

George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements

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This article considers how George W. Bush chose to use the presidential signing statement and the ways in which the administration's application of this tool of direct presidential action in its first term represents a set of important initiatives. The Bush administration has very effectively expanded the scope and character of the signing statement, not only to address specific provisions of legislation that the White House wishes to nullify but also to reposition and strengthen the powers of the presidency relative to the Congress. What is almost as interesting is the fact that so few in Congress, the media, or the scholarly community are aware that anything has happened at all.

As President George W. Bush approached the beginning of his second term, national news media speculated as to why he had not been willing to use his veto power and whether he would be forced to do so with the new Congress. When he threatened Congress that it should not even think about reopening the Medicare prescription drug legislation, the *Washington Post* observed: "For Bush, the forceful statement represented a rare invocation of the presidential veto as a weapon in a legislative fight with a Republican Congress. Through more than four years in the White House, Bush has never vetoed any bill" (Baker and Allen 2005). One *Baltimore Sun* columnist put the matter dramatically.

Whatever history says about George W. Bush, it won't say he was a weak president. . . . Yet in one major way, he has verged on timidity. In his entire first term, he hasn't used a power that most presidents have regarded as indispensable: the veto. It's the equivalent of Barbra Streisand refusing to sing show tunes or Donald Trump giving away all his worldly possessions. Why unilaterally relinquish your biggest asset? . . . Though Mr. Bush sometimes grumbles, he always succumbs in the end. (Chapman 2004)

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In a narrow and very technical sense, the commentators and some members of Congress were correct that the president had not returned legislation to Congress with his veto for their consideration of an override or further legislative action. In very real terms, however, they were quite wrong, for the president had used the little-known policy tool called a presidential signing statement as a very effective and substantive line-item veto to effectively nullify a wide range of statutory provisions even as he signed the legislation that contained them into law. This article considers the contemporary use of the signing statement with particular attention to President George W. Bush's first term. (The research examined all of the statements issued during his first four years in office.) The question is, how have this president and his administration chosen to use the signing statement and to what extent does the administration's application of this tool of direct presidential action represent important initiatives with future significance? The thesis that emerges from this study is that the George W. Bush administration has very effectively expanded the scope and character of the signing statement not only to address specific provisions of legislation that the White House wishes to nullify, but also in an effort to significantly reposition and strengthen the powers of the presidency relative to the Congress. This tour d'force has been carried out in such a systematic and careful fashion that few in Congress, the media, or the scholarly community are aware that anything has happened at all.

So what does all of this have to do with Edgar Allan Poe? The answer lies in Poe's classic "Purloined Letter" (Poe 1845). In the story, the prefect of police seeks the assistance of the famed C. Auguste Dupin to locate a letter that was taken by the infamous Minister "D." After having taken every reasonable direct step to locate the letter, the police had failed. However, Dupin promptly handed over the letter once he had been paid his fee. He then explained to the narrator that those seeking to get the goods on the minister had made two mistakes. The first was that they had underestimated the official with whom they were dealing, a serious but very common mistake. And because of the first error, they failed to consider "that the Minister had deposited the letter immediately beneath the nose of the whole world" (Poe 1845). The Bush administration has indeed hidden its bold political and legal actions in plain sight where few of its critics or opponents would see them.

A Primer on Presidential Signing Statements: The Nature and Uses of the Policy Tool

While a broader analysis of the nature, use, opportunities, and challenges of signing statements, including an assessment of their use in the Reagan, Bush I, and Clinton administrations, was presented elsewhere (Cooper 2002), it is useful to consider some basics before turning to the George W. Bush administration's use of the tool. Consider briefly what presidential signing statements are, how they have come into current use, how they are used and why, and just what some of their attractive qualities and problematic characteristics are.

Presidential signing statements are pronouncements issued by the president at the time a congressional enactment is signed that, in addition to providing general com-

mentary on the bills, identify provisions of the legislation with which the president has concerns and (1) provide the president's interpretation of the language of the law, (2) announce constitutional limits on the implementation of some of its provisions, or (3) indicate directions to executive branch officials as to how to administer the new law in an acceptable manner.

While there certainly were examples in the past of the use of signing statements (Fisher 1997, 132-41; Dellinger 1993), it was Ronald Reagan's attorney general, Edwin Meese III, who was responsible for the development of the signing statement into a significant and commonly used instrument of executive direct action. Prior to Reagan, such statements were rarely used for the kinds of substantive purposes to which they would be put starting with the Reagan years. Looking back prior to the Reagan administration, Assistant Attorney General Walter Dellinger found some sixteen situations in which thirteen different presidents issued signing statements that addressed what the president considered to be problematic parts of legislation presented for signature (Dellinger 1993). The Reagan administration saw the signing statement as a useful and potentially important tool.

The development of the signing statement was one piece of a three-part strategy developed by Meese and his colleagues to advance the Reagan revolution on the legal front (Meese 1992). They were determined to ensure appointment of judges who would be philosophically compatible, to challenge existing practices that they saw as violations of the separation of powers that intruded upon the president's authority, and to provide an opportunity for the chief executive to participate more actively in the creation of legislation than the mere decision to sign or veto bills transmitted from the Congress (Meese 1989, 78-79).

While few have accepted the contention that a presidential signing statement is a formal part of the legislative history of a statute, Meese was convinced that they should and would be part of the body of materials that ought to be available to courts and others who would consider the meaning of legislation over the years. He managed to have these signing statements included in the legislative history published in the *U.S. Code Congressional and Administrative News* and they were more systematically presented than before in the *Weekly Compilation of Presidential Documents* under the title "Statements on Signing." These statements have generally been prepared by the Office of Legal Counsel in the Department of Justice (Kmiec 1993). More specifically, the practice developed in which the president would sign the legislation so that it would become law rather than veto it. However, the White House took the position that the president's "duty to take care that the laws be faithfully executed" under Article II, Section 3 of the Constitution required the president not to implement unconstitutional provisions that found their way into the law. Hence, the signing statements would identify provisions in the new statute that raised issues of constitutional concern (the language often used to make the point), indicate the administration's objection, and instruct the responsible agency head to execute the law in a constitutional manner. That, of course, means that they are to act in the manner that the administration considers appropriate as compared to the way the legislation sets forth the policy. In that sense, it is a kind of line-item veto.

