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Harold J. Krent

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FEE SHIFTING AS A CONGRESSIONAL RESPONSE TO ADVENTUROUS PRESIDENTIAL SIGNING STATEMENTS

Harold J. Krent*

Much of the recent controversy over President George W. Bush's signing statements stems from his repeated assertions that he would not abide by particular legislative provisions that undermine his Article II powers. For example, President Bush objected to legislative qualifications for officeholders,¹ to requiring reports from agencies that include suggestions for budgetary revisions,² and to provisions directing the President to act through particular executive branch officials,³ all based on a threat to the unitary executive. Moreover, he has challenged many provisions on the ground that Congress should not interfere with his powers to control the foreign relations of the nation. To that end, he has objected to provisions vesting in subordinate executive branch officials the power to negotiate with foreign entities,⁴ directing the President to take particular stances in foreign affairs,⁵ and mandating compliance with international agreements.⁶ Indeed, at times he has objected to provisions on the ground of legislative interference with both his power to superintend the executive branch and to serve as Commander in Chief. President Bush responded to the McCain Amendment⁷ banning torture with a signing statement declaring that:

The executive branch shall construe [the Amendment] . . . in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in

* Dean & Professor, Chicago-Kent College of Law. I would like to thank Mark Rosen for his comments on an earlier draft and Kristin Munsch for her research assistance.

¹ See, e.g., Statement on Signing the Help America Vote Act of 2002, 38 WEEKLY COMP. PRES. DOC. 1888, 1888 (Oct. 29, 2002); Statement on Signing the Enhanced Border Security and Visa Entry Reform Act of 2002, 38 WEEKLY COMP. PRES. DOC. 822 (May 14, 2002).

² See, e.g., Statement on Signing the NASA Flexibility Act of 2004, 40 WEEKLY COMP. PRES. DOC. 278 (Feb. 24, 2004).

³ See, e.g., Statement on Signing the Enhanced Border Security and Visa Entry Reform Act of 2002, 38 WEEKLY COMP. PRES. DOC. 822 (May 14, 2002).

⁴ See, e.g., Statement on Signing the Export-Import Bank Reauthorization Act of 2002, 38 WEEKLY COMP. PRES. DOC. 1014 (June 14, 2002).

⁵ See, e.g., Statement on Signing the Foreign Operations, Export Financing, and Related Programs Act of 2006, 41 WEEKLY COMP. PRES. DOC. 1718 (Nov. 14, 2005); Statement on Signing the Foreign Operations, Export Financing, and Related Programs Act of 2002, 38 WEEKLY COMP. PRES. DOC. 49, 50 (Jan. 10, 2002).

⁶ See, e.g., Statement on Signing the Export-Import Bank Reauthorization Appropriations Act of 2002, 38 WEEKLY COMP. PRES. DOC. 1014 (June 14, 2002).

⁷ 42 U.S.C.A. § 2000dd-0 (West Supp. 2007).

Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President . . . of protecting the American people from further terrorist attacks.⁸

President Bush's reliance on Article II powers in signing statements to signal his refusal to comply with numerous congressional directives has sparked outrage among academics,⁹ the press,¹⁰ and the American Bar Association (ABA) leadership, which issued a Task Force Report¹¹ condemning President Bush's use of signing statements.

Given justiciability concerns, judges likely will have no occasion to assess the constitutional assumptions in such statements. No party can demonstrate the requisite injury from a signing statement to give rise to a case or controversy.¹² There is little way currently, therefore, for courts to step in to resolve the ongoing disputes between the President and Congress generated by presidential assertions of prerogative in the signing statements.

Senator Arlen Specter introduced legislation to create a justiciable case or controversy out of a congressional objection to a signing statement.¹³ The bill provided that:

Any court of the United States, upon the filing of an appropriate pleading by the United States Senate . . . may declare the legality of any presidential signing statement, whether or not further relief

⁸ See, e.g., Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act of 2006, 41 WEEKLY COMP. PRES. DOC. 1918, 1919 (Dec. 30, 2005).

⁹ See, e.g., Phillip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 PRESIDENTIAL STUD. Q. 515 (2005); Neil Kinkopf, *Signing Statements and the President's Authority to Refuse to Enforce the Law*, 1 ADVANCE 5, 5–10 (2007); Christopher S. Kelley, *The Unitary Executive and the Presidential Signing Statement* (2003) (unpublished Miami University Ph.D. dissertation), available at <http://www.ohiolink.edu/etd/view.cgi?miami1057716977>.

¹⁰ See, e.g., Editorial, *History Makes a Statement*, WASH. POST, July 30, 2006, at B2; Charlie Savage, *Bush Signings Called Efforts to Expand Power*, BOSTON GLOBE, Oct. 5, 2006, at A2.

¹¹ The Task Force concluded that “[t]he use of presidential signing statements to have the last word as to which laws will be enforced and which will not is inconsistent with those limitations and poses a serious threat to the rule of law.” AM. BAR ASS’N, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE 20 (2006), available at http://www.abanet.org/cp/op/signingstatements_recommendation_report_7-24-06.pdf.

¹² Courts seldom have adverted to signing statements, and generally only have done so in the context of resolving disputed interpretations of the legislative text. See, e.g., *United States v. Gonzalez*, 311 F.3d 440, 443 (1st Cir. 2002), cert. denied, 540 U.S. 826 (2003); *Don’t Waste Ariz., Inc. v. McLane Foods, Inc.*, 950 F. Supp. 972, 976 (D. Ariz. 1997).

¹³ Presidential Signing Statements Act of 2006, S. 3731, 109th Cong. § 5 (2006).

is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.¹⁴

Senator Specter summarized that the provision would “permit[] the Congress to seek what amounts to a declaratory judgment on the legality of Presidential signing statements that seek to modify—or even to nullify—a duly enacted statute.”¹⁵ Senator Specter’s goal is to obtain a judicial test of whether a President’s constitutional objections to a particular provision have validity. In turn, if signing statements were subject to review, Presidents might be deterred from rote incantation of presidential prerogatives in the statements.

