REORIENTING THE DEBATE ON PRESIDENTIAL SIGNING STATEMENTS: THE NEED FOR TRANSPARENCY IN THE PRESIDENT'S CONSTITUTIONAL OBJECTIONS, RESERVATIONS, AND ASSERTIONS OF POWER

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Presidential signing statements had been considered relatively obscure executive policy tools that have been used since at least the time of President Monroe. Their usage by former presidents aroused little attention until highly publicized reporting alleged that President George W. Bush had issued an unprecedented number of signing statements relative to his predecessors. The intense debate that followed in the legal community and among media commentators raised claims that signing statements threatened separation of powers as a line-item veto that deprived the U.S. Congress of the opportunity for a veto override. The American Bar Association taskforce on the subject released a bipartisan report that criticized such signing statements and urged the president to halt the practice.

This Comment argues that the genuine constitutional mischief of signing statements arises from the manner in which they are used rather than the instruments themselves because signing statements are not self-executing and, thus, have no practical or legal effect. The misplaced emphasis of the debate on the legitimacy of the practice is further transported into the proposals offered within the current debate, which accordingly are flawed because of their misdiagnosis of the problem. The debate should shift its focus toward the true separation of powers threat: how the vague legal boilerplate and sweeping generality that are characteristic of President Bush's signing statements have created uncertainty over whether the president's actions conform to his signing statements. Consequently, the unknown practical effect of signing statements impedes congressional oversight. Congress and the public should respond by exerting political pressure on the president to make his views and intended actions more transparent in his signing statements. Increased transparency would promote cooperation with Congress, provide Congress, courts, and the public the opportunity to strike the proper separation of powers balance with the president, and preserve the legitimacy of signing statements as a meaningful executive policy tool.

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INTRODUCTION

The heated controversy over President George W. Bush's use of constitutional signing statements ("signing statements")[1] often leads to an unfavorable comparison to President Nixon's views of expansive

1. The term "constitutional signing statements" in this Comment encompasses interpretive or legislative history signing statements, a category that commentators like Curtis Bradley and Eric Posner have distinguished. *See* Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power* 6 (Chi. Law Sch. Pub. Law & Legal Theory Research Paper Series, Paper No. 133, 2006), *available at* http://ssrn.com/abstract=922400. They have some overlap with constitutional statements and have also created controversy. In these statements, the president provides his understanding of what a bill means. The president may argue that certain provisions of a statute are ambiguous and thus have a particular meaning, based on his understanding of the statute's purpose, because that understanding preserves the constitutionality of the provision. *See id.* at 20. Critics have argued that President Bush has manipulated the traditional avoidance canon with constructions that are contrary to clear congressional intent, or that he has simply been wrong on the merits. *See* Posting of David Barron et al. to Georgetown Law Faculty Blog, http://gulcfac.typepad.com/georgetown_university_law/2006/07/thanks_to_the_p.html (July 31, 2006).

executive power.[2] Nixon infamously remarked, "'When the president does it, that means that it is not illegal.'"[3] The current debate over presidential signing statements may be captured by the slightly modified remark, "When the president *claims* it, that means that it is not unconstitutional." Nixon governed according to an all-powerful view of executive power that ultimately resulted in his resignation from the presidency for the unlawful acts of the Watergate scandal. His views have since been almost unanimously repudiated. In contrast, we cannot begin to debate the constitutionality of President Bush's view of executive power, because we do not even understand the threshold issue of what he means in his signing statements. A related problem is that we do not know the impact of his constitutional objections and reservations in his signing statements. The current language of Bush's statements is vague and does not signal his intentions with the law that he claims is either in part or in whole unconstitutional. Transparent statements would facilitate their traditional signaling function of promoting dialogue between Congress and the president in the event of disagreement.

This Comment argues for reorienting the current debate regarding signing statements. The debate should shift away from whether signing statements are constitutional, a mischaracterization of the problem, and toward examining the practical and legal effects of statements—what the president does or does not do according to what he says in his statements. Ultimately, we should demand that the president make his constitutional objections more transparent so that his constitutional concerns may be subject to the checks and balances that preserve the government's separation of powers.[4]

The president cannot carry out even the most expansive theory of executive power unless the checks and balances against such overreaching prove ineffective. The uncertainty over constitutional objections obscures the signaling function of signing statements, and makes even a vigilant

2. *See, e.g.*, John W. Dean, *The Problem With Presidential Signing Statements: Their Use and Misuse by the Bush Administration*, FINDLAW'S WRIT, Jan. 13, 2006, http://writ.news.findlaw.com/dean/20060113.html.

3. Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2359 (2006) (citing *Excerpts From Interview With Nixon About Domestic Effects of Indochina War*, N.Y. TIMES, May 20, 1977, at A16) (quoting President Nixon).

4. This Comment confines its analysis to constitutional signing statements and does not delve into the issue of the president using other instruments to achieve potentially similar ends of nonenforcement (for example, executive orders, or refusal to comply with statutory provisions without issuing signing statements). Signing statements, unlike other presidential directives, lack independent force.

Congress and judiciary impotent in reacting to the claims of the president. Are signing statements merely declarations of the president's view of executive power? Are they signals to executive agencies on how to implement or not implement a law? Are they meant to inure the other branches of government to the president's view of executive power? President Bush has repeatedly declared that provisions of a law are unconstitutional or, more opaquely, that he will construe those provisions in a way that will not contravene the U.S. Constitution. Such a lack of transparency and the unknown impact of the high number of statements[5] generate the uncertainty that pervades the controversy over signing statements. This uncertainty constitutes the threat to our separation of powers rather than the signing statements themselves. Increased transparency in signing statements would promote cooperation with Congress, revive the mechanism of checks and balances, and preserve the legitimacy of signing statements as a meaningful executive device.

Part I offers an overview of signing statements and provides examples of the role these statements have played in creating dialogue between the president and Congress. Part II discusses the current debate over signing

5. *See* Bradley & Posner, *supra* note 1, at 21 (arguing that not a single instance has been identified in which the Bush Administration followed through on the language in a signing statement and refused to enforce a statute as written). *But see* U.S. GEN. ACCOUNTING OFFICE, PRESIDENTIAL SIGNING STATEMENTS ACCOMPANYING THE FISCAL YEAR 2006 APPROPRIATIONS ACTS 9 (2007) [hereinafter GAO REPORT], http://www.gao.gov/decisions/appro/308603.pdf (finding at least six instances in which agencies did not execute provisions of law as written, subsequent to the issuance of signing statements on those provisions). The GAO report findings are the first evidence that suggests the "government may have acted on claims by Bush that he can set aside laws under his executive powers." Charlie Savage, *US Agencies Disobey 6 Laws That President Challenged*, BOSTON GLOBE, June 19, 2007, at A1. However, the report could not conclude that the signing statements caused the noncompliance. GAO REPORT, *supra*, at 9. Nonetheless, these findings are consistent with understanding signing statements as signals of a president's intent rather than implementation directives relied upon by executive branch officials. Complicating efforts to discern the practical effect of signing statements is the difficulty in measuring the downstream effects of implementation, which may mask any nonenforcement or selective enforcement of legislation. Moreover, the lack of evidence of the president following through on his signing statements does not necessarily mean that the president will continue to enforce the law despite his constitutional objections. The choice to implement or refuse to implement legislation is a recurring decision as long as the law remains valid. Presidents are not bound by their objections in signing statements, nor do they waive their ability to follow through on such objections because of previous compliance with the legislation (although the latter course of action may weaken the president's position if challenged in court). The uncertainty regarding the president's intentions and the difficulty inherent in detecting nonenforcement or selective enforcement are problematic. Further, signing statements are preserved in the national registry for subsequent administrations that must engage in the same continuous decisionmaking process with respect to enforcement.

statements sparked by the Detainee Treatment Act of 2005 (DTA)[6] and why the debate should be shifted to examining their practical effect. Part III provides an alternative discourse on signing statements, focusing on their uncertain effect and how *that* constitutes the true threat to the separation of powers. Part IV considers proposed recommendations within the current debate, explains their shortcomings, and posits a transparency norm to govern the practice of signing statements. Finally, this Comment concludes by examining the DTA signing statement as a case study that illustrates the value of transparent signing statements.

I. OVERVIEW OF SIGNING STATEMENTS

A. What Are Signing Statements?

A presidential signing statement is a written comment issued by the president at the time of signing legislation. It serves diverse purposes. Signing statements often are made for public relations or political purposes.[7] Some statements are ceremonial and merely comment on the bill signed, praising its supporters or emphasizing that it meets some pressing needs. Signing statements also may express general policy views; for example, they frequently include reference to how the legislation does not go far enough toward solving the problem at issue.[8]

The more controversial signing statements, and the subject of this Comment, involve claims by the president that some part of the legislation is unconstitutional and that he intends to ignore the provision or to implement it only in ways he believes are constitutional. Sometimes, these signing statements may recognize a statute as constitutional on its face but also foresee in extreme or unanticipated circumstances the possibility of an unconstitutional application.[9] A signing statement therefore may assert that the president fully intends to apply the law as far as possible, consistent with his duty to the Constitution.[10] As such, they signal the president's constitutional views to Congress and the public.

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6. Pub. L. No. 109-148, 119 Stat. 2739 (2005) (to be codified in scattered sections of 10, 28, and 42 U.S.C.).

7. *See* Bradley & Posner, *supra* note 1, at 8.

8. *Id.* at 5.

9. *The Use of Presidential Signing Statements: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) [hereinafter *Hearing*], *available at* http://judiciary.senate.gov/testimony.cfm?id=1969&wit_id=5479 (statement of Michelle Broadman, Deputy Assistant Att'y Gen., Office of Legal Counsel, Department of Justice).

10. *Id.*

B. Historical Usage of Signing Statements

The Constitution is silent on the subject of signing statements. Nonetheless, historical practice and judicial precedent provide strong support for recognizing that the president has some independent constitutional interpretive authority.[11] At the most basic understanding of the Constitution, Congress makes the laws, the president executes the laws, and the judiciary interprets the laws and thereby oversees this constitutional design of checks and balances.[12] If the president vetoes a bill, the Constitution requires him to tell Congress what his objections are, so that Congress can reconsider the bill and accommodate his concerns, or repass the bill with a two-thirds vote in both houses.[13] If Congress approves the bill over the veto of the president, the bill becomes law without his signature. A controversial issue arises when the president signs a law passed by Congress but declines to execute the law under conditions that he believes make it unconstitutional. Presidents have issued signing statements claiming this authority and have indeed exercised this authority from the presidency of James Monroe[14] to the present.

1. The Early Years of the Republic

Presidents have issued signing statements since at least the time of Jackson's administration and perhaps as early as Monroe's administration.[15] Jackson objected to a provision in an 1830 appropriations bill providing for a road

11. *See infra* Part I.B.1–I.B.4.

12. *See* U.S. CONST. art. I, § 7–8; *id.* art. II, § 3; *id.* art. III, § 2; *see also* Martin v. Hunter's Lessee, 14 U.S. 304, 329 (1816) ("The object of the constitution was to establish three great departments of government; the legislative, the executive, and the judicial departments. The first was to pass laws, the second to approve and execute them, and the third to expound and enforce them.").

13. *See* U.S. CONST. art. I, § 7.