In the Reagan years and after, signing statements have frequently been used by administrations for a variety of purposes. In addition to the general purpose of seeking to include the president's interpretations as part of the legislative history, signing statements have been employed as fiscal line-item vetoes, as substantive line-item vetoes, to set boundaries on the reach of parts of the legislation, and to structure the implementation of the new statute through instructions to the responsible agency head (Cooper 2002, 203-13). As former Attorney General Barr and Assistant Attorney General Douglas Kmiec have explained, they have also been used to address what the administration views as practical considerations. These include the problems that arise where the president does not want to veto a piece of legislation near the end of a legislative term such that corrective action would be difficult to accomplish or where there are objections to relatively few specific provisions of large and complex bills (Barr 1993; Kmiec 1993).

There are a variety of reasons that administrations may use the device. From a relatively obvious political perspective, they can be used to thank supporters, chide opponents, score political points with particular constituencies, or leverage the Congress into developing new legislation or amending the bill presently being signed but constrained by the president. Of course, there are tactics more or less legal in character that serve a variety of purposes from relatively narrow procedural concerns to broad ideological views about the nature of presidential power under the Constitution. One of the common techniques is to use the signing statement to issue what would in a court be termed a declaratory judgment, an authoritative determination of the meaning of the law that will govern relationships among parties. The White House may craft a signing statement with the hope that it will invite judicial review and influence the outcome of the opinions that will flow from that process, efforts employed by administrations as diverse as Reagan and Clinton. They may also be used in an effort to create a kind of body of precedent with which to support future uses of signing statements to bolster presidential claims to authority or to limit Congress so that, after a time, what are in fact broad claims to power appear to be more or less routine legal formulae that may begin to be seen like little more than boilerplate language not worthy of careful attention. This is a theme to which we shall return later.

The signing statement is an attractive device for a number of reasons. It is a very flexible tool, not specifically constrained by any law or policy. Each administration can tailor its uses to its own purposes and to unique situations. It also offers options in terms of the way in which the administration chooses to work with the Congress. The statement opens up a range of choices for action beyond a broad decision to veto to an entire piece of legislation delivered to a president after an arduous battle that many administrations would not like to fight all over again for the sake of particular provisions of which it disapproves. It also provides a vehicle for action that leaves Congress with few options to respond unless it is willing to pass entirely new legislation in an effort to retaliate for the president's actions. If Congress does try to retaliate, there is a clear, if perhaps implied, threat of a veto. Thus, it is an excellent device to get around the Congress.

Signing statements are attractive for two related legal reasons. The first is that they are, in most cases, extremely difficult to challenge unless an administration deliberately

makes clear specifically how and in what circumstances it will invoke the terms of the signing statement. Indeed, the Reagan administration did that with respect to the Competition in Contracting Act, which precipitated a dramatic battle that raged in the lower federal courts and culminated in a threat by congresspersons of both parties to eliminate funding for parts of the Department of Justice (Cooper 2002, 225-27; *AMERON, Inc. v. U.S. Army Corps of Engineers*, 607 F.Supp. 962 [DNJ 1985]; *AMERON, Inc. v. U.S. Corps of Engineers*, 610 F.Supp. 750 [DNJ 1985]; *AMERON, Inc. v. U.S. Army Corps of Engineers*, 787 F.2d 878 [3d Cir. 1986]; *AMERON, Inc. v. United States Senate*, 809 F.2d 979 [3d Cir. 1986]; *Lear Siegler v. Lehman*, 842 F.2d 1102 [9th Cir. 1988]). In that case, the administration gave specific instructions to the Office of Management and Budget to direct agencies as to their behavior under the signing statement, making it relatively simple for losing contractors to obtain standing to challenge the statement in court. Given that situation, the courts were faced with a direct challenge not only to the language of the legislation enacted by Congress and signed by the president, but the judges also saw a White House that purported to tell the courts what interpretation of law it would and would not obey.

The frontal assault seen in the *AMERON* case exceeded political tolerance limits both in Congress and in the courts, and administrations since then have been more careful about how they used the device. The language of the statement is often vague as in an assertion that a particular provision violates the president's authority under the Constitution to conduct foreign affairs and frequently does not specify the precise actions to be taken by the responsible administrators beyond requiring that they implement the provision in a manner that accords with the Constitution. In such circumstances, it is extremely difficult for a party to demonstrate at the other end of the policy implementation process that a particular problem can be traced directly to a signing statement.

If a case does reach the courts, contemporary rulings of the federal courts, and particularly the U.S. Supreme Court, limiting the actions of Congress (see, e.g., *INS v. Chadha*, 462 U.S. 919 [1983]; *Bowers v. Synar*, 478 U.S. 714 [1986]; *Printz v. United States*, 521 U.S. 898 [1997]; *Morrison v. United States*, 529 U.S. 598 [2000]) may suggest to the White House that, to the degree that its claims are based in Article II powers or specific limitation on legislative powers, there may be a strong base on which it can build a case. Some administrations have been willing to fight such battles for ideological reasons in hopes that they will prevail. Finally, there is the hope that more scholars and perhaps judges will at least consider presidential signing statements as they interpret statutes (see, e.g., *United States v. Story*, 891 F.2d 988, 994 [2d Cir. 1989]). In that case, the court concluded that the signing statements of two presidents of two different parties were at least worthy of mention in the court's interpretation of the statute.

