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The sky or acorns? A constitutional analysis of presidential signing statements

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CHAPTER 1. INTRODUCTION

WHAT IF CHICKEN LITTLE IS RIGHT?

As children, we learn the story of the melodramatic chicken who proclaimed to the world "the sky is falling." Why did he believe the sky was falling? Because he felt a piece of it fall on his head. In the end, we learn the sky wasn't falling on poor Chicken Little. He had been hit by a tiny acorn.

In 2006, The Boston Globe made an announcement similar to Chicken Little's claim. The sky wasn't falling, but for many it felt like it was. Journalist Charlie Savage introduced the news-reading public to a little known presidential tool - the signing statement. According to Savage, President Bush (hereinafter Bush II) had used this tool to personally challenge as many as 750 laws in his first six years in office. The article went on to explain that while the president does have a duty to faithfully execute the laws, President Bush II had asserted that he did not have to execute a law if he personally believed it was unconstitutional. As a result, he had declared the right to ignore "vast swaths of laws" (Savage 2006).

The idea that a president does not have to execute a law he believes to be unconstitutional is unsettling to many people. It also brings to mind other childhood lessons. After all, every child is taught by her social studies teachers (and even School House Rock) that it is up to the Supreme Court to decide what is constitutional and what is not (School House Rock Three Ring Government). Was President Bush II using the signing statement to encroach upon judicial territory and, if so, why wasn't the court doing

anything about it? Is the sky really falling? Maybe. According to Phillip Cooper, a presidential scholar and signing statement expert who is quoted in the Savage article, "[t]his is really big, very expansive, and very significant" (Savage 2006).

One might wonder how something this significant could stay under the radar for so long. The answer has to do with how signing statements work. They are not secret documents. In fact, they are published in the *United States Code Congressional and Administrative News* as part of the legislative history of the bill with which they are associated. However, they are typically issued with very little fanfare. When a bill is signed the headline will likely state only that the law has passed, if it is reported in the news at all. The fact that the president also included a document explaining his personal understanding of certain terms or giving directions to the executive agencies regarding exactly how they should carry out that law is almost never part of the headline. At least it wasn't part of the headline before Mr. Savage's article.

So, why was the signing statement finally worth our attention? One word explains it - torture. In 2005 Senator John McCain, prisoner of war survivor, included an amendment to H.R. 2863, the Defense Supplemental Appropriations bill for 2006, mandating that the United States would not engage in torture of detainees. The Bush II administration negotiated at length with Senator McCain but he was adamant and would not remove the amendment. President Bush II finally signed H.R. 2863 and when he did he stated "[t]he Administration is committed to treating all detainees held by the United States in a manner consistent with our Constitution, laws, and treaty obligations, which reflect the

values we hold dear" (Bush, 2005a). Later, however President Bush II added a second statement to the bill which read "[t]he executive branch shall construe Title X in Division A of the Act, related to detainees, in a manner consistent with the constitutional authority of the president to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power" (Bush, 2005b). The fact that such statements typically don't make headlines is not surprising because few people are able to read them and understand the direction the president is actually giving. What did that second statement actually mean? With respect to this particular bill it meant the president believed that, as Commander in Chief, it is up to him and him alone to determine what kind of interrogation techniques are used by the United States military. More importantly, it meant the president believed he could sign a bill into law and at the same time declare that he would not follow portions of it.

This is such a departure from most Americans' understanding of the process that it is no surprise that the Savage article caused a stir. How could the president ignore the separation of powers doctrine and claim executive and judicial powers at the same time? Arguably he was taking on a legislative role as well because, by picking and choosing which parts of a bill to follow and which ones not to follow, he was essentially rewriting legislation. Why would President Bush II believe he could do such a thing?

The president was actually adding to a long history of presidential signing statements that began with President James Monroe (Kelley and Marshall 2008). Most of the statements issued before the 1980s, however, were harmless announcements attached to

a bill, akin to a glorified press release. These glorified press releases (rhetorical signing statements) were used to express appreciation or make a political point (Cooper 2002: 214). They are not controversial and don't raise constitutional concerns.

Rhetorical signing statements, however, are nothing like the statements reported in the Savage article, which arguably change the law that congress passed. Use of more controversial signing statements actually dates to President Andrew Jackson in 1830. The signing statement issued by President Jackson explained his concerns with a bill involving road examinations and surveys. President Jackson's actions were later criticized in a House report as being comparable to a line item veto (Halstead 2007: 2).

The first constitutional challenge was made in a signing statement in 1842. President John Tyler challenged a bill involving the apportionment of House districts. His statement received little respect and was called an "extraneous document" that should be considered a "defacement of the public records and archives"(ABA Report: 7). Signing statements that make constitutional challenges are potentially the most controversial type and were used extensively by the Bush II administration.

Sometimes signing statements are issued in an attempt to influence the judicial branch. This tactic was made popular by the Reagan administration. According to the ABA taskforce, the Reagan administration used signing statements as a "strategic weapon in a campaign to influence the way legislation was interpreted by the courts and executive agencies" (ABA Report: 10).

More people started to pay attention to signing statements after the Savage article. However, that doesn't mean the public, or the legal and political science world for that matter, clearly understood their use and ramifications. Was the signing statement and its extensive use by the Bush administration just a blip on the radar of presidential power? Or, did the extensive use of the signing statement by Bush II work to significantly expand the power of the presidency to a point that this expanded role in the legislative and judicial process will be enjoyed by all presidents to come? In the 6 years since the publication of the Savage article, the White House has shifted not only to a new president, but to a new party as well. To determine whether the sky is falling as a result of the signing statement, it is important to look at that new presidency.

This thesis will examine the use of the signing statement throughout history. It will focus on the development of the signing statement from the Reagan Administration to present day. It will address the different types of signing statements and the constitutional ramifications of each. It will then offer a course of action for a president to follow to ensure the use of signing statements is not only beneficial to the president, but also constitutional. Hopefully, by following this course of action, future presidents can help make sure that the sky does not fall.

CHAPTER 2. OVERVIEW OF LITERATURE

Signing statements have not been a subject of research for many political science scholars. There are some interested scholars but, compared to other topics, this is one that is relatively understudied. As a result, a few names tend to come up again and again during research. Below is a summary and synthesis of the most influential authors and works on the topic from the 1980s to today. These articles cover the most important developments with signing statements, beginning with the Reagan administration which brought about a change to the quality and quantity of signing statements. The tool has grown in significance ever since. These authors espouse different opinions regarding the appropriate use and constitutionality of signing statements. They also are often quoted in newspaper interviews and government reports relating to the controversy surrounding signing statements that began with the Savage article.

One early article and a good starting point for constitutional evaluation of signing statements is Marc N. Garber and Kurt A. Wimmer's 1987 article, "Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power." This article was written in response to the first modern expansion of the use of the signing statement by the Reagan Presidency. According to Garber and Wimmer, Ronald Reagan and his staff were using signing statements in an attempt to regain some of the power they believed the office of the president had lost as a result of the Watergate scandal. In the article, Garber and Wimmer examine practices of the Reagan presidency regarding signing statements. They assert that while previous presidents used signing statements to

note their disapproval, the Reagan administration used them in an attempt to reinterpret the language of a bill into something that matched the president's views about the legislation and not necessarily the intent of congress (Garber and Wimmer: 366).

While this targeted use of signing statements was noteworthy, its impact would not necessarily be felt by many had it not corresponded with another interesting move on the part of Reagan's team. In order to "make sure that the president's own understanding of what's in a bill is the same… or is given consideration at the time of statutory construction later on by a court," Reagan's Attorney General, Edwin Meese, worked out a deal with West Publishing to include signing statements in the *U.S. Code Congressional and Administrative News* (Garber and Wimmer: 367). These statements of executive history did more than state the executive intent in signing the bill, they asserted the legislative intent in passing the bill. Garber and Wimmer called this an "overt attempt to usurp power reserved for the Legislature and the Judiciary" (Garber and Wimmer: 366).

After explaining the methods of the Reagan Administration and its use of signing statements, Garber and Wimmer argue that the statements should not be used by the courts as evidence of congressional intent. They assert that doing so is a violation of the separation of powers doctrine in two ways. First, it allows the president to make law by substituting his interpretation of the bill's terms in place of congressional intent. Second, by substituting his interpretation for their own, the courts are letting the president usurp the judiciary's role as well. Garber and Wimmer stress that these statements are inherently

unreliable as evidence of legislative intent and, for this and other reasons, should not be considered by the courts (Garber and Wimmer).

A second important source is Phillip Cooper's book *By order of the President: The Use and Abuse of Executive Direct Action* written in 2002. The book includes a chapter specifically addressing the signing statement. While this chapter includes information about the historical development of the signing statement and the importance of the deal Meese struck with West Publishing, it focuses on the similarity between the signing statement and the line-item veto.

Cooper explains that the actual line-item veto was a short-lived tool of the presidency enjoyed only by the Clinton administration. Challenges to this legislatively enacted power seemed imminent from the beginning and the line-item veto didn't last long. The Supreme Court struck it down on separation of powers grounds. The Court found that allowing a president to strike certain passages of a law is the equivalent of allowing him to write a new law, thus infringing on the power of the legislative branch. Cooper explains how presidents have used signing statements in a manner similar to the line-item veto to "specifically reject provisions of statutes even as they signed the legislation" (Cooper 2002: 204). Cooper draws the parallel between these two devices and argues that the use of a signing statement in this way is inappropriate. He continues by explaining that, even though inappropriate, presidents might strategically use signing statements to achieve their policy goals. He concludes by stating that signing statements

have become a "potent, and potentially very dangerous, tool of presidential direct action." (Cooper 2002: 230).

Cooper again addressed signing statements in his article, "George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements." This article, written in 2005, starts by noting that President Bush II did not veto a bill in more than four years in the White House. While some commentators viewed this as a sign of weakness in an otherwise strong president, Cooper stressed that the lack of vetoes was not a sign of weakness but the result of something else. Bush II simply did not need the veto because of his extensive use of the signing statement. According to Cooper while Bush II used the signing statement as an effective substitute for the line-item veto, he actually went beyond that. Bush II used the signing statement in a new way not only to address specific elements of specific bills, but also to "significantly reposition and strengthen the powers of the presidency relative to the congress" (Cooper 2005: 516).