Senator Specter’s bill implemented one of the ABA Task Force’s recommendations. The ABA Report urged Congress

to enact legislation that would enable the President, Congress, or other entities to seek judicial review, and contemplate[d] that such legislation would confer on Congress as an institution or its agents (either its own Members or interested private parties as in *qui tam* actions) standing in any instance in which the President uses a signing statement to claim the authority, or state the intention, to disregard or decline to enforce all or part of a law.¹⁶

The Report went on to suggest that a case or controversy could be demonstrated because “the concrete injury was the usurpation of the lawmaking powers of Congress by virtue of the provisions of the signing statement, and the denial of the opportunity to override a veto if the President believes a law is unconstitutional.”¹⁷

Senator Specter’s approach, like that of the ABA Task Force, has little hope of success legislatively. Even if enacted, courts likely would find challenges to signing statements lack justiciability. Congressional efforts to confer standing on its own members in all likelihood are doomed, despite the ABA Task Force’s argument that the Court would recognize Congress’s inability to exercise a veto as providing the concrete injury to permit suit. Almost the identical argument was raised in *Raines v. Byrd*¹⁸ and rejected. As the Supreme Court stated, a claim by a member of Congress that an action “causing a type of institutional injury (the diminution of legislative power), which necessarily damages all Members of Congress” is not cognizable.¹⁹

¹⁴ *Id.*

¹⁵ 152 CONG. REC. S8271 (daily ed. July 26, 2006) (statement of Sen. Specter).

¹⁶ AM. BAR ASS’N, *supra* note 11, at 25.

¹⁷ *Id.* at 26.

¹⁸ 521 U.S. 811 (1997) (holding that members of Congress lack standing to challenge Line Item Veto Act).

¹⁹ *Id.* at 812.

The Court of Appeals for the District of Columbia has since rejected similar claims of congressional standing.²⁰

Moreover, many of President Bush's signing statements, as in the McCain Amendment example, state only that he will interpret the statute consistent with presidential powers *if a clash ever arises*. For instance, President Bush's signing statements protesting restrictions on his appointment authority assert that he will treat Congress's limitations on officer qualifications as advisory only.²¹ No clash may ever arise, for a President may follow Congress's advice and thereby moot the controversy. Indeed, for a President to ignore that "advice" would risk a senatorial refusal to consent to his nominee.²² More telling, even when a President in a signing statement flatly announces that he will not enforce a provision on the ground of its constitutional invalidity,²³ no case or controversy has yet arisen and will not arise until an individual can trace an injury to the failure to enforce. Signing statements by themselves do not create injury but only leave open that possibility for the future.²⁴ Judicial review of such statements would amount to nothing more than an advisory opinion.²⁵

Curiously, Senator Specter, as well as the ABA Report itself, ignored an alternative line of pursuit. What if, instead of subjecting signing statements to direct judicial review, Congress subjected the executive branch to an attorney's fee award in every case in which the executive branch: (1) loses after it has declined to enforce the law as written for reasons of presidential prerogative, and (2) had articulated its intent to disregard the law in a signing statement? Can Congress, in other words, provide an incentive to private parties to challenge executive branch action that departs from

²⁰ See *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir.) (dismissing congressional challenge to alleged violation of War Powers Resolution), *cert. denied*, 531 U.S. 815 (2000); *Chenoweth v. Clinton*, 181 F.3d 112 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1012 (2000) (dismissing congressional challenge to executive order for protection of rivers).

²¹ See, e.g., Statement on Signing Legislation to Create the *Brown v. Board of Education* 50th Anniversary Commission, 37 WEEKLY COMP. PRES. DOC. 1336, 1336-37 (Sept. 18, 2001).

²² A recent study by the Government Accountability Office (GAO) concluded that, of nineteen instances studied in which the President had asserted the unconstitutionality of a particular provision, the executive branch failed to enforce the law on at most six occasions. U.S. GOV'T ACCOUNTABILITY OFFICE, PRESIDENTIAL SIGNING STATEMENTS ACCOMPANYING THE FISCAL YEAR 2006 APPROPRIATIONS ACTS (2007), available at <http://www.gao.gov/decisions/appro/308603.pdf>, at 1. In the others, the executive branch had either complied with the law or the contested issue had never arisen. *Id.*

²³ See, e.g., Statement on Signing the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 2002, 38 WEEKLY COMP. PRES. DOC. 50, 51 (Jan. 10, 2002).

²⁴ Finally, it is entirely unclear, even if Congress could provide for review, what standard courts are to use to assess the "legality" of signing statements. Are they to assess the possibility that a congressional statute could be used in a way that violated the Constitution? Are they to guess at every possible scenario in which a claim of presidential privilege might arise from the legislative provision passed?

²⁵ *Cf. Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792).

legislative text? On each occasion that the President in a signing statement asserts that he will not fully enforce a law for reasons of presidential prerogative, he would expose the executive branch to liability.

For instance, should the government be sued for torture in violation of the McCain Amendment²⁶ and defend on Article II grounds and lose, President Bush's reservation in the signing statement would generate fees. Similarly, consider that President Bush critiqued enactment of the John F. Kennedy Center Plaza Authorization Act on the ground that it purported to make the Department of Transportation's (DOT) contractual authority for the Kennedy Center "[s]ubject to the approval of the Board," which included members of Congress.²⁷ Under the authority of *INS v. Chadha*²⁸ and *Bowsher v. Synar*,²⁹ the President asserted that members of Congress could not execute the law as part of a group such as the Kennedy Center Board.³⁰ The President therefore directed the Secretary of the DOT to seek the advice of the Board before entering into a contract but not to submit contracts for the Board's approval.³¹ Any disappointed bidder on a project proposed by the Kennedy Center could later assert that it was denied a fair opportunity to win the contract given the Secretary of DOT's refusal to submit the contract to the Board for approval. The potential fee award might embolden the disappointed bidder to sue.³²

To be sure, many signing statements involving foreign affairs or appointments matters will not lead to cases and controversies, whether the litigant asserts that the President ignored the legislative command or not. Nonetheless, a fee shifting provision would broadcast Congress's displeasure with a President's use of signing

²⁶ Congress has not but could create a private right of action to enforce the Amendment. Cf. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (recognizing potential right to sue for torture under the Alien Tort Statute).

²⁷ Statement on Signing the John F. Kennedy Center Plaza Authorization Act of 2002, 38 WEEKLY COMP. PRES. DOC. 1576, 1576 (Sept. 18, 2002) (citing John F. Kennedy Center Plaza Authorization Act of 2002, H.R. 5012, 107th Cong. § 12(b)(5)).

²⁸ 462 U.S. 919 (1983).

²⁹ 478 U.S. 714 (1986).

³⁰ See Statement on Signing the John F. Kennedy Center Plaza Authorization Act of 2002, 38 WEEKLY COMP. PRES. DOC. 1576 (Sept. 18, 2002).

³¹ *Id.* at 1577.

