

## Presidential Signing Statements and Their Implications for Public Administration

*For most of U.S. history, presidents have issued signing statements to comment on bills being signed into law. These statements often are hortatory and comment on the merits of the new law. In recent decades, presidents also have used signing statements to indicate portions of laws that they consider unconstitutional. Pointing out such parts of new statutes is not a problem, but indicating that the president may not execute part of the law is problematic. President George W. Bush used signing statements in an aggressive way to imply that he might not faithfully execute more than 1,000 provisions of statutes that he signed into law. This essay argues that this practice undermines the rule of law and threatens the separation of powers system.*

Article I: "All legislative Powers herein granted shall be vested in a Congress of the United States . . ."

Article II: ". . . [H]e shall take Care that the Laws be faithfully executed . . ."

In 2005, Senator John McCain introduced an amendment to a military authorization act that would outlaw any torture by United States personnel anywhere in the world. When signing the bill into law, President George W. Bush issued a signing statement that read in part, "The executive branch shall construe Title X [of the Detainee Treatment Act] relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch." By issuing this signing statement, President Bush raised the possibility that he would not execute the law, using the justification that it might interfere with his prerogatives as commander in chief.

In 2008, Congress passed the National Defense Authorization Act of Fiscal Year 2008; section 1222 of the act provided that "no funds appropriated pursuant to an authorization of appropriations in this Act may be obligated or expended . . . to establish any military installation or base for the purpose of providing for

the permanent stationing of United States Armed Forces in Iraq." When President Bush signed the law, he issued a signing statement that said, "Provisions of the Act, including sections 841, 846, 1079, and 1222 purport to impose requirements that could inhibit the President's ability to carry out his constitutional obligations to take care that the laws be faithfully executed. . . . The executive branch shall construe such provisions in a manner consistent with the constitutional authority of the President" (White House 2008). Thus, President Bush left open the possibility that U.S. troops would be stationed in Iraq on permanent bases and signaled his conviction that Congress could not control expenditures from the treasury through law.

On March 9, 2006, President Bush signed a reauthorization of the USA PATRIOT Act (H.R. 3199), which was soon to expire. Legislators worried about civil liberties were concerned that the Federal Bureau of Investigation was conducting searches of homes and private records without warrants and called for more congressional oversight. In order to end a filibuster that delayed a vote on the bill, the administration agreed to provisions that would require it to report to oversight committees about its use of the law's search provisions. These legal guarantees convinced some members of Congress to drop their objections and to allow the bill to come to the floor for a vote and be passed. President Bush signed the bill into law with much fanfare in the East Room of the White House. Yet after signing the bill, the president issued a signing statement declaring, "The executive branch shall construe the provisions of H.R. 3199 that call for furnishing information to entities outside the executive branch [i.e., Congress] . . . in a manner consistent with the President's constitutional authority to . . . withhold information the disclosure of which could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties" (quoted in Savage 2007, 228).<sup>1</sup>

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In these signing statements, President Bush directly challenged the ability of Congress to constrain executive actions, the nature of the rule of law in the United States, and the meaning of the separation of powers system. In hundreds of other objections to laws contained in signing statements, President Bush challenged the authority of Congress and the law to force him to do anything he deemed an unconstitutional infringement on his authority as president.<sup>2</sup> Such statements can place public administrators into difficult situations: Should one follow the president's directive, or carry out the law as passed by Congress and signed by the president?

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### The Nature of Signing Statements

Signing statements are official pronouncements by the president that are issued when he signs a bill into law (Cooper 2002). These statements are recorded, but their legal and authoritative status has been in dispute, especially during the Bush administration. The practice of making presidential comments on the law is benign; there is no reason the president should not make public and official comments on a law that he signs into law. Noting constitutional objections to the law, however, raises troubling questions, if the implication is that the president may choose not to execute laws to which he has constitutional objections. Signing statements were issued occasionally during the first century and a half of the republic, but in the latter half of the twentieth century, they increased in usage and importance.

The use of rhetorical signing statements began to increase during the Harry S Truman administration, but the most controversial use of signing statements has been to register reservations about the constitutionality of the law in question. The use of signing statements for this purpose began to be taken seriously during the Jimmy Carter and Gerald Ford presidencies. It was during the Ronald Reagan presidency, however, that signing statements were used in a systematic way to argue that presidential opinions about legislative intent should be considered by courts (when the language of the statute is unclear), just as congressional committee reports have been used. The Reagan administration also used signing statements to assert that the president might not be obligated to execute laws.