14. President Monroe issued a statement to a bill that mandated reduction in the size of the U.S. Army and prescribed the method by which the president should select military officers. AM. BAR ASS'N, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE 7 (2006). The statement said that the president, not the U.S. Congress, bore the constitutional responsibility for appointing military officers. *Id.*

15. Signing statements, according to our contemporary understanding of them in connection with the signing of a bill, first began with Andrew Jackson. *See* CHRISTOPHER N. MAY, PRESIDENTIAL DEFIANCE OF "UNCONSTITUTIONAL" LAWS 73 (1998). However, some scholars credit Monroe with issuing the first signing statement. *See, e.g.*, T.J. HALSTEAD, CONG. RESEARCH SERV. REPORT FOR CONG., PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS 2 (2007), http://www.fas.org/sgp/crs/natsec/RL33667.pdf. Monroe sent a message to Congress weeks after the bill had become law that explained his understanding of how the law was to be executed. *See* MAY, *supra*, at 73; GAO REPORT, *supra* note 5, at 2.

running from Detroit to Chicago. Jackson signed the bill but in his signing statement directed that the road not extend into Chicago. The U.S. House of Representatives criticized Jackson for exercising what amounted to an "item veto," but ultimately honored Jackson's wishes.[16] A decade later, President Tyler issued a signing statement indicating his disapproval of certain provisions in a political apportionment bill. This provoked a rebuke from the Speaker of the House, John Quincy Adams, who advised that the "'extraneous document'" should be ignored as "'a defacement of the public records and archives.'"[17]

The U.S. Supreme Court later recognized signing statements as a proper means for the president to "inform Congress by message of his approval of bills, so that the fact may be recorded," but the Court stopped short of suggesting that signing statements had a more substantive function.[18] This early understanding of the limited legal effect of signing statements has persisted to modern-day interpretation by courts, which largely have ignored signing statements in legislative interpretation. The early Court's interpretation of signing statements confined their function to at most a tool of communication without independent effect. Their primary purpose remained as such for the first two hundred years of this nation's history.

2. The Reagan Administration

Many commentators credit the Reagan Administration as a period in which the use of signing statements escalated both quantitatively and qualitatively. President Reagan came to office in 1981, in the aftermath of Watergate, when the executive was less powerful than at any time since Reconstruction.[19] He sought to reclaim presidential power after what his supporters considered the "legislative opportunism" of a Congress that had used Watergate to expand its power at the expense of the executive branch.[20] Reagan transformed the signing statement into a strategic weapon to reclaim executive power.

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16. Christopher S. Kelley, A Comparative Look at the Constitutional Signing Statement: The Case of Bush and Clinton, Presentation at the 61st Annual Meeting of the Midwest Political Science Association (April 3, 2003) (on file with the UCLA Law Review).

17. AM. BAR ASS'N, *supra* note 14, at 7 (quoting Christopher Kelley, The Unitary Executive and the Presidential Signing Statement 59 (2003) (unpublished Ph.D. dissertation, Miami University), *available at* http://www.ohiolink.edu/etd/send-pdf.cgi?miami1057716977).

18. David H. Remes et al., Covington & Burling, Presidential Signing Statements: Will Congress Pick Up the Gauntlet? 3 (June 26, 2006), http://www.constitutionproject.org/pdf/signing_statements_Memo_from_Covington_&_Burling.pdf (citing LaAbra Silver Mining Co. v. United States, 175 U.S. 423, 454 (1899)).

19. *Id.*

20. *Id.* (citing PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION 202 (2002)).

Through the use of signing statements, Reagan sought to make executive interpretations of new laws a meaningful and legitimate part of the legislative history of a statute.[21] To carry out this goal, Attorney General Edwin Meese III brokered a 1986 agreement with West Publishing Company to include signing statements along with traditional legislative history in the *U.S. Code Congressional and Administrative News*, ensuring that they would be accessible to courts, lawyers, and implementing officials.[22] The Supreme Court gave Reagan's approach credibility in *INS v. Chadha*,[23] noting, without criticism, that presidents often sign legislation containing parts that they find objectionable on constitutional grounds and use signing statements to indicate they will not comply with those provisions.[24] Reagan read *Bowsher v. Synar*,[25] a case in which the Supreme Court made reference to his signing statement, as further support from the Court recognizing the legitimacy of the interpretive influence of signing statements.[26] The Court since then has not generally looked to signing statements for guidance, in contrast to the far more frequent and established practice of looking to legislative history.[27]

A confrontation between Reagan and both Congress and the judiciary ensued after the issuance of a signing statement to the Competition in Contracting Act of 1984.[28] In the signing statement, Reagan ordered executive branch officials to deny effect to a provision of the bill he believed was unconstitutional.[29] The provision in question allowed the

21. Phillip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 PRESIDENTIAL STUD. Q. 515, 517 (2005).

22. AM. BAR ASS'N, *supra* note 14, at 10.

23. 462 U.S. 919 (1983).

24. *Id.* at 11.

25. 478 U.S. 714 (1986).

26. The U.S. Supreme Court specifically referred to the Reagan signing statement criticizing the Gramm-Rudman Act when it held that certain provisions of the Act, which sought to place limits on deficit spending, were unconstitutional. *Id.* at 719 n.1.

27. The Second Circuit in *United States v. Story*, 891 F.2d 988 (2nd Cir. 1989), suggested that signing statements may be considered part of the legislative history in certain limited circumstances. *Id.* at 994. A full discussion of the legal significance of signing statements with respect to their judicial weight is beyond the scope of this analysis. However, this Comment operates on the assumption that statements have limited, if any, legal significance, because of courts' historical indifference toward signing statements. Further, no president has ever claimed that signing statements are controlling on courts. For more information, see, for example, Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J. ON LEGIS. 363 (1987). *See also* GAO REPORT, *supra* note 5, at 11 ("After reviewing the courts' use of presidential signing statements, we determined that, overall, federal courts infrequently cite or refer to them in their published opinions.").

28. Pub. L. No. 98-369, § 2701, 98 Stat. 494, 1175.

29. Statement on Signing the Deficit Reduction Act of 1984, 20 WEEKLY COMP. PRES. DOC. 1037 (July 18, 1984), *discussed in* Remes et al., *supra* note 18, at 4.

comptroller general to sequester money in the event of a challenge to a government contract. A losing bidder sued and the law was held constitutional.[30] Reagan tested the bounds of his executive power by refusing to comply with the court order. His defiance resulted in congressional threats to eliminate funding for the attorney general and a rebuke from the district court that "no man in this country is so high that he is above the law."[31] Reagan changed course and relented.[32]

This incident illustrates how transparent signing statements can trigger a traditional separation of powers dispute. The president exercised his independent constitutional interpretive authority in plain view of the other branches, first by announcing his intentions in the signing statement and then by acting accordingly. This transparency enabled the losing bidder to clearly trace his injury to the president's actions, thus satisfying a standing requirement.[33] The mechanism of checks and balances were then set in motion, with Congress and the judiciary reacting to constrain the president's efforts to overreach.

3. The George H.W. Bush Administration

President George H.W. Bush maintained the increasing use of signing statements that began with President Reagan. President H.W. Bush issued 228 signing statements, 107 of which raised objections to one or more of the statutory provisions signed into law.[34] President H.W. Bush continued Reagan's agenda of expanding presidential constitutional interpretive authority

30. *Id.* (citing Ameron, Inc. v. U.S. Army Corps of Eng'rs, 610 F. Supp. 750, 755 (D.N.J. 1985)).
31. United States v. Lee, 106 U.S. 196, 220 (1882).
32. Remes et al., *supra* note 18, at 4.
33. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).
34. HALSTEAD, *supra* note 15, at 2. President H.W. Bush issued a greater percentage of signing statements that contained constitutional objections (47 percent of all signing statements) than did his predecessor President Reagan, who issued 250 signing statements, 86 of which (34 percent) contained challenges to one or more of the statutory provisions signed into law. *Id.* Note that several different approaches for counting signing statements have emerged in the literature and in the news. Consequently, different figures have been reported. The most common counts are based on the number of signing statement documents and the number of affected provisions being challenged in the signing statements. Further standardization of methodology for quantitatively evaluating signing statements likely will continue. For the purposes of this analysis, the Congressional Research Service report figures will be used (last updated in September 2007). For a comprehensive discussion of the different approaches to counting signing statements and the latest updates on the numbers, see Presidential Signing Statements—FAQs—Learn About Presidential Signing Statements [hereinafter Presidential Signing Statements], http://www.coherentbabble.com/signingstatements/FAQs.htm#3.%20%20How%20many%20statement%20has%20George%20W.%20Bush%20signed (last visited Jan. 17, 2008).

by creating executive legislative history, including signing statements, which the president would later refer to as the definitive interpretation for purposes of enforcement.[35] In 1986, Samuel A. Alito, Jr., then a young attorney in the Justice Department, wrote a six-page memorandum on signing statements to "ensure that Presidential signing statements assume their rightful place in the interpretation of legislation."[36] Alito argued that greater use of signing statements would increase the power of the executive to shape law and curb some of his perceived abuses of the use of legislative history by courts, scholars, and litigants.[37]

An example here helps illustrate how the president vigorously executed Alito's strategy by using a signing statement to push forward a statutory interpretation despite the clearly conflicting intent of Congress. In the 1991 Civil Rights Act,[38] Congress made clear its intent to return to the broad interpretation of what constituted "disparate impact" for Title VII discrimination purposes that existed prior to the Supreme Court's narrow interpretation in *Wards Cove Packing Co. v. Atonio*.[39] The president's signing statement relied on a colloquy inserted in the record of the congressional debate and concluded that the Act "'codifies'" rather than "'overrules'" *Wards Cove*.[40] While some federal cases decided in the aftermath of the bill's passage characterized the Act as critical of or even overruling *Wards Cove*, and numerous commentators shared the same opinion, the vast majority of federal decisions confirmed that the basic statements of law set forth in the *Wards Cove* decision survived the Act (with the sole exception of the burden of persuasion).[41] The resulting power struggle between Congress and the president was independent of the signing statement, which merely reflected the underlying interbranch conflict. Courts in subsequent cases did not explicitly rely on or consider the signing statement as an authoritative source of statutory meaning in applying the 1991 Civil Rights Act.

35. Kelley, *supra* note 16, at 13.

36. Louis Fisher, *Signing Statements: What to Do?*, 4 FORUM issue 2, art. 7, at 2 (2006), http://www.bepress.com/forum/vol4/iss2/art7.

37. *Id.*

38. 42 U.S.C. § 2000e-2(a) (2000).

39. 490 U.S. 642 (1989).

40. Kelley, *supra* note 16, at 16–17 (quoting CHARLES TIEFER, THE SEMI-SOVEREIGN PRESIDENCY: THE BUSH ADMINISTRATION'S STRATEGY FOR GOVERNING WITHOUT CONGRESS 57 (1994)).

41. Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409, 457 (1998).

