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### Presidential Signing Statements: Expanding the Assessment of Include Policy as well as Constitutional Implications

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# INTRODUCTION | I

Presidents have been issuing signing statements—in which they comment upon aspects of legislation they have signed into law—since the Monroe administration. Until recently, the practice went largely unnoticed. That changed with President George W. Bush, who thus far has issued signing statements relating to more than 1,000 statutory provisions, more than all prior presidents combined.<sup>1</sup> He has done so as part of a broad strategy designed to expand his authority generally, and specifically to preserve his ability to challenge Congress on controversial issues such as interrogation techniques. The sheer volume, as well as the context and tone, of this administration's use of signing statements has brought this practice into the public spotlight, and generated a great deal of criticism. The criticism has been largely legal in nature. That is, it has been rooted primarily in legal/constitutional arguments that signing statements in which a president declares an interpretation of legislation contrary to that of Congress, or his view that aspects of legislation are unconstitutional and therefore should not be enforced, violate the constitutional provisions establishing the separation of powers between the judicial and executive branches. This paper briefly addresses these legal arguments, and concludes that, when measured

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<sup>1</sup> T.J. Halstead, Presidential Signing Statements: Constitutional and Institutional Implications (Washington DC: Congressional Research Service, 2007) 9-12. 16 Dec. 2007 <<http://www.coherentbabble.com/signingstatements/CRS/RL33667-9172007.pdf>>.

against established legal principles, it is evident that signing statements do not violate the Constitution.

The principal focus of this paper is on a second, non-legal analytical dimension: the efficacy of signing statements as policy. It analyzes signing statements, as one commentator has put it, as a method for political—as opposed to legal—constitutional construction.<sup>2</sup> It concludes that the use of signing statements by the current administration to advance its construction of the president’s constitutional authority has not been a successful policy. This is because the administration’s policy has lacked the characteristics necessary for its constitutional construction to succeed in the long term, while at the same time it has produced serious and disruptive political issues that have hampered the administration in advancing its agenda.

A two-dimensional assessment of signing statements—both as policy and in terms of their constitutionality—provides a superior analytical tool. The widespread criticism of signing statements is not satisfactorily answered or explained by the traditional legal analysis—like trying to fit a round peg into a square hole. However, viewing them as a political policy strategy provides a broader and more complete perspective.

This two-dimensional approach can be illustrated as follows:

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<sup>2</sup> Keith E. Whittington, Constitutional Construction: Divided Powers and Constitutional Meaning (Cambridge: Harvard UP, 1999).

## THE CONSTITUTIONALITY-POLICY MODEL

		<b>CONSTITUTIONALITY</b>	
		<b>Constitutional</b>	<b>Unconstitutional</b>
<b>POLICY</b>	<b>Good Policy</b>	1	2
	<b>Bad Policy</b>	3	4

Conventional wisdom has confined policy analysis to squares one and four of the diagram. This has created a false dichotomy that associates good policy with constitutionality and bad policy with unconstitutionality. Some examples of issues that have been subject to this dichotomy are racial profiling, affirmative action, strip searches and drug testing. At some point in time, each of these policies have been challenged as violations of the Constitution. In the 2003 Supreme Court case *Gratz v. Bollinger*, the Court found that the University of Michigan’s admission system gave too much weight to race and ethnicity.<sup>3</sup> While affirmative action as a policy is a feasible and effective way of increasing diversity – a well intentioned policy – it was heavily scrutinized as a violation of the equal protection clause in the 14<sup>th</sup> Amendment. Policy analysis is not a “black and white” issue as legal arguments for many of these issues would suggest. The unduly narrow view used in traditional analysis underutilizes available analytical tools and unnecessarily limits the resulting conclusions. Making cells two and three available remedies this limitation, and enables greater analytical clarity.

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<sup>3</sup> *Gratz v. Bollinger*, no. 02-516, Supreme Ct of the US, 23 June 2003.

Utilization of the entire diagram allows for a more complete perspective of policies. While policy and constitutionality are related, they are analytically distinct. A policy is judged based upon its effectiveness, feasibility and a cost-benefit analysis. The constitutionality of a policy is based upon application of constitutional principles as prescribed by case law. A policy can offer benefits that outweigh the costs to implement, be effective in addressing its goals, be totally feasible and yet never be employed because it is deemed unconstitutional. Examining constitutionality and policy separately creates the opportunity to modify a beneficial but unconstitutional policy so that it can be implemented without being termed illegal. In turn, using the policy-constitutionality diagram can help prevent the implementation of a constitutional, but bad policy.

The false choice that the conventional dichotomy creates is the idea that the effectiveness of a policy must correlate with constitutional legality. As seen with signing statements, this dilutes the underlying issues and restricts the assessment of policies. Application of this two-dimensional construct to signing statements provides a concrete illustration that a policy can fall within the parameters of the Constitution and still be a bad policy. By framing signing statements as policy, it becomes clear that the underlying issue is how they work as policy. And many of the legal arguments being made for or against signing statements are, in fact, founded on the policy debates.

# **PART I**

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The Constitutionality of Signing Statements

**SETTING THE STAGE:**  
***Signing statements against the backdrop  
of separation of powers***

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**II**

The argument that presidential signing statements are unconstitutional is predicated upon the proposition that the Constitution allocates the legislative function entirely to Congress, and that by stating his interpretation or intention not to enforce certain aspects of legislation, a president violates that allocation and improperly usurps a portion of the legislative function to the executive. In order to properly assess this proposition, it necessary to understand the background, purpose and effect of both signing statements and the separation of powers principles against which they are to be judged.

**- Evolution of Signing Statements as a Political Tool -**

***A. Origins and different uses of signing statements.***

The United States Constitution assigns to Congress the authority of passing legislation. The president, as head of the executive branch, is charged with enforcing legislation once passed. For legislation passed by Congress to become effective, the president must sign it. Since at least 1830, presidents have on occasion accompanied their execution of legislation with statements commenting on or calling into question the validity of one or more provisions of the legislation, and/or their intent to enforce such provisions. The first documented presidential signing statement dates back to the Monroe administration, and since that time approximately 2,200 signing statements have

been issued, the vast majority of them since the Reagan administration.<sup>4</sup> For most of our history, this practice did not raise concerns about whether it violated the Constitution or the principle of separation of powers upon which it was based. However, use of these presidential signing statements increased substantially during the Reagan administration, and continued to be used liberally by Presidents George H. W. Bush and Bill Clinton. President George W. Bush has elevated the use of the signing statements to a completely new level, challenging over 1,000 statutes in 118 laws during his first seven years, far more than any of his predecessors.<sup>5</sup>

Not all signing statements are controversial; it depends on the context and intent of their use. The types of signing statements that have fallen under scrutiny are those that challenge the constitutionality of signed bills and arguably circumvent the presentment clause of the Constitution. Signing statements have been organized into three different categories by political scientist Christopher Kelley and former Assistant Attorney General Walter Dellinger: constitutional signing statements, political signing statements and rhetorical signing statements. Each type of signing statement has a different effect on the bill to which it is attached. While these three types of signing statements have different policy

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<sup>4</sup> Christopher S. Kelley "The Unitary Executive and the Presidential Signing Statement" Diss. Miami Univ., 2003. 4 Nov. 2007 <[http://www.ohiolink.edu/etd/s\\_end-pdf.cgi/Kelley%20Christopher%20S .pdf?miami1057716977](http://www.ohiolink.edu/etd/s_end-pdf.cgi/Kelley%20Christopher%20S.pdf?miami1057716977)>.

<sup>5</sup> T.J. Halstead, Presidential Signing Statements: Constitutional and Institutional Implications (Washington DC: Congressional Research Service, 2007) 9-12. 16 Dec. 2007 <<http://www.coherentbabble.com /signingstatements/CRS/RL33667-9172007.pdf>>.



effects, none of them have an immediate impact on the legislation to which they are attached.

Rhetorical signing statements are used to convey the likely effects of a bill's adoption on the public and certain constituencies.<sup>6</sup> The president plays an important role in the legislative process, and much of a president's success depends upon his ability to get legislation passed consistent with his political agenda. Thus, it is often important that the president portray himself positively with respect to legislation that he signs. Rhetorical signing statements have become a part of presidential strategy to relate to the public. As a national figurehead, the president is often held responsible by the public for many of the nation's problems. Presidents have tried to mitigate this association by using political tools such as signing statements to positively affect public opinion. This use of signing statements has no real negative consequences, and was the most common use of signing statements before the 1980s.

Prior to the Reagan administration, signing statements were commonly used as a political device by the president. Political signing statements are used to direct officers in the executive branch on how to interpret and administer a law signed by the president.<sup>7</sup> This function relates to the fact that the executive branch has grown dramatically over time, making it increasingly difficult for a president to ensure that his constituents in the executive branch are all 'on the

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<sup>6</sup> Walter Dellinger, The Legal Significance of Presidential Signing Statements (United States: Department of Justice, 3 Nov. 1993) 12 Oct. 2007 <<http://www.usdoj.gov/olc/signing.htm>>.

<sup>7</sup> Ibid.

same page' when it comes to executing legislation. As James Pfiffner, an expert on the American presidency, has observed:

*In 1933, Franklin Roosevelt had only a few aides to help him draft and shepherd into law his famous '100 days' legislative agenda. In 2007, there were more than 400 people in the White House Office, 1,850 in the Executive Office of the President (which includes the White House Office), with a total of almost 5,000 serving the president and the White House more broadly. In the 1930s, there were fewer than 150 presidential appointees to manage the executive branch. In 2007, there were more than 600 (plus 3,000 more political appointees). In the 1930s and 1940s, the aides to the president were most often generalists. In the 1990s, the presidency comprised a plethora of complex bureaucracies filled with specialist.<sup>8</sup>*

In this context, signing statements are useful tools for organizing a large and complex institution.

Third, signing statements have been used by the president to assert his opinion that certain sections of a bill being signed are unconstitutional.<sup>9</sup> Use of such 'constitutional signing statements' is a controversial practice because of the ambiguity of the language in Article II of the Constitution and due to differing

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<sup>8</sup> James P. Pfiffner, The Modern Presidency 5th ed. (United States: Thomson Wadsworth, 2005) Viii.

<sup>9</sup> Ibid.

interpretations of the separation of powers principle. Article I, Section 7 – also known as the presentment clause – provides a structured framework within which a bill is supposed to become law, and the separate institutions’ role in that process. Because signing statements are not part of this process (they are in fact not mentioned in the Constitution at all), it is debatable as to whether or not constitutional signing statements circumvent the presentment clause – impeding the legislative process – or if they are a modern tool used by the president to “faithfully execute” the laws. Historically, this type of signing statement was the least used. However, the use of constitutional signing statements has increased exponentially since the Reagan administration.

