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# THE PRESIDENTIAL SIGNING STATEMENTS CONTROVERSY<sup>1</sup>

Ronald A. Cass\* & Peter L. Strauss\*\*

## INTRODUCTION

Presidential signing statements have come out of obscurity and into the headlines. Along with salutary attention to an interesting issue, the new public visibility of signing statements has generated much overblown commentary. The desire to make these little-known documents interesting to the public—and to score points in the inevitable political battles over any practice engaged in by a sitting President—has produced a lot of discussion that misleads the public and has tended to obscure the significant issues surrounding the use of signing statements. Reflection may help put the discussion in a more useful perspective. We offer these views as the joint product of persons who have served under different Presidents and are identified as Republican and Democrat (one in each camp) and as enthusiasts for fairly strong and relatively modest views of presidential authority under the Constitution (also one in each camp).

Presidents long have said what they think of the bills they sign into law and for two centuries have issued formal statements when they find something particularly noteworthy.<sup>2</sup> Even though conflicts over signing statements have arisen from time to time for more than 175 years, the practice of issuing these statements remained little known and little noticed until the past few years.<sup>3</sup> Recently, from the public's vantage, everything seems to have changed.

Newspaper exposés two years or so ago made it appear that President George W. Bush had greatly expanded the use of these statements beyond the practices of his predecessors, and concern over this characterization prompted both a Senate hearing (while the Senate remained Republican)<sup>4</sup> and an American Bar Association (ABA)

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<sup>1</sup> This article is adapted from a previously published version. Ronald A. Cass & Peter L. Strauss, *The ABA and the Presidential Signing Statements Controversy*, ENGAGE, Oct. 2006, at 28.

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<sup>2</sup> See, e.g., T.J. HALSTEAD, CONG. RESEARCH SERV., REPORT FOR CONGRESS: PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS (2007), available at <http://www.fas.org/sgp/crs/natsec/RL33667.pdf>.

<sup>3</sup> *Id.* at 1.

<sup>4</sup> *The Use of Presidential Signing Statements: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006).

resolution condemning misuse of presidential signing statements.<sup>5</sup> The bar association's resolution followed a much talked-about report by a blue-ribbon ABA task force and highly publicized statements from its chair, Neil Sonnett, tying the ABA's initiative to constrain signing statements to concerns about the Bush administration.<sup>6</sup> Subsequent to the Republicans' loss of control in Congress, the controversy continued with no lowering of the sound level. The House of Representatives has held hearings on the use of signing statements;<sup>7</sup> a bill has been filed to prevent the use of any funds for signing statements;<sup>8</sup> the Congressional Research Service has produced a report on signing statements' constitutional and institutional implications;<sup>9</sup> the Government Accountability Office (GAO), at the urging of congressional Democrats, has studied their actual implementation;<sup>10</sup> and this symposium has been held.

News reports and statements by politicians have cast the use of signing statements as a threat to our constitutional system and its division of powers among the branches of government.<sup>11</sup> Mr. Sonnett and other ABA leaders, for example, declared that any use of signing statements to assert the unconstitutionality of elements of a statute, or to direct an interpretation inconsistent with clear congressional purpose, is a misuse of presidential power.<sup>12</sup> They proclaimed that the Constitution gives the President the simple choice of vetoing laws or signing them, adding that if the President signs a bill into law, he cannot qualify that choice.<sup>13</sup> That was the theme sounded in the congressional hearings as well.<sup>14</sup> And, following the release of the GAO report, the *New York Times* editorialized that President Bush had used signing statements to dramatically

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<sup>5</sup> AM. BAR ASS'N, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE (2006), available at [http://www.abanet.org/op/signing-statements/aba\\_final\\_signing\\_statements\\_recommendationreport\\_T-24-06.pdf](http://www.abanet.org/op/signing-statements/aba_final_signing_statements_recommendationreport_T-24-06.pdf) (recommendations adopted by the ABA House of Delegates Aug. 7–8, 2006).

<sup>6</sup> See, e.g., Charlie Savage, *ABA Urges Halt to "Statements,"* BOSTON GLOBE, Aug. 9, 2006, at A2; Mark Silva, *ABA Panel Urges Checks on Bush Power*, CHI. TRIB., Jul. 24, 2006, at 1.

<sup>7</sup> See *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) [hereinafter *House Hearing*].

<sup>8</sup> H.R. 264, 110th Cong. (2007).

<sup>9</sup> HALSTEAD, *supra* note 2.

<sup>10</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, PRESIDENTIAL SIGNING STATEMENTS ACCOMPANYING THE FISCAL YEAR 2006 APPROPRIATIONS ACTS (2007) [hereinafter GAO REPORT], available at <http://www.gao.gov/decisions/appro/308603.pdf>.

