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## How the Signing Statement Thought it Killed the Veto; How the Veto May Have Killed the Signing Statement

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## How the Signing Statement Thought it Killed the Veto; How the Veto May Have Killed the Signing Statement

### I. INTRODUCTION

Article I of the Constitution provides a method and procedure for the President to reject laws passed by Congress. “Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it. . . .”<sup>1</sup> The method became known as the President’s veto power. For most of the nation’s history, this veto power was the Executive’s primary tool in combating legislation he disagreed with or thought unconstitutional.

In the past three decades, another tool, the signing statement, has grown in popularity. The popularity of the signing statement culminated during the presidency of George W. Bush. Through his first term of office, President Bush did not invoke the veto power.<sup>2</sup> In fact, it was not until July of 2006, more than five years after taking office, that President Bush first used the power to strike down a bill.<sup>3</sup> As of March 8, 2008, President Bush had vetoed a total of nine bills, the last of which was a high-profile veto of a bill that would have prohibited the Central Intelligence Agency from using waterboarding as an interrogation tactic.<sup>4</sup> While increased use of the veto in the last two years would not be labeled as widespread, it presents a stark contrast to the first four years of President Bush’s presidency. Although this increased use may be attributed to control of the House of Representatives and the Senate shifting from Republicans to Democrats, a shift in the frequency of use of another presidential tool sheds some light on another possibility.

Between taking office in 2001 and the end of 2006, President Bush issued over 130 signing statements. In 2007 President Bush issued only

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1. U.S. CONST. art. I, § 7.

2. See Charles Babington, *Stem Cell Bill Gets Bush’s First Veto*, WASH. POST, July 20, 2006, A04, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/19/AR2006071900524.html> (last visited Oct. 14, 2008).

3. *Id.*

4. Stephen Lee Myers, Op-Ed, *Veto of Bill on C.I.A. Tactics Affirms Bush’s Legacy*, N.Y. TIMES, Mar. 9, 2008, available at <http://www.nytimes.com/2008/03/09/washington/09policy.html> (last visited Oct. 14, 2008).

eight signing statements and, as of the end of October, 2008, he has issued only three.<sup>5</sup> During the time when his use of the signing statement was frequent, President Bush had no need for the veto. To quote Charlie Savage, President Bush “virtually abandoned his veto power, signing every bill that reached his desk during his first term even as he used signing statements to eviscerate them.”<sup>6</sup> When he began using the veto more regularly, his signing statement usage decreased. During the Bush administration, the country saw the death of the presidential veto at the hands of the signing statement. But the country has also seen the veto rise from its shallow grave to regain its proper place in the constitutional toolbox of the President.

While the veto power is rooted in the powers of the Constitution, the same Constitution is silent on signing statements. It neither grants the President the power to ignore laws nor forbids him from doing so.<sup>7</sup> It simply provides that the President “shall Take Care that the Laws be faithfully executed.”<sup>8</sup> Additionally, the President swears an oath of office to “preserve, protect, and defend the Constitution of the United States.”<sup>9</sup> These two clauses of the Constitution are the center of the whole debate but do not, on their own, clarify the duty of the President. On one hand, the President swears to uphold the law, and when he signs legislation, it becomes law. On the other hand, he swears to uphold the Constitution. If he believes a portion of a law to be unconstitutional, he cannot enact the law while honoring his oath—unless he believes an unconstitutional law is void regardless of whether he signs it.

This paper examines the legal effect of the signing statement, and why the veto has become the legislative tool of choice for the President once again. Part II of this paper examines the history and use of the signing statement from President Monroe to the present. Part III will examine the constitutionality of the different uses of the signing statement. Part IV will examine whether the signing statement deserves the attention it has received.

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5. John Woolley & Gerhard Peters, *Presidential Signing Statements*, *The American Presidency Project*, 2008, <http://www.presidency.ucsb.edu/signingstatements.php> (last visited Oct. 14, 2008).

6. Charlie Savage, *Introduction: The Last Word? The Constitutional Implications of Presidential Signing Statements*, 16 WM. & MARY BILL RTS. J. 1 (2007).

7. Ronald A. Cass & Peter L. Strauss, *The Presidential Signing Statements Controversy*, 16 WM. & MARY BILL RTS. J. 11, 15 (2007).

8. U.S. CONST. art. II, § 3.

9. U.S. CONST. art. II, § 1, cl. 8.

II. PRESIDENTIAL SIGNING STATEMENTS: HISTORY IN THE  
NEWSPAPERS

Signing statements have more than 180 years of historical precedent.<sup>10</sup> This alone is strong evidence that they are an appropriate exercise of executive power. Still, President George W. Bush has drawn a lot of fire for his use of this tool. To understand why this use has been so controversial it is necessary to look at the historical evolution and use of this tool.