Another notable interbranch dispute erupted when President H.W. Bush issued a signing statement that objected to a provision in the Dayton Aviation Heritage Preservation Act of 1992 (Dayton Act).[42] The contested provision purported to give executive powers to members of a commission without requiring their confirmation as executive officers. President H.W. Bush refused to appoint members of the commission until Congress amended the provision to meet his objection.[43] Congress complied.[44]

The Dayton Act illustrates a separation of powers dispute that directly affected the presidency and Congress as institutions. Congress was not concerned with ensuring that the executive carry out the law it had duly passed, but rather was concerned with protecting its own constitutional powers. No person or institution other than the legislature was legally harmed by the resolution of the power struggle between the president and Congress. Had President H.W. Bush complied with Congress's encroachment of executive authority, the Supreme Court conceivably would not have had occasion to declare the provision unconstitutional.[45]

The Dayton Act dispute was internal to the two branches, unlike the classic justiciable separation of powers dispute, in which private actors or institutions bring claims arguing that the constitutional structure was intended to allocate power between the branches in a manner that would be protective of the actors' interests.[46] The extrajudicial way in which this incident was resolved mirrors the way in which other internal separation of powers disputes usually are handled—politically. Once a dispute arises, interbranch negotiation and wrangling ensues and the two branches move from typically absolutist positions to more moderate ones as threats and counter-threats mount.[47] Here, the to-and-fro struggle resulted in Congress capitulating. The signing statement could be thought of as signaling the first of multiple threatened actions that will escalate until one side accedes. In this case, President H.W. Bush made his position clear to Congress and flexed his executive muscle until Congress backed down.

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42. Pub. L. No. 102-419, 106 Stat. 2141; Statement on Signing the Dayton Aviation Heritage Preservation Act of 1992, 28 WEEKLY COMP. PRES. DOC. 1966 (Oct. 19, 1992); *see* Remes et al., *supra* note 18, at 4.

43. Remes et al., *supra* note 18, at 4.

44. *Id.*

45. For a discussion of the issues related to legislator standing, see Anthony Clark Arend & Catherine B, Lotrionte, *Congress Goes to Court: The Past, Present, and Future of Legislator Standing*, 25 HARV. J.L. & PUB. POL'Y 209 (2001); *see also infra* note 127.

46. *See generally* David Barron, *Constitutionalism in the Shadow of Doctrine: The President's Non-Enforcement Power*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 61.

47. Dawn Johnsen, *Executive Privilege Since* United States v. Nixon*: Issues of the Motivation and Accommodation*, 83 MINN. L. REV. 1127, 1139 (1999).

4. The Clinton Administration

President Clinton continued the trend of his predecessors and issued 381 statements, 70 of which raised constitutional or legal objections.[48] Walter Dellinger, Clinton's assistant attorney general, justified a president's refusal to follow a facially unconstitutional law on historical, judicial, and constitutional grounds in a memorandum that has provided the basis for the current debate over the president's authority to decline enforcement of unconstitutional laws.[49]

Clinton's most high-profile use of a signing statement involved the National Defense Authorization Act for Fiscal Year 1996.[50] The Act contained a provision that required discharge from the military of all HIV-positive service members.[51] Clinton signed the bill into law because of the urgent need to fund the military. However, in his signing statement, Clinton asserted that the HIV provision was unconstitutional and violated equal protection.[52] He described the provision as "'mean-spirited,'"[53] and directed the attorney general not to defend it if challenged.[54] Congress repealed the provision before the effective date of the law, when the president would have been required to discharge the service members.[55]

48. HALSTEAD, *supra* note 15, at 6.

49. *See* Memorandum from Walter Dellinger, Assistant Att'y Gen., to the Honorable Abner J. Mikva, Counsel to the President, on Presidential Authority to Decline to Execute Unconstitutional Statutes (November 2, 1994), *available at* http://www.usdoj.gov/olc/nonexcut.htm.

50. Pub. L. No. 104-106, 110 Stat. 86 (1996).

51. *Id.* § 567, 110 Stat. at 328–29.

52. *See* Statement on Signing the National Defense Authorization Act for Fiscal Year 1996, 32 WEEKLY COMP. PRES. DOC. 237 (Feb. 19, 1996), *discussed in* Dawn Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 7.

53. Barron, *supra* note 46, at 76 (quoting White House Press Briefing, 1996 WL 54453, at *1 (Feb. 9, 1996) (statement of Jack Quinn, Counsel to the President)).

54. The president's discretion to decline to defend a statute he believes is unconstitutional is itself controversial. Implicit in the president's constitutional duty to faithfully execute the laws is the responsibility to defend and to uphold the laws against attacks in court. The executive traditionally has asserted a discretionary authority to decline to defend federal laws against constitutional challenges that (1) in his opinion, unconstitutionally encroach on the authority or powers of the presidency; or (2) are "clearly unconstitutional." *See* Note, *Executive Discretion and the Congressional Defense of Statutes*, 92 YALE L.J. 970, 973 (1983).

Clinton's determination not to defend the HIV provision marks the executive branch's first explicit assertion that such a decision should face a different, lower threshold than the more controversial decision not to enforce legislation. *See* Chrysanthe Gussis, Note, *The Constitution, the White House, and the Military HIV Ban: A New Threshold for Presidential Non-Defense of Statutes*, 30 U. MICH. J.L. REFORM 591, 604 (1997). For further discussion of executive nonenforcement, see *infra* Part II.B.1.

55. *See* Johnsen, *supra* note 52, at 13.

This incident highlights how interbranch exchanges may even forge consensus in the process. President Clinton made clear his intentions in his signing statement and provided authority to support his constitutional views. This signal from the president enabled Congress to react and, ultimately, to work with the president toward a resolution.

The president's constitutional interpretive authority in this situation provided for more robust protection of constitutional values than a court likely would provide, due to doctrinal limitations and the judiciary's institutional position.[56] A court likely would uphold the provision as constitutional under the toothless rational basis standard. According to one commentator, a court does not actually determine that the provision does not amount to a violation of equal protection in some objective, preclusive sense, but rather could be thought of as inviting the political branches to make ultimate judgments of constitutionality within the space provided by its doctrine of deference.[57]

Further, a court is generally unable to assess legislative motive through such a screen of deference.[58] Clinton was not bound by such deference and could (and in fact did) take into account that the HIV provision may have been motivated by animus.[59] The provision was attached as a rider to the bill, and its sponsor emphasized his mistaken belief that HIV is invariably contracted as the result of misconduct such as illegal drug use or sex with prostitutes.[60] If such animus were plainly expressed on the face of the law, it would have been constitutionally prohibited; if not, that same law would have slipped through a court's screen of deference. Further, Congress had not engaged in an assessment of the constitutional issue. It appears that neither house debated the constitutionality

56. *See* Barron, *supra* note 46, at 76.

57. *See id.* at 76–77.

58. *Id.* at 77.

59. *See* Johnsen, *supra* note 52, at 57 (noting that President Clinton suggested that the actual purpose behind the provision was an illegitimate one).

60. The sponsor of the bill, Representative Robert Dornan, repeatedly emphasized his belief that HIV-positive service members contracted the virus through misconduct, stating:

> [HIV] is spread by human God-given free will. . . . It is all from one of three causes, all of them in violation of the Uniform Code of Military Justice. Rolling up your white, khaki or blue uniform sleeve and sticking a contaminated filthy needle in your arm. . . . Heterosexual sex with prostitutes in an off-limits prostitution house where all of the prostitutes are infected with the AIDS virus . . . and the third category that seems to drive this whole thing politically, having unprotected sex with strangers in some hideaway or men's room somewhere, high-risk sex with strangers that is homosexual . . . .

141 CONG. REC. 31, 406 (1995); *see also* 142 CONG. REC. 2278 (1996).

of or the need for the provision. Therefore, no explicit disagreement over constitutionality actually emerged.[61]

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President Clinton and Congress came to an agreement on the HIV provision, unlike President Reagan and the other two branches during the confrontation regarding the Competition in Contracting Act of 1984. Despite the different results in the two incidents, signing statements provided the catalyst for the system of checks and balances to be activated. Each president made clear in a signing statement his constitutional objection and his intention with respect to his objection. Signing statements have provided an opportunity for Congress to cooperate with the president, as in the President Clinton example; push back, as in the President Reagan example; or engage in a back-and-forth struggle until one branch relents, as in the President H.W. Bush example.

II. THE CURRENT DEBATE

A. Background

The most high-profile signing statement of the current Bush Administration involved the passage of the DTA,[62] over which the White House and Congress publicly fought.[63] When it became clear that the bill would pass with veto-proof majorities, President Bush changed course and supported its passage. President Bush issued a signing statement that implied that the Act's prohibition of the use of torture or cruel, inhumane, or degrading treatment by a U.S. official on prisoners

61. *See* Johnsen, *supra* note 52, at 57.

62. Pub. L. No. 109-148, 119 Stat. 2739 (2005) (to be codified in scattered sections of 10, 28, and 42 U.S.C.).

63. *See* Charlie Savage, *Bush Challenges Hundreds of Laws*, BOSTON GLOBE, Apr. 30, 2006, at A1 (describing the Bush Administration's frequent use of signing statements to issue constitutional objections). This article launched the issue into the public spotlight and earned Charlie Savage a Pulitzer Prize. *See Globe Wins Pulitzer Prize for Series on Bush Efforts to Expand Presidential Power*, BOSTON GLOBE, Apr. 16, 2007, http://www.boston.com/news/globe/city_region/breaking_news/2007/04/globe_wins_puli_1.html. Constitutional commentators, academics, and the news media added their voices to the debate. *See, e.g.*, John W. Dean, *The Problem With Presidential Signing Statements: Their Use and Misuse by the Bush Administration*, FINDLAW.COM, Jan. 13, 2006, http://writ.news.findlaw.com/dean/20060113.html (last visited Jul. 27, 2006); Laurence Tribe, *'Signing Statements' Are a Phantom Target*, BOSTON GLOBE, Aug. 9, 2006, at A9.

did not bind the executive branch.[64] This sparked media controversy and public scrutiny of the administration's use of a signing statement to declare its refusal to enforce a law it considered unconstitutional. Commentators decried this use of signing statements as an assault on the constitutional separation of powers.[65]

Two major critiques of signing statements frame the core debate. The Constitution Project's Coalition to Defend Checks and Balances (Coalition) released a study in June 2006 on how signing statements have been used by the Bush Administration.[66] The study acknowledged that signing statements "are nearly as old as the Republic," and that there is "nothing inherently troubling about them."[67] The issue, according to the Coalition, was that President Bush has been issuing constitutional objections in his signing statements to "challenge or deny effect to legislation that he considers unconstitutional."[68] The Coalition urged the president to cease using signing statements in this manner and argued that the practice conflicted with the president's constitutional duty to "take Care that the Laws be faithfully executed."[69] In addition, in July 2006, a task force of the American Bar Association (ABA Task Force) released its study on signing statements.[70] The ABA Task Force provided its analysis on the issue and opposed

> as contrary to the rule of law and our constitutional system of separation of powers the issuance of presidential signing statements that claim the authority or state the intention to disregard or decline to enforce all or part of a law the President has signed, or to interpret such a law in a manner inconsistent with the clear intent of Congress.[71]

The Coalition and the ABA reports discuss the prevailing criticism of signing statements. The debate has primarily focused on two separate

64. *See* Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918 (Dec. 30, 2005) [hereinafter DTA Signing Statement]; *see also infra* Part V (reporting language from the objection in the signing statement).

65. *See, e.g.*, Charlie Savage, *Bush Could Bypass New Torture Ban*, BOSTON GLOBE, Jan. 4, 2006, at A1 ("'The basic civics lesson that there are three co-equal branches of government that provide checks and balances on each other is being fundamentally rejected by this executive branch.'" (quoting Elisa Massimino, Washington director for Human Rights Watch)).

66. THE CONSTITUTION PROJECT, STATEMENT ON PRESIDENTIAL SIGNING STATEMENTS BY THE COALITION TO DEFEND CHECKS AND BALANCES (2006).

67. *Id.* at 1.

68. *Id.*

69. *Id.* at 1–2.