One of the other interesting advantages of signing statements is that, while they are public documents that were clearly and intentionally placed on the record, almost no one outside the current administration pays attention to them. They are often viewed as hortatory and ceremonial rather than substantive. Further, if one wishes to understand fully what the administration is saying in a signing statement, it is often necessary to access the legislation in question and read the specific provisions to which an assertion in the statement refers. The president does not use ceremonial occasions to make

arguments on the legal merits of the specific provisions and the general news media, which focus not on documents but primarily on what happens on camera in public events and in interviews, rarely report what signing statements are about. Further, because the language is increasingly broad, general, and formulaic, at least in the Bush years, very important points can easily be lost on even experienced readers of the signing statements. Finally, as is increasingly true in matters pertaining to executive direct action tools, signing statements are best understood in the context of a larger set of such devices. The patterns that quickly become apparent to one who examines a set of these materials would be lost on those who look only to an occasional signing statement or executive order.

That said, these statements are used to structure the initial implementation of the new legislation. They include directives to the heads of the responsible agencies in the form of the guidance, mandates, and prohibitions issued as part of the signing statements. The admonitions they set forth can be expected to influence rulemaking efforts that will further explain and give detailed application to the legislation in question. After that implementation process has been shaped and administration of the policy moves forward, few of those inside or outside of government will know or later remember how and why the legislation was handled as it was by that agency. While this influence on implementation may not be an obvious and dramatic matter, it may be of more importance in the long term than any other impact of the signing statement.

None of these attractive qualities and uses of signing statements have escaped the notice of the George W. Bush administration. It is useful to consider just how his administration used this device in his first term.

George W. Bush Signing Statements: Tools, Weapons, and Declarations of Ideological Faith

Most recent presidential administrations have discovered and developed particular tools of presidential direct action. The Carter White House made innovative use of executive orders. The Reagan team exploited the possibilities of national security directives and explored a range of uses for presidential signing statements. Clinton found the presidential memorandum to be a useful device and applied it in a variety of settings. In some instances, these techniques were employed with considerable fanfare as in Clinton's use of executive orders and proclamations, while in others, like the Reagan administration's use of national security directives, the tools were deliberately and carefully used behind the scenes so that even the Congress was not aware of much of the action. The administration of George W. Bush has quietly, systematically, and effectively developed the presidential signing statement to regularly revise legislation and pursue its goal of building the unified executive.

The administration made somewhat limited use of the signing statement in the early months of 2001 and there was an obvious period of cooperation in the aftermath of 9/11. There then followed a period in which the administration was kept busy hammering out a deal on its major education package now known as No Child Left Behind.

Even so, the administration ultimately issued some 23 signing statements in 2001. The administration locked horns with Congress on a range of issues in late 2001, and 2002 would see some 34 such statements, presenting 168 constitutional objections, followed by 27 statements in 2003 with 142 constitutional challenges, and 23 statements in 2004 with 175 constitutional criticisms. This study identified 108 signing statements between the start of the Bush administration in early 2001 and the end of the 108th Congress at the end of 2004, which presented 505 constitutional challenges to various provisions of legislation adopted by Congress, but which the president chose to sign rather than veto. The greatest number of presidential criticisms to provisions of any one piece of legislation was the Consolidated Appropriations Act of 2004 with 32 constitutional objections for that one bill, which he nevertheless signed into law.

While these numbers are interesting, it is the qualitative character of these statements, and not their numbers, that matters. Indeed, there are a number of dangers involved in merely counting statements and attempting to make comparisons across administrations on those grounds. For one thing, unlike executive orders, national security directives, and presidential memoranda, the number of signing statements in a given year or administration depends upon the number of pieces of legislation adopted by Congress. Moreover, the potential consequences of the use of a statement depend mightily upon the particular legislation in which it is used and sometimes even in the context in which that legislation will be implemented.

Further, it can be extremely difficult to count the number of specific objections. Consider two brief examples of the problems. The administration came to adopt the practice of stringing together references to several claimed constitutional powers without explanation with respect to a particular statutory provision. Also, in broad legislation such as consolidated appropriations bills, the administration did not deal with each objectionable provision one at a time, but chose to begin with a broad summary paragraph containing a litany of objections and then provided nonexclusive lists of examples of some of the objectionable sections of the legislation. For these and other reasons, it is far more important to examine closely the kinds of claims that are made by the presidents and to examine how they are employed than it is to count and compare numbers of statements.

A variety of different types of constitutional objections were asserted by the George W. Bush administration, most on a relatively regular basis, although the scope of those objections increased over time (see Table 1). These powers were often asserted without supporting authorities, or even serious efforts at explanation. The administration interpreted its own powers, gave them the widest possible scope, and then interpreted the limitations it found on congressional authority, usually giving legislative powers the narrowest possible reading. It then declared its positions and often gave only general indications as to its intentions for the way in which it would implement the statute.

Ultimately, an understanding of the use and abuse of this tool requires a rather detailed consideration of the actual language used in the statements.