A. *Bush and the Reporter*

In April of 2007, President Bush's approval ratings hovered between 31 and 38 percent.<sup>11</sup> During the same month, Boston Globe reporter Charlie Savage reached a career pinnacle, winning a Pulitzer Prize for a series of articles reporting on Bush's prolific use of signing statements.<sup>12</sup> Savage reported, "President 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."<sup>13</sup> Bush claimed he has the power and duty to ignore any laws that attempt to encroach on his constitutionally allocated executive powers.<sup>14</sup> Perhaps it was President Bush's broad interpretation of those executive powers or just the power of the press in the face of an unpopular President, but either way, Savage's reporting has brought President Bush's use of the signing statement to a grinding halt.<sup>15</sup>

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10. ABA Task Force on Presidential Signing Statements and the Separation of Powers Doctrine Recommendation, 7 (2006) [hereinafter ABA Report], available at <http://www.abanet.org/op/signingstatements/> (last visited April 17, 2008) Oct. 14, 2008).

11. President Bush: Overall Job Rating in National Polls, Pollingplace.com, <http://www.pollingreport.com/BushJob.htm> (last viewed Oct. 14, 2008).

12. Boston Globe City & Region Desk, *Globe Wins Pulitzer Prize for Series on Bush Efforts to Expand Presidential Power*, BOSTON GLOBE, Apr. 16, 2007, available at [http://www.boston.com/news/globe/city\\_region/breaking\\_news/2007/04/globe\\_wins\\_puli\\_1.html](http://www.boston.com/news/globe/city_region/breaking_news/2007/04/globe_wins_puli_1.html).

13. Charlie Savage, *Bush Challenges Hundreds of Laws*, BOSTON GLOBE, Apr. 30, 2006, available at [http://www.boston.com/news/nation/articles/2006/04/30/bush\\_challenges\\_hundreds\\_of\\_laws/](http://www.boston.com/news/nation/articles/2006/04/30/bush_challenges_hundreds_of_laws/) (last visited Oct. 14, 2008).

14. *See id.*

15. *See* Woolley & Peters, *supra* note 5. In 2006, Bush issued 27 signing statements, some with multiple challenges. In 2007, he issued just eight. In 2008, he has issued only three signing statements.

### *B. What is a Signing Statement?*

Before launching into a greater discussion of the constitutionality of the signing statement, it is important to define what a signing statement is. It has been defined as:

Pronouncements issued by the President at the time a congressional enactment is signed that, in addition to providing general commentary on the bills, identify provisions of the legislation with which the President has concerns and (1) provide the President's interpretation of the language of the law, (2) announce constitutional limits on the implementation of some of its provisions, or (3) indicate directions to executive branch officials as to how to administer the new law in an acceptable manner.<sup>16</sup>

This definition is instructive in giving an overview of what the signing statement is and how it is used. This paper will use this definition as the basis of my discussion of signing statements.

### *C. History*

It is important to understand that the Constitution says nothing about the President issuing a statement when signing a bill, except to explain his objections when vetoing legislation.<sup>17</sup> Still, Presidents have long used the signing statement to praise Congress, explain their views on the meaning of laws, and to object to laws on constitutional grounds. It is entirely uncontroversial for a President to issue a statement regarding a bill; it is only when the statement purports to interpret or limit the law on constitutional grounds that the controversy arises.

The history of the signing statement traces back to James Monroe who signed into law a bill limiting the size of the army and the means of selecting officers and then issued a statement a month later explaining that the President alone held the power to select officers.<sup>18</sup> Andrew Jackson and John Tyler each issued statements objecting to provisions in bills they signed into law.<sup>19</sup>

Ulysses S. Grant brought about the next manifestation of the presidential signing statement, often called the constitutional avoidance technique.<sup>20</sup> He issued a statement in which he said he would interpret a

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16. Phillip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 *PRESIDENTIAL STUD.* Q. 515, 516–17 (2005).

17. U.S. CONST. art. I, § 7 (“he shall return it, with his objections to that House in which it shall have originated. . .”).