³² Similarly, Congress, pursuant to revisions under the National and Community Service Act of 1990, provided that the relevant executive branch agency was to consult with the Congressional Budget Office (CBO) before determining a formula in making certain educational awards. See S. 1276, 108th Cong. § 2(b)(2) (2003) (codified at 42 U.S.C. § 12605(2) (Supp. V 2005)). In signing the amendment, the President objected to the role of the CBO, again pursuant to *Chadha* and *Bowsher*, and directed that no consultation take place. See Statement on Signing the Strengthen AmeriCorps Program Act, 39 WEEKLY COMP. PRES. DOC. 876 (July 3, 2003). Anyone disappointed in the educational award might be able to challenge the award on the ground that the formula would have been different had the CBO been consulted. The prospect of a fee award might spur the disappointed awardee to action.

statements to articulate or presage a departure from the legislative text and, in some cases, provide the incentive needed to encourage private parties to curb such departures through litigation.

Sound far-fetched? Although lost in the debates over the propriety of President Bush's use of signing statements, one judicial opinion exists directly on point. In *Lear Siegler v. Lehman*,³³ the Ninth Circuit considered an attorney's fee award arising out of litigation over the legality of President Reagan's directive to ignore part of the Competition in Contracting Act of 1984 (CICA).³⁴ In response to a litigant whose competitor's award was not stayed under CICA by virtue of the presidential command, the court not only upheld CICA, but held that the President acted in bad faith in part because he issued a signing statement that he would not comply with legislation due to his belief that the Comptroller General's role encroached on his Article II powers.³⁵ Under the Equal Access to Justice Act (EAJA),³⁶ the court accordingly awarded fees to the litigant.³⁷ Although the court later reversed itself on the ground that *Lear Siegler* was not eligible for fees under the EAJA, the case highlights the potential for a fee award in the context of litigation over presidential prerogatives.³⁸

In Part I of this Essay, I sketch the *Lear Siegler* decision. My point is not to assess the probity of its analysis of signing statements—an issue that lies at the heart of much of the recent commentary on President Bush's use of signing statements. Rather, the goal is to show that fee decisions can implicate the propriety of presidential signing statements, as well as the larger question of whether Presidents can refuse to enforce law on the ground of presidential prerogative.

At the same time, however, the *Lear Siegler* decision shows that the EAJA as currently constituted is unlikely to be a useful tool in future challenges to presidential departures from legislative directives. Accordingly, in Part II, I briefly analyze those limitations in the EAJA. The panel in *Lear Siegler* only reached the propriety of the signing statement and accompanying directive to agencies to ignore part of the law on the basis of questionable reasoning, and the court *en banc* later reheard the fee portion of the case and reversed the panel.³⁹

In Part III, I suggest that Congress could borrow from the *Lear Siegler* example to amend the EAJA to provide for fee shifting whenever the President has announced in a signing statement that he will not enforce a law for reasons of presidential prerogative and the executive branch later loses in court on the merits of that issue. Such legislation would send a powerful message to Presidents that attachment of routine

³³ 842 F.2d 1102 (9th Cir. 1988), *rev'd in part*, 893 F.2d 205 (9th Cir. 1989).

³⁴ 31 U.S.C. § 3553 (2000); *Lear Siegler*, 842 F.2d at 1115–26.

³⁵ *Lear Siegler*, 842 F.2d at 1121.

³⁶ 28 U.S.C. § 2412 (2000).

³⁷ *Lear Siegler*, 842 F.2d at 1126.

³⁸ *Lear Siegler*, 893 F.2d at 208.

³⁹ *Id.* at 205.

messages taking exception to legislative encroachment on presidential prerogatives is not cost-free. Although the instances for awarding fees may be few, opportunities will arise in which litigants challenge executive branch conduct that departs from the legislative command and was preceded by a presidential signing statement indicating the departure.

Finally, I then explore whether such a fee shifting provision would serve the public interest. I doubt whether the prospect of a fee award significantly would deter Presidents from articulating reservations in signing statements based on presidential prerogative. Nonetheless, the one-way fee shifting provision could, at the margins, furnish incentive for private parties to challenge presidential departures from the legislative command that are announced in a signing statement. Fee shifting therefore would provide additional occasion for courts to assess the propriety of not only executive branch refusals to enforce the law but also presidential signing statements. As important, enactment of the provision would place, for the first time, some legal consequence on the now routine objections in signing statements based on presidential prerogative.

I. THE *LEAR SIEGLER* PRECEDENT

In CICA, Congress created a system under which the Comptroller General investigated protests by disappointed bidders alleging that agency contractors violated competitive procedures.⁴⁰ Upon investigation of the protest, the Comptroller General made a non-binding recommendation to the agency as to the merits of the protest.⁴¹ To provide the Comptroller General with sufficient time to complete the investigation before the work proceeded, Congress imposed an automatic stay on the contract award once a bid protest was timely filed for up to ninety days.⁴² The Comptroller General could extend the stay under particular circumstances, but the agency could override the stay “upon a written finding that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General.”⁴³

In signing CICA, President Reagan “vigorously object[ed] to certain provisions that would unconstitutionally attempt to delegate to the Comptroller General of the United States, an officer of Congress, the power to perform duties and responsibilities that in our constitutional system may be performed only by officials of the executive branch.”⁴⁴ He apparently reasoned that the Comptroller General, as an officer of

⁴⁰ Competition in Contracting Act of 1984 (CICA), 31 U.S.C. § 3553(a) (2000).

⁴¹ *Id.* § 3554 (2000).

⁴² *Id.* § 3553(c)(1).

⁴³ *Id.* § 3553(c)(2)(A).

⁴⁴ Statement on Signing the Deficit Reduction Act of 1984, 20 WEEKLY COMP. PRES. DOC. 1037, 1037 (July 18, 1984).

Congress, could not exercise any executive-type functions, including modulating the stay that prevented the agency from carrying out the contract. As a consequence, in the same signing statement, he directed the Attorney General to order agencies not to comply with the automatic stay provision.⁴⁵

A number of challenges by disappointed bidders ensued, including one by Lear Siegler.⁴⁶ Lear Siegler had placed a sealed bid in response to a Navy solicitation to provide fuel tanks for the F/A-18 aircraft.⁴⁷ Although Lear Siegler's bid was higher than that of the awardee, Israel Military Industries, it asserted that the Navy should not have waived a penalty factor that would otherwise have been levied against Israel Military Industries under the Buy American Act.⁴⁸ In light of the Justice Department's position, Israel Military Industries commenced work on the award, and Lear Siegler thereupon sued the Navy to compel it to abide by the stay provisions in CICA and to award Lear Siegler the contract.⁴⁹ The Comptroller General subsequently denied the protest on the merits, but the district court ruled that it should have stayed the contract, finding no constitutional problem with the Comptroller General's role under CICA.⁵⁰