Even though those who drafted signing statements used relatively careful language in the early going in 2001, the administration was clearly determined to be vigilant so as to protect the powers of the president, as the Ashcroft Justice Department saw them,

TABLE 1
George W. Bush Administration First-Term Signing Statement Constitutional Objections

<i>Primary Reasons for Rejecting Legislative Requirements</i>	
Power to supervise the unitary executive	82
Exclusive power over foreign affairs	77
Sole control over the authority to make recommendations to Congress	54
Authority to determine and impose national security classification and withhold information	48
Actions taken to execute constitutional duties	40
Keep secret deliberate processes of the executive branch	39
Commander-in-chief powers	37
Separation-of-powers claims based on <i>INS v. Chadha</i>	24
Sole power over appointments	23
Rejection of mandatory report or approval from Congress	22
Unimpeded authority to conduct negotiations for foreign affairs	15
Equal protection requirements of the Due Process clause of the Fifth Amendment	15
Duty to take care that the laws be faithfully executed	9
Rejections of involvement of congressional officers under <i>Bowers v. Synar</i>	6
Power to require opinions in writing of executive officials	6
Bicameralism and presentment clause	5
Federalism limits imposed by <i>Printz v. United States</i>	3
Total	505

from any threat, no matter how insubstantial. Thus, for example, only a week after the 9/11 tragedy, the president signed legislation creating the Brown v. Board of Education Anniversary Commission. In so doing, the administration took the trouble in that difficult time to make it clear that, although it would “as a matter of comity” be pleased to receive the recommendations for members of the commission from the various groups that the legislation indicated should be permitted to recommend appointments, there was no question that the appointment power belonged to the president under the appointments clause and further that “the Constitution does not permit them [the organizations called to make recommendations to the president] to participate in the performance of executive functions” (37 *Weekly Compilation of Presidential Documents* 1336-37 [2001]).

By the end of November of 2001, the post-9/11 tensions were growing between the White House and Congress. The administration, and particularly the Justice Department under Attorney General John Ashcroft, seemed to be adopting a mode of behavior that suggested an ends-justifies-the-means attitude and no interference with asserted presidential authority was to be tolerated. The administration issued a dramatic signing statement on the Department of Commerce, Justice, State, Judiciary and Related Agencies Appropriations Act, P.L. 107-77. In this document, the administration took a much more direct, sweeping, and aggressive approach in objecting to congressional provisions than in earlier statements. In the process, the administration laid the basis for what was to become its adamant insistence that Article II of the Constitution would not permit any interference with what the administration would come to refer to as the president’s “control of the unitary executive.”

I note that Section 612 of the bill sets forth certain requirements regarding the organization of the Department of Justice's efforts to combat terrorism. This provision raises separation of powers concerns by improperly and unnecessarily impinging upon my authority as President to direct the actions of the Executive Branch and its employees. I therefore will construe the provision to avoid constitutional difficulties and preserve the separation of powers required by the Constitution. (37 *Weekly Compilation of Presidential Documents* 1724 [2001])

This statement came at a time when the administration was pressing Congress on both spending and substantive legislation and in the midst of Senate hearings into concerns that the Justice Department and other agencies were abusing authority in the post-9/11 context. In particular, there were growing objections to the president's military order announcing trials by military commission (22 *Fed. Reg.* 57833 [2001]). The White House was determined to interpret the post-9/11 situation as the basis for sweeping assertions of power. This mode of behavior produced confrontations in the Senate Judiciary Committee when then Assistant Attorney General, now Homeland Security Secretary, Michael Chertoff appeared before the committee to answer questions about the recent order directing the use of military tribunals to try some of those detained in the widening war on terrorism. News reports highlighted Senator Patrick Leahy's (D-VT) challenge to Chertoff on the administration's unwillingness to operate within the constitutional checks and balances. Chertoff set forth the administration's position in no uncertain terms. Although he insisted that the administration was acting within the law and requirements of checks and balances, he said: "Are we being aggressive and hard-nosed? You bet we are. In the aftermath of September 11, how could we not be?" (Lewis 2001, B7; U.S. Senate 2001). Republican Senator Arlen Specter (PA) also challenged Chertoff. "It was surprising to me that the attorney general did not consult with any member of the committee," Mr. Specter said. When Mr. Chertoff began his response by saying that the president and attorney general regard Congress as a "full partner" in the fight against terrorism, Mr. Specter interjected, "How can you talk about full partnership when nobody let us know this executive order was coming down" (U.S. Senate 2001).

The legislation that brought the most constitutional objections in 2001 was the Intelligence Authorization Act for FY2002. It also marked what would become a pattern of broad-based, but often unspecified, sets of constitutional objections. It served notice that requirements in legislation for reports to Congress would be construed "in a manner consistent with the President's constitutional authority to withhold information the disclosure of which could impair foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties. Section 502 shall also be construed in a manner consistent with the statutory responsibility of the Director of Central Intelligence to protect intelligence sources and methods and other exceptionally sensitive matters" (37 *Weekly Compilation of Presidential Documents* 1834 [2001]). The administration would consistently reject the premise that Congress could demand reports, indicating in signing statements that it would construe such language in terms of requests for reports rather than requirements.

The National Defense Authorization Act also reached the president's desk at this point and was signed on December 29, 2001. This statement signaled the beginning of

an interesting set of challenges by the administration to long-standing mechanisms for addressing details in legislation. The White House objected to the use of a classified appendix to the bill that included classified programs but left the other nonclassified materials in the published part of the bill. The signing statement asserted: “My Administration discourages enactment of secret law as part of annual defense authorization acts and instead encourages appropriate use of classified annexes to committee reports and the joint statement of managers that accompanies the final legislation” (37 *Weekly Compilation of Presidential Documents* 1835 [2001]). While it called for Congress to place the key language in committee reports and other similar documents, the administration in other signing statements rejected such documents and any appendices attached to them as authoritative because they do not meet “the constitutional requirements of bicameral approval and presentment to the President needed to give them the force of law.” For example, in signing The Department of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2002 on January 10, 2002, the administration, after rejecting the authoritative nature of committee publication, added that: “My Administration will treat these specifications in a manner reflecting the comity between the executive and legislative branches on such matters.” Thus, the committee documents would be used if and when the administration wanted to use them and not otherwise (38 *Weekly Compilation of Presidential Documents* 51 [2002]).