<sup>11</sup> See, e.g., Jonathan E. Kaplan & Elana Schor, *Pelosi Threat to Sue Bush over Iraq Bill*, THE HILL, May 9, 2007, at 1 (describing comments by Nancy Pelosi, Speaker of the House of Representatives, respecting potential presidential signing statement).

<sup>12</sup> See AM. BAR ASS'N, *supra* note 5, at 1.

<sup>13</sup> *Id.*

<sup>14</sup> See, e.g., *House Hearing*, *supra* note 7, at 4 (statement of Rep. Jerrold Nadler).

flout the law and the will of Congress, characterizing the administration's approach as one of "Don't Veto, Don't Obey."<sup>15</sup>

In our judgment, there is a lot more smoke than fire in this uproar—although there is some fire, and that is worth focusing on. While President Bush has used his signing statements to take exception to many more individual provisions of legislation than any of his predecessors<sup>16</sup> and has tended to issue relatively lengthy statements, in fact they were often used by each of his three immediate predecessors, including President Clinton, whose frequency was quite similar to that of President Bush.<sup>17</sup> Conservative critics of the ABA and the Democratic leadership in Congress have invoked this reality to argue that the criticism of presidential signing statements is simply partisan politics.<sup>18</sup> They will find more support for that perspective in the contrast between the strident tones of the *New York Times* editorial and the quite limited and generally unexciting picture painted by the GAO report it draws on. What the GAO report details can be described as general compliance by the Bush administration (like its predecessors) with even those elements of complex statutes the President had identified as constitutionally objectionable, rather than a bold flouting of Congress. While we have concerns, as will emerge below, we doubt it is useful to address the issues in an assault on reason.

While the debate today has taken on sharply partisan tones, there is more that unites the executive practices of Democrats and Republicans than divides them. President Clinton and President Bush issued signing statements for similar reasons, often grounded in congressional misbehavior.<sup>19</sup> The assertion of congressional authority encroaching on presidential power reflects institutional, as much as political, differences. That is why there are disagreements between the President and Congress even when the President's party controls Congress.

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<sup>15</sup> Editorial, *Don't Veto, Don't Obey*, N.Y. TIMES, June 22, 2007, at A20; see also CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 228–49 (2007).

<sup>16</sup> On October 9, 2006 (that is, *before* the recent election put Congress into Democratic party control, and during a period of remarkable Republican party discipline), Christopher S. Kelley—a political scientist who has given much of his career to observing the use of signing statements—reported that President Bush had passed the 1000 mark in the number of statutory sections challenged, a frequency well beyond that of any of his predecessors. Media Watch, [http://www.users.muohio.edu/kelleycs/2006\\_10\\_01\\_medihistory.html](http://www.users.muohio.edu/kelleycs/2006_10_01_medihistory.html) (Oct. 9, 2006, 22:28 EST).

<sup>17</sup> HALSTEAD, *supra* note 2, at 3–9 (giving data on use of signing statements by Presidents); see also SAVAGE, *supra* note 15, at 230.

<sup>18</sup> See, e.g., Op-Ed., *The ABA's Agenda: The American Bar Association Takes Another Swipe at the Bush Presidency*, OPINION J., July 31, 2006, <http://www.opinionjournal.com/editorial/feature.html?id=110008728>.

<sup>19</sup> See HALSTEAD, *supra* note 2, at 5–9 (providing examples of the reasons given by Presidents Clinton and Bush for their objections in signing statements).

Those who are weighing in on the use of signing statements need to understand why Presidents issue these statements and what they actually do. Rather than begin with the proposition that one or another President has done something wrong in issuing signing statements, commentators would do better to examine the claims being made about presidential signing statements to see what is unexceptional and what is problematic in this practice. In truth, there is less to the debate over signing statements than meets the eye. Our view is not that there is nothing to be concerned about, merely that the concerns generally are both misdirected and overstated. And that is true no matter who serves as President.

### I. SIGNING STATEMENT BASICS, CONSTITUTIONALITY, AND INTERPRETIVE WEIGHT

#### *A. The Basics of Signing Statements*

Presidential signing statements are formal documents issued by the President, after wide consultation within the executive branch, when he signs an enacted bill into law. They state the President's understanding of the legislation he is signing and also may give instructions to the executive branch regarding how the new law's provisions are to be treated.<sup>20</sup> That is a positive development. While such views have been formulated throughout our history, only since Ronald Reagan's presidency have signing statements become readily available public documents.<sup>21</sup> It is always useful for the citizenry (and Congress) to know how the executive branch understands the laws Congress enacts.<sup>22</sup>

President Reagan's motivations for raising the visibility of presidential signing statements doubtless included increasing presidential influence within government and influencing the outcome of judicial proceedings when controversies about interpretation arose. Yet his use of signing statements was also understandable as a reaction to the increasing tendency of Congress, generally in the control of Democrats at the time, to present him with extremely complex bodies of legislation (notably, omnibus

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<sup>20</sup> John Cooney, a former White House official, describes the signing statement as essentially a presidential press release. John F. Cooney, *Presidential Signing Statements II*, ADMIN. & REG. L. NEWS, Winter 2007, at 5.