Bush II accomplished this by challenging large sections of bills based on broad constitutional objections. Essentially, he used signing statements to insist that Article II of the Constitution does not permit any interference with the president's "control of the unitary executive" (Cooper 2005: 522). Based on this theory, Bush II claimed the executive branch had the power to ignore multiple legislative mandates, including, for example, requirements that the executive branch report directly to congress and prohibitions against the use of torture (Cooper 2005).

Cooper seems impressed despite himself at Bush II's bold claim to power through the use of the signing statement. It is a tool that is rarely noticed by the public and allows these challenges to be "hidden in plain sight," hence the Edgar Allen Poe reference. Cooper leaves little doubt that he believes this usurpation of power by the Bush II administration lacks constitutional support, especially in light of the fact that the Supreme Court has rejected the legislatively enacted line-item veto. It would not logically follow that a president could use a similar tool, and one that was not even granted statutorily at that, to reach an end that the Court already struck down (Cooper, 2005: 530).

Curtis A. Bradley and Eric A. Posner take a very different view of the importance and appropriateness of signing statements in their 2006 article "Presidential Signing Statements and Executive Power." They take the position that signing statements, as described above, do not violate the doctrine of separation of powers or the legislative process. And, contrary to the opinion of Phillip Cooper, they believe signing statements can sometimes be used as evidence of statutory meaning (Bradley and Posner).

Much of their article focuses on addressing critics' challenges to the Bush II administration specifically. One such challenge is the belief that signing statements could be used to direct the officials of the executive branch not to enforce statutes based on "dubious constitutional theories." However, Bradley and Posner argue that, because presidents can use any number of tools to reach this same end critics should not be concerned with the signing statement but with the underlying policy (Bradley and Posner: 310).

After addressing the "dubious constitutional theories" challenge and other Bush II related criticisms, Bradley and Posner take a step by step approach to answering the various challenges raised against the use of signing statements generally. First, regarding signing statements that make constitutional challenges, they claim there is no crisis or reason for concern. According to Bradley and Posner, since the president is actually obligated under the "Take Care Clause" to comply with the constitution, "if the president believes that a statute violates the constitution, he has a constitutional obligation not to enforce it" (Bradley and Posner: 358).

The second argument they address is the concern that the president could use signing statements to "thwart the will of congress" and that, even if the courts do not give weight to signing statements, they still might cause harm to the constitution by changing the norms and the division of power between the different branches of government. They believe this concern is vulnerable to two different responses. First, congress and the president have a variety of tools and tactics that they use in negotiating and relating to each other and no one outside of those offices really knows how it works. So, it is "impossible to say whether the signing statement gives the president a significant advantage over congress" (Bradley and Posner: 360). Second, they believe this concern really rests on whether the individual believes the president has too little or too much power relative to that of congress. To challenge the signing statement as giving the president too much power, one must first be sure that the current level of power of the president is either just right or too much. According to Bradley and Posner, there is too much controversy on the

issue of the appropriate balance of power for the signing statement to be a deciding factor (Bradley and Posner: 361).

Bradley and Posner are strong supporters of the signing statement or, at the very least, they do not believe there is reason to be concerned about them. They assert that courts rarely rely on or refer to signing statements in their opinions even though they are included as legislative history. Bradley and Posner also stress that, while Bush II challenged hundreds of provisions of law, critics have not identified a "single instance where the Bush administration followed through on the language in the signing statement and refused to enforce the statute as written." Therefore, they claim that signing statements are mostly political rhetoric and, are not a constitutional concern (Bradley and Posner: 332).

Christopher S. Kelley and Bryan W. Marshall of Miami University are possibly the most active scholars currently researching signing statements. They published articles in 2008, 2009 and 2010 and are currently publishing a book on the topic (Email from Christopher Kelly). Each of their articles addresses a slightly different aspect of the use of this tool. Their first article, "The Last Word: Presidential Power and the Role of Signing Statements," examines the use of the signing statement as one of the many tools a president has when working with the other branches of government. They spend very little time discussing challenges to the constitutionality or appropriateness of signing statements and instead hold them up as an important tool that presidents can use to protect, and even enhance, presidential power. They briefly acknowledge the controversy around some of

the signing statements used by Bush II. But, they focus on the usefulness of signing statements to influence policy when other methods break down. They argue this is most often the case in times of divided government. In those times, they believe the signing statement can be used to avoid gridlock (Kelley and Marshall 2008).

Kelley and Marshall, like other scholars, recognize the Reagan presidency as the time when the use of signing statements took on new importance. They stress that, after the Watergate scandal, congress began to dial back the freedom and power the office of the president had gained during much of the 20th century. The signing statement was seen as a way for the Reagan White House to strategically regain some of the power lost at that time (Kelley and Marshall 2008: 254).

The focus of this particular article is to determine what conditions make a signing statement more likely on a given piece of legislation. They hypothesize that the most important conditions will be divided government and the importance of the particular piece of legislation. After analyzing these variables using a logit model, they conclude that these two factors are important in determining when a signing statement will be used by a president (Kelley and Marshall 2008).

Kelley and Marshall's 2009 article, "Assessing Presidential Power, Signing Statements and Veto Threats as Coordinated Strategies," analyzes the use of the signing statement as part of the veto bargaining process. In this article, they used a spatial model to analyze how a signing statement can help a president reach, or at least come closer, to his

desired legislative outcome. They assert that the president can achieve more with the signing statement than he could with the veto alone (518).

In their 2010 article, "Going it Alone: The Politics of Signing Statements from Reagan to Bush II," Kelley and Marshall again use a logit model, this time to examine signing statements used to make constitutional challenges. According to their research, this type of signing statement is actually more likely during a unified government and is unrelated to issues of gridlock. As the title of the article suggests, they found that using a signing statement allows a president to "go it alone" and "have the last word on legislation signed into law" (Kelley and Marshall 2010: 183).

No review of signing statement literature would be complete without including the work of Charlie Savage. While he is not a constitutional or political science scholar, his contribution to the field is no less important than the work of the scholars discussed so far. It was his 2006 Boston Globe Article, after all, that brought signing statements out of oblivion and into public discourse for the first time. His announcement that "President Bush has quietly claimed the authority to disobey more than 750 laws enacted since he took office" was the decree that lead scholars, bloggers, members of congress and even the American Bar Association (ABA) to believe that the sky was falling. His article was thoroughly researched and included interviews with Christopher Kelley, Phillip Cooper and other scholars (Savage 2006).

In a time when political news seems to be more about scandal than substance, Savage has attempted to keep the public abreast of the developments around the signing

statement saga. In 2007, he interviewed then-candidate Obama and, among other things, questioned him about his beliefs regarding the appropriate use of signing statements. Obama answered that he would "not use signing statements to nullify or undermine congressional instructions as enacted into law" (Savage 2007). In 2009, Savage followed up on his 2006 article with an article entitled "Obama's Embrace of a Bush Tactic Riles Congress."

Savage's 2006 article prompted the creation of an ABA task force to examine the use of signing statements. This task force released a report in August 2006 that made four important recommendations to presidents regarding the use of signing statements. First, the report recommends that when the president believes a bill is unconstitutional he should communicate his concern to congress. Second, if the concerns are not addressed when the bill reaches the president's desk, he should veto the bill. Third, the ABA report recommends that congress enact legislation requiring the president to submit copies of all signing statements to congress. Fourth, the report recommends new legislation that would allow the president, congress or other involved individuals to seek judicial review whenever the president claims the authority to disregard any section of a bill or to interpret a law in a way that is inconsistent with the clear intent of congress.

As stated above, a search of traditional scholarly sources for research and writing on the topic of signing statements does not lead to a significant number of results. But, there are a handful of scholars working to bring attention to the topic. Their work, along with the work of journalists and bloggers, has helped raise awareness within government as well

as in the public. As a result, there have been multiple congressional hearings on the topic, an ABA special taskforce report, a letter from the Government Accountability Office (GAO) focusing on the topic and a report from the Congressional Research Service (CRS). Taken together, these sources paint a complete picture of the history, use, and potential future issues regarding this little known presidential tool.

CHAPTER 3. METHODS

INTRODUCTION

A little ground work is necessary before determining when or if a president should use a signing statement. This section provides a brief history of the use of signing statements, a breakdown of the different types of signing statements, a discussion of when each type is used, and finally, a discussion of the difference between the signing statement and certain other tools in the presidential arsenal.

HISTORY

Casual observers of the use of signing statements likely would believe they are a new phenomenon. This is a reasonable belief given the lack of information available in the press or even scholarly journals prior to 1986. However, that belief couldn't be further from the truth. Signing statements actually have been around for more than a century; yet there is still no official established definition. According to the Government Accountability Office, a signing statement usually refers to a presidential statement or press release that is issued in connection with the signing of a bill (Kepplinger 2007). The first signing statement is traced back to President James Monroe in 1822. The particular law in question involved the commissioning and Senate confirmation of certain military officers. President Monroe believed there was some confusion in the law regarding whether the promotion of four officers required Senate approval. He determined that they did require Senate

approval and, therefore, submitted the commissions to the Senate. His statement was a letter to the Senate explaining the situation (Monroe 1822).

The first controversial use of a signing statement is traced to President Andrew Jackson in 1830. The bill dealt with road examinations and surveys. President Jackson took issue with a provision in the bill calling for a road from Detroit to Chicago and announced that the appropriation would be allowed only for the construction of the road in the territory of Michigan (Jackson 1830). Jackson's signing statement was later criticized in a House report as an action comparable to a line-item veto (Halstead 2007: 2).

The first time a constitutional challenge was made in a signing statement was in 1842 when President John Tyler respectfully disagreed with provisions regarding apportionment of house districts. John Quincy Adams was the spokesman for the House at the time and he referred to the signing statement as an "extraneous document" and said that it should be considered a "defacement of the public records and archives" (ABA Report: 7).

While other presidents did use signing statements like Tyler and Jackson to state their interpretations or beliefs about constitutionality during the 19th and 20th centuries, the vast majority of signing statements have been little more than "glorified press releases." (Kelley and Marshall 2009: 513). This changed significantly with the Reagan Administration. President Reagan made the signing statement what it is today (Cooper 2002: 201). Maybe no other piece of evidence is more supportive of this fact than the simple change in numbers. As Figure 1 indicates, the use of signing statements for constitutional

challenges or objections, before the Reagan Administration, was far outweighed by rhetorical signing statements. The Reagan presidency ushered in a noticeable change, not in the overall number of signing statements, but in their purpose (Kelley 2002). (See Appendix 1 for a complete table of presidential signing statements.)

