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SIGNING STATEMENTS AND STATUTORY INTERPRETATION IN THE BUSH ADMINISTRATION

Neil Kinkopf*

Over twenty years ago, Attorney General Edwin Meese touched off a contentious debate by proposing that judges take presidential signing statements into account when interpreting statutes. To facilitate this proposal, the Attorney General persuaded West Publishing Company to include presidential signing statements in the legislative history it published in the U.S. Code Congressional and Administrative News (U.S.C.C.A.N.).¹ Attorney General Meese's position was fairly straightforward: the President is a significant actor in the legislative process. The Constitution authorizes the President to recommend to Congress "such Measures as he shall judge necessary and expedient."² Moreover, a bill may not become a law unless it has been presented to the President and has been either approved by him or passed by Congress over the President's veto.³ Constitutional formalities aside, the President is a vitally important actor in the legislative process. The President exercises a great deal of agenda-setting power, especially when the President's party holds a majority in Congress. The President is in a position to offer incentives and disincentives to help persuade legislators to vote in favor of the President's legislative priorities. The President, as head of the executive branch, controls much of the information that forms the basis of legislative decisionmaking. In these and other ways, the President is extremely powerful in the legislative arena. Thus, if a court is attempting to determine the legislative intent behind a piece of legislation, the published views of the President would seem to be potentially probative. This innovation was largely developed by a young Justice Department attorney named Samuel Alito.⁴

The controversy that the Meese and Alito proposal generated soon died down. More recently, the Bush administration has followed a practice that has brought signing statements back to broad public attention, but for different reasons. The

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¹ PHILLIP J. COOPER, *BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION* 202-03 (2002).

² U.S. CONST. art. II, § 3, cl. 2.

³ *See id.* art. I, § 7.

⁴ *See* Memorandum from Samuel A. Alito, Jr., Deputy Ass't Att'y Gen., Office of Legal Counsel, to Litig. Strategy Working Group (Feb. 5, 1986), *available at* <http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf>.

Bush administration has used signing statements to issue an unprecedented number of constitutional objections to new laws—1042 by the end of 2006.⁵ While there is nothing new in a President using a signing statement to convey his constitutional objections to a provision of a bill that the President just signed into law, the sheer number of such constitutional objections issued by the Bush administration has made the practice noteworthy. There have been two major objections to this use of signing statements. First, the American Bar Association, among others, has condemned the practice on the grounds that the President is constitutionally obligated to veto a bill if the President believes that the bill contains an unconstitutional provision.⁶ Second, President Bush's signing statements have often been taken to express a refusal to be bound by provisions of law he believes to be unconstitutional.⁷ Some commentators take the position that the President is bound by the duty to take care that the laws be faithfully executed⁸ to execute every statute regardless of his view of the statute's constitutionality.⁹

⁵ See Neil Kinkopf & Peter M. Shane, *Signed Under Protest: A Database of Presidential Signing Statements, 2001-2006* (Ohio State Public Law Working Paper No. 106), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1022202.

⁶ See AM. BAR ASS'N, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE (2006), available at http://www.abanet.org/op/signing-statements/aba_final_signing_statements_recommendation-report_7-24-06.pdf; Am. Bar Ass'n, ABA Adopts New Policy on Presidential Signing Statements, Attorney Client Privilege and Inspector General for the Federal Judiciary, http://www.abanet.org/media/releases/news080806_1.html (last visited Sept. 3, 2007).

⁷ A careful reading of President Bush's signing statements reveals that, in fact, he has never openly declared that he will not enforce or be bound by a law because that law is unconstitutional. The signing statements are, however, replete with instances in which President Bush declares that he will interpret a law in order to avoid constitutional problems. In many instances, President Bush interprets the objectionable provision in a way that is flatly contrary to the plain meaning of the provision's text. For example, in response to the hundreds of provisions requiring administration officials to submit legislative recommendations, President Bush has typically declared that he would interpret the provision as hortatory and not as a requirement. Indeed, President Bush frequently asserts such an interpretation even after describing the offending provision as enacting, or "purporting" to enact, a requirement. As a practical matter, this form of interpretation amounts to the same thing as an assertion that the President will not enforce or be bound by a particular provision of law. For a discussion of the significant problems raised by the Bush administration's misuse of the avoidance canon, see Trevor Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006) (describing controversial episodes of executive branch legal interpretation relating to the "War on Terror"); H. Jefferson Powell, *The Executive and the Avoidance Canon*, 81 IND. L.J. 1313 (2006) (describing the differences between executive and legislative understanding of laws that have been passed).

⁸ U.S. CONST. art. II, § 3.

⁹ See Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865 (1994).