By mid-2002, the administration was increasingly prepared to issue signing statements that were confrontational and particularly to reject anything that it regarded as interference with its prerogative powers in the areas of national security, foreign affairs, Defense Department matters, intelligence policy, or law enforcement. The administration also appeared ready to declare legislative action that touched upon such subjects unconstitutional and to treat what were clearly intended to be mandatory legislative provisions as “advisory” or “precatory” (a term that indicates a request but not a legal requirement). It was also increasingly prepared to reject requirements for coordination or consultation. Thus, in signing the Enhanced Border Security and Visa Entry Reform Act of 2002, the administration flatly rejected legislative mandates for coordination or consultation and indicated that these provisions would be treated as advisory only.

Several sections of the Act raise constitutional concerns. Sections 2(6), 201(c)(2), and 202(a)(3) purport to require the President to act through a specified assistant to the President or in coordination or consultation with specified officers of the United States, agencies, or congressional committees. The President’s constitutional authority to supervise the unitary executive branch and take care that the laws be faithfully executed cannot be made by law subject to requirements to exercise those constitutional authorities through a particular member of the President’s staff or in coordination or consultation with specified officers or elements of the Government. Accordingly, the executive branch shall treat the purported requirements as precatory. (38 *Weekly Compilation of Presidential Documents* 822 [2002])

Another of the practices that was to become a matter of formula in Bush signing statements was a reference to the Fifth Amendment’s Due Process clause. For example, in the Export-Import Bank Reauthorization Act of 2002 statement, the president used what was to become formulaic language for rejection of affirmative action provisions.

Referring to Section 7(b) of the legislation, the statement announced that: “The executive branch shall carry out Section 7(b) . . . in a manner consistent with the requirements of equal protection under the Due Process Clause of the Fifth Amendment to the Constitution” (38 *Weekly Compilation of Presidential Documents* 1014 [2002]). Many reading this language would not understand what this formula language meant. The Supreme Court long ago read the concept of equal protection of the law which protects against discrimination to be incorporated into the Due Process clause of the Fifth Amendment (*Bolling v. Sharpe*, 347 U.S. 497 [1954]). Because the Bush administration regards affirmative action programs as a violation of equal protection of the laws, the use of the language about the Fifth Amendment meant that the administration would treat legislative provisions requiring or suggesting affirmative action accordingly. It employed this formula fifteen times during the first Bush term of office.

In many instances, the language of a signing statement spoke of constitutional concerns and claimed to construe the language in a manner that the administration considered would avoid the constitutional problem. In short, the White House would effectively rewrite the legislative requirements in the process of implementation. On other occasions, the statements went beyond that general language to provide a kind of declaratory judgment. In the Codification of Public Buildings, Property, and Works Act statement, for example, the administration asserted:

The constitutional requirement of bicameralism and presentment is infringed whenever a single house, committee, or agent of Congress attempts to direct the execution of the laws or to promulgate rules or standards intended to bind the actions of executive or administrative officials that have not been approved by both houses and presented to the President. *INS v. Chadha*, 462 U.S. 919, 958-59 (1983). The executive branch will therefore interpret these and similar provisions to require advance notification only, since any other interpretation would contradict the Supreme Court’s ruling in *INS v. Chadha*. (38 *Weekly Compilation of Presidential Documents* 1427 [2002])

There is no small bit of irony in the administration’s declaration of the violations of bicameralism and the presentment clause, given that it was using a method that evaded the presentment clause requirements that legislation be signed or a veto be returned to Congress for a possible override (see *Clinton v. New York*, 524 U.S. 417 [1998]). The signing statement tactic was in fact being used as a mechanism for avoiding the full application of that Article I provision.

The administration rarely missed the opportunity to stake out its claims in the broadest possible terms. Indeed, one who examines the White House practice over the course of the first four years of the Bush administration may be surprised that, just when it seemed that the language used in signing statements was perhaps as broad as it could get, the administration would push the boundaries yet again. In signing the Military Construction Appropriation Act in October 2002, the administration used language that was extremely broad but also to become formulaic.

The U.S. Supreme Court has stated that the President’s authority to classify and control access to information bearing on national security flows from the Constitution and does not

depend upon a legislative grant of authority. Although the notice can be provided [to Congress] in most situations as a matter of comity, situations may arise, especially in wartime, in which the President must act promptly under his constitutional grants of executive power and authority as Commander in Chief while protecting sensitive national security information. The executive branch shall construe these sections in a manner consistent with the President's constitutional authority. (38 *Weekly Compilation of Presidential Documents* 1836 [2002])

Similarly, it was no accident when, in the signing statement for the Foreign Relations Authorization Act for FY2003, the administration proclaimed that it would “preserve the prerogatives of the President in the area of foreign affairs” (38 *Weekly Compilation of Presidential Documents* 1659 [2001]). The invocation of the language of prerogative power should not be considered an accident in this context. This administration makes it clear that it considers that it does exercise the prerogative power and certainly in any area that touches on foreign, military, national security, or intelligence policy. Another indication of just how far the administration was willing to push the boundaries can be seen in its frequent rejection of provisions commonly used over the years that call for presidents to act once they have found certain specified conditions existed in an international situation. Such provisions have often been used to indicate trigger points for imposing sanctions in trade problems, for example. However, the Bush administration would not tolerate most such conditions as binding.

Another area in which the administration has demonstrated a zero tolerance attitude is in the field of appointment authority. It was one thing for the administration to reject any participation of congressional leaders in the appointment process for the Election Assistance Commission, created by the Help America Vote Act, but the White House went much further than that. It even dismissed the 120-day deadline for the appointments. “[T]his deadline unduly circumscribes the presidential appointment power. Moreover, this deadline is practically impossible to satisfy given the time required for the pre-nomination personnel process and confirmation by the full Senate. For these reasons, the executive branch shall interpret this provision as advisory” (38 *Weekly Compilation of Presidential Documents* 1888 [2002]). Just where the administration found the authority to rewrite a mandatory provision from a statute such as a specific deadline for executive action is not indicated.