70. AM. BAR ASS'N, *supra* note 14.

71. *Id.* at 18.

issues: (1) the use of signing statements; and (2) the underlying views expressed in the signing statements.[72] Commentators have argued that Bush has used signing statements as a veto that denies Congress the opportunity to override the president pursuant to Article I of the Constitution. According to this argument, the use of signing statements poses a danger to our separation of powers.

B. Why the Debate Is Misdirected

Both the Coalition and the ABA Task Force provided a two-fold misdiagnosis of the problem with signing statements: (1) The president does not have the power to decline to enforce all or part of a law that he has signed; and (2) signing statements are an abuse of the veto process that constitute line-item vetoes, which the Supreme Court ruled unconstitutional in *Clinton v. City of New York*.[73] These criticisms are based on faulty assumptions, as the analysis below explains.

1. The President's Nonenforcement Authority

The premise underpinning the Coalition's and ABA Task Force's arguments against signing statements is that the president does not have the authority to decline to enforce, either in part or in whole, legislation that he has signed. According to the Coalition, when the president issues a signing statement objecting to a provision in a law, the President has unilaterally repealed the legislation, in violation of the principle that only Congress may repeal legislation.[74] Thus, it would follow that if the president disagrees with a law, he is faced with either vetoing the bill, which would give Congress the opportunity for a legislative override, or signing the bill into law and giving the law effect. Any other result would constitute the president usurping the powers of Congress, contrary to the Constitution.[75] Setting aside the issue of the president actually following through on his constitutional objections in a signing statement and failing

72. President Bush has been criticized for his claims of executive power under a unitary executive theory. *See* HALSTEAD, *supra* note 15, at 10–11; Cooper, *supra* note 21, at 531. This Comment does not address the controversy directly, but rather addresses the importance of exposing the underlying views expressed in signing statements to the political gauntlet of scrutiny, critique, and review, in order for the three branches to strike a separation of powers balance in plain, public view.

73. 524 U.S. 417, 438–41 (1998).

74. THE CONSTITUTION PROJECT, *supra* note 66, at 2.

75. *See* U.S. CONST. art. I, § 7, cl. 2.

to implement a law,[76] the Coalition's argument provides an overly simplistic scenario in which the president, when faced with a constitutionally offensive provision in an otherwise unobjectionable omnibus measure, has two stark choices: (1) veto an entire bill that may have taken months to hammer out; or (2) sign it and then enforce it in its entirety, regardless of his good-faith views as to its constitutional infirmities.

Commentators are divided over whether the president has a constitutional duty to enforce laws he believes are unconstitutional, an issue that the Supreme Court has not definitively addressed. Curtis Bradley and Eric Posner have provided a helpful breakdown of the different views:

> Some commentators argue that presidents must always enforce a statute, regardless of whether they believe it to be constitutional, unless and until courts hold that the statute is unconstitutional. Other commentators argue that in the absence of a judicial resolution of the issue, presidents have no obligation to enforce a statute that they believe to be unconstitutional—and, indeed, may have an obligation *not* to enforce the statute. Still other commentators argue for an intermediate position whereby presidents may sometimes disregard statutes that they believe to be unconstitutional, such as where a statute violates a Supreme Court precedent or invades executive power. There is also a related debate over the extent to which presidents should presume statutes to be constitutional.[77]

From the earlier overview of the historical use of signing statements in different administrations,[78] it is clear that presidents have claimed the power of nonenforcement since the beginning of the Republic.[79] Support can be drawn from the Supreme Court's holdings and dicta both for and against an executive power to disregard at least some unconstitutional statutes.[80] The Constitution's text, history, and structure provide no direct prohibition or authorization of presidential refusals to enforce constitutionally

76. *See infra* Part III.

77. Bradley & Posner, *supra* note 1, at 23 (footnotes omitted).

78. *See supra* Part I.B.1–I.B.4.

79. *See* Aaron Paul Arnzen, Note, United States v. Dickerson*: A Case Study in Executive Constitutional Interpretation*, 78 N.C. L. REV. 1153, 1163 (2000) ("Some notable examples include President Jefferson's refusal to enforce the Sedition Act of 1798 and the refusal by all [e]xecutives to enforce the 1973 War Powers Resolution since its enactment."); *see also* Bradley & Posner, *supra* note 1, at 23 n.92, 23–24 (describing how every president since the passage of the War Powers Resolution was enacted in 1973 over President Nixon's veto has objected to the legislation as an unconstitutional infringement by Congress on the president's commander-in-chief powers).

80. Bradley & Posner, *supra* note 1, at 24.

objectionable laws.[81] The most uncontroversial executive interpretive authority inheres in the pardon and veto powers on constitutional grounds, which enable the president to impose his own views even when that interpretation is inconsistent with the judiciary's interpretation. The more controversial exercise of executive interpretive authority through nonenforcement of federal statutes does not necessarily conflict with Congress's ability to pass legislation.[82] Neither does executive interpretive authority necessarily conflict with the judiciary's responsibility to resolve justiciable controversies.[83] The president, for example, can promote the implementation of Supreme Court rulings by declining to enforce laws that are indistinguishable from those the Court has held unconstitutional. Also, "where Congress passed the laws prior to the Court's articulation of the constitutional rule and without consideration of the constitutional issue, non-enforcement does not inappropriately interfere with Congress's lawmaking power."[84] Historically, presidents have found in certain limited circumstances that refusing to comply with a law is more consistent with his constitutional duty than enforcing it.[85] The most obvious example is when a law is plainly unconstitutional under governing and undisputed Supreme Court precedent.[86]

The existence and the parameters of the president's authority to refuse to enforce constitutionally objectionable statutes remain hotly contested and open to reasonable disagreement. This Comment operates under the assumption that under the totality of considerations, including constitutional structure,

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81. Johnsen, *supra* note 52, at 10. It has been argued that presidential nonenforcement is consistent with the view of the framers. For example, James Wilson, a prominent framer, legal theorist, and later Associate Justice of the Supreme Court, told the Pennsylvania ratifiers

> that the power of the Constitution was paramount to the power of the legislature acting under that Constitution; for it is possible that the legislature . . . may transgress the bounds assigned to it, and an act may pass, in the usual mode, notwithstanding that transgression; but when it comes to be discussed before the judges . . . it is their duty to pronounce it void. . . . In the same manner, the President of the United States could shield himself and refuse to carry into effect an act that violates the Constitution.

Memorandum from Walter Dellinger, *supra* note 49 (emphasis omitted).

82. *See* Johnsen, *supra* note 52, at 10.

83. *Id.* Other controversial situations in which the president exercises independent interpretive authority include noncompliance with court opinions and refusals to carry out specific judicial orders. *See* Arnzen, *supra* note 79, at 1161.

84. Johnsen, *supra* note 52, at 10.

85. *See, e.g.*, MAY, *supra* note 15, at 103–18 (discussing cases of executive noncompliance historically with a law that the president had objected to in a signing statement); Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1594 (2007) ("Factors that traditionally have supported nonenforcement include a constitutional defect that was clear (either on its face or under judicial precedent), an encroachment upon presidential power, or a constitutional violation unlikely to be justiciable absent nonenforcement.").

86. Posting of David Barron et al., *supra* note 1.

historical precedent, and instances of Supreme Court approval, the use of executive nonenforcement authority is available to the president under certain circumstances.[87] Even if one disagrees with the claim that there is an executive nonenforcement authority, this issue is not the genuine problem with signing statements.[88] Signing statements that obscure the intentions of the president deprive Congress and the public of the opportunity to hold the president politically accountable for the views expressed therein. Therefore, whether the president may exercise his nonenforcement power should not constitute a primary critique of signing statements in the current debate.

2. Signing Statements and the Veto Power

Both the Coalition and ABA Task Force have unpersuasively argued that the president improperly circumvents the legislative process if he signs a bill and then expresses in a signing statement a constitutional objection or refusal to enforce the provision or law at issue. A related criticism is that signing statements constitute improper line-item vetoes.[89] The practice of signing statements has often been characterized as "cherry-picking" legislation.[90] The arguments made in the widely circulated reports by the Coalition and the ABA Task Force are inaccurate for a number of reasons.

The argument that the president improperly circumvents the legislative process can be refuted in two ways. First, unlike with a veto, the president claims that the Constitution itself prevents the law from taking effect in a signing statement. Regardless of the merits of the president's claims, he is purporting to act under the Constitution, rather than under his presidential authority to veto laws with which he may disagree simply as a

87. *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 349 U.S. 579, 637 (1952) (Jackson, J., concurring) (suggesting that under some circumstances, the President may "take measures incompatible with the expressed or implied will of Congress"); Myers v. United States, 272 U.S. 52 (1926) (agreeing with the president that a statute requiring U.S. Senate approval for removal of the postmaster was unconstitutional).

88. *See generally* Bradley & Posner, *supra* note 1.

89. *See* AM. BAR ASS'N, supra note 14, at 22 ("To sign a bill and refuse to enforce some of its provisions because of constitutional qualms is tantamount to exercising the line-item veto power held unconstitutional by the Supreme Court in *Clinton v. City of New York* . . . ."). In *Clinton v. City of New York*, 524 U.S. 417 (1998), the Supreme Court held that line-item vetoes are unconstitutional, even if approved in advance by Congress. *Id.* at 421. A line-item veto occurs when the president cancels or alters legislation after it is enacted. *See* Bradley and Posner, *supra* note 1, at 26–27.

90. *E.g.*, Charlie Savage, *Senator Considers Suit Over Bush Law Challenge*, BOSTON GLOBE, June 28, 2006, at A1.

matter of policy.[91] Second, signing statements have no independent legal effect, unlike a veto.[92] When the president exercises his veto power, he cancels legislation and it never becomes law, unless it is passed by a supermajority of Congress.[93] In contrast, a signing statement does not independently affect the statute, which would remain on the books available for interpretation by courts, or for application by a subsequent president (or even the current president, if he follows through on his objections initially but then decides to enforce the law at some future time). The signing statement is not a self-executing document but instead requires the president additionally to direct his subordinates to disregard the law. The president may state his intention to pursue such a course of action in a signing statement, but such orders also may occur via internal communications within the executive branch. As Bradley and Posner stated:

> The critics confuse the medium and the message . . . . The fact that presidents may use signing statements to advance erroneous views about their constitutional powers or the meaning of a statute is not grounds for criticizing the tool, just as policy disagreement about the use of the veto would not be grounds for criticizing the president's veto power.[94]

For this reason, the debate should shift its focus to the actual outcomes of the president's constitutional objections and, further, should consider how best to insist that the president make clear his intentions in his signing statements.

The argument that signing statements amount to line-item vetoes suffers similar problems as the veto-abuse claims. When the president issues a constitutional objection to a provision of a law, he is exercising his executive interpretive authority and making a claim about the Constitution's effect on that statute. There is nothing inherently unconstitutional about such communication from the president. After all, it is one thing for the president to assert that a law is unconstitutional and quite another for him to actually disregard the law. His constitutional objection may not in fact translate to a failure to implement the law. Even if the president fails to implement a provision of a law, the law itself remains on the books. In contrast, a line-item veto essentially nullifies that provision.

91. *See* Bradley & Posner, *supra* note 1, at 26.
92. *Id.*
93. *Id.*
94. *Id.* at 44.

