

REPORT

*The preservation of liberty requires that
the three great departments of power
should be separate and distinct.*

– James Madison, Federalist Papers, No. 47.

I. INTRODUCTION

On April 30, 2006, Charlie Savage, a respected veteran reporter for the Boston Globe, wrote a lengthy article on the use of presidential “signing statements” in which he reported that “President Bush has quietly claimed the authority to disobey more than 750 laws enacted since he took office, asserting that he has the power to set aside any statute passed by Congress when it conflicts with his interpretation of the Constitution.”¹ Savage wrote:

Legal scholars say the scope and aggression of Bush's assertions that he can bypass laws represent a concerted effort to expand his power at the expense of Congress, upsetting the balance between the branches of government. The Constitution is clear in assigning to Congress the power to write the laws and to the president a duty "to take care that the laws be faithfully executed." Bush, however, has repeatedly declared that he does not need to "execute" a law he believes is unconstitutional.

Id. The Savage articles created a major national controversy, with the use – and, as some charged, the abuse – of signing statements drawing both severe critics and staunch defenders, with dozens of newspaper editorials² and op-ed pieces published.

Senator Arlen Specter (R-PA), the Chairman of the Senate Judiciary Committee, charged that congressional legislation “doesn't amount to anything if the president can say, 'My constitutional authority supersedes the statute.' And I think we've got to lay down the gauntlet

¹ See Charlie Savage, *Bush Challenges Hundreds of Laws*, BOSTON GLOBE, April 30, 2006, at http://www.boston.com/news/nation/Washington/articles/2006/04/30/bush_challenges_hundreds_of_laws/.

² See, e.g., *Veto? Who Needs a Veto?*, Editorial, NEW YORK TIMES, May 5, 2006 at <http://www.nytimes.com/2006/05/05/opinion/05fri1.html?th&emc=th>; *A White House power grab*, Editorial, SAN FRANCISCO CHRONICLE, June 12, 2006, at <http://sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2006/06/12/EDGMSJB0EJ1.DTL>; *Signing statements an abuse of power*, Editorial, ASBURY PARK PRESS, June 6, 2006, at <http://www.app.com/apps/pbcs.dll/article?AID=/20060606/OPINION/606060313/1032>.

and challenge him on it”³ He denounced the President’s use of signing statements as “a very blatant encroachment” on Congress's power to legislate.⁴

At a June 27, 2006 Senate Judiciary Committee hearing on “Presidential Signing Statements,”⁵ Senator Patrick Leahy (D-VT), the Ranking Member, stated:

We are at a pivotal moment in our Nation’s history, where Americans are faced with a President who makes sweeping claims for almost unchecked Executive power. One of the most troubling aspects of such claims is the President’s unprecedented use of signing statements. Historically, these statements have served as public announcements containing comments from the President, on the enactment of laws. But this Administration has taken what was otherwise a press release and transformed it into a proclamation stating which parts of the law the President will follow and which parts he will simply ignore.

Senator Leahy called the broad use of signing statements “a grave threat to our constitutional system of checks and balances.”⁶

In light of the importance of these issues, ABA President Michael S. Greco appointed an ABA Task Force on Presidential Signing Statements and the Separation of Powers Doctrine to “examine the changing role of presidential signing statements, in which U.S. presidents articulate their views of provisions in newly enacted laws, attaching statements to the new legislation before forwarding it to the Federal Register” and to “consider whether such statements conflict with express statutory language or congressional intent.”⁷

³ See Andy Sullivan, *Specter to grill officials on Bush ignoring laws*,” REUTERS, June 21, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/21/AR2006062101594.html>

⁴ See Charlie Savage, *Senators Renew Call for Hearings on Signing Statements*, BOSTON GLOBE, June 16, 2006, at http://www.boston.com/news/nation/washington/articles/2006/06/16/senators_renew_call_for_hearings_on_signing_statements/.

⁵ The statements of all witnesses at the Senate Judiciary Committee hearing on "Presidential Signing Statements," including Task Force members Bruce Fein and Professor Charles Ogletree, can be accessed at: <http://judiciary.senate.gov/hearing.cfm?id=1969>.

⁶ See Statement of Senator Patrick Leahy, Ranking Member, Judiciary Committee Hearing on Presidential Signing Statements, June 27, 2006, at http://judiciary.senate.gov/member_statement.cfm?id=1969&wit_id=2629

⁷ See ABA News Release, “ABA to Examine Constitutional, Legal Issues of Presidential Signing Statements” at: <http://www.abanews.org/releases/news060506.html>

In appointing the Task Force, President Greco stated:

The issue to be addressed by this distinguished task force is of great consequence to our constitutional system of government and its delicate system of checks and balances and separation of powers. The task force will provide an independent, non-partisan and scholarly analysis of the utility of presidential signing statements and how they comport with the Constitution and enacted law.

President Greco took special care to ensure that the membership of the Task Force represented a variety of diverse views and backgrounds. The Task Force members are both conservative and liberal, Republican and Democrat, and have had substantial experience in government, the judiciary, and constitutional law.⁸

While the Task Force was operating under intense time pressures, it benefitted from the fact that the use of presidential signing statements has been the subject of a variety of scholarly books and articles.⁹ In addition, the American Presidency Project, a collaboration between John Woolley and Gerhard Peters at the University of California, Santa Barbara, contains the signing statements of all United States Presidents since 1929,¹⁰ and Joyce A. Green, a concerned and public spirited Oklahoma City lawyer, created an annotated website of all of the signing statements since 2001 in order to “provide free convenient access -- for the entire world -- to the text of George W. Bush's presidential signing statements.”¹¹

The members of the Task Force reviewed a large number of reference materials and discussed and debated the issues in more than a half dozen lengthy conference calls and hundreds of emails. Every word of each recommendation was carefully considered and parsed until there

⁸ The Task Force is chaired by **Neal R. Sonnett**, and includes **Mark D. Agrast, Hon. Mickey Edwards, Bruce Fein, Dean Harold Hongju Koh, Professor Charles Ogletree, Professor Stephen A. Saltzburg, Hon. William S. Sessions, Professor Kathleen Sullivan, Tom Susman, and Hon. Patricia M. Wald. Alan J. Rothstein** serves as a Special Advisor. A short biography of each appears in an Appendix to this Report.

⁹ See, e.g., PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION (2002); Christopher S. Kelley, “A Comparative Look at the Constitutional Signing Statement: The Case of Bush and Clinton,” Paper presented at the 61st Annual Meeting of the Midwest Political Science Association (April 2003), at <http://mpsa.indiana.edu/conf2003papers/1031858822.pdf>; Philip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 PRESIDENTIAL STUD. Q. 515 (2005).

¹⁰ See <http://www.presidency.ucsb.edu/signingstatements.php?year=2006&Submit=DISPLAY>.

¹¹ See <http://www.coherentbabble.com/signingstatements/about.htm>

was unanimous consensus by the members. Among those unanimous recommendations, the Task Force voted to:

- ! oppose, as contrary to the rule of law and our constitutional system of separation of powers, a President's issuance of signing statements to claim the authority or state the intention to disregard or decline to enforce all or part of a law he has signed, or to interpret such a law in a manner inconsistent with the clear intent of Congress;
- ! urge the President, if he believes that any provision of a bill pending before Congress would be unconstitutional if enacted, to communicate such concerns to Congress prior to passage;
- ! urge the President to confine any signing statements to his views regarding the meaning, purpose, and significance of bills, and to use his veto power if he believes that all or part of a bill is unconstitutional;
- ! urge Congress to enact legislation requiring the President promptly to submit to Congress an official copy of all signing statements, and to report to Congress the reasons and legal basis for any instance in which he claims the authority, or states the intention, to disregard or decline to enforce all or part of a law he has signed, or to interpret such a law in a manner inconsistent with the clear intent of Congress, and to make all such submissions be available in a publicly accessible database.
- ! urge Congress to enact legislation enabling the President, Congress, or other entities or individuals, to seek judicial review of such signing statements to the extent constitutionally permissible, and urge Congress and the President to support a judicial resolution of the President's claim or interpretation.

Our recommendations are not intended to be, and should not be viewed as, an attack on the current President. His term will come to an end and he will be replaced by another President, who will, in turn, be succeeded by yet another.

To be sure, it was the number and nature of the current President's signing statements which generated the formation of this Task Force and compelled our recommendations. However, those recommendations are directed not just to the sitting President, but to all Chief Executives who will follow him, and they are intended to underscore the importance of the doctrine of separation of powers. They therefore represent a call to this President and to all his successors to fully respect the rule of law and our constitutional system of separation of powers.

II. PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE

According to Professor Neil Kinkopf, signing statements have historically served “a largely innocuous and ceremonial function” to explain the President’s reasons for signing a bill into law and to serve to “promote public awareness and discourse in much the same way as a veto message”¹² And Professor Christopher Kelley, In his 2003 doctoral dissertation on this issue, noted that:

. . . it is what the president does with the signing statement that makes this an area of interest to those studying presidential power. The president can use the signing statement to reward constituents, mobilize public opinion toward his preferred policies or against his political opponents, decline to defend or enforce sections of the bill he finds to be constitutionally objectionable, reward political constituents by making political declarations regarding the supposed constitutional veracity of a section of a bill, and even move a section of law closer to his preferred policy.¹³

According to Kinkopf, “there is nothing inherently wrong with or controversial about signing statements.” However, the controversy arises when “a signing statement is used not to extol the virtues of the bill being signed into law, but to simultaneously condemn a provision of the new law as unconstitutional and announce the President’s refusal to enforce the unconstitutional provision.”¹⁴

Since several recent studies have concluded that the Bush Administration has used signing statements to claim the authority or state the intention to disregard or decline to enforce all or part of a law he signed more than all of his predecessors combined,¹⁵ we believe that a short history of the use of such statements will provide background, context, and perspective to this report.

¹² Neil Kinkopf, *Signing Statements and the President's Authority to Refuse to Enforce the Law 2* (June 15, 2006), at <http://www.acslaw.org/node/2965>.

¹³ Christopher Kelley, *The Unitary Executive and the Presidential Signing Statement* (2003) (unpublished Ph.D. dissertation, Miami University), at <http://www.ohiolink.edu/etd/send-pdf.cgi?miami1057716977>.

¹⁴ *Id.*

¹⁵ *Id.* at 3; Savage, *supra*, note 1.

A. A History of the Use of Signing Statements

1. The First Two Centuries

The Constitution says nothing about the President issuing any statement when he signs a bill presented to him. If he vetoes the bill, Article 1, §7 requires him to tell Congress what his objections are, so that Congress can reconsider the bill and accommodate him or repass it by a two-thirds vote of both Houses in which case it becomes law without his signature.

Nonetheless Presidents have issued statements elaborating on their views of the laws they sign since the time of President James Monroe who, a month after he signed a bill into law which mandated reduction in the size of the army and prescribed the method by which the President should select military officers, issued a statement that the President, not Congress, bore the constitutional responsibility for appointing military officers.¹⁶

In 1830, President Andrew Jackson signed an appropriations bill providing for a road from Detroit to Chicago he objected to, but insisted in his signing statement that the road involved was not to extend beyond Michigan. The House of Representatives vigorously objected to his limitation but in fact acceded to it.¹⁷

In 1840, President John Tyler issued a signing statement disagreeing quite respectfully with certain provisions in a bill dealing with apportionment of congressional districts. As spokesman for the House, John Quincy Adams wondered why such an “extraneous document” was issued at all and advised that the signing statement should “be regarded in no other light than a defacement of the public records and archives.”¹⁸

No signing statements announcing a President’s intent not to comply with a law were issued until 70 years after the Constitution was ratified. Although after the Jackson and Tyler contretemps, Presidents seemed to shy away from statements denouncing provisions in bills they signed, the practice of identifying their differences with the Congress continued throughout the 19th century.¹⁹ There is, additionally, at least one example of a 19th century signing statement by

¹⁶ Kelley, *supra* note 9, at 5.

¹⁷ *Id.* at 5-6.

¹⁸ *Id.* at 5.

¹⁹ *Id.* The practice was recognized by the Supreme Court in *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 454 (1899). But the characterization in the 1994 Office of Legal Counsel memorandum authorized by Walter Dellinger on Presidential Authority to Decline to Execute Unconstitutional Statutes (hereafter Dellinger Declination Memorandum), at <http://www.usdoj.gov/olc/nonexecut.htm> (pagination according to the printed version), of a

President Ulysses S. Grant that “interpreted” a bill in a way that would overcome the Presidential constitutional concern, a technique that would frequently be employed by later 20th century Presidents to mold legislation to fit their own constitutional and statutory preferences. An appropriation bill had prescribed the closing of certain consular and diplomatic offices. President Grant thought it “an invasion of the constitutional prerogatives and duty of the Executive” and said he would accordingly construe it as intending merely “to fix a time at which the compensation of certain diplomatic and consular officers shall cease and not to invade the constitutional rights of the Executive.”²⁰

This pattern continued basically into the first 80 years of the 20th century. President Theodore Roosevelt proclaimed his intention in 1909 to ignore a restriction on his power to establish volunteer commissions in a signing statement; President Woodrow Wilson advised in a signing statement that executing a particular provision would result in violation of 32 treaties which he refused to do; and in 1943 President Franklin Roosevelt vehemently lashed back at a rider in an appropriation bill which barred compensation to three government employees deemed “subversive” by the Congress. Roosevelt “place[d] on record my view that this provision is not only unwise and discriminatory, but unconstitutional” and was thus not binding on the Executive or Judicial branches. This signing statement was later cited by the Supreme Court in *United States v. Lovett*,²¹ where it held the law unconstitutional. Roosevelt indicated he would enforce the law but that when the employees sued, he would instruct the Attorney General to side with them and attack the statute, which he did. Congress had to appoint a special counsel to defend it, unsuccessfully.²²

“consistent and substantial executive practice” of Presidential noncompliance with provisions in signed bills has been challenged by some commentators. See William C. Banks, *Still the Imperial Presidency*, 2 JURIST BOOKS-ON-LAW BOOK REVIEWS, No. 3 (March 1999), reviewing CHRISTOPHER N. MAY, PRESIDENTIAL DEFIANCE OF “UNCONSTITUTIONAL” LAWS: REVIVING THE ROYAL PREROGATIVE (1998), at <http://jurist.law.pitt.edu/lawbooks/revmar99.htm#Banks>. An earlier 1993 Dellinger memorandum on the Legal Significance of Presidential Signing Statements (hereafter Dellinger Signing Memorandum), at <http://www.usdoj.gov/olc/signing.htm> (pagination according to the printed version), lists Presidents Jackson, Tyler, Lincoln and Johnson as issuing signing statements dealing with constitutional objections to bills they signed. These statements in the main noted the Presidents’ objections and urged Congress to address them (which it often did). But some, however, such as Jackson’s road limitation, were read by Congress as signifying an intent not to follow the law and, in Jackson’s case, labeled an “item veto.”

²⁰ Dellinger Signing Memorandum, at 5.

²¹ 238 U.S. 303 (1946).

²² Kelley, *supra* note 9, at 7-8.

President Roosevelt also employed the “constitutional avoidance” technique pioneered by President Grant of interpreting a controversial provision so as not to raise constitutional concerns. When he issued a signing statement for the Emergency Price Control Act of 1942, he objected to certain “protectionist measures for farmers,” but continued that “nothing contained therein . . . can be construed as a limitation on existing powers of government agencies such as the Commodity Credit Corporation to make sales of agricultural commodities in the normal conduct of their operations.” Either Congress should remove the provision or he would treat it as a nullity. Congress removed it.²³ President Truman followed suit in a signing statement regarding a provision in a 1951 appropriations act, saying: “I do not regard this provision as a directive, which would be unconstitutional, but instead as an authorization . . .”²⁴ And in signing the Portal to Portal Act, President Truman took the then unusual step of defining the term “compensable labor” in a way so as to benefit the interests of organized labor, an interpretation later accepted by the courts.²⁵

Presaging the formulaic signing statements of the current era refusing to follow laws mandating intelligence disclosures, President Dwight Eisenhower in 1959 signed the Mutual Security Act, but stated, “I have signed this bill on the express promise that the three amendments relating to disclosure are not intended to alter and cannot alter the Constitutional duty and power of the Executive with respect to the disclosure of information, documents and other materials. Indeed any other construction of these amendments would raise grave constitutional questions under the historic Separation of Powers Doctrine.”²⁶

President Nixon in turn objected to a 1971 military authorization bill which set a date for withdrawal of U.S. forces from Indochina as being “without binding force or effect.”²⁷ And prior to the Supreme Court’s 1983 decision in *INS v. Chadha*,²⁸ invalidating the legislative veto, Presidents Eisenhower, Nixon, Ford and Carter objected to variations of those vetoes in signing statements and said they would not abide by them. Presidents John F. Kennedy and Lyndon Johnson construed such legislative vetoes as “request[s] for information.”²⁹

²³ Kelley, *supra* note 9, at 7; Dellinger Signing Memorandum, Appendix, at 6.

²⁴ Dellinger Signing Memorandum, Appendix, at 6.

²⁵ Kelley, *supra* note 9, at 4.

²⁶ Dellinger Signing Memorandum, Appendix at 6.

²⁷ *Id.*

²⁸ 462 U.S. 919 (1983). In its opinion the Supreme Court noted that eleven Presidents had indicated in signing statements and otherwise that the legislative veto was unconstitutional.

