

# Much Ado About Nothing: Signing Statements, Vetoes, and Presidential Constitutional Interpretation

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MUCH ADO ABOUT NOTHING: SIGNING STATEMENTS,  
VETOES, AND PRESIDENTIAL CONSTITUTIONAL  
INTERPRETATION

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ABSTRACT

*During the Bush presidency, presidential signing statements became briefly controversial. The controversy has faded, but the White House continues to issue statements when signing legislation. Those statements frequently point out constitutional difficulties in new statutes and sometimes warn that the executive branch will administer the statutes so as to avoid those constitutional difficulties. This Article argues that the criticisms of signing statements were mostly misguided. Signing statements as such present few problems and offer some benefits to the workings of the American political system. While there might be reason to object to the substantive constitutional positions adopted in any given signing statement, signing statements as such are mostly unobjectionable. Although it might be preferable for Presidents to veto constitutionally problematic legislation, modern legislative practices have made the veto power less useful and rendered signing statements more useful.*

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## INTRODUCTION

The final years of the presidency of George W. Bush were absorbed by a variety of constitutional controversies over the scope and exercise of presidential power. Among the more fleeting of these controversies was the dust-up over presidential signing statements.<sup>1</sup> Critics took the White House to task for its extensive use of statements issued upon signing a piece of legislation.<sup>2</sup> Such statements have traditionally served a variety of functions, but the Bush Administration was particularly aggressive in its use of the statements to outline its many constitutional objections to legislative provisions that were being signed into law.<sup>3</sup> As the Administration complained that Congress was passing statutes that impinged on the President's own constitutional prerogatives,<sup>4</sup> critics of the Administration responded by complaining that the President was asserting a dictatorial power to sit in judgment of the constitutionality of Congress's handiwork.<sup>5</sup>

In this Article, I argue that the controversy over the Bush-era signing statements as such was much ado about nothing. The critiques of the signing statements were mostly overblown and misdirected.<sup>6</sup> Indeed, there might well be some benefits to the practice of recording constitutional objections to legislation in signing statements.<sup>7</sup> But the debate tended to obscure what might be useful and what might be objectionable about signing statements and gave inadequate consideration to the possible alternatives to this use of signing statements.<sup>8</sup>

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1. See TODD GARVEY, CONG. RESEARCH SERV., RL33667, PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS 7 (2012).

2. See *id.* at 8.

3. See Michael T. Crabb, Comment, "The Executive Branch Shall Construe": The Canon of Constitutional Avoidance and the Presidential Signing Statement, 56 U. KAN. L. REV. 711, 716 (2008).

4. See GARVEY, *supra* note 1, at 8.

5. See CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 229-30 (2007).

6. See *infra* Part II.

7. See *infra* Part III.

8. See *infra* Part IV.

Signing statements were once a fairly obscure type of presidential document of relatively little consequence or controversy.<sup>9</sup> By virtue of the Bush-era controversies, the concept is at least more familiar, even if the actual documents themselves continue to have a low profile.<sup>10</sup> Often, signing statements have been primarily celebratory and political.<sup>11</sup> Accompanied by formal ceremonies, brief signing statements provide an opportunity for credit claiming for policy accomplishments.<sup>12</sup> President Ronald Reagan gathered with congressional leaders on the South Lawn of the White House a few days before the 1986 midterm elections in order to “sign[] the most sweeping overhaul of our tax code in our nation’s history.”<sup>13</sup> In 1964, President Lyndon B. Johnson gathered congressional and civil rights leaders in the East Room of the White House to watch him issue a televised address upon his signing of the Civil Rights Act.<sup>14</sup>

On less momentous occasions, Presidents have simply issued a written statement commemorating their actions, as when President Herbert Hoover informed the country that he had signed a bill authorizing the transfer of juvenile delinquents to local jurisdictions, as recommended by a presidential commission and with the “active interest and approval of social workers all over the country.”<sup>15</sup> In other cases, Presidents use signing statements to voice their continuing objections to features of the new legislation, as when President Richard Nixon issued a statement that began, “To avoid any possible misconceptions, I wish to emphasize that section 601 of this act ... does not represent the policies of this Administration.”<sup>16</sup> The President would not fail to sign the 1971 Military

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9. See Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 308 (2006).

10. See *id.*

11. See Christopher S. Kelley & Bryan W. Marshall, *The Last Word: Presidential Power and the Role of Signing Statements*, 38 PRESIDENTIAL STUD. Q. 248, 250-51 (2008).

12. See Christopher S. Kelley & Bryan W. Marshall, *Going It Alone: The Politics of Signing Statements from Reagan to Bush II*, 91 SOC. SCI. Q. 168, 169 (2010).

13. Remarks on Signing the Tax Reform Act of 1986, 2 PUB. PAPERS 1414, 1414 (Oct. 22, 1986).

14. Radio and Television Remarks Upon Signing the Civil Rights Bill, 2 PUB. PAPERS 842, 842 (July 2, 1964).

15. Statement on Signing a Bill Authorizing the Transfer of Juvenile Delinquents to Local Jurisdictions, 1932 PUB. PAPERS 258, 259 (June 11, 1932).

16. Statement on Signing the Military Appropriations Authorization Bill, 1971 PUB. PAPERS 360, 360 (Nov. 17, 1971) [hereinafter Signing Statement Nov. 17, 1971].

Appropriations Authorization Bill, but he continued to protest the inclusion of language calling for the announcement of a “final date” for the withdrawal of American troops from Southeast Asia.<sup>17</sup>

For current purposes, the more interesting signing statements are those that mount constitutional arguments connected to the legislation in question and disclose presidential views about future implementation of its provisions. Sometimes, Presidents hope to put a particular spin on legislation they support as when President Franklin D. Roosevelt issued a statement indicating that the Alien Registration Act of 1940 “should be interpreted and administered” so as to protect “the loyal aliens who are [our nation’s] guests” from hostile local communities as well as to protect the nation at large from “aliens who are disloyal and are bent on harm to this country.”<sup>18</sup> In other cases, signing statements might provide a road map of constitutional concerns as when upon signing the Bipartisan Campaign Reform Act, President George W. Bush announced his expectation “that the courts will resolve these legitimate legal questions as appropriate under the law.”<sup>19</sup> Of course, most notoriously, President George W. Bush frequently filled signing statements with the ominous words: “The executive branch shall construe these sections in a manner consistent with the constitutional authority of the President.”<sup>20</sup>

The discussion that follows reveals the extent to which criticism leveled at even the most notorious signing statements appears unfounded. In Part I, I outline how signing statements have been used and describe the recent controversy surrounding them. This section identifies the major objections raised by politicians, journalists, lawyers, and scholars against Presidents voicing constitutional objections in signing statements. In Part II, I argue that the objection to signing statements has tended to confuse the message with the messenger. At heart, the objection does not appear directed to signing statements as such but to presidential efforts to interpret

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17. *Id.* (quoting Act of Nov. 17, 1971, Pub. L. No. 92-156, § 601, 85 Stat. 423, 430 (1971)).

18. Statement on Signing the Alien Registration Act, 1940 PUB. PAPERS 64, 64 (June 29, 1940).

19. Statement on Signing the Bipartisan Campaign Reform Act of 2002, 1 PUB. PAPERS 503, 503 (Mar. 27, 2002).

20. *E.g.*, Statement on Signing the Military Construction Appropriations and Emergency Hurricane Supplemental Appropriations Act, 2005, 3 PUB. PAPERS 2504, 2504 (Oct. 13, 2004).

the Constitution in the context of their role as chief executive. In Part III, I turn to the potential virtues of presidential signing statements as an instrument for announcing such constitutional views and presidential intentions regarding implementation. Finally, in Part IV, I turn to the use of the presidential veto to block constitutionally defective legislation.

### I. THE OBJECTION TO SIGNING STATEMENTS

Though not specifically anticipated by the U.S. Constitution, presidential signing statements have been a long-standing feature of American political practice.<sup>21</sup> The Constitution only requires two statements from Presidents. First, Presidents are expected to provide Congress “from time to time” with “Information of the State of the Union.”<sup>22</sup> In practice, this duty has been fulfilled with an annual message, or, since the Woodrow Wilson Administration, by the oral delivery of the State of the Union address.<sup>23</sup> Second, Presidents are also required to issue a message to Congress when vetoing a bill so that Congress may “enter the Objections at large on their Journal, and proceed to reconsider it.”<sup>24</sup> Of course, ever since George Washington’s Administration, Presidents have sent Congress a variety of special messages on a range of topics on different occasions. Early Presidents did not routinely issue a statement upon signing bills into law, but in 1830, Andrew Jackson issued the first true signing statement.<sup>25</sup> After signing a bill appropriating funds to extend a road from Detroit to Chicago, President Jackson stated, “I desire to be understood as having approved this bill with the understanding that the road authorized by this section is not to be extended beyond the limits of [the federal territory of Michigan].”<sup>26</sup>

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21. See Christopher N. May, *Presidential Defiance of “Unconstitutional” Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 929-30 (1994).

22. U.S. CONST. art. II, § 3.

23. Gerhard Peters, *State of the Union Addresses and Messages*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/sou.php> [<https://perma.cc/PY8G-NLNQ>].

24. U.S. CONST. art. I, § 7, cl. 2.

25. GARVEY, *supra* note 1, at 2.

26. President Andrew Jackson, Special Message (May 30, 1830), <http://www.presidency.ucsb.edu/ws/?pid=66775> [<https://perma.cc/MPE5-MN87>].

Such statements were relatively uncommon early in the nation's history but have become increasingly common in the twentieth century.<sup>27</sup> Their use has ranged from the innocuous to the controversial.<sup>28</sup> The ceremonial and the credit-claiming uses are particularly innocuous. With the rise of modern mass media, Presidents have seen particular political benefit in advertising the performance of their routine constitutional duty of signing bills into law.<sup>29</sup> Presidents emphasize their active participation in the lawmaking process—and their pivotal role in bringing policy into being—by calling attention to their decision to approve and sign legislation.<sup>30</sup> Presidents steal at least part of the spotlight from legislators by claiming popular laws as their own.<sup>31</sup> The President's signature not only completes the constitutional procedure for passing legislation but also stamps the President's name on public policy. Congressmen might be able to informally name legislation after themselves, but only the President can create a photo op in the Rose Garden or the East Room.