In a number of instances, the Bush administration seemed to go out of its way to press the boundaries to make a point. The Act to Provide for Improvement of Federal Education Research, Statistics, Evaluation, Information, and Dissemination elicited a range of objections that were sweeping in character and far out of proportion to the nature of the legislation or the provisions drawn into question. For example, the statement indicated that: “Finally, the executive branch shall construe section 156(b) regarding the furnishing of compilations or surveys in a manner consistent with the principles enunciated by the U.S. Supreme Court in 1983 in *INS v. Chadha*, which do not permit the Congress by law to authorize a congressional committee to direct an executive branch entity to create a compilation or survey” (38 *Weekly Compilation of Presidential Documents* 1995 [2002]). The *Chadha* case was not nearly so sweeping as this language would suggest. It, of course, concerned prohibitions on the efforts by a congressional commit-

tee or a single house to make a legally binding decision reversing or blocking an executive branch decision. Nothing of the sort was involved in that bill. This statement was an interpretation of *Chadha* so broad as to prohibit, in this case, even a request for information from an agency, the Statistics Center, created for the purpose of providing information. Another objection might have been interposed if the administration was seeking to block interference in the operation of an executive branch agency, but this particular assertion is excessive, unhelpful, and needlessly confrontational.

One of the problems is that the language in the statements has often been so broad that it is very difficult for anyone not trained in constitutional and administrative law to understand what is actually intended. On other occasions, the statement is tantamount to a mini-brief as in the case of the Accountability of Tax Dollars Act of 2002. In one paragraph of this statement, the administration cited no less than one Supreme Court case, *Franklin v. Massachusetts* (505 U.S. 788 [1992]), and two court of appeals rulings, *Meyer v. Bush* (981 F.2d 1288 [D.C. Cir. 1993]) and *Haddon v. Walters* (43 F.3d 1488 [D.C. Cir. 1995]), to constrain the definition of covered agency under the statute. Even so, the statement still did not explain what it specifically objected to in the statute or precisely what interpretation it placed on the cited cases.

Given what has been said to this point, it probably will come as no surprise that the signing statement for the Homeland Security Act was wide ranging and adamant. It contained one brief laudatory paragraph. The remaining four-plus pages consist of one legal interpretation, constraint on the statute as written, or effective veto after another. It used several of what had become formulae for constraining any expectations by Congress. For example, it found that:

Section 214(a)(1)(D)(ii) provides that voluntarily shared critical infrastructure information shall not be used or disclosed by any Federal employee without the written consent of the person or entity submitting the information, except when disclosure of the information would be to the Congress or the Comptroller General. The executive branch does not construe this provision to impose any independent or affirmative requirement to share such information with the Congress or the Comptroller General and shall construe it in any event in a manner consistent with the constitutional authorities of the President to *supervise the unitary executive branch and to withhold information the disclosure of which could impair foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties*. (Emphasis added; 38 *Weekly Compilation of Presidential Documents* 2092-2093 [2002]).

Another formula developed by the administration relates to often sweeping claims concerning the ability to refuse to disclose information. The usual statement reads in part:

The executive branch shall construe and carry out these provisions, as well as other provisions of the Act, including those in title II of the Act, in a manner consistent with the President's constitutional and statutory authorities to control access to and protect classified information, intelligence sources and methods, sensitive law enforcement information, and information the disclosure of which could otherwise harm the foreign relations or national security of the United States. (38 *Weekly Compilation of Presidential Documents* 2093 [2002])

A number of the commentaries purported to be statements of authoritative interpretation of statutory provisions, even where there was no specific constitutional issue or direct statutory conflict. It appeared as if the White House was rendering advisory opinions, issuing declaratory judgments (as in its interpretations of the requirements needed for the inspector general to make arrests under the statute), and adding savings clauses to the statutes, reserving any ambiguous authority to the White House.

Similarly in signing the Intelligence Authorization Act for FY2003, which, among other things, created the 9/11 Commission, the administration included the by-then familiar formula for insisting that it would provide only the information it chose to provide. The administration's view of its discretion to provide or withhold information for the commission, of course, led to a series of battles over efforts by the commission to obtain the information needed to complete its work and then to efforts by its opponents in the administration to prevent the extension of time necessitated by the early refusal to provide the requisite information.

Another area in which the administration determined to take on Congress was in the field of appropriations. In signing the Consolidated Appropriations Resolution in February 2003, the president chided Congress for disagreeing with the administration's priorities and announced his intention to use every means possible to reprogram the funds to meet the administration's priorities. "My Administration will use all the tools at its disposal to ensure that as much of this funding as possible is directed toward terrorism preparedness and prevention" (39 *Weekly Compilation of Presidential Documents* 225-26 [2003]). It was a very aggressive statement which the president declared in no uncertain terms that Congress had violated the Constitution in several respects.

In addition, a number of provisions of H.J. Res. 2 are inconsistent with the constitutional authority of the President to conduct foreign affairs, command the Armed Forces, supervise the unitary executive branch, protect sensitive information, and make recommendations to the Congress. Other provisions unconstitutionally condition execution of the laws by the executive branch upon approval by congressional committees.

Thus, the executive branch shall construe as advisory the provisions of the bill that purport to: direct or burden the Executive's conduct of international negotiations, such as sections 514, 556, 576, and 577 in the Foreign Operations Appropriations Act; limit the President's authority as Commander in Chief, such as language under the heading "Andean Counter-drug Initiative" in the Foreign Operations Appropriations Act and section 609 of the Commerce Appropriations Act; or limit the President's authority to supervise the unitary executive branch, such as section 718 of the Agriculture Appropriations Act and the provisions relating to Office of Management and Budget review of executive branch orders, activities, regulations, transcripts and testimony in the Treasury Appropriations Act. (39 *Weekly Compilation of Presidential Documents* 226 [2003])

By 2003, the administration was moving even further in asserting its claims to discretion in such areas as appointments. That assertiveness included a rejection by the administration as binding provisions in the legislation setting basic qualifications for certain types of officials. The statement on the Vision 100—Century of Aviation Reauthorization Act issued December 12, 2003 provided an example. Where the White

House chose to do so, it simply decided to treat such statements of requirements as “advisory.”