²⁹ Dellinger Signing Memorandum, Appendix, at 6; Dellinger Declination Memorandum,

As a general matter, President Jimmy Carter made greater use than his predecessors of signing statements, refusing, as President Grant had done before him, to follow the mandate of Congress to close certain consular posts and indicating his intent to construe the provision as only “precatory.”³⁰ He also issued a statement accompanying his signing of a 1978 appropriations act which contained a provision forbidding use of funds to implement his amnesty program for Vietnam draft resisters; he maintained that the provision was a bill of attainder, denied due process and interfered with the President’s constitutional pardoning power. He then proceeded in defiance of the law to use funds to process reentry visas for the Vietnam resisters and when critics sued the government to enforce the law his administration successfully defended his actions on the ground that the challengers had no standing to sue.³¹

2. The Reagan, Bush I and Clinton Years

The Administration of President Ronald Reagan is credited by many commentators as a period in which the use of signing statements escalated both quantitatively and qualitatively. The first observation is only moderately accurate; the second is quite true. For the first time, signing statements were viewed as a strategic weapon in a campaign to influence the way legislation was interpreted by the courts and Executive agencies as well as their more traditional use to preserve Presidential prerogatives.³² President Reagan’s Attorney General Edwin Meese secured an agreement from West Publishing Company to include signing statements along with traditional legislative history in the United States Code Congressional and Administrative News for easy availability by courts and implementing officials.³³

Appendix, at 6.

³⁰ Dellinger Signing Memorandum, Appendix, at 6.

³¹ Kelley, *supra* note 9, at 3. Professor May contends that of the 101 statutory provisions challenged by Presidents through 1981, the President actually “disregarded” only 12; of those 12, seven occurred between 1974 and 1981. President Carter accounted for five of those. *Banks, supra*.

³² Now Supreme Court Justice Samuel Alito wrote a memorandum while in the Office of Legal Counsel in 1986 counseling some modest experimentation with signing statements construing “ambiguous” statutory terms but recommended avoiding interpretive conflicts with Congress where the meaning of the law was clear. *See* Samuel A. Alito, Jr., Using Presidential Signing Statement to Make Fuller Use of the President’s Constitutionally Assigned Role in the Process of Enacting Law (Feb. 5, 1986) (Office of Legal Counsel memorandum), at <http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf>

³³ Kelley, *supra* note 9, at 8-9.

President Reagan succeeded in having his signing statements cited in several Supreme Court cases which upheld his Presidential powers against challenges by the Comptroller General in *Bowsher v. Synar*,³⁴ involving deficit spending limits and in the final denouement of the legislative veto in the *Chadha* case.³⁵ In his statement accompanying the signing of the Competition in Contracting Act in 1984, he had refused to abide by the provision which allowed the Comptroller General to sequester money in the event of a challenge to a government contract. His nonenforcement was challenged by a losing bidder, and the courts found the Act constitutional. His continued refusal to obey the court order resulted in a judicial tongue lashing and Congressional threats to eliminate funding, whereupon he changed course.³⁶

Two of the most aggressive uses of the signing statement by President Reagan to control statutory implementation occurred in the Immigration Reform and Control Act of 1986 in which Congress legislated that a “brief, casual and imminent absence” of a deportable alien from the United States would not terminate the required “continuous physical presence” required for an alien’s eligibility for legalized status. President Reagan announced in the signing statement, however, that an alien would be required to apply to the INS before any such brief or casual absence, a requirement totally absent from the bill. He also reinterpreted the Safe Drinking Water Act so as not to make several of its provisions mandatory.³⁷

President George Herbert Walker Bush (“President Bush I”) overtook President Reagan in the number of signing statement challenges to provisions in laws presented to him—232 in his four years in office compared to 71 in the two-term Reagan Administration.³⁸ A third of President Bush I’s constitutional challenges were in the foreign policy field. An Office of Legal Counsel opinion prepared for the President listed 10 types of legislative encroachments on Presidential prerogatives and urged they be countered in signing statements.³⁹

³⁴ Kelley, *supra* note 9, at 8; *Bowsher v. Synar*, 478 U.S. 717, 719 n.1 (1986).

³⁵ *INS v. Chadha*, 462 U.S. 919 (1983) n.13. Though not involving a signing statement the Reagan push to influence legislative interpretation received a boost from the Supreme Court’s decision in *Chevron U.S.A. Inc. v. NRDC*, 462 U.S. 919 (1983), which ruled that unless the text or Congressional intent was clear, any “permissible,” *aka* reasonable, interpretation by the agency of statutory language would prevail even if the court’s own interpretation might be different.

³⁶ Kelley, *supra* note 9, at 8-9.

³⁷ Marc V. Garber and Kurt A. Williams, *Presidential Signing Statement as Interpretation of Legislative Intent: An Executive Aggrandizement of Power*, 24 Harv. J. on Legis. 363 (1987), at 2 and n.14.

³⁸ Kelley, *supra* note 9, at 10.

³⁹ *Id.*

He responded forcefully to his perception of such threats in laws, both great and small. The Dayton Aviation Heritage and Preservation Act of 1992, for example, directed the Secretary of the Interior to make appointments to a commission which would exercise Executive power though the appointees were not confirmed as Executive branch officers. Appraising this as an affront to Presidential power under the Appointments Clause, President Bush I refused to appoint anyone until Congress changed the law. He acted similarly with respect to nominations under the National and Community Services Act which had designated the Speaker and Senate Majority Leader to make appointments.⁴⁰

President Bush I advanced the Reagan interpretive agenda further in two instances in which his administration first arranged to have colloquies inserted into the congressional debates and then in signing statements relied on those colloquies to interpret statutory provisions despite stronger legislative evidence in favor of contrary interpretation. The first case involved a foreign affairs appropriations bill in which the Congress had forbidden sale of arms to a foreign government to further a foreign policy objective of the United States which the United States could not advance directly. Stating first that he intended to construe “any constitutionally doubtful provisions in accordance with the requirements of the Constitution,” President Bush I said he would restrict the scope of the ban to the kind of “*quid pro quo*” exchange discussed in a specific colloquy his administration had arranged with Congressional allies rather than credit the broader range of transactions clearly contemplated by the textual definition which included deals for arms “in exchange for” furthering of a U.S. objective. “My decision to sign this bill,” he said in the statement, “is predicated on these understandings” of the relevant section, referring to the colloquy.⁴¹

In the 1991 Civil Rights Act, a piece of legislation President Bush I could not afford politically to veto, Congress said quite clearly that it wished to return to an interpretation of what constituted “disparate impact” for Title VII discrimination purposes that existed prior to the Supreme Court’s cutback in the *Ward’s Cove* case.⁴² The President’s signing statement, however, labeled by one commentator as the most controversial signing statement of his term, again relied on a colloquy inserted in the record of the congressional debate and concluded that the Act “codifies” rather than “overrules” *Ward’s Cove*.⁴³

A look at the Clinton record of the use of the presidential signing statement shows that President Clinton used the constitutional signing statement less in his two terms than did his

⁴⁰ Kelley, *supra* note 9, at 11-12.

⁴¹ Kelley, *supra* note 9, at 12-14.

⁴² *Ward’s Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989).

⁴³ Kelley, *supra* note 9, at 14-16.

predecessor in one (105 to 146), but still more than the Reagan administration (105 to 71).⁴⁴ For the Clinton Administration, “the signing statement was an important cornerstone of presidential power, as outlined by Walter Dellinger in his 1993 OLC memo. It would become particularly important after the 1994 mid-term elections when the Congress became Republican and more polarized.”⁴⁵

In a 1993 memorandum, the then head of OLC, later acting Solicitor General Walter Dellinger, justified on historical and constitutional bases, a President’s refusal to follow a law that is “unconstitutional” on its face. In a second memorandum in 1994 to White House Counsel Abner Mikva, he said the President had an “enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional power of the Presidency.” But he cautioned:

As a general matter, if the President believes that the Court would sustain a particular provision as constitutional, the President should execute the statute, notwithstanding his own beliefs about the constitutional issue. If, however, the President, exercising his independent judgment, determines both that a provision would violate the Constitution and that it is probable that the Court would agree with him, the President has the authority to decline to execute the statute.

[I]n deciding whether to enforce a statute the President should be guided by a careful weighing of the effect of compliance with the provision on the constitutional rights of affected individuals and on the executive branch’s constitutional authority. Also relevant is the likelihood that compliance or noncompliance will permit judicial resolution of the issue.⁴⁶

Over half of President Clinton’s constitutionally related signing statements were in the realm of foreign policy. In the 1996 National Defense Authorization Act, which followed his prior veto of a provision requiring discharge of HIV positive service members, the same provision resurfaced. This time Clinton declared in the signing statement that the provision was unconstitutional and instructed his Attorney General not to defend the law if it were challenged.

However, President Clinton’s advisors made it clear that, if the law were not struck down, the President would have no choice but to enforce it. At a White House briefing on February 9, 1996,⁴⁷ White House Counsel Jack Quinn explained that “in circumstances where you don’t have

⁴⁴ *Id.* at 19.

⁴⁵ *Id.* at 23.

⁴⁶ Dellinger Declination Memorandum.

⁴⁷ See *Special White House Briefing on Provision in the FY1996 Defense Authorization Bill Relating to HIV-positive Armed Services Members*, February 9, 1996, Federal News Service,

the benefit of such a prior judicial holding, it's appropriate and necessary to enforce it. . .” Assistant Attorney General Walter Dellinger added:

When the president's obligation to execute laws enacted by Congress is in tension with his responsibility to act in accordance to the Constitution, questions arise that really go to the very heart of the system, and the president can decline to comply with the law, in our view, only where there is a judgment that the Supreme Court has resolved the issue.