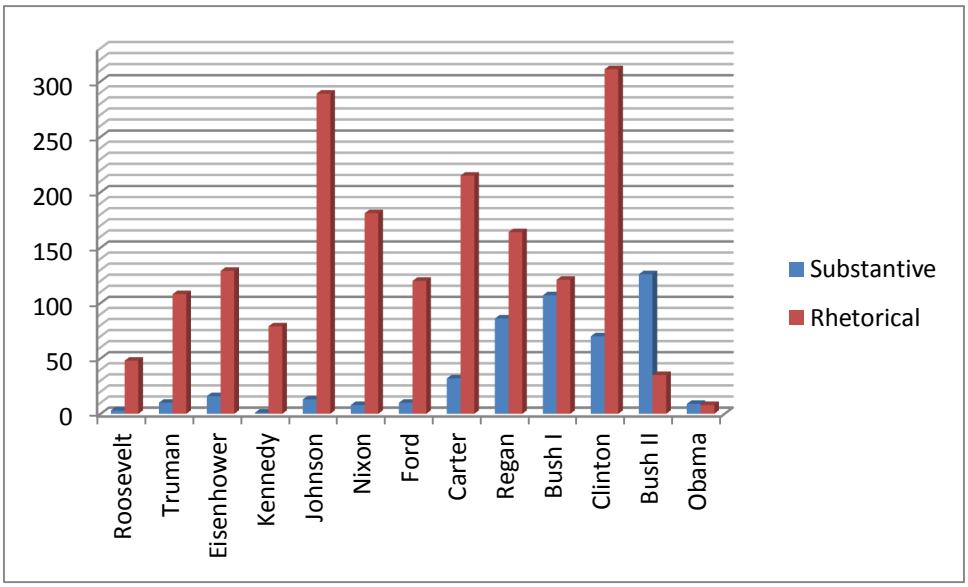

Figure 1. Presidential Signing Statements Roosevelt to Obama

Not only was there a shift from rhetorical to substantive statements, but substantive statements took on a new character as well. Unlike the pre-Reagan era where presidents used substantive signing statements to note their disapproval or give guidance to congress regarding something they believed should change in the future, the new purpose of the signing statement involved an attempt by the president to reinterpret the language of a bill to coincide with his views (Garber and Wimmer: 366). Reagan and his advisors believed presidential power had been seriously diminished by congress since the days of the Nixon administration. The signing statement was used as part of an overall strategy to gain back some of that power (Kelley and Marshall 2008: 254).

The most noteworthy move in this strategic game was made by Reagan's Attorney General Edwin Meese. Meese struck a deal with West Publishing to publish presidential signing statements in the *United States Code Congressional and Administrative News* as part of the legislative history (Kelley and Marshall 2008: 251). Meese asserted to the press that including signing statements in legislative history was necessary to ensure the president's understanding of a bill was either the same as that of congress or to alert the judicial branch to the differences (Meese 1986). This view was supported by then Deputy Assistant to the Attorney General (and now Supreme Court Justice) Samuel Alito. Alito asserted that the president's approval of a bill was just as important as the approval of congress and, therefore, it followed that the president's understanding of the bill should be part of the legislative history (Kelley and Marshall 2008: 251).

Including signing statements as part of legislative history was important because it would make them much more accessible to the public. More importantly, they became easily accessible to the courts and administrative agencies. According to the ABA taskforce report, the Reagan administration used signing statements as a "strategic weapon in a campaign to influence the way legislation was interpreted by the courts and executive agencies" (ABA Report: 10). The Reagan administration also relied on a key Supreme Court decision as part of this campaign. According to the *Chevron* case, an agency head could interpret a vague or undefined provision when congress had not provided a clear meaning in the legislative history (*Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.,* 1984). The Reagan Administration built on the foundation provided by *Chevron* to

determine that the president, as the head of all administrative agencies, could use signing statements to direct bureaucrats in interpreting those vague terms (Kelley and Marshall 2008: 252).

As Figure 1 indicates, the use of signing statements as a way to make constitutional challenges did not end with President Reagan. President George H.W. Bush (hereinafter Bush I) issued 228 signing statements during his presidency, 107 of which raised a constitutional or legal objection to the law (Halstead 2007: 5). Bush I was known for challenging statements when the underlying policy objective of the bill was not consistent with his own policy objectives (Cooper 2002).

One such policy was affirmative action. Bush I was a known opponent of most affirmative action programs and, for example, used a signing statement to disregard congressionally mandated affirmative action policies as they applied to contracting for the Department of Energy. In his signing statement the president stated "I therefore direct the Secretary… to administer the section in a constitutional manner" (Cooper 2002: 206). While that language may seem a bit cryptic to the layperson, to Bush I's administration the point was clear. The affirmative action requirements would not be followed because the president had determined they were unconstitutional.

Bush I also was creative in the use of signing statements in another way. On at least two occasions he actually arranged to have colloquies inserted into the congressional record and then relied on those statements as support for his interpretation of the law in his signing statement. He did so even though there was more evidence in favor of a different

interpretation of the statute (ABA Report: 12). Bush I used this tactic in his most controversial signing statement, which was issued when he signed the 1991 Civil Rights Act. In that act, congress made it clear that they wished to return to a definition of "disparate impact" that had been used before the *Ward's Cove* decision. However, again relying on inserted colloquy, the president stated that the act codified rather than over ruled *Ward's Cove* (ABA Report: 12).

The Clinton Presidency didn't end the use of substantive signing statements, but it did signal another change in how they would be used. Of his 381 statements, only 70 raised concerns or objections (substantive signing statements). This is 18% of his signing statements in that category as compared to 47% for Bush I and 34% for Reagan (Halstead 2007: 6, 5, & 3). While this is a change, the reduced percentage of constitutional challenges should not be misunderstood as an indication that Clinton was against using signing statements in this way. First, notice the significantly higher number of rhetorical statements used by Clinton, 311 as opposed to 121 for Bush I and 164 for Reagan (Halstead 2007). The sheer number of rhetorical statements is one reason for the decreased percentage of his total statements that did raise constitutional or interpretive concerns. Nevertheless, absolute numbers of substantive statements are down, even compared to Bush I, who was only in office for four years.

The substantive signing statement became a more important tool for President Clinton after the 1994 midterm elections when the democrats lost control of congress. In that same year, White House counsel Abner Mikva received support for the use of signing

statements in the form of a memo from Assistant Attorney General Walter Dellinger. The "Dellinger Memo," as it is known, addressed the question of whether the President of the United States has the authority to decline to execute unconstitutional statutes. The memo cited little constitutional authority or case law, but did announce that, in many instances not only *can* the president refuse to execute a law he believed to be unconstitutional, but *should* do so (Dellinger memo).

While Clinton's reduced use of substantive signing statements based on percentages could have indicated a step back to the pre-Reagan days, the Bush II administration reversed that trend and, in fact, brought about the most significant change in the use of signing statements. As was the case with the Clinton administration, this change cannot be seen by a quick look at raw numbers. In fact, Bush II's use of signing statements might seem quite modest based on raw numbers. After all, he issued only 161 in his eight years in office as opposed to the 228 issued by his father in only four years (Coherentbable.com, 2011). To truly understand the impact of the Bush II presidency, however, one must look at the scope and nature of his signing statements. Taking a cue from president Reagan, who used signing statements as part of a larger plan to rebuild presidential power, Bush II used them to grow the office of the president to previously unreached levels of presidential power as part of his Unitary Executive theory (Halstead 2007: 10). According to Phillip Cooper, "[t]here is no question that [the Bush II] administration has been involved in a very carefully thought-out, systematic process of expanding presidential power at the expense of the other branches of government" (Cooper in Savage 2006).

The number of signing statements was not as important in the Bush II administration as was the number of challenges included within those statements. The 161 signing statements issued by Bush II actually challenged approximately 1,100 provisions of law do to the omnibus nature of legislation. To put this in perspective, before Bush II took office signing statements had only been used to challenge 600 provisions of law by all the other presidents combined (ABA Report: 14).

Not only was the number of challenges of the Bush II administration noteworthy, the broad nature of the language used in the challenges, which he used repeatedly, was as well. When Bush II signed H.R. 2863, the Defense Supplemental Appropriation, he included the following statement "[t]he executive branch shall construe Title X in Division A of the Act, related to detainees, in a manner consistent with the constitutional authority of the president to supervise the unitary executive branch and as Commander in Chief and consistent with the Constitutional limitations on the judicial power, which will assist in achieving the shared objective of the congress and the president, evidenced in Title X, of protecting the American people from further terrorist attacks" (Bush 2005b). This language was actually used by Bush II in at least 82 different signing statements through 2005 (Cooper 2005: 521). Like other signing statements already discussed, the language does a good job of hiding the significance of the statement. What this particular statement did was state that the Bush II administration didn't intend to follow the McCain Amendment restricting the use of torture for detainees.

Although that particular signing statement turned signing statements into headline news, Bush II made a habit of using them in several other subject matter areas. One key area had to do with requirements in bills for the executive branch to give reports to congress. Such a requirement was included in the USA PATRIOT act. The signing statement Bush II issued when signing the act indicated that the Bush II administration would consider the requirement to produce such reports to be advisory (Cooper 2005: 523). According to Cooper, in the first term of the Bush II presidency, the default position became "when in doubt challenge legislative provisions whether there is a serious issue or not" (Cooper 2005: 531). The Bush II administration took this practice as far as routing every new bill through Vice President Cheney's office so that he could look for possible threats to the "Unitary Executive" (ABA Report: 15).