Section 106(p)(7)(B)(iii) of title 49, as enacted by section 202 of the bill, purports to limit the qualifications of the pool of persons from whom the President may select ATSC [Air Traffic Services Committee] members in a manner that rules out a large portion of those persons best qualified by experience and knowledge to fill the office. Congressional participation in such appointments is limited by the Appointments Clause of the Constitution to the Senate’s provision of advice and consent with respect to Presidential nominees. The executive branch shall construe the provisions concerning qualifications in section 106(p)(7)(B)(iii) as advisory, as is consistent with the Appointments Clause. (39 *Weekly Compilation of Presidential Documents* 1796 [2003]).

While this wording appears to be addressing a dramatic bit of statutory language, the fact is that the provision in question was quite specific and limited.

Increasingly over the years, the administration made clear not only its wide-ranging assertions of authority, but also its judgment that those powers were exclusive. Thus, in signing the Intelligence Authorization Act for FY2004, the White House warned:

The executive branch shall construe these provisions in a manner consistent with the Constitution’s commitment to the President of exclusive authority to submit for the consideration of the Congress such measures as the President judges necessary and expedient and to supervise the unitary executive branch, and to withhold information the disclosure of which could impair the deliberative processes of the Executive or the performance of the Executive’s constitutional duties. (39 *Weekly Compilation of Presidential Documents* 1788 [2003])

By the time Bush signed the Consolidated Appropriations Act of 2004, the administration was ready to take the opportunity for sweeping constitutional declaratory judgments and broad rewriting of the legislation without specification of each of the elements of the bill that was problematic. In the introduction to this statement the president says: “Many provisions of the CAA are inconsistent with the constitutional authority of the President to conduct foreign affairs, command the Armed Forces, protect sensitive information, supervise the unitary executive branch, make appointments, and make recommendations to the Congress. Many other provisions unconstitutionally condition execution of the laws by the executive branch upon approval by congressional committees” (40 *Weekly Compilation of Presidential Documents* 137 [2004]). And again in the Intelligence Reform and Terrorism Prevention Act of 2004, the administration asserted:

Many provisions of the Act deal with the conduct of United States intelligence activities and the defense of the Nation, which are two of the most important functions of the Presidency. The executive branch shall construe the Act, including amendments made by the Act, in a manner consistent with the constitutional authority of the President to conduct the Nation’s foreign relations, as Commander in Chief of the Armed Forces, and to supervise the unitary executive branch, which encompass the authority to conduct intelligence operations. (40 *Weekly Compilation of Presidential Documents* 2993 [2004])

The Paradox of Bush Signing Statements: Audacious Claims to Power Hidden in Plain Sight

It is difficult for one who has examined the presidential signing statements issued by President George W. Bush in his first term not to see an intriguing paradox. On the one hand, the statements represent nothing less than a set of audacious claims to constitutional authority. The scope of the claims and the sweeping formulae used to present them are little short of breathtaking. What is more, they are not alone assertions of executive authority, but also often dramatic declaratory judgments holding acts of Congress unconstitutional and purporting to interpret not only Article II presidential powers but those of the legislature under Article I. At the same time, though, the administration has pursued its strategy in such a way and using such a little-known policy instrument in a manner often so difficult to understand that its actions are known to the relative few who happen to be specialists in constitutional law and American political institutions and are, for one reason or another, attentive to the use of the signing statement. In an era of increasing attention to the craft of using sophisticated policy implements (Salamon 2002), there is a danger that this paradox of policy tools will be present and problematic in other important settings.

Beyond this general point, there are other conclusions that arise from this study. First, the Bush administration has chosen the signing statement as a tool to pursue consistently and with increasing vigor over time its claims to prerogative powers in the post-9/11 context. It has also employed this device to press its theory of the power “to control the unitary executive” so dramatically that it might surprise even Alexander Hamilton.

Certainly there is nothing new about presidents asserting broad, even dramatic, claims to authority in the context of conflict. The analogies drawn by Bush administration supporters to Pearl Harbor and U.S. actions thereafter are well known. However, the administration has not constrained its assertions as the years have passed since 9/11, but has, on the contrary, expanded them both internationally and domestically, even in the face of judicial rulings that make clear that the existence of the war on terror does not justify any action the president considers expedient to advance the conflict (*Hamdi v. Rumsfeld*, 159 L. Ed. 2d 578 [2004]; *Rasul v. Bush*, 159 L. Ed. 2d 548 [2004]) and in light of the fact that the Supreme Court has already rejected the line-item veto. Indeed, although the administration has been fond of pointing to the limitations on congressional action in *INS v. Chadha* (462 U.S. 919 [1983]), the Supreme Court made quite clear that *Chadha*'s admonitions apply as much to the executive as to the legislature and indicated in the Clinton case that mechanisms that are in fact—whatever they may be called—line-item vetoes fail the constitutional requirements (*Clinton v. New York*, 524 U.S. 417 [1998]). While one portion of the *Clinton* rationale was based on the fact that the president was reaching back into a previously enacted law, the other was grounded in the president's effort to nullify one portion of a piece of legislation rather than the whole and the fact that the veto requires an overall assessment and proper return for a possible veto override. So the fact that the signing statement was not addressing a previously approved statute is of no help to the administration's argument.

