William & Mary Bill of Rights Journal

Volume *16 (2007-2008)*
Issue 1 *Symposium: The Last Word? The Constitutional Implications of Presidential Signing Statements*

Article 2

October 2007

Introduction: The Last Word? The Constitutional Implications of Presidential Signing Statements

Charlie Savage

INTRODUCTION: THE LAST WORD? THE CONSTITUTIONAL IMPLICATIONS OF PRESIDENTIAL SIGNING STATEMENTS

Charlie Savage*

It is not often in a republic more than 200 years old that a seemingly new constitutional topic emerges that proves worthy of widespread academic thought. Yet on February 3, 2007, legal and political scholars from around the nation converged on Williamsburg, Virginia, to participate in an unprecedented conference at the William & Mary School of Law: "The Last Word? The Constitutional Implications of Presidential Signing Statements." Never before had an entire academic symposium been devoted to this subject. Indeed, the time was not far gone when most Americans had never heard of a "signing statement." But 2006 had witnessed an extraordinary national conversation about this tool of executive power, its exponential growth in the hands of recent Presidents, and its implications for the future of the Constitution's system of checks and balances. This exploding attention to a previously obscure device reached a peak at the *William & Mary Bill of Rights Journal*'s annual scholarly symposium.

By then, the "signing statement" had become a household term, and its basic outlines were generally understood. In short, a signing statement is an official legal document issued by the President on the day he or she signs a bill. Filed in the Federal Register, signing statements lay out the President's interpretation of new laws and instruct the executive branch to interpret the laws in the same fashion. The device becomes controversial when Presidents use it to declare that various sections of the bills that they have just signed are unconstitutional and so do not need to be enforced as Congress wrote them. Moreover, the laws targeted in this fashion have most often been constraints on the President's own power as head of the executive branch or Commander in Chief, so this claimed power to-sign-but-not-enforce boils down to a claimed power to-sign-but-disobey. Or, as the practice's defenders prefer to say, it is a power to instruct the executive branch to "construe" such a law in a manner that would avoid the constitutional conflict that the President claims would otherwise exist—such as by reinterpreting a mandatory provision into a merely advisory one, or otherwise to discover in the statute an unwritten exception for the President to exercise at his own discretion.

---

* Charlie Savage, the national legal affairs correspondent for *The Boston Globe*, received the 2007 Pulitzer Prize for national reporting for his articles about the Bush administration's signing statements and other efforts to expand presidential power. His book *Takeover: The Return of the Imperial Presidency and the Subversion of American Democracy* was published in September 2007 by Little, Brown & Co.

Presidents have issued signing statements challenging laws dating back to the nineteenth century. But the practice was rare until the Reagan administration's second term, when attorneys in the Meese Justice Department proposed issuing them more often as a way to expand presidential power over the law.[1] Since the mid-1980s, Presidents of both parties have used signing statements to challenge provisions in bills much more frequently. And under the Bush-Cheney administration, the practice reached an unprecedented level of intensity. By the time of this symposium, according to data compiled by conference participant Dr. Christopher Kelley of the Miami University in Ohio, Bush had used signing statements to target more than 1,100 distinct sections of bills—nearly double the roughly 600 such laws challenged by all previous Presidents in American history combined.[2] Moreover, unlike his immediate predecessors, Bush had also virtually abandoned his veto power, signing every bill that reached his desk during his first term even as he used signing statements to eviscerate them.[3]

Observers outside the executive branch were slow to recognize what was happening. With the notable exceptions of Kelley and Professor Phillip Cooper at Portland State University's Mark O. Hatfield School of Government, most political and legal scholars gave virtually no thought to signing statements prior to 2006.[4] Nor did the media or Congress pay any attention to the signing statements the White House had quietly filed during the first five years of the Bush-Cheney presidency. But that neglect came to an abrupt end in January 2006 after Bush issued a signing statement asserting that the President, as Commander in Chief, could set aside the so-called McCain Torture Ban,[5] a putatively loopholes-free ban on cruel, inhumane, and degrading treatment by interrogators questioning detainees in the war on terrorism.[6] Because Congress had passed the new law by veto-proof majorities in the face of White House opposition and because almost no legal scholar who did not work for the administration thought that the President's power could trump the law, this signing statement drew widespread attention. The topic flared up again about ten weeks later, in March 2006, when Bush issued another provocative signing statement claiming a constitutional right to defy new oversight provisions in the USA PATRIOT Act reauthorization bill[7]—provisions that he had agreed to accept in a deal to end a Senate filibuster against the bill.[8] The follow-

---

[1] *See* CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 231–32 (2007).

