AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 11: The Contemporary Era – Separation of Powers

Walter Dellinger, **The Legal Significance of Presidential Signing Statements** (1993)[1]

Presidential messages marking the occasion of their signing bills into law have a long history and many uses. They took on new significance in the modern era. Attorney General Edwin Meese in the Reagan administration oversaw the development of new arguments that presidential signing statements should be regarded as part of the legislative record explaining the meaning of a law and should be used by judges when interpreting the law in future cases. Among the young lawyers who first worked on that Justice Department initiative was future Supreme Court justice Samuel Alito.

Although such an implication of presidential signing statement had yet to win significant support in the courts, it had been the subject of controversy among lawyers in political circles, leading some to begin to question the entire idea of the presidential signing statement. As head of President Clinton's Office of Legal Counsel, Walter Dellinger did not disavow the legitimacy and utility of the presidential signing statement and even accepted the Republicans' emphasis on the use of signing statements as an alternative to the veto as a means for the president to address constitutional problems in proposed legislation. Dellinger did stop short of endorsing the view that judges should look to signing statements for guidance in determining what laws mean. Presidential signing statements became newly controversial and frequent during the George W. Bush administration. During the Bush presidency, signing statements were denounced by the American Bar Association and Democratic congressmen. The Obama administration has continued the practice, and Democratic congressmen have again voiced their objections to the use of signing statements to raise constitutional objections to legislative provisions. What authorizes the president to issue any sort of statement when signing legislation? Is the presidential power to enforce the law affected by whether or not the president issues a signing statement? Why might presidents make such public statements?

Memorandum for Bernard N. Nussbaum, Counsel to the President

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To begin with, it appears to be an uncontroversial use of signing statements to explain to the public, and more particularly to interested constituencies, what the President understands to be the likely effects of the bill, and how it coheres or fails to cohere with the Administration's views or programs.

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

A third function, more controversial than either of the two considered above, is the use of signing statements to announce the President's view of the constitutionality of the legislation he is signing. This category embraces at least three species: statements that declare that the legislation (or relevant provisions) would be unconstitutional in certain applications; statements that purport to construe the legislation in a manner that would "save" it from unconstitutionality; and statements that state flatly that

[1] Excerpt from Office of Legal Counsel, 17 *Op. Off. Leg. Counsel* 131 (1993).

the legislation is unconstitutional on its face. Each of these species of statement may include a declaration as to how -- or whether -- the legislation will be enforced.

Thus, the President may use a signing statement to announce that, although the legislation is constitutional on its face, it would be unconstitutional in various applications, and that in such applications he will refuse to execute it. . . . Relatedly, a signing statement may put forward a "saving" construction of the bill, explaining that the President will construe it in a certain manner in order to avoid constitutional difficulties. . . .This, too, is analogous to the Supreme Court's practice of construing statutes, if possible, to avoid holding them unconstitutional, or even to avoid deciding difficult constitutional questions.

More boldly still, the President may declare in a signing statement that a provision of the bill before him is flatly unconstitutional, and that he will refuse to enforce it. This species of statement merits separate discussion.

In each of the last three Administrations, the Department of Justice has advised the President that the Constitution provides him with the authority to decline to enforce a clearly unconstitutional law. This advice is, we believe, consistent with the views of the Framers. Moreover, four sitting Justices of the Supreme Court have joined in the opinion that the President may resist laws that encroach upon his powers by "disregard[ing] them when they are unconstitutional." *Freytag v. C.I.R.* (1991) (Scalia, J., joined by O'Connor, Kennedy and Souter, JJ., concurring in part and concurring in judgment).

If the President may properly decline to enforce a law, at least when it unconstitutionally encroaches on his powers, then it arguably follows that he may properly *announce* to Congress and to the public that he will not enforce a provision of an enactment he is signing. . . .

The contrary view -- that it is the President's constitutional *duty* not to sign legislation that he believes is unconstitutional -- has been advanced on occasion. For example, Secretary of State Thomas Jefferson advised President Washington in 1791 that the veto power "is the shield provided by the constitution to protect against the invasions of the legislature [of] 1. the rights of the Executive 2. of the Judiciary 3. of the states and state legislatures." . . . Jefferson and Madison, however, did not in fact always act on this understanding of the President's duties: in 1803 President Jefferson, with Secretary of State Madison's agreement, signed legislation appropriating funds for the Louisiana Purchase even though Jefferson thought the purchase unconstitutional. . . . In light of our constitutional history, we do not believe that the President is under any duty to veto legislation containing a constitutionally infirm provision, although of course it is entirely appropriate for the President to do so.

Separate and distinct from all the preceding categories of signing statement, and apparently even more controversial than any of them, is the use of such statements to create legislative (or "executive") history that is expected to be given weight by the courts in ascertain the meaning of statutory language. . . . Although isolated examples can perhaps be found earlier, signing statements of this kind appear to have originated (and were certainly first widely used) in the Reagan Administration.

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In support of the view that signing statements can be used to create a species of legislative history, it can be argued that the President as a matter both of constitutional right and of political reality plays a critical role in the legislative process. . . . It may therefore be appropriate for the President, when signing legislation, to explain what his (and Congress's) intention was in making the legislation law, particularly if the Administration has played a significant part in moving the legislation through Congress. . . .

On the other side, it can be argued that the President simply cannot speak for Congress, which is an independent constitutional actor and which, moreover, is specifically vested with "[a]ll legislative powers herein granted." . . . Congress makes legislative history in committee reports, floor debates and hearings, and nothing that the President says on the occasion of signing on a bill can reinterpret that record: once an enrolled bill has been attested by the Speaker of the House and the President of the Senate and has been presented to the President, the legislative record is closed. . . .

Many Presidents have used signing statements to make substantive legal, constitutional or administrative pronouncements on the bill being signed. Although the recent practice of issuing signing statements to create "legislative history" remains controversial, the other uses of Presidential signing statements generally serve legitimate and defensible purposes.

Note: In an internal 1986 Department of Justice memo, Deputy Assistant Attorney General Samuel Alito observed:

> "Under the Constitution, a bill becomes law only when passed by both houses of Congress and signed by the President (or enacted over his veto). Since the President's approval is just as important as that of the House or Senate, it seems to follow that the President's understanding of the bill should be just as important as that of Congress. Yet in interpreting statutes, both courts and litigants . . . invariably speak of 'legislative' or 'congressional' intent. Rarely if ever do courts or litigants inquire into the President's intent. Why is this so?
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> Part of the reason undoubtedly is that the Presidents, unlike Congress, do not customarily comment on their understanding of bills. Congress churns out great masses of legislative history bearing on its intent – committee reports, floor debates, hearings. Presidents have traditionally created nothing comparable. . . .
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> From the perspective of the Executive Branch, the issuance of interpretive signing statements would have two chief advantages. First, it would increase the power of the Executive to shape the law. Second, by forcing some rethinking by courts, scholars, and litigants, it may help to curb some of the prevalent abuses of legislative history."[2]

Why might the Reagan administration have taken such an issue in signing statements? If the president is a participant in the legislative process through the choice to sign or veto a bill, should that imply that his understanding that his understanding of the meaning of the bill is as relevant as the understandings of various members of Congress?

[2] Samuel A. Alito, Jr., "Memo on Using Presidential Signing Statement to Make Fuller Use of the President's Constitutionally Assigned Role in the Process of Enacting Law, February 5, 1986," Office of Legal Counsel.