This paper analyzes both the legal and policy implications of the constitutional type of presidential signing statements. It assesses the application of separation of powers principles from how they were envisioned by the Constitution’s framers, to how they have been applied and interpreted through history. It then reviews some of the legal and practical barriers to resolving issues surrounding a particular signing statement, as well as the legislative provisions it challenges. Finally, it reviews the policy implications of this practice and the political difficulties it creates. It concludes that signing statements likely do not violate the constitution, but more importantly, they create political problems that render them unsupportable as a matter of public policy.

***B. The signing statement controversy takes center stage: are they a legitimate exercise of executive power or an improper usurpation of legislative or judicial power?***

The proliferation of constitutional signing statements during the George W. Bush administration has drawn attention to, and fanned the flames of controversy around this practice. At first, the issue was limited primarily to legal and political circles. Beginning with the Reagan administration in the 1980s, the Department of Justice issued a series of memoranda defending the limited use of signing statements as an appropriate use of executive power.<sup>10</sup> The practice continued along a similar path through the Clinton and first Bush administrations.

The use of signing statements changed in magnitude and philosophy with the second Bush administration, which dramatically increased their use in what many viewed as a frontal assault on the Congress' legislative prerogative. This change caught the eye of *Boston Globe* columnist Charlie Savage, who published a series of Pulitzer Prize winning articles which criticized this practice as an example of an overreaching, "imperialistic" presidency. Savage observed that:

*Legal scholars say the scope and aggression of  
Bush's assertions that he can bypass laws represent*

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<sup>10</sup> See, Steve Calabresi, memorandum for the Attorney General on Presidential Signing Statements, 23 Aug. 1985. 23 Sept. 2007 <<http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box3-SG-ChronologicalFile.pdf>>.

Walter Dellinger, memo to the Department of Justice, The Legal Significance of Presidential Signing Statements, 3 Nov. 1993. 12 Oct. 2007 <<http://www.usdoj.gov/olc/signing.htm>>.

Samuel Alito Jr., memo to the Litigation Strategy Working Group, U.S. Department of Justice Office of Legal Counsel, Washington, DC. 5 Feb. 1986. 14 April 2007 <<http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf>>.

*a concerted effort to expand his power at the expense of Congress, upsetting the balance between the branches of government. The Constitution is clear in assigning to Congress the power to write laws and to the president a duty “to take care that the laws be faithfully executed.” Bush, however, has repeatedly declared that he does not need to execute a law he believes is unconstitutional.*

Savage’s articles transformed President Bush’s use of signing statements into a national issue, and broadened the debate beyond inner political and legal circles to the public at large. As a result, not only were the views of Congress and the Executive Branch widely publicized, but many other views were aired. Editors of major newspapers addressed the issue on their op-ed pages, readers responded, and articles and papers on the subject appeared across a broad spectrum of publications.<sup>11</sup>

### **- Separation of Powers: A Bedrock Constitutional Principle -**

The basic premise underlying the principle of separation of powers is easily stated. Forged in the kiln of the revolutionary movements of the eighteenth century and pounded into shape by the philosophers of the day – such as

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<sup>11</sup> See, “Veto? Who Needs a Veto?,” Editorial, New York Times 5 May 2006 <<http://www.nytimes.com/2006/05/05/opinion/05fril.html?th&emc=th>>

“A White House power grab,” Editorial, San Francisco Chronicle 12 June 2006 <<http://sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2006/06/12/EDGMSJBOEJ1.DTL>>

“Signing statements an abuse of power,” Editorial, Asbury Park Press 6 June 2006, <<http://www.app.com/apps/pbcs.dll/article?AID=/20060606/OPINION/606060313/1032>>

Montesquieu – the concept was a cornerstone of the freedom movement whose goal was to prevent too much power from accumulating in the hands of too few. To do so, the legitimate powers of the government were to be separated into the different branches of government, with each providing a check against the others gaining too much power.

This structure was adopted by the authors of the Constitution as a foundational principle upon which the structure of our government was to be anchored. Recently divorced from English rule, the founders were acutely aware of the dangers of sovereign rule, and were determined not to re-create it in the form of an overly strong executive. At the same time, however, they recognized the need for a functional central government with sufficient authority to meet the young country's needs. Indeed, there was little disagreement that the Articles of Confederation, to be replaced by the Constitution, were wholly inadequate on this score. These competing concerns were advanced, on the one hand, by the Federalist or Hamiltonian camp that argued for a strong central government and president, and on the other by the Jeffersonians who did not want a dominant president—or central, federal government, for that matter-- and advocated for a decentralized government with as much power as possible residing in the states.

Not surprisingly, these principles figured prominently in the debates leading up to the creation of the Constitution. In *The Federalist No. 51*, James Madison noted that the separation of powers is “essential to the preservation of liberty.”<sup>12</sup> Madison further observed in *Federalist No.48* that the different

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<sup>12</sup> James Madison, *Federalist No. 51*: “The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments.”

branches must have control over one another in order to be “separate and distinct.”<sup>13</sup> He very succinctly described how critical separation of powers was to the young democracy: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands...may justly be pronounced the very definition of tyranny.”<sup>14</sup> In the end, the importance of having a strong national figurehead trumped the fear of putting too much power in the hands of one person. The critical safeguard against a usurpation of power by the president was the separate powers entrusted to the judicial and legislative branches, and the system of checks and balances that resulted.

In the end, all agreed upon a system of government that divided the key functions of government among the executive, legislative and judicial branches. The debate about how the system worked did not, however, end with the ratification of the Constitution. Indeed, it is one of the great ironies of our political history that not even those men who had so carefully crafted our Constitution around the principle of separation of powers agreed on how that principle should be applied in practice. Throughout the late eighteenth and early

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*Independent Journal*. 6 February 1788. 17 December 2007 <  
<http://www.constitution.org/fed/federa51.htm>>

<sup>13</sup> James Madison. Federalist No. 48: “These Departments Should Not Be So Far Separated as to Have No Constitutional Control Over Each Other.” *New York Packet*. 1 February 1788. 17 December 2007 <  
<http://www.constitution.org/fed/federa48.htm>>

<sup>14</sup> James Madison. Federalist No. 47: “The Particular Structure of the New Government and the Distribution of Power Among Its Different Parts.” *New York Packet*. 30 January 1788. 9 January 2008 <  
<http://www.constitution.org/fed/federa47.htm>>

nineteenth centuries, this issue was the subject of heated partisan debate between the Federalists and the Republicans.

Nor was there agreement on how disputes over constitutional interpretation should be resolved. It is commonly understood today that the courts are the arbiters of the Constitution. But that was not the case immediately after the Constitution was ratified. Indeed, it was commonly thought that constitutional questions were far too fundamental to be entrusted to federal judges who were not answerable to the people because they were appointed by the president and had life tenure, and who for the most part were partisan appointees of the party in power. This issue was put to rest in 1803 by Chief Justice John Marshall's opinion in *Marbury v. Madison*. The backdrop of *Marbury* was the bitter partisan divide following Jefferson's defeat of Adams in 1800, and the actions of the lame-duck Federalists in passing the Judiciary Act and packing the judiciary with last minute Federalist appointments. In addressing these issues, Marshall determined that while the appointments were consistent with the Judiciary Act, the Judiciary Act itself contravened the Constitution, and therefore could not be enforced. In one fell swoop, Marshall declared the supremacy of the Constitution over any other law or act, and stated that it was the role of the judiciary alone to interpret the Constitution and determine when it was being infringed. These propositions, so obvious today, were not at all obvious in the years following the Constitution's birth.

While many disagreed with *Marbury*, its essential rulings never came under serious threat. Subsequent Supreme Court decisions concerning separation



of powers confirmed and strengthened the judiciary's role as the final arbiter of disputes over constitutional meaning. As discussed below, however, many argue that there remains an important *political* role in constitutional construction, thus perpetuating (at a reduced level) the original debate.

### III

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## **SIGNING STATEMENTS & THE LAW:**

### ***Signing Statements Do Not Violate The Constitution***

Following the Savage articles, the American Bar Association (“ABA”) decided to enter the debate. While it is the largest and most influential national organization of attorneys, the ABA has no formal, official role in resolving constitutional issues. Nonetheless, its views on important legal and constitutional issues are quite influential. For example, the ABA historically rates nominees to the Supreme Court and other important legal positions in terms of their qualifications, capabilities and experience.

In April of 2006, then ABA President Michael Greco established a non-partisan task force comprised of judges, law professors and attorneys to study the issue and offer its conclusions and recommendations. The Task Force issued its report in August 2006, in which it unanimously and unequivocally concluded that signing statements were unconstitutional. Specifically, they voted to

*Oppose, as contrary to the rule of law and our constitutional system of separation of powers, a President’s issuance of signing statements to claim the authority or state the intention to disregard or decline to enforce all or part of a law he has signed, or to interpret such a law in a manner inconsistent with the clear intent of Congress.*<sup>15</sup>

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<sup>15</sup> “American Bar Association, Task Force on Presidential Signing Statements and the Separation of Powers Doctrine, Report with Recommendations,” 5 (2006), <[http://www.abanet.org/op/signingstatements/aba\\_final\\_signing\\_statements\\_recommendation-report\\_7-24-06.pdf](http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf)>

Based upon this conclusion, the Task Force passed several resolutions, including resolutions urging:

- *The President, if he believes that any provision of a bill pending before Congress would be unconstitutional if enacted to communicate such concerns to Congress prior to passage;*
- *The President to confine any signing statements to his views regarding the meaning, purpose and significance of bills presented by Congress, and that if he believes that all or part of a bill is unconstitutional, to veto the bill in accordance with Article I, § 7 of the Constitution of the United States, which directs him to approve or disapprove each bill in its entirety;*
- *Congress to enact legislation requiring the President promptly to submit to Congress an official copy of all signing statements he issues, and in any instance in which he claims the authority, or states the intention, to disregard or decline to enforce all or part of a law he has signed, or to interpret such a law in a manner inconsistent with the clear intent of Congress, to submit to Congress a report setting forth in full the reasons and legal basis for the statement; and further requiring that all such submissions be available in a publicly accessible database; and*
- *Congress to enact legislation enabling the President, Congress, or other entities or individuals, to seek judicial review, to the extent*

*constitutionally permissible, in any instance in which the President claims the authority, or states the intention, to disregard or decline to enforce all or part of a law he has signed, or interprets such a law in a manner inconsistent with the clear intent of Congress, and urges Congress and the President to support a judicial resolution of the President's claim or intention.*<sup>16</sup>

Each of these recommendations was intended to obviate the political and legal tensions created by signing statements. However, they spring from a faulty premise: that a president unconstitutionally usurps legislative authority from the legislative branch when he asserts his belief that aspects of the legislation are unconstitutional, and declares his intention not to enforce aspects of such legislation. In fact, signing statements do not, in and of themselves, violate the Constitution, and to hold otherwise violates longstanding principles of constitutional interpretation, with potentially serious consequences. There are four bases for this conclusion, each of which is addressed, in turn, below.