[2] *See id.* at 230.

[3] *See id.* at 230–31.

[4] *Id.* at 231 n.5.

[5] Statement on Signing the National Defense Authorization Act for Fiscal Year 2006, 42 WEEKLY COMP. PRES. DOC. 23 (Jan. 6, 2006).

[6] S. Amdt. 1977, 109th Cong. (2005).

[7] Statement on Signing the USA PATRIOT Improvement and Reauthorization Act of 2005, 42 WEEKLY COMP. PRES. DOC. 425–26 (Mar. 9, 2006).

[8] *See* SAVAGE, *supra* note 1, at 228–29.

ing month, the *Boston Globe* published an article reporting that Bush had by that point used signing statements to challenge more than 750 distinct sections of bills since taking office and detailing many of the specific laws that he had claimed a right to disobey.[9] Among them were numerous rules and regulations for the military, including a troop cap and a ban on direct combat by U.S. forces stationed in Colombia,[10] whistleblower protections for executive branch employees,[11] protections against political interference in federally funded research,[12] affirmative action hiring requirements for the government,[13] and many other such limits or requirements Congress had placed on the executive branch. By May, this relatively novel constitutional topic had become the subject of widespread national attention. More than 150 editorial boards, columnists, and editorial cartoonists called for an end to signing statements, and the issue was a staple of discussion on talk radio and the political blogosphere.[14]

The growing attention to signing statements prompted a sustained reaction in Congress. The Senate Judiciary Committee held an oversight hearing on signing statements,[15] and its chairman, Republican Senator Arlen Specter, filed a bill that attempted to instruct courts not to cite a signing statement as authority for interpreting a disputed statute and that attempted to confer upon Congress standing to sue the President over the legal claims he made in a signing statement so that a court could review them.[16] Specter's bill did not receive a vote before the 109th Congress came to an end, but he went on to file a revised version in 2007.[17] The new version scaled back the lawsuit section that had proved legally controversial because American courts do not issue advisory opinions.[18] Other bills targeting the device were also filed in the House of Representatives,[19] and in January 2007, the House Judiciary Committee devoted its first oversight hearing under Democratic leadership to the topic of Bush's signing state-

---

[9] *See id.* at 230–31, 371 n.26.

[10] Statement on Signing the Intelligence Authorization Act for Fiscal Year 2005, 40 WEEKLY COMP. PRES. DOC. 3012 (Dec. 23, 2004).

[11] Statement on Signing the Energy Policy Act of 2005, 41 WEEKLY COMP. PRES. DOC. 1267 (Aug. 8, 2005).

[12] Statement on Signing the Departments of Labor, Health and Human Services, and Education and Related Agencies Appropriations Act of 2006, 41 WEEKLY COMP. PRES. DOC. 1920 (Dec. 30, 2005).

[13] Statement on Signing the Intelligence Reform and Terrorism Prevention Act of 2004, 40 WEEKLY COMP. PRES. DOC. 2993 (Dec. 17, 2004).

[14] SAVAGE, *supra* note 1, at 245.

[15] *Presidential Signing Statements: Hearing Before the S. Judiciary Comm.*, 109th Cong. (2006).

[16] Presidential Signing Statements Act of 2006, S. 3731, 109th Cong. (2006).

[17] Presidential Signing Statements Act of 2007, S. 1747, 110th Cong. (2007).

[18] S. 1747, 110th Cong. § 5 (2007).