Id. Congress subsequently repealed the provision before any court challenge was mounted.⁴⁸

In another 1995 appropriations act, the President took aim at the Government Printing Office's attempts to control Executive branch printing through a provision that “no funds appropriated may be expended for procurement of any printing of government publications unless through the GPO.” Clinton instructed his subordinates to disregard the provision and his defiant stance was never put to the test.⁴⁹ Clinton followed his predecessors in repudiating and refusing to enforce the series of legislative vetoes declared illegal in 1984 by the Supreme Court that Congress nevertheless continued to attach to legislation.⁵⁰ Clinton issued signing statements objecting to 140 constitutional incursions on his Presidential authority.⁵¹

3. The Bush II Era

From the inception of the Republic until 2000, Presidents produced signing statements containing fewer than 600 challenges to the bills they signed. According to the most recent update, in his one-and-a-half terms so far, President George W. Bush (Bush II) has produced more than 800.⁵²

available on Lexis-Nexis. *See also*, Alison Mitchell, *President Finds a Way to Fight Mandate to Oust H.I.V. Troops*, NEW YORK TIMES, February 10, 1996 (Clinton “once signing the overall legislation, would have no choice but to enforce the law, in the absence of a court ruling against it”).

⁴⁸ Kelley, *supra* note 9, at 19.

⁴⁹ *Id.* at 20-21.

⁵⁰ Neil Kinkopf, *Signing Statements and the President's Authority to Refuse to Enforce the Law* (2006), 3-4, at <http://www.acslaw.org/files/kinkopf-Signing%20statements%20and%20President's%20Authority.pdf>.

⁵¹ Savage, *supra*, note 1.

⁵² It is important to understand that these numbers refer to the number of **challenges** to provisions

He asserted constitutional objections to over 500 in his first term: 82 of these related to his theory of the “unitary executive,” 77 to the President’s exclusive power over foreign affairs, 48 to his power to withhold information required by Congress to protect national security, 37 to his Commander in Chief powers.⁵³

Whereas President Clinton on occasion asked for memoranda from the Office of Legal Counsel on his authority to challenge or reject controversial provisions in bills presented to him, it is reported that in the Bush II Administration all bills are routed through Vice President Cheney’s office to be searched for perceived threats to the “unitary executive”— the theory that the President has the sole power to control the execution of powers delegated to him in the Constitution and encapsulated in his Commander in Chief powers and in his constitutional mandate to see that “the laws are faithfully executed.”⁵⁴

Some examples of signing statements in which President Bush has indicated he will not follow the law are: bills banning the use of U.S. troops in combat against rebels in Colombia; bills requiring reports to Congress when money from regular appropriations is diverted to secret operations; two bills forbidding the use in military intelligence of materials “not lawfully collected” in violation of the Fourth Amendment; a post-Abu Ghraib bill mandating new regulations for military prisons in which military lawyers were permitted to advise commanders on the legality of certain kinds of treatment even if the Department of Justice lawyers did not agree; bills requiring the retraining of prison guards in humane treatment under the Geneva Conventions, requiring background checks for civilian contractors in Iraq and banning contractors from performing security, law enforcement, intelligence and criminal justice functions.⁵⁵

Perhaps the most prominent signing statements which conveyed refusals to carry out laws involved:

of laws rather than to the number of signing statements; a single signing statement may contain multiple such challenges. *See* Kelley, *A Signing Statement Update*, Media Watch Blog, July 11, 2006 at <http://www.users.muohio.edu/kelleycs/2006/07/signing-statement-update.html>. As of July 11, 2006, the total was 807. *See* <http://www.users.muohio.edu/kelleycs/mediablog.html>.

⁵³ Philip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statement*, 35 *Presidential Studies Quarterly* (2005), at 515, 522.

⁵⁴ Charlie Savage, “Cheney Aide is Screening Legislation,” *BOSTON GLOBE*, May 28, 2006 at http://www.boston.com/news/nation/articles/2006/05/28/cheney_aide_is_screening_legislation/.

⁵⁵ Savage, *supra* note 1.

- ! Congressional requirements to report back to Congress on the use of Patriot Act authority to secretly search homes and seize private papers,⁵⁶
- ! The McCain amendment forbidding any U.S. officials to use torture or cruel, inhuman, or degrading treatment on prisoners (the President said in his statement that as Commander in Chief he could waive any such requirement if necessary to prevent terrorist attacks);
- ! A requirement that government scientists transmit their findings to Congress uncensored, along with a guarantee that whistleblower employees at the Department of Energy and the Nuclear Regulatory Commission will not be punished for providing information to Congress about safety issues in the planned nuclear waste repository at Yucca Mountain in ⁵⁷

President Bush has been particularly adamant about preventing any of his subordinates from reporting directly to Congress even though there is Supreme Court precedent to the effect that Congress may authorize a subordinate official to act directly or to report directly to Congress. When Congress set up an educational research institute to generate independent statistics about student performance, and to publish reports “without the approval” of the Secretary of Education, President Bush asserted in his signing statement that “the Institute director would be subject to the supervision and direction of the Secretary.”

In another bill, Congress said no U.S. official shall prevent the Inspector General for the Coalition Provisional Authority in Iraq from carrying out his investigations and he should report any attempt directly to Congress. President Bush insisted in his signing statement that the Inspector General “refrain” from any investigation involving national security or intelligence already being investigated by the Pentagon and the Inspector General himself could not tell Congress anything without going through the President.⁵⁸

The Intelligence Authorization Act of 2002 required that the Congress be given regular reports on special matters. The signing statement treated this requirement as “advisory” or “precatory” only stating that the requirement “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

⁵⁶ See Senator Patrick Leahy’s Opening Statement on U.S. Patriot Improvement and Reauthorization Act of 2005, Executive Business Meeting, March 15, 2006 at http://judiciary.senate.gov/member_statement.cfm?id=1811&wit_id=2629.

⁵⁷ Savage, *supra* note 1.

⁵⁸ *Id.*

performance of the Executive’s constitutional duties.”⁵⁹

This exact phraseology has been repeated in Bush signing statements innumerable times. Scholars have noted that it is a hallmark of the Bush II signing statements that the objections are ritualistic, mechanical and generally carry no citation of authority or detailed explanation.⁶⁰ “These boilerplate objections [are] placed over and over again in signing statements.”⁶¹

A frustrated Congress finally enacted a law requiring the Attorney General to submit to Congress a report of any instance in which that official or any officer of the Department of Justice established or pursued a policy of refraining from enforcing any provision of any federal statute, but this too was subjected to a ritual signing statement insisting on the President’s authority to withhold information whenever he deemed it necessary.⁶²

Even action deadlines set in the National Homeland Security Act were rejected as contravening the unitary executive function.⁶³ The Intelligence Authorization Act of 2003 setting up the 9/11 Commission provoked the same signing statement retaining the President’s power to withhold information — a claim which later became a major bone of contention between the White House and the Commission. A December 2004 intelligence bill required reports on the use of national security wiretaps on U.S. soil as well as reports on civil liberties, security clearances, border security and counter narcotics efforts. All were subjected to the same treatment by signing statement.⁶⁴ Even the Homeland Security Act requirements for reports to Congress about airport screening chemical plant vulnerabilities and visa services suffered a similar fate.⁶⁵

⁵⁹ Cooper, *supra* note 53, at 523-24.

⁶⁰ Kinkopf, *supra* note 49, at 6. The language used in the signing statement accompanying the McCain amendment, that the President would construe it “in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as commander in chief consistent with the constitutional limitations on the judicial power” was used 82 times in the first Bush term; Cooper, *supra* note 52, at 521.

⁶¹ Cooper, *supra* note 53, at 522-23, 526.

⁶² Pub. L. 107-273, § 202(a), codified at 28 USC § 530D.

⁶³ Savage, *supra* note 1.

⁶⁴ Savage, *supra* note 1.

⁶⁵ Cooper, *supra* note 53, at 524-25; Savage, *supra* note 1.

President Bush’s signing statements have consistently refused to honor Congressional attempts to impose affirmative action or diversity requirements on federal hiring. Fifteen times the Bush signing statements have objected to such provisions, proclaiming that they would be construed “in a manner consistent with the Constitution’s guarantee of equal protection.” This included directions by Congress to recruit and train women and minorities in the intelligence agencies and promote diversity in the Export-Import bank operations.⁶⁶

One learned commentator sums up the Bush II use of signing statements as follows: “When in doubt challenge the legislative process whether there is a serious issue or not.” He labels the Bush record on signing statements as “an audacious claim to constitutional authority; the scope of the claims and the sweeping formulae used to present them are little short of breathtaking.” They are “dramatic declaratory judgments holding acts of Congress unconstitutional and purporting to interpret not only Article II Presidential powers but those of the legislators under Article I.”⁶⁷

B. Separation of Powers and the Intent Of The Framers

The original intent of the framers was to require the President to either sign or veto a bill presented by Congress in its entirety. A line-item veto is not a constitutionally permissible alternative even when the President believes that some provisions of a bill are unconstitutional.