**1. Signing statements do not exceed the President's constitutional authority, or usurp authority delegated to the other two branches.**

Any argument that an action by one of the three branches of government violates the separation of powers must, by definition, be based upon a showing that the action exceeds the express delegation of authority under the Constitution

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<sup>16</sup> Ibid.

and/or encroaches on the authority delegated to one of the other branches.

Signing statements do neither.

In arguing that signing statements exceed the President's designated authority, the Task Force first pointed to the limited role of the President in the legislative process. Under Article I, § 7, he must either sign or veto a bill that is passed by Congress and submitted to him under the Presentment Clause. The Task Force then argued that the president exceeds his authority when he signs a bill but indicates in a signing statement his position that one or more aspects of the bill are unconstitutional, or that he interprets one or more provisions differently than Congress. Finally, the Task Force concluded that by so doing, the president violates his constitutional duty to faithfully execute the law.<sup>17</sup>

These arguments ring hollow. As a threshold matter, it is broadly accepted that while the Constitution was designed around the separation of powers principle, that separation is not, and was never intended to be, absolute and complete. One constitutional scholar has described the relationship as more of a 'mingling' than a separation:

*Although it is a misnomer as a matter of intellectual history, "separation of powers" is often used as a shorthand phrase for the complex system of checks and balances created by the Constitution—checks and balances that in fact mingle the different types of governmental power. To be sure, the Constitution provides that Congress is given "[a]ll the legislative powers herein granted," that "the*

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<sup>17</sup> Ibid.

*Executive power” is vested in the President, and that “the Judicial Power of the United States” is vested in the Supreme Court and the lower courts created by Congress. But the Constitution does not itself define “legislative,” “executive,” or “judicial” powers, and the functions assigned to each branch belie any suggestion that the Constitution establishes a strict separation.<sup>18</sup>*

With respect to the legislative power, while primary responsibility for legislation falls to Congress, it is universally recognized that the president does have a constitutional role in legislation. That role begins, at a minimum, with the power to sign or veto legislation under the Presentment Clause, and many view it as extending into a much broader range of legislative roles. One commentator identifies no fewer than fifteen areas in which the Constitution arguably confers legislative authority on the President.<sup>19</sup> However enumerated, it is clear that the President has *some* role in legislation, and therefore the premise that signing statements are unconstitutional *because* they involve legislation cannot withstand scrutiny.

Moreover, the argument that the President must either veto a bill in its entirety or sign it and then execute each and every portion of it with equal rigor is unpersuasive. The conditions under which the President should either sign or veto

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<sup>18</sup> Laurence H. Tribe, American Constitutional Law Third ed. Vol. 1. (New York: West Publishing Company, 1999) 137.

<sup>19</sup> Theodore Olson, “Presidential Lawmaking Powers: Vetoes, Line Item Vetoes, Signing Statements, Executive Orders, and Delegations of Rulemaking Authority,” Washington University Law Quarterly (1990).

a bill are not defined in the Constitution. Nowhere does it say or suggest that he must veto a bill he believes presents constitutional issues, or that by signing a bill he waives such concerns. And the view that a president must enforce a statutory provision he believes to be unconstitutional is difficult to justify as a constitutional mandate. But these arguments necessarily underlie the Task Force's position, which would eliminate a president's ability to reserve his constitutional concerns for a later time, and require him to veto an entire bill if he had potential concerns about some aspect of the bill. Not only is this mandate nowhere to be found in the Constitution, but it runs directly counter to the president's obligation to uphold the Constitution. It could also very well lead to an unworkable legislative process, as the President would feel compelled to veto bills with much greater frequency to protect his position, even if it is highly unlikely that his concerns will come to pass for any single piece of legislation. This would be particularly unworkable in the realities of modern legislation, which are often in the form of omnibus bills containing thousands of provisions.

Similarly, the President's expressed concerns over the constitutionality of a provision, and a stated intention to interpret it in a certain way and/or not to execute it under certain circumstances, create only the *possibility* of a conflict in the future. Indeed, in comparison to the number of signing statements issued, only a small portion have actually resulted in a dispute. A stated difference of opinion that may, at some future time and under circumstances that may or may not come to pass, lead to a refusal by the president to execute the law as intended by Congress simply is not a violation of separation of powers.

Finally, signing statements do not usurp the legislative function from Congress. They do not interfere with the ability of Congress to pass legislation and present it to the president, or to override his veto if he should exercise it. While it is understandable that Congress does not like the practice and the president's broad use of it, in fact it has had minimal impact in the execution of its legislation by the president. It is well recognized that each branch has a legitimate interest in protecting its authority and arguing for an expanded interpretation of its authority relative to the other branches. The branches are unlikely to ever reach agreement on their respective powers. To require that all such disputes be resolved finally through the veto process would likely bring the legislative process to a standstill. And while it is true that once the president has acted it may be difficult to resolve the dispute, as discussed below an actual controversy can be resolved in the courts.

## **2. Signing statements have no legal effect.**

Signing statements are not law, and do not embody any action by the president at the time they are made. To the extent they are an effort to influence judicial construction of statutes, they have been woefully unsuccessful. In *Hamdan v Rumsfeld* (2006), the Court held that presidential signing statements containing the president's proposed interpretation of a statute are virtually irrelevant when it comes to determining the intent behind a statute.<sup>20</sup>

It is difficult to argue that an action by one of the branches that has no effect at the time it was taken somehow infringes upon the authority of one of the

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<sup>20</sup> *Hamdan V. Rumsfeld*. No. 05-184. Supreme Court of the United States. 29 June 2006. 9 Jan. 2008 <<http://www.supremecourtus.gov/opinions/05pdf/05-184.pdf>>.



other branches. If and when the president decides to not enforce a statutory provision, or to apply it in a manner contrary to Congress' intent, then—and only then—is there a basis for challenge.

### **3. Signing statements are not justiciable at the time they are issued.**

Article III of the Constitution limits the power of the judiciary to decide only actual “cases or controversies.” This provision requires that someone seeking judicial review of government action must be able to show that they have suffered some form of concrete harm. Closely related to the ‘case or controversy’ requirement are other requirements that relate to whether or not an issue is capable of being adjudicated. They include standing, requiring that the party bringing suit personally be in a position to bring suit; ripeness, requiring that the issue to be adjudicated has actually occurred; and mootness, requiring that a controversy still be alive at the time of adjudication. Together, these principles embody the concept of justiciability.

The Supreme Court addressed the justiciability issue in the context of separation of powers between the executive and legislative branches in *Raines v. Byrd*. After voting against the Line Item Veto Act giving the President the power to selectively veto specific portions of a spending bill, several members of Congress filed suit against members of the executive branch charged with enforcing the Act. They claimed that granting the President the ability to veto specific portions of a bill, rather than the entire bill as provided in the Constitution, diluted their legislative authority under Article I. The Supreme Court dismissed their case, ruling that the members had failed to identify the sort of particularized,

concrete harm to themselves necessary to present a ‘case or controversy’ as required by Article III.

The same barrier prevents Congress from challenging signing statements in the courts. The ABA Task Force, and others critical of signing statements, point to this justiciability problem in support of their argument that signing statements violate separation of powers principles. But this is a non-sequitor. The fact that Congress cannot challenge signing statements under Article III has nothing to do with whether they encroach upon Congress’ Article I authority.

#### **- Final Statement on Constitutionality -**

Numerous complex legal arguments can be made for or against the constitutionality of signing statements. Because the focus of this paper is primarily on the policy rather than the legality of signing statements, the arguments above assume that the balance of all the legal debates suggest signing statements are legitimate under the Constitution. Under this condition, the next section of this paper will examine how signing statements are an example of a bad policy despite being constitutional.

## **PART II**

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Presidential Signing Statements as Policy

## THE MODERN USE OF SIGNING STATEMENTS

### *The Utilization of Signing Statements to Expand Presidential Power*

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## IV

The conclusion that the Bush administration's broad use of signing statements is not unconstitutional when made does not end the controversy that surrounds them. They still arguably represent a unilateral power grab by the executive branch at the expense of Congress, as Savage characterizes them in his articles.<sup>21</sup> They continue to foster resentment in Congress and a seriously reduced willingness to work cooperatively with the President. And while the ABA overreached in its conclusion with respect to the constitutionality of signing statements, its analysis, conclusions and recommendations reflect a widespread belief that the administration's actions are inappropriate. In short, while signing statements may not violate the letter of the Constitution and the separation of powers principles upon which it was built, there remains a strong argument that they violate the spirit of these principles, and have a corrosive effect on the delicate balance that the drafters so carefully crafted.

#### **A. Political Construction of the Constitution and Resulting Policy.**

From the very moment the Constitution was ratified, debates have raged over the respective authority, and limits thereon, of the three branches. This is particularly true as between the executive and legislative branches, reflecting a continuation of the original constitutional debate over the need for a strong

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<sup>21</sup> See, Charlie Savage's series of articles regarding signing statements available from [http://www.boston.com/news/specials/savage\\_signing\\_statements/](http://www.boston.com/news/specials/savage_signing_statements/)

executive, contrasted with the importance of a strong legislative body to keep the executive in check. Indeed, it has become an accepted, and expected, role of each branch to take an expansive view of its authority, and defend that view as against the other branches. In his book *Constitutional Construction: Divided Powers and Constitutional Meaning*, Keith B. Whittington examines this dynamic not as a marginal product of partisan politics, but rather as an integral component of constitutional construction and the evolution thereof. Whittington posits that the traditional analysis of constitutional construction in strictly legal terms misses a significant aspect of how our understanding of the Constitution has, and should be, developed. He asserts:

*The bridge from Constitutionalism to judicial supremacy has been built on the contention that the courts are preeminently the American “forum of principle,” whereas the non-judicial arenas are characterized by a politics of power driven by conflicting interests and assertions of will. Unfortunately, that bridge depended more on caricatures drawn by academic lawyers than on the examination of historical political experience. The role of the Court will have to be situated within a context of competing claims to constitutional authority and alternative visions of appropriate constitutional meaning.*<sup>22</sup>

The principal “non-judicial arenas” to which Whittington refers are the political arenas in which skirmishes routinely take place over the authority, and limitations

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<sup>22</sup> Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Cambridge: Harvard UP, 1999) 209.

thereon, of the executive and legislative branches, respectively. Fueled by “political will” and advanced by “explicit advocates,” these skirmishes “display none of the objectivity valued in the jurisprudential model” of constitutional construction.<sup>23</sup>

Whittington’s view that political constitutional construction is desirable and necessary is undoubtedly at odds with a ‘strict constructionist’ view of constitutional interpretation, which would not only limit construction to the judiciary, but strictly limit the judiciary’s role and flexibility. Regardless of whether political construction should occur, however, it no doubt does. And the battle over signing statements provides a concrete example of “[a]mbitious political actors” construing the constitution “in order to find support for their own political interests and [constructing] a vision of constitutional meaning that enshrines their own values and interests.”<sup>24</sup>

### **B. The Evolution of Signing Statements as Policy – From Reagan to George W. Bush.**

In order to properly evaluate signing statements as acts of political construction, it is necessary to understand the policy goals and implications that they entail, and to trace the development of the policy and the underlying context. As discussed above, signing statements were used only sporadically prior to the 1980’s. Beginning with the Reagan administration and continuing to the present, presidents have increasingly used signing statements in a planned, strategic manner. This change was not accidental. It arose out of conflicts between the

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<sup>23</sup> Ibid, 210.

