



# SIGNING STATEMENTS: History and Issues

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*Dolly Kefgen*

## ***Introduction***

During 2006 my 45-year-old, inquisitive eldest son asked me if I knew the background and issues surrounding Signing Statements. Believing that his question related to the exorbitant salaries of professional athletes, I was puzzled that he was asking me rather than his father. However I attempted to answer his question searching my memory bank for information.

Quickly I recalled that in the late 1990's Michael Jordan signed an annual contract worth 30 million dollars. Skipping over to baseball, I remembered reading in 2000 that Alex Rodriguez signed a ten-year contract with the New York Yankees for a quarter of a billion dollars. Confidently I concluded that Tiger Woods would make over 100 million dollars that year. He would be the highest paid athlete in the world counting his salary and endorsements with Nike. Wow was my son going to be impressed!

Startled I heard my son say, "Mom, this has nothing to do with professional athletes. It refers to laws passed by Congress and signed by the President. I'm asking you because you have a Ph.D. in Political Science and Economics from the University

of Michigan. If I wanted to know about sports, I would ask my Dad, the Coach.”

I was speechless and for those of you who know me that was a feat in itself. Truthfully I didn’t have the answer. I knew nothing about Signing Statements. To sooth my sense of inadequacy, I turned to my friends and asked if they had heard of Signing Statements. Whew, I was not alone. Almost everyone was in the dark on this topic.

To shed light on the subject I began what turned out to be an extensive research project. This report documents the history of Signing Statements and identifies the issues surrounding their use, highlighting both the pros and cons.

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

A “*Signing Statement*” is a written comment that specifies how the President interprets a bill passed by Congress and how he plans to execute the law. The comment is published in the *Federal Register*.

A signing statement is not a legal document. Many statements simply express the President’s opinion while others identify statutes in a bill he maintains are unconstitutional and infringe on executive authority. However federal agencies may turn to the President’s signing statement as a guide when implementing a law. Signing statements also can be used by the judicial branch in understanding the intent of the President as it rules on the constitutionality of a law or statute.

### ***What is the History of Signing Statements?***

The first signing statement is attributed to James Monroe who in 1822 wrote a message to Congress citing discrepancies he believed existed between a bill and the Constitution. From President Monroe’s Administration (1817–25) to the Carter

Administration (1977–81), the Executive Branch issued a total of 75 signing statements to protect presidential prerogatives.<sup>1</sup>

During the Reagan Administration (1981–89) the use of signing statements increased. Edwin Meese, Attorney General, with the assistance of Justice Department lawyer, Samuel Alito, launched a policy to use signing statements as a means of reinforcing the president’s message. Over 250 signing statements were issued during Reagan’s term of office; 34 percent contained provisions objecting to one or more of the statutory provisions signed into law. During the four-year term (1989–93) of George H. W. Bush, 228 signing statements were issued with 47 percent raising constitutional or legal objections. Bill Clinton, in his two-term administration (1993–2001), issued 381 signing statements of which 18 percent raised objections.<sup>2</sup>

During the first term of the George W. Bush Administration (2001–2005), the practice grew exponentially. Unlike his predecessors, the President raised multiple objections within a single bill resulting in 750 challenges. The President did not challenge 750 bills but challenged 750 statutes which were provisions contained in about 150 bills. Seventy-eight percent of the signing statements contained some type of challenge or objection.<sup>3</sup>

### ***Did the Increased Use of Signing Statements Create a Controversy?***

The extensive use of signing statements by the Bush Administration raised a red flag among a number of law professors,

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<sup>1</sup> Curtis A. Bradley and Eric A. Posner, “Presidential Signing Statements and Executive Power,” *23 Constitutional Comment* 307, 323, (2006).