The plain language of Article I, §7, clause 2 (Presentment Clause) compels this conclusion. It speaks of the signing or vetoing of a “Bill,” and a veto override vote in Congress by two-thirds majorities to enact a “Bill.” There is not even a hint that the President could sign or veto part of a bill and elect to enforce a law that differed from the one passed by Congress. But for a vagrant remark by James Wilson, not a syllable uttered during the constitutional convention or state ratification debates questions the plain meaning of the Presentment Clause. Our first President George Washington confirmed the clear understanding of the Clause when he declared that a bill must be either approved in all of its parts or rejected in toto. Writings of George Washington 96 (J. Fitzgerald ed., 1940).

Accordingly, the United States Supreme Court in *Clinton v. New York*, 524 U.S. 417 (1998), held the line item veto unconstitutional, even if approved in a statute enacted by Congress. Writing for the Court, Justice John Paul Stevens elaborated: “Familiar historical materials provide abundant support for the conclusion that the power to enact statutes may only ‘be exercised in accord with a single finely wrought and exhaustively considered procedure.’ Our first President understood the text of the Presentment Clause as requiring that he either ‘approve all the parts of a Bill, or reject it in toto.’” 524 U.S. 439-440 (quoting *INS v. Chadha*, *supra* at 951).

⁶⁶ Savage, *supra* note 1.

⁶⁷ Cooper, *supra* note 53, at 530.

The presidential oath enshrined in Article II, § 1, clause 7 requires a President to the best of his ability to “defend the Constitution of the United States.” There are many ways in which a President can defend the Constitution. One is to veto a bill that he believes violates the Constitution in whole or in part. The President must defend the entire Constitution, and that includes the Presentment Clause and Article II, § 3, which stipulates that the President “shall take Care that the Laws be faithfully executed....”

Article II, §3 has important historical roots in the complaint about non-enforcement of laws made against King James II by the British Parliament, which ultimately occasioned his dethronement. Thus, the English Bill of Rights of 1688 indicted the King for “assuming and exercising a power of dispensing with and suspending of laws and the execution of laws without consent of Parliament.” It declared “That the pretended power of suspending of laws or the execution of laws by regal authority without consent of Parliament is illegal.” Because the “take care” obligation of the President requires him to faithfully execute all laws, his obligation is to veto bills he believes are unconstitutional. He may not sign them into law and then emulate King James II by refusing to enforce them.

In *United States v. Smith*, 27 F. Cas. 1192 (C.C.D.N.Y. 1806), defendants claimed a right to violate the Neutrality Act because of a presidential authorization. The government countered: “Among the powers and duties of the president...he is expressly required to ‘take care that the laws be faithfully executed.’ They will not venture to contend that this clause gives the president the right of dispensing with the law...He has a qualified veto, before the law passes...When it has become law...it is his duty to take care that it be faithfully executed. He cannot suspend its operation, dispense with its application, or prevent its effect, otherwise than by the exercise of [his] constitutional power of pardoning, after conviction. If he could do so, he could repeal the law, and would thus invade the province assigned to the legislature, and become paramount to the other branches of the government.”

Supreme Court Justice William Patterson, sitting on the court, agreed: “[The Neutrality Act] imparts no dispensing power to the president. Does the constitution give it? Far from it, for it explicitly directs that he shall ‘take care that the laws be faithfully executed’...True, a *nolle prosequi* may be entered, a pardon may be granted; but these presume criminality, presume guilt, presume amenability to judicial investigation and punishment, which are very different from a power to dispense with the law.”

Article II, § 1, vests the “Executive Power” in the President. But at least since 1688, the executive power as conceived in Great Britain and America excluded a power to dispense with or suspend execution of the laws for any reason.

III. THE ABA TASK FORCE RECOMMENDATIONS

If our constitutional system of separation of powers is to operate as the framers intended, the President must accept the limitations imposed on his office by the Constitution itself. The use of presidential signing statements to have the last word as to which laws will be enforced and which will not is inconsistent with those limitations and poses a serious threat to the rule of law. It is this threat which the Task Force recommendations seek to address.

A. Signing Statements Must Respect the Rule of Law and Our Constitutional System of Separation of Powers

As noted above, the first Recommendation urges that the President and those who succeed him cease the practice of using presidential signing statements to state his intention to disregard or decline to enforce a law or to interpret it in a manner inconsistent with the will of Congress. One of the most fundamental innovations of the American Constitution was to separate the executive from the legislative power. The Framers regarded this separation of powers as “essential to the preservation of liberty.” James Madison, *The Federalist* No. 51.

In particular, the Framers sought to prevent in our new government the abuses that had arisen from the exercise of prerogative power by the Crown. Their device for doing so was to vest lawmaking power in the Congress and enforcement power in the President, and to provide in Article II § 3 that the President “shall take Care that the Laws be faithfully executed.” As the Supreme Court stated in holding that President Truman could not seize the nation’s steel mills during the Korean war without congressional authorization, “In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

The Constitution accordingly embodies “the Framers’ decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.” *INS v. Chadha*, 462 U.S. 919 (1983). Under Article I, §7, every law requires a majority of each house of Congress and presentment to the President for approval or disapproval. The Constitution thus limits the President’s role in the lawmaking process to the recommendation of laws he thinks wise and the vetoing of laws he thinks unwise.

It may well seem burdensome or frustrating to a President to be so confined in his response to the legislative enactments of the Congress. The Supreme Court has acknowledged that “[the choices . . . made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable.” But the Court has reminded us that “those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked,” and often restated that there is no “better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.” *INS v. Chadha, supra*.

The Supreme Court has struck down both one-House vetoes, which sought to enlarge the power of Congress, and presidential line-item vetoes, which sought to diminish it, as inconsistent with those restraints. Presidential signing statements that express an intent to disregard or effectively rewrite enacted legislation are similarly inconsistent with the “single, finely wrought and exhaustively considered, procedure” provided for by the Framers.

B. Presidential Concerns Regarding Constitutionality of Pending Bills Should Be Communicated To Congress Prior To Passage

The White House and each of the 15 major executive departments maintain large and sophisticated legislative or congressional affairs offices and routinely and closely track the progress of bills introduced in the Congress. Moreover, much legislation considered by Congress each session emanates initially from the Executive Branch. For that reason, it is unlikely that important legislation would be considered and passed without the opportunity for full and fair input by the Administration.

Therefore, our second recommendation urges the President, if he believes that any provision of a bill pending before Congress would be unconstitutional if enacted, to communicate such concerns to Congress prior to passage. It is reasonable to expect the President to work cooperatively with Congress to identify and ameliorate any constitutional infirmities during the legislative process, rather than waiting until after passage of legislation to express such concerns in a signing statement.

C. Signing Statements Should Not Be A Substitute For A Presidential Veto

The third Recommendation urges the President to confine signing statements to the meaning, purpose, or significance of bills he has signed into law, which he then must faithfully execute. For example, it is entirely appropriate for the President to praise a bill as a landmark in civil rights or environmental law and applaud its legislative sponsors, or to provide his views as to how the enactment of the law will affect the welfare of the nation.

When Congress enacted the Sarbanes Oxley Act,⁶⁸ President Bush wrote in his signing statement that it contained "the most far-reaching reforms of American business practices since the time of Franklin Delano Roosevelt."⁶⁹ And when President Carter signed the Foreign

⁶⁸15 U.S.C. §7201 *et seq.*

⁶⁹ See Signing Statement of George W. Bush, July 30, 2002, available at <http://www.whitehouse.gov/news/releases/2002/07/20020730.html>.

Intelligence Surveillance Act of 1978,⁷⁰ he wrote in his signing statement:⁷¹

The bill requires, for the first time, a prior judicial warrant for *all* electronic surveillance for foreign intelligence or counterintelligence purposes in the in the United States in which communications of U.S. persons might be intercepted. It clarifies the Executive's authority to gather foreign intelligence by electronic surveillance in the United States. It will remove any doubt about the legality of those surveillances which are conducted to protect our country against espionage and international terrorism. It will assure FBI field agents and others involved in intelligence collection that their acts are authorized by statute and, if a U.S. person's communications are concerned, by a court order. And it will protect the privacy of the American people.

In short, the act helps to solidify the relationship of trust between the American people and their Government. It provides a basis for the trust of the American people in the fact that the activities of their intelligence agencies are both effective and lawful. It provides enough secrecy to ensure that intelligence relating to national security can be securely required, while permitting review by the courts and Congress to safeguard the rights of Americans and others.

Id. Such statements contribute to public dialogue and accountability.

However, the Recommendation urges the President not to use signing statements in lieu of compliance with his constitutional obligation to veto any bill that he believes violates the Constitution in whole or in part. That obligation follows from the original intent and practice of the Founding Fathers, including President George Washington.