More controversial are the efforts to use signing statements to accomplish policy goals, rather than political goals. Those policy goals might be either legislative or constitutional.<sup>32</sup> From a legislative perspective, Presidents have used signing statements to clarify, elaborate, or assert what an Administration views as the significant policy implications of the signed bill.<sup>33</sup> This effort by Presidents to add to the legislative history of a statute by announcing the "presidential intent"<sup>34</sup> is most notable if what Presidents are adding is at odds with what various legislative sponsors might have thought would be the effect of the statute's language. From a constitutional

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27. See May, *supra* note 21, at 929-30.

28. Crabb, *supra* note 3, at 712-13.

29. U.S. CONST. art. I, § 7, cl. 2 ("Every Bill ... shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it.").

30. See Kelley & Marshall, *supra* note 11, at 250-51.

31. See May, *supra* note 21, at 930 n.304.

32. See *id.* at 930 (noting the use of signing statements as an opportunity for the President to call for additional legislation from Congress to supplement or adjust the bill signed into law).

33. See Bradley & Posner, *supra* note 9, at 314.

34. Memorandum from Samuel A. Alito, Jr., Deputy Assistant Attorney Gen., Office of Legal Counsel, Dep't of Justice, to the Litig. Strategy Working Grp. 3 (Feb. 5, 1986), <http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf> [<https://perma.cc/E7LQ-KX2L>].

perspective, Presidents have used signing statements to raise constitutional objections or concerns about new statutes.<sup>35</sup> Andrew Jackson's statement regarding the internal improvements project in Michigan is such a case.<sup>36</sup>

Congress might have once regarded such presidentially issued statements as objectionable but seems to have eventually acceded to the practice. Former President John Quincy Adams wrote a blistering report for the House of Representatives denouncing President John Tyler for issuing a signing statement casting doubt on the constitutionality of a Whig-sponsored apportionment bill.<sup>37</sup> Adams denounced Tyler's statement as "a defacement of the public records."<sup>38</sup> The next few Presidents were at least apologetic when they broke protocol to issue written statements calling into question Congress's handiwork.<sup>39</sup> But, a few decades later, Presidents were issuing signing statements at a rapid pace.<sup>40</sup> By the time of Herbert Hoover's presidency, signing statements had been routinized and cataloged, and Hoover himself issued sixteen statements explicitly designated as such.<sup>41</sup> Twentieth-century legislators were unlikely to view such statements as a stain on the public records. And Presidents in the twentieth century increasingly turned to signing statements to articulate and advance a constitutional vision of expansive executive power.<sup>42</sup>

Signing statements became briefly controversial again during the Reagan Administration. The Reagan Administration did not issue signing statements at a particularly high rate,<sup>43</sup> but the Administration was more self-consciously concerned with what signing

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35. See Bradley & Posner, *supra* note 9, at 313.

36. See Jackson, *supra* note 26.

37. KEITH E. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* 177 & n.38 (2007).

38. *Id.* (quoting H.R. REP. NO. 27-909, at 2 (1842)).

39. See May, *supra* note 21, at 929-30, 929 n.297.

40. See *id.* at 931 tbl.2, 932.

41. This number was calculated using the catalog of modern presidential signing statements at AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/signingstatements.php> [<https://perma.cc/DL6K-ALM2>].

42. See Kevin A. Evans, *Looking Before Watergate: Foundations in the Development of the Constitutional Challenges Within Signing Statements*, *FDR-Nixon*, 42 *PRESIDENTIAL STUD. Q.* 390, 402-03 (2012).

43. See May, *supra* note 21, at 931 tbl.2.

statements could do.<sup>44</sup> The Department of Justice under Attorney General Edwin Meese was more vocal about the appropriateness of and need for the executive branch to independently interpret the Constitution, and signing statements were one vehicle for promoting the executive's constitutional vision.<sup>45</sup> Notably, as then Deputy Assistant Attorney General Samuel Alito put it, the Department of Justice's "primary objective is to ensure that Presidential signing statements assume their rightful place in the interpretation of legislation."<sup>46</sup> Alito further noted that the Reagan Department of Justice "should seek to have interpretive signing statements issued for a reasonable number of bills," with the hope that those statements would become part of the legislative history that judges would turn to when interpreting and applying statutes.<sup>47</sup> Democratic Representative Barney Frank called this "the gravest usurpation of legislative prerogative I can think of."<sup>48</sup> Strong claims on behalf of interpretive signing statements were criticized for a time, but eventually the debate receded as interpretive signing statements were normalized.<sup>49</sup>

A new debate over signing statements emerged during the presidency of George W. Bush. As a Congressional Research Service report observed, the Bush White House used signing statements in ways that were comparable to how previous Administrations—both

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44. See *id.* at 930-31, 931 n.304; see also William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 *IND. L.J.* 699, 703-09 (1991).

45. Bradley & Posner, *supra* note 9, at 316.

46. Alito, *supra* note 34, at 1.

47. *Id.* at 4.

48. See Frank B. Cross, *The Constitutional Legitimacy and Significance of Presidential "Signing Statements"*, 40 *ADMIN. L. REV.* 209, 209 (1988) (quoting Linda Greenhouse, *Washington Talk: The White House; In Signing Bills, Reagan Tries to Write History*, *N.Y. TIMES* (Dec. 9, 1986), <http://www.nytimes.com/1986/12/09/us/washington-talk-the-white-house-in-signing-bills-reagan-tries-to-write-history.html> [<https://perma.cc/PDP8-XZ97>]).

49. For the Reagan-era debate, see generally Legal Significance of Presidential Signing Statements, 17 *Op. O.L.C.* 131 (1993) (analyzing the useful and legally significant functions of presidential signing statements); Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 *HARV. J. ON LEGIS.* 363 (1987) (arguing that courts should not use presidential signing statements as a tool for interpreting congressional intent); Popkin, *supra* note 44 (examining judicial reliance on presidential signing statements); Brad Waites, Note, *Let Me Tell You What You Mean: An Analysis of Presidential Signing Statements*, 21 *GA. L. REV.* 755 (1987) (analyzing the policy of publishing presidential signing statements).

Democratic and Republican—had used them.<sup>50</sup> But the report noted that, “while the nature and scope of the [constitutional] objections [to legislation] raised by the Bush II Administration mirrored those of prior Administrations, the *sheer number* of challenges contained in the signing statements” proved anomalous.<sup>51</sup> To critics, the “innumerable” objections to statutory provisions felt merely “ritualistic” and “mechanical,” demonstrating little executive deliberation or deference to legislative sensibilities.<sup>52</sup> The Bush Administration did not emphasize the kind of interpretive signing statements that the Reagan Administration hoped would shape how judges understood statutes.<sup>53</sup> Instead, the Bush White House used signing statements to advance constitutional understandings that the executive branch would use itself in crafting the implementation of statutes.<sup>54</sup> In doing so, the Bush Administration highlighted signing statements as an example of presidential unilateral action, which was a concept of increasing interest and concern in the context of a polarized and divided government.<sup>55</sup>

As the once-obscure device of a signing statement became more visible during the Bush Administration, criticism mounted from numerous directions. The journalist Charlie Savage did much to shine a public spotlight on presidential signing statements, which he ultimately characterized as a lynchpin of an “imperial presidency” and a critical instrument for the “subversion of American democracy.”<sup>56</sup> For his “revelation[.]” of the existence of Bush’s controversial signing statements, he was awarded a Pulitzer Prize.<sup>57</sup> The American Bar Association (ABA) mobilized a special task force to examine the Bush Administration’s use of the signing statement, and the ABA House of Delegates resolved to denounce the Administration’s “misuse of presidential signing statements” as contrary to

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50. GARVEY, *supra* note 1, at 7.

51. *Id.* (emphasis added).

52. *Report of the Task Force on Presidential Signing Statements and the Separation of Powers*, 131 A.B.A. CRIM. JUST. SEC. 671, 683-84 (2006) [hereinafter *ABA Task Force Report*].

53. Bradley & Posner, *supra* note 9, at 321.

54. *See id.* at 317-20.

55. *See, e.g.*, Kelley & Marshall, *supra* note 12, at 183-84.

56. SAVAGE, *supra* note 5, at 228-49.

57. *The 2007 Pulitzer Prize Winners: National Reporting*, PULITZER PRIZES (2007), <http://archive.pulitzer.org/citation/2007-National-Reporting> [<https://perma.cc/W33G-QSSG>].

the constitutional separation of powers.<sup>58</sup> Congress held hearings to investigate the President's use of signing statements.<sup>59</sup> Legal academics and political scientists weighed in on the problems of the Bush Administration's signing statements.<sup>60</sup>

The criticisms of the Bush constitutional signing statements were various, but three concerns stand out as particularly notable. First, the signing statements were criticized as subverting interbranch comity.<sup>61</sup> Although signing statements are public and readily available documents, their relative obscurity suggests to some that there is something inappropriate about hiding "bold political and legal actions in plain sight where few of its critics or opponents would see them."<sup>62</sup> What is worse, signing statements have traditionally been relatively brief and sweeping, more akin to an exercise in political rhetoric than legal analysis.<sup>63</sup> In the case of the Bush Administration's constitutional signing statements, constitutional claims were "often asserted without supporting authorities, or even serious efforts at explanation."<sup>64</sup> Rather than engaging Congress in shared deliberation about constitutional meaning, the White House deployed a "zero tolerance attitude" toward potential legislative missteps,<sup>65</sup> and assigned staff to "scrutinize[]" bills "look[ing] for anything that might infringe on presidential power."<sup>66</sup>

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58. See *ABA Task Force Report*, *supra* note 52, at 671, 673.

59. See generally *Presidential Signing Statements Under the Bush Administration: A Threat to Checks and Balances and the Rule of Law?: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. (2007); *The Use of Presidential Signing Statements: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006).