According to Unitary Executive Theory, the president has the power to act unilaterally in a wide range of areas and these areas cannot be encroached upon by congress. These areas include foreign relations, military affairs, national security and intelligence policy. It is in these areas that Bush II most often issued constitutional challenges with signing statements. The theory relies on the Article II, § 1"vesting" clause of the constitution which states that executive power shall be vested in a "President of the United States of America." According to the theory, this clause, along with the Oath of office (also found in Article II, § 1 of the Constitution) in which the president promises to "faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States," have been

interpreted to mean that it is within the power of the president to determine whether or not a law is constitutional. Unitary Executive Theory has been aggressively used since 1987 when then Attorney General Ed Meese explained in an address to Tulane Law School that the constitution is up for the interpretation of all branches and not just the courts (Kelley and Marshall 2009: 515-516). But, this idea of a "unitary executive" has been called an extreme construction by some who claim that it lacks judicial sanction (Kinkopf 2006: 6).

While Bush II used signing statements in a previously unprecedented way, their study would be the focus of historians rather than political scientists but for one important fact, the legacy did not end with Bush II. President Obama may have curtailed their use, but some argue he has embraced the device that he once criticized Bush II for utilizing (Savage 2009). Even though signing statements would hardly register on most polls as a topic of concern to the American public, they did find their way into the 2008 presidential campaign. Along the campaign trail, then-candidate Obama was asked a simple question during one of his stops: "When congress offers you a bill do you promise not to use presidential signage to get your way?" After giving the crowd a quick civics lesson on the separation of powers and Bush II's interest in expanding presidential power, candidate Obama made the following statement "I believe in the constitution and I will obey the constitution of the United States. We're not going to use Signing Statements as a way of doing an end run around congress" (YouTube).

Candidate Obama also answered a question about signing statements in a 2007 interview for the Boston Globe. He again explained his belief that president Bush II used

signing statements to change the meaning of legislation and to raise "implausible or dubious constitutional objections." Obama did add that signing statements are appropriate when used properly to protect the "president's constitutional prerogatives," but stated the Bush II administration had taken this too far (Savage 2007). So, while Obama clearly left the door open regarding his use of signing statements, his statements on the campaign trail were understood as a pledge not to use them to change laws that do not match the president's policy objectives or to insert the president's interpretation in the place of congress's interpretation. Because of this pledge, journalists have been keeping a close eye on President Obama and his use of this controversial tool.

President Obama used a signing statement for the first time on February 17, 2009. It was a rhetorical statement attached to the American Recovery and Reinvestment Act and, therefore, did not cause any controversy. However, he did get people talking less than a month later when he shared his "Memo for the Heads of Executive Departments and Agencies" as a press release. The memo explained that he would not use signing statements to disregard statutory provisions because of policy disagreements but that signing statements do serve a legitimate legislative function. According to President Obama, the statements can be used when they are based on "well founded constitutional objections." He further explained that he would use caution and restraint but, based on his duty to take care that the laws be faithfully executed, he believed he had a responsibility to determine whether any provisions in a bill were unconstitutional. These statements, while

somewhat restrained, on the one hand, sound very much like Unitary Executive Theory on the other.

To date (November 1, 2011), president Obama has issued 17 signing statements and has used 9 of them to challenge some aspect of the law (Coherentbabble.com). The most recent statement is so far, his most controversial. The statement was attached to the Fiscal Year 2011 budget bill and addressed a provision that stripped funding for four presidential "czars." President Obama argued in the statement that he has the authority to appoint such advisers and that it is unconstitutional for congress to try to inhibit this ability (Taylor 2011). He did not state that the provisions would not be enforced as Bush II likely would have done. Nevertheless, at the end of the statement he wrote "the executive branch will construe section 2262 not to abrogate these presidential prerogatives" (Obama 2011). This refers to his ability to appoint certain advisors which the bill clearly intends to limit. So, he is using this statement to explain that he will follow the bill only to the extent that he believes the provisions are constitutional. While this probably is consistent with his campaign pledge, it is not necessarily palatable to those who believe signing statements should not be used to make constitutional challenges. Seventeen statements in 35 months is a significant decrease as compared to the pattern from Reagan to Bush II. Still, the tool is alive and kicking and the question of whether it is constitutionally sound is alive as well.

TYPES OF SIGNING STATEMENTS

As explained briefly in the introduction above, there are two different types of signing statements. First, there are rhetorical signing statements. These are little more than press releases and are not considered controversial. They have been used to express appreciation, recognize the importance of the new legislation, or sometimes to chastise legislators. The second type of signing statement is much more controversial and bears little resemblance to its rhetorical cousin. These are called substantive signing statements. Substantive signing statements can be broken down into two further subcategories, interpretive and constitutional.

Interpretive signing statements, as the name suggests, interpret the bill. Even after all the time and effort that congress takes in drafting legislation, certain terms or provisions can still be ambiguous. In those cases, the president might include an interpretive signing statement explaining his interpretation of the ambiguous provisions or terms. With this type of statement, the president will either define undefined terms in a statute or clarify terms or provisions that he believes are unclear.

Constitutional signing statements, on the other hand, address the constitutionality of a bill. The president will use a constitutional signing statement to state his opinion that the bill or parts of the bill are unconstitutional (Kelley and Marshall 2008). From the early days of our republic, presidents have argued that they have the power to determine what is constitutional and what is not. In part, they have relied on Federalist Number 49 in which James Madison explains that, while the different branches of government will be given

different powers, none of them "can pretend to an exclusive or superior right of settling the boundaries between their respective powers" (Federalist No. 49). More recently, they have argued that the Oath of office found in Article II, § I, which states "I do solemnly swear (or affirm) that I will faithfully execute the Office of the president of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States," means they are obligated to refuse to defend or execute provisions of law that they believe are unconstitutional (Kelley and Marshall 2008: 253). As a result, presidents have argued that constitutional signing statements are appropriate.

Presidents Reagan, Bush I and Clinton all cited their duty to ensure that the laws are faithfully executed as evidence of their ability to ignore provisions of law they believed were unconstitutional. The syllogism here goes as follows:

Premise 1. The president has a duty to take care that the laws are faithfully executed:

Premise 2. The Constitution is the supreme law of the land:

Premise 3. The Constitution is included in the "laws" that the president must make sure are faithfully executed:

Conclusion. Therefore, enforcing a law that violates the Constitution would violate the president's duty (Cooper 2005: 206-7).

Versions of this argument continue to be cited in articles that support the liberal use of signing statements (Bradley and Posner).

Substantive signing statements not only differ in type, interpretive or constitutional, but they also differ in purpose. One purpose is to influence the judicial branch, attempting to influence congress and giving direction to the enforcing administrative agency. Their significance in influencing the judicial branch changed dramatically when Edwin Meese struck the deal with West Publishing to include signing statements as part of the legislative history. Doing so made the statements readily accessible to justices and to the public. A second purpose is to influence congress. Presidents attempt to influence congress by using signing statements to explain the provisions they have issues with and to encourage congress to repeal those provisions. Finally, presidents use signing statements to direct administrative agencies. They do so by including directions to agency officials who are responsible for administering the law. This way the president can make sure that the bill is carried out appropriately. There are, of course, times when one signing statement may include both interpretive and constitutional challenges and may be designed for multiple purposes. (See Appendix 2 for a flow chart of substantive signing statements and their purposes.)

DISTINGUISHING SIGNING STATEMENTS FROM OTHER PRESIDENTIAL TOOLS

Some supporters of signing statements argue that their critics should not/do not really have a problem with the tool; instead the problem they have is with the particular policy end the statement is used to achieve. While this may be true in some instances, there are distinct advantages and disadvantages of signing statements and the other tools to

which they are compared. These different devices are drawn from different constitutional provisions or traditional practices. As such, it is important to point out some of the differences between signing statements and the other tools used by presidents when they take unilateral action.

Line-item Veto

Critics of signing statements often compare them to the line-item veto. The line-item veto is used by Governors throughout the country and, for a short time; it was used by the president of the United States. In 1996 congress passed the Line-Item Veto Act. The purpose of the act was to allow the president to remove earmarks from bills. It gave him the power to eliminate sections of bills that he didn't want, without the trouble of vetoing the entire bill. Congress then could override the items the president had vetoed with a 2/3 vote (Haskell and Gold 2006).

President Clinton used the line-item veto eleven times before the Supreme Court declared it unconstitutional in *Clinton* v. *New York* (1998). The Court found that the line-item veto violated separation of powers in that it essentially allowed the president to rewrite bills. When the president makes a constitutional challenge to a bill in a signing statement and states that he will not enforce that part of the law it is essentially the same as striking it out with a line-item veto. And, according to Cooper, this action is even less defensible than the line-item veto because congress actually granted the president the power to use the line-item veto (2005: 223). No act of congress has ever purported to grant

the president the power to issue a signing statement. In addition, the Line-Item Veto Act included an override procedure and was still found unconstitutional by the Supreme Court. There is no such procedure for overriding a signing statement.

Executive Orders

Signing statements also are sometimes compared to the executive order. While a president could use these two tools to meet the same goal, there are some important differences. One such difference is executive orders, can be revoked by future presidents or by new laws passed by congress. Thus they are more limited than signing statements because signing statements stay with the particular piece of legislation. Therefore, they will continue to be effective unless the law itself is repealed by congress or is found unconstitutional by the Supreme Court. Another difference is the broad nature of signing statements starting with Bush II – applying to multiple laws at once.

There is no constitutional provision granting the president the power to use either an executive order or a signing statement and yet there is a long tradition behind both tools. While the Supreme Court has not addressed the constitutionality of signing statements, it has addressed executive orders. In *Youngstown Sheet and Tube* v. *Sawyer* (1952) President Truman used an executive order to facilitate governmental control of the steel industry. He believed that the takeover was necessary as a matter of national security.

In most circumstances the production of steel would be seen as a domestic issue. But, at the time the United States' war effort in Korea was dependent on this industry. To

Truman this moved the steel industry from a domestic issue to a foreign affairs issue. That move was important because the Court recognized in *United States* v. *Curtiss-Wright Export Corp*. (1936) that the president is the "sole organ" of American international affairs. As such, he is given greater leeway to take unilateral action in this area.

The Court however did not share Truman's view and distinguished *Youngstown* from *Curtiss-Wright*. They found that his actions had gone beyond his power to execute the law. Nevertheless, they didn't rule that the executive order was the problem. Instead, they explained the order constituted an attempt to make law rather than an attempt to clarify a law passed by congress. Justice Jackson's concurring opinion, which has taken on precedential value, explained three different scenarios for presidential action. In the first the president is acting pursuant to authority granted by Congress, in the second the president takes action in the absence of a congressional grant or denial of authority, and in the third the president acts contrary to the express or implied will of Congress. The *Youngstown* case was in the third category, the one where the president's power is at its "lowest ebb," and therefore the president's action was struck down. As a result, presidents since *Youngstown* make an effort to cite the congressional authority for executive orders they issue.