III. AN ALTERNATIVE DISCOURSE

A. The Real Problem—Uncertainty

While the current debate misdiagnoses the problem with signing statements, it has brought attention to legitimate symptoms of the real problem—the uncertain effect of signing statements, which obstructs congressional oversight and political accountability of the executive. The critiques of signing statements from the Coalition and the ABA Task Force missed the key question: Does the president follow through on his objections in signing statements by refusing to enforce a law, in whole or in part, or under particular circumstances? Without an answer to this threshold question, Congress, the judiciary, and the public are deprived of the opportunity to participate in the ever-shifting dialogue on separation of powers boundaries. The courts and Congress traditionally push back if the president oversteps his bounds—by judicial rulings that his actions violate a stature or the Constitution; by oversight hearings and enforcement of subpoenas for information required by law; or, if all else fails, by impeachment for failure to faithfully execute the law.[95] The troubling aspect of the Bush Administration's use of signing statements is that the pushback mechanism is ineffective if Congress does not know the meaning and the intentions of the president's objections. Signing statements may express contentious views of executive power, but, without more information on how or whether the president will translate his views into action, it is unclear if those views will or will not be implemented.

The sweeping boilerplate objections in Bush's signing statements have undermined the traditional signaling function of these statements. This function has been an important mode of communication between a deadlocked Congress and president.[96] Bush's signing statements, however, obscure his actual intent and harm the constitutional norms of cooperation between the branches of government. This in turn prevents effective congressional oversight. Even if the president uses signing statements simply to declare his constitutional views in a rhetorical fashion, the president should issue communications that make that purpose transparent. In some instances, the president's objections in signing statements are merely "placeholders to preserve an executive viewpoint about the

95. *Id.* at 40.

96. See *supra* Part I.B.1–I.B.4 for examples of signing statements from different administrations that triggered dialogue between Congress and the president.

Constitution, not an indication that the Executive will decline to fully enforce a statute."[97] The uncertain outcome of a placeholder objection in a signing statement impedes congressional oversight. By making his views public, the president has an institutional and prudential obligation to communicate openly, rather than confusing Congress and the public with boilerplate language that seems deliberately to obscure the president's intentions. Such rote objections in statements dull the signaling purpose of an important communication device.

The pragmatic concern here is that what are actually broad claims to power gradually appear to be "routine legal formulae" that escape careful attention.[98] Congress and the public become accustomed to the frequent template objections, which may in fact constitute executive overreaching that passes unnoticed and unchecked. Thus, the harm of vague signing statements could be interpreted as

> an attempt by the Administration to systematically object to any perceived congressional encroachment, however slight, with the aim of inuring the other branches of government and the public to the validity of such objections and the attendant conception of presidential authority that will presumably follow from sustained exposure and acquiescence to such claims of power.[99]

Even if the president does not deliberately conceal his intentions, such unclear communication creates suspicion, mistrust, and uncertainty that nonetheless damage the relationship between the president and Congress.[100] This may

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97. Bradley & Posner, *supra* note 1, at 28.

98. Cooper, *supra* note 21, at 518.

99. HALSTEAD, *supra* note 15, at 11. Constitutional law scholar Laurence Tribe similarly described this process of indoctrination:

> [W]hat is new and distressing [about this administration's use of signing statements] is the bizarre, frighteningly self-serving, and constitutionally reckless character of those views—and the suspicion that this President either intends actually to act on them with some regularity, often in a manner that won't be publicly visible at the time, or intends them as declarations of hegemony and contempt for the coordinate branches—declarations that he hopes will gradually come to be accepted in the constitutional culture as descriptions of the legal and political landscape properly conceived and as precedents for later action either by his own or by future administrations.

Posting of Laurence Tribe to Balkanization Blog, http://balkin.blogspot.com/2006/08/larry-tribe-on-aba-signing-statements.html (Aug. 6, 2006, 20:00 EST).

100. Vague signing statements expose the president to criticism that he may not even deserve. Critics may attribute opportunistic motives of executive overreaching even when there are none. The uncertainty of the effect of signing statements breeds speculation about what the president may be hiding, leading to friction between Congress and the president. *See, e.g.*, Bradley & Posner, *supra* note 1, at 20 (rejecting the argument that President Bush's increased use of signing statements after the September 11 attacks is a "subterfuge" for expanding his power).

harm the informal cooperation that takes place during the legislative process and, thus, increase bargaining costs.[101]

B. President Bush's Departure From His Predecessors

There is nothing new about presidents asserting broad, even dramatic, claims to authority, particularly in the context of conflict such as 9/11. However, the sweeping nature and boilerplate formula used by President Bush to communicate his claims are unprecedented.[102] In addition, the Bush Administration's prolific issuance of signing statements has generated speculation over what the president wants to hide or may be hiding.

President Bush seems to have departed from his predecessors in at least two ways. First, Bush has produced more constitutional challenges or objections in signing statements than his predecessors.[103] According to the latest count, President Bush had issued 157 signing statements, challenging over 1100 provisions of law.[104] The significant rise in the proportion of signing statements that contain constitutional objections (78 percent) is amplified even more when considering the fact that they generally contain multiple objections.[105] He has asserted 363 objections on the basis that Article II does not allow Congress to interfere with the president's power to supervise the "unitary executive," 147 objections based on the president's exclusive power over foreign affairs, 170 objections based on his power to withhold information required by Congress to protect national security, and 76 objections based on his commander-in-chief powers.[106] President Bush has

101. *See id.* at 35. Congress may suspect that the president will publicly support a position prior to the vote and express a different position after the vote in a signing statement. As a result, Congress may vote down bills whose compromise language it supports.

102. The scope of President Bush's signing statements also has been the subject of controversy. The majority of President Bush's signing statements have asserted a broad and, in many instances, exclusive set of powers in the president using the theory of the unitary executive. This Comment limits the discussion to how the expansive nature of such claims in signing statements contributes to the uncertainty of the statements' actual effect.

103. HALSTEAD, *supra* note 15, at Summary.

104. *See* NEIL KINKOPF & PETER SHANE, AM. CONSTITUTION SOC'Y FOR LAW & POLICY, INDEX OF PRESIDENTIAL SIGNING STATEMENTS: 2001–2007 (2007), http://www.acslaw.org/files/Signing%20Statement%20Chart%20-%20Neil%20Kinkopf%20and%20Peter%20Shane.pdf (including a chart detailing the types and numbers of challenges or objections to statutory provisions signed into law, with a total of 1430 affected provisions); Presidential Signing Statements, *supra* note 34 ("At this point, it is more accurate to say that 156 signing statements challenge about 1,100 provisions in about 155 federal bills."); Dr. Christopher S. Kelley, http://www.users.muohio.edu/kelleycs (last visited Jan. 31, 2007).

105. HALSTEAD, *supra* note 15, at 9.

106. KINKOPF & SHANE, *supra* note 104.

also issued objections to legislative provisions establishing affirmative action programs, statutes requiring reports by executive agencies, and legislation establishing basic qualifications for executive appointees.[107]

Second, "it is a hallmark of the [president's] signing statements that the objections are ritualistic, mechanical, and [unspecific] with no citation of authority or detailed explanation."[108] The president's reservation of broad swaths of executive power leaves us wondering when and whether the president has decided to exercise his nonenforcement power or implement the law in a way that departs from the intent of Congress.

Scholars disagree about the extent to which Bush's practice differs from that of his predecessors. Bradley and Posner provide a useful comparison between the Clinton and Bush Administrations and conclude that the two presidents do not differ significantly in their substantive objections, which generally are issued in response to perceived encroachments on executive authority. Bradley and Posner concede, however, that Bush has "departed from the norm by frequently issuing challenges to numerous statutory provisions within a single signing statement."[109] A typical Bush signing statement may challenge a half dozen or more statutory provisions, unlike the signing statements used by other presidents, which usually challenged only a few.[110] The Congressional Research Service has confirmed this finding:

> Of President Bush's 149 signing statements, 127 (85%) contain some type of constitutional challenge or objection, as compared to 105 (27%) during the Clinton Administration. Even more significant, however, is the fact that these 127 signing statements are typified by multiple constitutional and statutory objections, containing challenges to over 700 distinct provisions of law.[111]

The signing statements do not provide specific constitutional reasoning for the president's objections, assertions, or scenarios in which his reservations of power would be invoked.[112] Instead, the statements make vague assertions of

107. *Id.*
108. AM. BAR ASS'N, *supra* note 14, at 17.
109. Bradley & Posner, *supra* note 1, at 5.
110. *Id.*
111. HALSTEAD, *supra* note 15, at 9.
112. *See id.* at 11; *see, e.g.*, Statement on Signing the Consolidated Appropriations Resolution, 2003, 39 WEEKLY COMP. PRES. DOC. 225, 226 (Feb. 20, 2003) ("In addition, a number of provisions of H.J. Res. 2 are inconsistent with the constitutional authority of the President to conduct foreign affairs, command the Armed Forces, supervise the unitary executive branch, protect sensitive information, and make recommendations to the Congress. Other provisions unconstitutionally condition execution of the laws by the executive branch upon approval by congressional committees. Thus, the executive branch shall construe as advisory the provisions of the bill that

executive authority that render it effectively impossible to ascertain what factors, if any, might lead to substantive constitutional or interpretive conflict in the implementation of a statute. The vague nature of these constitutional challenges and the high number of signing statements have combined to create a level of confusion and uncertainty that the current debate has not adequately addressed.

IV. RECOMMENDATIONS CONSIDERED

A. Legislative Remedies for a Misdiagnosed Problem

Proposals have emerged from the current debate that are ineffective by virtue of targeting the wrong problem. The ABA Task Force proposed that Congress pass legislation that would mandate increased transparency in the president's use of signing statements and would provide Congress standing to challenge signing statements in court. Both of these proposals would be ineffective because they presuppose that signing statements are the problem that needs to be fixed, rather than the underlying threatened action in the signing statement. For this reason, the proposals—while a laudable effort to eliminate uncertainty over signing statements—are not likely to be enforceable in the courts or effective as a practical matter.

1. Transparency—A Binding Requirement

The ABA Task Force proposed that Congress pass legislation requiring the president to submit to Congress an official copy of all signing statements that states the legal basis for his claims and the intention behind the decision, and to make all such submissions available in a publicly accessible database.[113] Such a law already exists but ironically is subject to a signing statement with an unclear effect. In 2002, President Bush signed a Justice Department authorization bill that required the attorney general to submit a report of any instance in which he or any Justice Department official "'establishes or implements a formal or informal policy'" to refrain from enforcing, applying, or administering any provision on the grounds that such provision is unconstitutional.[114]

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purport to: direct or burden the Executive's conduct of international negotiations, such as sections 514, 556, 576, and 577 in the Foreign Operations Appropriations Act.").

113. AM. BAR ASS'N, *supra* note 14, at 24.

114. Fisher, *supra* note 36, at 8 (quoting Pub. L. No. 107-273, § 202(a), 116 Stat. 177 (2002) (codified at 28 U.S.C. § 530D)).

President Bush issued a signing statement with the following challenge to the statute:

> The executive branch shall construe section 530D of title 28, and related provisions in section 202 of the Act, 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, of the performance of the Executive's constitutional duties.[115]

The ABA Task Force characterized this signing statement objection as an "absurd result" that "underscores the reason we so strongly oppose such use of signing statements as 'contrary to the rule of law and our constitutional system of separation of powers.'"[116] The ABA Task Force's characterization of the "absurd result" of the president's signing statement may be attributed to the futility of a bill that attempts to tell the president how he can communicate his views.[117]

The ABA report's proposal misconstrues the nature of signing statements because the president's actions matter, and not just his words. A signing statement may be an idle threat until the point of actual nullification of the law. In fact, signing statements can improve legislative outcomes by serving as an early warning to Congress on where to look for possible failures to fully enforce the law, thereby increasing transparency.[118] When a president subverts the function of signing statements by issuing vague, boilerplate language, Congress should insist on greater transparency through sufficient detail and analysis to evaluate the president's views. However, it is another matter for Congress to require the president to communicate his views on a subject in a certain way.