[19] *E.g.*, Congressional Lawmaking Authority Protection Act of 2007, H.R. 264, 110th Cong. (2007); Presidential Signing Statements Act of 2007, H.R. 3045, 110th Cong. (2007).

ments.[20] Democrats in 2007 also asked the Government Accountability Office (GAO) to perform a study of whether Bush's signing statements were mere bluster or whether they were being carried out.[21] In June 2007, four months after the William & Mary symposium, the GAO released its initial findings.[22] It had studied a small sample of the provisions Bush had challenged in appropriations bills in 2005, looking at what happened to nineteen of the challenged bill sections.[23] The congressional watchdog agency found that executive agencies had gone on to disobey six of the bill sections that Bush's signing statements had targeted, while enforcing ten others as written.[24] Three other sections did not need to be enforced because the circumstances they contemplated had not arisen.[25] This GAO report presented the first evidence that the signing statements seemed to be having a real-world impact. However, the GAO did not study any of the most controversial challenges, such as the torture ban or the Patriot Act oversight requirements, in part because they involved classified matters.[26]

Three months after the GAO report, the U.S. district court for the District of Columbia handed down a ruling in a case that presented further evidence that signing statements were having a real-world impact and, increasingly, becoming a source of authority for courts.[27] In 2002, Congress had passed a bill that contained a provision requiring the State Department, when issuing passports to U.S. citizens, to list "Israel" as the country of birth for anyone who had been born in Jerusalem.[28] Bush signed the bill into law but issued a signing statement instructing the State Department to view the new Jerusalem-is-Israel statute as an unconstitutional intrusion into his own "authority to conduct the Nation's foreign affairs and to supervise the unitary executive branch."[29] A few weeks later, in October 2002, a child was born to an American couple in Jerusalem. They applied for a U.S. passport on behalf of their son, and the State Department listed the boy's place of birth as "Jerusalem" instead of "Israel" on that passport. The couple sued to get the State Department to obey the new law concerning Jerusalem and passports, setting up a rare case in which a court had juris-

---

[20] *Presidential Signing Statements under the Bush Administration: Hearing Before H. Comm. on the Judiciary*, 110th Cong. (2007), *available at* http://www.gao.gov/decisions/appro/308603.pdf.

[21] *See* SAVAGE, *supra* note 1, at 242.

[22] U.S. GOV'T ACCOUNTABILITY OFFICE, PRESIDENTIAL SIGNING STATEMENTS ACCOMPANYING THE FISCAL YEAR 2006 APPROPRIATION ACTS (2007).

[23] *Id.* at 1.

[24] *Id.*

[25] *Id.*

[26] *See id.* at 14.

[27] Zivotofsky v. Sec'y of State, No. 03-1921 (GK), 2007 U.S. Dist. LEXIS 68849 (D.D.C. Sept. 19, 2007).

[28] Foreign Relations Authorization Act for Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1350 (2002).

[29] Statement on Signing the Foreign Relations Authorization Act for Fiscal Year 2003, 38 WEEKLY COMP. PRES. DOC. 1659 (Sept. 30, 2003).

diction to hear a challenge to a legal claim arising from a presidential signing statement. But on September 19, 2007, the judge dismissed the case in a decision that both quoted Bush's signing statement and ruled that the issue was a "non-justiciable political question."[30] The White House had won.

The topic of signing statements also galvanized the legal community. Back in 2006, the American Bar Association (ABA) convened a bipartisan, blue-ribbon task force of prominent legal scholars, former government officials, and retired judges to study the growth of presidential signing statements.[31] The task force concluded that the device was evolving into a kind of back-door, override-proof, line-item veto power for Presidents, one that the Founders never intended Presidents to have.[32] Moreover, it noted that because most laws restricting presidential power are not the sort that courts are likely to have an opportunity to review, the mechanism was ripe for abuse by any President willing to concoct, in bad faith or delusion, a false constitutional objection to a law.[33] As a prescription for closing this loophole, the task force argued that the Constitution gives Presidents only two options: sign a bill and enforce all of it as written, or veto a bill and give Congress a chance to override that veto.[34] Based on the task force's findings, the ABA House of Delegates voted to call on Presidents to stop issuing signing statements, denouncing the mechanism as "contrary to the rule of law and our constitutional system of separation of powers."[35]