To sign a bill and refuse to enforce some of its provisions because of constitutional qualms is tantamount to exercising the line-item veto power held unconstitutional by the Supreme Court in *Clinton v. New York, supra*. By honoring his obligation to veto any bill he believes would violate the Constitution in any respect the President honors his oath to defend the Constitution. That obligation ensures that both Congress and the President will be politically accountable for their actions and that the law the President enforces will not be different from the one Congress enacted.

In 1969, future Chief Justice William H. Rehnquist, then the Then Assistant Attorney General for the Office of Legal Counsel, wrote: "It is our view extremely difficult to formulate a constitutional theory to justify a refusal by the President to comply with a Congressional directive

⁷⁰ See 50 U.S.C. §1801 *et seq.*

⁷¹ Statement on Signing S.1566 Into Law, October 25, 1978, at: <http://www.cnss.org/Carter.pdf>.

to spend[T]he execution of any law is, by definition, an executive function, and it seems an anomalous proposition that because the Executive Branch is bound to execute the laws, it is free to decline to execute them." *See* Hearings on the Executive Impoundment of Appropriated Funds Before the Subcommittee on Separation of Powers of the Senate Judiciary Committee, 92nd Cong., 1st Sess. 279, 283 (1971).

The Task Force did not ignore the rare possibility that a President could think it unavoidable to sign legislation containing what he believed to be an unconstitutional provision. As illustrated by the many bills enacted by Congress that contain one-House or committee veto directives that had been specifically declared unconstitutional by the Supreme Court in *Chadha*, it is not far-fetched to suppose that Members of Congress could persist in enacting unquestionably unconstitutional provisions. There may also be situations where, on first look, insignificant provisions in omnibus emergency-relief or military-funding measures, enacted as Congress recesses or adjourns, would seem not to merit a veto.

In acknowledging this possibility, the Task Force does not wish to suggest that it finds acceptable the use of signing statements to signal executive branch noncompliance with a provision enacted by Congress. The Founding Fathers contemplated bills with both attractive and unattractive features packaged together with unrelated provisions, including appropriations riders. The President nonetheless was expected to veto even "urgent" bills that he believed were unconstitutional in part and, if the urgency were genuine, Congress could either delete the offending provisions or override the President. Only once or twice in the nation's history has Congress overridden a veto occasioned by the President's belief in the unconstitutionality of the bill presented.⁷²

If the President and Congress are unable to resolve their differences regarding the constitutionality of proposed legislation, and practical exigencies militate against a veto, and if the President therefore signs the bill and issues a signing statement, he should clearly and publicly state in his signing statement his views on the legislation and his intentions with respect to enforcement or implementation, and should then seek or cooperate with others in obtaining timely judicial review regarding the provision in dispute (see section E, below).

Such situations notwithstanding, the Task Force opposes the use of presidential signing statements to effect a line-item veto or to usurp judicial authority as the final arbiter of the constitutionality of congressional acts. Definitive constitutional interpretations are entrusted to an independent and impartial Supreme Court, not a partisan and interested President. That is the meaning of *Marbury v. Madison*. A President could easily contrive a constitutional excuse to decline enforcement of any law he deplored, and transform his qualified veto into a monarch-like absolute veto. The President's constitutional duty is to enforce laws he has signed into being

⁷² *See generally*, Dawn E. Johnsen, *Presidential Non-enforcement of Constitutionally Objectionable Statutes*, 63 *Law & Contemp. Probs.* 7 (Winter/Spring 2000), available at <http://www.law.duke.edu/journals/63LCPJohnsen>.

unless and until they are held unconstitutional by the Supreme Court or a subordinate tribunal. The Constitution is not what the President says it is.

D. Legislation Is Needed To Ensure That Congress And The Public Are Fully Informed About The Use Of Presidential Signing Statements

Today, when the President issues a signing statement, it is published in the Weekly Compilation of Presidential Documents. In addition, since the Reagan administration, signing statements have been included with the legislative history reprinted in the volumes of the U.S. Code Congressional & Administrative News.

However, there is no requirement that these statements be submitted to Congress or made readily available to the public. There is also no requirement that the President explain the reasons and legal basis for a statement in which he claims the authority, or states the intention, to disregard or decline to enforce all or part of a law he has signed, or to interpret such a law in a manner inconsistent with the clear intent of Congress.

The result, until quite recently, was that few members of Congress, and even fewer members of the public, were aware that the President had taken these actions, and that they might seriously undercut the legislation he had signed.

The recommendation seeks to remedy this situation by urging Congress to enact legislation requiring the President promptly to submit to Congress an official copy of all signing statements he issues, and in any instance in which he claims the authority, or states the intention, to disregard or decline to enforce all or part of a law he has signed, or to interpret such a law in a manner inconsistent with the clear intent of Congress, to submit to Congress a report setting forth in full the reasons and legal basis for the statement. The proposed legislation would further require that the materials submitted by the President be made available in a publicly accessible database.

Could a President, in a signing statement, disregard even this legislation? That is precisely what occurred in 2002 when President Bush II signed a bill which required the Attorney General to submit a detailed report of any instance in which he or any Justice Department official "establishes or implements a formal or informal policy to refrain . . . from enforcing, applying, or administering any provision of any Federal statute . . . on the grounds that such provision is unconstitutional." Pub. L. 107-273, § 202(a), codified at 28 USC § 530D. The President issued a signing statement which read, in pertinent part:

The executive branch shall construe § 530D of title 28, and related provisions in § 202 of the Act, 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.⁷³

The statement went on to say that the President had instructed executive agencies accordingly. In effect, the statement said that the President may order executive agencies not to comply with a congressional directive requiring them to report instances in which they have been ordered not to comply.

This absurd result highlights the purpose of our first clause, and underscores the reason we so strongly oppose such use of signing statements as “contrary to the rule of law and our constitutional system of separation of powers.”

**E. Legislation Is Needed To Provide For Judicial Review
Of Presidential Signing Statements In Appropriate Cases**

The final Recommendation of the Task Force addresses the question of how Congress should respond if a President insists on signing statements that declare his intent to refuse to enforce provisions of a bill he has signed into law because of his belief that they are unconstitutional.

At present, the standing element of the “case or controversy” requirement of Article III of the Constitution frequently frustrates any attempt to obtain judicial review of such presidential claims of line-item veto authority that trespass on the lawmaking powers of Congress. Congress cannot lessen the case or controversy threshold, but it can dismantle barriers above the constitutional floor.

Currently a plaintiff must allege an individualized concrete injury caused by the defendant as opposed to a generalized grievance about unconstitutional government. Further, the requested judicial relief must be reasonably calculated to redress the injury. For individual plaintiffs, a signing statement might well elude the case or controversy requirement because the immediate injury is to the lawmaking powers of Congress. The President thus becomes the final judge of his own constitutional powers, and he invariably rules in favor of himself.

Therefore, this Recommendation urges Congress to enact legislation that would enable the President, Congress, or other entities to seek judicial review, and contemplates that such legislation would confer on Congress as an institution or its agents (either its own Members or interested private parties as in *qui tam* actions) standing in any instance in which the President uses a signing statement to claim the authority, or state the intention, to disregard or decline to enforce all or part of a law, or interpret such a law in a manner inconsistent with the clear intent of Congress.

⁷³ See President Signs Justice Approps Authorization Act - Statement by the President, November 2, 2002, at <http://www.whitehouse.gov/news/releases/2002/11/20021104-3.html>.

If such review were initiated by the Congress or other entities, it could be argued that the concrete injury was the usurpation of the lawmaking powers of Congress by virtue of the provisions of the signing statement, and the denial of the opportunity to override a veto if the President believes a law is unconstitutional. As noted above, however, our recommendation also contemplates that the President could initiate such judicial review.

The remedy fashioned could be an order directing that the enacted law be fully enforced, since the President would have foregone the opportunity for a veto by signing of the bill, or it could be a more general declaratory judgment that the President may not use signing statements in such a manner, but must either enforce a bill which he signs into law or exercise his veto on any bill he believes is unconstitutional in whole or in part. It is to be hoped that the President would obey any constitutional declaration of the Supreme Court.

This Recommendation also urges Congress and the President to support judicial resolution of the President's claim or interpretation through the use of signing statements, for example, by avoiding non-constitutional arguments like the political question doctrine or prudential standing. It would be expected that one case before the Supreme Court would put to rest the constitutionality of a signing statement that announces the President's intent not to enforce a provision of a law or to do so in a manner contradictory to clear congressional intent.

As noted above, the Task Force recognizes that legislation providing for judicial review of signing statements would have to overcome constitutional and legal hurdles, and the ABA stands ready to work with Congress on these issues. We also recognize that such legislation could be rejected by the Supreme Court. However, it would still have been worth the undertaking, since it would demonstrate an eagerness to play by constitutional rules short of impeachment, and the use of signing statements in the manner opposed by our recommendations presents a critically important separation of powers issue.⁷⁴

F. Additional Issues Not Considered by the Task Force

The Task Force considered developing a recommendation to address the issue of what weight the courts should give to presidential signing statements in determining the meaning and purpose of legislation, but decided that this topic, while important, is beyond our immediate charge. Although most courts accord little or no weight to presidential signing statements, some appear to have taken them into account in determining the intent of legislation.

