



Presidential Signing Statements: Constitutional and Institutional Implications

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Summary

Presidential signing statements are official pronouncements issued by the President contemporaneously to the signing of a bill into law that, in addition to commenting on the law generally, have been used to forward the President's interpretation of the statutory language; to assert constitutional objections to the provisions contained therein; and, concordantly, to announce that the provisions of the law will be administered in a manner that comports with the administration's conception of the President's constitutional prerogatives. While the history of presidential issuance of signing statements dates to the early 19th century, the practice has become the source of significant controversy in the modern era as Presidents have increasingly employed the statements to assert constitutional and legal objections to congressional enactments. President Reagan initiated this practice in earnest, transforming the signing statement into a mechanism for the assertion of presidential authority and intent. President Reagan issued 250 signing statements, 86 of which (34%) contained provisions objecting to one or more of the statutory provisions signed into law. President George H. W. Bush continued this practice, issuing 228 signing statements, 107 of which (47%) raised objections. President Clinton's conception of presidential power proved to be largely consonant with that of the preceding two administrations. In turn, President Clinton made aggressive use of the signing statement, issuing 381 statements, 70 of which (18%) raised constitutional or legal objections. President George W. Bush continued this practice, issuing 161 signing statements, 127 of which (79%) contain some type of challenge or objection. The significant rise in the proportion of constitutional objections made by President George W. Bush was compounded by the fact that his statements were typified by multiple objections, resulting in more than 1,000 challenges to distinct provisions of law. Although President Barack Obama has continued to use presidential signing statements, the Obama Administration has used the interpretive tools with less frequency than previous administrations—issuing 20 signing statements, of which 10 (50%) contain constitutional challenges to an enacted statutory provision.

The number and scope of such assertions in the George W. Bush Administration gave rise to extensive debate over the issuance of signing statements, with the American Bar Association (ABA) publishing a report declaring that these instruments are “contrary to the rule of law and our constitutional separation of powers” when they “claim the authority or state the intention to disregard or decline to enforce all or part of a law ... or to interpret such a law in a manner inconsistent with the clear intent of Congress.”

However, in analyzing the constitutional basis for, and legal effect of, presidential signing statements, it becomes apparent that no constitutional or legal deficiencies adhere to the issuance of such statements in and of themselves. Rather, it appears that the appropriate focus of inquiry in this context is on the assertions of presidential authority contained therein, coupled with an examination of substantive executive action taken or forborne with regard to the provisions of law implicated in a presidential signing statement. Applying this analytical rubric, it seems evident that the issues involved center not on the simple issue of signing statements, but rather on the view of presidential authority that governs the substantive actions of the administration in question. This report focuses on the use of signing statements by recent administrations, with particular emphasis on the Administrations of George W. Bush and Barack Obama.

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Introduction

Presidential signing statements are official pronouncements issued by the President contemporaneously to the signing of a bill into law that, in addition to commenting on the law generally, have been used to forward the President's interpretation of the statutory language; to assert constitutional objections to the provisions contained therein; and, concordantly, to announce that the provisions of the law will be administered in a manner that comports with the administration's conception of the President's constitutional prerogatives.¹ While the history of presidential issuance of signing statements dates to the early 19th century, the practice has become the source of significant controversy in the modern era as Presidents have increasingly employed the statements to assert constitutional objections to congressional enactments.² The number and scope of such assertions in the George W. Bush Administration in particular gave rise to extensive debate over the issuance of signing statements, with the American Bar Association (ABA) publishing a report declaring that these instruments are "contrary to the rule of law and our constitutional separation of powers" when they "claim the authority or state the intention to disregard or decline to enforce all or part of a law ... or to interpret such a law in a manner inconsistent with the clear intent of Congress."³

However, in analyzing the constitutional basis for, and legal effect of, presidential signing statements, it becomes apparent that no constitutional or legal deficiencies adhere to the issuance of such statements in and of themselves. Rather, it appears that the appropriate focus of inquiry in this context is on the assertions of presidential authority contained therein, coupled with an examination of substantive executive action taken or forborne with regard to the provisions of law implicated in a presidential signing statement. Applying this analytical rubric, it seems evident that the issues involved center not on the simple issue of signing statements, but rather on the view of presidential authority that governs the substantive actions of the administration in question. This report focuses on the use of signing statements by recent administrations, with particular emphasis on the Administrations of George W. Bush and Barack Obama.