Impoundment; a Specific Use of the Executive Order

The court addressed one very specific use of executive orders in *Train* v. *City of New York* (1974). In this case the order was used as a way for the president to get around fully funding federal programs with which he didn't agree, a procedure known as

impoundment. Essentially the president issues an executive order to the treasury forbidding them from releasing the funds. This was a tactic favored by the Nixon administration. In the *Train* case the court found that the practice frustrated the will of congress and was therefore not an appropriate use of the executive order. As in *Youngstown*, the problem was not the order itself but the lack of congressional authority for the action.

Veto

Signing statements are often compared to the veto as well. However, there are some distinctive differences between the two. While a veto does have more certainty and finality in one respect, it also can be overridden. A signing statement, on the other hand, gives the president the final advantage because there is no congressional review of the law after it is issued (Kelley and Marshall 2008). This "final word" quality makes the signing statement similar to an absolute veto because congress does not have the power to override it. In fact, they don't even have the opportunity to debate or vote on the content of a signing statement unless they decide to enact new legislation in the future. Furthermore, even if they do pass a new law on the matter, it too could be subject to a signing statement. While the founders did not address the constitutionality of signing statements, they did unanimously vote down a proposal to grant the president an absolute veto (Garber and Wimmer: 373).

CHAPTER 4. RESULTS

INTRODUCTION

What effect do signing statements have on the balance of power between our three branches of government and what is a president to do when a bill he believes includes unconstitutional provisions hits his desk? For an absolutist the answer is easy: The president can sign it, or he can veto it. These are the only two options given in the constitution as spelled out in the "presentment clause" (Article II, § 7). Others would argue the constitution is a living document and the long history of using signing statements has created a place for them within the procedures that regulate the three branches of government (Seeley: 182). Those in favor of the liberal use of signing statements also would point to the fact that there is nothing in the constitution that prohibits their use and the Supreme Court has never addressed their constitutionality, indicating either that they approve of the use of signing statements or that they consider them a "political question" and, therefore, not subject to judicial review.

GUNS DON'T KILL PEOPLE. PEOPLE KILL PEOPLE.

What do guns have to do with signing statements? Good question. The easy answer would be nothing. On the other hand, the same argument made in support of owning a gun has been made in support of signing statements. The weapon isn't the problem. The problem is the person in control of it and the choices that person makes. According to the CRS Report, there are not constitutional problems with the signing

statement as a tool. The problem it identifies is the view of presidential authority that allows a president to use this tool to substantively affect a law while signing it at the same time.

Bradley and Posner make a similar argument in their article. They claim that the problems critics have are not with signing statements per se, but with how they are used. Because of this, they argue that attacks on signing statements are misplaced. After all, presidents could use executive orders or memoranda to reach the same result. They encourage critics to focus on the underlying policy, which they believe is the root of the critique (Bradley and Posner).

This argument has a great deal of appeal on the surface, but it fails to address some important details. As with guns, it takes the weapon *and* the person to do the damage. And, like a gun, this particular weapon has proved to be powerful and, at times, extremely damaging. As Cooper pointed out in his article "George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements," the signing statement has the unique quality of allowing the president to take controversial action but hide it in plain view. Because so few people are aware of signing statements and there is rarely any fanfare in conjunction with their release, they inflict their damage right in front of our faces and usually we don't even know it has happened.

So, what is to be done? It is not an easy question because the answer will be different depending on the type of statement and the purpose behind it. Bradley and Posner are correct that the underlying policy behind a signing statement is often the root of

the problem. So, let's start there. In the next section, I will examine substantive signing statements in detail. I will look at the purpose of the signing statement and whether the challenges the president makes are based on interpretation of the statute or claims of constitutional issues with the statute. It is important, however, to keep in mind that often a statement will fall under both the interpretive and the constitutional categories and that presidents sometimes use both, or either, category to reach the same ends. This makes their classification somewhat tricky, but not impossible.

SIGNING STATEMENTS AND THE JUDICIARY

Interpretive Statements Designed to Influence the Judicial Branch

There is much debate over the question of whether the judicial branch should take the president's interpretation of a bill into account in court. The Reagan administration certainly believed the practice was appropriate. As discussed above, Edwin Meese, Reagan's Attorney General, made sure signing statements were easily accessible to the judicial branch by working with West Publishing to include signing statements as part of a bill's legislative history. The Reagan administration did this as one piece of a larger plan to regain power for the president that they believed had been taken by congress after the Watergate scandal. They believed that including the views of the president in the form of signing statements in the legislative history of a bill would increase the influence of the presidency vis-a-vis congress in the eyes of the courts. The appropriateness of using signing statements to influence the courts has been debated ever since.

That debate includes a couple of different questions. First, should the president's interpretation of a bill be included in legislative history at all? After all, he is not a part of the legislative branch. But, the president does play a role in the legislative process by signing or vetoing bills. He also, of course, plays a role during the earlier stages through negotiations with congress to try to get congress to pass laws that will advance the policy goals of the administration. Second, should the courts accept the president's interpretations? While that is an important question, this paper will focus on the constitutionality of the president's actions in using interpretive signing statements. The weight the courts should give them is a subject for future research.

As explained above, sometimes the president writes an interpretive signing statement to explain ambiguous or undefined terms. Whether the president is acting constitutionally in writing such a statement depends on whether the terms were truly ambiguous or undefined. The fear is the president will identify ambiguities and exceptions in an act even if they were not apparent during the legislative process. In this situation, the president is essentially interpreting the law, which is the job of the judicial branch, and by rewriting it, he is making law, the job of the legislative branch (see discussion of Immigration Reform and Control Act below for example) (Garber and Wimmer: 367).

Second, even if the language truly is ambiguous, there is still a question as to whether the president's interpretation should be considered. One argument in support of using the president's interpretation in this way is that the president is the head of the various executive branch agencies. In *Chevron U.S.A., Inc.* v. *Natural Resources Defense*

Council, Inc. (1984) the Court found that deference should be given to the interpretations of agency directors. Presidents have inferred from this that, since the agency director's interpretation receives deference, then the person that director reports to should receive deference as well. But, the underlying reason to grant deference to agency heads was that they have expertise in the particular subject matter. The president does not have that same expertise and, therefore, his interpretation of ambiguity in statutes does not deserve that same deference (Garber and Wimmer: 387).

Not all interpretive signing statements are designed to clear up ambiguity. Sometimes the president writes the statement to offer background and support regarding the purposes behind the law. When this is done to influence the courts, the president is hoping that the background he gives will be accepted by the court and used to help decide future cases.

It has been argued that it is never appropriate for a court to use a signing statement. to determine congressional intent (Garber and Wimmer). If that is true, then it would logically follow that the president should never issue a statement for this purpose. When this argument is made the term "congressional intent" is sometimes used interchangeably with "legislative intent." Garber and Wimmer argue quite convincingly that a signing statement is not evidence of congressional intent. They are right that the president does not speak for congress. But, it does not necessarily follow that the president's input should not be considered in determining legislative intent. The president has a clear role in the legislative process. As such, his statements regarding what happened during that process

seem to be just as valuable (or as unreliable, as the case may be) as the statements of members of congress who were involved in the process. Therefore, using congressional intent and legislative intent interchangeably is a mistake when evaluating the appropriate use of this type of statement. Garber and Wimmer argue that the courts must recognize that these signing statements only contain the views of the executive branch and are "constitutionally unreliable indicators of congress's will" (Garber and Wimmer: 381). That is true, but it does not mean that the views of the executive branch that are expressed are not valuable information about the legislative process.

It is important to remember that signing statements designed to influence the courts as part of the legislative history are subject to the same problems as statements of members of congress regarding legislative history. The most common complaint is that such statements are unreliable because the people who make them are likely to be taking creative license and "planting" history strictly for the purpose of influencing the court (Carroll: 516). But, this "people kill people" argument is evidence of why the court should be careful and selective regarding any external evidence they accept and not evidence of why signing statements in particular should not be used as part of legislative history.

Constitutional Statements Designed to Influence the Judicial Branch

Another way presidents use signing statements is to influence the courts. In such a case, the president claims that a provision of a bill is unconstitutional in an attempt to influence the court's determination in the event a challenge arises. The role of the Judiciary

to determine what is constitutional and what is not was declared in *Marbury* v. *Madison* (1803) and reaffirmed in multiple cases including *Baker* v. *Carr* (1962) and *U.S.* v. *Nixon* (1974). Even so, it is unreasonable to believe that the president of the United States would not hold his own opinions on issues of constitutionality as well. The Court recognized in *U.S.* v. *Nixon* that each branch at times will need to interpret the constitution and determine questions of constitutionality (*U.S.* v. *Nixon* 1974). Therefore, if faced with a provision that he believes is unconstitutional, the president may state his belief in a signing statement in order to bring that provision to the court's attention. While it is not common for the courts to refer to signing statements in their opinions, they have done so occasionally. In *INS* v. *Chadha* (1983), for example, the court referred to the fact that 11 presidents had gone on record challenging the constitutionality of the congressional veto. However, the court did not rely on the signing statements in making its decision (Kepplinger 2007: 41).

Does Lack of Judicial Reliance Make These Statements a Non-issue?

The argument has been made that the courts rarely refer to signing statements in their decision making; therefore people should not be concerned about them. The Government Accountability Office (GAO) addressed this in their report "Presidential Signing Statements Accompanying the Fiscal Year 2006 Appropriations Acts." Saying they are not used often, however, is a far cry from saying they are not used at all. It only takes one bullet to kill someone and it only takes reliance on one signing statement to violate the

separation of powers doctrine and insert the opinion of the president in place of the opinion of the court.