<sup>21</sup> For a history of presidential signing statements, see, for example, LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 128 (4th ed. 1997); HALSTEAD, *supra* note 2, at 2–11.

<sup>22</sup> The information about presidential understandings provides, among other things, additional guidance to anyone seeking to predict how the law will be enforced by the executive authorities who are charged initially with its application. Whether in this context or any other, transparency regarding laws' interpretation and enforcement is a basic attribute of a well-functioning legal system. See, e.g., LON L. FULLER, THE MORALITY OF LAW 38–40 (rev. ed. 1969).

budget measures) that no President could reasonably be expected to veto even though they included occasional objectionable components among their hundreds of separate provisions.<sup>23</sup>

Many of the provisions that have been addressed in signing statements from Reagan on reflect congressional initiatives that all Presidents find troubling. The recent GAO Report, for example, studied the signing statements accompanying eleven appropriations acts for Fiscal Year 2006.<sup>24</sup> Of 167 provisions (out of several thousand) singled out for mention in these statements, 107 involved apparent requirements for congressional pre-approval of executive actions inconsistent with the Supreme Court's decision in *INS v. Chadha*.<sup>25</sup> *Chadha*, of course, was decided early in the Reagan administration, and Congress's disregard of its teachings has been notorious;<sup>26</sup> it is probably no coincidence that the increase in the use of presidential signing statements dates from this time.

One can identify three separate legal questions about the use of signing statements. The first and simplest is whether they are constitutional. The second would be what, if any, legal force such statements have when issued, in the courts or within the President's administration. Finally, and related to the second, is whether any of the particular uses of signing statements, on their individual merits, embody inappropriate views of presidential power or otherwise give rise to rule-of-law concerns. We have not the slightest doubt, on the first question, that signing statements are constitutional. The second and third questions are harder.

### *B. The Constitutionality of Signing Statements*

Although the Constitution says nothing about signing statements, it also is silent regarding the reports regularly written by congressional committees. The President takes an oath to support the Constitution and the laws of the United States<sup>27</sup> and has clear authority to explain how he views the legislation he is signing or deciding not to sign, just as congressional committees have authority to explain their views on the legislation they send forward. His obligation to "take Care that the Laws be faithfully

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<sup>23</sup> See, e.g., Statement on Signing H.R. 4169 into Law, 20 WEEKLY COMP. PRES. DOC. 570 (Apr. 18, 1984) (stating President Reagan's disagreement with amendments made to loan programs for the Small Business Association even though he approved the Act).

<sup>24</sup> GAO REPORT, *supra* note 10.

<sup>25</sup> 462 U.S. 919 (1983); see GAO REPORT, *supra* note 10, at 16–19 (noting eighteen provisions identified as purporting to make consultation with Congress a precondition to execution, seventy provisions requiring the approval of a congressional entity, and nineteen provisions requiring agencies to honor congressional documents lacking statutory status).

<sup>26</sup> See, e.g., RONALD A. CASS ET AL., ADMINISTRATIVE LAW: CASES AND MATERIALS 38–55 (5th ed. 2006); PETER L. STRAUSS ET AL., GELLHORN & BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 206–07 (10th ed. 2003).

<sup>27</sup> U.S. CONST. art. II, § 2, cl. 8.

executed”<sup>28</sup> clearly extends to the Constitution he has sworn to uphold as well as to statutes, and thus gives him authority to advise agencies how they may avoid constitutional issues lurking in the details of complex and generally desirable measures. Surely Congress, by burying objectionable detail in such a measure, as is increasingly its practice, cannot defeat this responsibility. Claims that signing statements, as such, violate the Constitution and transgress constitutional separation of powers are either silly or radically overbroad.

### *C. The Legal Force of Signing Statements*

This question has three related aspects: first, whether a view of statutory meaning expressed in a signing statement has evidentiary weight for an interpreter of the statute; second, whether, because this view comes from the President, it has the same kind of force for an interpreting court as is associated with certain agency interpretations under the decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*;<sup>29</sup> and, third, whether the view expressed in a signing statement is binding on agency interpreters. The arguments in favor of these statements having legal, not merely evidentiary, force distinguish presidential signing statements interpreting law from the issues surrounding the use of legislative history. The prospect that signing statements could have such effects may also help explain concerns expressed by the ABA and other signing statement critics.