18. ABA Report, *supra* note 10, at 7.

19. *Id.*

20. *Id.* at 8, 9.

provision he thought unconstitutional in a way that would overcome the problem.<sup>21</sup> The bill attempted to close a number of consular and diplomatic offices.<sup>22</sup> President Grant thought it “an invasion of the constitutional prerogatives and duty of the Executive” and said he would accordingly construe it as intending merely “to fix a time at which the compensation of certain diplomatic and consular officers shall cease and not to invade the constitutional rights of the Executive.”<sup>23</sup> This type of signing statement, which purported not to disregard the law, but to interpret it, became a standard tool for later Presidents “to mold legislation to fit their own constitutional and statutory preferences.”<sup>24</sup>

Presidents Theodore Roosevelt, Woodrow Wilson, and Franklin Roosevelt each employed presidential signing statements to refuse to implement legislation with which they disagreed on policy grounds.<sup>25</sup> One of Franklin Roosevelt’s signing statements was cited in a Supreme Court decision for *United States v. Lovett*.<sup>26</sup> The signing statement said that the act of Congress was a Bill of Attainder, and therefore, unconstitutional.<sup>27</sup> In that case, the Supreme Court agreed with Franklin Roosevelt’s classification of the act and held the law unconstitutional.<sup>28</sup> Franklin Roosevelt also revived the constitutional avoidance technique when he used a signing statement to send a message to Congress that if Congress did not remove a provision he thought unconstitutional, he would not implement it.<sup>29</sup> He did, however, sign the bill into law.<sup>30</sup> Interestingly, rather than being forced to stand by his signing statement, Franklin Roosevelt put enough pressure on Congress with his statement to bring about a change in the legislation.<sup>31</sup>

After President Franklin Roosevelt, Presidents Harry Truman, Dwight Eisenhower, and Richard Nixon each used signing statements to state their intention to not enforce unconstitutional provisions.<sup>32</sup> Presidents John Kennedy and Lyndon Johnson each used signing statements to interpret legislative vetoes as information requests, to avoid what would have amounted, in their minds and later in the opinion of the

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21. *Id.*

22. *Id.* at 7–8.

23. *Id.* at 8.

24. *Id.*

25. *Id.*

26. *Id.* citing 328 U.S. 303 (1946).

27. See *U.S. v. Lovett*, 328 U.S. at 305–06.

28. See *id.* at 318.

29. *Id.*

30. *Id.*

31. *Id.* at 9.

32. *Id.*

Supreme Court, to an unconstitutional exercise of power.<sup>33</sup> President Jimmy Carter also used the signing statement to indicate his intention to ignore a congressional mandate to close consular offices and, instead, interpreted the mandate as merely “precatory.”<sup>34</sup>

In the three decades that followed the Carter Administration, the signing statement was more widely used than ever before. In a report for Congress, T.J. Halstead broke down the usage of the signing statement since Reagan.<sup>35</sup>

President Reagan issued 250 signing statements, 86 of which (34%) contained provisions objecting to one or more of the statutory provisions signed into law. President George H. W. Bush continued this practice, issuing 228 signing statements, 107 of which (47%) raised objections. . . . President Clinton made aggressive use of the signing statement, issuing 381 statements, 70 of which (18%) raised constitutional or legal objections. President George W. Bush has continued this practice, issuing 152 signing statements, 118 of which (78%) contain some type of challenge or objection.<sup>36</sup>

Halstead estimated President George W. Bush’s signing statement objections to exceed one thousand.<sup>37</sup> Each of these Presidents used the signing statement as an important tool in creating and dictating policy.

The modern use of the signing statement started with President Ronald Reagan.<sup>38</sup> Reagan used the signing statement as a weapon to influence legislation, court interpretations, and Executive Branch applications.<sup>39</sup> To do this, Attorney General Edwin Meese contracted with West Publishing to include signing statements in the United States Code Congressional and Administrative News along with traditional legislative history.<sup>40</sup> This helped the Reagan Administration get several signing statements cited in Supreme Court opinions.<sup>41</sup>

President George H. W. Bush continued to expand the use of the signing statement, particularly in foreign affairs issues.<sup>42</sup> President Bill

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33. *Id.*

34. *Id.*

35. T.J. Halstead, *Congressional Research Service Report for Congress, Presidential Signing Statements: Constitutional and Institutional Implications*, ii (updated Apr. 13, 2007) available at <http://www.fas.org/sgp/crs/natsec/RL33667.pdf> (last viewed Oct. 14, 2008).

36. *Id.* at 9.

37. *Id.*

38. See ABA Report, *supra* note 10, at 10.

39. *Id.*

40. *Id.*

41. *Id.* at 11.