<sup>24</sup> Ibid, 207.

executive and legislative branches over legislative policy, which prompted attorneys and policymakers in the executive branch to develop constitutional theories supporting use of signing statements as a tool against Congress. A review of the analyses underlying these theories and how they evolved over time provides some insight into the development and use of signing statements as policy, and how each administration intended to use signing statements to enhance presidential power.

An analytical framework within which to evaluate this policy development is also useful. Presidents have used different forms of executive power to influence legislation. Academic studies examining the modern presidency have focused on the different means by which presidents use their power to push their personal agendas through the legislative branch. The three principal theories that relate to how presidents (since Reagan) have issued signing statements as policy are: the power to persuade Congress; appealing to the electorate in order to gain support; and unilateral presidential action.<sup>25</sup>

After World War II the president became more widely recognized as the “chief legislator” due to the important role held in the legislative process.<sup>26</sup> From this idea of a legislative presidency Neustadt, Kernell and Howell have identified three commonly accepted forms effective presidential leadership. In 1960, Neustadt wrote a study on presidential power that concluded “presidential power

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<sup>25</sup> William G. Howell, Power Without Persuasion: The Politics of Direct Presidential Action (Princeton: Princeton UP, 2003).

<sup>26</sup> Roger H. Davidson, and Walter J. Oleszek. Congress and Its Members 10th ed. (Washington DC: CQ P, 2006) 306.

is the power to persuade.”<sup>27</sup> Neustadt’s conception of presidential power became an influential study of the presidency. Kernell’s theory of going public to gain support and Howell’s unilateral action model are both derived from Neustadt’s study of presidential power. These different forms of presidential power have branched off from Neustadt’s original conception to test the water of expansive presidential powers. Likewise, they have been applied to signing statements in an attempt to utilize their full potential as a form of persuasion.

While the president holds many formal and informal powers to influence legislation, signing statements have encompassed the three listed above. Understanding the use of signing statements in terms of these theories will demonstrate how the signing statement, as a policy, has fundamentally changed in its general purpose and implementation from its origins in the Reagan administration to the presidency of George W. Bush. Indeed, the transformation of the signing statement by the Bush administration into a broad-based, unilateral effort to co-opt power to the president fundamentally changed the debate around this issue.

#### **-Ronald Reagan-**

Steven Calabresi and John Harrison, two young attorneys in the Office of Legal Counsel under President Reagan, are generally credited as the first people to propose the strategic use of signing statements as a policy tool for increasing executive power. According to Calabresi and Harrison, judges notoriously abused legislative history when interpreting laws and ignored the stance of the president

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<sup>27</sup> Ibid, 307.



when making their decisions.<sup>28</sup> On August 23, 1985, the two young lawyers sent a memorandum to Attorney General Ed Meese, suggesting that signing statements can be used to put the president's interpretation of a law on record and, in effect, take away Congress' monopoly over legislative interpretation.<sup>29</sup> As a direct result of this memorandum, Attorney General Meese arranged for the West Publishing Company – the company that publishes official legislative history – to publish presidential signing statements along with legislative history.<sup>30</sup> Subsequent memoranda circulated through the Department of Justice suggested that the signing statement was a severely underutilized tool for the president to counteract Congress' legislative supremacy.

The ideology behind this approach was that the very existence of signing statements would give the administration leverage over Congress in legislative matters and would, in turn, make Congress more willing to compromise with the president. Another behind-the-scenes framer of this new approach to signing statements was then Assistant Attorney General Ralph Tarr. Tarr insisted on using signing statements to influence how agencies interpret statutes, to inform Congress of a problematic or unconstitutional provision and to make the

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<sup>28</sup> Charlie Savage, Takeover: the Return of the Imperial Presidency and the Subversion of American Democracy (Boston: Little, Brown and Company, 2007) 232-234.

<sup>29</sup> Steve Calabresi, memo to Attorney General Ed Meese, Department of Justice, Washington DC. 23 Aug 1985. 23 Sept. 2007 <<http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box3-SG-ChronologicalFile.pdf>>.

<sup>30</sup> Charlie Savage, Takeover: the Return of the Imperial Presidency and the Subversion of American Democracy (Boston: Little, Brown and Company, 2007) 232-234.

executive's position available to judges.<sup>31</sup> These internal memoranda suggest that the original intent of signing statements as policy was to keep pace with an overbearing Congress. If that is actually the case then it becomes important to quickly analyze the relationship between Congress and the Reagan administration.

Reagan began his presidential career with relative success in passing his agenda through Congress. He was able to successfully pass his budget priorities in 1981, but found it difficult to get most of his agenda through Congress after that, especially in his second term.<sup>32</sup> Prior to the 1983 Supreme Court case *INS v. Chadha*, Congress used legislative vetoes – an act by Congress that removed powers granted to the executive branch – to broaden its power by having control over executive agencies. And, even after the Supreme Court found legislative vetoes to be unconstitutional, Congress frequently acted with hostility toward the administration instead of cooperating in order to pass legislation. Reagan subsequently set up meetings with congressmen and negotiated compromises and agreements in order to move his agenda forward.<sup>33</sup> Signing statements emerged from Reagan's legal department as a tool for the president to coerce cooperation from legislators, pass his agenda and to assert the president's authority as chief ruler of the executive branch.

With these intentions in mind, the signing statement under Reagan represents a form of presidential power envisioned by Richard Neustadt.

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<sup>31</sup> Ibid.

<sup>32</sup> James P. Pfiffner *The Modern Presidency*. 5th ed. (United States: Thomson Wadsworth, 2005) 166.

<sup>33</sup> Roger H. Davidson, and Walter J. Oleszek. *Congress and Its Members* 10th ed. (Washington DC: CQ P, 2006) 308.

Neustadt is an expert on the American Presidency, has been a presidential advisor for three decades, and is a professor in the Kennedy School of Government at Harvard University. Neustadt submits that presidents use their inherent skill sets to influence legislation by bargaining with Congress. He recognizes Reagan's skills as a likable and effective communicator that enabled him to consistently come off in a positive light in the public and the media, skills that produced approval ratings consistently around 65 percent for much of his tenure.<sup>34</sup>

Reagan's use of signing statements, however, did not utilize this skill set; rather, they were primarily used as leverage against Congress – a form of bargaining – and kept out of the media. Viewed through Neustadt's theory of presidential power, the Reagan administration's approach used signing statements as a way to stake their territory in the executive branch and to influence legislation through the power of persuasion. According to William Howell, "Neustadt's original formulation of presidential power remains conventional wisdom -- presidents are powerful to the extent that they can drive their legislative agendas through Congress, bargain with bureaucrats, and breed loyalty within their administrations."<sup>35</sup> Facing repeated opposition and increased power in Congress, the new and increased use of signing statements by the Reagan administration can be seen as a formal means of the president asserting his power of persuasion in order to keep up with a legislative branch that controlled the lawmaking process.

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<sup>34</sup> Richard E. Neustadt, Presidential Power and the Modern Presidents: the Politics of Leadership From Roosevelt to Reagan 3rd ed. (New York: The Free P, 1991) 269-273.

<sup>35</sup> William G. Howell, Power Without Persuasion: The Politics of Direct Presidential Action (Princeton: Princeton UP, 2003) 175.

**-George H. W. Bush (Bush I)-**

The first Bush administration followed a similar strategy to the Reagan administration regarding signing statements, with the primary objective being to increase his influence over legislation using the power of persuasion. However, the Justice Department had become much more organized addressing signing statements since Calabresi and Harrison's memorandum in 1985, and the process of issuing signing statements became much more formulaic. This re-organization can be traced to another executive branch memorandum, this one authored by Deputy Assistant Attorney General under President Reagan, Samuel Alito, and sent to the Litigation Strategy Working Group. Alito's memorandum set forth a plan to slowly implement the use of signing statements as a regular policy, and forewarned of the possible oppositions this policy faced. Alito took the view that because the president inherently plays a major role in the passage and execution of legislation, the interpretation of the president should be as important and hold as much weight as legislative history.

Alito's proposal strategically laid out how the administration should go about issuing signing statements to achieve the goal of expanding presidential influence over the legislative process. Alito's memorandum lists five possible obstacles to the enhanced use of signing statements: (1) the limited amount of resources available; (2) the president only has ten days to issue a signing statement after receiving a bill from Congress; (3) Congress will most likely have a negative reaction to the use of signing statements; (4) the possibility of reluctance by executive departments and agencies; and (5) the theoretical issues

(legal concerns) regarding the president's role in the legislative process.<sup>36</sup>

Following is Alito's proposal to most effectively deal with these obstacles:

*C. A Proposal.*

*In view of the concerns noted above, I would make the following recommendation.*

*- As an introductory step, the Department should seek to have interpretive signing statements issued for a reasonable number of bills that fall within its own field of responsibility. By concentrating at first on a small number of bills, we can begin without a commitment of resources that would necessitate major changes in staffing. And by concentrating on bills within our own field of responsibility and concern, we can begin without depending upon the cooperation of other departments and agencies, which may be skeptical at first. If our project is successful, cooperation may be more readily available.*

*- For use in this pilot project, we should try to identify bills that (a) are reasonably likely to pass, (b) are of some importance, and (c) are likely to present suitable problems of interpretation.*

*- Again, as an introductory step, our interpretive statements should be of moderate size*

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<sup>36</sup> Samuel Alito Jr., memo to the Litigation Strategy Working Group, U.S. Department of Justice Office of Legal Counsel, Washington, DC. 5 Feb. 1986. 14 April 2007 <<http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf>>.