During the Reagan administration in the 1980s, executive branch lawyers made a concerted effort to enhance the authority of the presidency through signing statements. President Reagan issued a total of 276 signing statements, and 71 of those raised consti-

tutional questions. This was a sharp increase in constitutional objections from the 24 that President Carter issued, and it ushered in the era of more active use of signing statements to challenge the constitutionality of laws (Halstead 2007, 3). The Reagan administration began its systematic campaign to use signing statements in a strategic

manner for several purposes: to get signing statements institutionalized and accepted within the executive branch, to get them seen as legitimate sources of legislative intent, to allow the president to use them to instruct executive branch subordinates, and to raise challenges to the constitutionality of parts of statutes to which the president objected (Alito 1986; Kelley, forthcoming).

President George H. W. Bush was concerned with protecting presidential prerogatives against Congress. He issued 214 signing statements and raised constitutional issues in 146 of them. President Bill Clinton also used signing statements to claim that Congress had overstepped its authority in some laws. He issued 391 signing statements, most of which did not raise constitutional issues, but 105 of them did.

President George W. Bush issued signing statements regarding 171 laws (as of October 15, 2008), fewer than the 391 of President Clinton. But most of them, 127, made constitutional claims, as opposed to the 105 of President Clinton. More important, however, was the fact that in those 171 signing statements, President Bush objected to more than 1,168 provisions of laws (Kelley 2008). This is almost twice as many as all previous presidents of the United States combined. All previous presidents issued a total of fewer than 600 constitutional challenges to laws in their signing statements (Savage 2007, 230).

In addition to the sheer volume of challenges to laws, President Bush used signing statements in a systematic and strategic way to lay the groundwork for claiming more presidential power. Any provision in a law that might conceivably relate to executive authority was subject to a signing statement objection, often of a general and vague type, rather than a specific objection accompanied by legal reasoning.

The use of signing statements for hortatory, ceremonial, or informational purposes is legitimate and not controversial. Presidents ought to be able to say what they want about laws, and presidential signing statements can be used legitimately as vehicles for these benign purposes. When presidents go further, however, in their claims for the authority of signing

statements, their use of this vehicle becomes more problematic. Signing statements may also be used for the following purposes:

- As official parts of the legislative record
- As directions to executive branch subordinates
- As declarations that the president might not execute the law because it unconstitutionally infringes on the president's constitutional authority

The question of whether presidential signing statements should influence judicial interpretation of the laws may be arguable, but it does not present a direct threat to the constitutional balance. Presidents can say what they want and their opinions can be published, but, ultimately, judges must decide which factors to take into account when they interpret ambiguous laws. Whether signing statements may be used to direct subordinates in the executive branch is more problematic and will be considered next.

### The Implications of Signing Statements for Public Administrators

In a formal opinion, the Bush administration's Office of Legal Counsel argued that the president has complete control over members of the executive branch. "In order to fulfill those [constitutional] responsibilities, the President must be able to rely upon the faithful service of subordinate officials. To the extent that Congress or the courts interfere with the President's right to control or receive effective service from his subordinates within the Executive Branch, those other branches limit the ability of the President to perform his constitutional function" (OLC 2004). The question arises as to whether public law can be considered "interference" with the executive branch.

The use of presidential signing statements to instruct subordinate executive branch officials presents potential constitutional problems. The president is the head of the executive branch, and in general, executive branch officials are bound to follow his direction. In cases in which a subordinate is ordered to do something illegal, the person can legitimately refuse the order. But if the public administrator is ordered to refuse to execute the law as it stands because the president has determined that the law infringes on his own interpretation of his constitutional authority, the public administrator faces an ethical dilemma. Although some public administrators may question the president's order, for practical purposes, subordinates, especially military personnel, will almost always follow the president's direction rather than question the president's constitutional judgment. This situation

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raises serious constitutional questions if the president is trying to defeat the purpose of a law.

During the Clinton administration, Assistant Attorney General Walter Dellinger wrote an opinion defending the use of signing statements in most cases. Dellinger argued that signing statements were appropriate for directing subordinates in the executive branch.