Shortly after the district court reached its decision, the Supreme Court ruled in *Bowsher* that the Comptroller General could not, consistent with the Constitution, perform the budget cutting functions assigned to it under the Gramm-Rudman-Hollings Act (Gramm-Rudman).⁵¹ The Court reasoned that the Comptroller General, as an agent of Congress, could not participate in execution of the law.⁵² Upon the executive branch's motion, the district court reconsidered the Navy's argument.⁵³ The Navy argued that the stay modulating powers exercised by the Comptroller General should be viewed akin to the budget assessment functions in Gramm-Rudman.⁵⁴ Both involved implementing laws that bound parties outside the legislative branch.⁵⁵

Despite *Bowsher*, the district court stayed the course. It stated that, in contrast to prescribing budget cuts, the Comptroller General's stay modulating function under CICA could not be understood as an executive-type power.⁵⁶ Rather, the power to shorten a stay was at most incidental to its advisory power on the merits of the

⁴⁵ *Id.* The Office of Legal Counsel (OLC) under the first President Bush similarly opined in 1992, consistent with President Reagan's action, that the Constitution authorizes the President to refuse to enforce legislation he deems unconstitutional. *Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports*, 16 Op. Off. Leg. Counsel 18 (1992).

⁴⁶ *See, Lear Siegler v. Lehman*, 842 F.2d 1102 (9th Cir. 1988), *rev'd in part*, 893 F.2d 205 (9th Cir. 1989).

⁴⁷ *Id.* at 1105.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *See id.*

⁵¹ *Bowsher v. Synar*, 478 U.S. 714, 733-34 (1986).

⁵² *Id.* at 726-27.

⁵³ *See Lear Siegler*, 842 F.2d at 1106.

⁵⁴ *See id.* at 1110.

⁵⁵ *See id.*

⁵⁶ *See id.*

stay.⁵⁷ The Navy appealed, and Lear Siegler cross-appealed on the merits of the bid protest decision.⁵⁸

The court of appeals upheld the district court's constitutional ruling and decision, rejecting the merits of the bid protest.⁵⁹ With respect to the scope of presidential power, it reasoned that the Supreme Court in *Bowsher* had not intended to prevent Congress from vesting the Comptroller General with power to "affect" those outside of Congress but rather to prevent it from exercising ultimate authority or "control" over execution of the law as it had under Gramm-Rudman.⁶⁰ In the court's view, the stay modulating power under CICA "is temporary" and the provisions "force nothing more than a dialogue between the procuring agency and the legislature."⁶¹ The court subsequently denied a petition for rehearing on the merits of the constitutional holding.⁶²

That much of the story under CICA is well-known. Another part, however, had been unfolding at the same time. Lear Siegler sought fees against the Navy, first on the ground that the executive branch's conduct was not "substantially justified" under the EAJA.⁶³ The district court agreed but then altered course when it later determined that Lear Siegler was not eligible for relief under that section due to its size.⁶⁴ Lear Siegler thereupon sought fees under a neighboring provision of the EAJA pursuant to the common law rule permitting recovery of fees to prevailing parties demonstrating bad faith of their adversaries' conduct.⁶⁵ The Supreme Court has long held that, although each party ordinarily should be responsible for paying its own attorney's fees, fees may be awarded when a party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons."⁶⁶ The district court agreed with Lear Siegler, predicating fees on the "bad faith" of the executive branch, asserting that the "government's

⁵⁷ *See id.*

⁵⁸ *Id.* at 1104.

⁵⁹ *Id.* at 1112.

⁶⁰ *Id.* at 1108.

⁶¹ *Id.* at 1110.

⁶² *See Lear Siegler v. Lehman*, 893 F.2d 205, 206 (9th Cir. 1989) (granting rehearing only on attorney fees award, not constitutional holding).

⁶³ 28 U.S.C. § 2412(d)(1)(A) (2000).

⁶⁴ *See Lear Siegler*, 893 F.2d at 207. Section 2412(d)(2)(B) limits eligible parties to corporations with assets less than seven million dollars and individuals with a net worth less than two million dollars. *See* 28 U.S.C. § 2412(d)(2)(B).

⁶⁵ Under 28 U.S.C. § 2412(b), private parties can recover fees against the United States to the same extent as could a private party under common law:

[A] court may award reasonable fees and expenses of attorneys . . . to the prevailing party in any civil action brought by or against the United States or any agency The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

28 U.S.C. § 2412(b).

⁶⁶ *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258–59 (1975).

conduct certainly cannot justify forcing plaintiff to bear the expense of litigation to compel the government to follow the law.”⁶⁷

The executive branch strenuously had objected to the bad faith determination on a number of grounds.⁶⁸ It argued that Lear Siegler could not be considered a prevailing party given that it achieved no tangible benefit and did not itself present the constitutional arguments.⁶⁹ The House and Senate each had intervened in the proceeding to defend the constitutionality of CICA.⁷⁰ The executive branch also asserted that no bad faith could either be imputed to the executive branch’s conduct of the litigation or to its underlying position that, in the absence of a prior judicial ruling, the President can decline to enforce a statute that he reasonably believes unconstitutionally interferes with his executive powers.⁷¹

On review of the fee award, the court of appeals first determined that Lear Siegler was a prevailing party even though its bid protest had been denied.⁷² Turning to the bad faith issue, it summarized that “[a]n award of attorney fees under the ‘bad faith’ exception is punitive, and the penalty can be imposed ‘only in exceptional cases and for dominating reasons of justice.’”⁷³ The court of appeals agreed with the Navy that the Navy’s conduct in the litigation was reasonable.⁷⁴ However, the court focused “on the government’s conduct *giving rise to* the legal controversy: specifically, its intentional refusal to abide by the stay provisions of CICA.”⁷⁵

To the court, President Reagan’s signing of the bill and then directing noncompliance constituted bad faith. The court stated that “[o]nce signed by the President, as CICA was on July 18, 1984, the bill becomes part of the law of the land and the President must ‘take care that [it] be faithfully executed.’”⁷⁶ The court continued that the Constitution does not “empower the President to revise a bill, either before or after signing. It does not empower the President to employ a so-called ‘line item veto’ and excise or sever provisions of a bill with which he disagrees.”⁷⁷ Indeed, “[t]he only constitutionally prescribed means for the President to effectuate his objections to a bill is to veto it and to state those objections upon returning the bill to Congress.”⁷⁸ The court concluded that the executive branch’s asserted power to “declare laws unconstitutional and suspend their operation” plainly constituted bad faith, warranting imposition

⁶⁷ See *Lear Siegler*, 893 F.2d at 207 (citation omitted).

⁶⁸ *Lear Siegler v. Lehman*, 842 F.2d 1102, 1117 (9th Cir. 1988).