It should also be noted that while most scholars are familiar with the debates over the claims by presidents to the prerogative theory of expansive authority, many are not as aware that the parallel domestic argument, heavily laced with ideology, is phrased in terms of the “control of the unitary executive,” which asserts a broad and in many instances exclusive set of powers in the president (see, e.g., Yoo, Calabresi, and Nee 2004; Calabresi 2001; Devins and Herz 2003; Lessig and Sunstein 1994). In addition to the eighty-two uses of the unitary executive concept in signing statements, the administration has also claimed that authority in a number of executive orders (see, e.g., Executive Order 13361, 69 *Fed. Reg.* 67633 [2004]; Executive Order 13346, 69 *Fed. Reg.* 41905 [2004]; Executive Order 13302, 68 *Fed. Reg.* 27429 [2003]; Executive Order 13257, 67 *Fed. Reg.* 7259 [2002]). A full discussion of this debate is beyond the scope of this article, but in light of the use made of this doctrine by the Bush administration in its signing statements, a further discussion is warranted, and one that extends well beyond the pages of law reviews. “Control of the unitary executive” is not empty language, but a serious effort to reinterpret the scope of executive power and the limits to congressional authority.

The administration’s default position has been, when in doubt challenge legislative provisions whether there is a serious issue or not. As has been true of other uses and abuses of presidential direct action in recent administrations, the dangers here are several, one of the most important of which is to further damage the long-standing informal working relationships that permit the White House and Congress to get essential work done even in the midst of partisan and ideological differences (dealt with in greater detail in Cooper 2002, chapter 8). This problem is exacerbated by the tendency not only to claim authority but to assert that the power is solely and exclusively vested in the president. Related to that problem is the tendency not only to reinterpret language in legislation but to reject outright what are mandatory provisions of bills. The tendency, to the point of creation of a standard practice, during the Bush first term to reject mandatory provisions of legislation and convert them into advisory provisions or to treat them as precatory is nothing less than a post-congressional amendment process without benefit of either bicameralism or presentment.

Conclusion

Presidential signing statements are important, if generally little known, instruments of presidential direct action. They can and have been used as line-item vetoes of legislation presented to the president for signature or veto but without the use of the formal veto or the opportunity for legislative override processes. A study of the first Bush administration reveals wide-ranging assertions of exclusive authority and court-like pronouncements that redefine legislative powers under the Constitution. They reveal a systematic effort to define presidential authority in terms of the broad conception of the prerogative both internationally and domestically under the unitary executive theory.

In many ways, one of the more interesting lessons from this study is the way in which the administration has used this policy tool, adopting the mystery writers’ device,

originated by Edgar Allan Poe in the “Purloined Letter,” of hiding in plain view. This campaign has been carried out with such skill that the administration’s efforts would have drawn admiring comment from the likes of Poe and Sir Arthur Conan Doyle. To those who use and sometimes abuse such tools of presidential direct action, one is tempted to recall the quotation with which Poe began his tale, “*Nil sapientiae odiosius acumine nimio.*” It is a quote Poe attributed to Seneca which has been translated to mean “Nothing is more hateful to wisdom than excessive cleverness” (New Criterion 2003).

References

- Baker, Peter, and Mike Allen. 2005. President vows to veto any changes to Medicare. *Washington Post*, February 12, p. A05.
- Barr, William P. 1993. Attorney general’s remarks, Benjamin N. Cardozo School of Law. *Cardozo Law Review* 15: 31-41.
- Calabresi, Steven G. 2001. The virtues of presidential government. *Constitutional Commentary* 18: 51-104.
- Chapman, Steve. 2004. George W. Bush: The president who couldn’t say no. *Baltimore Sun*, November 16, p. 17A.
- Cooper, Phillip J. 2002. *By order of the president: The use and abuse of executive direct action*. Lawrence: University Press of Kansas.
- Dellinger, Walter. 1993. Memorandum for Bernard N. Nussbaum, counsel to the president. The legal significance of presidential signing statements, November 3. Available from <http://www.usdoj.gov/olc/signing.htm>. Accessed April 6, 2005.
- Devins, Neal, and Michael Herz. 2003. Velazquez and beyond: The uneasy case for Department of Justice control of federal litigation. *University of Pennsylvania Journal of Constitutional Law* 5: 558-606.
- Fisher, Louis. 1997. *Constitutional conflicts between Congress and the president*. 4th ed. Lawrence: University Press of Kansas.
- Kmieciak, Douglas W. 1993. OLC’s opinion writing functions: The legal adhesive for a unitary executive. *Cardozo Law Review* 15: 337-74.
- Lessig, Lawrence, and Cass Sunstein. 1994. The president and the administration. *Columbia Law Review* 94: 2-123.
- Lewis, Neil A. 2001. A nation challenged: The hearings; Justice Department and Senate clash over Bush actions. *New York Times*, November 29, p. B7.
- Meese, Edwin III. 1989. *Major policy statements of the attorney general: Edwin Meese III, 1985-1988*. Washington, DC: Government Printing Office.
- . 1992. *With Reagan: The inside story*. Washington, DC: Regnery Gateway.
- New Criterion. 2003. *Notes & comments*. May. Available from <http://www.newcriterion.com/archive/21/may03/notes.htm>. Accessed April 6, 2005.
- Poe, Edgar Allan. 1845. *The purloined letter*. Available from <http://xroads.virginia.edu/~HYPER/POE/purloine.html>. Accessed April 6, 2005.
- Salamon, Lester. 2002. *The tools of government*. New York: Oxford University Press.
- U.S. Senate. 2001. Hearings before the Committee on the Judiciary. Department of Justice oversight: Preserving our freedoms while defending against terrorism, 107th Cong., 1st Sess.
- Yoo, Christopher S., Steven G. Calabresi, and Laurence D. Nee. 2004. The unitary executive during the third half-century, 1889-1945. *Notre Dame Law Review* 80: 1-109.