60. See, e.g., JAMES P. PFIFFNER, *POWER PLAY*, at x-xi (2008); PETER M. SHANE, *MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* 132-42 (2009); Phillip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 *PRESIDENTIAL STUD. Q.* 515, 521, 523-27, 530 (2005); Louis Fisher, *Signing Statements: Constitutional and Practical Limits*, 16 *WM. & MARY BILL RTS. J.* 183, 194, 200-01 (2007); Kelley & Marshall, *supra* note 11, at 249; May, *supra* note 21, at 979-80, 986; Neil Kinkopf, *Signing Statements and the President's Authority to Refuse to Enforce the Law*, ACS *ISSUE BRIEF*, June 2006, at 2, 5-7.

61. See Cooper, *supra* note 60, at 518, 521, 525, 531.

62. *Id.* at 516.

63. See *id.* at 521.

64. *Id.*

65. *Id.* at 526.

66. Kelley & Marshall, *supra* note 11, at 263.

Second, the signing statements were denounced as a kind of absolute, line-item veto.<sup>67</sup> When signing statements indicated that the “executive branch shall construe these sections in a manner consistent with the constitutional authority of the President,”<sup>68</sup> they asserted an executive power to ignore what Congress had (arguably) done. Statutory provisions were to be set aside or truncated to the extent that, in the executive’s own judgment, such provisions impinged on executive authority. In Christopher May’s evocative characterization, Bush was “Reviving the Royal Prerogative.”<sup>69</sup> In issuing such statements, “Presidents have asserted that they have the power to disregard any law that they believe to be unconstitutional” and “are in effect asserting an absolute item veto—‘absolute’ because Congress gets no opportunity to override the President’s action, and an ‘item veto’ because it operates surgically against only those parts of a statute that the White House finds objectionable.”<sup>70</sup> The signing statements were one of the “trappings of an Imperial Presidency.”<sup>71</sup>

A corollary to this argument is that Presidents are obliged to exercise their constitutionally provided veto power when presented with a bill containing unconstitutional provisions.<sup>72</sup> Presidents are armed with a veto over legislation in part to protect the Constitution and their own office against legislative encroachment.<sup>73</sup> Moreover, the ability of the President to veto proposed legislation inserts the President into the legislative process and offers the President the opportunity to formally weigh in on the desirability of a policy proposal.<sup>74</sup> Once a bill becomes law, however, Presidents shift to an exclusively executive function in which their job is best understood as requiring them to implement statutes as written rather than stamp their own policy preferences onto completed legislation.<sup>75</sup>

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67. Cooper, *supra* note 60, at 518.

68. Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influence Act, 2006, 2 PUB. PAPERS 1901, 1901 (Dec. 30, 2005) [hereinafter Signing Statement Dec. 30, 2005].

69. May, *supra* note 21, at 865, 867, 981-82.

70. *Id.* at 867.

71. *Id.*

72. *See id.* at 877-78.

73. *See id.*

74. *See* Cooper, *supra* note 60, at 516-17.

75. *See* May, *supra* note 21, at 873-74.

Moreover, the veto, as outlined in Article I of the Constitution, is qualified, rather than absolute, and gives Congress a formal opportunity to consider the President's objections and respond accordingly, whether by abandoning the legislation, adjusting it, or mustering the supermajority necessary to override the veto.<sup>76</sup> As the ABA concluded, the "Constitution thus limits the President's role in the lawmaking process."<sup>77</sup> The President has a "constitutional obligation to veto any bill that he believes violates the Constitution in whole or in part," and signing statements are no substitute for fulfilling that primary constitutional duty.<sup>78</sup>

Third, the signing statements were criticized for advancing a flawed theory of a unitary executive. Substantively, many of the Bush Administration's signing statements claimed to find flaws with statutory provisions because they interfered with the ability of the President to exercise complete and unilateral control over the executive branch.<sup>79</sup> The unitary theory of the executive advanced by legal conservatives since the Reagan Era argues that, in order for the President to fulfill his constitutional duty to "take Care that the Laws be faithfully executed,"<sup>80</sup> the President must have the authority to direct and, if necessary, remove any lower-level executive official.<sup>81</sup> Congressional interference with the President's command over executive branch officials would, therefore, be unconstitutional, impinging on the President's constitutional authority and interfering with the constitutional scheme by which public policy is administered.<sup>82</sup> Given that focus, the Bush Administration's signing statements seemed troubling for simultaneously relying on a controversial understanding of the Constitution and expanding the power of the office of the President.<sup>83</sup>

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76. *See id.* at 878.

77. *ABA Task Force Report*, *supra* note 52, at 686.

78. *Id.* at 688; *see also* CONST. PROJECT, STATEMENT ON PRESIDENTIAL SIGNING STATEMENTS BY THE COALITION TO DEFEND CHECKS AND BALANCES 1 (2006), [http://www.constitutionproject.org/pdf/Statement\\_on\\_Presidential\\_Signing\\_Statement.pdf](http://www.constitutionproject.org/pdf/Statement_on_Presidential_Signing_Statement.pdf) [<https://perma.cc/H8DZ-MC3W>].

79. *See Cooper*, *supra* note 60, at 522.

80. U.S. CONST. art. II, § 3.

81. *See* STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE 3-4 (2008).

82. *See id.*

83. *See Fisher*, *supra* note 60, at 183.

The subsequent parts of this Article suggest that these objections are misplaced. While there might have been reason to object to the particular content of any given signing statement, the practice of issuing signing statements is not particularly sinister. Indeed, there may well be some virtues to Presidents making use of signing statements to voice constitutional objections to provisions of the U.S. Code.

## II. CONFUSING THE MESSAGE WITH THE MESSENGER

Although there have been occasional objections to the President even issuing signing statements critical of Congress, most of the contemporary objections to the signing statements issued by the Bush White House revolved around either the actual substance of the President's constitutional claims or the institutional claim that the President had the authority to "construe these sections in a manner consistent with the constitutional authority of the President."<sup>84</sup> To the extent that the objection is to the substantive constitutional claim made in the signing statement, then focusing on the instrument by which the President announced the constitutional claim is a red herring. Similarly, to the extent that the objection is to the idea of presidential nonenforcement of arguably constitutional statutory provisions, then it matters little whether the intention to refuse to enforce such provisions is declared in a signing statement or elsewhere.

There might be reasons to be skeptical of either the substantive constitutional claim or the institutional claim made by the Bush Administration's signing statements, but none of those reasons cast doubt on the device of the signing statement itself as a mechanism for announcing the Administration's constitutional position.<sup>85</sup> Imagine, for example, that the President does not issue a signing statement at the time that he gives his approval to a bill and converts it into a law. At some point in the days, weeks, or months after the law is passed, however, the Administration announces by some other means its posture on a constitutional question regarding the statute. Perhaps the White House press secretary takes note of

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84. Signing Statement Dec. 30, 2005, *supra* note 68, at 1901.

85. See Kelley & Marshall, *supra* note 11, at 250-51.

the constitutional problem informally in a press conference; perhaps the attorney general or the Office of Legal Counsel produces an opinion examining the constitutional question; perhaps the President comments on the constitutional issue in a prepared speech on some random occasion. Is the Administration's action properly subject to any less criticism as a result of announcing its position by one of those alternative means? It seems unlikely that any critic of the Bush Administration's signing statements would be any less critical if the substantive content of the statement came in some different form. What generated the criticism was not really the signing statement as such but the message conveyed therein.

Nonetheless, there might be reasonable concerns about signing statements as a genre, regardless of the actual content of the statements. The question, however, ought to be a comparative one. If signing statements are inadequate, then compared to what? Implicitly, the ideal seems to be an opinion issued by the U.S. Supreme Court. It has been common to compare political documents to judicial opinions and find the former wanting.<sup>86</sup> Unsurprisingly, signing statements tend to be conclusory rather than analytical.<sup>87</sup> Positions are stated but are rarely defended—or even fully elaborated and explained.<sup>88</sup> As a vehicle for communicating the Administration's constitutional claim, signing statements can be effective, but as a vehicle for developing and explaining a constitutional argument, they are inadequate.<sup>89</sup> This does not by itself make signing statements problematic, but it does indicate that signing statements cannot serve the function that we would expect judicial opinions to serve. They are best viewed as a complement to other documents—part of a larger effort to advance a presidential understanding of the Constitution. Signing statements make less sense as stand-alone documents than as a means of publicizing principles to be developed in more detail elsewhere.

A second concern with raising constitutional complaints in signing statements is the potential effect on interbranch relations.

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86. See Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 779 (2002).

87. See Cooper, *supra* note 60, at 521.

88. See *id.*

89. See *id.*

Expressing constitutional doubts about legislation in a signing statement might reasonably be taken as disrespectful of the legislature and subversive of a good working relationship between the two branches.<sup>90</sup> At the broadest level, this seems like an exaggerated concern. In the early days of the republic, the judiciary expressed some hesitation to openly asserting that Congress had violated the Constitution.<sup>91</sup> Much more preferable, some thought, to maintain the fiction that Congress would never knowingly cross constitutional limits.<sup>92</sup> But the courts eventually abandoned that polite fiction and became willing to opine straightforwardly that politicians do not always attend to the niceties of constitutional fidelity.<sup>93</sup> There is little reason to think that relations between the legislature and the judiciary are any worse for wear as a consequence of such frank talk. At this point, Presidents are often biting in references to Congress in a myriad of venues, from veto messages to stump speeches.<sup>94</sup> Signing statements are neither particularly notable nor especially cutting in exposing Congress to presidential aspersions.<sup>95</sup>

Beyond the rhetorical features of constitutional signing statements, there is also a substantive question of the appropriate posture that Presidents should adopt relative to Congress and proposed legislation. One of the distinctive features of the Bush signing statements was the sheer volume of objections that the White House raised to provisions of federal statutes, and there is reason to think that the Administration was self-consciously invested in identifying constitutional problems with the products of the legislative process.<sup>96</sup>

Is such aggressive monitoring of legislative action by the executive constitutionally appropriate? Should the White House give Congress the benefit of the doubt on disputed constitutional ques-

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90. See, e.g., CONST. PROJECT, *supra* note 78, at 1-2.