⁶⁹ *Id.*

⁷⁰ *Id.* at 1105.

⁷¹ *Id.* at 1121–22 & n.14.

⁷² *Id.* at 1115–17.

⁷³ *Id.* at 1117 (citation omitted).

⁷⁴ *Id.*

⁷⁵ *Id.* at 1117–18.

⁷⁶ *Id.* at 1124 (citation omitted).

⁷⁷ *Id.* (citation omitted).

⁷⁸ *Id.*

of attorney's fees.⁷⁹ Accordingly, the court of appeals upheld the attorney's fee award.⁸⁰ Through the fee award, the court excoriated the President's use of a signing statement to announce that the executive branch would not comply with the provision of a law duly enacted by Congress and signed by him.

The court en banc later reversed itself on the fee issue, reasoning that Lear Siegler was not a prevailing party.⁸¹ Nonetheless, the panel's earlier analysis suggests a possible role for fee shifting in encouraging challenges to presidential signing statements announcing an intent not to enforce a law.

II. CURRENT EAJA LIMITATIONS

Lear Siegler is an anomaly. In all likelihood, it will remain the only opinion to conclude that a presidential signing statement signaling departure from a legislative command constitutes bad faith. The EAJA cannot be relied upon to provide fees for private parties contesting the use of signing statements to stake out claims of presidential prerogative.

First, as the en banc court held,⁸² litigants may succeed on a constitutional claim against the United States without being considered a prevailing party. The Supreme Court has made it clear that, to prevail, a party must be able to "point to a resolution of the dispute which changes the legal relationship between itself and the [adversary]."⁸³ Lear Siegler, however, gained nothing tangible through the litigation.⁸⁴ Its challenge to the bid was denied on the merits.⁸⁵ The fact that it received a judicial declaration that the contract should have been stayed pending the challenge is insufficient to confer prevailing party status.⁸⁶ Indeed, Lear Siegler never even litigated the stay issues, leaving the Senate and House, which had both intervened, to present the constitutional issues to the courts.⁸⁷ Private parties may not benefit tangibly from resolution of a clash between presidential and congressional powers. Requiring prevailing party status,

⁷⁹ *Id.* at 1123, 1125.

⁸⁰ *Id.* at 1125. The court noted that "[w]e do not take issue with the Navy's assertion that its constitutional claims in the district court and here, even though they do not prevail, are not 'unreasonable' or 'groundless.'" *Id.* at 1117. The court predicated the claim solely on the President's antecedent decision to sign the law while, at the same time, declaring part of it unenforceable. *See supra* notes 76–79.

⁸¹ *Lear Siegler v. Lehman*, 893 F.2d 205 (9th Cir. 1989).

⁸² *Id.* at 208.

⁸³ *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989); *see also Sole v. Wyner*, 127 S. Ct. 2188 (2007) (holding that party did not achieve prevailing party status by obtaining a preliminary injunction, given the district court's subsequent decision on the merits denying a permanent injunction).

⁸⁴ *Lear Siegler*, 893 F.2d at 208.

⁸⁵ *Id.* at 207.

⁸⁶ *See id.*

⁸⁷ *Id.* at 208.

therefore, restricts significantly the pool of those who might benefit from a fee shifting provision.

Second, a consensus has now been reached that federal courts cannot base bad faith fee awards solely on pre-litigation conduct.⁸⁸ Courts have reasoned that the attorney's fee remedy should be predicated at least in part on the vexatious conduct in prolonging or over-complicating litigation, not merely on conduct that precipitated the suit.⁸⁹ In *Lear Siegler*, the court of appeals specifically held that the Department of Justice (DOJ) acted reasonably in defending the President's position on the merits, particularly in light of the *Bowsher* Court's holding that restricted the duties that the Comptroller General could perform.⁹⁰ Not only must future litigants persuade a court that the President's refusal to enforce constitutes bad faith, a proposition that many would reject,⁹¹ but they must argue that the executive branch's position in the litigation was unreasonable. Demonstrating bad faith under the EAJA has become more difficult.

Third, section 2412(d) of the EAJA limits eligible parties contesting the substantial justification of executive branch action to parties with a net worth below seven million dollars.⁹² Congress enacted section 2412(d) with the hope of encouraging small businesses to challenge overbearing government regulation. Many parties affected by presidential refusals to enforce the law, therefore, would be ineligible for fees. Indeed, the district court corrected itself in holding that *Lear Siegler* could not qualify for fees under section 2412(d).⁹³ Section 2412(d), therefore, provides scant incentive to private parties to contest executive branch refusals to enforce the laws.

Fourth, litigants with less net worth than *Lear Siegler* might still have difficulty demonstrating that the executive branch's position lacked substantial justification.⁹⁴ The substantial justification test, like that for bad faith, combines conduct of the litigation with the action that precipitated suit.⁹⁵ Congress has stated that "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is

⁸⁸ See *Stevenson v. Union Pac. R.R.*, 354 F.3d 739 (8th Cir. 2003); *Kerin v. U.S. Postal Serv.*, 218 F.3d 185 (2d Cir. 2000); *Lamb Eng'g & Constr. Co. v. Neb. Pub. Power Dist.*, 103 F.3d 1422, 1435 (8th Cir. 1997).

⁸⁹ See, e.g., *Kerin*, 218 F.3d 185; *Ass'n of Flight Attendants v. Horizon Air Indus.*, 976 F.2d 541, 550 (9th Cir. 1992).

⁹⁰ See *supra* notes 51–53, 80 and accompanying text.

⁹¹ Many judges might not find that the executive branch's refusal to enforce a law on grounds of presidential prerogative constitutes bad faith. See *supra* note 45. This issue occupies much attention in this symposium.

⁹² 28 U.S.C. § 2412(d)(2)(B) (2000).

⁹³ See *supra* note 64 and accompanying text.

⁹⁴ Finally, fees are capped under the "substantial justification" provision in section 2412(d), even when a party qualifies under that section and can demonstrate a lack of substantial justification, minimizing the incentive to sue. 28 U.S.C. §§ 2412(d)(1)(A)–(B).

⁹⁵ See *id.* § 2412(d)(1)(B).

based.”⁹⁶ It is unclear, therefore, whether a presidential directive not to enforce a law would be sufficient in itself to demonstrate a lack of substantial justification. Not only might the refusal to enforce have been reasonable but the executive branch could also argue that its position in the litigation was reasonable, and thereby that its position overall was substantially justified.⁹⁷ Moreover, it could argue that its failure to enforce stemmed from resource considerations as opposed merely to a prior presidential statement based on presidential prerogatives. Resource-based explanations have long persuaded courts that they should not compel agency action despite a seeming congressional intent to the contrary.⁹⁸

Thus, the litigation involving *Lear Siegler* reveals the very hap of the attorney’s fee award in the case. Litigation for attorney’s fees under the EAJA as currently constituted is unlikely to result in an award arising from a signing statement resting on presidential prerogative.