<sup>2</sup> Curtis A. Bradley and Eric A. Posner

<sup>3</sup> Neil Kinkopf, Associate Professor of Law at Georgia State University College of Law and Former Special Assistant in the Office of Legal Counsel, “Index of Presidential Signing Statements: 2001-2007”, *American Constitution Society for Law and Policy*, August 2007.

congressmen, policy makers, and journalists. Law professors and legal organizations have studied the practice and rendered opinions on the issue. Charlie Savage of the *Boston Globe* initially raised the issue in the press. Many other journalists followed suit. In 2006 the Senate Judiciary Committee conducted hearings on the proliferation of signing statements calling for testimony from the Executive Branch and constitutional experts.

The frequency of the statements drew attention, but it was the “kind” of challenges that resulted in accusations against the Bush Administration. The most widely used challenge by the President centered on a statute’s constitutionality. Other challenges referenced the President’s exclusive power over foreign affairs and concern over national security and classified information.<sup>4</sup>

Critics maintained that a signing statement could be viewed as an intention by the President to ignore a statute or implement it only in ways consistent with his concept of constitutionality and protection of executive authority. They argued that rather than veto a bill, the President was using signing statements as line-item vetoes. More controversial, the President was accused of broadening the power of the Executive Office at the expense of Congress, thus threatening the system of checks and balances inherent in the Constitution.

### ***Issue: Line Item Veto***

George W. Bush was the first president to complete four years in office without a veto since John Quincy Adams in the 1820’s. Other presidents have used signing statements to clarify their interpretation of laws, but no president has relied solely on the use of signing statements rather than the veto authority spelled

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<sup>4</sup>Neil Kinkopf

out in Article I of the U. S. Constitution.<sup>5</sup> (An entire list of presidential vetoes can be found on-line.<sup>6</sup>)

### **Line Item Veto—Criticisms**

Critics who maintain that President Bush is using signing statements as line-item vetoes turn to a ruling by the Supreme Court to bolster their case. They cite that in 1996 President Clinton signed into law the Line Item Veto Act intended to curb pork barrel spending. The law gave the President the ability to veto parts of a bill without having to veto the entire bill. In *Clinton v. New York* in 1998, the Supreme Court ruled the law unconstitutional. The Supreme Court held the Line Item Veto Act unconstitutional because it violated the Constitution's Presentment Clause which clearly states that the veto power is to be used with respect to a bill in its entirety, not in part.<sup>7</sup>

In June of 2006 the Senate Judiciary Committee held hearings on the issue. Both Republicans and Democrats on the Committee voiced their concern. Senator Arlen Specter (R-PA), the Chairman of the Committee charged that "congressional legislation doesn't amount to anything if the president can say that his constitutional authority supersedes the statute. In effect, he is cherry-picking the provisions he likes and excludes the ones he doesn't like."<sup>8</sup>

Driven by a growing concern over the extensive use of signing statements, the American Bar Association (ABA) created a bipartisan eleven-member task force to study the issue. The ABA panel concurred with the critics. "To sign a bill and refuse to enforce some of its provisions because of constitu-

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<sup>5</sup> Philip J. Cooper, "George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements", 35 *Presidential Studies Quarterly*, September 2005.

<sup>6</sup> Wikipedia, "List of United States Presidential Vetoes", *The Free On-Line Encyclopedia*.

<sup>7</sup> American Bar Association (ABA), "Presidential Signing Statements and the Separation of Powers Doctrine", *ABA Task Force Report*, August 2006, p. 18.

<sup>8</sup> Arlen Specter (R-PA), "Congressional Hearings on Presidential Signing Statements", *The Senate Judiciary Committee*, June 27, 2006.

tional qualms is tantamount to exercising the line-item veto power held unconstitutional by the Supreme Court.”<sup>9</sup>

To correct the situation and set a precedent for future presidents, the ABA Task Force recommended that the President communicate concerns to Congress prior to passage of a bill. “It is reasonable to expect the President to work cooperatively with Congress to identify and ameliorate any constitutional infirmities during the legislative process, rather than waiting until after passage of legislation to express such concerns in a signing statement.”<sup>10</sup>

Although a signing statement is published in the *Federal Register*, a period of time elapses before it appears in print. Therefore the ABA Task Force also recommended that the President promptly submit to Congress an official copy of all signing statements setting forth in full the reasons and legal basis for the statement.