Historical Usage and Constitutional Basis

There is no explicit constitutional provision authorizing the issuance of presidential signing statements. Article I of the Constitution provides only that the President "shall sign" a bill of which he approves, while in vetoing a measure the President is required to return the measure "with his Objections to that House in which it shall have originated."⁴ However, Presidents have issued such statements since the Monroe Administration, and there is little evident constitutional or legal support for the proposition that the President may be constrained from issuing a statement regarding a provision of law.

¹ Philip J. Cooper, "George W. Bush, Edgar Allen Poe and the Use and Abuse of Presidential Signing Statements," *Presidential Studies Quarterly* 35, no. 3, at p. 517 (September 2005).

² Christopher N. May, "Presidential Defiance of 'Unconstitutional' Laws: Reviving the Royal Prerogative," 21 *Hastings Const. L.Q.* 865, 932 (1994).

³ American Bar Association, *Report of the Task Force on Presidential Signing Statements and the Separation of Powers Doctrine* at p. 5 (August 2006).

⁴ U.S. Const., Art I, sec. 7 cl. 2; *see also*, May, n. 2, *supra*, at 929.

The first controversy arising in this context stemmed from a signing statement issued by Andrew Jackson in 1830 that raised objections to an appropriations bill that involved internal improvements.⁵ The bill specifically addressed road examinations and surveys. In his signing statement President Jackson declared that the road in question, which was to reach from Detroit to Chicago, should not extend beyond the territory of Michigan.⁶ A subsequently issued House report criticized Jackson's action, characterizing it as in effect constituting a line item veto.⁷ Likewise, a signing statement issued by President Tyler in 1842 expressing doubts about the constitutionality of a bill regarding the apportionment of congressional districts was characterized by a select committee of the House as "a defacement of the public records and archives."⁸ Perhaps sensitized by this rebuke, Presidents Polk and Pierce apologized for the issuance of signing statements, noting that such action departed from the traditional practice of notifying Congress of the approval of a bill via an oral message from the President's private secretary.⁹ This conception of a signing statement as an unusual instrument was again noted by President Grant in 1875, when he declared that his use of a signing statement was an "unusual method of conveying the notice of approval."¹⁰

Signing statements remained comparatively rare through the end of the 19th century, but had become common instruments by 1950. President Truman, for instance, issued nearly 16 signing statements per year, on average, with the figure steadily increasing up to the modern day. Concurrent with the rise in the number of statements issued, the use of signing statements to voice constitutional objections to acts of Congress has become increasingly prevalent over the past 60 years. This type of executive action began in earnest during the Reagan Administration, as one aspect of a comprehensive strategy employed by the Reagan Administration to assert aggressively the constitutional prerogatives of the presidency.¹¹

A. Signing Statements in the Reagan Administration

President Reagan expanded the use and impact of the presidential signing statement, transforming it into a mechanism for the assertion of presidential authority and intent. President Reagan issued 250 signing statements, 86 of which (34%) objected to one or more of the statutory provisions signed into law.¹² One key aspect of President Reagan's approach in this context centered on attempts to establish the signing statement as part of the legislative history of an enactment, and, concordantly, to persuade courts to take the statements into consideration in judicial rulings. This goal was illustrated in a memorandum drafted by Samuel A. Alito, Jr., then serving in the Office of Legal Counsel (OLC) of the Department of Justice, announcing a "primary objective" to

⁵ (name redacted), "Constitutional Conflicts Between Congress and the President," University Press of Kansas, *Id.*, at p. 132 (1997).

⁶ See Christopher S. Kelley, "A Comparative Look at the Constitutional Signing Statement," 61st Annual Meeting of the Midwest Political Science Association, at p. 5 (2003).

⁷ Fisher, n. 5, *supra*, at 132.

⁸ Fisher, n. 5, *supra*, at 133.

⁹ May, n. 2, *supra*, at 929-930.

¹⁰ May, n. 2, *supra*, at 930.

¹¹ See, e.g., (name redacted), "Congress's Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive," 57 *Geo. Wash. L. Rev.* 627 (1989); CRS Report RL32855, *Presidential Review of Agency Rulemaking*, by (name redacted) (2005).

¹² Curtis A. Bradley, Eric A. Posner, "Presidential Signing Statements and Executive Power," 23 *Const. Comment.* 307, 323 (2006).