91. Mark A. Graber, *The New Fiction: Dred Scott and the Language of Judicial Authority*, 82 CHI.-KENT L. REV. 177, 180 (2007).

92. On early judicial rhetoric, see *id.* at 181; Keith E. Whittington, *Judicial Review of Congress Before the Civil War*, 97 GEO. L.J. 1257, 1270-84 (2009).

93. See, e.g., Graber, *supra* note 91, at 181.

94. See May, *supra* note 21, at 905, 977.

95. On the ways in which the twentieth-century President abandoned many of the rhetorical constraints that were accepted in the nineteenth-century, see JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 6-8 (1987).

96. See Kelley & Marshall, *supra* note 11, at 263.

tions, rather than combatively casting doubt on Congress? These questions have two dimensions. At one level, we might be concerned with how legislators might respond to such a bellicose executive stance. If legislators are likely to take offense at the White House questioning the quality of their work and become less cooperative with the executive as a result, then Presidents might be better served by adopting a strategy of getting along. Confronting others on their constitutional deficiencies might ratchet up political conflict and expend political capital that would be better spent elsewhere. Presidents must weigh what they hope to accomplish by repeatedly pointing out constitutional errors against what they hope to accomplish by choosing to overlook problematic features of legislation of no immediate consequence. The Bush White House might have imagined that the symbolism of repeatedly insisting on its constitutional point would chip away at legislative overreach, but any such gains might be more illusory than real.

At a second level, we might be concerned that such executive aggressiveness is in conflict with the level of deference that is due to the national legislature. While the courts might no longer maintain the pretense that Congress never passes an unconstitutional law,<sup>97</sup> the judicial branch continues to declare that Congress deserves the presumption that its work passes constitutional muster.<sup>98</sup> The White House's willingness to aggressively scrutinize bills for constitutional flaws would seem to be inconsistent with that more deferential starting point.<sup>99</sup> While the President might not face the same countermajoritarian difficulty that judges do, the democratic and deliberative authority of the legislature might well be sufficient to suggest that the executive should give Congress the benefit of the doubt on contested constitutional issues.

Beyond the question of signing statements as a genre of presidential speech is the particular constitutional uses to which they were

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97. See, e.g., Graber, *supra* note 91, at 181, 186 (discussing how pre-Civil War Justices refrained from declaring federal laws unconstitutional).

98. *E.g.*, *Boumediene v. Bush*, 553 U.S. 723, 738 (2008) ("The usual presumption is that Members of Congress, in accord with their oath of office, considered the constitutional issue and determined the amended statute to be a lawful one."); see also Crabb, *supra* note 3, at 720.

99. See Kinkopf, *supra* note 60, at 2-3 (discussing President George W. Bush's frequent use of the nonenforcement power).

put by the Bush Administration. This is not the place to mount an attack or defense of the substantive theories advanced by the Bush Administration. It is enough for present purposes to simply recognize that they are controversial.<sup>100</sup> Constitutional controversy (among faithful interpreters) might take one of two forms. There might be disagreement about the constitutional rule itself. The Administration and its opponents might disagree over whether a proffered legal restraint can even be validly located in the Constitution. In other cases, there might be disagreement not about the constitutional rule but about the application of the rule to the issue at hand.

While both sorts of disagreement create divergence between the White House and Congress, the first type might be more polarizing. Disagreements over constitutional applications are routine and are particularly familiar in the type of hard cases that might be expected to disproportionately occupy the attention of high-level federal officials. Disagreements over the existence of a given constitutional rule, however, are less typical, though hardly unknown within American politics. Such disagreements might be harder to resolve since Congress and the President start from such divergent starting points, which may suggest a more extreme form of constitutional disagreement. Many of the signing statements issued by the Bush Administration entered into this sort of controversy, with critics charging not merely that the Administration misapplied accepted constitutional doctrine but asserted new, unprecedented, and ill-conceived doctrines.<sup>101</sup> Executive reliance on such constitutional theories is likely to heighten interbranch and cross-partisan conflict, and Presidents might need to be particularly wary of taking such a step.

One difficulty with adopting controversial constitutional rules is that they might increase the incidences of disagreement. Errors of constitutional application are likely to be relatively uncommon. If the constitutional rules are known, failures to abide by them might come about from a variety of causes, but the objective to be achieved

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100. See Cooper, *supra* note 60, at 516; Kelley & Marshall, *supra* note 11, at 262-63; Kinkopf, *supra* note 60, at 2.

101. See Kinkopf, *supra* note 60, at 5-6.

is at least fairly clear.<sup>102</sup> When the legislature and the executive are referencing different constitutional rule books, then constitutional errors are likely to seem ubiquitous. If the legislature is operating under a different set of constitutional rules than those that the executive accepts, then even relatively mundane legislative actions might seem constitutionally problematic. Moving the constitutional baseline will suddenly put myriad routine acts on the wrong side of constitutional requirements. Having adopted a controversial constitutional theory, constitutional actors are likely to find themselves constantly encountering, identifying, and objecting to constitutional errors by the legislature.

One somewhat ironic virtue of signing statements, however, is that they do not do anything. When the judiciary strikes down a law as unconstitutional, it voids a policy.<sup>103</sup> When Presidents veto bills, they obstruct the creation of new policy.<sup>104</sup> When Presidents issue signing statements voicing constitutional objections to language within a statute, the arguments advanced have no immediate effect.<sup>105</sup> The signing statement might announce an intention to take action at some point in the indefinite future, but this challenge to legislative policy is necessarily smaller than if the statement had the immediate effect of blocking policy.<sup>106</sup> This gap between rhetoric and reality, or intention and action, provides the executive with some opportunity to calibrate its actual response to what it understands to be constitutionally problematic legislative provisions. Signing statements allow for the President to avoid outlining any plan of action. Or the statement itself might serve as the Administration's response to the perceived constitutional violation.<sup>107</sup> Statements allow for rhetorical posturing that lays down a marker on the executive's favored constitutional interpretation and calls out the legislature for failing to adequately observe the President's view of constitutional boundaries, without requiring the executive

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102. On the failures of constitutional constraints, see Keith E. Whittington, *Constitutional Constraints in Politics*, in *THE SUPREME COURT AND THE IDEA OF CONSTITUTIONALISM* 221, 222 (Steven Kautz et al. eds., 2009).

103. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 180 (1803).

104. See U.S. CONST. art. I, § 7.

105. See Cooper, *supra* note 60, at 516-20 (explaining consequences of signing statements).

106. See *id.* at 518.

107. See May, *supra* note 21, at 977.

to further heighten the conflict by taking action that would actually affect policy.<sup>108</sup> The message is the action.

Simply conveying the message might have particular uses in the constitutional context. Constitutional law and constitutional norms develop through accumulated actions. In the judicial arena, these actions primarily come in the form of decisions that accumulate as precedents that are eventually taken for granted and become the foundation for additional decisions further extending and deepening them.<sup>109</sup> In the political arena, precedents are established through political actions and political rhetoric.<sup>110</sup> Acquiescence to political and policy initiatives lays the foundations for future innovations. What is controversial now is later taken as a given. Judges themselves might well look back on that history in order to identify whether an adequate pattern of custom and “usage” might have settled constitutional controversies such that newly raised objections should be regarded as moot.<sup>111</sup>

By accepting dubious legislative provisions in silence, Presidents might well be allowing those constitutional encroachments to become entrenched. Simply voicing objections to them helps provide the legal materials that future executives might need in order to pursue more vigorous actions. Rather than being put in the position of raising seemingly unprecedented constitutional claims, the executive can point to a history of prior objections that demonstrate that the executive has never accepted, even if it has gone along with, legislative assertions.

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108. *See id.* at 937-45.

109. For one elaboration and defense of this vision of constitutional law, see David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 888 (1996).

110. On political development of constitutional expectations and practices, see generally STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM* (1996); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1 (1998).

111. *See generally* Ernest A. Young, *Our Prescriptive Judicial Power: Constitutive and Entrenchment Effects of Historical Practice in Federal Courts Law*, 58 WM. & MARY L. REV. 535, 543 (2016); Keith E. Whittington, *Upholding Law in the Nineteenth Century* (unpublished manuscript) (on file with the *William & Mary Law Review*).

## III. THE VIRTUE OF SIGNING STATEMENTS

Although some characterize presidential signing statements as exemplifying the executive's power of unilateral action,<sup>112</sup> such statements should not be categorized as actions at all. At best, signing statements signal the possibility of future action, but do not take actions themselves. Unlike a veto or an executive order, signing statements have no legal force and implement no policy decision.<sup>113</sup> They announce and publicize a position, but cannot execute a policy.<sup>114</sup> The value of the signing statement as a presidential tool lies in its ability to communicate presidential preferences to others.

Presidents communicate to many audiences, and over time they have innovated in how to deliver their message to those audiences more effectively. From written messages to stump speeches, from inaugural addresses to fireside chats, Presidents have increasingly leveraged their position to persuade others and mobilize support.<sup>115</sup> Signing statements are a particularly flexible tool that can speak to multiple audiences.<sup>116</sup> If this particular instrument is to be eliminated from the President's toolkit, we should appreciate what functions it has served and what alternatives there might be to replace them. In this Part, I consider four possible audiences for signing statements.

Judges are the first potential audience for signing statements. As the Reagan Administration emphasized, signing statements build a record of legislative history that might affect how judges interpret the statutes that the President signs into law.<sup>117</sup> Signing statements provide one contemporaneous claim of how an important political actor in the legislative process understands the meaning of the legislation being adopted.<sup>118</sup> To the extent that judges regard such historical materials as relevant to the process of statutory interpretation, Presidents can seek to build their own record to

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112. See, e.g., SAVAGE, *supra* note 5, at 243.