### **Line Item Veto—The President’s Position**

During the hearings before the Senate Judiciary Committee, Michelle Boardman, Deputy Assistant Attorney General, articulated the Bush Administration position on signing statements. She explained that the practice is an appropriate means by which the President fulfills his constitutional duty to “take Care that the Laws be faithfully executed”. She also claimed that the President’s signing statements have not differed significantly from those of his recent predecessors.<sup>11</sup>

The Administration’s position received support from Nicholas Rosenkranz, Associate Professor of Law at Georgetown University Law Center. During Congressional hearings, he stated that signing statements offer the President a vehicle by which he can articulate his position without rendering a

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<sup>9</sup> ABA Task Force Report, p. 22

<sup>10</sup> ABA Task Force Report, p.21

<sup>11</sup> Michelle Boardman, Deputy Assistant Attorney General, “Prepared Testimony on Presidential Signing Statements” before *The Senate Judiciary Committee*, June 27, 2006.

veto of an entire bill. He believes that the brouhaha over presidential signing statements is largely unwarranted.<sup>12</sup>

A panel of experts on constitutional law reacted to the ABA Report. The panel supported the Administration position—but with an acrimonious caveat. They write that the President is not resorting to the use of line-item vetoes because the statutes under question became law. “It is unrealistic to expect the President to veto finely wrought and hard-fought legislation of any importance just because two or three provisions out of a thousand contain what they believe to be an unconstitutional item or one that unduly impinges on Executive authority. A signing statement that announces the president’s intention to disregard the invalid provision offers a valuable, and lawful, alternative.”<sup>13</sup>

However, this panel of constitutional experts who all served in the Office of Legal Counsel in the Department of Justice believes problems exist with the current Administration’s *process*. “Signing statements imply the intent on the part of the President not to enforce a particular statute. Non-enforcement appears to be a strategy of first resort, not last. The frequent and cavalier declarations on constitutional objections by the Bush Administration demonstrate that it pays little or no heed to the important roles of Congress and the courts in the process of constitutional interpretation and the resolution of constitutional controversy.”<sup>14</sup>

### ***Issue: Expansion of Executive Power***

Many of the signing statements issued by the Bush Administration dispute a statute’s constitutionality. Other challenges are

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<sup>12</sup> Nicholas Quinn Rosenkranz, Associate Professor of Law, Georgetown University Law Center, “Prepared Testimony on Presidential Signing Statements”, before *The Senate Judiciary Committee*, June 27, 2006.

<sup>13</sup> Georgetown Law Faculty Blog, “Untangling the Debate on Signing Statements”, July 31, 2006, p. 7.

<sup>14</sup> Georgetown Law Faculty Blog, pp. 7–8

based on the President's claim of "exclusive power over foreign affairs, the authority to determine and impose national security classification and a right to withhold information."<sup>15</sup>

The President's emphasis on his exclusive responsibility to conduct foreign affairs and protect the nation from terrorism raised concern among critics. Many held the view that the President's claim of exclusive responsibility threatened the separation of powers—a basic doctrine in the U. S. Constitution. The Separation of Powers was formulated to create the executive, legislative and judicial branches of the United States government as independent entities that do not infringe upon each other's rights and duties.

However, "separation of powers is not absolute; it is instead qualified by the doctrine of checks and balances—a system designed to allow each branch to restrain abuse by each other branch. Governmental powers and responsibilities intentionally overlap. For example, congressional authority to enact laws can be checked by an executive veto, which in turn can be overridden by a two-thirds majority vote in both houses; the President serves as commander-in-chief, but only the Congress has the authority to raise and support an army, and to declare war; the President has the power to appoint all federal judges, ambassadors, and other high government officials, but all appointments must be affirmed by the Senate; and the Supreme Court has final authority to strike down both legislative and presidential acts as unconstitutional. This balancing of power is intended to ensure that no one branch grows too powerful and dominates the national government."<sup>16</sup>

### **Expansion of Executive Power—Criticisms**

Critics charge that the scope and character of signing statements have changed dramatically. They argue that the White

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<sup>15</sup> Philip J. Cooper

<sup>16</sup> National Constitution Center, "Separation of Powers and a System of Checks and Balances", *On-line*.