In this Article, I will not address these controversies.¹⁰ Rather, I want to address the issue raised by the Meese proposal but in the specific context of the Bush administration's signing statements. Should the judiciary or anyone outside the executive branch¹¹ use President Bush's signing statements¹² as a guide to the meaning of statutes? The short answer is no.

One possible reason for a negative answer is that it is categorically improper to consider presidential signing statements as an element of legislative history. This argument was urged against the Meese proposal and takes two forms.¹³ First, formally, the President is not part of the legislature, and therefore, signing statements cannot be considered part of the legislative history.¹⁴ Second, pragmatically, signing statements are easily manipulated so as to reflect not so much the legislative intent as the preference of the President.¹⁵ Neither of these arguments is ultimately persuasive.

As to the first objection, the Constitution expressly accords the President a crucial role in the legislative process.¹⁶ Moreover, Presidents since George Washington have in fact played a vital role in the legislative process.¹⁷ The second

¹⁰ For what it is worth, I regard the Bush administration's practice as problematic principally because the substantive constitutional views expressed in President Bush's signing statements are unwarranted. See Neil J. Kinkopf, *Signing Statements and the President's Authority to Refuse to Enforce the Law*, 1 ADVANCE 5 (2007), available at <http://www.acslaw.org/files/Kinkopf-Signing%20Statements-Jun%202006-Advance%20Vol%201.pdf>; Posting of David Barron et al., to Georgetown Law Faculty Blog, http://gulcfac.typepad.com/georgetown_university_law/2006/07/thanks_to_the_p.html (July 31, 2006). The volume of objections seriously compounds the substantive problems and can amount to an assertion that the President is above the law. Kinkopf, *supra* at 8–10.

¹¹ A recent study examining nineteen statutory provisions found that agencies did not enforce six provisions as they were enacted, and of those six, President Bush objected to three of them for varying reasons within his signing statements. See 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>.

¹² In this Article, I only consider the statements that express an objection to a statute on constitutional grounds and that offer an interpretation of the statute in light of that constitutional objection. To say that I "only" consider such statements, however, may leave a misimpression. President Bush has issued more than 1000 such objections. Kinkopf & Shane, *supra* note 5.

¹³ See William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 IND. L.J. 699, 709 (1990–1991).

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ U.S. CONST. art. I, § 7, cl. 2; *Id.* art. II, § 3; see Popkin, *supra* note 13, at 709 (describing the President's limited legislative roles within the Constitution).

¹⁷ See Frank B. Cross, *The Constitutional Legitimacy and Significance of Presidential "Signing Statements"*, 40 ADMIN. L. REV. 209, 214–15 (1988).

objection is more powerful. Because a signing statement is not issued until after a bill has passed both the House and the Senate, Congress has no opportunity to respond to erroneous or tendentious interpretations set forth in a signing statement.¹⁸ Thus, signing statements should generally be regarded, like all other post-enactment legislative histories, as unreliable.

There may be circumstances where a signing statement's interpretation is accompanied by indicia of reliability. For example, where it repeats congressional testimony offered by administration officials while a bill was under consideration before Congress or where the interpretation was offered during congressional debates in the form of a Statement of Administration Policy.¹⁹ When these indicia are in place and when the President and the administration have played a central role in the passage of the legislation, there seems to be no reason—formal or practical—to exclude the President's signing statement from the legislative history.²⁰

A second objection to the use of signing statements as an interpretive device is the claim that legislative history is never a permissible source of statutory meaning. This broad claim obviously is not limited to the use of signing statements, but rather objects to the use of any form of legislative history. It is well beyond the scope of this Article to assess the force of such claims. What is relevant to note, however, is that President Bush's signing statements themselves appear to accept this argument.²¹

One prominent version of this argument asserts that only text that has been enacted through the constitutional process of bicameralism and presentment can be treated as law. To give weight to legislative history would violate what the Supreme Court has described as the "single, finely wrought and exhaustively considered, procedure" for the enactment of legislation.²² In a number of signing statements, President Bush has included the following objection: provisions "of the Act purport to allocate funds for specified purposes as set forth in the joint explanatory statement of managers that accompanied the Act,"²³ or "the Act refers to a joint explanatory

¹⁸ See Popkin, *supra* note 13, at 713–14 (discussing former President Reagan's potentially manipulative uses of presidential signing statements).

¹⁹ See Cross, *supra* note 17, at 232–33 (arguing that contemporaneity of statutory interpretation between the executive and legislative branches adds a degree of reliability to presidential signing statements).

²⁰ This view has been fully elaborated by Professor Frank Cross. See *id.* at 234–38.

²¹ See Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 319–20 (2006) (discussing President Bush's interpretation and treatment of statutes that he addressed as potentially unconstitutional within his signing statements).