A second, and also generally uncontroversial, function of Presidential signing statements is to guide and direct Executive officials in interpreting or administering a statute. The President has the constitutional authority to supervise and control the activity of subordinate officials within the Executive Branch. . . . In the exercise of that authority he may direct such officials how to interpret and apply the statutes they administer. . . . Signing statements have frequently expressed the President's intention to construe or administer a statute in a particular manner (often to save the statute from unconstitutionality), and such statements have the effect of binding the statutory interpretation of other Executive Branch officials. (Dellinger 1993; endnotes excluded)

Dellinger did not see the use of signing statements to direct subordinates in the executive branch or to announce that the law will not be enforced as problematic. It is probable that Dellinger may have made this judgment because he did not foresee its future use to challenge the very nature of legislation and the Article II provision that "the president shall take care that the laws be faithfully executed."

Calabresi and Lev also claimed that signing statements can be used to give binding authoritative orders to executive branch subordinates of the president: "Signing statements allow the President to provide authoritative guidance to his subordinates in the executive branch as to how they should carry out and execute the law. Signing statements thus can serve as "binding directives or order [*sic*] from the President to his millions of delegates in the executive branch" (2006, 8).

The problem in such instances is that if the president issues a signing statement that nullifies the intent of the law, he may use the statement to instruct or allow his subordinates in the executive branch not to execute the law. As mentioned earlier, President Bush issued a signing statement accompanying the Detainee Treatment Act of 2005 stating that he would enforce the law consistent with his commander-in-chief

authority. Because his administration previously had asserted that the commander-in-chief authority could overcome any law, it is reasonable to assume that President Bush felt that his subordinates were entitled to ignore the law and use whatever harsh interrogation procedures he preferred (short of his definition of torture), regardless of the law. This could amount to instructing interrogators in the military or the Central Intelligence Agency that the law was not binding on them (Piffner 2008, 157).

Because President Bush had intended that the interrogation methods used on al-Qaeda suspects remain secret and had argued that they could not be challenged or disclosed in court, there was no assurance that he would not use secret orders to command executive branch subordinates to ignore other laws that he deemed to infringe on his constitutional prerogatives. This is exactly what happened with the National Security Agency's surveillance without warrants of individuals in the United States: President Bush gave a secret order, and when the Terrorist Surveillance Program was made public, he claimed the constitutional authority to be able to carry out the program, despite the clear language of the Foreign Intelligence Surveillance Act (Piffner 2008, 168).

This use of signing statements is worrisome because the president is head of the executive branch, and its public administrators have the presumptive duty to follow his legitimate orders. Only in extreme circumstances—for instance, if a public administrator thinks that the president is ordering an illegal, unconstitutional, or immoral act—should the official refuse to carry out the directive. Thus, in the case of signing statements, if the president gives an order that is on its face reasonable, even though it may be in violation of the law, the executive branch official can quite reasonably decide not to second-guess the president's interpretation of his constitutional power. In addition, doing so could be dangerous to a public administrator's career. This is why the threat implied in signing statements, as used by President Bush, is so dangerous to the rule of law.

In cases similar to Bush's National Security Agency order, the president could either prospectively or retrospectively issue a signing statement and then order his executive branch subordinates to ignore the part of the law to which he objects and thereby escape all accountability. This undermines the whole point of the separation of powers structure of the Constitution. This interpretation of signing statements allows the president to choose

which laws to obey and which to ignore. It also allows him to avoid the constitutional checks of issuing a veto and submitting to the possibility of having it overridden.

### The Constitution and the Rule of Law

The framers' deliberations over the veto power shed light on the use of presidential signing statements to nullify laws. The framers had chafed under the use of the absolute veto that royal governors had used to defeat laws passed by the colonial assemblies. They also resented the uses to which King George III put his authority to nullify laws. The first in the list of grievances against King George in the Declaration of Independence reads, "He has refused his Assent to laws, the most wholesome and necessary for the public Good." After independence, none of the states granted its executive an absolute veto (except South Carolina, which abolished it after two years), and only two of the states provided for a qualified veto (May 1994, 876–81).