III. A FOCUSED FEE SHIFTING APPROACH

The *Lear Siegler* precedent suggests that a fee shifting provision properly crafted could subject some presidential signing statements to judicial scrutiny. In this Part, I first argue that targeting signing statements for review through a fee shifting provision would pass constitutional muster. Second, I suggest that the fee shifting approach would generate a significant part of the benefits sought by Senator Specter and the authors of the ABA Report. Congress might well wish to enact such a fee shifting provision: to serve the heuristic function of communicating Congress’s anger at presidential misuse of signing statements; ensure that presidential assertions of prerogative in signing statements have, albeit in relatively rare cases, a palpable impact on the government fisc; and facilitate contexts in which courts can assess the propriety of presidential refusals to enforce, as well as signing statements based on presidential prerogative.

With respect to the constitutional argument, most of the steps that Congress can take to limit signing statements would be inconsistent with Article II. Presidents would be on strong ground in objecting to any congressional penalty imposed for issuing a signing statement. Presidents historically have utilized signing statements for a variety of purposes,⁹⁹ and issuing such statements plainly falls within the President’s constitutional powers. The President is free to criticize in writing or at a press conference whatever laws he chooses. Whether the President signs a law and bewails aspects of

⁹⁶ *Id.* 28 U.S.C. § 2412(d)(2)(D).

⁹⁷ *See, e.g., Am. Wrecking Corp. v. Sec’y of Labor*, 364 F.3d 321, 325 (D.C. Cir. 2004).

⁹⁸ *Cf. Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985) (noting that agency decisions not to enforce are largely unreviewable because of judicial inability to measure factors including “whether agency resources are best spent on this violation or another”).

⁹⁹ *See* T.J. HALSTEAD, CONG. RESEARCH SERV., REPORT FOR CONGRESS: PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS (2007), available at <http://www.fas.org/sgp/crs/natsec/RL33667.pdf>.

the law the next month, the next day, or upon signing the law should not be of constitutional moment. Thus, any congressional effort to outlaw signing statements directly would unconstitutionally infringe upon the President's power under Article II.

Similarly, consider that Congress could provide by statute that appropriations to the DOJ be lowered by a percentage point with each signing statement. Although the issue is closer, the President should prevail in invalidating that congressional response on grounds of a clash with his powers under Article II. Presidents must be able to communicate to the public, and even the appropriations power cannot be used to block exercise of presidential discretion grounded in the Constitution. A statute purporting to prevent a President from using appropriated monies to sign a presidential pardon would similarly violate Article II.¹⁰⁰

Congressional efforts to preclude only those signing statements in which the President asserts that a particular provision is unconstitutional would fare no better. To be sure, opponents of signing statements have asserted that it is unconstitutional for Presidents to sign bills into law that they believe are unconstitutional. According to a number of commentators, Presidents violate their oath to uphold the Constitution if they sign a law they believe unconstitutional.¹⁰¹ Yet those commentators have rarely specified whether that constitutional objection applies to signing statements in which Presidents assert only that a legislative provision *could* be unconstitutional in a particular context. Presidents are signing the bill into law on the understanding that the bill, on its face, is constitutional even though it might transgress Article II in particular applications. Many signing statements fall within this category. Moreover, other signing statements advance a particular interpretation of the provision to avoid the perceived unconstitutionality.¹⁰² As long as the proffered interpretation is reasonable and the Article II objection plausible, the claim that the signing statement violates the President's oath of office rings hollow. Any effort to block signing statements that assert only the *potential* inconsistency of the new law with Article II seems misguided.

In any event, the problem identified by the "violation of oath" perspective is not the signing statement itself but signing the bill into law. Information in the signing statement by itself causes no independent harm. Thus, any effort to ban signing statements that assert the unconstitutionality of particular provisions not only would be unconstitutional but would not even address the concerns articulated by detractors of the statements.

¹⁰⁰ In reaction to President Carter's pardons of draft evaders, Congress in fact provided that no funds could be expended to put into effect those pardons. See HAROLD J. KRENT, *PRESIDENTIAL POWERS* 81 (2005).

¹⁰¹ See Phillip J. Cooper, *Signing Statements as Declaratory Judgments: The President as Judge*, 16 WM. & MARY BILL RTS. J. 253 (2007).

¹⁰² See Memorandum from Walter Dellinger, Ass't Att'y Gen., to Bernard N. Nussbaum, Counsel to the President (Nov. 3, 1993), in *Recent Legal Opinions Concerning Presidential Powers*, 48 ARK. L. REV. 311, 333 (1995).

Alternatively, Congress, rather than directly banning signing statements, might enact provisions to enable members of Congress or individuals to sue for a judicial declaration that the presidential assertion of authority in a signing statement is inconsistent with Supreme Court precedent. Attempts to permit its own members to sue for such declarations would, as discussed earlier, in all likelihood fail.¹⁰³ Congress cannot circumvent the case and controversy requirement merely by recognizing in its members a right to sue.

Congress might instead enact a type of *qui tam* action to police any “false claims” of presidential authority in signing statements. Citizens would thereby sue in the name of the United States to prevent Presidents from asserting constitutional authority that the Supreme Court and Congress do not believe that the President possesses. Indeed, the ABA Task Force may have had such a mechanism in mind.¹⁰⁴ As discussed previously, the signing statement by itself does not give rise to a case or controversy, and it is doubtful that courts would recognize any congressionally fashioned interest in having the President refrain from “claim[ing] the authority, or stat[ing] the intention, to disregard or decline to enforce all of part of a law” to create a sufficient stake to permit suit to proceed.¹⁰⁵ Moreover, although *qui tam* suits can be created to monitor harm inflicted by private parties upon the government, they do not furnish a useful device to monitor presidential conduct. A *qui tam* type action in the signing statement context would contemplate a suit in the name of the United States against the President acting in his official capacity. No historical pedigree exists for such suits. Permitting the United States to sue the President would, needless to say, strain our contemporary understanding of the system of separated powers and undermine basic notions of a unitary executive.¹⁰⁶ It is the President as chief law enforcement officer who has the authority to determine, within constraints, who is sued in the name of the United States (and for what conduct). To the extent that Congress can confer that prerogative on itself or a private party, the President must, in some fashion, be able to superintend that litigation as it now routinely does for *qui tam* actions under the False Claims Act.¹⁰⁷

¹⁰³ See *supra* notes 18–20 and accompanying text.