#### 1. Evidence of Meaning

Viewed simply as evidence possibly bearing on statutory interpretation, the question respecting presidential signing statements’ effect on judicial interpretation is largely the same as with congressional contributions to legislative history. The best evidence of what a law means almost always is the words used in the law itself. But the size, complexity, and mixed parentage of laws today sometimes produce text that, read literally, is difficult to credit as what could have been reasonably understood by those who enacted it. The words enacted into law, in other words, are either difficult to decipher without additional information or are seemingly at odds with what a reasonable, neutral observer would conclude was the meaning understood by those who enacted the law. At times, the law is ambiguous and the legislative history clears up a point. At other times, the law is clear enough and the legislative history is designed to revise the understanding in ways that never would have commanded majority support in the legislature—which is why lobbyists work so hard to have favorable language that could not make it into the law inserted into the history.<sup>30</sup>

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<sup>28</sup> *Id.* art. II, § 3.

<sup>29</sup> 467 U.S. 837 (1984).

<sup>30</sup> This is partly the basis for Justice Scalia’s opposition to judicial advertence to legislative

Presidential signing statements offer the same benefits and the same problems. They can assist in understanding a law, or they can state a view that, while capturing the President's view of good law, could never have commanded majority support in the legislature. Like legislative history, and unlike a veto override vote, there is no clear way of testing the congruence of the President's view with the congressional majority. Unlike much legislative history, the signing statement at least is likely to state the clear view of one essential player in the enactment of law.<sup>31</sup>

Courts have developed principles of construction to sort through what weight to give text and history in particular contexts. These do not provide great clarity as to what courts, or even individual judges, will do in any given case. Nor is any set of general rules likely to be able to resolve the difficult issues respecting actual interpretation of law—that is why the canons of construction have been so effectively ridiculed for many years by Karl Llewellyn and many more.<sup>32</sup> The point is not that there is a simple answer to the weight to be given presidential signing statements. The current practice of courts sensibly accords different weight to presidential signing statements in different circumstances. The recent GAO Report, for example, finds judges especially cautious where the President's stated view has obvious partisan overtones.<sup>33</sup> The essential point respecting the evidentiary weight to be accorded presidential signing statements by courts charged with construction of the law is that the analysis presents problems quite similar to those associated with congressional legislative history.

## 2. The *Chevron* Issue

Courts have said that when statutory language is ambiguous, and has been reasonably interpreted by an administrative agency charged to administer the statute, the courts must accept that interpretation rather than engage in their own independent analysis.<sup>34</sup> Later decisions have qualified this principle as limited to interpretations that emerge from public procedures or other contexts in which Congress has clearly envisioned the responsible agency exercising such authority.<sup>35</sup> But the exact contours of that limitation are anything but precise.

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history. See ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 34 (1997).

<sup>31</sup> The contrast is exposed, among other places, in Kenneth A. Shepsle, *Congress is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239 (1992).

<sup>32</sup> See, e.g., Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 399–406 (1950).

<sup>33</sup> GAO REPORT, *supra* note 10, at 40. The example given in the report is President George H.W. Bush's effort to favor Republican over Democratic accounts of the meaning of the Civil Rights Act Amendments of 1991. *Id.* For another example, see *United States v. Castillo*, 460 F.3d 337, 347 (2d Cir. 2006) (consulting both legislative history and signing statement on statute dealing with disparity between sentences for powdered and crack cocaine).

<sup>34</sup> See *Chevron*, 467 U.S. at 837.

<sup>35</sup> See, e.g., *United States v. Mead Corp.*, 533 U.S. 218 (2001).



Given the current state of play on judicial deference to the executive branch's interpretations of law, one can imagine the government arguing that a signing statement announcing the President's reasonable interpretation of an ambiguous provision is entitled to the same treatment as an agency's. Yet such statements are not products of public procedures such as are used in agency notice-and-comment rulemaking. Thus, they would seem to fall outside the ambit of interpretations that the courts have recently identified as meriting strong judicial deference.

While this issue has yet to be presented, one Supreme Court decision from last year, upholding the Oregon assisted-suicide statute in the face of a similar kind of interpretation made by then-Attorney General John Ashcroft, suggests that the Court would not give the same deference to presidential signing statements as to interpretations contained in agency legislative rules.<sup>36</sup> But three Justices dissented from that holding, and Justice Alito, who in other contexts has voted to uphold strong executive claims, did not participate.<sup>37</sup> For one of us, the Court's 5–4 split during the current term in *Massachusetts v. EPA*<sup>38</sup> was similar, giving no deference to, and indeed showing a degree of disdain for, an agency's interpretation despite statutory text committing the decision to the judgment of the agency administrator.<sup>39</sup> We both agree that observers concerned about strong executive authority will be inclined to oppose *Chevron* use of signing statements.