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115. Statement on Signing the 21st Century Department of Justice Appropriations Authorization Act, 38 WEEKLY COMP. PRES. DOC. 1971 (Nov. 11, 2002).

116. AM. BAR ASS'N, *supra* note 14, at 25.

117. This critique of legislative efforts to impose transparency standards on the president's use of signing statements is confined to how such efforts are legally and practically unenforceable. It is another matter entirely whether the effort by Congress to legislate how the president may communicate his views is politically effective, even if it is legally and practically unenforceable. The effort may be a legitimate strategic move by Congress to impose political pressure on the president. In that regard, previous efforts have had minimal success as measured by the president's continued issuance of signing statements in his characteristic boilerplate fashion. *See infra* note 143.

118. Don Wolfensberger, *The Problem Isn't Signing Statements; It's Enforcing the Laws*, ROLL CALL, Aug. 14, 2006, *available at* http://www.wilsoncenter.org/index.cfm?topic_id=1412&fuseaction=topics.publications&doc_id=196752&group_id=180829.

A binding transparency requirement on the president's issuance of signing statements is legally unenforceable because the courts have limited authority over how the president communicates his commands when he is exercising a legitimate constitutional power, and they have even less authority over how the president communicates his policy and constitutional views, even if those views are problematic or plainly wrong.[119] The president should adopt the guidelines in the proposed statute as a prudential matter, but it is unlikely that Congress could succeed in legislatively compelling a defiant president to adhere to the guidelines. Therefore, Congress should evaluate any instances of actual executive noncompliance with the law, rather than limiting the use of signing statements that may have predicted it.[120]

2. Judicial Standing

The same misdirected approach to a proposed remedy emerges in the second recommendation from the ABA Task Force: for Congress to enact legislation that would confer Article III standing on Congress (as an institution or through its agents) to dispute signing statements in federal court.[121] Similar to legislation that prescribes mandatory guidelines for the president's use of signing statements, legislation that gives Congress standing to challenge signing statements is a vain effort to curb the threat of signing statements to our separation of powers. Also, courts' institutional doctrines invite the political branches to exercise their own interpretive authority regarding the constitutionality of certain governmental action; in the event of interbranch conflict,

119. *See* Todd F. Gaziano, *The Use and Abuse of Executive Orders and Other Presidential Directives*, 5 TEX. REV. L. & POL. 267, 281 (2001) (discussing how the president has broad discretion to use written directives when he is lawfully exercising one of his constitutional or statutorily delegated powers).

120. *See* HALSTEAD, *supra* note 15 ("It does not seem likely that a reduction in the number of challenges raised in signing statements, whether caused by procedural limitations or political rebuke, will necessarily result in any change in a president's conception and assertion of executive authority. Accordingly, a more effective congressional response might be to focus on any substantive actions taken by the Bush II Administration that are arguably designed to embed that conception of presidential power in the constitutional framework."); Johnsen, *supra* note 85, at 1591 ("Critics should take care not to deter the appropriate use of signing statements as a form of presidential communication and should instead focus on evaluating the legal views expressed in the statements and any inappropriate executive action premised on those views.").

121. Senator Arlen Specter introduced a bill that would grant standing on Congress to challenge signing statements in federal court. Presidential Signing Statements Act of 2006, S. 3731, 109th Cong. (2006).

courts often decline judicial review and leave the branches to resolve their dispute through the political process.[122]

There are several flaws inherent in the ABA proposal to confer Article III standing on Congress. First, Congress can grant statutory standing but not Article III constitutional standing, which only federal judges may decide according to what constitutes a case or controversy.[123] A case or controversy must include, at minimum, a cognizable injury, traceability, and redressability.[124] A signing statement does not actually constitute an injury to Congress, notwithstanding other potential complications of providing congressional standing.[125] Laurence Tribe likened the president's objections in a signing statement to "mere insult, not genuine injury—just as Congress might be insulted but could hardly be deemed 'injured,' in any sense of which a court could properly take notice, by a president's contemptuous remarks in a State of the Union Address."[126] For this reason, it is unlikely that a federal court would recognize congressional standing in this context.

Second, the remedy presupposes that a signing statement actually nullifies a law, thereby constituting executive lawmaking in defiance of Congress's powers. However, the actual effect of a signing statement is unclear and may only amount to the president reserving the power to act according to his conception of executive power. If this is the case, then there is no basis for claiming a constitutional injury. Further, it is probably never the case that a signing statement alone can nullify a law, because there must be some ensuing executive action. The president would have to carry out his objections in his signing statement in order for any action, let alone injury, to occur.[127]

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122. *See* Goldwater v. Carter, 444 U.S. 996 (1979). In *Goldwater*, individual members of Congress challenged a presidential treaty termination, but it was found nonjusticiable because it presented a political question. *Id.* For an argument of how Congress as a party plaintiff would not pose the same practical problems with standing as do actions by individual members of Congress, see Lawrence Dessem, *Congressional Standing to Sue: Whose Vote Is This Anyway?*, 62 NOTRE DAME L. REV. 1 (1986).

123. Fisher, *supra* note 36, at 10.

124. *See* Allen v. Wright, 468 U.S. 737, 751 (1984).

125. *See, e.g.*, Arend & Lotrionte, *supra* note 45.

126. Posting of Laurence Tribe, *supra* note 99.

127. Even if Congress could show that the president takes nonenforcement action in accordance with his claimed authority in a signing statement, and assuming standing were met, courts may find that an action of the president is not reviewable based on the political question doctrine. The reluctance of courts to get involved may be best exemplified in the context of executive orders, a close cousin of signing statements (except that executive orders are affirmative executive directives, whereas signing statements may be merely rhetorical assertions of executive power). Only a handful of executive orders have been judicially overturned. *See* Tara L. Branum,

Finally, there is a constitutionalism argument against judicial resolution of interbranch disputes. Constitutional scholar David Barron has raised the perils of a court implying a cause of action that could subject the interbranch dispute to be resolved at the insistence of either Congress or a private party.[128] He argued that the Court has not attempted to assert itself as a final authority on constitutional meaning in all cases that come before it, but rather leaves room for other branches to make independent constitutional judgments.[129] This structural sharing of interpretive authority is implied in federal courts' doctrines of deference, which reflect the courts' own conception of the limitations of its decisional capacities.[130] The constitutional structure that provides for sharing of interpretive authority is intentionally ambiguous on many questions of relative authority between the branches.[131] This opacity results in the practical distribution of powers that the Constitution confers to the branches through the "to and fro of political struggle," rather than through judicial resolution.[132] Even if the courts decided they could review the sensitive and shifting questions of interpretive authority at the heart of interbranch disputes, judicial resolution by virtue of doctrinal limitations likely would resolve the disputes in a categorical manner.

B. An Aspirational Argument for Transparency

Despite the futility of legislating a transparency norm for the use of signing statements, the requirements for notification and reporting suggested in the 21st Century Department of Justice Appropriations Authorization Act[133] serve as constructive guidelines to provide more transparency. Providing as much notice as possible as early as possible in the legislation cycle increases the transparency of the president's

President or King? The Use and Abuse of Executive Orders in Modern-Day America, 28 J. LEGIS. 1, 79 (2002) (discussing *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999), which held that an institutional injury to the power of Congress does not grant standing in court and that disputes between the branches should be, as they have been historically, regarded as political disputes). *But cf*. Barron, *supra* note 46, at 91–99 ("[I]n disputes between the branches, the Court does purport to be performing the strongest form of its settlement function. . . . Thus, it would be a mistake to argue that a [separation of powers] dispute . . . is one that by nature is a political question or would not actually settle the interbranch dispute.").

128. Barron, *supra* note 46, at 102.

129. *Id*. at 69–70.

130. *See id*. at 70 (citing LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 949 n.121 (3d. ed. 1999)).

131. *Id*. at 86.

132. *Id*. at 100.

133. Pub. L. No. 107-273, 116 Stat. 1758 (2002) (codified in scattered sections of 28 U.S.C.).

intentions and allows those who disagree with his interpretation of a statute to mobilize to litigate or obtain a legislative revision.

This transparency is well illustrated by the examples discussed in Part I.B, which show how previous administrations have fashioned signing statements to advance dialogue between the president and Congress. Presidents have used signing statements to signal disagreement with Congress with varying outcomes. Under some circumstances, a signing statement triggered confrontation, escalation of threats, and, ultimately, resolution of the separation of powers dispute. Under other circumstances, such as in the Competition in Contracting Act of 1984[134] during the Reagan Administration, the interbranch dispute was resolved by a court at the insistence of a private party who sued under the Act.[135]

Bush's use of signing statements has not led to such open dispute resolution. Rather, his signing statements have generated uncertainty and confusion because they obfuscate the intentions of the president. Phillip Cooper[136] suggested holding the president accountable in the use of signing statements by tracking further signing statements and asking the following questions: "'What do you mean by this? What is your intention? What is the significance?'"[137] This kind of public scrutiny and political pressure should be applied to the president to demand that he increase the level of transparency and accountability in his use of signing statements.

As previously discussed, trying to legislate how the president may announce his constitutional views misconstrues the nature of signing statements and their true problem. Bradley and Posner agree that the current criticism against signing statements is a red herring, viewing them as mere policy statements by the executive that are constrained in the same way as all other exercises of delegated authority.[138] Thus, they argue that signing statements do not undermine the separation of powers as critics claim.[139] However, Bradley and Posner's view of the nature of signing statements neglects how certain uses of signing statements obscure the president's intentions with a law, and that a lack of transparency threatens the separation of powers. The lack of transparency makes it difficult for Congress to constrain the executive, because Congress does not know how the president's position relative to a law translates to executive action, if at all. In fact, the president may not clearly

134. Pub. L. No. 98-369, § 2701, 98 Stat. 494, 1175.

135. *See supra* Part I.B.2.

136. The Portland State University professor has studied President Bush's first-term signing statements. *See generally* Cooper, *supra* note 21.

137. Posting of Dan Froomkin to Neiman Watchdog Blog, http://www.niemanwatchdog.org/index.cfm?fuseaction=ask_this.view&askthisid=00211 (July 27, 2006) (quoting Phillip Cooper).

138. *See* Bradley & Posner, *supra* note 1, at 36–39.

139. *See generally* Bradley & Posner, *supra* note 1.

express his position in the first place. Unlike signing statements as mere policy statements, signing statements as expressions of broad reservations of executive power, to be exercised by the president at his discretion—now, later, or never—provide virtually no guidance for congressional oversight. The Bush Administration has issued signing statements that do not make the distinction between a policy statement and what ultimately could lead to something more, such as a directive to the president's subordinates to exercise nonenforcement of a law.[140]

To ease this uncertainty, the president should provide increased transparency in his signing statements as a prudential matter. Signing statements historically have served to trigger a political tug-of-war between the branches. They have since evolved into legal boilerplate and thereby have lost their value as communication devices that signal the president's disagreement with and reservations about legislation. As a result, uncertainty and suspicion have replaced the political rebuke and healthy debate between the branches that signing statements formerly initiated.