“ensure that Presidential signing statements assume their rightful place in the interpretation of legislation.”¹³ To this end, Attorney General Edwin Meese III entered into an agreement in 1986 with the West Publishing Company for signing statements to be included in the legislative histories contained in its U.S. Code Congressional and Administrative News publication.¹⁴

This strategy met with a degree of success in two major Supreme Court cases that were decided during this time period. In *INS v. Chadha*, which struck down as unconstitutional the congressional practice of subjecting various executive branch actions to a legislative veto, the Court noted that “11 Presidents, from Mr. Wilson through Mr. Reagan, who have been presented with this issue have gone on record at some point to challenge congressional vetoes as unconstitutional.”¹⁵ Likewise, in *Bowsher v. Synar*, which struck down provisions of the Gramm-Rudman Deficit Reduction Act on the basis that they impermissibly imbued a legislative branch officer with executive authority, the Court noted: “[i]n his signing statement, the President expressed his view that the act was constitutionally defective because of the Comptroller General’s ability to exercise supervisory authority over the President.”¹⁶ While these citations by the Court lend credence to the validity of signing statements as constitutional presidential instruments, it does not appear that the statements were in fact relied upon in any determinative degree by the Court. Indeed, as discussed in further detail below, the contents of signing statements do not seem to have factored prominently in judicial decisions.¹⁷

One of the most significant conflicts involving a presidential signing statement in the Reagan Administration arose from the President’s statement accompanying the signing of the Deficit Reduction Act of 1984. In that statement, the President took issue with provisions of the bill constituting the Competition in Contracting Act, announcing his “vigorous objection to certain provisions that would unconstitutionally attempt to delegate to the Comptroller General ... the power to perform duties and responsibilities that in our constitutional system may be performed only by officials of the executive branch.”¹⁸ The President further stated that he was “instructing the Attorney General to inform all executive branch agencies as soon as possible with respect to how they may comply with the provisions of the bill in a manner consistent with the Constitution.”¹⁹ President Reagan was specifically objecting to an automatic stay provision that prohibited the award of government contracts during any period where the Comptroller General was investigating complaints that an agency had not complied with the competitive bidding procedures required by the act. Subsequent to this declaration, the Director of the Office of Management and Budget (OMB) issued OMB Bulletin 85-8, instructing federal agencies not to cooperate with the Government Accountability Office’s (GAO’s) efforts to implement the act.²⁰ Given that the actions taken by the relevant agencies pursuant to the specific instructions contained in the bulletin directly impacted contractors, the issue was ripe for judicial review. A

¹³ Samuel A. Alito, Jr., “Using Presidential Signing Statements to Make Fuller Use of the President’s Constitutionally Assigned Role in the Process of Enacting Law,” Office of Legal Counsel Memorandum, February 5, 1986.

¹⁴ Phillip J. Cooper, “By Order of the President: The Use and Abuse of Executive Direct Action,” University of Kansas Press, at p. 203 (2002).

¹⁵ 462 U.S. 919, 942 fn. 13 (1983).

¹⁶ 478 U.S. 714, 719 fn. 1 (1986). See n. 57, *infra*, for a more detailed overview of the decision in *Bowsher v. Synar*.

¹⁷ See n. 93 and accompanying text, *infra*.

¹⁸ P.L. 98-369, Deficit Reduction Act of 1984, Statement by President Ronald W. Reagan Upon Signing H.R. 4170, July 18, 1984.

¹⁹ *Id.*

²⁰ Cooper, n. 14, *supra*, at 226.

judicial ruling issued in March of 1985 upheld the conferral of power at issue.²¹ However, the Administration persisted in its refusals to give effect to the terms of the act, acceding only in the face of additional rulings on the issue as well as a vote by the House Judiciary Committee to eliminate funds for the Office of the Attorney General from the budget.²²

B. Signing Statements in the George H. W. Bush Administration

The Administration of President George H. W. Bush (Bush I) continued to employ signing statements to further presidential prerogatives, issuing 228 signing statements, 107 of which (47%) raised constitutional or legal objections.²³ In particular, the Bush I Administration was highly sensitive to perceived encroachments upon executive power by Congress, as illustrated by an OLC opinion drafted by Deputy Attorney General William P. Barr. In this memo, Barr identified 10 categories of legislative action he considered constitutionally problematic and noted that the Administration had objected to many of these perceived intrusions through the issuance of signing statements.²⁴