### 3. Intra-Executive Branch Instructions

Signing statements can be used within an administration to help resolve disputable questions of interpretation. There are many different executive officials who might have a hand in the implementation, and therefore the interpretation, of statutory instructions. A signing statement provides the President's direction on which interpretive turn to take. The question is how far the President can go in giving legally binding directions to other executive branch officers.

One increasingly prevalent view is that officials in cabinet departments and other governmental bodies are *obliged* to accept the President's interpretation of law in carrying out their duties, because as chief executive, he is entitled to give executive branch officials instructions of this sort.<sup>40</sup> The President must appoint the most important

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<sup>36</sup> *Gonzales v. Oregon*, 546 U.S. 243 (2006); see Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 750 (2007).

<sup>37</sup> Justice Scalia's dissent was joined by Chief Justice Roberts and Justice Thomas. *Gonzales*, 546 U.S. at 275 (Scalia, J., dissenting).

<sup>38</sup> 127 S. Ct. 1438 (2007).

<sup>39</sup> See Ronald A. Cass, *Massachusetts v. EPA: The Inconvenient Truth About Precedent*, VA. L. REV. IN BRIEF, May 21, 2007, at 73.

<sup>40</sup> See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).

governmental officials,<sup>41</sup> is the person in whom executive authority is entrusted by the Constitution,<sup>42</sup> and (for those holding this view) must also have unconstrained authority to remove executive officers who do not carry out their duties to the President's satisfaction.<sup>43</sup> Because the Constitution vests the national government's executive authority in the President, everyone else in the executive branch derives executive authority from him. In short, according to this view, the President's interpretation governs within the administration because he is the boss.<sup>44</sup> Under this view, cabinet officials and other executive officials are obliged to regard presidential interpretations stated in signing statements as legally binding upon them.

The opposing view is that although the Constitution does make the President chief executive, nonetheless (outside the military and foreign relations contexts) its text repeatedly imagines that legal responsibility for law administration will be placed in the hands of others.<sup>45</sup> When Congress enacts statutes conferring regulatory authority, it generally confers that authority on an agency head, not on the President. In this view, his duties with respect to ordinary domestic administration are those of an overseer, not decider.<sup>46</sup> Congress has more power to structure the instruments of government—it can, for example, limit the President's removal authority over regulatory officials to those who have given him "cause" for removal. Even where it has not done this, so that the President can remove from office anyone whose administration displeases him (as is the case for cabinet secretaries, for example), an administrator who sees the legal responsibility for particular decisions as *his* own, not the President's, may find it easier to resist presidential "instructions." And removal may carry a high political cost. Not only does the President invite conflict over his interpretation of the law—and possibly congressional efforts to revise the law in ways not congenial to the President—but the President also will have to get congressional approval of the successor he appoints.

People holding this view note the many historical struggles between Presidents and their appointees as evidence that there is at least an understood political cost to

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<sup>41</sup> Freytag v. Comm'r, 501 U.S. 868 (1991).

<sup>42</sup> See U.S. CONST. art. II, § 1.

<sup>43</sup> See, e.g., Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779 (2006).

<sup>44</sup> That, in a nutshell, is presumably what President Bush meant in saying that he is "the decider." David S. Cloud, *Here's Donny! In His Defense, a Show is Born*, N.Y. TIMES, Apr. 19, 2006, at A1.

<sup>45</sup> Thus, Article II unambiguously makes the President "Commander in Chief" of the military, but, with respect to domestic matters, it says only that "he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices," appearing to place the "Duties" in those departments and not in the President. U.S. CONST. art. II, § 2, cl. 1 The President's obligation to "take Care that the Laws be faithfully executed," is worded in the passive not the active voice, as if someone else would be doing the executing. *Id.* art. II, § 3

<sup>46</sup> See, e.g., Strauss, *supra* note 36.

the assertion of strong presidential power over some officials and particularly over their interpretations of law.<sup>47</sup> These commentators fear that if high officials believe that they have a legal obligation to let the President decide disputed points within their statutory responsibilities, the result will be a concentration of enormous power in one place and that the President may often be successful in exercising that power confidentially and without public process. This they see as the road to presidential tyranny.<sup>48</sup> In this view, when statutes confer regulatory authority on agencies, not on the President, actual interpretation is the business of the agencies and outside the President's authority directly to determine.<sup>49</sup>

Remarkably, the question just how strong is the character of our unitary executive remains contested after more than two hundred years. And that contest intimately connects with some aspects of the current signing statement controversy. The view that our Constitution creates a strong, unitary executive entails presidential control over interpretation of law.<sup>50</sup> The confluence of Presidents' increased use of signing

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<sup>47</sup> One striking example noted by Strauss concerned President Andrew Jackson's efforts to remove federal funds from the U.S. Bank, whose demise he had successfully made a crux of his second, successful presidential campaign. *Id.* at 706–07. He did not think he could move the funds himself, and his Secretaries of the Treasury did not think his direction to move them was a sufficient legal basis for their doing so. He had to dismiss two Secretaries of the Treasury in succession before he could get an (Acting) Secretary of the Treasury, Roger Taney, to decide to move the funds as Jackson wished. Then Taney's nomination to be Secretary was rejected by the Senate (as was Taney's first nomination to the Supreme Court), the first rejection of a cabinet appointment in American history. *Id.*

<sup>48</sup> See generally SAVAGE, *supra* note 15, at 248–49.