42. *Id.*

Clinton used signing statements less frequently than President George H. W. Bush, but still more than President Reagan. “For the Clinton Administration, ‘the signing statement was an important cornerstone of presidential power . . . .”<sup>43</sup>

Although George W. Bush certainly did not invent the signing statement, he certainly took its use into uncharted territory. An American Bar Association taskforce charged with studying and reporting on the constitutional and legal implications of signing statements estimated that all Presidents from 1776 to 2000 produced about 600 challenges through signing statements.<sup>44</sup> President George W. Bush has produced over 800.<sup>45</sup> This heightened use garnered attention, not only from Charlie Savage and the press, but from Congress as well. “Congress finally enacted a law requiring the Attorney General to submit to Congress a report of any instance in which . . . any officer of the Department of Justice established or pursued a policy of refraining from enforcing any provision of any federal statute. . . .”<sup>46</sup> The legislation reached the President’s desk and was signed into law accompanied by a signing statement “insisting on the President’s authority to withhold information whenever he deemed it necessary.”<sup>47</sup>

This level of constitutional objections by presidential signing statement is unprecedented in the historical analysis. Although the practice has quietly existed almost as long as our nation, the signing statement has now come to the forefront of American news and politics. Because of this newfound prominence, scholars, lawmakers, and judges are taking a closer look at the legal foundations of this Executive tool.

### III. CONSTITUTIONALITY OF SIGNING STATEMENTS

While there is clearly great debate about the constitutionality of presidential signing statements, it is important to delineate the types of signing statements in order to examine their constitutionality. Signing

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43. *Id.* at 12.

44. *Id.* at 14.

45. *Id.*

46. *Id.* at 17.

47. *Id.* See President George W. Bush, *Statement on Signing the 21st Century Department of Justice Appropriations Authorization Act*, Nov. 2, 2002, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=73177> (last visited Oct. 14, 2008) (“The executive branch shall construe [these sections] 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.”). The President used this same phraseology on several provisions of the Act.

statements can be classified in three groups: (1) press releases;<sup>48</sup> (2) statutory interpretation for legislative history, bureaucratic instruction, or constitutional avoidance;<sup>49</sup> (3) and statement of intention not to execute laws.<sup>50</sup> The press release type of signing statement is entirely uncontroversial. The statutory interpretation signing statement can be more controversial, depending on the purpose of the statement. Finally, the expression of the President's intention not to enforce a law is the least common, but raises the most debate.

#### A. *Press Releases*

There is no debate about the constitutionality of the press release signing statement.<sup>51</sup> While nothing in the Constitution authorizes this statement, the statement does nothing except express the thoughts of the Executive upon signing the bill into law. It is the equivalent of the President standing up in a press conference. President Clinton provided many examples of this type of signing statement like this one:

Today I am pleased to sign into law H.R. 4283, the "Africa: Seeds of Hope Act of 1998." This Act, which passed the Congress with broad bipartisan support, reaffirms the importance of helping Africans generate the food and income necessary to feed themselves. It is an important component of my Administration's efforts to expand our partnership with Africa and complements our efforts to expand trade and investment through the African Growth and Opportunity Act, which I hope will be passed by the next Congress.<sup>52</sup>

The statement does not purport do to anything; it only allows the President a means to express the importance of the issue and encourages further legislation on the subject. This type of signing statement has no legal force or influence. Thus, it raises little controversy.

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48. See Samuel A. Alito, Jr., *Using Presidential Signing Statement to Make Fuller Use of the President's Constitutionally Assigned Role in the Process of Enacting Law*, Office of Legal Counsel Memorandum, Feb. 5, 1985, available at <http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SGLSWG-AlitotoLSWG-Feb1986.pdf>. "Presidential approval is usually accompanied by a statement that is often little more than a press release." *Id.*

49. See Cooper, *supra* note 16, at 516–17.

50. See discussion *supra*, part III.D.

51. See 17 Op. Off. Legal Counsel 131, 131–32 (1993) [hereinafter OLC Signing Statements] ("It appears to be an uncontroversial use of signing statements to explain to the public . . . what the President understands to be the likely effects of the bill, and how the bill coheres or fails to cohere with the Administration's views or programs.").

52. President William J. Clinton, Statement on Signing the Africa: Seeds of Hope Act of 1998, November 13th, 1998, available at <http://www.presidency.ucsb.edu/ws/index.php?pid=55272>.

*B. Statutory Interpretation in Signing Statements*

The Executive Branch engages in statutory interpretation every day; it does this for a variety of reasons. First, it must implement laws, and to do so, it must have a clear understanding of what the laws mean. Second, it often seeks to place its own stamp on the legislative history, and thereby influence courts. Third, it is the constitutional duty of the Executive Branch to engage in constitutional appraisal of new laws.