²² *INS v. Chadha*, 462 U.S. 919, 951 (1983); see ANTONIN SCALIA, A MATTER OF INTERPRETATION 29–36 (1997) (arguing against the increased use of legislative history as a source for statutory construction).

²³ Statement on Signing the Department of Defense Appropriations Act, 2007, 42 WEEKLY COMP. PRES. DOC. 1703, 1704 (Sept. 29, 2006); see Department of Defense Appropriations Act of 2007, Pub. L. No. 109-289, §§ 8039, 8064, 120 Stat. 1257, 1282, 1288 (2006).

statement of a committee of conference on a bill as if the statement had the force of law.”²⁴ The statement then asserts: “The executive branch shall construe the provision in a manner consistent with the bicameral passage and presentment requirements of the Constitution for the making of a law.”²⁵ In other words, because legislative history is not subject to bicameralism and presentment, it cannot be given legal effect. I do not mean to suggest that I regard this objection as persuasive. Rather, I mean only to point out that, if one were inclined to regard President Bush’s signing statements as an element of legislative history, those statements themselves assert that they should not be used for purposes of statutory interpretation.

It is nevertheless still possible to disagree with President Bush’s evident view that legislative history has no place in statutory interpretation and thus to consider President Bush’s signing statements when interpreting the statutes he has signed into law. There remain two major obstacles to actually using President Bush’s signing statements. First, many of the President’s signing statements abuse the avoidance canon. Second, President Bush’s statements, on examination, contain nothing that an interpreter could use. They are stated in such vague and conclusory terms that they offer nothing useful to the enterprise of interpretation.

The avoidance canon refers to the precept of statutory construction that advocates adopting the interpretation of a statute that avoids a serious constitutional question when such an interpretation is fairly plausible.²⁶ The canon, then, has two predicate conditions. First, one plausible interpretation must raise a serious—not a frivolous or speculative—constitutional question.²⁷ Second, the alternative interpretation—the one that avoids the serious constitutional question—must be a plausible interpretation of the statute, lest the avoidance canon become a tool for rewriting a statute.²⁸

President Bush’s signing statements are written using a formula that does not take account of or satisfy the first condition. The statement will claim that a certain interpretation of a specified provision “would be inconsistent with” some presidential power.²⁹ The signing statements rarely, if ever, explain how the objectionable provision could be inconsistent with presidential power or whether the

²⁴ Statement on Signing the National Defense Authorization Act for Fiscal Year 2006, 42 WEEKLY COMP. PRES. DOC. 23 (Jan. 6, 2006); National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 1222, 119 Stat. 3136, 3463 (2006).

²⁵ Statement on Signing the National Defense Authorization Act for Fiscal Year 2006, 42 WEEKLY COMP. PRES. DOC. 23 (Jan. 6, 2006).

²⁶ Morrison, *supra* note 7, at 1202–03 (defining the avoidance canon).

²⁷ *See id.* at 1203.

²⁸ *See* Public Citizen v. U.S. Dep’t of Justice, 491 U.S. 440, 481 (1989) (Kennedy, J., concurring); *see also* Morrison, *supra* note 7, at 1209 (criticizing the avoidance canon as contrary to congressional intent).

²⁹ *See, e.g.*, Statement on Signing the Department of Defense Appropriations Act, 2007, 42 WEEKLY COMP. PRES. DOC. 1703, 1704 (Sept. 29, 2006).

potential inconsistency is likely to arise. Moreover, the signing statements offer no elaboration of their various theories of presidential power, so there is no basis on which to determine whether the asserted constitutional problem is a serious one or is based on an unfounded theory of constitutional law. For example, President Bush's signing statements object on 363 occasions to provisions that could be inconsistent with the President's "constitutional authority to supervise the unitary executive branch."³⁰ No signing statement offers any explanation of what the President means by "the unitary executive branch" or provides illuminating consideration of how the provision at issue might be inconsistent with the theory.

President Bush's signing statements also generally fail to satisfy the second predicate condition because the alternative interpretation that they offer is rarely a plausible interpretation of the statute's text. For example, the signing statements frequently object to requirements that executive branch officials make reports or recommendations to Congress or that appointees to certain offices meet certain qualifications. Although these statutory provisions are specifically phrased as requirements (and the signing statements themselves even refer to them as requirements),³¹ President Bush's signing statements typically respond to such requirements by construing them as advisory. This is not construction but a refusal to enforce.