113. See Kinkopf, *supra* note 60, at 2, 5.

114. See *id.*

115. See Kenneth Mayer, Book Review, 5 PERSP. ON POL. 635, 635-36 (2007).

116. Cooper, *supra* note 60, at 518.

117. See Bradley & Posner, *supra* note 9, at 316.

118. See Cooper, *supra* note 60, at 516-17.

supplement more traditional components of legislative history such as committee reports.<sup>119</sup> There are well known objections to the use of legislative history in statutory interpretation,<sup>120</sup> but to the extent that such materials are taken to be valuable—and to the extent to which the President is understood to be part of the relevant legislative process<sup>121</sup>—then signing statements serve a function comparable to various legislative documents that accompany the production of statutes.<sup>122</sup>

Eliminating signing statements would, perhaps inappropriately, obscure the President's role in the adoption of legislation and slant the record of legislative history toward congressionally produced documents. This would potentially force Presidents to seek out alternative mechanisms for putting their stamp on the legislative history, whether by influencing the drafting of committee reports or insisting on changes to the statutory text itself.<sup>123</sup> Alternatively, if shut out from contributing to the legislative history, Presidents might seek to devalue legislative history entirely by, for example, nominating judges who are committed to textualism in statutory interpretation.<sup>124</sup>

Signing statements can also be used to communicate to judges the administration's position on constitutional meaning as well as statutory meaning. Signing statements can outline constitutional difficulties with statutory provisions, whether or not the statement goes further and indicates that the administration will avoid implementing the statute in a way that would run afoul of those difficulties.<sup>125</sup> Constitutional objections may be raised in either a weak form—merely flagging possible constitutional concerns—or a strong

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119. *See id.* at 517.

120. *See, e.g.,* James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 161-62 (2008).

121. *See* SAVAGE, *supra* note 5, at 234 (noting that judges did not support an initial attempt to have presidential signing statements constitute legislative history).

122. Steven G. Calabresi & Daniel Lev, *The Legal Significance of Presidential Signing Statements*, FORUM, Sep. 2006, at 1, 5.

123. *See* Cross, *supra* note 48, at 222, 224.

124. *See* Cooper, *supra* note 60, at 517; *see also* Waites, *supra* note 49, at 775 (explaining the President's influence on the composition of the judiciary).

125. *See* Cooper, *supra* note 60, at 516-17.

form—asserting that the statute contradicts constitutional requirements.<sup>126</sup>

The executive branch has an obvious alternative means for communicating its constitutional concerns to the judiciary in the context of litigation. Whether through amicus briefs or directly as a party in a case, administration lawyers are likely to have opportunities to advance their constitutional arguments before the bench.<sup>127</sup> The distinctive utility of signing statements is reduced to the extent that such direct communication to judges is adequate to elaborate the administration's positions.<sup>128</sup> Indeed, the detailed argument contained in legal briefs is likely to be of higher quality than the short assertions that might be contained in signing statements.<sup>129</sup>

If legal briefs are preferable as a means for advancing high-quality legal arguments directly to judges, the advantage of the supplemental mechanism may be primarily a matter of timing.<sup>130</sup> Signing statements issue contemporaneously with the adoption of a statute but prior to enforcement,<sup>131</sup> whereas legal briefs accompany litigation,<sup>132</sup> which in turn must generally wait until implementation of the terms of the statute has begun. The administration may find publicizing its constitutional arguments early advantageous to the degree that such arguments may impact parties and lawyers considering litigation. Presidents might be able to interject their perspective into legal arguments before the government would otherwise be able to make an appearance in a court. Signing

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126. See May, *supra* note 21, at 933 tbl.3 (noting the various constitutional grounds on which Presidents objected to statutes).

127. May, *supra* note 21, at 940-43 (discussing examples of the executive branch asserting that a law was unconstitutional when the government was a party to the suit); Anne Skrodzki, Comment, *Signing Statements and the New Supreme Court: The Future of Presidential Expression*, 40 J. MARSHALL L. REV. 1317, 1329, 1335 (2007) (discussing examples of the executive branch using amicus briefs to assert that a law was unconstitutional).

128. Cross, *supra* note 48, at 234.

129. Cf. Cooper, *supra* note 60, at 521 (discussing the lack of legal analysis in many signing statements voicing constitutional objections); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 817 (2000) (explaining the quality of amicus briefs and their impact on judicial decisions).

130. Cross, *supra* note 48, at 232.

131. See Calabresi & Lev, *supra* note 122, at 1 n.2; May, *supra* note 21, at 905.

132. See FED. R. APP. P. 29(e) (requiring the filing of an amicus brief within seven days of the filing of the principle briefs); *id.* 31(a) (requiring the filing of an appellant's brief within forty days of the record filing and appellee's brief thirty days thereafter).

statements also give the President an opportunity to put his constitutional concerns on the public record, even if no litigation on those issues arises during the President's term of office.<sup>133</sup> While such unique benefits to the administration of being able to make use of a signing statement are real, they are likely to be relatively small given the ready access that the White House has to the courts and the ability to make its case more directly to a judicial audience.<sup>134</sup>

Congress is a second possible audience for presidential signing statements. To legislators, the presidential signing statement serves as a warning about possible implementation of the newly adopted statute.<sup>135</sup> The effect, of course, is to throw down a gauntlet in a public confrontation between the White House and Congress.<sup>136</sup> While the signing statement makes the administration's intentions more visible to Congress, it encourages further legislative surveillance and investigation of how the executive branch is implementing statutes.<sup>137</sup>

But again, we should consider what alternatives would be available to the administration if signing statements were taken out of the toolkit. Perhaps the most likely alternative is simply for the executive branch to behave the same as it otherwise would have, but to do so without the visibility associated with the public statement of the administration's intentions. While presidential signing statements sometimes reference politically salient and fairly visible executive actions that would be at issue under the statute,<sup>138</sup> they often relate to more low-profile issues that may otherwise fly under the radar.<sup>139</sup> Executive implementation of the statutory provisions at issue would, absent the signing statement, be far less visible to legislators.<sup>140</sup> The statement makes visible a conflict between the

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133. See Cooper, *supra* note 60, at 519.

134. See, e.g., May, *supra* note 21, at 940-43 (providing examples of Presidents challenging a law's constitutionality as a party to the case); Skrodzki, *supra* note 127, at 1335 (providing examples of the executive branch using amicus briefs to challenge a law's constitutionality).

135. See Cooper, *supra* note 60, at 520 (explaining that a signing statement can give details about the executive's directives for implementation).

136. See, e.g., *id.* at 522, 524.

137. See *id.* at 520.

138. See, e.g., Signing Statement Nov. 17, 1971, *supra* note 16, at 360 (noting that statutory provisions urging a "final date" would not change the administration's Vietnam policy).

139. See, e.g., Popkin, *supra* note 44, at 702-03, app. at 718-22.

140. See Cooper, *supra* note 60, at 520.

executive and the legislature that would otherwise still exist but would be less clear to the legislature.<sup>141</sup> Discouraging signing statements would just push the conflict into the shadows.

An administration focused on the production of signing statements, however, might be dedicating resources at the wrong point in the policy-making process. Signing statements are generated at the end of the legislative process, as bills reach the White House for the President's signature.<sup>142</sup> At least in the Bush Administration, bills adopted by Congress were routed through a group of lawyers who reviewed them for objectionable provisions and drafted signing statements to flag those provisions.<sup>143</sup> Although critics have complained about this systematic effort of "picking through bills of Congress to find things to disagree with,"<sup>144</sup> a more potent objection might be to the tardiness of the intervention. If officials within the administration are likely to have objections to legislative proposals, the more productive time to intervene is during the legislative process rather than at its end.<sup>145</sup> White House efforts to lobby the legislature to modify bills might not always be effective, but bargaining at the drafting stage is likely to be more effective in shaping policy than writing signing statements in the transition between the legislation and the implementation stages of the policy-making process. Signing statements might still usefully memorialize objections that had been made in vain during the lawmaking process, but holding objections until the signing stage has limited value.

Optimally, signing statements would be a last-ditch effort to voice administration concerns about a bill after all lobbying efforts have failed, rather than a first option.<sup>146</sup> Even so, raising constitutional concerns for the first time in a signing statement seems preferable to burying constitutional concerns that had been raised during the lawmaking process but put on the shelf once Congress adopted the

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141. *See id.* at 522, 524.

142. *See* May, *supra* note 21, at 905.

143. SAVAGE, *supra* note 5, at 236.

144. *Id.* at 237 (quoting Ron Klain, former Chief of Staff to Vice President Al Gore).

145. *See* Cross, *supra* note 48, at 214-17.

146. *See id.* at 224 (describing the usefulness as well as drawbacks in having the executive voice administrative concerns in signing statements); *see also* Kinkopf, *supra* note 60, at 6-7 (concluding that more modern signing statements have proven particularly problematic).

flawed measure. The Clinton Administration, for example, repeatedly denounced as unconstitutional the key provisions of the Communications Decency Act (CDA), which criminalized the transmission via the Internet of “patently offensive” material to minors.<sup>147</sup> Nonetheless, when the CDA was incorporated into the broader Telecommunications Act of 1996,<sup>148</sup> President Clinton organized a celebratory signing ceremony at the Library of Congress and issued two separate signing statements praising the “historic legislation.”<sup>149</sup> The President chose to make no mention of the Communications Decency Act or its constitutional flaws in those signing statements, though he did single out a different provision of the bill that extended a ban on the “transmittal of abortion-related speech and information” as unconstitutional.<sup>150</sup> The Department of Justice, he affirmed, would treat that provision of the newly enacted statute as void, and thus it would “not be enforced.”<sup>151</sup>

Ultimately, proactively lobbying the legislature so as to identify and try to defeat constitutionally dubious legislative proposals would be the preferable approach for dealing with legislators who advance policies that the administration regards as constitutionally problematic. Once such efforts have failed, however, issuing a signing statement calling attention to the constitutional problem would seem preferable to letting the flawed statute pass in silence.

The Bush Administration’s approach of going through statutes with a fine-tooth comb after the bills have already passed through Congress may also have the tendency of instigating unnecessary conflicts.<sup>152</sup> Political scientists have distinguished between “fire alarm” and “police patrol” models of oversight.<sup>153</sup> Police patrols are “comparatively centralized, active, and direct.”<sup>154</sup> In this case, by

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147. Communications Decency Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 56, 134 (codified as amended at 47 U.S.C. § 223 (2012)); Whittington, *supra* note 102, at 208-10.