<sup>49</sup> See, e.g., Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987 (1997); Kevin M. Stack, *The President's Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 267 (2006); Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 984–86 (1997).

<sup>50</sup> Even commentators with a more moderate view of presidential authority often emphasize the independent law-interpreting function that inheres in the President's constitutional obligation to take care that the laws are faithfully executed. See, e.g., Cass R. Sunstein, *Beyond Marbury: The Executive's Power To Say What the Law Is*, 115 YALE L.J. 2580 (2006); cf. Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676 (2005) (indicating that the Office of Legal Counsel carefully avoids test of the question).

For a running debate between one of us and Professor Sunstein respecting his cited article, see Peter L. Strauss, *Within Marbury: The Importance of Judicial Limits on the Executive's Power To Say What the Law Is*, 116 YALE L.J. POCKET PART 59 (2006), <http://www.thepocketpart.org/2006/09/27/strauss.html>; Cass R. Sunstein, *The Virtues of Simplicity*, 116 YALE L.J. POCKET PART 70 (2006), <http://www.thepocketpart.org/2006/09/27/strauss.html>; Peter L. Strauss, *Exploiting Simplicity*, 116 YALE L.J. POCKET PART 77 (2006), <http://www.thepocketpart.org/2006/09/27/strauss.html>; Cass R. Sunstein, *Costing Mead*, 116 YALE L.J. POCKET PART 79 (2006), <http://www.thepocketpart.org/2006/09/27/strauss.html>; Peter L. Strauss, *The Virtue of Checks*, 116 YALE L.J. POCKET PART 81 (2006), <http://www.thepocketpart.org/2006/09/27/strauss.html>.

statements and the increasing attention to the strong unitary executive view thus helps explain the recent concern about signing statements—which then are not simply statements about the President’s views but more directly instructions to subordinates about what to do.

Resolving the legal weight of signing statements turns in part on construction of the same constitutional material that is contested in disputes over the degree to which executive authority is unitary. But note that this is a dispute about the constitutional meaning of the presidency and not about signing statements as such; the same issues would attach to any presidential control efforts, whenever and however made. That they are made publicly, and at the very initial stages of law administration, which is in the nature of signing statements, is not in itself a source of concern; if anything, these two characteristics are of benefit to the country and to the Congress. The real questions concern the view of constitutional authority they may assert.

## II. IF THE PRESIDENT BELIEVES A STATUTE IS UNCONSTITUTIONAL, MUST HE VETO IT?

Signing statements often raise questions about the constitutionality of the legislative elements they address, and a frequent criticism is that such doubts require not a statement (with accompanying declarations that the provisions are not to be enforced or respected) but a veto. The question here is what the President properly may do when he believes a statutory provision is contrary to constitutional command. This is a question of congruence with rule of law precepts, rather than with any express or implied constitutional limitation on the President. But it is a serious question in its own right.

One pole of the controversy is marked by the simple, sweeping assertion that the President should never sign legislation if he believes it has provisions that are unconstitutional.<sup>51</sup> This is the analytical twin to the sweeping assertion of signing statements’ unconstitutionality. It is similarly bold, broad, and wrong. Presidents, just as much as judges, are responsible for upholding the Constitution; they take an oath to do so.<sup>52</sup> They have independent constitutional authority for asserting views of constitutional meaning. And, just like every other officer with similar constitutional authority, they are responsible for doing what best advances their view of constitutional command.

In a world of large, complex laws—some running to hundreds of pages—no official is tied to a simple, two-choice model of possible actions. Legislators need

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<sup>51</sup> See, e.g., AM. BAR ASS’N, *supra* note 5, at 19; Christopher N. May, *Presidential Defiance of “Unconstitutional” Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865 (1994).