Courts actually have used signing statements for many different reasons in their opinions. In *United States* v. *Lovett* (1946), the Court cited President Roosevelt's signing statement in which he declared that a provision of a bill essentially firing three federal employees was an unconstitutional bill of attainder. The Court agreed with the president and found the law unconstitutional. In *Bowsher* v. *Synar* (1986) and *U.S.* v. *Lopez* (1995), the Court, in striking down the laws in question, referred to the fact that the president also thought the statute in question was unconstitutional. In *United States* v. *Yacoubian,* the 9th Circuit relied on a signing statement when explaining the fundamental purpose of the statute (1994). Similarly, a signing statement was used as confirmation of the reading of statutory language in *Mayhew Inc.* v. *Wirtz* (1969). And, at times, the Court even has used a signing statement to tip the scales in one direction or the other when they reach an impasse. They have done this both by relying on a signing statement or ignoring it, whichever is necessary in the situation (Carroll: 512).

Support for the argument that courts rarely use signing statements is offered in the GAO letter "Presidential Signing Statements Accompanying the Fiscal Year 2006Appropriations Acts." The GAO letter states that the court infrequently cites signing statements. According to the letter, the federal courts have done so in conjunction with legislative history about 40 times (Kepplinger 2007: 38) and have referred to constitutional signing statements in about 20 opinions (Kepplinger 2007: 40). The letter further states that

there have been a total of only 137 references to signing statements by federal courts and only five of these were in Supreme Court cases (Kepplinger 2007: 37). Given that the Supreme Court decides between 75-80 cases each year, this number of references is low (Supreme Court Web Site).

But, the letter is either missing or ignoring a trend in the Court's use of signing statements. The report states that there have only been 137 cases in which signing statements are mentioned. But, all of the cases they reference in the report were decided between 1945 and 2007. And, all but two of the cases were decided between 1983 and 2007. The fact that so many of the cases that do cite signing statements were decided during or after the Reagan administration seems to indicate that Ed Meese's effort to include signing statements in legislative history has been successful.

SIGNING STATEMENTS AND EXECUTIVE AGENCIES

Interpretive Statements Designed to Direct Executive Agencies

Article II, § 3 of the constitution includes the "take Care" clause: the president shall "take Care that the Laws be faithfully executed." In doing so, he needs to give some direction to the executive branch agency that will be responsible for executing the law. Sometimes this means clarifying terms or provisions that seem ambiguous. While this seems innocuous, a problem can arise if the president substitutes his interpretation of the law for what congress actually wrote. If this happens, he takes on a policy making role that is not supported by any of his enumerated powers (Garber and Wimmer: 381). In

Youngstown Sheet and Tube v. *Sawyer* (1952), the Court held that the "take Care" clause limits the president's power in the legislative process to "recommending laws he thinks wise and vetoing the laws he thinks bad" (*Youngstown*: 587). In *Youngstown*, the Court did not allow the president to make policy through the use of an executive order even in the extreme circumstances of war. It follows that the president should not be allowed to make policy by using a different tool, a signing statement (Garber and Wimmer: 382).

Signing statements become problematic when the president replaces the interpretation of congress with his own understanding of the law. One way the president could do this would be to find "ambiguities" when none were apparent in the actual legislative process. For example, President Reagan included a statement when he signed the Immigration Reform and Control Act of 1986. The act gave "amnesty" to certain undocumented immigrants but required them to have continuous physical presence in the country. The act also stated that "brief, casual, and innocent" absences would not terminate continuous presence. In his signing statement, President Reagan included a requirement that the immigrant must apply to the INS for permission to leave before even a "brief, casual, [or] innocent" absence. This clarification was really an addition made by the president. This added requirement was used by the INS when enforcing the statute so the president effectively rewrote the law (Garber and Wimmer: 368-369).

This process of issuing a signing statement to rewrite a law infringes upon the role of congress and violates the separation of powers doctrine. By doing this, the president crosses into a policy making role that is not within his power (*Youngstown*). But, if the

president is only clarifying terms or clearing up ambiguities to ensure that the intent of congress is carried out, there should not be a problem with the statement. Often the question comes down to whether the president's motives are pure in the use of the signing statement or whether he is making an "end run" around congress. In the first instance the signing statement may be appropriate; in the second, it never will be.

Interpretive Statements Designed to Avoid Unconstitutional Laws

Occasionally the president will claim that there is ambiguity in a law and that, if read the wrong way, the law would be unconstitutional. In these instances, the president will direct the executive agency to follow the interpretation that will avoid the constitutional problem. This is using the doctrine of constitutional avoidance that has been embraced by the courts. As Justice Holmes explained in *Blodgett* v. *Holden* (1927), "the rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act." It is appropriate in these instances for the president to set forth an interpretation that saves the act (Seeley: 181).

Constitutional Statements Designed to Direct Executive Agencies

While the first constitutional challenge to a bill through a signing statement can be traced back to President Tyler, it was many years before they were used to direct an executive agency not to enforce the bill as written. According to the ABA taskforce, this

didn't happen until 70 years after the ratification of the constitution (ABA report: 7). Early use of constitutional signing statements focused on influencing the courts or putting congress on notice that the president did not believe a provision was constitutional and would not provide a legal defense for it if it was challenged. FDR did this when signing the bill that he believed included a bill of attainder (Kelley and Marshall, 2009:515). More recently, however, presidents have used these statements to direct the executive branch not to follow provisions that they believe are unconstitutional. For example, when signing a bill that he believed unconstitutionally restricted his duty to protect national secrets, president Reagan stated that the offending section "will be considered of no force or effect"(Cooper 2002: 205).

The nature of constitutional challenges in signing statements has changed dramatically over time, especially with the Bush II Presidency (Kelley and Marshall 2009: 510). Bush II expanded the scope of signing statements. Instead of pointing out specific problem provisions, he directed the executive branch to ignore "vast swaths of laws" (Savage: 2006). The Bush II administration built on the expansion that began with Reagan in significant ways. Scholars believe they did this in an attempt to reposition the powers of the Presidency relative to congress (Cooper 2005: 516). The broad nature of the challenges is evident when comparing the number of statements written to the number of challenges made. While President Bush only issued 161 signing statements in his 8 years in office, they amounted to challenges to more than 1,100 provisions of law (Kelley and Marshall 2009: 515). Challenges were used so often that Cooper claimed that during Bush II's first

term the default position became "when in doubt challenge legislative provisions whether there is a serious issue or not" (Cooper 2005: 351).

As mentioned above, the court held in *U.S.* v. *Nixon* (1972) that from time to time each branch will need to make its own determination regarding whether something is constitutional. But, the court followed up by saying that it is "emphatically the province and duty of the judicial department to say what the law is." These two statements may seem to be contradictory but that is not necessarily the case. The problem can be rectified by looking at the purpose behind the claim of constitutionality or unconstitutionality. If the reason the president states that something is unconstitutional is to make his view known to the court, this would seem to be appropriate according to *U.S.* v. *Nixon* (1974). But, if the reason is to direct an agency not to follow the provision based on the president's determination that the provision is unconstitutional, then he would have encroached on the power of the court to say "what the law is."

Does Lack of Executive Enforcement Make These Statements a Non-issue?

Some supporters of signing statement argue that the impact of constitutional challenges has been greatly exaggerated. These arguments typically focus on the Bush II administration and the fact that 1,100 challenges does not necessarily mean 1,100 instances in which the administration actually followed the instruction of the signing statement (Kelley and Marshall 2009:515). Bradley and Posner take this a step further and claim that critics of Bush II's use of signing statements "have not identified a single instance where the

Bush administration followed through on the language in the signing statement and refused to enforce the statute as written" (332).

However, the GAO came to a different conclusion when examining the challenges made to the 2006 appropriations bills. Their research involved 12 bills and 11 signing statements. The GAO found that those 11 statements included challenges to 160 provisions of law. The GAO then closely examined 19 of those 160 challenged provisions and found that the agency did not enact six of the provisions as written (Kepplinger 2007: 9).

While they state that they cannot conclude that the noncompliance was a result of the signing statement, they did not rule out that possibility either. They also do not explain in their letter why the 19 provisions were chosen or why more provisions were not examined. And, they downplay the fact that of the provisions they examined 32% were not enforced as written. If these provisions and these 11 signing statements are to be taken as a representative sample, then one could infer that 32% of all laws with signing statements are not enacted as written. This may not be a reasonable inference given the lack of explanation of methods in the GAO letter. But it is just as plausible as the inference that the instances of noncompliance are actually very low.

The assertion that signing statements are not likely to be enforced is at best dubious in light of the evidence presented so far. Even if it is true, the uneven enforcement of signing statements causes uncertainty and this uncertainty is an evil in and of itself (Eggspuehler 2007). According to Cooper, the impact of a signing statement on the implementation of a law may not be obvious right away (Cooper 2005: 520). If that is true,

the GAO's 2007 letter examining statements attached to the 2006 Appropriations acts may be missing the significance of those statements that will only become clear at some later date. The signing statement stays with the legislation and could be enforced down the road to change the direction of the administrative agency if the president is unhappy with the execution of the bill as written.

STATEMENTS AND CONGRESS

Whether interpretive or constitutional, substantive signing statements are sometimes issued by the president in an attempt to influence congressional action. Through the statement, the president gives congress notice that they should repeal the sections he finds inappropriate or face a veto with similar sections in the future. This likely was the purpose behind the statements of President Jackson and Tyler who first made substantive remarks in a signing statement.

A more recent example is the statement President Clinton issued when he signed the 1996 National Defense Authorization Act. It included a provision that required the discharge of service members who tested positive for HIV. President Clinton had vetoed a prior bill including that same provision but it reappeared in this act. Instead of vetoing the bill and dealing with the consequences of a likely military shutdown due to lack of funding, he declared in his signing statement that the provision was unconstitutional and it would not be defended. President Clinton never had the opportunity to make good on this

promise because congress repealed the provision before any legal challenges were mounted (ABA report: 13-14).

CONSTITUTIONAL IMPLICATIONS OF SIGNING STATEMENTS

Introduction

While signing statements are not new, Figure 1 and Appendix 1 indicate that their use has increased and their purpose has shifted significantly over time especially since the Reagan administration. Simply asking whether signing statements are constitutional is not the right question. As explained above, they are used for many different purposes and many of them are designed to achieve more than one goal at a time. Rhetorical statements only serve as glorified press releases; therefore scholars agree that they do not raise any constitutional problems. Substantive statements are much trickier and require a deeper evaluation to determine the constitutional implications.