*1. Bureaucratic instruction*

It is the Executive's duty to see that the laws are implemented.<sup>53</sup> To do this, some degree of interpretation is required. Presidents have often used signing statements as a means of instructing the Executive Branch officers who will ultimately be responsible for the implementation. This instructional type of signing statement application is fairly uncontroversial. The Executive Branch's opinion is that "the President has the constitutional authority to supervise and control the activity of subordinate officials within the [E]xecutive [B]ranch."<sup>54</sup>

This view is supported by the United States Supreme Court decision in *Bowsher v. Synar*.<sup>55</sup> "Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."<sup>56</sup> Of course, this does not give the President explicit authorization to interpret any statute any way he pleases. Professor Nicholas Rosenkranz explained at a Senate Judiciary Committee hearing: "[The President] has a constitutional duty to 'take Care that the Laws be faithfully executed,' and this faithfulness inherently and inevitably includes a good faith effort to determine what 'the Laws' mean."<sup>57</sup> Furthermore, it is the President's duty and right to oversee the execution of the law by his subordinates.<sup>58</sup> "[The President] may properly supervise and guide [subordinates'] construction of the statutes under which they act in order to secure that unitary and uniform execution of the

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53. See U.S. CONST. art. II, § 3.

54. OLC Signing Statements, *supra* note 51, at 132 (citing *Franklin v. Massachusetts*, 505 U.S. 788, 800 (1992) ("It is hard to imagine a purpose for involving the President if he is to be prevented from exercising his accustomed supervisory powers over his executive officers.")).

55. *Bowsher v. Synar*, 478 U.S. 714 (1986).

56. *Id.* at 733.

57. *The Use of Presidential Signing Statements: Before the Senate Judiciary Committee*, 109th Cong. (2006) (Statement of Nicholas Q. Rosenkranz, Associate Professor of Law, Georgetown University Law Center) [hereinafter Rosenkranz Senate].

58. *Myers v. U.S.*, 272 U.S. 52, 135 (1926).

laws . . . .”<sup>59</sup> Unfortunately, there seems to be no test for how a President should go about interpreting the legislation to comply with this requirement. It is apparent that the President should consult with the legislative history to determine congressional intent. Beyond that, the criteria for determining the validity of an interpretation by the President remain nebulous. It could reasonably be expected that the Executive would follow the same path in reaching his interpretation as a federal court would.<sup>60</sup> Still, as long as the Executive is indeed making a good faith effort to interpret and execute the laws, there should be no constitutional debate about the legal effect of the interpretation.

But because of the nature of signing statements and the realities of the process, it seems unlikely that any signing statement could reasonably comply with the good faith standard discussed above. The Executive Branch lacks both time and manpower to conduct such an intensive review of each legislative act.

Because of time restraints, properly interpreting a statute and inserting a signing statement may be difficult. The President only has ten days to sign or veto a bill once it has reached his desk.<sup>61</sup> In 1985 Samuel Alito, then a Deputy Assistant Attorney General in the Justice Department, wrote a memorandum on the interpretive uses of signing statements.<sup>62</sup> In that memo, he outlined some of the problems with an expanded use of signing statements for interpretive purposes.<sup>63</sup> One of those problems was the ten-day time constraint. “Since presidential signing statements have traditionally been issued at the time of the signing of legislation, very little time has been available for the preparation and review of such statements.”<sup>64</sup> Another major problem, according to Alito, would be manpower.<sup>65</sup> “In all likelihood, it would be

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59. *Id.*

60. *See Rosenkranz Senate, supra note 57.*

The President interprets statutes in much the same way that courts do, with the same panoply of tools and strategies. His lawyers carefully study the text and structure of Acts of Congress, 13 aided perhaps by dictionaries, linguistic treatises, and other tools of statutory interpretation. In addition, just like courts, they also apply well-established maxims of statutory interpretation, called canons.

*Id.*

61. U.S. Const. Art I § 7 (“If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.”).

62. Alito, *supra note 48*, at 2.

63. *Id.* at 2–3.

64. *Id.* at 2.

65. *Id.*

necessary to create a new office with a substantial staff to serve as a clearinghouse for statements . . . .”<sup>66</sup>

The problems of time constraints and shortage of manpower still exist for the Executive. The Executive Branch has not created a new office to create signing statements with good-faith legal interpretations. For these reasons it is unlikely that statements have been made based on good faith interpretations of legislative history and intent, even when purporting to interpret laws for the instruction of Executive Branch subordinates.