148. Whittington, *supra* note 102, at 208.

149. Statement on Signing the Telecommunications Act of 1996, 1 PUB. PAPERS 188 (Feb. 8, 1996) [hereinafter Clinton Telecommunications Signing Statement I]; Remarks on Signing the Telecommunications Act of 1996, 1 PUB. PAPERS 185, 186 (Feb. 8, 1996).

150. See Clinton Telecommunications Signing Statement I, *supra* note 149.

151. *Id.*

152. See SAVAGE, *supra* note 5, at 236.

153. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

154. *Id.*

directing White House attorneys to review every bill to identify constitutional flaws, the Bush Administration adopted a police patrol model for addressing legislative errors.<sup>155</sup> In contrast, a fire alarm model would take a more passive approach, waiting for constitutional problems to arise in the course of policy administration and trying to resolve them only at that point.<sup>156</sup>

In general, the fire alarm model has an advantage over the police patrol model in its ability to focus resources on policy decisions that prove to be actually controversial in practice while avoiding policies that might appear problematic in the abstract but provoke no controversies in practice.<sup>157</sup> Signing statements have the disadvantage of trying to evaluate the consequences of statutory provisions in the abstract with no real information about what concrete problems actual implementation of the statute might reveal. In general, this form of oversight might simply be regarded as wasteful, forcing government officials to spend time on hypothetical problems rather than real problems.<sup>158</sup>

In this particular context, however, we might think that such administration efforts are not merely inefficient. Signing statements might be prone to errors, in the sense of generating false negatives (by missing constitutional flaws that will only become apparent in the midst of implementation) and false positives (by flagging constitutional flaws that would otherwise never present actual problems). Statutory provisions that might have proven relatively harmless wind up getting elevated into points of conflict between the executive and the legislature by this proactive approach. Faced with the choice, the lawyers of the Office of Legal Counsel might be better used for writing opinions to provide guidance when constitutional questions arise in the context of statutory implementation than for writing signing statements at the time of statutory passage.

Lower-level executive officials constitute a third possible audience for presidential signing statements. Controlling the executive bu-

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155. *Cf. id.*

156. *See id.* American-style judicial review also operates on the fire alarm model. *See, e.g.*, David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 *GEO. L.J.* 723, 747-54 (2009); Keith E. Whittington, *Legislative Sanctions and the Strategic Environment of Judicial Review*, 1 *INT'L J. CONST. L.* 446, 457 & n.30 (2003).

157. *See* McCubbins & Schwartz, *supra* note 153, at 168.

158. *See id.*

reaucracy is a basic challenge of presidential leadership, particularly in the context of the modern state where the executive bureaucracy is vast and most executive agents are insulated from presidential appointment and removal by the civil service system.<sup>159</sup> Presidents face incentives to try to “politicize” the executive apparatus and “centralize” decision-making in the White House in order to exert as much control as possible over executive policy making.<sup>160</sup> Rather than relying on distant bureaucrats, Presidents would prefer to have important policy decisions made by political appointees who are more likely to share presidential preferences and are more readily held accountable for their actions.<sup>161</sup> The sheer size of the modern executive bureaucracy and the complexity of modern policy making create governing dilemmas for the President.<sup>162</sup>

The White House has difficulty monitoring what is happening across the vast executive branch, and even politically sympathetic government officials located far from the Oval Office may have difficulty identifying what presidential preferences might be regarding the daily mundane tasks of normal governance. Signing statements can be a helpful tool for coordinating action across that executive bureaucracy. Lawyers relatively close to the President can be tasked with the responsibility of identifying constitutional issues that might otherwise go unnoticed by lower-level government officials housed in the bowels of the Department of Education, for example, and for formulating a coordinated administration response to those issues that the lower-level officials would be expected to carry out.<sup>163</sup>

Absent the mechanism of the signing statement, Presidents would need to search for some alternative tool for ensuring that their wishes are recognized and acted upon by far-flung administrators.

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159. See George A. Krause et al., *Political Appointments, Civil Service Systems, and Bureaucratic Competence: Organizational Balancing and Executive Branch Revenue Forecasts in the American States*, 50 AM. J. POL. SCI. 770, 770-71 (2006).

160. See generally Daniel Galvin & Colleen Shogan, *Presidential Politicization and Centralization Across the Modern-Traditional Divide*, 36 POLITY 477 (2004); Terry M. Moe, *The Politicized Presidency*, in THE NEW DIRECTION IN AMERICAN POLITICS 235 (John E. Chubb & Paul E. Peterson eds., 1985).

161. See Galvin & Shogan, *supra* note 160, at 481, 488, 494.

162. See *id.* at 481; Moe, *supra* note 160, at 249-50 (detailing the growth of executive agencies).

163. See Cooper, *supra* note 60, at 516-17, 519-20 (explaining that some signing statements include directions for officials in executive agencies).

Signing statements might substitute for—or supplement—other White House efforts to supervise distant executive-branch employees. To the extent that we think it would be preferable for executive officers to be responsive to presidential directives, then hampering the ability of presidents to coordinate the actions of those officers through signing statements would seem counterproductive.

Finally, the general public is a fourth possible audience for signing statements. Signing statements are distinctly public documents, if not necessarily widely read or high-profile.<sup>164</sup> They are written precisely to publicize presidential positions, at least to the interested public if not to the mass public.<sup>165</sup> Oftentimes, they are mere puffery. They try to call the public's attention to legislative accomplishments for which the President can claim some credit.<sup>166</sup> But no matter how substantively thick or thin a signing statement might be, it is designed for public consumption.

A singular virtue of signing statements is their introduction of transparency into American governance. As noted previously, signing statements are not themselves unilateral presidential action, but they can publicize unilateral presidential action.<sup>167</sup> While some executive actions are highly visible, from vetoing legislation to launching missiles, many are not.<sup>168</sup> In the extreme case—for example, covert government action in the context of the war on terror—executive actions are intended to be largely invisible. When Congress incorporated the Detainee Treatment Act into an emergency supplemental appropriations bill, however, the Bush Administration issued a signing statement observing that the requirement that detainees not be subjected to what had euphemistically become known as “enhanced” interrogation techniques would be construed “in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief.”<sup>169</sup> While the statement itself does little to specify what actions the executive might take, it does acknowledge the potential

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164. See Kinkopf, *supra* note 60, at 2.

165. See, e.g., Cooper, *supra* note 60, at 519.

166. See May, *supra* note 21, at 930 & n.304 (explaining the President's use of signing statements as a way to give credit, especially during an election year).

167. E.g., Kinkopf, *supra* note 60, at 2, 5.

168. See Cooper, *supra* note 60, at 520.

169. Signing Statement Dec. 30, 2005, *supra* note 68, at 1902.

conflict between the Administration's internal plans and the policy advanced by Congress, and puts Congress on notice that the conflict has not yet been resolved. Presidential positions that might otherwise have appeared only in unpublished OLC opinions at least see the light of day if articulated in signing statements.

#### IV. THE DECLINE OF THE CONSTITUTIONAL VETO

Utilizing the presidential veto power has been offered as the chief alternative to issuing signing statements raising constitutional doubts about provisions of an enacted statute.<sup>170</sup> Unlike signing statements, presidential vetoes and veto messages are explicitly provided for in the U.S. Constitution.<sup>171</sup> While signing statements provide no formal opportunity for Congress to respond to presidential concerns, the Constitution mandates that Congress has the opportunity to override the veto of a bill.<sup>172</sup> The President's veto power is qualified, not absolute, and a sufficiently large majority of legislators can reverse the President's judgment that a bill is constitutionally problematic.<sup>173</sup> Presidential objections to a bill are offered for congressional consideration in a veto message, rather than imperiously handed down in a signing statement.

It is worth noting that the modern preference for vetoes over signing statements departs from historical traditions. The Whigs who first objected to the use of signing statements were equally displeased with the presidential use of the veto power.<sup>174</sup> The Whig theory of the presidency held that both were inconsistent with the proper balancing of the legislature and executive.<sup>175</sup> When President John Tyler issued a signing statement raising constitutional qualms about a newly passed apportionment act, then-Representative and former-President John Quincy Adams wrote a committee report objecting to the innovation.<sup>176</sup> Adams complained that the Presi-

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170. See May, *supra* note 21, at 877-78.

171. U.S. CONST. art. I, § 7.

172. *Id.*

173. *Id.*; May, *supra* note 21, at 878.

174. See Michael J. Gerhardt, *Constitutional Construction and Departmentalism: A Case Study of the Demise of the Whig Presidency*, 12 U. PA. J. CONST. L. 425, 438-39 (2010).

175. See *id.*

176. See H.R. REP. NO. 27-909, at 1-2 (1842).

dent's only constitutional choices were to approve or veto legislation, but issuing a statement "means not approval, but doubt."<sup>177</sup> The President was casting aspersions on the wisdom of Congress and the validity of the statute, when the President's only duty was to show "mere obsequiousness to the will of Congress."<sup>178</sup> By effectively supplementing the text of the statute with the signing statement, the President "would transfer the legislative power of Congress itself to the arbitrary will of the Executive."<sup>179</sup> Adams was no happier when Tyler vetoed legislation. Adams fondly recalled a time when merely taking notice of the wishes of the President on legislation "was regarded as an outrage upon the rights of the deliberative body, among the first of whose duties it is to spurn the influence of the dispenser of patronage and power."<sup>180</sup> The willingness of the President to elevate himself to a position of equivalence with Congress resulted in "the whole legislative power of the Union" being "strangled" and placed "in a state of suspended animation" by the arrogant "will of one man" wielding the veto pen.<sup>181</sup>

Adams would have preferred to have amended the veto power contained in the Constitution.<sup>182</sup> Not all the Whigs would have gone that far, but they shared Adams's general concern.<sup>183</sup> Concerns of that sort drove William Henry Harrison to announce in his inaugural address that he would seek to "arrest the progress of that tendency" observed in Democratic Administrations toward creating a "virtual monarchy."<sup>184</sup> A key part of that effort was his pledge to refrain from using the veto power in any but the most exceptional of circumstances.<sup>185</sup> On disputed questions of policy or principle, the

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177. *Id.* at 7.