Reactions to the ABA's formalist analysis varied sharply. Many lay observers, including newspaper editorial boards and columnists, applauded and endorsed the report. But within the academic community, the ABA's approach proved more controversial, even among some who were critics of the Bush-Cheney administration's use of signing statements. The ABA's critics argued that there is nothing inherently wrong with a President signing a bill while simultaneously instructing the executive branch not to enforce some of the statutes created by that bill because they are unconstitutional.[36] They noted that most people agree that the President has a duty not to enforce an unconstitutional statute that is already on the books when he takes office, and so, they asked, why cannot the President decline to enforce an unconstitutional provision in a bill that he signed himself?[37] Moreover, some critics argued that because Congress has a habit of passing enormous omnibus bills lumping together many different future laws, it is impractical for the President to veto every bill that has some

---

[30] *Zivotofsky*, 2007 U.S. Dist. LEXIS 68849, at *2.

[31] AM. BAR ASS'N, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE (2006), *available at* http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf.

[32] *See id.* at 22–23.

[33] *See id.* at 25.

[34] *Id.* at 22.

[35] *Id.* at 1.

[36] *See* SAVAGE, *supra* note 1, at 245–47.

[37] *See id.* at 246.

minor constitutional flaw—such as a legislative veto provision, which Congress has kept adding to bills in defiance of the Supreme Court's 1983 ruling that they are unconstitutional.[38] Thus, in the real world, they said, Presidents are likely to sign most bills anyway with the intent not to enforce unconstitutional provisions, so getting rid of signing statements would just mean that the public and Congress would not know what was happening inside the executive branch.[39]

The ABA task force rejected these arguments against its report. First, it argued that signing a bill is different from dealing with a pre-existing statute: because the President swears an oath to defend the Constitution, he has a special duty to veto a bill in order to prevent a statute he thinks is unconstitutional from becoming law.[40] Moreover, it said, the gears of government would not grind to a halt if its prescription were followed. Congress can quickly fix problems in a vetoed bill and pass it again, and if Presidents started enforcing the rules more rigidly, lawmakers would likely clean up their acts and take greater efforts to pass clean bills. And because the task force proposed a world in which Presidents had no choice but to enforce everything in a bill they signed, the issue of whether signing statements improve government transparency fell away.

The critics of the ABA task force further fell into two camps. Some—almost exclusively current and former members of the executive branch during Republican administrations—argued that the entire hullabaloo about signing statements in 2006 was misplaced. Not only were signing statements a constitutionally valid and useful tool in general, they argued, but nothing the Bush-Cheney administration had done with them was in any way untoward. These critics tended to deny that the unprecedented number of challenges the administration had made with them—or Bush's simultaneous disuse of the veto power—had any significance. They also tended to defend the aggressive legal claims made by the Bush-Cheney White House by arguing that the Clinton White House had made similar claims during the 1990s.

The other set of vocal critics of the ABA task force vehemently opposed this view. This camp—almost exclusively former members of the executive branch under the Clinton administration, with the exception of prominent Harvard Law professor Laurence Tribe, who has never worked in the executive branch—agreed with the ABA that a major constitutional problem had emerged but disagreed about the nature of the problem.[41] The problem, they argued, was not signing statements per se; they said signing statements are both constitutional and useful so long as a President uses them only to invoke a mainstream interpretation of the Constitution. Instead, they said, the problem was the aggressive and widely contested constitutional theory about executive power that the Bush-Cheney administration was invoking in its signing

---

[38] INS v. Chadha, 462 U.S. 919 (1983); *see also* SAVAGE, *supra* note 1, at 246.

[39] SAVAGE, *supra* note 1, at 246.

[40] *Id.* at 246–47.

[41] *See id.* at 247.

statements.[42] They accused the ABA task force of having distorted the issue in order to avoid singling out the Bush-Cheney administration in the interest of bipartisan appearances. This camp heatedly rejected the contention that Clinton's signing statement claims resembled Bush's beyond superficial similarities, noting that Clinton never invoked the so-called unitary executive theory as Bush had done dozens of times and that none of Clinton's challenges were remotely as aggressive as Bush's attacks on the torture ban or Patriot Act oversight provisions. Bush, they said, had abused an otherwise good mechanism.