House is using signing statements to expand its power relative to Congress. Without a veto Congress cannot respond to the President's objections, in essence, reducing the legislative control over the rule of law.

Interestingly this accusation finds validity in the words of John Yoo, Assistant Attorney General in the Office of Legal Counsel. He writes that Vice President Cheney, "deplores the erosion of the powers and the ability of the president of the United States to do his job. We are weaker today as an institution because of the unwise compromises that have been made over the last 30 to 35 years".<sup>17</sup>

The following examples of the Bush Administration signing statements highlight attempts to increase the strength of the Executive Office at the expense of Congress:

- Disagreement with Congress over what constitutes torture of prisoners in the McCain Amendment. In the President's signing statement he instructed the CIA and military interrogators that he had the power to authorize them to bypass the limits of torture stated in the law. John McCain has gone on record against the use of signing statements if elected President.<sup>18</sup>
- Refusal to provide information to Congress on the implementation of the U. S. Patriot Act. The Act was signed into law on October 26, 2001 and renewed in 2005. Despite his objections to new congressional oversight provisions, the President signed the law. He then issued a signing statement asserting his right to bypass the oversight provisions in certain circumstances.
- Refusal by the Executive Branch to obtain a court order to open suspected terrorist mail—warrantless mail inspection. The signing statement claims the right to bypass the law forbidding mail to be opened without a warrant in emergencies.

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<sup>17</sup>John Yoo, Deputy Assistant Attorney General 2001-2003, "How the Presidency Regained Its Balance", *The New York Times*, September 17, 2006.

<sup>18</sup>Charlie Savage and James W. Pindell, article in *The Boston Globe*, November 20, 2007.

- Controversy over nuclear energy cooperation with India. Congressional critics voiced concern that by making it possible for India to access larger supplies of nuclear fuel for use in its civil nuclear power plants, the deal will free up that country's small existing uranium supplies for use by its military. The President issued a signing statement stating that the Executive Branch was not bound by terms of the agreement approved by Congress. It was only advisory in nature.
- Objection to Congressional wording in the 2008 Defense Appropriations Act that no funds would be used to establish any military installation or base for the purpose of providing for the permanent stationing of United States Armed Forces in Iraq or to exercise United States control of the oil resources of Iraq.

Many signing statements have challenged the role of Congress. However, according to the Constitution, only Congress can create all the departments and agencies of the Executive Branch and only Congress can fund these operations. By implication, Congress has the power to regulate and to oversee. Yet many signing statements have disregarded this congressional responsibility.

The American Bar Association Task Force agreed. "If our constitutional system of separation of powers is to operate as the framers intended, the President must accept the limitations imposed on his office by the Constitution itself. The use of presidential signing statements to have the last word as to which laws will be enforced and which will not is inconsistent with those limitations and poses a serious threat to the rule of law."<sup>19</sup>

### **Expansion of Executive Power— The President's Position**

The President maintains that signing statements assist him in upholding the Constitution and defending the nation's secu-

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<sup>19</sup> ABA Task Force Report, p.20

riety. Many of his signing statements include a reference to the *unitary executive* concept which holds that the Executive Branch can overrule the courts and Congress on the basis of the president's interpretation of the Constitution.

The concept of the *unitary executive* was formulated by John Yoo, who claims that signing statements assert the president's right not to enforce unconstitutional laws. He worked in an advisory role with David Addington, Chief of Staff for Vice President Cheney, in formulating many of the signing statements.