¹⁰⁴ See *supra* note 16 and accompanying text.

¹⁰⁵ AM. BAR ASS’N, *supra* note 11, at 25.

¹⁰⁶ *United States v. Nixon* represents the rare case in which the interests of the United States were distinct from those of the President due to the need for information in White House files to conduct a criminal investigation and due to the fact that Nixon was an unindicted co-conspirator in the case. 418 U.S. 683 (1974).

¹⁰⁷ 31 U.S.C. §§ 3729–3733 (2000); see *United States ex rel. Stone v. Rockwell Int’l Corp.*, 282 F.3d 787 (10th Cir. 2002); *Riley v. St. Luke’s Episcopal Hosp.*, 252 F.3d 749 (5th Cir. 2001) (en banc); see also *Morrison v. Olson*, 487 U.S. 654 (1988) (holding that the President must be able to superintend prosecution under the independent counsel provisions of the Ethics in Government Act).

The fee shifting alternative discussed,¹⁰⁸ however, has none of those deficiencies. Fees would be awarded if the President's Article II position loses in court, and the court finds that the President (or predecessor) had signaled that position in a signing statement. The fee shifting would be triggered by the government's loss in court on the merits of a case, not from the presidential signing statement itself. The presence of a signing statement would be one of the factors making a private party eligible for fees. Given that the EAJA is itself unproblematic, providing an award in a slightly different context—when the President relied on presidential prerogative contrary to a congressional directive—should not raise serious constitutional concerns.

For example, in light of the executive branch's loss in the independent counsel case, *Morrison v. Olson*,¹⁰⁹ there would have been nothing constitutionally suspect about forcing the executive branch to pay attorney's fees to the independent counsel on the ground that the executive branch lost on the merits, and the President had previously protested reenactment of the independent counsel statute even while signing it into law. President Reagan asserted that "[a]n officer of the United States exercising executive authority in the core area of law enforcement necessarily, under our constitutional scheme, must be subject to executive branch appointment, review, and removal. There is no other constitutionally permissible alternative."¹¹⁰ Upon losing its challenge to the independent counsel law, the executive branch could have been forced to pay fees to the victor.¹¹¹ Thus, the fee shifting approach avoids the likely infirmities of the other proposed means of penalizing the President for excessive assertions of presidential prerogative in signing statements.

The constitutional viability of the fee shifting approach does not suggest that its use would be wise. In enacting one-way fee provisions, Congress may rely on any of a number of rationales.¹¹² For instance, Congress may wish to deter a private (or government) party's wrongdoing, seek to provide an incentive for a private party to initiate suit, wish to provide greater compensation for an injured party, or endeavor to minimize the cost of monitoring lower-level officials in the executive branch.¹¹³

¹⁰⁸ See *supra* text following note 25.

¹⁰⁹ 487 U.S. 654, 696–97 (1988). President Carter signed the Ethics in Government Act but noted reservations as to the act's constitutionality. Statement on Signing Amendments to the Ethics in Government Act of 1978, 15 WEEKLY COMP. PRES. DOC. 1130 (June 22, 1979).

¹¹⁰ Statement on Signing the Independent Counsel Reauthorization Act of 1987, 23 WEEKLY COMP. PRES. DOC. 1526, 1527 (Dec. 15, 1987).

¹¹¹ Indeed, the Ethics in Government Act itself provided for fee shifting. See 28 U.S.C. § 593(f) (2000); see also *In re Cisneros*, 454 F.3d 342 (D.C. Cir. 2006) (addressing fee petition under the act arising out of Cisneros's investigation).

¹¹² See generally Harold J. Krent, *Explaining One-Way Fee Shifting*, 79 VA. L. REV. 2039 (1993) (examining the possible public policy justifications underlying Congress's one-way fee shifting mechanisms).

¹¹³ *Id.* at 2044–45.

In the signing statement context, creation of a one-way fee shifting mechanism could serve four principal purposes. First, it might deter Presidents from utilizing the mechanism of a signing statement. That, of course, would presumably be Congress's goal. Presidents might desist from including in signing statements any reservation on the basis of a potential conflict with presidential powers.

The fee shifting mechanism, however, would not likely achieve a goal of deterrence. Presidents, unlike most private parties, do not internalize the potential costs of a fee award. Awards are uncertain, would likely be minimal,¹¹⁴ and might even come long after the President is out of office. The prospect of paying an award, therefore, would not likely deter a President from issuing a signing statement reserving a claim of presidential right.

Even if a fee shifting statute produced a deterrent effect, that impact might not serve the public interest. Whatever one's view of signing statements, at least they further a measure of transparency. Encouraging the President to relegate his views on enforcing statutes in full or in part to internal executive branch memos may not achieve the result sought by Congress. With signing statements, a member of Congress at least knows where the President stands and can attempt to force execution of the law in a myriad fashions. Congress can wield the usual means of expressing displeasure by withholding funds, stonewalling unrelated executive branch initiatives, senatorial refusal to consent to presidential appointees, and the like.

Second, a fee shifting provision would provide marginally more incentive for a private party to contest a presidential position when that position both injures the private party and departs from the congressional design, as in *Lear Siegler*. Most individuals will bring suit only when they can expect to receive relief sufficient to compensate them for the expense and risk of litigation. Some injured parties, however, lack the resources to use litigation as a means to force their adversaries to provide effective relief. Even when the litigation may impact a broad swath of society, as for most litigation involving questions of constitutional right, it is unlikely that affected individuals will contribute to the suit because of familiar collective action problems. And, given that many actions against the government are not readily monetizable, the prospect of a fee award may help persuade a party to risk fees to vindicate a principle.

As under the EAJA generally, therefore, the prospect of a fee award may prompt future *Lear Siegler*s to take on the expensive risk of challenging a presidential action in court. Little empirical work exists measuring the impact of fee shifting provisions upon the incidence of suit, but correlations have been noted in several contexts.¹¹⁵ I would suspect that there would be sufficient incentive in most cases, irrespective of the possibility of recovering fees, to sue the executive branch when its acts cause harm in departing from the legislative text. Nonetheless, the prospect of a fee award might tip the scales in some cases. Through the fee shifting mechanism, Congress would be

¹¹⁴ The claim for fees in *Lear Siegler* approximated only \$30,000.

¹¹⁵ See Krent, *supra* note 112, at 2053–54 & n.57.

recruiting private parties to take its side in disputes with the President and present those disputes to courts for resolution where possible.