*and scope. Only relatively important questions should be addressed. We should concentrate on points of true ambiguity, rather than issuing interpretations that may seem to conflict with those of Congress. The first step will be to convince the courts that Presidential signing statements are valuable interpretive tools.*

*- It would also be very helpful, as pointed out in Steve Calabresi's memorandum of January 27, 1986, to include in each signing statement a section spelling out the grant of authority to the federal government on which the statute rests.*

*- The most important step will be approval of this project by the President. Obviously there can be no project unless the President wishes to sign interpretive statements of the type we envision. For the purpose of presenting this issue to the President, it may be helpful if we draft a sample of a new-style signing statement either for a bill that is now pending before Congress or one that was recently enacted. Also, as a first step, the proposal should be discussed with White House counsel.*

*- The Office of Legislative and Intergovernmental Affairs seems the logical unit within the Department to coordinate our efforts. In particular, OLIA should be able to identify appropriate bills as they proceed through Congress. The actual selection of the bills may then be done, in cooperation with OLIA, by this Group as a whole, a subgroup, or*

*some other body. Once appropriate bills have been chosen, components of the Department with expertise regarding the particular bills selected should be asked for their views. For example, OLC should be consulted, as it now is, when constitutional questions are raised. OLIA should assemble and coordinate the responses of the various units.*

*- Because of the time problems previously noted, the drafting of our pilot signing statements should begin well before final passage of the bills. Moreover, if Presidential signing statements are ever to achieve much importance, I think it will be necessary to escape from the requirement of having to complete our work prior to the signing of the bill. Accordingly, after the first few efforts, the President could merely state when signing the bill that his signing is based on an /\*/0-63. Bt the pressure to complete a formal statement for public release would be relieved. This procedure would mirror the procedure followed by congressional committees, which vote out proposed legislation long before the committee report is issued.*

*- The Department should continue and should intensify its internal consideration of the theoretical problems posed by the proposed expanded role for Presidential signing statements. Once a few signing statements of this new type have been issued, discussion in legal journals may be,*

*stimulated and should be encouraged.*<sup>37</sup>

Thus, Alito was cognizant of both the potential to expand presidential power through signing statements, and the potential pitfalls that this strategy could entail. The in-depth strategizing that went into this effort exemplifies the complexity and controversy surrounding such a policy, and the obstacles that Alito identifies are partially what limit signing statements from being effective policy. The underlying point is that Samuel Alito's proposition opened the door for the expansion of signing statements but it did so on some precarious grounds.

President George H. W. Bush's administration took the stance that the presidency had been losing much of the power that was originally intended by the framers because of increasing congressional dominance in the legislative process. Bush's attorney general, Richard Thornburgh, argued to the Federalist Society in 1990 that the president did not have as much power in the legislative process as he used to. In his speech Thornburgh claimed:

*Today's legislative process has rendered the presidential veto a less effective check on congressional encroachments than was envisioned two centuries ago...It is often very difficult for the President to veto legislation that contains sometimes blatantly unconstitutional provisions. For example, Congress has become fond of inserting substantive provisions in appropriations*

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<sup>37</sup> Ibid.



*bills. This is what they call making the provision veto-proof.*<sup>38</sup>

This statement illustrates the sentiment held by the White House at the time that Congress had the upper hand in lawmaking by using legislative loopholes. It is because of this continued struggle for power between Congress and the executive branch that the first Bush administration used Alito's strategy as a foundation for their use of signing statements.

While still using the signing statement as a form of persuasion (as envisioned by Neustadt) against Congress, the first Bush administration began expanding its use of signing statements and became much more strategically organized in issuing them. This resulted in the first Bush administration utilizing signing statements more than the Reagan administration – challenging 232 sections of bills – but not significantly changing the intended purpose of the signing statement as a form of presidential policy.

It is difficult to measure the effectiveness of signing statements during the Reagan and first Bush administration because there is no empirical evidence available describing how signing statements affected lawmakers. It can be assumed that they were not very effective because there are very few writings from that time on signing statements and no references to them in court decisions. The ineffectiveness of signing statements as a form of persuasion may be why the Clinton administration used a different strategy in implementing them.

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<sup>38</sup> Richard Thornburgh, "The Presidency and Congress: Constitutionally Separated and Shared Powers." U.S. Attorney General's Office. Address to the Federalist Society. Washington DC. 19 Jan. 1990.

**-Clinton-**

President Clinton's use of signing statements demonstrates that their use transcends party lines. The signing statement is an instrument used in the institutional power struggle between the executive and legislative branches; it can and has been used by presidents of each party. The extent to which partisan politics play a role in signing statements is apparent when ideological polarization exists between the President and Congress, restricting the ability of the president to pass his policy agenda through the legislature. This was the case for President Clinton through most of his tenure as president. Dealing with a Republican led Congress through most of his two terms, President Clinton resorted to signing statements in order to set his agenda against a hostile Congress.<sup>39</sup>

Clinton, however, followed a slightly different approach than presidents Reagan and Bush. While the first Bush administration primarily meant for the signing statements to be seen by Congress and courts, President Clinton also wanted the public to be made aware of his stances on legislation through signing statements. According to a letter from Walter Dellinger, head of the Office of Legal Counsel under President Clinton:

*If the President may properly decline to enforce a law, at least when it unconstitutionally encroaches on his powers, then it arguably follows that he may properly announce to Congress and to the public that he will not enforce a provision of an enactment*

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<sup>39</sup> Charlie Savage, Takeover: the Return of the Imperial Presidency and the Subversion of American Democracy. (Boston: Little, Brown and Company, 2007) 235.

*he is signing. If so, then a signing statement that challenges what the President determines to be an unconstitutional encroachment on his power, or that announces the President's unwillingness to enforce (or willingness to litigate) such a provision, can be a valid and reasonable exercise of Presidential authority.<sup>40</sup>*

Thus, the Clinton administration used signing statements not only as a form of persuasion, but also to gain support from the public. This represents a slightly different approach to achieving the same end: passing the presidential agenda through Congress. The President, being the solitary nationally elected official, often faces public scrutiny when he cannot make changes or pass laws promised in his campaign. When it is others (i.e. Congress) who are holding back such agendas, the President can go directly to the public in an attempt to gain support against the actor(s) blocking the presidential agenda.

Samuel Kernell, a professor of political science at the University of California, San Diego, has termed this new presidential strategy as “going public.” When used under Neustadt’s model, signing statements (at least as originally viewed in the Reagan Justice Department) would be used as leverage, but would still promote bargaining and some form of cooperation. According to Kernell, going public “violates” bargaining by circumventing exchanges between the two branches. However, Kernell believes that practiced in an appropriate manner, going public can displace bargaining. Another major difference between

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<sup>40</sup> Walter Dellinger, memo to Bernard N. Nussbaum Counsel to the President, U.S. Department of Justice, Washington, DC. 3 Nov. 1993. 21 Oct. 2007 <<http://www.usdoj.gov/olc/signing.htm>>.

going public and the power of persuasion is that going public is much more combative.<sup>41</sup> Instead of bi-lateral bargaining to reach an agreement, going public involves bringing the public in as a third party to the process, implicitly threatening members of Congress with electoral consequences if they do not cooperate.

By going public with signing statements, the Clinton administration was exploring a different manner in which signing statements could be used to the president's advantage, in an effort to render them a more effective tool of persuasion than they were under Bush and Reagan. A valid question to ask here is: if signing statements were made public by Clinton over a decade ago, why was there little, if any, public controversy about them at the time? The answer to this question correlates with the same reasons that Kernell's strategy proved ineffective with signing statements. First, the Clinton administration challenged only 140 sections of law, 92 fewer than the first Bush administration.<sup>42</sup> If the number of challenges had continued on an upward trend, there may have been more of a public concern, but the declining trend diminished the thought of any real threat.

Second, the Clinton administration was inconsistent and never fully expanded the use of signing statements to the level foreseen by Alito. For example, after attaching a signing statement to a bill that would remove all those

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<sup>41</sup> Samuel Kernell. Going Public: New Strategies of Presidential Leadership 4th ed. (Washington DC: CQ P, 2007) 3-4.

<sup>42</sup> Charlie Savage. Takeover: the Return of the Imperial Presidency and the Subversion of American Democracy (Boston: Little, Brown and Company, 2007) 235.

testing positive for HIV from the military, Dellinger and White House Counsel Jack Quinn told reporters that it was the position of the administration that the president was forced to execute the law as written unless the Supreme Court intervened and said otherwise.<sup>43</sup> By going public here, the administration avoided vetoing a bill, but let the public know at the same time that it disagreed with some provisions of the bill. Its position could possibly mobilize constituents who disagree with the bill to write their congressmen, or a person affected by the bill could take the government to court. The Clinton administration saw that these possibilities alone might make some legislators change their mind and could assist in passing the president's agenda. But due to the lack of consistency by the president's employment of signing statements there was not a strong public reaction.<sup>44</sup> And due to the position of the Clinton administration that signing statements held no standing unless a Supreme Court Justice rules on them, there was no concern that the president would be acting unilaterally outside of the system of checks and balances.

Third, the Line Item Veto Act of 1996 granted Clinton the power to veto specific lines of certain bills passed through Congress. With this power, Clinton had little need to use signing statements as line-item vetoes – one of the largest criticisms of the practice. In 1998, the Supreme Court ruled that the use of the line-item veto was unconstitutional in the case *Clinton v. City of New York*. This decision may have reinforced the idea in the public's mind that the Court was keeping tabs on the expansion of presidential powers.

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<sup>43</sup> Ibid, 235 – 236.

<sup>44</sup> Ibid

Finally, Kernell acknowledges that for numerous reasons, going public is not always effective.<sup>45</sup> Going public with signing statements as a policy to advance the president's agenda was ineffective for many of those same reasons. At the time, the signing statement was a little known political tool in which the public had very little interest. On top of that, Clinton never touched on the issue of signing statements in a national address, suggesting that while the goal of the Clinton administration was to go public with signing statements, it was not prepared to make it a major issue. The lack of interest and the minimal media coverage along with the other factors made the use of signing statements used by Clinton relatively ineffective and, in turn, unimportant to the public.

While Clinton wanted signing statements to gain public support for his agenda, his attempts to do so were ultimately futile. The ineffectiveness of the signing statement under Kernell's theory of going public makes it a bad policy because it ultimately has little to no impact on legislation. In trying to make the idea of the signing statement palatable to the public, it lost its leverage as a bargaining chip.