⁷⁴ The Task Force determined that it was not within its mandate to make recommendations as to what remedies Congress should employ in the event that the President continues on his present course and judicial review proves impracticable. We note, however, that Congress is not without constitutional recourse, including the "power of the purse" to withhold appropriations, should it choose to exercise it.

For example, signing statements have received attention in *United States v. Story*, 891 F.2d 988 (2nd Cir. 1989), a President Reagan signing statement, though the court concluded that deference to such statements should occur only in exceptional circumstances, and in two cases declaring the Pledge of Allegiance unconstitutional. *Newdow v. United States Cong.*, 292 F.3d 597 (9th Cir. 2002); *Newdow v. United States Cong.*, 328 F.3d 466 (9th Cir. 2002). Most recently, in his dissent in *Hamdan v. Rumsfeld*, 548 U.S. ____ (June 29, 2006), Associate Justice Antonin Scalia cited the President's statement on signing H.R. 2863,⁷⁵ which addressed, in part, the Detainee Treatment Act of 2005, and quoted from the signing statement in a footnote.⁷⁶

The Task Force also declined to expand its mission to address such questions as what effect signing statements should be given within the Executive Branch; how the President should respond if Congress overrides a veto motivated by his constitutional concerns; or what should be done if the President, in the absence of a signing statement, nevertheless fails to enforce a law enacted under his or an earlier administration.

While these are undoubtedly important issues, the Task Force believed them to be subsidiary to the issue of the President's duty to enforce or veto the bills presented to him, and the constraints of time did not permit us to delve into them. Although outside the precise scope of our mission, they clearly merit further exploration and analysis, either by our Task Force or by another appropriate ABA entity.

IV. CONCLUSION

Professor Kinkopf concludes that the use, frequency, and nature of the President's signing statements demonstrates a "radically expansive view" of executive power which "amounts to a claim that he is impervious to the laws that Congress enacts" and represents a serious assault on the constitutional system of checks and balances.⁷⁷

⁷⁵ See President's Statement on Signing of H. R. 2863, the "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006" (Dec. 30, 2005), at http://www.whitehouse.gov/news/releases/2005/12/print/20051230_8.html.

⁷⁶ See *Hamdan v. Rumsfeld*, *supra*, Scalia, J., *dissenting*, Slip. Op. at 13, n. 5: [T]he executive branch shall construe section 1005 to preclude the Federal courts from exercising subject matter jurisdiction over any existing or future action, including applications for writs of habeas corpus, described in section 1005."

⁷⁷ Kinkopf, *supra*, at 7. "If the President may dispense with application of laws by concocting a constitutional objection, we will quickly cease to live under the rule of law." *Id.*

We emphasize once again that our concerns are not addressed solely to the current President, and we do not question his good faith belief in his use of signing statements. However, the importance of respect for the doctrine of separation of powers cannot be overstated.

The Supreme Court has reminded us that it was the “the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.”⁷⁸ And Justice Kennedy has observed that “[l]iberty is always at stake when one or more of the branches seek to transgress the separation of powers:”

Separation of powers was designed to implement a fundamental insight: Concentration of power in the hands of a single branch is a threat to liberty. The Federalist states the axiom in these explicit terms: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny.” The Federalist No. 47. So convinced were the Framers that liberty of the person inheres in structure that at first they did not consider a Bill of Rights necessary. It was at Madison's insistence that the First Congress enacted the Bill of Rights. It would be a grave mistake, however, to think a Bill of Rights in Madison's scheme then or in sound constitutional theory now renders separation of powers of lesser importance.

Clinton v. City of New York, 524 U.S. 417, 450 (1998) (Kennedy, J. concurring) (internal citations omitted).

The Recommendations of the ABA Task Force on Presidential Signing Statements and the Separation of Powers Doctrine recognize and honor those cherished principles. The American Bar Association has always been in the forefront of efforts to protect the rule of law and our constitution, and it is now incumbent upon this great organization to speak out forcefully against actions which would weaken our cherished system of checks and balances and separation of powers. We urge the House of Delegates to adopt the proposed Recommendations.

Respectfully submitted,

NEAL R. SONNETT,
Chair
ABA Task Force on Presidential Signing Statements
and the Separation of Powers Doctrine

August 2006

⁷⁸ *Mistretta v. United States*, 488 U.S. 361, 380 (1989).

APPENDIX
ABA Task Force on Presidential Signing Statements
and the Separation of Powers Doctrine
Biographies

Chair

Neal R. Sonnett

Mr. Sonnett is a former Assistant United States Attorney and Chief of the Criminal Division for the Southern District of Florida. He heads his own Miami law firm concentrating on the defense of corporate, white collar and complex criminal cases throughout the United States. He has been profiled by the National Law Journal as one of the “Nation's Top White Collar Criminal Defense Lawyers,” was selected three times by that publication as one of the “100 Most Influential Lawyers In America,” and has been included in all 20 editions of The Best Lawyers in America.

Mr. Sonnett is a former Chair of the ABA Criminal Justice Section, which he now represents in the ABA House of Delegates, and a former President of the National Association of Criminal Defense Lawyers. He is the incoming President of the American Judicature Society and Vice-Chair of the ABA Section of Individual Rights and Responsibilities. He serves as Chair of the ABA Task Force on Treatment of Enemy Combatants, Chair of the ABA Task Force on Domestic Surveillance in the Fight Against Terrorism, and serves as the ABA’s official Observer for the Guantanamo military commission trials. He is also a member of the ABA Task Force on the Attorney-Client Privilege, the Task Force on Gatekeeper Regulation and the Profession, and he served on the ABA Justice Kennedy Commission. He is a Life Fellow of the American Bar Foundation and serves on the ALI-ABA Advisory Panel on Criminal Law and on the Editorial Advisory Boards of The National Law Journal and Money Laundering Alert.

Mr. Sonnett has received the ADL Jurisprudence Award and the Florida Bar Foundation Medal Of Honor for his "dedicated service in improving the administration of the criminal justice system and in protecting individual rights precious to our American Constitutional form of government." He has also received the highest awards of the ABA Criminal Justice Section, the National Association of Criminal Defense Lawyers, The Florida Bar Criminal Law Section, the Florida Association of Criminal Defense Lawyers (Miami), and the ACLU of Miami.

Members

Mark D. Agrast

Mark Agrast is a Senior Fellow at the Center for American Progress in Washington, D.C., where he oversees programs related to the Constitution, the rule of law, and the history of American progressive thought.

Before joining the Center for American Progress, Mr. Agrast was Counsel and Legislative Director to Congressman William D. Delahunt of Massachusetts (1997-2003). He previously served as a top aide to Massachusetts Congressman Gerry E. Studds (1992-97) and practiced international law with the Washington office of Jones, Day, Reavis & Pogue (1985-91). During his years on Capitol Hill, Mr. Agrast

played a prominent role in shaping laws on civil and constitutional rights, terrorism and civil liberties, criminal justice, patent and copyright law, antitrust, and other matters within the jurisdiction of the House Committee on the Judiciary. He was also responsible for legal issues within the jurisdiction of the House International Relations Committee, including the implementation of international agreements on human rights, intercountry adoption, and the protection of intellectual property rights.

Mr. Agrast is a member of the Board of Governors of the American Bar Association and a Fellow of the American Bar Foundation. A past Chair of the ABA Section of Individual Rights and Responsibilities, he currently chairs the ABA's Commission on the Renaissance of Idealism in the Legal Profession.

Hon. Mickey Edwards

Mickey Edwards is a lecturer at Princeton University's Woodrow Wilson School of Public and International Affairs and the Executive Director of the Aspen Institute-Rodel Fellowships in Public Leadership. He was a Republican member of Congress from Oklahoma for 16 years (1977-92), during which time he was a member of the House Republican leadership and served on the House Budget and Appropriations committees.

He was a founding trustee of the Heritage Foundation, former national chair of the American Conservative Union, and director of policy advisory task forces for the Reagan presidential campaign.

He has taught at Harvard, Georgetown, and Princeton universities and has chaired various task forces for the Constitution Project, the Brookings Institution, and the Council on Foreign Relations. In addition, he is currently an advisor to the US Department of State and a member of the Princeton Project on National Security.

Bruce Fein

Bruce Fein graduated from Harvard Law School with honors in 1972. After a coveted federal judicial clerkship, he joined the U.S. Department of Justice where he served as assistant director of the Office of Legal Policy, legal adviser to the assistant attorney general for antitrust, and the associate deputy attorney general. Mr. Fein then was appointed general counsel of the Federal Communications Commission, followed by an appointment as research director for the Joint Congressional Committee on Covert Arms Sales to Iran.

He has authored several volumes on the United States Supreme Court, the United States Constitution, and international law, and has assisted two dozen countries in constitutional revision. He has been an adjunct scholar with the American Enterprise Institute, a resident scholar at the Heritage Foundation, a lecturer at the Brookings Institute, and an adjunct professor at George Washington University.