Third, although the deterrence rationale is weak and the incentives rationale modest, the fee shifting model would be far more successful in another respect—signaling to the President Congress’s dissatisfaction with such presidential statements. The fee shifting provision would communicate to the public (and the President) Congress’s strong objection to the use of signing statements to assert claims of presidential prerogative. By enacting the provision, Congress, in a constitutionally appropriate fashion, could craft into law a potential legal consequence for signing statements such as those recently questioning hundreds of provisions on the ground of inconsistency with presidential powers. Congress would thereby encourage private parties to present to courts disputes impacting private rights when Congress and the President disagree over the scope of presidential powers. Many have noted the beneficial impact of Congress’s enactment of statutes to reflect important policy views even when little change is accomplished.¹¹⁶

Finally, enactment of a fee shifting provision would assure more frequent contexts, as in *Lear Siegler*, in which courts would consider the legitimacy of presidential refusals to enforce. To the extent that the fee shifting provision induces private parties to contest refusals to enforce, then courts will have more occasion to assess the merits of such executive branch positions. Judges can clarify lines between legislative and executive power.

At the same time, the fee shifting mechanism will allow courts to weigh in on the propriety of signing statements themselves. Although the proposed fee shifting provision would shift fees automatically upon a finding that the statement unpersuasively asserted a right not to enforce the law based on presidential prerogative, most signing statements are not so cut and dried. Rather, they either warn of a context in which the provision might trample on Article II values, or they assert a narrowing interpretation in light of Article II. Judges, therefore, would need to develop standards with which to determine whether signing statements legitimately sought to avoid a constitutional question through a plausible, narrowing construction, or appropriately warned of a future circumstance in which the provision would collide with Article II values. Judicial oversight might lead to more circumscribed use of signing statements in the future.

Note that Congress could enact a broader fee shifting provision that would cover any instance in which the President stakes out a position in conflict with that of Congress, whether or not the issue touches on presidential powers. Congress could determine that presidential signing statements warning of a clash with the Fourth

¹¹⁶ See, e.g., Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1520–28 (2000).

Amendment¹¹⁷ or Due Process Clause¹¹⁸ are just as divisive as those warning of inconsistency with presidential powers.

Yet, presidential signing statements noting reservations on non-Article II grounds can play a critical role in protecting individual rights. For instance, President Bush noted that Congress had embraced a variety of warrantless searches under the Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005.¹¹⁹ He signed the Act but signaled that all such searches must conform to the dictates of the Fourth Amendment.¹²⁰ President Clinton signaled greater concern for rights of privacy and speech in signing the Telecommunications Act of 1996.¹²¹ Such signing statements, even if critical of legislation, invite further dialogue. To be sure, other signing statements, as in the affirmative action context, seem to restrict the scope of individual rights.¹²² Irrespective of whether the presidential statement seems to enlarge or restrict the individual right, however, courts are likely to address such rights issues even if Congress provides no additional incentive for suit. The fee shifting remedy is not necessary to induce suit, and given that Article II powers are not in question, there is less reason to fear presidential aggrandizement of power. Any proposed fee shifting provision should permit recovery only when Presidents object in signing statements to provisions based on assertions of Article II authority. After all, the core challenge posed by President Bush's use of signing statements rests with his assertions of presidential prerogative not with interpretations of other constitutional provisions.

Alternatively, Congress could establish a fee shifting mechanism to deter presidential refusals to enforce the law whether or not the President has indicated such disagreement in a signing statement. Congress might desire courts to umpire as many congressional/presidential splits as possible. The signing statement, although an irritant, may be of secondary importance to ensuring that the President faithfully executes the laws. However, the issue of presidential refusals to enforce particular provisions—in the absence of presidential statements announcing the non-enforcement—presents a set of additional concerns. How can one tell when a refusal to enforce rests on a constitutional principle? What if the refusal stems from a disputed interpretation of law and

¹¹⁷ See, e.g., Statement on Signing Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005 into Law, 41 WEEKLY COMP. PRES. DOC. 1273, 1274 (Aug. 10, 2005).

¹¹⁸ See, e.g., Statement on Signing Help America Vote Act of 2002 into Law, 38 WEEKLY COMP. PRES. DOC. 1888 (Oct. 29, 2002).

¹¹⁹ Statement on Signing Safe, Accountable, Flexible, Efficient Transportation Equity Act of 2005 into Law, 41 WEEKLY COMP. PRES. DOC. 1273, 1274 (Aug. 10, 2005).

¹²⁰ *Id.*

¹²¹ Statement on Signing Telecommunications Act of 1996 into Law, 32 WEEKLY COMP. PRES. DOC. 218, 219 (Feb. 8, 1996); Statement on Signing Assisted Suicide Funding Restriction Act of 1997 into Law, 33 WEEKLY COMP. PRES. DOC. 617, 618 (Apr. 30, 1997) (“The Department of Justice[] advised that a broad construction of [section 5(a)(3)] would raise serious First Amendment concerns.”).

¹²² See, e.g., Statement on Signing the Export-Import Bank Reauthorization Act of 2002, 38 WEEKLY COMP. PRES. DOC. 1014 (June 14, 2002).

not from constitutional principle? What if the refusal is resource-based or if conditions have materially changed since enactment of a law? In addition, focusing on all refusals to enforce misses the unique concerns raised by the nearly one thousand provisions challenged by President Bush predominantly on Article II grounds. Thus, any fee shifting proposal should focus only on presidential refusals to enforce that are announced in signing statements and stem from the President's view of his own authority.

In short, Congress should abandon any goal of subjecting presidential signing statements directly to judicial review. Instead, it should consider enacting a fee shifting provision to encourage private parties to challenge presidential acts, or refusals to act, when they cause injury or conflict with congressional directives and the conflict is presaged in a presidential signing statement.

CONCLUSION

Presidential signing statements hit a raw nerve among members of Congress and the public alike. They often appear to flaunt presidential authority while flouting the primary policymaking role of Congress.

Despite recent congressional steps, efforts to make presidential signing statements subject to judicial review are not feasible. No case or controversy is presented by congressional outrage. Nevertheless, a fee shifting provision can, at the margins, encourage lawsuits against Presidents for refusals to enforce the law and, in so doing, facilitate review of presidential signing statements. At the same time, Congress's enactment of such a fee shifting provision would, for the first time, impose some legal consequence on presidential use of signing statements to announce objections based on presidential prerogative. Providing additional contexts in which judges can assess executive branch non-enforcement and signing statements announcing that intent may dampen the zeal with which Presidents use signing statements to assert presidential prerogatives. Finally, through revision of the Equal Access to Justice Act, future Lear Sieglers would gain more complete redress for any injuries suffered by virtue of a President's refusal to comply with the law.