#### **-George W. Bush (Bush II)-**

The use of signing statements by President George W. Bush became controversial for two main reasons. One reason was the dramatic increase in the sheer number of signing statements. In his first six years in office, President Bush challenged more than 800 statutory provisions in his signing statements; all

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<sup>45</sup> Samuel Kernell, Going Public: New Strategies of Presidential Leadership 4th ed. (Washington DC: CQ P, 2007) 234 – 235.

previous presidents combined issued fewer than 600 such challenges.<sup>46</sup> Along with the inordinate number of signing statements issued by President Bush, he issued an unusually low number of vetoes. Seven years into office, President Bush had vetoed only two bills presented to him by Congress. Even the prior three presidents who used constitutional signing statements continued to use their veto power; Clinton vetoed 37 bills during his tenure, George H.W. Bush vetoed 44 and Reagan vetoed 78 over his two terms.<sup>47</sup> This downward trend in the utilization of presidential veto power tends to support Thornburgh's position that the veto had lost much of its power, and administrations were searching for other avenues to exert the office's power (signing statements being one of the major policies). Combined, the lack of vetoes and overexpansion of constitutional signing statements raised a red flag.

The second reason signing statements became more of a concern in the second Bush administration is that they were implemented as a unilateral presidential action. Using the signing statement to go public or as a form of persuasion were very informal ways of bargaining with Congress. However, unilateral actions by the president come off as much more finite and aggressive. William Howell, a professor of public policy at the Harris School at the University of Chicago, points out that one of the most effective ways presidents

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<sup>46</sup> Mark D. Agrast, et al. Task Force on Presidential Signing Statements and the Separation of Powers Doctrine. American Bar Association, 2006. 14-15. 17 Apr. <[http://www.abanet.org/op/signingstatements/aba\\_final\\_signing\\_statements\\_recommendation-report\\_7-24-06.pdf](http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf)>.

<sup>47</sup> Charlie Savage, Takeover: the Return of the Imperial Presidency and the Subversion of American Democracy. (Boston: Little, Brown and Company, 2007) 230.

go beyond being merely a veto player is to act unilaterally in making policy.<sup>48</sup>

Howell's book, Power Without Persuasion, focuses on the presidential strategy of acting unilaterally to create policy and push an agenda forward. The major difference between this strategy and the other two is that instead of trying to influence the legislative process, unilateral action attempts to circumvent it.<sup>49</sup> The extent to which unilateral action will be effective depends upon the institutional constraints placed upon the executive branch by Congress and the judiciary.<sup>50</sup> In the case of Bush's signing statements, the constraints were fairly restrictive when the president's policy became clearer. For example, none of Bush's signing statements have held weight in a court decision. In *Hamdan v. Rumsfeld*, the Court specifically rejected the principles established in one of Bush's signing statements. Also, in January of 2007, the House of Representatives Committee on the Judiciary and the Senate Judiciary Committee both held hearings examining the use of signing statements under President George W. Bush. These hearings along with Senator Arlen Specter's (R-PA) proposal – embodied in The Presidential Signing Statement Act of 2006 – to limit the power of signing statements illustrate the backlash Bush's use of signing statements have caused in Congress.

Deputy Assistant Attorney General Michelle E. Boardman's testimony before the Senate Committee on the Judiciary provides insight into the Bush

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<sup>48</sup> William G. Howell, Power Without Persuasion: The Politics of Direct Presidential Action. (Princeton: Princeton UP, 2003) 175.

<sup>49</sup> Ibid, 177.

<sup>50</sup> Ibid, 176.



administration's intentions when issuing signing statements. Boardman argued in the hearing that signing statements were good for separation of powers because it created dialogue between the branches.<sup>51</sup> The resulting dialog, however, focused on signing statements as unilateral actions and not on the substantive issues surrounding the bills to which the signing statements were attached. If signing statements actually initiated discussions on bills between the President and Congress then the signing statements would be effectively fulfilling part their original purpose. However, the unilateral use of signing statements under Bush has incited more conflict between the branches than cooperation and bargaining.

In response to the Bush II administration citing his memorandum to defend their use of signing statements, former Assistant Attorney General Walter Dellinger wrote an Op-Ed piece to the New York Time explaining why the Bush administration's use of signing statements have been misguided. Dellinger first points out that the American Bar Association has misdiagnosed signing statements as being the problem when the real problem is the president's constitutional interpretations.<sup>52</sup> This was an issue that was never a problem when signing statements were used as a form of persuasion or for going public.

Dellinger had assumed the president is always afforded the ability to refuse to enforce unconstitutional laws and, according to Dellinger:

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<sup>51</sup> Michelle E. Boardman, "Committee Hearing on Presidential Signing Statements." 27 June 2006, United States Senate Senate Judiciary Committee. 17 Apr. 2007 <[http://judiciary.senate.gov/testimony.cfm?id=1969&wit\\_id=5479](http://judiciary.senate.gov/testimony.cfm?id=1969&wit_id=5479)>.

<sup>52</sup> Walter Dellinger, "Slip of the Pen." *New York Times* 31 July 2006. 6 Jan. 2008 <[http://www.nytimes.com/2006/07/31/opinion/31Dellinger.html?\\_r=1&oref=slogin](http://www.nytimes.com/2006/07/31/opinion/31Dellinger.html?_r=1&oref=slogin)>.

*A president's ability to decline to enforce unconstitutional laws is an important safeguard of both separation of powers and individual liberty...If a president may decline to execute an unconstitutional law enacted before he assumed office, he should retain that right in the case of an unconstitutional provision of a bill he signs himself. Of course, if presented with a bill that is entirely unconstitutional, the proper response is a veto.<sup>53</sup>*

Under these assumptions, the sole purpose of a signing statement is to actually place a check on Congressional actions. It has been more difficult in the modern presidency to use the veto as the lone check on bills passed through Congress, especially with the amount of multiprovision and omnibus legislation – the signing statement offers a “valuable and lawful alternative” to vetoing one of these bills.<sup>54</sup> From this, Dellinger concludes that the real risk is not the signing statement but the unilateral authority Bush assumes from the use of signing statements. Bush clearly ignores Dellinger’s warnings that the president should presume most laws are legitimate and exercise great deference to Congress’ positions on a provision’s constitutionality. When these warnings are strictly heeded, the risk that a president will “assert a dubious claim of unconstitutionality in order to sidestep a law he simply doesn’t like” will likely go way down.<sup>55</sup>

Dellinger’s letter to the *New York Times* illustrates how the strategic

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<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

implementation of a policy can clearly change the original intention behind it. The Bush II administration's decision to issue signing statements as unilateral actions was ineffective as a policy because it altered the purpose of the original policy and it created more tension with Congress.

The Bush II administration systematically dove into legislation looking for any possible section of a bill a signing statement could be attached to – using minimal deference. They created an assembly line of attorneys whose job it was to read through legislation and identify any provision that could conceivably limit presidential power, and thus was a candidate for a signing statement. Before any signing statement could be presented to the president, it had to go through the Office of the Vice President – an office that had never before had any involvement in the process of issuing signing statements.<sup>56</sup> Thus, the Bush II administration's primary goal of signing statements had shifted from pushing the presidential agenda forward, to instituting a unitary executive.

The idea of a unitary executive, in short, is to limit the powers of Congress while endowing the president with absolute control over the executive branch. This simplified theory along with the types of provisions President Bush challenged can provide a better understanding of why he used signing statements the way he did.

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<sup>56</sup> Charlie Savage, Takeover: the Return of the Imperial Presidency and the Subversion of American Democracy. (Boston: Little, Brown and Company, 2007) 236.

Neil Kinkopf, an Associate Professor of Law at Georgia State University College of Law, and Peter Shane, the Director of the Project on Law and Democratic Development at the Ohio State University Moritz College of Law, compiled a data set of signing statements under President George W. Bush organized by the category of objection:

### Signing Statement Categories

1.	Recommendations Clause	212
2.	Bicameralism and Presentment	235
3.	Unitary Executive	363
4.	President's Authority over Foreign Affairs	147
5.	Commander-in-Chief Authority	76
6.	Appointments Clause	31
7.	President's Authority to withhold Information, including information relating to national security and to classify information	170
8.	President's Authority to Withhold Information, not including national security matters	27
9.	Equal Protection and Due Process	49
10.	Federalism	3
11.	Unspecified Separation of Powers	45
12.	First Amendment	19
13.	Non-Delegation Doctrine	3
14.	Opinions Clause	24
15.	Article II (including the Vesting Clause and the Take Care Clause)	13
16.	Fourth Amendment	2
17.	Constitutional Limits on the Judicial Power	1
18.	Judicial Independence	1
19.	Constitutional Immunities	1
20.	Congressional Aggrandizement ( <i>Bowsher v. Synar</i> )	2
21.	Removal Power	3
22.	Recess Appointments	1
23.	Article III Case or Controversy Requirement	2
<b>TOTAL</b>		<b>1430</b>

*Source: Kinkopf, Neil, and Peter Shane. Index of Presidential Signing Statements: 2001- 2007. American Constitution Society for Law and Policy. Advance, 2007. 12 Mar. 2008 <<http://www.acslaw.org/files/Signing%20Statement%20Chart%20-%20Neil%20Kinkopf%20and%20Peter%20Shane.pdf>>.*

This table provides 23 objections and highlights five major categories of objections that were continuously used in signing statements under the second Bush administration. These five objections were the recommendations clause,

bicameralism and presentment, unitary executive, presidential authority over foreign affairs and the executive privilege to withhold information (especially issues relating to national security and classified information). Issues regarding the authority of the president as commander-in-chief were also used numerous times. The categories challenged in these signing statements represent constitutional issues of presidential power. One of the primary objectives of signing statements under the three administrations before George W. Bush was to avoid executing provisions of laws that were unconstitutional. By using signing statements as a unilateral action, one of his primary objectives was to redefine the constitutional powers of the president. Asserting constitutional powers through signing statements is not only unfounded but it makes an already ineffective policy even less palatable.

In short, the Bush II administration transformed the signing statement from a surgical instrument used to advance the president's legislative agenda in carefully selected areas, to a blunt axe used wherever and whenever possible in order to expand and re-define presidential power generally. It is clear that by implementing signing statements as a form of unilateral presidential authority, President Bush deviated from the original intent of signing statements. It was this use of signing statements that ignited Charlie Savage's Pulitzer Prize winning articles on signing statements and raised controversy over the practice.

## V

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### **AN INEFFECTIVE POLICY: *The Use of Signing Statements by the Bush II Administration Has Failed as a Policy Strategy.***

Having concluded that the use of signing statements by the Bush II administration does not violate judicial constitutional principles, and are more effectively viewed as a political exercise in constitutional construction, the question remains whether they are an appropriate or effective exercise of that power.