During the Constitutional Convention, the framers overwhelmingly rejected three proposals for an absolute veto. They also unanimously rejected a proposal to give the executive the power to suspend the law for a limited amount of time (Farrand 1911, 1:98–103). If the framers had intended for the president to be able to suspend the law or not to faithfully execute laws, the qualified veto they did give the president would have been superfluous. Why have a veto if the president could decide by himself which parts of laws to execute and which parts not to execute? That the framers gave the executive a qualified veto is a strong argument that they did not intend the president to have the authority not to carry out the law (May 1994, 877–78).

Although recent presidents, particularly President Bush, have asserted the right to refuse to carry out laws that they deem to be unconstitutional, the framers intended that the qualified veto power be the remedy for legislation that seems to impinge on the executive department. Elbridge Gerry said, "The primary object of the revisionary check on the Presi-

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dent is not to protect the general interest, but to defend his own department" (Farrand 1911, 2:586). In *Federalist No. 73*, Alexander Hamilton argued that "the primary inducement to conferring the power in question [the veto] upon the Executive, is to enable him to defend himself." The idea that the president could choose not to execute the laws was never considered at the Constitutional Convention (May 1994, 879).

The idea of presidential signing statements begins with the reasonable presumption that each coordinate branch of government should have a role in interpreting the Constitution and its own constitutional powers. As James Madison said in *Federalist No. 49*, “The several departments being perfectly co-ordinate 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.” Thus, within the checks and balances of the Constitution, no single branch has the exclusive right to determine what the Constitution says or what public policy shall be (Fisher 2008). Although the Supreme Court may have the final word in interpreting a law, the president can try to convince Congress to pass another law to accomplish similar ends that passes constitutional muster. Each branch has a role in interpreting the Constitution, but each is subject to constitutional checks and balances exercised by the other two branches.

### Is There a Remedy?

Given the threat to the separation of powers presented by President Bush’s use of signing statements, what would constitute an appropriate remedy? The difficulty in seeking a remedy is that the vehicle itself (a signing statement) is legitimate and unremarkable. But the American Bar Association was concerned enough about President Bush’s use of signing statements that it passed a resolution condemning presidential signing statements and suggested that legislative remedies should be explored. The association’s statement read, “Resolved: That the American Bar Association opposes as contrary to the rule of law and our constitutional system of separation of powers, the issuance of presidential signing statements that claim the authority or state the intention to disregard or decline to enforce all or part of a law the President has signed, or to interpret such law in a manner inconsistent with the clear intent of Congress” (ABA 2006) The ABA thus urged Congress to “enact legislation enabling the President, Congress, or other entities or individuals, to seek judicial review” when the president threatens to not enforce the law. Several bills intended to remedy the situation have been introduced in Congress, with the intent of thwarting signing statements in which presidents threatened not to execute the law.

For example, H.R. 264, which was introduced in the 110th Congress, provided that “[n]one of the funds made available to the Executive Office of President, or to any Executive agency . . . from any source may be used to produce, publish, or disseminate any statement made by the President contemporaneously with the signing of any bill or joint

resolution presented for signing by the President” (Halstead 2007, 25). The problems with this formulation are obvious: “Contemporaneous” may be interpreted different ways, but more importantly, the president can communicate the intent of a signing statement in many other ways, such as memoranda, executive orders, and so on. The same objections can be made about section 4 of H.R. 264, which forbids any executive branch agency from “taking into consideration any statement made by the President contemporaneously with the President’s signing of the bill” (Halstead 2007, 25). During the 109th Congress, S. 3731 would have given both houses of Congress standing to challenge a signing statement “upon the filing of an appropriate pleading by” either house (Fisher 2008, 209; Halstead 2007, 26). Because the type of signing statement at which this bill was aimed would involve constitutional issues, it is not clear that federal courts would have to accept such cases.

The ultimate irony in the Bush administration’s use of signing statements was revealed when Congress placed a reporting requirement in an authorization bill for the Justice Department. The law required that if the Department of Justice “establishes or implements a formal or informal policy to refrain from enforcing, applying, or administering any provision of any Federal statute, rule, regulation, program, policy, or other law . . . on the grounds that [the] provision is unconstitutional,” it had to report the issue to Congress. Of course, when President Bush signed the law, he issued a signing statement declaring that he would execute the law “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” (Fisher 2008, 208). Thus, President Bush, in a signing statement, stated that he was not bound to enforce a statute requiring him to report signing statements to Congress. (Check. Check. Check. Stalemate.)