There is, however, a strong argument for inclusion of interpretation in signing statements. By including his interpretation in a signing statement, the President is making the interpretation public information and it is more likely to be enforced:

In short, in the United States, we have a strong preference for sunlight in government. Once it is clear that interpreting the law is essential to executing it, there can be no independent objection to the President making his interpretations public. This is the primary function of presidential signing statements . . . .<sup>67</sup>

Any argument about the constitutionality of this method may be moot because these interpretations may be difficult to implement. Alito also argued that he anticipated friction between an Executive Branch unit charged with the good-faith interpretation of the legislation “and the various departments and agencies wishing to insert interpretive statements into presidential signing statements.”<sup>68</sup> In short, the bureaucracies would be unwilling to accept an interpretation of a law with which they did not agree and would lobby within the Executive Branch to have their interpretation included. Although the President ultimately has the power to replace almost any high-ranking Executive Branch official who disagrees, it is unlikely that he would risk alienating a powerful bureaucracy and therefore would find himself caught between conflicting interpretations. This bureaucratic stubbornness may be the core reason that this interpretive signing statement has little legal effect.

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66. *Id.*

67. Rosenkranz Senate, *supra* note 57.

68. Alito, *supra* note 48, at 3.

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2. *Statutory interpretation for legislative history*

While it is clear that the President has the power to interpret laws for the instruction of Executive Branch officers, more controversy arises when the signing statement includes the interpretation for the purpose of establishing legislative history. That the President is not a legislator is clear. “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”<sup>69</sup> The Constitution clearly and purposefully vested all the legislative power in the Congress, and apportioned none to the President. Professor Rosenkranz described the President’s role in legislating as “the power to ‘approve’ or disapprove legislation; it is a simple, binary, up-or-down decision, subsequent to, and distinct from, the legislative process.”<sup>70</sup> If that is the only role of the President in creating law, is it appropriate for the courts to consider the President’s interpretation when examining the validity or constitutionality of the law? During the Senate Judiciary Committee hearing, Professor Rosenkranz pointed out that this may be an overly formalistic view of the President’s role.

In reality, the administration often drafts legislation, and even when it does not, the entire legislative machinery operates in the shadow of the President’s veto power. On this view, the President’s understanding of a bill as reflected in a signing statement is at least as important as the understanding of Congress reflected in legislative history.<sup>71</sup>

Some scholars have even considered the President a “third house of Congress,” because of his high level of involvement in the legislative process.<sup>72</sup> If this view is correct, then it follows that it would be appropriate for the President to comment on new legislation, just as it would be for Senators and Representatives.

Regardless of the appropriateness of such signing statements, they have little effect for statutory interpretation outside the Executive Branch unless the courts consider them. As a matter of legal precedent, several courts have used executive interpretation when conducting their own

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69. U.S. CONST. Art 1, § 1.

70. Rosenkranz Senate, *supra* note 57.

71. *Id.*

72. OLC Signing Statements, *supra* note 51, at 136, (citing CLINTON ROSSITER, THE AMERICAN PRESIDENCY 96 (Johns Hopkins Press 1987) (1956)) (“[H]e is now expected to make detailed recommendations in the form of messages and proposed bills, to watch them closely in their tortuous progress on the floor and in committee in each house, and to use every honorable means within his power to persuade . . . Congress to give him what he wanted in the first place.”).

interpretations. In *United States v. Story*, a federal appellate court had to decide how to construe a portion of a minimum mandatory sentencing statute.<sup>73</sup> In doing so, the court relied on a signing statement President Reagan attached to the legislation.<sup>74</sup> The court reasoned that although “in some circumstances there is room for doubt as to the weight to be accorded a presidential signing statement in illuminating congressional intent. . . . President Reagan’s views are significant here because the Executive Branch participated in the negotiation of the compromise legislation.”<sup>75</sup> The President’s involvement in the legislative process added weight to his interpretation in the signing statement. In at least two other cases, federal appellate courts have used presidential signing statements in interpreting statutes. In *Berry v. Department of Justice*, when reviewing the Freedom of Information Act, the Ninth Circuit referred to President Lyndon Johnson’s signing statement on goals of the act.<sup>76</sup> In *Clifton D. Mayhew, Inc. v. Wirtz*, the Fourth Circuit relied on President Harry Truman’s signing statement describing the proper legal standard for the Portal-to-Portal Act.<sup>77</sup>

While some courts have given at least some weight to signing statements, in *Hamdan v. Rumsfeld*, the Supreme Court apparently ignored—but did not disavow—a presidential signing statement when interpreting the Detainee Treatment Act (DTA).<sup>78</sup> In *Hamdan*, the government argued that the DTA removed Hamdan’s case from the jurisdiction of the federal courts, and therefore it was not subject to review by the Supreme Court.<sup>79</sup> The Court rejected the Government’s construction of the statute, basing its reasoning on the “ordinary principles of statutory construction.”<sup>80</sup> In doing so, it construed an absence of a jurisdiction stripping provision as an intentional act by Congress.<sup>81</sup> When signing the legislation, President Bush had included a signing statement which provided: “[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

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73. *U.S. v. Story*, 891 F.2d 988 (2d Cir. 1989).