Beyond the problematic misuse of the avoidance canon, President Bush's signing statements contain no useful interpretive guidance. Instead, they express constitutional conclusions without any analysis or explanation that might assist an interpreter of the statute. In this context, consider again the objection to provisions that could be inconsistent with the President's "authority to supervise the unitary executive branch."³²

The conclusory assertions of President Bush's signing statements are not problematic when the basis for the objection is clear and uncontroversial. For example, President Bush has objected to 235 provisions that contain legislative vetoes in violation of *INS v. Chadha*.³³ It is clear what the objection to these provisions is, and it is equally clear that *Chadha* has settled the constitutional question as to all legislative vetoes.³⁴ No elaboration is needed in the signing statement.

Where the basis of the constitutional objection is not as clear, President Bush's signing statements do not provide useful guidance. The signing statements consistently lack any elaboration beyond short-hand categorizations, such as "unitary executive."

³⁰ Energy & Water Dev. Appropriations Act, 2002, Pub. L. No. 107-66, 115 Stat. 486 (2001).

³¹ The favored formulation of these signing statements is that the provision "purports to require" a report or recommendation, for example. Of course, to say that a provision purports to require something is to concede that its plain textual meaning is to require that something. Thus, treating the provision as advisory conflicts with the provision's plain meaning.

³² See 115 Stat. 486 (2001).

³³ 462 U.S. 919 (1983).

³⁴ See *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991); *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987).

This leaves an interpreter to guess at the actual basis of the President's objection. Moreover, the statements repeatedly fail to provide any sense of how the objectionable provision might conflict with the President's legal theory. For example, President Bush objected to Section 8098 of the Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States.³⁵ Because this section "purport[s] to limit . . . the number of Department of Defense military and civilian personnel assigned to legislative affairs . . . and to mandate the percentage distribution of such personnel among various offices of the Department," the section could be inconsistent "with the President's constitutional authority to supervise the executive branch and as Commander in Chief of the Armed Forces."³⁶ Evidently, the Commander-in-Chief Clause not only means the President may order the military to take a particular hill in a theater of war, the President may also order the military's lobbyists to take Capitol Hill. It would appear that this objection rests on the same view of presidential power expressed in a memorandum that later supported the infamous torture memo.³⁷ But the torture memo was never officially released (and was repudiated after it was leaked) so there is no certain way to know precisely upon what theory of presidential power this signing statement rests. Because the conclusion is highly contestable, the conclusion alone has no persuasive force.

Finally, the conclusions found in President Bush's signing statements are sometimes contradictory. In over twenty instances, President Bush objected to provisions that required the President to consult with Congress in advance of taking a particular action.³⁸ These statements assert that a statute may not require consultation as a precondition to presidential action.³⁹ The 235 objections to legislative vetoes assert that the executive branch will construe the invalid legislative vetoes as report-and-wait requirements.⁴⁰ I do not doubt that the Justice

³⁵ Statement on Signing the Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, 2002, 38 WEEKLY COMP. PRES. DOC. 46, 48 (Jan. 10, 2002).

³⁶ *Id.*

³⁷ Memorandum from John C. Yoo, Deputy Ass't Att'y Gen., to Timothy Flanigan, Deputy Counsel to the President, *The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them* (Sept. 25, 2001), available at <http://www.usdoj.gov/olc/warpowers925.htm>. The torture memo was issued eight months later but appears to have been emblematic of the Justice Department's view of the President's Commander-in-Chief power during this time frame. See, e.g., Memorandum from Jay S. Bybee, Office of Legal Counsel, to Alberto Gonzales, Counsel to the President, (Aug. 1, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo2002080.pdf>. See generally Mike Ailen & Dana Priest, *Memo on Torture Draws Focus to Bush*, WASH. POST, June 9, 2004, at A3.

³⁸ See *supra* note 37.

³⁹ *Id.*

⁴⁰ *Id.*

Department's Office of Legal Counsel has a theory that reconciles these seemingly inconsistent statements. But, first, we do not know what that theory might be because the signing statements do not express it or cite to legal memoranda containing the theory. Second, whatever that reconciling theory might be, it will surely be contestable. In this setting, the mere conclusion expressed in the signing statements cannot itself be treated as useful guidance to the meaning or proper interpretation of the statute.

The vast body of President Bush's signing statements is subject to a variety of criticisms. The most significant from the standpoint of statutory interpretation is that, although they typically purport to offer a saving interpretation of the objectionable provision, those interpretations are frequently so tendentious that they cannot be taken to express a true attempt at interpretation. Rather, those of President Bush's signing statements that cite constitutional objections generally represent an attempt to alter the meaning of those statutes or to exempt the President and the executive branch from their coverage. Yet none of those statements purports to offer guidance to interpreters outside the executive branch. In fact, they are so ill-suited to such a use that it is doubtful President Bush means for them to be taken as a component of a statute's legislative history.