#### ***1. The policy limits of political construction.***

Unlike judicial constitutional construction, in which disputes between the executive and legislative branches are refereed by the judiciary, which ultimately declares a ‘winner’ and a ‘loser,’ the outcome of political construction battles are not so decisive. Political construction reflects a process more than an issue specific outcome, and the results are measured over time. Throughout this process, Whittington observes, “[t]he balance of powers [is] adjusted over time to match different political needs and different systems of political values.”<sup>57</sup> Whittington sees the success or failure of a particular political construction policy as being determined by various mechanisms that impact the stability of that construction. He identifies one of these mechanisms as “ideological, or the articulation of a persuasive conception of constitutional meaning that is then

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<sup>57</sup> Keith E. Whittington, Constitutional Construction: Divided Powers and Constitutional Meaning. (Cambridge: Harvard UP, 1999).

widely adopted among relevant political actors.”<sup>58</sup> Another mechanism for stabilizing political construction involves “the structuring of political support.”<sup>59</sup> While this mechanism does not require widespread acceptance, it does require convincing “all parties [of the relevant coalition] that a commitment to the construction, or at least a lack of hostility to the construction, is necessary to their own political success.”<sup>60</sup>

Using these mechanisms as guideposts, one can readily deduce the factors to be evaluated in determining the success or failure of a given political construction. First, the extent to which the construction at issue has actually been adopted must be considered. Second, irrespective of its immediate adoption, one must consider the acceptance (or rejection) of the construction as an ideological concept. Finally, the political support generated behind the construction, as well as the political opposition generated, should be considered. Measured against each of these yardsticks, the use of signing statements by the Bush II administration has not been successful.

***2. President Bush’s use of signing statements has not been adopted, nor have the political positions he has sought to advance through signing statements.***

The widespread use of signing statements by the Bush II administration is not a measure of success. That is, of course, because they are entirely unilateral. They require neither agreement nor a decision not to oppose them, as neither

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<sup>58</sup> Ibid, 219.

<sup>59</sup> Ibid, 220.

<sup>60</sup> Ibid.

Congress nor the courts have a mechanism to challenge them at the time they are issued.

On the other hand, the success of their underlying objectives is a fair proxy for the success of signing statements in general. One of the principle objectives advanced for signing statements was to increase the President's influence over legislation, and better position him to push through his legislative agenda. There is no evidence that this has in fact occurred. The success of the signing statement can be judged partially on the success rate presidents have had pushing their agenda through Congress. *Congressional Quarterly Weekly Reports* has published the presidential success rate with Congress. This information, while surely affected by other variables, suggests that signing statements did not successfully push the president's agenda through Congress:

Reagan	Bush I	Clinton	Bush II
Year - Success Rate	Year - Success Rate	Year - Success Rate	Year - Success Rate
1981 - 2.4%	1989 - 62.6%	1993 - 86.4%	2001 - 86.7%
1982 - 72.4%	1990 - 46.8%	1994 - 86.4%	2002 - 78.8%
1983 - 67.1%	1991 - 54.2%	1995 - 36.3%	2003 - 78.7%
1984 - 65.8%	1992 - 43.0%	1996 - 55.1%	2004 - 72.6%
1985 - 59.9%		1997 - 53.6%	2005 - 78.0%
1986 - 56.1%		1998 - 50.6%	
1987 - 43.5%		1999 - 37.8 %	
1988 - 47.4%		2000 - 55.0%	

Source: *Congressional Quarterly Weekly Reports*, December 19, 1992, p.3896; December 21, 1996, p.3428; January 3, 1988, p. 13; January 9, 1999, p.86; December 14, 2002, p.3275; December 11, 2004; January 9, 2006. Qtd. in Pfiffner, James P. The Modern Presidency. 5th ed. United States: Thomson Wadsworth, 2005. 166.



This information shows that in each of the four administrations discussed, the president's success rate with Congress dropped significantly from the first to the second term. While George W. Bush's success rate dropped the least of the four presidents, it still is on a downward trend. Moreover, this information is unavailable after 2005, when democrats took control of Congress. A swing in power to Democrats in Congress since 2005 suggests that Bush II's success rate has most likely fallen significantly since 2005.

The evidence is even more compelling when it comes to specific aspects of Bush II's legislative agenda. For example, a principal target of his signing statements has been legislation relating to the war in Iraq. In 2006, he issued a signing statement with respect to the so-called McCain Amendment to the Detainee Treatment Act of 2006, which categorically prohibits cruel, inhuman and degrading treatment of any and all detainees by all U.S personnel, wherever they are located. In language typical of his other signing statements, President Bush stated that in executing the statute he could interpret in "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 limits on judicial power."<sup>61</sup> He recently issued a similar statement in connection with the 2008 National Defense Authorization Act, reserving his right to ignore aspects of the legislation addressing his duty to faithfully execute the law:

*Today, I have signed into law H.R. 4986, the*

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<sup>61</sup> President's Statement on H.R. 5441, Department of Homeland Security Appropriations Act, 2007 (Washington DC: White House, 2006).

*National Defense Authorization Act for Fiscal Year 2008. The Act authorizes funding for the defense of the United States and its interests abroad, for military construction, and for national security-related energy programs.*

*Provisions of the Act, including sections 841, 846, 1079, and 1222, purport to impose requirements that could inhibit the President's ability to carry out his constitutional obligations to take care that the laws be faithfully executed, to protect national security, to supervise the executive branch, and to execute his authority as Commander in Chief. The executive branch shall construe such provisions in a manner consistent with the constitutional authority of the President.*

*George W. Bush* □ *The White House*, □ *January 28, 2008.* □ □ *H.R. 4986, approved January 28, was assigned Public Law No. 110-181.*<sup>62</sup>

Have these statements been effective in preserving presidential authority in these areas? The evidence suggests the answer is “no.” There are no concrete examples of the Bush II administration actually refusing to enforce clear legislative mandate, or to adopt an interpretation obviously contrary to that intended by Congress. Whether this is because situations have not arisen that would require the administration to take this position, or because the administration has not wanted to escalate confrontation around these issues, the

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<sup>62</sup> John Woolley,, and Gerhard Peters, comps. “Presidential Signing Statements.” 1999. The American Presidency Project. 9 Jan. 2008 <<http://www.presidency.ucsb.edu/ws/index.php?pid=76389>>

fact remains that the administration has simply not used the turf staked out by its signing statements. Moreover, the administration's position on these issues is generally unpopular, both politically and with the public in general.

Indeed, it can be fairly said that President Bush's historically low approval ratings generally, and those with respect to his conduct of the Iraq war in particular, suggest a general failure with respect to his war policies. In this context, his attempt to expand and consolidate his presidential power with respect to virtually any issue touching upon the war cannot be viewed as a success. And while, under Whittington's view, the ultimate proof must be measured over a longer period, it does not appear from the success—or lack thereof—of the initiatives of the Bush II administration that a foundation has been laid for expanded presidential powers going forward.

Another objective of signing statements was to give the president a place at the table when it comes to legislative interpretation. This objective has been a complete failure. Following the lead of a number of scholars who have argued that signing statements should be given “no weight” in interpreting legislation, the Roberts Court held that the contemporaneous views of the president are virtually irrelevant to the process of determining a statute's meaning.<sup>63</sup>

Alasdair Roberts, Professor of Public Administration in the Maxwell School of Citizenship and Public Affairs at Syracuse University, has theorized that the United States is in a postmillennial liberal state that has weakened the

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<sup>63</sup> Hamdan V. Rumsfeld. No. 05-184. Supreme Ct of the US. 29 June 2006. 9 Jan. 2008 <<http://www.supremecourtus.gov/opinions/05pdf/05-184.pdf>>.

authority of the president.<sup>64</sup> Due to this, the presidency cannot be as strong as it was in the mid-twentieth century. Roberts claims that in response to the decline of presidential power in this period, Bush II has attempted to expand his power of command:

*The 9/11 attacks were regarded as an opportunity to revive presidential authority. More than five years after the attacks, it should be possible to assess whether this goal has been achieved. It is necessary, when doing this, to look beyond individual battles about presidential prerogative – the fight over presidential signing statements or over the breadth of executive privilege, for example – and consider instead the overall outcome of the struggle over executive power.*<sup>65</sup>

Roberts concludes that Bush II has done very little to affect the constraints on the presidency and to increase executive power – two main goals of signing statements.<sup>66</sup> Because the signing statement failed to achieve these goals it can be rendered a failed policy. Furthermore, the attempt to expand presidential authority contributed to the negative perception of the second Bush administration being an “imperial presidency.”

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<sup>64</sup> Alasdair Roberts, The Collapse of Fortress Bush: The Crisis of Authority in American Government (New York: New York UP, 2008) 172 – 175).

<sup>65</sup> Ibid, 168.

<sup>66</sup> Ibid.

### **3. The ideology underlying Bush II's use of signing statements has not been widely accepted.**

The Bush II administration believes that it is appropriate to routinely issue signing statements questioning an enormous number of legislative provisions in order to expand presidential power. Putting aside the fact that this policy has not worked, the underlying ideology has not been widely accepted outside the administration. Even those who espouse the use of signing statements generally have criticized the Bush II approach. Perhaps the most stark example of this mindset is Walter Dellinger, one of the early architects of signing statement policy as head of the Justice Department's Office of Legal Counsel from 1993 to 1996. While Dellinger continues to defend the use of signing statements and the authority of the executive branch to refuse to enforce legislative provisions he believes to be unconstitutional, he cannot defend the Bush II approach to signing statements. Indeed, Dellinger believes that this administration has relied upon a warped interpretation of his analysis in 1994 to justify its policy. Specifically, Dellinger emphasized that a president

*Should presume laws are valid and accord great deference to Congress' views that its acts are consistent with the Constitution. A president should also recognize that, while the Supreme Court is not the sole arbiter of constitutionality, it plays a special role in resolving such questions." If conscientiously followed, these principles reduce the risk that a president will assert a dubious claim of unconstitutionality in order to sidestep a law he simply doesn't like. The Bush [II] administration's*

*frequent and seemingly cavalier refusal to enforce laws, which is aggravated by its avoidance of judicial review and even public disclosure of its actions, places it at odds with these principles and with predecessors of both parties.*<sup>67</sup>

This abuse, Dellinger contends, reflects a deeper problem: the Bush II “administration’s extravagant claims to unilateral authority to govern.”<sup>68</sup>

Similarly, while Professor Laurence Tribe agrees that signing statements are largely “informative and constitutionally unobjectionable,” he concludes that this administration has abused the practice.<sup>69</sup> He finds the practice “objectionable not by virtue of the signing statements themselves but rather by virtue of the president’s refusal to face the political music by issuing a veto and subjecting that veto to the possibility of an override by Congress.”<sup>70</sup>

Rather than articulating a “persuasive conception of constitutional meaning” around signing statements, as Whittington suggests<sup>71</sup>, this administration has simply bulldozed ahead, alienating even those who are sympathetic to the use of signing statements. In the absence of broad-based ideological support, this policy is unlikely to have any long-term traction.