One category that was consistently acted upon by the Bush I Administration was protection of presidential authority under the Appointments Clause of the Constitution. For example, upon signing the National and Community Services Act of 1990 into law, President Bush issued a statement declaring that provisions in the bill establishing a Board of Directors charged with administering a National and Community Services Act Commission were unconstitutional due to the requirement that certain appointees were to be drawn from a pool of nominees forwarded by the Speaker of the House of Representatives and the majority leader of the Senate. President Bush specifically noted that such a requirement exceeded the authority of Congress in the appointment context and declared that he would treat the requirement as being “without legal force or effect.” The President further directed the Attorney General “to prepare remedial legislation for submission to the Congress during its next session, so that the act can be brought into compliance with the Constitution’s requirements.” Congress subsequently passed a bill remedying the constitutionally challenged provisions. Additionally, upon signing the Dayton Heritage Preservation Act of 1992 into law, President Bush issued a statement objecting to language in the bill that directed the Secretary of Interior to make appointments of individuals to the Dayton Aviation Heritage Commission based on the recommendations of local officials, stating that since “[t]he majority of members are effectively selected by various nonfederal officials and thus are not appointed in conformity with the Appointments Clause of the Constitution,” he was signing the bill “on the understanding that the commission will serve only in an advisory capacity and will not exercise Government power.”²⁵ The Bush I Administration subsequently refused to make any appointments to the commission until this concern was addressed in remedial legislative action in 1995.²⁶ The Bush I Administration also continued to pursue a strategy of employing signing statements to influence the interpretation of the legislative history accompanying a bill. However, as in the Reagan Administration, it is not apparent that these efforts were successful.

²¹ *Ameron, Inc. v. U.S. Army Corps of Engineers*, 607 F.Supp. 962 (D.N.J. 1985).

²² Cooper, n. 14, *supra*, at 226-27.

²³ See Bradley & Posner, n. 12, *supra*, at 323.

²⁴ Department of Justice, Office of Legal Counsel, “Common Legislative Encroachments on Executive Branch Authority,” 13 U.S. Op. Off. Legal Counsel, 248, 249 (1989).

²⁵ Statement of President George H. W. Bush Upon Signing H.R. 2321, October 16, 1992.

²⁶ Kelley, n. 6, *supra*, at 11.

C. Signing Statements in the Clinton Administration

While the policy aims of his Administration might have differed, President Clinton's conception of executive power revealed itself to be largely consonant with the philosophical underpinnings of the Reagan and Bush I Administrations.²⁷ Accordingly, President Clinton also made active use of signing statements as a mechanism to assert presidential prerogatives. President Clinton issued 381 signing statements, 70 of which (18%) voiced concerns or objections.²⁸

President Clinton also relied upon the OLC to produce memoranda not only in support of the issuance of signing statements generally, but also asserting presidential authority to refuse to enforce unconstitutional statutes. Regarding the former, then Assistant Attorney General Walter Dellinger prepared an OLC memorandum asserting that the issuance of signing statements to "make substantive legal, constitutional or administrative pronouncements," was well established, and that these uses "generally serve legitimate and defensible purposes."²⁹ In a subsequent memorandum, Assistant Attorney General Dellinger declared that "there are circumstances in which the President may appropriately decline to enforce a statute that he views as unconstitutional."³⁰ In support of this "general proposition" that Mr. Dellinger "believe[d] to be uncontroversial," the memorandum pointed to what he argued was "significant judicial approval," and "consistent and substantial executive practice."³¹

It is important to note that while the Dellinger memorandum asserted that the President has an "enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional power of the Presidency," the memo nonetheless acknowledged that the "Supreme Court plays a special role in resolving disputes about the constitutionality of enactments." Accordingly, the memorandum advised:

As a general matter, if the President believes that the Court would sustain a particular provision as constitutional, the President should execute the statute, notwithstanding his own beliefs about the constitutional issue. If, however, the President, exercising his independent judgment, determines both that a provision would violate the Constitution and that it is probable that the Court would agree with him, the President has the authority to decline to execute the statute.³²

The memorandum went on to advise that in deciding whether to refuse to enforce a provision of law, the President should weigh "the effect of compliance with the provision on the constitutional rights of affected individuals and on the executive branch's constitutional authority," with a focus on the likelihood of whether that compliance or non-compliance would permit judicial resolution of the issue.³³ While this recommendation appears to be based on a determination that it would be

²⁷ See, e.g., CRS Report RL32855, *Presidential Review of Agency Rulemaking*, by (name redacted) (2005).