74. *Id.* at 993, 994.

75. *Id.* at 994.

76. OLC Signing Statements, *supra* note 51, at 136 (citing *Berry v. Dept. of Justice*, 733 F.2d 1343, 1349–50 (9th Cir. 1984)).

77. *Id.* (citing *Clifton D. Mayhew, Inc. v. Wirtz*, 413 F.2d 658, 661–62 (4th Cir. 1969)).

78. *Hamdan v. Rumsfeld*, 548 U.S. 557, 126 S. Ct. 2749, 2816 (2006) (Scalia, J., dissenting) (“Of course in its discussion of legislative history the Court wholly ignores the President’s signing statement, which explicitly set forth *his* understanding that the DTA ousted jurisdiction over pending cases.”).

79. *Id.* at 2763.

80. *Id.* at 2764.

81. *Id.* at 2765.

applications for writs of habeas corpus, described in section 1005.”<sup>82</sup> President Bush’s interpretation would have provided legislative support for the government’s interpretation of the DTA. However, as Justice Scalia pointed out in his dissent, the Court did not consider the signing statement.<sup>83</sup>

The *Hamdan* case did not settle the matter, but shed at least some light on how the Supreme Court will view signing statements.

### 3. *Constitutional avoidance*

The President’s duty to uphold the constitution may give him wiggle room to ignore another constitutional duty: to enforce the laws. One commentator put it this way: “The tension here is evident: to ‘save’ a statute from unconstitutionality the President may ignore his constitutional duties under the Take Care Clause.”<sup>84</sup> This usage is more controversial than the two discussed above.<sup>85</sup> This is true, probably not because of the actual effect of the signing statement, but the perceived effect. The perception is that the President is rewriting the legislation, or ignoring the intent of Congress. In reality this constitutional avoidance principle is founded on sound reasoning and precedent.

As discussed above, the President engages in statutory interpretation, and should do so in the same manner as courts. One of the methods courts use to interpret laws is the doctrine of constitutional avoidance.<sup>86</sup> Chief Justice Holmes explained this doctrine as follows: “the rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act. Even to avoid a serious doubt the rule is the same.”<sup>87</sup> Because it is appropriate for courts to apply this doctrine, it follows that the President should be able to do the same when engaging in statutory interpretation. If the President can interpret laws this way, then he should also be able to make his interpretation public.

While the concept of the Executive engaging in statutory interpretation is uncontroversial, it is the means by which the President

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82. President’s Statement on Signing of H.R. 2863, the “Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006” (Dec. 30, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/print/200512308.html>.

83. *Hamdan*, 548 U.S. at 126 (Scalia, J., dissenting).

84. Louis Fisher, *Signing Statements: Constitutional and Practical Limits*, 16 WM. & MARY BILL RTS. J. 183, 195 (2007).

85. OLC Signing Statements, *supra* note 51, at 132.

86. Rosenkranz Senate, *supra* note 57.

87. *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, C.J., concurring).

executes his interpretation that can be problematic. The perceived problem with this type of signing statement really belongs to another group altogether: signing statements including an intention not to enforce. After all, it is not the rhetorical exertion or presidential authority that worries people, but the apparent disregard for the enactments of Congress.

*D. Intention Not to Enforce on Constitutional Grounds*

As discussed above, there is a long history of Presidents refusing to enact laws or provisions in laws that they believe to be unconstitutional.<sup>88</sup> They have done this in three ways. First, they have vetoed bills and returned them to Congress.<sup>89</sup> Second, they have issued signing statements in which they express their concerns with the bill, sign it, but then refuse to enforce it.<sup>90</sup> Third, they say nothing about the bill, but still do not enforce it.<sup>91</sup> This historical precedent alone is not enough to quell the debate over the constitutionality of this method.

On its face, the Constitution gives the President only three options when he is presented with a bill from Congress: (1) sign it, (2) return it with his objections, and (3) he may do nothing, and after 10 days, it will enter into law as if he had signed it.<sup>92</sup> According to the ABA Report, these were the only options the Framers intended the President to have.<sup>93</sup> Some commentators believe George Washington and Thomas Jefferson each felt they had a duty to veto any unconstitutional law.<sup>94</sup> It is also clear that other early Presidents, James Madison, James Monroe, and Andrew Jackson felt they had to veto unconstitutional legislation.<sup>95</sup> While it is clear that the concept of a duty to veto is well rooted in history, the signing statement is also well grounded historically. Has the signing statement evolved into a fourth option?