Yoo's views created a stir because it is the Judicial Branch that determines the constitutionality of laws, not the President. If a law or statute is challenged in the courts, a signing statement can be a useful means of interpreting the President's position but the Supreme Court is the final arbitrator.<sup>20</sup>

According to Curtis A. Bradley, a Duke University law professor, President Bill Clinton raised many of the same issues in presidential signing statements as President George Bush. In fact, it was Clinton's advisers in the Office of Legal Counsel who argued that the president had an obligation to guard against Congressional encroachments on executive power and could make that assertion in signing statements.<sup>21</sup>

Michelle Boardman expanded on the President's right to issue signing statements in congressional hearings. "The constitutional signing statements discussed here are a small, but central, sampling of the many statements issued by American Presidents. These statements are an established part of the President's responsibility to 'take Care that the Laws be faithfully executed'. Members of Congress and the President will occasionally disagree on a constitutional question. This disagreement does not relieve the President of the obligation to interpret and uphold the Constitution, but instead supports the candid public announcement of the President's views."<sup>22</sup>

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<sup>20</sup> John Yoo

<sup>21</sup> Bernard N. Nussbaum, Counsel to President Clinton, "The Legal Significance of Presidential Signing Statements", November 3, 1993.

<sup>22</sup> Michele Boardman

## CONCLUSIONS

Signing statements have been issued by American presidents and are not inherently problematic. The Bush Administration testimony before Congress makes this position clear. “Presidents since James Monroe have issued statements of interpretation to accompany laws, and every president since Eisenhower has issued statements reserving the right not to execute sections of laws that may contradict the Constitution. Even if there has been a modest increase in the number of signing statements, they should be viewed in light of current events and Congress’s response to those events. The significance of legislation affecting national security has increased markedly since September 11th.”<sup>23</sup>

It has been shown that the frequent use of signing statements was hardly a “modest increase”. By Bush’s seventh year in office, the President had signed 150 bills to which he added signing statements that challenged the constitutionality of well over 1,100 separate sections in the legislation. *All* the presidents who came before him, by contrast, appended signing statements to a total of only 600 sections of the law.<sup>24</sup>

With regard to national security and the war on terrorism, the response is mixed. Some believe that the President has the sole responsibility for dealing with terrorism and national security and whatever he deems necessary is justified. Others hold that in a democracy, the President cannot assume absolute authority. The central premise of the U. S. Constitution is the separation of powers. Thus, the Constitution must be safeguarded and upheld even in times of war.

The Bush Administration’s approach to terrorism and national security is well documented. The most poignant rationale for expanded Executive responsibility in times of war is explained by a memorandum from John Yoo, Deputy Assistant

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<sup>23</sup> Michele Boardman

<sup>24</sup> Charlie Savage, *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy*, Little, Brown & Company, 2008.

Attorney General to Timothy Flanigan, Deputy Counsel to the President. In Yoo's twenty-page document entitled, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist and Nations Supporting Them*, he concluded that Congress could do nothing to check the President's power to respond to the terrorist threat. He argued that Congress cannot place any limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. These decisions, under the Constitution are for the President alone to make.<sup>25</sup>

In response Sandra Day O'Connor, a Reagan appointee, vehemently stated when considering the rights of Guantanamo detainees that "a state of war is not a blank check for the President". She continued, "It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."<sup>26</sup>

The Supreme Court ruled 6–3 that the Guantanamo detainees did have the right to challenge their incarceration in a U.S. district court. To the surprise of the Bush Administration, Judge Scalia, a conservative on the Supreme Court, wrote that the Bush Administration's entire concept of detention of enemy combatants was unconstitutional for American citizens held at Guantanamo.<sup>27</sup>

These citations are used to show the intent on the part of the Bush Administration to expand the power of the Executive Branch. "Vice President Cheney and David Addington—and through their influence, President Bush and Alberto Gonzales—had no qualms on this subject. They shared a commitment to expanding presidential power that they had long

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<sup>25</sup> Jack Goldsmith, former Assistant Attorney General, Office of Legal Counsel, *The Terror Presidency*, W. W. Norton & Company, 2007, p. 98.