²⁸ See Bradley & Posner, n. 12, *supra*, at 323.

²⁹ Department of Justice, Office of Legal Counsel, "The Legal Significance of Presidential Signing Statements," 17 U.S. Op. Off. Legal Counsel 131 (1993). While the memorandum defended the use of signing statements to announce that an Administration would not give effect to a congressional enactment, it went on to note that "the recent practice of issuing signing statements to create 'legislative history' remains controversial...."

³⁰ Department of Justice, Office of Legal Counsel, "Presidential Authority to Decline to Execute Unconstitutional Statutes," 18 U.S. Op. Off. Legal Counsel, 199 (1994).

³¹ *Id.*

³² *Id.* at 200.

³³ *Id.* at 201.

more appropriate to limit a refusal to enforce a law to situations that “would afford the Supreme Court an opportunity to review the constitutional judgment of the legislative branch,” the memorandum nonetheless declared that some encroachments would not be justiciable, and that in such instances the President “must shoulder the responsibility of protecting the constitutional role of the presidency.”³⁴

In light of this conception of presidential power, it is not surprising that the Clinton signing statements often contained broad constitutional pronouncements similar to those of the Reagan and Bush I Administrations, ranging from the foreign affairs power to the Recommendation Clause. Regarding the latter, in a signing statement accompanying the Balanced Budget Act of 1997, President Clinton took objection to a provision requiring the Secretary of Health and Human Services to develop certain legislative proposals, declaring that he would “construe this provision in light of my constitutional duty and authority to recommend to the Congress such legislative measures as I judge necessary and expedient, and to supervise and guide my subordinates, including the review of their proposed communications to Congress.”³⁵ Like his predecessor, President Clinton also guarded presidential appointment prerogatives, objecting to provisions he perceived as impinging upon executive authority in that context. For example, in a statement issued along with the enactment of the Coast Guard Authorization Act of 1997, President Clinton likewise objected to a provision of the bill that purported to require the designation of certain commission members exercising executive power from persons recommended by local officials or organizations. President Clinton declared that “[t]he Appointments Clause does not permit such restrictions to be imposed upon the executive branch’s powers of appointment. Therefore I will not interpret [this provision] of the act as binding, and I direct the Secretary of Transportation to regard the designations and recommendations arising from it as advisory only.”³⁶

While signing statements that raise constitutional objections or signal an intention to refuse to enforce a provision in law are usually generalized in nature, President Clinton’s statement accompanying the National Defense Authorization Act for Fiscal Year 2000 provides a stark example of a substantive presidential directive being included within a statement itself. The act established the National Nuclear Security Administration (NNSA), a new, semi-autonomous agency within the Department of Energy to manage and oversee the operational and security activities of the department’s nuclear weapons laboratories.

In his signing statement, the President expressed misgivings with respect to structural arrangements within the new agency and the limitations on the Secretary of Energy’s ability to direct and control the activities and personnel of the NNSA, but did not suggest that the legislation raised constitutional issues. In particular, the President objected to what he saw as the isolation of the personnel and contractors of the NNSA from direction by department officials outside the new agency; the limitation on the Secretary’s ability to employ his statutory authorities to direct the activities and personnel of the NNSA both personally and through designated subordinates; the uncertainty whether the department’s duty to comply with the procedural and substantive requirements of environmental laws would be fulfilled under the new arrangement; the removal of the Secretary’s direct authority over certain sensitive classified programs; and the potentially deleterious effect of the creation of redundant support functions in

³⁴ *Id.* at 201.

³⁵ See Bradley and Posner, n. 12, *supra*, at 326.

³⁶ *Id.*

the areas of procurement, personnel, public affairs, legal affairs, and counterintelligence. To ensure that these perceived deficiencies do not, in his view, undermine the Secretary's statutory responsibilities in the area, the President directed the Secretary to assume the duties and functions of the new office of Under Secretary for Nuclear Security and to "guide and direct" all NNSA personnel by using his authority, "to the extent permitted by law," to assign any departmental officer or employee to a concurrent office within NNSA. The Secretary is also directed to "mitigate" the risks to the chain of command between him and subordinate agency personnel presented by the legislation's redundant functions "to the extent permissible under law." The President indicated that he might not submit a nominee for Under Secretary for Nuclear Security until action was taken by Congress to remedy the identified deficiencies and to "harmonize" the Secretary's authorities with those vested in the Under Secretary.