These were the arguments that spilled over into the *William & Mary Bill of Rights Journal* symposium in February 2007. Representatives from all the camps attended, as well as scholars who were interested in other topics related to the device—among them, its historical origins, its use as a form of "legislative history" for judges to use when interpreting ambiguous statutes, and its potential impact on administrative law. In the following pages, many of the scholars have followed up on their presentations and arguments with essays that flesh out their views and respond to the critiques of others.[43] Among them:

Phillip Cooper, of the Hatfield School of Government at Portland State University, argues that signing statements enable the President to act as a judge, essentially laying down a declaratory judgment about how to interpret a law.[44] One of the few academics who studied Bush's signing statements prior to 2006, Cooper says signing statements should be viewed with suspicion because they potentially violate the separation of powers system.[45]

Saikrishna Prakash of the University of San Diego School of Law joins in finding signing statements alarming and goes on to embrace many of the ABA task force's conclusions.[46] He argues that Presidents must return to vetoing any bill that they believe is unconstitutional as was understood to be a duty by the earliest Presidents.[47]

Similarly, Michael Rappaport of the University of San Diego School of Law argues that while Presidents may have the power not to enforce or obey putatively unconstitutional laws that were on the books before they took office, they do not have the discretion to sign bills with the intent of not enforcing them as written.[48]

---

[42] *Id.*

[43] The writer of this introduction did not read the essays himself. Rather, the quick synopsis of each was derived from informal executive summaries provided to the writer by the staff of the journal.

[44] Phillip Cooper, *Signing Statements as Declaratory Judgments: The President as Judge*, 16 WM. & MARY BILL RTS. J. 253 (2007).

[45] *Id.*

[46] Saikrishna B. Prakash, *Why the President Must Veto Unconstitutional Bills*, 16 WM. & MARY BILL RTS. J. 81 (2007).

[47] *Id.*

[48] Michael Rappaport, *The Unconstitutionality of "Signing and Not Enforcing,"* 16 WM. & MARY BILL RTS. J. 113 (2007).

But Nelson Lund of the George Mason University School of Law attacks the ABA's conclusions.[49] He argues that there is nothing wrong with the President signing a bill that he believes to be unconstitutional and that the President has just as much right and duty to interpret the Constitution for himself as the other branches.[50]

Louis Fisher of the Library of Congress argues that most signing statements are just bluster on the part of executive branch attorneys but that the laws are likely to be enforced or obeyed as written anyway.[51] A greater threat, he says, comes from Presidents acting in secrecy, so signing statements are welcome because they provide advance warning about potentially suspect presidential action in the execution of laws.[52]

Writing jointly, Ronald Cass, the Dean Emeritus of Boston University School of Law, and Peter Strauss of Columbia Law School, place in a single paper the debate between the two camps that criticized the ABA's conclusions.[53] Both agree that signing statements are constitutional except when they directly undercut the legislative purpose for enacting a law, but they disagree over where to draw that line and the view of executive power that may be legitimately advanced in a signing statement.[54]

Peter Shane of Ohio State University's Moritz College of Law focuses on the Bush-Cheney administration's unprecedented escalation of the number of challenges made in signing statements.[55] He argues that the intensified practice is best understood as a desire to create a paper trail of documents which can be cited as ad hoc precedents for its aggressive view of executive power, legitimizing such concepts as the unitary executive theory by showing that it has long been invoked in official government documents.[56]

Philip Heymann of Harvard Law School focuses on the legal claims advanced by the Bush administration in its signing statements.[57] Heymann argues that Presidents cannot override legislative checks and balances even in a time of war, and so Congress and the courts must hold the President accountable when he tries to seize power contrary to legislative intent.[58]

---

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

[50] *Id.*

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

[52] *Id.*

[53] Ronald Cass & Peter Strauss, *The Presidential Signing Statements Controversy*, 16 WM. & MARY BILL RTS. J. 11 (2007).

