eisenhower, Nixon, Ford, and Carter).

<sup>10</sup> Cooper, *supra* note 5, at 202.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> In *Chadha*, the Supreme Court held the one-house legislative veto unconstitutional. In a footnote, the Court mentioned that “eleven presidents, from Mr. Wilson through Mr. Reagan, who have been presented with this issue have gone on record at some point to challenge congressional vetoes as unconstitutional . . . Furthermore, it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds.” *Id.* at 942 n.13 (citations omitted). In addition, the Court specifically referred to the Reagan signing statement criticizing the Gramm-Rudman Act, when it held that certain provisions of the Act, which sought to place limits on deficit spending, were unconstitutional. *Bowsher v. Synar*, 478 U.S. 714, 719 n.1 (1986).

<sup>14</sup> Cooper, *supra* note 5 at 203 (quoting Ed Meese).

<sup>15</sup> Competition in Contracting Act of 1984, Pub. L. No. 98-369, § 2701, 98 Stat 494, 1175.

<sup>16</sup> Phillip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 PRES. STUD. Q. 515 (2005).

<sup>17</sup> *AMERON, Inc. v. U.S. Army Corps of Eng’rs*, 607 F. Supp. 962 (D.N.J. 1985).

<sup>18</sup> *AMERON, Inc. v. U.S. Army Corps of Eng'rs*, 610 F. Supp. 750, 755 (D.N.J. 1985) (citing *United States v. Lee*, 106 U.S. 196, 220 (1882)).

<sup>19</sup> See David Burnham, *Panel Condemns Reagan Orders To Ignore Contract Review*, N.Y. TIMES, May 15, 1985, at B10, col. 1; David Burnham, *House Panel Blocks Funds for Meese's Office*, N.Y. TIMES, May 8, 1985, at A28, col. 1.

<sup>20</sup> Kelley, *supra* note 6, at 10.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 12.

<sup>23</sup> *Id.* at 11.

<sup>24</sup> *Id.*

<sup>25</sup> Kelley, *supra* note 6, at 18. "Veto bargaining" involves ordinary negotiations between Congress and the Executive to avoid a presidential veto of legislation.

<sup>26</sup> Kelley, *The Unitary Executive*, *supra* note 2, at 9.

<sup>27</sup> Dellinger, *supra* note 9, at 336 ("In each of the last three Administrations, the Department of Justice has advised the President that the Constitution provides him with the authority to decline to enforce a clearly unconstitutional law. . . . This advice is, we believe, consistent with the views of the Framers. Moreover, four sitting Justices of the Supreme Court have joined in the opinion that the President may resist laws that encroach upon his powers by 'disregarding them when they are unconstitutional.'") (citations omitted).

<sup>28</sup> *Id.* at 338.

<sup>29</sup> *Id.* at 338–41.

<sup>30</sup> National Defense Authorization Act for FY 1996, Pub. L. No. 104-106, §567, 110 Stat. 186, 328.

<sup>31</sup> Kelley, *supra* note 6, at 19.

<sup>32</sup> *Id.* at 22.

<sup>33</sup> Cooper, *George W. Bush*, *supra* note 16.

<sup>34</sup> Kelley, *The Unitary Executive*, *supra* note 2, at 8.

<sup>35</sup> *Id.*.

<sup>36</sup> See Kelley, *The Unitary Executive*, *supra* note 2, at 9–10, see also Cooper, *George W. Bush*, *supra* note 16.

<sup>37</sup> Cooper, *George W. Bush*, *supra* note 16.

<sup>38</sup> *INS v. Chadha*, 462 U.S. 919, 951 (1983).

<sup>39</sup> Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001–1006, 119 Stat. 2679, 2739–44. *See also* Statement by President George W. Bush upon Signing H.R. 2863, 2005 U.S.C.C.A.N. S50 (Dec. 30, 2005) (“[T]he executive branch shall construe section 1005 to preclude the Federal courts from exercising subject matter jurisdiction over any existing or future action, including applications for writs of habeas corpus, described in section 1005.”).

<sup>40</sup> Dan Eggen, *Record Shows ‘Debate’ That Wasn’t*, WASH. POST, Mar. 29, 2006, at A6; Emily Bazelon, *Invisible Men: Did Lindsey Graham and Jon Kyl Mislead the Supreme Court?*, SLATE, Mar. 27, 2006, <http://www.slate.com/id/2138750/>.