<sup>52</sup> See, e.g., Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1990); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1286–87 (1996).

not vote against a large, complex law because they believe one of its provisions to be unconstitutional. They may support the law and trust that the problematic provision will not be enforced or will be struck down in court in an appropriate case.<sup>53</sup> Judges, similarly, are not always required to invalidate in its entirety legislation that has one or two unconstitutional provisions.<sup>54</sup> So, too, a President is not limited to either vetoing legislation that has one or two provisions he believes to be unconstitutional or signing it without objection. The President—like any individual legislator—might well decide that, on balance, a law is beneficial, even if he believes that one or more provisions violate constitutional strictures.<sup>55</sup> The practical political reality is that Congress, ignoring common precepts like “single subject” rules, frequently deploys statutory complexity as a weapon against the veto; indeed, appropriations measures are often so prolix that no member of Congress is likely to know all that they contain, and individual members have been able to perpetuate a good deal of statutory mischief by manipulating this reality.<sup>56</sup> And the Supreme Court, in *Clinton v. City of New York*, struck down a law that might have provided a realistic alternative means for dealing with these legislative abuses by giving the President line-item veto authority over certain spending provisions.<sup>57</sup>

In our view, then, no President is bound simply to go along with every aspect of every statute he may sign into law. In taking care that the laws “be faithfully executed,” the President is not obliged to assure the enforcement of elements of the laws that are contrary to constitutional command.<sup>58</sup> Subject to reservations that the executive branch may not simply ignore whole statutory schemes of which it disapproves, decisions by the President and other executive branch officials respecting law enforcement generally warrant extraordinary deference by other branches.<sup>59</sup> In this context especially, they should be expected to place constitutional command over

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<sup>53</sup> Indeed, legislators commonly announce support for a law while explaining opposition to some part of it. The fact that courts have, ever since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), exercised the power of judicial review of legislation provides a basis for supposing that the courts indeed will be proper authorities for correcting constitutional errors in legislation.

<sup>54</sup> See, e.g., *Champlin Ref. Co. v. Corp. Comm’n of Okla.*, 286 U.S. 210, 234 (1932).

<sup>55</sup> See, e.g., Cooney, *supra* note 20.

<sup>56</sup> Nor are these the only sources of congressional power vis à vis the President. Beyond its ability to manipulate the legislative package, subject to the political forces that constrain all players in the process, Congress also has a wide variety of other tools at its disposal to influence the implementation of legislation and to restrict the effective scope of presidential authority. See, e.g., Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 68 (2006).

<sup>57</sup> 524 U.S. 417 (1998).

<sup>58</sup> See *Freytag v. Comm’r*, 501 U.S. 868, 906 (1991); *Myers v. United States*, 272 U.S. 52 (1926).

<sup>59</sup> *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985). Justice Rehnquist, who wrote this opinion, voiced a similar reservation in his separate opinion in *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part).

legislative command. It is hardly surprising if the President is particularly concerned to protect the constitutional powers of the presidency and seeks to tailor executive branch implementation of laws accordingly. Our disagreements, really, are about what those powers are, not the instrument by which the President chooses to voice them.

So, for example, if Congress includes a legislative veto provision in a complex law—as it has done numerous times since the Supreme Court ruled such provisos unconstitutional in *INS v. Chadha*<sup>60</sup>—the President might properly choose to sign the legislation, but also properly choose not to respect the unconstitutional legislative veto provision. In those circumstances, a signing statement indicating the President's view that the provision is unconstitutional advances rule of law interests. It puts others on notice of his intentions with respect to the law, accords with respectable views of constitutionality, and comports with institutional interests of the executive branch. All of those elements advance the predictability and legitimacy of the law.<sup>61</sup> This has generally been the pattern of presidential uses of signing statements. The two of us have our disagreements about the views of the Constitution and executive authority these statements may express, but the objection, so far as there is one, is to the message, not the medium.<sup>62</sup>

### III. OCCASIONALLY, SIGNING STATEMENTS ARE MISUSED

In our judgment, one use of presidential signing statements, in and of itself, undermines the rule of law. If the law put before the President is one that *at its core* would command conduct that the President believes to be unconstitutional, the President sends a clear message by vetoing the law—he is willing to stand on principle and reject legislation that is fundamentally not in line with his view of the Constitution. If the President signs such a law while suggesting that its core provisions are unconstitutional, he reduces the clarity and predictability of the law.

The line between the proper and improper uses of the veto versus signing statements obviously can be argued. There is no bright line dividing the good from the bad. None of the signing statements associated with the complex appropriations statutes recently studied by the GAO was bad, however; their very complexity and the all-or-nothing choice Congress gave President Bush about the veto made his use of signing statements to identify trouble spots acceptable whether or not we would agree (we do not) that all of the spots that he identified were properly called troublesome. But

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<sup>60</sup> 462 U.S. 919 (1983); *see supra* notes 24–26 and accompanying text (showing how dominant these concerns were in the signing statements recently studied by the GAO).

<sup>61</sup> The relation of these considerations to rule of law concerns is discussed in RONALD A. CASS, *THE RULE OF LAW IN AMERICA* 7–19 (2001).