<sup>26</sup> Jeffery Toobin, *The Nine, Inside the Secret World of the Supreme Court*, Doubleday Broadway Publishing Group, 2007, pp. 230, 235.

<sup>27</sup> Jeffery Toobin, p. 236

been anxious to implement. It is not right to say, as some have done, that these men took advantage of the 9/11 attacks to implement a radical pro-President agenda. But their unusual conception of presidential prerogative influenced everything they did to meet the post 9/11 threat.”<sup>28</sup>

Thus, one can conclude that the Bush Administration used the signing statement practice excessively and that the Administration, right or wrongly, was expanding its power vis-à-vis Congress.

A major question remains. Has the President refused to follow a statute or law? The evidence indicates that in several cases he did. The President sidestepped Congress in the previously mentioned instances: the torture of combatants, the oversight provisions in the Patriot Act, the warrantless mail inspection, the nuclear energy cooperation agreement with India and objections to funding permanent troops in Iraq.

In addition, the United States Government Accountability Office (GAO) conducted a study of several appropriations acts for fiscal 2006. GAO investigators found 160 separate provisions President Bush had objected to in signing statements. They chose 19 to follow. Of the 19 provisions, six were not carried out according to the law. Ten were executed by the Executive Branch. On three others, conditions did not require an Executive Branch response. With regard to the use of signing statements by the federal courts, the GAO found that they cite or refer to them infrequently and only in rare instances have relied on them as authoritative interpretations of the law.<sup>29</sup>

The Congressional Research Service (CRS) issued a report on signing statements concluding that “signing statements do not have legal force or effect and have not been utilized to effect the formal nullification of laws. Instead, it appears that recent administrations, as made apparent by the

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<sup>28</sup> Jack Goldsmith, pp. 89–90

<sup>29</sup> Comptroller General of the United States, “Presidential Signing Statements Accompanying the Fiscal Year 2006 Appropriations Acts”, *U. S. Government Accountability Office*, June 18, 2007, p.1.

voluminous challenges lodged by President George W. Bush, have employed these instruments in an attempt to leverage power and control away from Congress by establishing these broad assertions of authority as a constitutional norm.”<sup>30</sup>

Congress has responded by conducting hearings on the issue and on July 3, 2007 Senator Arlen Specter (R-PA), ranking member on the Senate Judiciary Committee, introduced legislation to regulate the use of presidential signing statements in the interpretation of an Act of Congress. The bill was referred to Committee.

On May 12, 2008 Representative Walter B. Jones (R-NC) introduced H.W. 5993, the Presidential Signing Statements Act, a bill that would promote congressional and public awareness and understanding of presidential signing statements. The bill would:

- Require the president to transmit copies of the signing statements to congressional leadership within three days of issuance.
- Require executive staff to testify on the meaning and justification for presidential signing statements at the request of the House or Senate Judiciary Committee.
- Provide that no monies may be authorized or expended to implement any law accompanied by a signing statement if any provision of the act is violated.

One can argue that the instances of non-compliance on the part of the President are few compared to the number of signing statements he has issued. Others will argue that it is executive intent that is crucial. Here I refer to the statement by the panel of constitutional law experts who firmly supported the President’s right to issue signing statements. Their caveat reads, “Signing statements imply the intent on the part of the President not to enforce a particular statute. Non-enforcement

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<sup>30</sup> T. J. Halstead, Legislative Attorney, American Law Division, “Presidential Signing Statements: Constitutional and Institutional Implications”, *CRS Report for Congress*, Updated September 17, 2007, p. 30.

appears to be a strategy of first resort, not last. The frequent and cavalier declarations on constitutional objections by the Bush Administration demonstrate that it pays little or no heed to the important roles of Congress and the courts in the process of constitutional interpretation and the resolution of constitutional controversy.”<sup>31</sup>

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<sup>31</sup> Georgetown Law Faculty Blog, p. 7