Because a president who is determined not to feel bound by any law that he thinks might impinge on his constitutional prerogatives can make assertions about his intentions anytime he sees fit, there appears to be no easy way for Congress to compel him to stop. If a president takes actions that are against the law, Congress can cut off funds, and the courts can interpret the law; ultimately, Congress can impeach and remove him from office. But signing statements are merely threats that the president might not

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execute the law (though they present the constitutional difficulties outlined earlier). Thus, the only remedy seems to be self-restraint on the part of the executive.

If a president wants to use governmental powers to take or not take an action, there is not much the other branches can do if he is not acting in good faith. Congress can pass laws and the courts can interpret the law and try to compel actions, but the executive can refuse to comply. Congress does have the authority to take other actions, such as to refuse to pass appropriation acts in order to force a president to cease issuing signing statements. But such actions are blunt instruments that attempt to apply political pressure, and there is no guarantee they will have the intended effect of precluding the president from issuing signing statements.

The United States' constitutional system fundamentally depends on good faith compliance by officers of the government with provisions of the constitution. If there is no common agreement on the meaning of the Constitution, there must be a case or controversy that is accepted by the Supreme Court to decide the issue. Signing statements are not easily amenable to court decisions. It is difficult to force a president to stop making threats to ignore the law.

### Conclusion

Some people play down the import of signing statements by looking at the language literally and arguing that few of the signing statements state directly and unequivocally that President Bush intended to break the law. Why should we get upset about a mere hypothetical situation? But signing statements should not be considered merely idle threats or harmless declarations. The Bush administration used them with the clear purpose of expanding executive power at the expense of Congress and the courts and to accomplish goals it could not achieve through the legislative process. Signing statements must be taken seriously if the institutional independence of the other two branches of government is to be defended.

Defenders of President Bush's use of signing statements said that there was nothing to worry about because President Bush would only use his claimed authority to suspend the law when necessary. But this misses the constitutional point that precedents can be used by future presidents. Some argue that all signing statements are legitimate, and most would agree that some uses of them are. That is not the point. The point is what many of them purport to do—that is, allow a president to ignore the law at some future time in an unspecified way. The real problem with signing statements, as noted earlier, is not their mere existence as vehicles to express presidential opinions, but rather their use as threats to refuse to faithfully

execute the laws. The vehicle itself is legitimate, but the uses to which it was often put by President Bush are suspect.

To the extent that the president publicly specifies which section of a law he is challenging and states the grounds for his objection and welcomes litigation of the issue before the courts, he mitigates the illegitimacy of his actions. However, when a president makes repeated, general, and vague objections to many parts of many newly enacted laws, his actions carry much less legitimacy because his challenges might be acted on in secret at some future time. If the president's actions are secret, there is little chance for a case to be brought before the courts and little possibility that Congress will be able to object to the president's interpretation of the law.

The argument here is based on the premise that the Constitution does not give the president the right to decide *not* to execute the laws, except in some very limited circumstances. If there is a dispute about the interpretation of a law, the interaction of the three branches in the constitutional process, including the politics of passage, the choice to veto, and the right to challenge laws in court, are all legitimate ways to deal with differences in interpretation of the law; each of these options has a long record of use over U.S. history. But the assertion by the executive that it alone has the authority to interpret the law and that it will enforce the law at its own discretion is a dangerous claim.

The implications of President Bush's sweeping claims to presidential authority are profound and undermine the very meaning of the rule of law. Despite the Constitution's granting of lawmaking power to the Congress, if the president maintains that presidential executive authority and the commander-in-chief clause can overcome virtually any law that constrains the executive, the executive is claiming unilateral control of the laws. If the executive claims that it is not subject to the law as it is written but can pick and choose which provisions to enforce, it is essentially claiming the unitary power to say what the law is. The "all legislative powers" clause of Article I and the "take care" clause of Article II thus can be effectively nullified.

### Notes

1. The signing statement, "Statement on Signing the USA PATRIOT Improvement and Reauthorization Act of 2005" (March 9, 2006), can be found at <http://www.coherentbabble.com/signingstatements/Statements/SShr3199s2271.pdf>.
2. A compilation of all of the signing statements of the Bush administration can be found at <http://www.coherentbabble.com/signingstatements/fullist.htm>.

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