<sup>62</sup> The same position, arrived at primarily through analysis built on positive political theory, is advanced in Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307 (2006).

there are relatively clear examples of misuse of signing statements—uses that reduce the clarity and consistency of the law—from presidencies of the left *and* of the right.

Consider, for example, President Bill Clinton's signing of the Social Security Independence and Program Improvements Act of 1994, which made the Social Security Administration (SSA) an independent agency.<sup>63</sup> Although the law made other changes, a central provision, widely noted in contemporaneous accounts, made the agency independent of the President.<sup>64</sup> It gave the agency's single administrator a six-year term of office—longer than a presidential term—and provided that the administrator could be removed only for cause.<sup>65</sup> President Clinton did not veto the law, but his signing statement indicated that he viewed this change as an unconstitutional encroachment on the power of the presidency.<sup>66</sup>

Similarly, President George W. Bush chose to sign the Detainee Treatment Act of 2005, sponsored by Senators McCain and Graham among others, despite his clear disagreement with the law's core provisions. The Act recommitments the United States to observance of the Geneva Conventions and other laws respecting torture and the humane treatment of prisoners.<sup>67</sup> In signing the bill into law, President Bush expressed concern that it intruded on constitutionally preserved presidential authority and reserved the choice to refuse enforcement of key portions of the law.<sup>68</sup> His objection was not to an incidental aspect of otherwise desirable legislation but went to the very heart of what Congress had done.

In both cases, the Presidents' decisions to sign the laws while condemning central provisions sent decidedly mixed messages, seeming to give with one hand and take back almost as much with the other. In the second case, this concern is compounded by the probabilities that presidential actions inconsistent with the statute will be taken out of public view and that judicial review of those actions is unlikely. A President convinced that the six-year term of the SSA Administrator was unconstitutional could anticipate both publicity and a judicial test of his view.<sup>69</sup> But both actions are hard

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<sup>63</sup> Statement on Signing the Social Security Independence and Program Improvements Act of 1994, 30 WEEKLY COMP. PRES. DOC. 1676 (Aug. 15, 1994).

<sup>64</sup> 42 U.S.C. § 901 (2000).

<sup>65</sup> *Id.* § 902.

<sup>66</sup> Statement on Signing the Social Security Independence and Program Improvements Act of 1994, 30 WEEKLY COMP. PRES. DOC. 1676 (Aug. 15, 1994).

<sup>67</sup> Pub. L. No. 109-148, § 1006, 119 Stat. 2739 (2005).

<sup>68</sup> Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918 (Dec. 30, 2005).

<sup>69</sup> *See, e.g.,* *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935). In contrast, although the Supreme Court over the past few years has pushed out the boundaries of judicial review for executive action respecting those suspected of being illegal combatants and held in military facilities outside the United States, see for example *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), the general rule with respect to actions taken against suspected terrorists is that such executive conduct is removed from the public domain and from judicial review. *See, e.g.,*

to defend as preferable to vetoes of legislation the President believes violates the Constitution at its core. Had they not had recourse to a signing statement publicly expressing their strong disagreement with the law, it is hard to imagine that the Presidents would have signed these bills.

Such uses of signing statements constitute the limited set that can properly be addressed under the heading of “misuse.” We underscore, in light of other pronouncements about signing statements (and particularly pronouncements about the ABA’s resolution on signing statements),<sup>70</sup> that the misuse label properly attaches only to a small subset of presidential signing statements—and that it is important to avoid tarring other presidential signing statements with an overly broad brush.

### CONCLUSION

After all is said and done, the presidential signing statement clearly should be understood to be an appropriate, often helpful—and certainly constitutional—tool of presidential participation in the process of enacting and enforcing our laws. Although a smaller set of signing statements accompany actions that are not consistent with rule of law values, and others express interpretations of questionable validity, the signing statement itself is implicated as a problematic device only when it lowers the cost of the offending conduct. This occurs when the President signs a law that he believes, in its core provisions, so fundamentally violates the Constitution that he cannot with a straight face declare its constitutional merits outweigh its flaws.

The problem is not that the President says too much too often about the laws he signs, but instead that he reduces the clarity and predictability of the law if he signs legislation that he is declaring wrong at its core—and wrong in ways that, as an independent constitutional actor, he has an obligation to confront. Ultimately, it is the very fact of his independent constitutional authority that makes a subset of signing statements problematic—not because the President oversteps his bounds in saying so much but because he falls short of his obligation to the Constitution to veto laws that he believes stand primarily as vehicles for violating our most fundamental legal charter.

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Johnson v. Eisentrager, 339 U.S. 763 (1950).

<sup>70</sup> See AM. BAR ASS’N, *supra* note 5.