Professor Charles Ogletree, a member of the American Bar Association task force that examined signing statements, framed the issue this way: “The essential issue is whether a president, who objects to a law being enacted by Congress through its constitutionally prescribed

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88. See discussion *supra* Part II.C.

89. *Id.*

90. *Id.*

91. *Id.*

92. U.S. CONST. art 1 § 7.

93. ABA Report, *supra* note 10, at 18.

94. Saikrishna Prakash, *Why the President Must Veto Unconstitutional Bills*, 16 WM. & MARY BILL RTS. J. 81, 84–86 (2007).

95. *Id.* at 86. It should be noted here, that James Monroe is credited with having invented the signing statement.

procedures, should either veto that law, or find other ways to challenge it.”<sup>96</sup> According to Professor Ogletree, any signing statement that suggests a law is unconstitutional “raises serious legal considerations.”<sup>97</sup> These considerations arise because the President seems to have changed or ignored legislation rather than using his veto power. The President’s power of interpretation, said Ogletree, must be balanced with the powers granted to the Legislative and Judicial Branches.<sup>98</sup> Failure to do so “is not only bad public policy, but also creates a unilateral and unchecked exercise of authority in one branch of government without the interaction and consideration of the others.”<sup>99</sup>

This formalistic interpretation presents an alternative view of the duties binding the President, and has garnered the support of Justice Scalia, who wrote in a concurring opinion that the President has “the power to veto encroaching laws . . . or even to disregard them when they are unconstitutional.”<sup>100</sup> This formalistic view raises an interesting question as to what the outcome would be when a President vetoes legislation, and then Congress overcomes his veto with a two-thirds vote. Must the President enforce a provision he considers unconstitutional?

The long and consistent practice of Presidents using the signing statement to refuse to enforce unconstitutional laws is, perhaps, the best argument in its favor.<sup>101</sup> Another argument in favor of the signing statement over the veto is that it is not possible to create unconstitutional law. “A President could take the plausible formalist position that an unconstitutional statutory provision is not a law no matter who may have purported to enact or approve it. A President’s signature on a piece of paper purporting to create an unconstitutional statute would then have no necessary legal effect . . . .”<sup>102</sup> If there is no legal effect, there is no violation of duty.

Under this view, what then is the standard the President must follow when disregarding a statute as unconstitutional? An Office of Legal Counsel opinion provided this general rule: if “the President, exercising his independent judgment, determines both that a provision would violate the Constitution and that it is probable that the Court would agree with

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96. Presidential Signing Statements: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006) (statement of Charles J. Ogletree, Jr., Jesse Climenko Professor of Law, Executive Director, Charles Hamilton Houston Institute for Race & Justice, Harvard Law School.).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Freytag v. C.I.R.*, 501 U.S. 868, 906 (1991) (Scalia, J. concurring).

101. Prakash, *supra* note 94, at 86–87.

102. Nelson Lund, *Presidential Signing Statements in Perspective*, 16 WM. & MARY BILL RTS. J. 95, 101 (2007).

him, the President has the authority to decline to execute the statute.”<sup>103</sup> If the Court would likely uphold the law as Constitutional, the President is bound to enforce the law.<sup>104</sup>

#### IV. CONCLUSION

After all the evaluation, the question remains, does it matter? Any time an issue of power grabbing arises, it is appropriate for political leaders, scholars, journalists, and citizens to examine the practices of the various branches of government. Still, many commentators think the debate has been overblown. Deputy Assistant Attorney General Michelle Boardman testified at the Senate hearings that signing statements do not present any constitutional strain.

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.<sup>105</sup>

Furthermore, as discussed above, the courts are uncertain what weight to give to these statements in interpreting the law.<sup>106</sup> Perhaps the strongest argument that the issue received more attention than it deserved was the way the political process corrected itself. After President Bush’s widespread use of the signing statement became public knowledge in 2006, the veto re-emerged. The President’s use of the signing statement dropped off significantly. Perhaps that is the strength of the American system of government and the real reason signing statements are not a reason for great concern.

Whether it matters or not, signing statements will likely remain a matter of public and political concern. As a new President takes office

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103. 18 U.S. Op. Off. Legal Counsel 199, 200 (1994).

104. *Id.*

105. Presidential Signing Statements: Hearing Before the S. Comm. on the Judiciary, 109th Cong. (2006) (statement of Michelle Boardman, Deputy Assistant Attorney General).

106. See discussion *supra* Part III.C.2.

next year, it remains to be seen if the signing statement's usage will continue, expand, or fall off in the face of public criticism.

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