Substantive Signing Statements and Constitutionality

Not all substantive signing statements are created equal. They are used to interpret a law, to avoid constitutional issues, to influence the courts, to influence congress and to direct executive agencies. When determining whether any of these uses are constitutional further questions need to be evaluated. The most important inquiry is how genuine are the president's interpretive or constitutional concerns and what orders does he give as a result of those concerns?

Whether or not the president's interpretive or constitutional concerns are genuine is an important question. If the signing statement is being used as a way to say one thing (*e.g.* that the law is ambiguous) but do another (*e.g.* insert the president's own interpretation in place of that of congress) serious constitutional problems could arise. This issue has been raised by many commentators regarding signing statements. Defenders of the tool often point out that this problem is not unique to signing statements but exists in every aspect of a president's job. Signing statements are unique, however, in that they can serve as the last word on the meaning of a bill. As a result, there is increased potential for negative consequences that can result from using them in a less than forthright manner. This would be the case if the president claims there are constitutional issues with a bill as a guise for making an end run around congress. This is a difficult issue because there doesn't seem to be a check on this power. There certainly is not one in the legislative process as laid out by the constitution. Because the Supreme Court has avoided addressing signing statements in their decisions so far, it is a problem that has evaded review. While the question of the review of signing statements is important, it is beyond the scope of this paper and is recommended as a topic for future research.

Before explaining what constitutional problems a signing statement might cause, one more question must be answered about the statement. It must be determined whether the president is using the statement to shine a light on possible problems or if he is using it to rewrite the law and direct noncompliance. The direction the president gives is the critical determinant in the constitutionality of a signing statement.

Arguments against the use of the signing statement generally involve either the presentment clause in Article I, § 7, the separation of powers doctrine, or both. The presentment clause is the section of the constitution in which the president's legislative involvement is explained. According to this section, after a bill has passed both houses of congress it is to be "presented to the president of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections." This return process is the presidential veto. The section then goes on to explain the process through which congress can overturn that presidential veto. This is a clear procedure and it has been cited in Supreme Court cases when the president has overstepped his bounds and attempted to write legislation and not just implement it (*Youngstown Sheet and Tube* v. *Sawyer* 1952). While the Supreme Court has never directly addressed whether signing statements violate this procedure, critics argue that because this clear procedure doesn't allow for a signing statement, they cannot be used. Those adhering to this absolutist position claim that the only constitutionally appropriate option the president has when faced with a bill that he believes has constitutional or interpretive issues is to veto it (ABA report).

While this is an appealing argument, supporters of the use of signing statements point to the fact that the Supreme Court is aware of the use of signing statements and has not directly addressed the constitutionality of their use. They argue that this means the Court is implicitly approving the use of signing statements. They also argue that signing statements are a flexible tool that helps avoid stand offs with congress regarding critical

legislation (Kelley and Marshall 2008: 255). And, finally, there is nothing in the constitution or an act of congress prohibiting the addition of a statement with the signing of a bill.

The other most common argument against the use of the signing statement is based on separation of powers. Supporters of this argument claim that the president actually could infringe on the powers of both the legislative and judicial branch at the same time by issuing a signing statement. This occurs because the president, by making changes to a bill, is essentially rewriting it; thereby making law and infringing on the powers of congress. When the president does this because he is expressing his belief that provisions in the bill are unconstitutional, he is infringing on the power of the judicial branch to "say what the law is" (*U.S.* v. *Nixon* 1974).

Whether the president is actually infringing on those powers, however, rests on what instructions he is giving to the enforcing agency in the signing statement. If the statement instructs the agency to follow the president's interpretation instead of a contrary interpretation offered by congress, there is a clear violation of separation of powers. In that situation, the president essentially is rewriting the law because he is directing the executive branch not to enact the law as written but to enact it with his changes.

When the president makes constitutional challenges to a law, the constitutionality of the statement will again rest on what he instructs the executive agency to do. If the statement declares "I believe this section is unconstitutional but you should enforce it anyway," the president is not using Presidential Review that is similar to Judicial Review because he does not claim to be the final decision maker on the constitutionality of the law.

Instead, he is making the kind of determination about constitutionality that the founders anticipated in Federalist Paper 49 and that the Court references in *U.S.* v. *Nixon* (1974). On the other hand, if the president uses the statement to instruct the agency to ignore the provisions he believes are unconstitutional, he has rewritten the law and infringed on the judicial branch's power of judicial review at the same time. In these situations, it is difficult to come to any conclusion other than that this is an unconstitutional violation of the separation of powers doctrine.

Relying on the presentment clause alone is insufficient unless the critic is willing to take an absolutist position that signing statements, even those that are completely rhetorical, should never be allowed. This is because the argument is based on following a procedure provided in the constitution. The procedure is clear and any variation from it is a violation of the constitution. The language of the signing statement is not the issue. It is the existence of the signing statement itself that violates the constitution.

Such an extreme absolutist view has not been taken even by the most critical authors. Scholarly articles and governmental reports alike have asserted that rhetorical statements do not cause constitutional issues. Yet, if the president were required to follow the plain language of the constitution the statements would not be permitted. The fact that this position has not been taken indicates that critics are not truly concerned with whether the president follows an exact procedure. Instead, critics are concerned about the potential violation of the separation of powers doctrine that exists if the president directs his administrative agency not to enact the bill as written. By focusing on this separation of

powers argument, it is clear that statements that inform congress of the president's concerns about a law so that they may make changes in the future do not create any constitutional problems because it cannot be argued that the president has "rewritten" the law.

Statements designed to influence the judicial branch are likewise safe from constitutional issues. While some argue that the inclusion of signing statements in legislative history violates the separation of powers doctrine because it allows the president's view of constitutionality to be substituted for the view of the Court, this would only be true if the court was deferential to the statements. At most, the court has used them as support for their independently reached conclusions. The Court has a tradition of looking to a variety of competing sources to assure that their decisions not only meet constitutional muster, but also don't veer so far away from the sentiment of the nation that they are in danger of being overturned through a constitutional amendment. Statements offered by the president regarding his beliefs about a law are one logical source of such outside information.

WHAT IS A PRESIDENT TO DO?

Introduction

The question of what a president should do when faced with a bill he believes includes unclear or unconstitutional provisions has been tackled by presidential advisors, government committees, scholars, and even the American Bar Association. The results are

far from unanimous. Presidential advisors obviously have a unique point of view when they search for answers to this question. Others who have drafted recommendations have their own potential biases as well. The resulting recommendations have ranged from the argument that the president has a duty to refuse to enforce any law he believes is unconstitutional to the ABA's absolutist recommendation that when faced with this situation the president's only option is to veto the bill (Dellinger Memo and ABA Report).

The argument that the president can rely on his oath of office to refuse to enforce provisions of a bill after signing it has been used by more than one president (see page 30 for the explanation of the argument). This is an appealing argument but it ignores other provisions in the constitution, including the presentment clause: the president has the option of either signing or vetoing the bill. His duty to uphold the constitution means the entire constitution and not just the parts that will make his job more convenient. With that in mind, if the president believes that a bill is unconstitutional he has a duty to veto it according to the procedure in the presentment clause. To do otherwise would be the equivalent of rewriting the bill; therefore violating the separation of powers doctrine.

So, can the president refuse to comply with a statute that he believes is unconstitutional? Under a strict reading of the constitution the answer is no. A more interesting question is why would he want to? Issuing a signing statement might be an effective way to advance the president's legislative agenda in the short term. But, in doing this the constitutionality of the law will not be settled.

The plan explained below can be used by presidents to ensure the separation of powers doctrine is not violated through their use of signing statements. It is an attempt to balance the absolutist position that the only option for a president is to sign or veto a bill, with the pragmatic reality of the office. While using the veto when faced with a bill he believes has constitutional issues may be the best option in an ideal world, there may be times that a president truly believes using it is not an option. In those instances the president should take the steps outlined below to ensure that his use of the signing statement does not violate his oath to uphold the constitution.

The Constitutional Balance Plan

When faced with an ambiguous or vague bill, the president has a couple of options. If the president believes the ambiguity is harmful and cannot be resolved with a signing statement, he should veto the bill. If, however, the issue with the offending language can be resolved by issuing an explanation of terms in a signing statement, the president should do this to make sure that the true intent of congress is understood and the bill is implemented properly.

The question of unconstitutional provisions is a bit more complicated. First, there are situations in which alternative readings of a bill would lead to a constitutional result on the one hand and an unconstitutional result on the other. In these situations, the president should use a signing statement to explain to the administrative agency that the constitutional reading is what they should follow in the implementation process. This

should be done as a way of giving congress the benefit of the doubt that what they intended to pass was a constitutional law.

The president should first work with congress to make the legislation as clear as possible and to ensure that the legislation does not include provisions that the president believes are unconstitutional. If the problems with the legislation have not been resolved by the time the bill reaches the president's desk, he should use a signing statement as described above. When the statement is issued, the president should make sure to announce it to congress and the public to avoid the problem Cooper described as hiding in plain sight (Cooper 2005)

In the second situation the president must decide what to do when he truly believes that provisions in a bill are unconstitutional. The preferred position should be to veto the bill following the procedure that is detailed in the presentment clause. But, because of the omnibus nature of legislation today and consequences that will affect the government and the people of the United States if certain bills are vetoed, the president may believe that vetoing a bill presented to him is not a realistic option.

Consider the case of President Clinton in 1996. Had he vetoed the annual military appropriations bill because he believed the provision requiring the discharge of service members with HIV was unconstitutional, the consequence would have been a military shutdown. This would have been on the heels of two government shutdowns that occurred as a result of budget battles (Kinkopf 2006). In that situation, President Clinton likely believed that vetoing the bill would be political suicide, and also would cause

extreme hardship to military families and compromise the defense of the nation. As a result, instead of vetoing the bill, he issued a signing statement expressing his belief that the provision requiring the discharge of service members with HIV was unconstitutional. Nevertheless, he directed the administrative agency to enforce the law as written (Kinkopf 2006).

This course of action is what is recommended here. By shedding light on what the president believes is an unconstitutional provision, congress has the opportunity to make changes and the president is not violating the separation of powers doctrine by either rewriting legislation or using some form of judicial review. After issuing such a statement, the president should work with congress to repeal the offending provisions. If those provisions are not repealed, the president should refuse to defend the law in the face of legal challenges and should assist potential challengers in whatever way is appropriate.