178. *Id.* at 7

179. *Id.* at 5.

180. H.R. REP. NO. 27-998, at 29 (1842).

181. *Id.* at 35.

182. *See id.* at 35-36 ("[T]he abusive exercise of the constitutional power of the President to arrest the action of Congress ... has wrought conviction upon the minds of a majority of the committee, that the veto power itself must be restrained and modified by an amendment of the Constitution.").

183. *See* Gerhardt, *supra* note 174, at 443-45.

184. President William Henry Harrison, Inaugural Address (Mar. 4, 1841), <http://www.presidency.ucsb.edu/ws/?pid=25813> [<https://perma.cc/HG5R-8ZJF>].

185. *See id.* ("I consider the veto power, therefore, given by the Constitution to the Executive of the United States solely as a conservative power, to be used only first, to protect the Constitution from violation; secondly, the people from the effects of hasty legislation where

executive would defer to the elected representatives of the people assembled in Congress.<sup>186</sup> From that Whiggish perspective, the critical flaw in President Tyler's signing statements and his vetoes was his willingness to set himself against Congress.

Few today would embrace the Whig's theory of the presidency and a generalized posture of presidential deference to Congress. Modern commentators generally prefer a more activist presidency that is capable of advancing policies independently of Congress.<sup>187</sup> To that extent, we tend to be more Jacksonian than Whiggish in our understanding of the presidential role within the American constitutional system.<sup>188</sup> But that sentiment would seem to imply that Presidents have a responsibility to use both vetoes *and* signing statements to advance their policy views and constitutional understandings. We would not expect the President to sit idly by while Congress passes legislation that the President thinks violates the Constitution.<sup>189</sup> We expect the President to take action to stop the constitutional violation. It seems unlikely that the veto is the exclusive tool available to Presidents for that purpose.

If we think Presidents should act independently of Congress to prevent constitutional violations, then it seems reasonable to expect Presidents to favor the aggressive use of the veto power. But there are reasons to doubt whether the veto power is adequate for this purpose in the modern legislative context. Vetoing legislation is a relatively drastic response to flawed legislation. The veto threat puts the President in a powerful bargaining position to try to move legislative details toward his favored position,<sup>190</sup> but the President ultimately faces an all-or-nothing choice. When considering whether

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their will has been probably disregarded or not well understood, and, thirdly, to prevent the effects of combinations violative of the rights of minorities.”)

186. *See id.* (“I may observe that I consider it the right and privilege of the people to decide disputed points of the Constitution arising from the general grant of power to Congress to carry into effect the powers expressly given; and I believe ... such disputed points as settled.”).

187. *See, e.g.*, J. Richard Broughton, *Rethinking the Presidential Veto*, 42 HARV. J. ON LEGIS. 91, 111 (2005); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 549 (1994); Alberto R. Gonzales, *Advising the President: The Growing Scope of Executive Power to Protect America*, 38 HARV. J.L. & PUB. POL'Y 451, 457 (2015).

188. *See* Broughton, *supra* note 187, at 91-93.

189. *See* U.S. CONST. art. II, § 1, cl. 8 (stating that the President shall “preserve, protect, and defend the Constitution”).

190. *See* J. Gregory Sidak, *The Recommendation Clause*, 77 GEO. L.J. 2079, 2127-28 (1989).

to veto a bill, the White House must decide whether it prefers a less-than-ideal new law or the status quo. How heavily should constitutional flaws weigh in that calculation?

Suppose that the President thinks a piece of legislation is generally valuable but contains some relatively minor constitutional flaws. What course of action is most appropriate in such a situation? Preferably, the White House would point out the flaws to Congress and seek to have the bill modified to remove them. That effort might fail for a myriad of reasons, however, ranging from disagreements about the constitutional issue itself to disagreements about the bill's importance. The White House must then decide whether the constitutional flaw is sufficiently grave to justify losing the otherwise valuable policy in its entirety.

We are accustomed to being constitutional perfectionists. We generally assume that constitutional violations should always be identified and corrected. But that orientation is easier to sustain in the judicial context, where judges can zero in on the specific application that produces the constitutional violation. The presidential veto is a relatively blunt instrument, and as a consequence the cost-benefit ratio of eliminating constitutional imperfections from the law is less favorable than abandoning a policy.

Consider, for example, the Fraud Enforcement and Recovery Act of 2009.<sup>191</sup> President Barack Obama signed the measure into law and issued a statement praising the ways in which the law would empower the Department of Justice “to address the challenges that face the Nation in difficult economic times and to do their part to help the Nation respond to this challenge.”<sup>192</sup> But the President also singled out the law's requirement that executive officials “furnish to the Financial Crisis Inquiry Commission, a legislative entity, any information related to any Commission inquiry,” and noted that “as [his] Administration communicated to the Congress during the legislative process, the executive branch [would] construe this subsection of the bill not to abrogate any constitutional privilege.”<sup>193</sup>

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191. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (codified in scattered sections of 18 U.S.C. and 31 U.S.C.).

192. Statement on Signing the Fraud Enforcement and Recovery Act of 2009, 1 PUB. PAPERS 689, 689 (May 20, 2009) [hereinafter Obama Signing Statement May 20, 2009].

193. *Id.*

Presumably, the constitutional violation represented by the objectionable reporting requirement is relatively minor (and perhaps mostly hypothetical) compared to the expected social benefits that would be produced by the new law. Even from the Administration's perspective—which implicitly accepted that the constitutional violation appeared likely and real—the constitutional damage might be worth absorbing in order to gain the benefits of the law.<sup>194</sup> A veto under such circumstances would be inadvisable, while a signing statement would offer a less costly opportunity for addressing the potential constitutional problem.

The cost-benefit calculation of using the veto to address constitutional difficulties in statutes has become even more daunting in the modern context. As the example of the Fraud Enforcement and Recovery Act indicates, the constitutional difficulty with a piece of legislation may only involve a small subsection of a much larger measure.<sup>195</sup> Classical exemplars of constitutionally motivated vetoes tend to put the constitutional dispute at the center of the legislative struggle. When George Washington was urged to veto, and Andrew Jackson actually did veto, the charter for the Bank of the United States, the very legitimacy of a national bank was at issue.<sup>196</sup> The constitutional objection went to the core of the proposed bill, not to a peripheral feature of it.<sup>197</sup> But distinguishing what is central and what is peripheral to a bill is itself endogenous to the legislative process.

When President Cleveland vetoed a record-breaking 304 bills during his first term,<sup>198</sup> he was working with a Congress that produced hundreds of individual bills that averaged just over a page in length. Most of them were private bills affecting single individuals<sup>199</sup> or highly specific public works bills, such as his first veto of a bill

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194. See Cooper, *supra* note 60, at 518.

195. See Obama Signing Statement May 20, 2009, *supra* note 192.

196. See Andrew Jackson, Veto Message (July 10, 1832), reprinted in 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1139, 1139 (James D. Richardson ed., 1897); see also Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1644-45 (2008).

197. See Jackson, *supra* note 196, at 1139.

198. See Broughton, *supra* note 187, at 124-25.

199. See Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL'Y 667, 797 (2003).

authorizing the construction of a bridge in Vermont.<sup>200</sup> The consequences of vetoing such a bill were relatively small.

The modern Congress does not operate in the same way. Omnibus legislation is common. Whereas the 50th Congress presented Cleveland with hundreds of bills authorizing individual construction projects in 1887, the 114th Congress presented President Obama with a single transportation bill in 2015 that used over a thousand pages of text to allocate hundreds of billions of dollars.<sup>201</sup> When the 112th Congress passed the Consolidated Appropriations Act of 2012, it occupied hundreds of pages and sprawled across dozens of titles.<sup>202</sup> Unsurprisingly, upon signing the bill, the President issued a statement observing that the bill “provides the funding necessary for the smooth operation of our Nation’s Government,” but also identifying numerous provisions that “raise constitutional concerns.”<sup>203</sup> The stakes of vetoing such a bill are much higher, and Congress in effect has chosen to raise the stakes by bundling what were once discrete pieces of legislation into such large packages. In such circumstances, the veto power becomes much less useful as a practical tool for preventing constitutional violations by Congress. Signing statements become about the best option a hapless President has to record constitutional objections to what Congress has done.

When the veto is an empty threat, are Presidents powerless in the face of (arguably) unconstitutional legislative provisions? John Marshall’s argument on behalf of a judicial duty to interpret the Constitution and hold the “fundamental” law more dear than mere statutes<sup>204</sup> has implications for the President. Marshall observed that acts prohibited by the Constitution and acts allowed under it could not be “of equal obligation.”<sup>205</sup> If a statute contrary to the Constitution was void and of no authority, how could the President

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200. See Grover Cleveland, Veto Message (July 30, 1886), *reprinted in* 11 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, *supra* note 196, at 5060.

201. Fixing America’s Surface Transportation Act, Pub. L. No. 114-94, 129 Stat. 1312 (2015).

202. Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, 125 Stat. 786 (2011).

203. Statement on Signing the Consolidated Appropriations Act, 2012, 2 PUB. PAPERS 1568, 1568 (Dec. 23, 2011) [hereinafter Obama Signing Statement Dec. 23, 2011].

204. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803).

205. *Id.* at 176-77.

be obliged “to give it effect”?<sup>206</sup> The executive, no more than the judiciary, can hardly “close [its] eyes on the constitution, and see only the law.”<sup>207</sup> The executive function of enforcing the law is not wholly distinct from the judicial function of interpreting the law. Unsurprisingly, political and legal theorists prior to Montesquieu tended to merge the two.<sup>208</sup> Like the judiciary, the executive applies the law to the particular case, and consequently must make at least an initial determination as to what the law is that is applicable in a given situation.<sup>209</sup> The judiciary and the executive share the duty to correctly execute the applicable law, and the Constitution is part of the law to be correctly applied.<sup>210</sup> To the extent that this observation is true, signing statements merely make plain what is otherwise implicit in the President’s duty as the chief executive under the Constitution.