[54] *Id.*

[55] Peter Shane, *Presidential Signing Statements and the Rule of Law as an "Unstructured Institution,"* 16 WM. & MARY BILL RTS. J. 231 (2007).

[56] *Id.*

[57] Philip Heymann, *The On/Off Switch*, 16 WM. & MARY BILL RTS. J. 55 (2007).

[58] *Id.*

Neal Devins of the College of William & Mary School of Law explores the political context for Bush's signing statements as a means of exercising control over administration decisionmaking.[59] He argues that Bush's expansive use of the mechanism is especially remarkable given that it took place when Republicans controlled both the White House and Congress.[60]

A. Christopher Bryant of the University of Cincinnati College of Law attacks one of the proposed remedies for the problem of signing statements—found in both Senator Arlen Specter's 2006 bill and the ABA report—of trying to get courts to test the validity of the legal claims made in a signing statement.[61] He argues that a better solution is for Congress to perform more aggressive oversight of how its laws are being enforced and obeyed by the executive.[62]

Similarly, Michele Gilman of the University of Baltimore School of Law shares Bryant's skepticism about litigation over the claims made in signing statements for several reasons.[63] She, too, argues that Congress must use political instead of judicial means to carry out its will.[64]

Harold Krent of Chicago-Kent College of Law also criticizes the idea of granting standing to lawmakers to sue the President over claims made in a signing statement.[65] As an alternative remedy, he suggests a law that would enable private parties to exact attorney's fees from the government if they successfully bring lawsuits against the government for its failure to enforce a law that had been targeted by a presidential signing statement.[66]

Christopher Kelley of Miami University in Ohio explores the historical underpinnings of the dramatic increase in the issuance of signing statements midway through the Reagan administration.[67] Kelley, who has made a unique contribution to the study of signing statements by compiling data about the number of challenges issued by each President in U.S. history, argues here that the Reagan team had as its goal from the beginning to use signing statements to increase its control of how bureaucratic agencies interpret and implement laws.[68]

---

[59] Neal Devins, *Signing Statements and Divided Government*, 16 WM. & MARY BILL RTS. J. 63 (2007).

[60] *Id.*

[61] A. Christopher Bryant, *Presidential Signing Statements and Congressional Oversight*, 16 WM. & MARY BILL RTS. J. 169 (2007).

[62] *Id.*

[63] Michele Gilman, *Litigating Presidential Signing Statements*, 16 WM. & MARY BILL RTS. J. 131 (2007).

[64] *Id.*

[65] Harold Krent, *Fee Shifting as a Congressional Response to Adventurous Presidential Signing Statements*, 16 WM. & MARY BILL RTS. J. 211 (2007).

[66] *Id.*

[67] Christopher S. Kelley, *A Matter of Direction: The Reagan Administration, the Signing Statement, and the 1986 Westlaw Decision*, 16 WM. & MARY BILL RTS. J. 283 (2007).

[68] *Id.*

M. Elizabeth Magill of the University of Virginia School of Law also focuses on the signing statement as a means for exerting greater political control over executive agencies.[69] She argues that the device is a forceful way for the President to have the "first word" on agenda setting and enforcement strategies.[70]

Finally, Neil Kinkopf of Georgia State Law School, a veteran of the Clinton administration's Office of Legal Counsel, argues that whatever their role internal to the executive branch, signing statements should not be cited by courts as a legitimate source of "legislative history" when interpreting the meaning of a statute.[71] Kinkopf writes that signing statements are too vaguely written to raise serious constitutional questions in a meaningful way, have often advanced legal theories that are contradictory or unsubstantiated, and frequently have been used to revise a law rather than to offer a plausible interpretation.[72]

In the pages that follow, these essays demonstrate that the constitutional debate over presidential signing statements, so brightly illuminated at the 2007 *William & Mary Bill of Rights Journal* symposium, is far from over.

---

[69] M. Elizabeth Magill, *The First Word*, 16 WM. & MARY BILL RTS. J. 27 (2007).

[70] *Id.*

[71] Neil Kinkopf, *Signing Statements and Statutory Interpretation in the Bush Administration*, 16 WM. & MARY BILL RTS. J. 307 (2007).

[72] *Id.*