If the president tries to hide his intentions or resists drafting transparent signing statements, as this administration has done,[141] Congress must enhance its use of oversight tools that provide political leverage over the president. Until now, Congress has had minimal, albeit promising,[142] success with exerting

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140. While the focus on signing statements as a source of controversy may be misplaced, congressional concerns with effective oversight of the executive to protect its institutional prerogatives has resulted in greater scrutiny of the Bush Administration's

> expansive view of presidential authority as expressed not only in signing statements, but in executive orders, [Office of Legal Counsel] opinions, internal White House Memoranda, and refusals to accede to congressional and legislative branch agency requests for information. All of these tools have been used by President Bush to exert control over executive personnel in their administration of statutory obligations and interaction with Congress.

HALSTEAD, *supra* note 15, at 25.

141. Phillip Cooper described the Bush Administration's signing statements as a paradox—"audacious claims to power hidden in plain sight"—that reserve expansive authority for the executive but leave unclear how and whether that placeholder translates to executive action. Cooper, *supra* note 21, at 530 (capitalization altered).

142. The increased political pressure and greater public scrutiny on the administration's issuance of signing statements may explain the changes in the president's usage of signing statements. *See* Presidential Signing Statements—George W. Bush—2001–2008, http://www.coherentbabble.com/signingstatements/signstateann.htm (last visited Jan. 20, 2008) (providing a chronology of news items related to signing statements, as well as a database that shows (1) the increasing media treatment of signing statements; (2) the decreasing number of signing statements; and (3) the increasing number of presidential vetoes).

Further, President Bush issued no vetoes in his first five years in office. Since the highly publicized congressional oversight hearings regarding signing statements in June 2006, he has issued six vetoes according to the latest count. The first veto on a stem cell research bill was issued in July 2006. *See* Jennifer Loven, *Bush Vetoes $606 Billion Spending Bill*, ASSOCIATED PRESS, Nov. 13, 2007, http://ap.google.com/article/ALeqM5j057jBReERcsF-FcZRSWe0h1gaXQD8ST1JJ82.

political pressure on the president over his use of signing statements.[143] As discussed in Part III.A, legislating transparency requirements would not be legally binding. Further, they have had limited political efficacy thus far because the president has resorted to issuing signing statements that contain circular and conclusory claims that statutes are unconstitutional because he believes them to be unconstitutional. By obscuring his intentions regarding whether he will fail to enforce a law or will take some alternative measure that constitutes less than the expected enforcement, the president has evaded political accountability for his constitutional judgments and corresponding actions.[144] Thus, Congress and the public should marshal their political resources to insist that the president restore the signaling function of signing statements by making his constitutional objections, reservations, and assertions of power transparent. A signing statement should provide the basis and authority for any objection, the specific provision(s) at issue, and the president's intentions with respect to enforcing the legislation.

143. To date, the legislation Congress passed to institute greater transparency in the practice of signing statements has achieved minimal results because the administration has largely rebuffed the political pressure intended by the legislation's passage, and the statute itself is not legally enforceable. Subsequent to the legislation, President Bush has continued to issue signing statements that contain the vague legal boilerplate and sweeping generality, which the statute was intended to address. *See, e.g.*, Statement on Signing the Department of Defense Appropriations Act, 2008, 43 WEEKLY COMP. PRES. DOC. 1485 (Nov. 13, 2007).

144. Even if the statute has no real legal or practical consequences, it may have increased the political costs of issuing signing statements and forced the issue into the open. Release of a controversial signing statement will now place the president in a defensive position in which he must justify the nature and substance of his signing statements. Also, the president may be less inclined to release a signing statement when Congress has threatened to take counter-action. For example, President Bush vetoed an Iraq war spending bill in May 2007. *See* U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, H.R. 1591, 110th Cong. (2007). Based on the language in Bush's veto message, democratic lawmakers grew concerned that he would attach a signing statement to circumvent a future Iraq spending bill, and thus threatened to sue the president in such an event. *See* Jonathan E. Kaplan & Elana Schor, *Pelosi Threat to Sue Bush Over Iraq Bill*, HILL, May 8, 2007, http://thehill.com/leading-the-news/pelosi-threat-to-sue-bush-over-iraq-bill-2007-05-08.html. Congress sent the president a new Iraq funding bill later in the month that did not contain the deadline restrictions from the first iteration of the bill, but that did contain mandatory reports to Congress on Iraq's progress in meeting progress benchmarks. *See* Small Business and Work Opportunity Tax Act of 2007, Pub. L. 110-28, 121 Stat. 169 (2007). The bill was passed without a signing statement. The lack of a signing statement is noteworthy because President Bush has routinely issued signing statements that have challenged mandatory reporting as an interference with the president's authority to withhold information. Such statements have contained formulaic language, such as the following: "The executive branch shall construe such provisions 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." *See, e.g.*, Statement on Signing the National Defense Authorization Act for Fiscal Year 2006, 42 WEEKLY COMP. PRES. DOC. 23 (Jan. 6, 2006).

Congress could strengthen its latest efforts to achieve this goal by utilizing oversight tools with direct legal force as part of its overall political strategy. Congress could threaten to cut budgets, order investigations of the president and his subordinates, and, at the most extreme, impeach the president. If the president tried to hide his intentions with a law, he would face the prospect of engaging in a potentially escalating confrontation. In this situation, the president's recalcitrance would only engender political costs such as generating public mistrust and embarrassing Congress; these costs could create problems for the president as a repeat player in the legislative process. Congress's appropriations power has more direct persuasive muscle that compels the president either to communicate openly and work with Congress on a given disagreement or to face withheld funding for certain executive posts and initiatives.[145]

A transparency norm would operate as a presumptive standard that respects the shared powers between Congress and the president in what is an inherently opaque and fluid separation of powers structure. While the presumption would favor more, rather than less, transparency in signing statements, the standard may be less exacting in a context in which the respective powers of Congress and the president are well established as more separate spheres. For example, the president has broad executive interpretive power with respect to his pardon powers.[146] If Congress passed a bill that infringed on the president's exercise of his pardon power, for instance, by subjecting the president's decision to congressional approval, the president's signing statement could validly object to this encroachment of his executive authority. Congress would have overreached, and the president may cite to the express constitutional grant of the pardon

145. For example, Democratic lawmakers, dissatisfied with the president's veto on November 13, 2007, of a domestic spending bill (H.R. 3043), while on the same day signing a defense spending bill (H.R. 3222), are withholding a veterans spending bill favored by the president in order to retain leverage. *See* David Clarke, *Bush Vetoes Labor-HHS-Education Spending Bill, Signs Defense Measure*, CQ TODAY, Nov. 13, 2007, *available at* http://www.lexisnexis.com (last visited Nov. 13, 2007) ("Republicans have been pressing Democrats to send Bush the Military Construction-VA spending bill (HR 2642). But Democrats are reluctant to do so because it is the only remaining bill Bush has said he is ready to sign. To send it to him on its own would remove most of the minimal leverage they still have.").

146. The Pardon Clause of the U.S. Constitution vests in the president the "Power to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." U.S. CONST. art. II, § 2. Although the Supreme Court has struck down congressional attempts to limit the president's pardon power, *see* United States v. Klein, 80 U.S. 128, 147–48 (1871), "no court has ever ruled on the issue of whether Congress has any authority either to exercise the pardon power itself (either through specific pardons or general amnesties) or to oversee the president's use of the power," Todd David Peterson, *Congressional Power Over Pardon and Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225, 1226 (2003).

power with little controversy.[147] Here, the president's objection and cited authority for his objection would serve as a useful signal to Congress. In other circumstances, where the doctrine is less clear, the president would need to provide more guidance on how he intends to interpret and carry out (or refuse to carry out) the provision at issue. The overall purpose would be to provide Congress with the transparency required for activating the system of checks and balances to ensure that the branches do not overstep their constitutional bounds, and, toward that end, for promoting interbranch dialogue.

Signing statements may be used differently in circumstances in which Congress encroaches on executive authority in legislation but the president nonetheless cooperates with congressional requests. Such circumstances have previously arisen. For example, Congress often attempts to place restrictions on the pool from which the president may select appointment candidates.[148] As a mandatory directive to the president, these restrictions violate the Appointments Clause,[149] as each of the past four presidents has noted in signing statements.[150] On the other hand, "[i]f construed as a recommendation from Congress . . . these provisions are constitutional and are often routinely followed."[151] A signing statement on this issue, therefore, may be a declaration that the president remains free as a matter of policy to adopt the provisions, rather than a declaration that he will not follow them.[152] Such a reservation of executive authority to comply with a congressional mandate may be considered uncontroversial where the limits of constitutional authority are more clearly demarcated. In fact, such a signing statement would allow the executive the flexibility to cooperate with Congress while retaining the executive authority it otherwise would appear to be ceding.

When promoting dialogue is an issue because the authority claimed is a shared power between the president and Congress, or the topic of the legislation implicates shared powers, transparency in a signing statement would be most compelling. The president and Congress are both operating within a jointly controlled sphere of authority, and, therefore,

147. *See* U.S. CONST. art. II, § 2.

148. *See, e.g.*, Statement on Signing the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, 41 WEEKLY COMP. PRES. DOC. 1273, 1273 (Aug. 10, 2005) ("The executive branch shall construe the described qualifications and lists of nominees under section 4305(b) as recommendations only, consistent with the provisions of the Appointments Clause of the Constitution."); *see also Hearing*, *supra* note 9.

149. U.S. CONST. art. II, § 2.

150. *Hearing*, *supra* note 9.

151. *Id.*

152. *Id.*

there is an increased need for dialogue between the branches. For example, the HIV provision in the National Defense Authorization Act for Fiscal Year 1996[153] signing statement implicated shared powers—President Clinton's commander-in-chief powers over the armed forces and Congress's power to make rules for the regulation of the armed forces.[154] President Clinton's signing statement provided an effective signal of constitutional disagreement with Congress and implicitly acknowledged Congress's shared authority in managing the military.[155]

Difficulty arises when there is disagreement over whether the claimed or implicated power in the subject of the legislation is a shared power or when there is disagreement over the extent of each branch's powers in an amorphous sphere of overlapping powers. Under these circumstances, transparency would be highly important, allowing the dispute to be fought openly, providing Congress and the public the opportunity to negotiate a proper separation of powers balance. Often, the president believes he is restoring power to the executive branch by objecting to the encroachment of his powers in a signing statement, while Congress believes the president is overstepping his bounds or is simply wrong on the merits of his objections. Examples of contested issues include the power to terminate treaties, to enter into executive agreements, and to establish and enforce U.S. foreign policy, which are heatedly and inconclusively debated.[156] These are contentious areas in which Congress and the executive have traditionally skirmished, and the lines demarcating constitutional boundaries remain nebulous. Such occasions call for open dialogue between the branches to safeguard any encroachment by either branch.

The areas of disagreement regarding shared versus exclusive powers have grown larger as a result of the Bush Administration's expansive concept of executive power.[157] For instance, Bush has consistently objected to reporting requirements.[158] The president's signing statements often include the boilerplate language that the executive branch will construe provisions

153. Pub. L. No. 104-106, 110 Stat. 86 (1996).

154. The president's broadly defined commander-in-chief power is limited by other constitutional powers granted to Congress in Article I of the Constitution, such as the power to declare war, to raise and support the armed forces, to make rules for the regulation of the armed forces, and to provide for calling forth the militia of the several states. U.S. CONST. art. I, § 8.

155. *See supra* Part I.B.4.

156. Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231, 233 (2001).

157. The conflicting perspectives of executive power held by the president and members of Congress may explain the relatively high number of constitutional signing statements issued by the Bush Administration. See *supra* Part III.B for statistics.

158. *See* HALSTEAD, *supra* note 15, at 18–19.

of an act requiring the submission of information to Congress "in a manner consistent with the President's constitutional authority to withhold information."[159] This position overstates in ostensibly absolutist terms the executive's right to withhold documents from Congress. Historical and judicial precedent offer a different view of the executive's right to confidentiality of information.[160] For example, the constitutional grant of authority to Congress to impose reporting requirements on the executive branch is well established.[161] The president may still exercise a claim of privilege or withhold documents on the basis of national security, but even this authority is circumscribed by the compulsory powers of the other branches.[162] Regarding claims of privilege to presidential communications, the Supreme Court held in *United States v. Nixon*[163] that the notion of privilege is constitutionally rooted, and that when invoked by the President, the materials at issue are deemed "presumptively privileged."[164] Yet, the Court further held that the privilege is qualified, not absolute, and may be overcome by an adequate showing of need.[165] Thus, the position that Bush has taken with respect to executive privilege seems more absolutist than historical understandings of the scope of the privilege.

Disagreement regarding the scope of executive privilege would normally call for heightened transparency. However, the need for and importance of transparency that should otherwise govern this objection in a signing statement competes with claims of executive privilege to withhold national security intelligence. Certainly, Congress could not expect the president to anticipate future circumstances in which newly enacted provisions might be construed to involve the disclosure of sensitive information.[166] The president necessarily may have to reserve the power

159. *Id.* at 15.
160. *Id.* at 17.
161. *Id.* at 20.
162. *See* Mark J. Rozell, *Executive Privilege Revived?: Secrecy and Conflict During the Bush Presidency*, 52 DUKE L.J. 403, 404 (2002) ("Executive privilege is an implied power derived from Article II. It is most easily defined as the right of the president and high-level executive branch officers to withhold information from those who have compulsory power—Congress and the courts (and therefore, ultimately, the public) . . . Today, executive privilege is considered most legitimate when used to protect, first, certain national security needs, and second, the confidentiality of White House deliberations between the president and his advisors so that openness, honesty, and trust will prevail in high-level policy discussions. Related to the second, executive privilege may be appropriate in circumstances where confidentiality is necessary to protect ongoing executive branch investigations.").
163. 418 U.S. 683 (1974).
164. *Id.* at 708 (internal quotation marks omitted).
165. *See id.* at 706.
166. *See, e.g.*, Statement by the President Upon Approval of Bill Amending the Mutual Security Act of 1954, PUB. PAPERS 549 (July 24, 1959) ("I have signed this bill on the express

to withhold information in such unpredictable future circumstances. A good-faith assessment by the executive in claiming authority to withhold information may still result in a legitimately different view from Congress regarding the scope of the claimed executive privilege. While transparency may not be at its most robust in this situation,[167] because of the difficulty in forecasting future events, Congress would still benefit from a general presumption in favor of transparency. When the president provides a placeholder objection by reserving executive authority in a signing statement, Congress is put on notice of the potential for presidential nonenforcement in undefined circumstances. Ideally, the president would notify Congress of such nonenforcement, but he is not bound to do so.[168] In a regime of transparency, even a relatively nontransparent signing statement would provide a useful signal to Congress by virtue of its conspicuous lack of transparency. In contrast, vague, legal boilerplate is characteristic of current signing statements. Congress cannot pursue effective oversight if it cannot differentiate between rhetorical claims of power and genuine constitutional reservations and objections.

V. THE ASPIRATIONAL ARGUMENT APPLIED

If we return to the DTA signing statement as a case study, we may observe the value of a transparency norm in signing statements. Ironically, the

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premise that the three amendments relating to disclosure are not intended to alter and cannot alter the recognized Constitutional duty and power of the Executive with respect to the disclosure of information, documents, and other materials. Indeed, any other construction of these amendments would raise grave Constitutional questions under the historic Separation of Powers Doctrine."); *see also Hearing*, *supra* note 9.

167. This generalized declaration of executive power, without any specific objection to the provision or any substantive analysis of how its requirements might impinge on executive authority, provides no basis for Congress to engage the president in meaningful debate.

168. For example, the Reagan Administration voluntarily instituted notice guidelines in a memorandum on the use of executive privilege:

> [I]f a department head believed that a congressional request for information might concern privileged information, he would notify and consult with both the attorney general and the counsel to the president. Those three individuals would then decide to release the information to Congress, or have the matter submitted to the president for a decision if any one of them believed that it was necessary to invoke executive privilege. At that point, the department head would ask Congress to await a presidential decision. If the president chose executive privilege, he would instruct the department head to inform Congress that the claim of executive privilege [was] being made with the specific approval of the President. The Reagan memorandum allowed for the use of executive privilege even if the information originated from staff levels far removed from the Oval Office.

Rozell, *supra* note 162, at 406 (citation omitted) (internal quotation marks omitted).

DTA signing statement, despite containing the opaque language characteristic of the Bush Administration, triggered the kind of debate and scrutiny that signing statements should generate and traditionally have generated. The high visibility of the matter resulted from a public clash between the Bush Administration and Congress. By attracting not only national but also international attention, this clash generated pressure on the administration to abandon its opposition to the legislation. This was a special case, however. We can imagine that without a transparency norm in signing statements, legal boilerplate objections could easily slip past the radar of Congress and the public when laws are not fought at such a visible level and during a different administration that may not garner the same level of hostility and suspicion due to its controversial views of executive power.[169]

According to a transparency norm, President Bush would have made clear his intentions in his signing statement and confronted the political consequences.[170] Instead, he supported the law after public outcry and international pressure,[171] and then issued a signing statement with an objection in characteristically sweeping, vague language. The DTA signing statement read:

> [T]he executive branch shall construe [the law] in a manner consistent with the President's constitutional authority as Commander in Chief. . . . [This approach] will assist in achieving the shared objective of the Congress and the President . . . of protecting the American people from further terrorist attacks.[172]

The president's signing statement struck Congress and the public as misleading. Senator Patrick Leahy described the president's action as

169. Even with the Detainee Treatment Act of 2005 (DTA) signing statement, *see* DTA Signing Statement, *supra* note 64, it was reported that the statement, which was posted on the White House website, had gone unnoticed over the New Year's weekend. Savage, *supra* note 65, at A1.

170. The DTA implicated the president's war powers, *see* Pub. L. No. 109-148, 119 Stat. 2739 (2005) (to be codified in scattered sections of 10, 28, and 42 U.S.C.), an area of disagreement between the president and Congress because of the president's claim to exclusive power in this sphere. Such disagreement would make transparency a compelling case to push the separation of powers debate forward.

171. Senator John McCain introduced an amendment to the DTA to ban all U.S. personnel from engaging in "cruel, inhuman, or degrading treatment" of detainees. *See* Savage, *supra* note 65, at A1; 151 CONG. REC. S10,908 (daily ed. Oct. 3, 2005) (SA 1977). The White House had threatened a veto unless the legislation contained an exemption for the CIA. *See* Savage, *supra* note 65, at A1. The administration argued that the bill would otherwise limit the president's ability to protect Americans from a terrorist attack. *Id.* The White House and Congress reached a deal granting the administration's request for the CIA exemption after months of opposition. *See id.* ("[A]fter veto-proof majorities in both houses of Congress approved [the amendment], Bush called a press conference with McCain, praised the measure, and said he would accept it."). President Bush then issued a signing statement. *See id.*

172. DTA Signing Statement, *supra* note 64, at 1918–19.

"'crossing his fingers behind his back.'"[173] The looming question was whether the president intended to follow the law. There were more hints than usual from which to speculate an answer, given White House efforts to block the law before its passage—most notably, the infamous, now-overruled August 2002 Torture Opinion,[174] in which the U.S. Department of Justice's Office of Legal Counsel opined that even criminal prohibitions against torture do "not apply to the President's detention and interrogation of enemy combatants pursuant to [the President's] Commander-in-Chief authority," and that "[a]ny effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President."[175]

The pressure on the administration in the weeks following the DTA signing statement prompted the White House to explain its seemingly contradictory and, at worst, underhanded strategy. An anonymous senior administration official[176] revealed that "the president intended to reserve the right to use harsher methods in special situations involving national security."[177] The official stated that the administration was "not going to ignore this law," and explained that a situation could arise in which Bush may have to waive the law's restrictions to carry out his responsibilities to protect national security.[178] As an example, he cited "a 'ticking time bomb' scenario, in which a detainee is believed to have information that could prevent a planned terrorist attack," but he also admitted that it was not likely that the president's responsibilities to follow the law and to protect the country as commander-in-chief would conflict.[179]

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173. Jonathan Weisman, *Bush's Challenges of Laws He Signed Is Criticized*, WASH. POST, June 28, 2006, at A9 (quoting Senator Patrick Leahy).

174. Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Methods Under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002), *available at* http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf.

175. The Torture Opinion further suggested that executive officials can escape prosecution for torture on the ground that "they were carrying out the President's Commander-in-Chief powers," reasoning that such orders would preclude the application of a valid federal criminal statute "to punish officials for aiding the President in exercising his exclusive constitutional authorities." U.S. Department of Justice, Memorandum from John Yoo, Deputy Assistant Att'y Gen., to Alberto R. Gonzales, White House Counsel, on Interrogation Methods That Do Not Violate Prohibitions Against Torture (Aug. 1, 2002), *available at* http://news.findlaw.com/wp/docs/doj/bybee80102ltr.html.

176. The official refused to be identified by name because the person was not authorized to be a public spokesperson. Savage, *supra* note 65, at A1.

177. *Id.*

178. *Id.* (internal quotation marks omitted).

179. *Id.*

The media firestorm over the signing statement issued after the president's high-profile opposition to the legislation provided political scrutiny that otherwise likely would have been muzzled by a rote objection in a signing statement. As a result, Congress was on heightened alert of the possibility of presidential nonenforcement and could carefully monitor the executive's actions accordingly. The DTA signing statement reinforces the value of a transparency norm that would preserve the useful signaling function of signing statements, even when there is no media fury to trigger political debate.

CONCLUSION

Signing statements historically have served as a useful signal from the president to express disagreement with Congress and as a catalyst to activate the mechanism of checks and balances. Signing statements trigger the dispute resolution mechanism, which begins with the president communicating his constitutional objections and reservations.[180] The president's use of a signing statement to articulate the circumstances in which he predicts that the Constitution will trump the literal mandate of the statute gives Congress notice of potential nonenforcement situations so that it may better provide oversight. The Bush Administration has not issued signing statements in this fashion. Congress should use its institutional and political leverage to insist that the president make transparent his signing statement objections so that Congress may have the opportunity to understand the legal and practical effects of a signing statement. Only then would Congress, courts, and the public have the information necessary to respond accordingly, and to hold the executive politically accountable.[181]

180. It may be argued that the president should express his objections before a law is passed or that he should veto the law, as the ABA Task Force recommended in its report. *See supra* Part II.A. With respect to virtually all omnibus legislation, the president may anticipate applications of some of the provisions that would raise constitutional problems. The possibility that such applications might occur is an unconvincing reason for the president to veto the whole bill. Further, the president may be reluctant to veto an otherwise constitutionally unobjectionable bill after the hard work and political compromise that omnibus legislation entails.

181. *See* Posting of David Barron et al., *supra* note 1.