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<sup>67</sup> Walter Dellinger "A Slip of the Pen." New York Times 31 July 2006.

<sup>68</sup> Ibid.

<sup>69</sup> Laurence Tribe, "'Signing Statements' are a Phantom Target." The Boston Globe 9 Aug. 2006.

<sup>70</sup> Ibid.

<sup>71</sup> Whittington, Keith E. Constitutional Construction: Divided Powers and Constitutional Meaning. (Cambridge: Harvard UP, 1999).

#### **4. Bush II's use of signing statements has fostered mistrust and hostility in Congress.**

Unsurprisingly, the Bush II administration's use of signing statements to unilaterally expand presidential power has not been well received in Congress. The adverse reaction is not new. Indeed, following President Reagan's use of a signing statement in connection with his execution of the Immigration Reform and Control Act of 1986, Barney Frank commented that the practice constituted "the gravest usurpation of legislative prerogative I can think of."<sup>72</sup> While the rhetoric has remained harsh, the threat has grown in the eyes of Congress as it has evolved into a perceived frontal assault on the legislative function. In a Senate Judiciary Committee hearing on "Presidential Signing Statements" held on June 27, 2006, Ranking Member Senator Patrick Leahy (D-VT) remarked:

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

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<sup>72</sup>. Bradley H. Patterson Jr., The White House Staff: Inside the West Wing and Beyond (Washington DC: Brookings Institution P, 2001) 103.

*President will follow and which parts he will simply ignore.*<sup>73</sup>

This view is by no means limited to Congressional Democrats. Indeed, Republican Senator Arlen Specter (R-PA), Chairman of the Senate Judiciary Committee, has asserted that the legislative authority of Congress “doesn’t amount to anything if the president can say, ‘My constitutional authority supersedes the statute.’ And I think we’ve got to lay down the gauntlet and challenge him on it.” And Senator Specter did. On July 26, 2006, Senator Specter introduced a bill granting legislators legal standing to bring litigation challenging the legality of signing statements.<sup>74</sup> In advancing this legislation, he stated:

*The President cannot use a signing statement to rewrite the words of a statute nor can the President use a signing statement to selectively nullify those provisions he does not like. This much is clear from the Constitution...If the President is permitted to rewrite the bills that Congress passes and cherry pick which provisions he likes and does not like, he subverts the constitutional process designed by our Framers.*<sup>75</sup>

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<sup>73</sup> “Hearing on Presidential Signing Statements,” United States Senate Committee on the Judiciary, Washington DC, 23 June 2006.

<sup>74</sup> Presidential Signing Statements Act of 2006, S. 3731, 109<sup>th</sup> Cong. §5 (2006).

<sup>75</sup> Savage, Charlie. "Specter Takes Step to Halt Bush Signing Statements: Says Congress Needs Power to Sue President." Boston Globe 27 July 2006. 2 Feb. 2008 <[http://www.boston.com/news/nation/washington/articles/2006/07/27/specter\\_takes\\_step\\_to\\_halt\\_bush\\_signing\\_statements/](http://www.boston.com/news/nation/washington/articles/2006/07/27/specter_takes_step_to_halt_bush_signing_statements/)>.



The proposed legislation reflected Congress's anger at the power play that the Bush II administration's use of signing statements represented. It also reflected the frustration of not being able to confront them directly, because the Supreme Court had consistently ruled that legislators do not have legal standing to challenge such actions in court because they have not suffered the requisite "injury." Specifically, the Supreme Court has granted standing to legislators only in cases involving the nullification of a specific vote.<sup>76</sup> Issuance of a signing statement questioning the constitutionality of a legislative provision or indicating the intent not to enforce a provision in the future does not rise to the level of vote nullification under these cases.

Congress's extreme reaction has further fanned the flames of hostility between Congress and the Bush II administration. Such hostility cannot, of course, be contained within the single issue of signing statements or the bills that they affect. Indeed, they have been used in so many statutes that this "limitation" would not be all that limiting.

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<sup>76</sup> *Raines v. Byrd*, no. 96-1671, Supreme Ct. of the US, 27 May 1997.

## CONCLUSION | VI

Recent debates over presidential signing statements have mistakenly focused solely on legal arguments concerning the constitutionality of this practice. This narrow focus overlooks the fact that signing statements have historically been used as a policy by the executive branch to advance the presidential agenda. It also forces analysis of them into a limited analytical model, based solely upon legal precedent, that does not fully capture the relevant issues. This traditional model suggests that signing statements are constitutional and therefore appropriate, despite the fact that broad criticism of signing statements persists. Analyzing signing statements not in terms of their constitutionality but as executive policy permits a deeper assessment of these concerns, and more far reaching conclusions with respect to their advisability.

Equating constitutionality with good policy conflates two completely separate issues. Analyzing the efficacy of signing statements as policy demonstrates that they are not good policy despite the fact that they are likely constitutional. Thus, they provide a concrete example of why these two analyses are distinct. The inverse is also true; that is, an effective policy might not pass constitutional muster. An example of this might be the line item veto. Passed by Congress and signed by President Clinton, many believed that the line item veto was effective policy that helped to streamline the legislative process and limited the opportunity for legislators to hold up important legislation by adding on partisan or pork barrel provisions. However, the Supreme Court ruled in *Clinton v City of New York* that the line item veto unconstitutionally transferred to the

president a function allocated to Congress.<sup>77</sup> This was so even though Congress approved the transfer.

Since the Reagan administration, signing statements have been used extensively and even after numerous variations of use, they have not served their intended purpose as a policy. Using the concepts of presidential power set forth by Neustadt, Kernell and Howell (power of persuasion, going public and unilateral action), presidents for over two decades attempted to use signing statements to increase executive influence in the legislative process. After failed attempts to create an effective policy by four administrations, it is apparent that signing statements are bad policy and cannot be made more effective. In fact, the recent use of signing statements has been counterproductive. They have generated a great deal of hostility between the executive and legislative branches, and widespread criticism by legal scholars and the general public.

The teaching of this paper reaches beyond its conclusions about presidential signing statements. It demonstrates the importance of utilizing an analytical framework that is broad enough to capture the salient issues and concerns raised by the issue presented. When it comes to turf battles between the branches of government—of which signing statements are an example—the traditional analysis has all too often been limited to legal assessments based upon separation of powers principles. Expanding the analysis to include policy issues broadens, deepens and strengthens the analysis and the resulting conclusions.

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<sup>77</sup> Clinton v. City of New York, no. 97-134, Supreme Ct. of the US, 27 April 1998.

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Beginning in 2006, Charlie Savage, a political columnist for *The Boston Globe*, began writing a series of articles on the use of signing statements by President George W. Bush. Since then, presidential signing statements have been the subject of much debate. My original goal at the outset of this project was to examine the constitutionality of presidential signing statements within the context of separation of powers principles. However, it became evident that many of the legal arguments for and against the use of signing statements have been exhausted without a clear resolution. Ultimately, I found the arguments that they were unconstitutional unconvincing, and yet was still troubled by how they were being used.

At this point, my lack of legal expertise became advantageous as I started examining the signing statement as a policy instead of exclusively as a legal issue. What I came to realize is that many of the legal arguments being made were based on issues of policy rather than legality. By assessing signing statements within an analytical framework based upon policy rather than constitutionality, the issue of signing statements became a canvas on which to examine the correlation between policy arguments and constitutional examination in conventional policy analysis.

To illustrate the premise of this argument, the four-cell table below represents the full spectrum of analysis that can be utilized in assessing behavior by one branch that potentially intrudes upon the domain of another. Using signing statements as an example, this paper argues that conventional analysis based upon legal/constitutional principles underutilizes the full range of available analysis and

confines the arguments to an unduly narrow perspective. With reference to this table, traditional analysis is limited to cells 1 and 4 of the table, essentially equating constitutionality with good policy, and vice versa.

### THE CONSTITUTIONALITY-POLICY MODEL

		<b>CONSTITUTIONALITY</b>	
		<b>Constitutional</b>	<b>Unconstitutional</b>
<b>POLICY</b>	<b>Good Policy</b>	1	2
	<b>Bad Policy</b>	3	4

Utilizing the entire table above suggests a policy can be both good and unconstitutional, or bad policy can be constitutional. A policy must be judged on effectiveness, feasibility and a cost-benefit analysis to see if it will successfully fulfill its intended purpose. Constitutionality is determined to establish whether or not a policy can be implemented without violating legal principles. By separating constitutional arguments from policy analysis, it becomes easier to effectively and unabashedly evaluate a policy.

The methods used to perform this study were two-fold. First, the legal arguments both for and against the use of signing statements were briefly identified, and it was concluded that signing statements are not a violation of the Constitution, at least at the time they are made. This conclusion provided the foundation for making the larger connection between constitutionality and policy. There are solid legal arguments on both sides of this issue, but there is yet to be

any empirical evidence that signing statements have caused harm to the public by violating the Constitution. The primary sources used in the first section of the paper were from law reviews, scholarly studies on signing statements, reports on the use of signing statements and original White House documents regarding the implementation of signing statements.

Second, the use of signing statements was examined from the Reagan administration to the George W. Bush administration. Using three theories of presidential exertion of power – the power of persuasion, going public and unilateral action – signing statements were identified as an executive policy used to advance the president’s agenda in Congress and to have presidential interpretation become a part of legislative history.

The two-dimensional analysis of this paper concludes that signing statements are constitutional, but are a bad policy. Particularly as utilized by George W. Bush, signing statements have not been effective in either expanding presidential policy generally, or specifically his political or legislative agenda. Not only did the implementation of the signing statement not achieve its attended goals, it created controversy over the exertion of presidential authority in the second Bush administration. And while this policy was not expensive to implement, it was costly by creating negative publicity for the Bush administration (e.g. the Charlie Savage articles). In the end, the costs of implementing this policy far outweigh the benefits. One of the advantages of examining policy using the constitutionality- policy model is that a good policy that violates the Constitution can sometimes be altered to be legally implemented

and vice versa for a bad policy. In the case of signing statements, their use as an exertion of presidential influence on legislation have been exhausted and they cannot be modified into a good policy.

This paper provides important insights into how policy is examined when the issue of constitutionality is involved. The more thorough analysis provided in the constitutionality-policy model helped frame the recent debate over presidential signing statements as a policy issue rather than one of constitutionality and from that perspective concluded that signing statements are bad policy regardless of constitutionality. The broader significance of this paper is the expansive use of policy analysis that separates the traditional coupling of constitutionality with policy analysis. This model can be used to reexamine old policies and new policy proposals. The expectation is that this new analysis will allow for the modification of policies before they are disregarded because they are deemed unconstitutional and so that bad policies are not implemented purely on the basis of their constitutionality.