Mr. Fein has been executive editor of World Intelligence Review, a periodical devoted to national security and intelligence issues. At present, he writes a weekly column for The Washington Times devoted to legal and international affairs, guest columns for numerous other newspapers, and articles for professional and lay journals. He is invited to testify frequently before Congress and administrative agencies by both Democrats and Republicans. He appears regularly on national broadcast, cable, and radio programs as an expert in foreign affairs, international and constitutional law, telecommunications, terrorism, national security, and related subjects.

Harold Hongju Koh

Harold Hongju Koh, Dean and Gerard C. and Bernice Latrobe Smith Professor of International Law, is one of the country's leading experts on international law, international human rights, national security law and international economic law. He has received more than twenty awards for his human rights work.

A former Assistant Secretary of State, Dean Koh advised former Secretary Albright on U.S. policy on democracy, human rights, labor, the rule of law, and religious freedom. Harold clerked for both Judge Malcolm Richard Wilkey of the U.S. Court of Appeals for the D.C. Circuit and Justice Harry A. Blackmun of the United States Supreme Court. He worked in private practice in Washington, D.C. and as an attorney at the Office of Legal Counsel at the U.S. Department of Justice.

Dean Koh earned a B.A. from Harvard University in 1975, an Honours B.A. from Magdalen College, Oxford University in 1977, and a J.D. from Harvard Law School in 1980. He has been a Visiting Fellow and Lecturer at Magdalen and All Souls Colleges, Oxford University, and has taught at The Hague Academy of International Law, the University of Toronto, and the George Washington University National Law Center.

Charles J. Ogletree

Charles J. Ogletree is the Jesse Climenko Professor of Law at Harvard Law School and Founding and Executive Director of Harvard's Charles Hamilton Houston Institute for Race & Justice. He is a prominent legal theorist who has made an international reputation by taking a hard look at complex issues of law and by working to secure the rights guaranteed by the Constitution for everyone equally under the law.

The Charles Hamilton Houston Institute for Race and Justice (<http://www.charleshamiltonhouston.org>), named in honor of the visionary lawyer who spearheaded the litigation in *Brown v. Board of Education*, opened in September 2005, and focuses on a variety of issues relating to race and justice, and will sponsor research, hold conferences, and provide policy analysis;

Stephen A. Saltzburg

Professor Saltzburg joined the faculty of the George Washington University Law School in 1990. Before that, he had taught at the University of Virginia School of Law since 1972, and was named the first incumbent of the Class of 1962 Endowed Chair there. In 1996, he founded and began directing the master's program in Litigation and Dispute Resolution at GW.

Professor Saltzburg served as Reporter for and then as a member of the Advisory Committee on the Federal Rules of Criminal Procedure and as a member of the Advisory Committee on the Federal Rules of Evidence. He has mediated a wide variety of disputes involving public agencies as well as private litigants; has served as a sole arbitrator, panel Chair, and panel member in domestic arbitrations; and has served as an arbitrator for the International Chamber of Commerce.

Professor Saltzburg's public service includes positions as Associate Independent Counsel in the Iran-Contra investigation, Deputy Assistant Attorney General in the Criminal Division of the U.S. Department of Justice, the Attorney General's ex-officio representative on the U.S. Sentencing Commission, and as director of the Tax Refund Fraud Task Force, appointed by the Secretary of the Treasury. He currently

serves on the Council of the ABA Criminal Justice Section and as its Vice Chair for Planning. He was appointed to the ABA Task Force on Terrorism and the Law and to the Task Force on Gatekeeper Regulation and the Profession in 2001 and to the ABA Task Force on Treatment of Enemy Combatants in 2002.

Hon. William S. Sessions

William S. Sessions has had a distinguished career in public service, as Chief of the Government Operations Section of the Department of Justice, United States Attorney for the Western District of Texas, United States District Judge for the Western District of Texas, Chief Judge of that court, and as the Director of the Federal Bureau of Investigation. He received the 2002 Price Daniel Distinguished Public Service Award and has been honored by Baylor University Law School as the 1988 Lawyer of the Year.

Judge Sessions joined Holland & Knight LLP in 2000 and is a partner engaged primarily in Alternative Dispute Resolution procedures. He holds the highest rating assigned by Martindale-Hubbell and is listed in The Best Lawyers In America for 2005 & 2006 for Alternative Dispute Resolution. He serves as an arbitrator and mediator for the American Arbitration Association, the International Center for Dispute Resolution and for the CPR Institute of Dispute Resolution.

Since June 2002, Judge Sessions has served on The Governor's Anti-Crime Commission and as the Vice Chair of the Governor's Task Force on Homeland Security for the State of Texas. He is a past President of the Waco-McLennan County Bar Association, the Federal Bar Association of San Antonio, the District Judges Association of the Fifth Circuit, and he was a member of the Board of Directors of the Federal Judicial Center. He served as the initial Chair of the ABA Committee on Independence of the Judiciary, honorary co-Chair of the ABA Commission on the 21st Century Judiciary, and as a member of the ABA Commission on Civic Education and the Separation of Powers. He was a member of the Martin Luther King, Jr. Federal Holiday Commission and he serves on the George W. Bush Presidential Library Steering Committee for Baylor University.

Kathleen M. Sullivan

Kathleen M. Sullivan is the Stanley Morrison Professor of Law and the head of Stanford's new Constitutional Law Center. She previously served for five years as Dean of Stanford Law School, having raised over \$100 million in gifts to the School. She has taught at Harvard and USC Law Schools, and is a Visiting Scholar at the National Constitution Center. A nationally known constitutional law expert, she is co-author of the nation's leading casebook in Constitutional Law.

Ms. Sullivan has 25 years of experience in appellate advocacy, having litigated over 30 appeals in federal court and argued three cases in the US Supreme Court. She has represented the broadcasting, wine, and pharmaceutical industries as well as state and city governments including Boston, Honolulu, San Francisco, Berkeley, Puerto Rico and Hawaii. Ms. Sullivan has special expertise in first amendment and constitutional issues as well as experience in a variety of constitutional issues involved in white-collar criminal defense.

She has been named by the National Law Journal as one of the 100 Most Influential Lawyers in America and one of the 50 Most Influential Women Lawyers in America, and by the Daily Journal as one of the top 100 Most Influential Lawyers in California.

Thomas M. Susman

Tom Susman is a partner in the Washington Office of Ropes & Gray, LLP, where he conducts a diverse legislative and regulatory practice. Before joining Ropes & Gray he was general counsel to the U.S. Senate Committee on the Judiciary and various Judiciary subcommittees, and prior to that he served in the Office of Legal Counsel of the Department of Justice.

Presenting serving as Delegate to the ABA House of Delegates, Mr. Susman has been on the Board of Governors and chaired the Section on Administrative Law and Regulatory Practice. He is on the Council of the Council on Legal Education Opportunity, on the Board of Trustees of the National Judicial College, and a member of the ABA Committee on the Law Library of Congress. He is also a member of the American Law Institute, chair of the Ethics Committee of the American League of Lobbyists, President of the D.C. Public Library Foundation, and Adjunct Professor at the Washington College of Law of the American University.

Mr. Susman frequently testifies before Congress and lectures in the U.S. and abroad on legislative process and lobbying, freedom of information, and administrative law. He received the U.S. Court of Federal Claims Golden Eagle Award for Outstanding Service to the Court and has been inducted into the Freedom of Information Hall of Fame. He earned his B.A. from Yale University and his J.D. from the University of Texas, and following law school he clerked for Fifth Circuit Judge John Minor Wisdom.

Hon. Patricia M. Wald

Patricia M. Wald served as a judge on the U.S. Court of Appeals for the D.C. Circuit from 1979-1999 and as its Chief Judge from 1986-1991. She then was appointed to the International Criminal Tribunal for the former Yugoslavia where she served on the trial and appellate benches from 1999-2001. Prior to her judicial service, she was an Assistant Attorney General for Legislative Affairs in the Carter Administration. Judge Wald most recently served as a member of the President's commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction.

Judge Wald is currently a consultant on international justice, the Co-Chair of New Perimeter, a Board member of OSI-Justice Initiative and the American Constitution society. She is the recipient of the ABA Margaret Brant Award for Women Lawyers of Achievement and the American Lawyer Lifetime Achievement Award. She was recently named by the National Law Journal as one of the "100 Most Influential Lawyers in America."

Special Adviser

Alan Rothstein

Alan Rothstein serves as General Counsel to the Association of the Bar of the City of New York, where he coordinate the extensive law reform and public policy work of this 22,000-member Association. Founded in 1870, the Association has been influential on a local, state, national and international level.

Prior to his 20 years with the Association, Rothstein was the Associate Director of Citizens Union, a long-standing civic association in New York City. Rothstein started his legal career with the firm of Weil, Gotshal & Manges. He earned his B.A. degree from City College of New York and an M.A. in Economics

from Brown University before earning his J.D. from NYU in 1978. Prior to his legal career, Rothstein worked as an economist in the environmental consulting field and for the New York City Economic Development Administration.

Mr. Rothstein serves on the boards of directors of Volunteers of Legal Service and Citizens Union, where he chairs its Committee on State Affairs. He also serves on the New York State Bar Association House of Delegates.