If the president were to do otherwise and instruct the executive branch not to enforce the potentially unconstitutional provisions, that action would violate the separation of powers doctrine and would eliminate the opportunity for a plaintiff to bring a case challenging the law. This results because the provision would not be enacted as written but according to the president's edited version. The constitutionality of the provisions would remain unclear because they would never be subject to judicial review.

WHAT IF THE PRESIDENT DOESN'T DO THIS?

It's a Question of Standing/Review

The procedure outlined above could be used by the Court if a signing statement is challenged in a case brought before them. If the president didn't follow the procedure, then his use of the statement was unconstitutional, the changes he made to the law should be stricken, and the agency should ignore the statement and enact the law as written. The question then becomes who can challenge it. The fact that as of yet there has not been a direct challenge to a signing statement in court is an issue of standing. Congressional standing has been denied. For a case to be brought, it will require an educated plaintiff who suffers a loss because the bill was changed by the signing statement. While more people are taking notice of signing statements than in the past, this educated plaintiff has not yet materialized.

The ABA has recommended that congress draft legislation creating a process that will allow judicial review of signing statements. While this may be a good idea, it is difficult to envision what that process would be and attempts by congress to pass such legislation have failed so far (Halstead 2007: 27). In addition, particularly cynical critics believe that such legislation likely would fail to reach its objective because it to would be vulnerable to an unconstitutional signing statement. If the right plaintiff does come forward, the test offered here could be used to determine whether the president's use of the signing statement was constitutional or not.

CHAPTER 5. CONCLUSION

Are signing statements worthy of a panic stricken society proclaiming that the sky is falling? Probably not. But, no one really wants a bunch of acorns falling on their heads either. The tool has been around for centuries but is rarely made public and even less often understood. The type of statements that have the most potential for violating the separation of powers doctrine (substantive signing statements whether interpretive or constitutional) are also the type that are being used more and more. The increase in the use and scope of these statements began with President Reagan, reached new levels during the Bush II administration and, while it may have slowed down under President Obama, it certainly hasn't stopped. Bringing attention to what signing statements are and how they are used, therefore, is an ongoing and relevant topic for political science research.

Signing statements are unique because they can be used by a president to take unilateral action and have the final word on a bill. Yet, they have evaded review by the courts so far. Therefore, they continue to hide in plain sight. They are often compared to other tools of the Presidency such as the executive order and the line-item veto. Those tools can be manipulated when the president's motives are not genuine. The key difference between the signing statement and these other tools is that the other tools are subject to checks and balances. The line-item veto, which was ultimately found to be unconstitutional, was subject to congressional override. Policies created in an executive order can be overturned by a new act of congress on the matter. In the case of the signing statement, the president is really offered the last word.

Critics of the use of substantive signing statements often rely on the presentment clause as a reason they should not be used. The clause offers a clear procedure to follow when presented with a bill and including a signing statement is not a part of the procedure. But, that is true whether the statement is used to make substantive changes to the bill or not. The fact that no authors assert that rhetorical statements should never be issued is evidence that there is more than a presentment problem going on here.

The real issue arises when the president uses a signing statement to change a law. He does this through interpretation or by asserting that certain provisions are unconstitutional and directing the executive branch not to execute the law as written. This direction to the executive branch is the critical factor. It takes the statement from a tool used to express the president's opinion to a tool that allows the president to act as executive, legislator and judge all at the same time. The plan for presidential action outlined above gives the Court a test to use when evaluating the use of signing statements and gives the president a way to keep his use of the signing statement within constitutional boundaries.

The challenge that remains is standing. While the ability to bring a challenge to an unconstitutional signing statement is tricky, it is not impossible. One solution is extending standing to challenge signing statements to congress. Absent that, we are left with finding a plaintiff who has suffered an injury due to the enforcement of an unconstitutional signing statement. In either case, resolution by the Supreme Court is needed to finally settle the

issue and draw the right boundaries. That time, perhaps we will no longer get hit by acorns.

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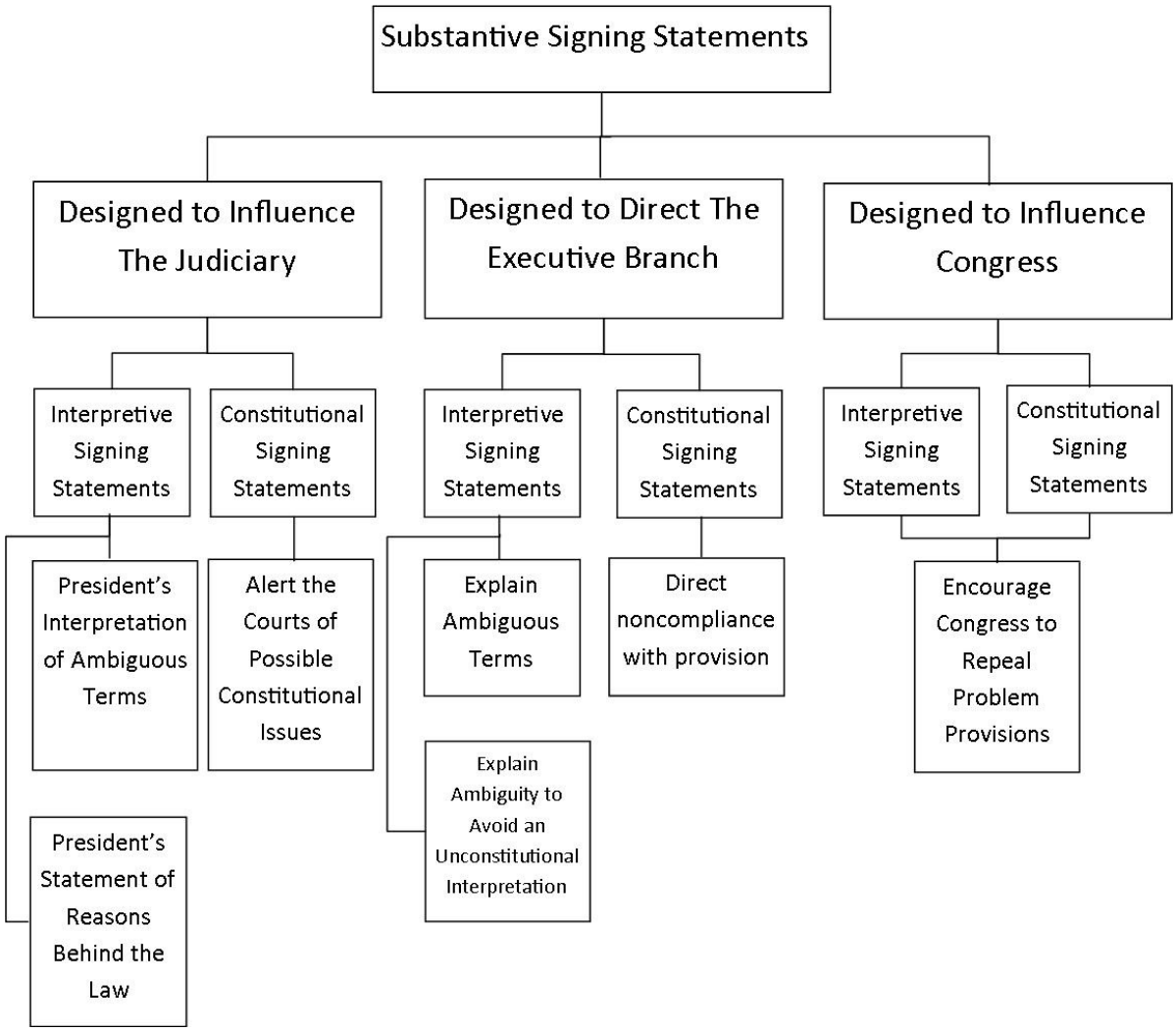
APPENDIX 1

President	Constitutional and Interpretive Combined	Rhetorical	Total
Washington	0	0	0
Adams	0	0	0
Jefferson	0	0	0
Madison	0	0	0
Monroe	0	0	2
Adams JQ	0	0	0
Jackson	1	1	2
Van Buren	0	0	0
Harrison	0	0	0
Tyler	1	0	1
Polk	0	0	1
Taylor	0	0	0
Fillmore	0	0	0
Pierce	1	0	1
Buchanan	1	0	1
Lincoln	1	3	4
Johnson A	3	0	3
Grant	1	5	6
Hayes	0	0	0
Garfield	0	0	0
Arthur	1	0	5
Cleveland	1	0	4
Harrison	0	0	0
Cleveland	0	0	0
McKinley	0	0	0
Roosevelt T	0	1	1
Taft	1	1	2
Wilson	1	6	7
Harding	0	0	0
Coolidge	0	0	0
Hoover	1	11	12
Roosevelt F	3	48	51
Truman	10	108	118
Eisenhower	16	129	145

Kennedy	1	79	80
Johnson L	13	289	302
Nixon	8	181	189
Ford	10	120	130
Carter	32	215	247
Regan	86	164	250
Bush I	107	121	228
Clinton	70	311	381
Bush II	126	35	161
Obama	9	8	17

The data in the table above was compiled from multiple sources. The numbers for President Washington through President Carter were originally included in Christopher Kelley's 2002 paper "'Faithfully Executing' and 'Taking Care'---The Unitary Executive and the Presidential Signing Statement." The numbers for President Reagan through President Bush II were taken from the CRS report for congress, Presidential Signing Statements: Constitutional and Institutional Implications. However, that report only included Bush II's first 152 signing statements. The data for his final 9 signing statements and all of President Obama's signing statements is available at www.coherentbabble.com.

APPENDIX 2


Substantive Signing Statements
Designed to Influence The Judiciary
Designed to Direct The Executive Branch
Designed to Influence Congress
Interpretive Signing Statements
Constitutional Signing Statements
Interpretive Signing Statements
Constitutional Signing Statements
Interpretive Signing Statements
Constitutional Signing Statements
President's Interpretation of Ambiguous Terms
Alert the Courts of Possible Constitutional Issues
Explain Ambiguous Terms
Direct noncompliance with provision
Encourage Congress to Repeal Problem Provisions
President's Statement of Reasons Behind the Law
Explain Ambiguity to Avoid an Unconstitutional Interpretation

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