When the conflict between a statutory provision and the Constitution is clear on the face of the statute, the pressure to veto the legislation is particularly intense. The adoption of such a statute will make constitutional violations inevitable. Refraining from vetoing the bill simply passes the responsibility to remedy the constitutional violation to the courts. But this challenge describes only a fraction of the conflicts between federal statutes and the Constitution that even the Supreme Court is called upon to address. The Court is not often called upon to declare whether the bare terms of legislation violate constitutional requirements. When exercising the power of judicial review, the Court is often called on to determine not whether the statute on its face violates the Constitution, but whether the statute as applied violates the Constitution.<sup>211</sup> The

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206. *Id.* at 177.

207. *Id.* at 178.

208. See Keith E. Whittington, *The Separation of Powers at the Founding*, in *THE SEPARATION OF POWERS* 1, 2-3 (Katy J. Harriger ed., 2003).

209. The difficult issue for both the courts and the President is what to do about disagreements over what the Constitution requires.

210. For an elaboration of this idea of “judicial duty” as an aspect of what it means to apply the law in a complex constitutional system, as opposed to conceptualizing judicial review as a distinctive “power” of the courts to check legislative abuses, see PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* 17-18 (2008).

211. See KEITH E. WHITTINGTON, *REPUGNANT LAWS: JUDICIAL REVIEW OF ACTS OF CONGRESS FROM THE FOUNDING TO THE PRESENT* (forthcoming) (manuscript at 12-13) (on file with the *William & Mary Law Review*).

constitutional difficulty resides in the potential implications of the statute, not on its surface. Allowing the statute to be put on the books would not itself create the constitutional problem. Vetoing such a bill would negate the policy for the sake of preventing constitutional violations that might not even arise. Constitutionally sensitive administration of the law holds the possibility of avoiding the violation in the first place.<sup>212</sup>

Many signing statements put this interpretive aspect of the executive office front and center. In order to “faithfully execute[]” the law,<sup>213</sup> the President must determine what the applicable law is.<sup>214</sup> As Marshall would have emphasized, this inquiry sometimes requires disentangling and prioritizing multiple legal directives, including those arising from the fundamental law.<sup>215</sup> For example, section 8013 of the Consolidated Appropriations Act of 2012, incorporated in the Defense Appropriation Act of 2012, prohibits the use of the appropriated funds “in any way, directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before the Congress.”<sup>216</sup> The statute prohibits government employees from trying to influence Congress and borrows language from the long-standing Anti-Lobbying Act that has been regularly incorporated into various appropriations bills.<sup>217</sup> Various entities, including the Department of Justice, have in turn sought to construe such provisions in a manner that rules out some forms of lobbying that Congress might find objectionable while still permitting other activities, such as giving public speeches on policy issues or otherwise conveying the Administration’s positions on

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212. See generally Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006) (discussing the Executive’s use of the avoidance canon of statutory interpretation).

213. U.S. CONST. art. II, § 3.

214. Cf. Prakash, *supra* note 196, at 1645 (“The Constitution never says that the President is generally barred from interpreting the Constitution and acting on his interpretations.”).

215. Cf. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803) (“[I]f both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case.”).

216. Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, § 8013, 125 Stat. 786, 807 (2011); see Crabb, *supra* note 3, at 722-23 (discussing the basis for executive constitutional interpretation).

217. See STEPHEN K. SCROGGS, *ARMY RELATIONS WITH CONGRESS* 3-4 (2000).

proposed legislation, that indirectly influence the legislative activity of Congress.<sup>218</sup> President Obama's signing statement calling out this provision did not significantly alter this legal framework, but simply called attention to it by noting "I have advised Congress that I will not construe these provisions as preventing me from fulfilling my constitutional responsibility to recommend to the Congress's consideration such measures as I shall judge necessary and expedient."<sup>219</sup> Such executive efforts to articulate what Congress meant when adopting a given statutory provision—what the statute's legal effect should be understood to be—are unavoidable. Taking the Constitution into account when engaging in those efforts of statutory interpretation would seem to be generally desirable.

Signing statements shed light on that process but do not significantly alter it. When President Benjamin Harrison signed the Sherman Antitrust Act in 1890,<sup>220</sup> he did not issue a signing statement. Substantial disagreement existed in Congress over the scope of congressional authority to regulate monopolies. While Senator John Sherman took a broad view of federal authority, others took a more restrictive view and successfully amended the statute to delete references to unlawful restraints on "production" in favor of regulating restraints on "trade and commerce."<sup>221</sup> The Harrison Administration did not aggressively bring prosecutions under the Act, and the Administration of his successor Grover Cleveland was not much different.<sup>222</sup> Attorney General Richard Olney of the Cleveland Administration was a skeptic of the statute,<sup>223</sup> and was not surprised when the U.S. Supreme Court restricted the statute in a test case to exclude monopolistic behavior that affects interstate commerce "only incidentally and indirectly."<sup>224</sup> The executive branch had no choice but to make decisions about what activities fell within the scope of the Sherman Antitrust Act, and thus what cases to

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218. *See id.* at 4-6.

219. Obama Signing Statement Dec. 23, 2011, *supra* note 203, at 1569.

220. Act of July 2, 1890, ch. 647, 26 Stat. 209.

221. Keith E. Whittington, *Congress Before the Lochner Court*, 85 B.U. L. REV. 821, 842 (2005).

222. *See id.* at 843-44.

223. *See id.*

224. *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895); Whittington, *supra* note 221, at 843.

prosecute. Making those determinations, however, required interpreting what was meant by the prohibition on contracts made “in restraint of trade or commerce among the several States.”<sup>225</sup> For the Cleveland Administration, that provision meant contracts that directly restrained interstate commerce,<sup>226</sup> and the Court ultimately agreed.<sup>227</sup> Reaching that conclusion effectively narrowed the scope of the statute by ruling out possible applications of the law that exceeded the scope of congressional authority, but it left in place a variety of possible applications of the law where prosecutions could be made and sustained by the courts. Those interpretive decisions would have been made regardless of whether President Harrison issued a statement pointing out the difficulty at the time of the law’s passage. Such a signing statement would have made more visible the workings of the executive branch, but the executive responsibility would have been the same regardless of the issuance of any public statement highlighting the issue.

Signing statements have been criticized as the functional equivalent of an absolute line-item veto,<sup>228</sup> but the Sherman Antitrust Act example illustrates how signing statements are less absolute and final than a veto message. If Harrison had chosen to veto the Sherman Antitrust Act on the grounds that Congress was unconstitutionally attempting, in part, to regulate manufacturing, it would have removed the possibility of any antitrust prosecutions by the federal government until Congress took new action at some point in the future. By allowing the law to take effect, however, the Administration at least laid the groundwork for bringing prosecutions of some restraints on trade, even if it viewed its hands as being tied in cases against monopolies in manufacturing, such as the sugar trust.<sup>229</sup>

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225. Act of July 2, 1890, ch. 647, § 1, 26 Stat. 209, 209 (codified as amended at 15 U.S.C. § 1).

226. See Christopher S. Yoo, Steven G. Calabresi & Laurence D. Nee, *The Unitary Executive During the Third Half-Century, 1889-1945*, 80 NOTRE DAME L. REV. 1, 19-20 (2004).

227. See *In re Debs*, 158 U.S. 564, 581-82 (1895).

228. See, e.g., *ABA Task Force Report*, *supra* note 52, at 688; Garber & Wimmer, *supra* note 49, at 376.

229. See ALBERT H. WALKER, *HISTORY OF THE SHERMAN LAW OF THE UNITED STATES OF AMERICA* 77-81 (1910).

When Cleveland took office in 1893, his Administration needed to make a fresh judgment on the legal scope of the antitrust statute. As it happened, the Cleveland Administration shared the Harrison Administration's restrictive view of the interstate Commerce Clause, and thus of the Sherman Antitrust Act.<sup>230</sup> But Harrison's successor was free to decide otherwise. If John Sherman had been elected President in 1892, for example, then his Administration presumably would have embraced the broad view of congressional authority that he had advocated while serving in Congress and thus would have concluded that cases like *United States v. E.C. Knight* were well within the scope of the terms of the interstate Commerce Clause and the Sherman Antitrust Act. Harrison's decision to sign the Act while adopting a narrow interpretation of its effects set the stage for a subsequent President to act more aggressively. If Harrison had memorialized his narrow reading of the statute in a signing statement, he still would not have been able to tie the hands of a future President who might disagree with that reading. Harrison could only make public his own Administration's views about the meaning of the statute; he could not alter the terms of the statute. Signing statements are by their nature ephemeral. A President who hopes to bind his successors should veto legislation. With a signing statement, he can only hope to persuade future Presidents to see things in the same way as his own Administration did.

#### CONCLUSION

Congress sometimes makes mistakes. When a federal statute appears to include provisions that violate the dictates of the U.S. Constitution, Presidents are faced with a dilemma. If they veto a proposed bill containing such provisions, they risk losing valuable—and sometimes essential—public policy. If they sign such a bill, they are potentially tasked with the responsibility of administering a constitutionally problematic statute.

Signing statements offer a middle ground between a veto and simple acquiescence. They have become useful vehicles for articulating constitutional concerns about legislation, whether those con-

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230. See Whittington, *supra* note 221, at 843-44.

cerns point the way toward future litigation, nonenforcement, or careful administration. Although often characterized as a form of unilateral action on the part of the President, signing statements are better understood as tools for giving greater visibility to the process of administering the law. The statements themselves have no consequence, but they shine a spotlight on considerations that might otherwise remain hidden within the dark corners of the executive branch. By giving voice to constitutional concerns about newly adopted statutes, the administration efficiently communicates to a variety of audiences while memorializing for the future constitutional objections that might otherwise have been left hidden in private conversations.

Critics of recent signing statements would be better served by focusing their critiques at the substantive constitutional disagreements that they might have with executive officials, rather than the medium by which those officials voice their positions. Signing statements are, to be sure, crude instruments. They announce positions. They do not advance arguments and give evidence. By highlighting disagreements, they risk escalating interbranch conflicts. But they also give public evidence of ongoing presidential engagement with the Constitution. Presidents might well be misguided in the positions that they assume, but neither Congress nor the general public are likely to be well served by encouraging Presidents to obscure those positions rather than make them more transparent.