Whereas the statement issued by President Reagan in response to the Competition in Contracting Act was typical of presidential signing statements in that it contained a generalized constitutional objection to a provision in a bill, followed by subsequent particularized and substantive presidential action, President Clinton's NNSA statement was uncharacteristically direct, laying out the specific actions that were to be taken in order to ensure the vitiating of the provisions President Clinton deemed objectionable. As noted by Professor Philip J. Cooper, this statement did not simply raise a generalized constitutional objection or signal an intent to refuse to enforce the provisions at issue, but, rather, constituted an "order to do that which the Congress had expressly rejected."³⁷

D. Signing Statements in the George W. Bush Administration

Like its predecessors, the Administration of George W. Bush (Bush II) employed the signing statement to voice constitutional objections to, or concerns with, congressional enactments, or to enunciate the Administration's interpretation of an enactment it deemed ambiguous. However, while the nature and scope of the objections raised by the Bush II Administration mirrored those of prior Administrations, the sheer number of challenges contained in the signing statements indicated the Administration was using the presidential instrument relative to all levels and elements of the executive branch and to assert aggressively presidential prerogatives in its relations with the Congress and the judiciary. These factors, in turn, generated a significant degree of controversy regarding the issuance of presidential signing statements.

At first glance, it does not appear that President Bush departed significantly from prior practice in the signing statement context, having issued 161 signing statements as compared to 381 during the Clinton Administration. However, the qualitative difference in the Bush II approach becomes apparent when considering the number of individual challenges or objections to statutory provisions that were contained in his statements. Of President Bush's 161 signing statements, 127 (79%) contain some type of constitutional challenge or objection, as compared to 70 (18%) during the Clinton Administration.³⁸ Even more significant, however, is the fact that these 127

³⁷ Cooper, n. 14, *supra*, at 228.

³⁸ See Neil J. Kinkopf and Peter M. Shane "Signed Under Protest: A Database of Presidential Signing Statements, 2001-2009," Public Law and Legal Theory Working Paper Series No. 141 (January 2011). Available at <http://www.ssrn.com>.

signing statements were typified by multiple constitutional and statutory objections, containing challenges to more than 1,000 distinct provisions of law.³⁹

Contributing to the controversy was the high profile of several of the provisions to which President Bush objected. For instance, in the signing statement accompanying the USA PATRIOT Improvement and Reauthorization Act of 2005, President Bush declared that provisions requiring the executive branch to submit reports and audits to Congress would be construed “in a manner consistent with the President’s constitutional authority to supervise the unitary executive branch and to withhold information the disclosure of which could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive’s constitutional duties.”⁴⁰ Likewise, in the signing statement accompanying the law that contained the McCain Amendment (as part of the Detainee Treatment Act) prohibiting the use of torture, or cruel, inhuman, or degrading treatment of prisoners, the President declared that the executive branch would construe that provision “in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief ... [in order to protect] the American people from further terrorist attacks.”⁴¹

While the number of provisions challenged or objected to by President Bush gave rise to controversy, it is important to note that the substance of his signing statements did not appear to differ substantively from those issued by either Presidents Reagan or Clinton. As with those Administrations, the majority of the Bush II signing statements made generalized objections to perceived encroachments on executive authority.⁴² Moreover, in almost all instances where President Bush raised a constitutional concern or objection, he stated that he would construe the provision at issue in a manner that will avoid his concerns.⁴³ Relatedly, in some statements that raised constitutional objections, President Bush declared that he would comply with the provision at issue “as a matter of comity.”⁴⁴

Professor Philip J. Cooper characterized the constitutional objections raised by President Bush as falling across 17 categories, ranging from generalized assertions of presidential authority to supervise the “unitary executive branch”⁴⁵ to federalism limits imposed by the Supreme Court in *United States v. Printz*.⁴⁶ The Bush II Administration was particularly prolific in issuing signing statements that objected to provisions that it claimed infringed on the President’s power over foreign affairs (oftentimes with regard to requirements that the Administration take a particular position in negotiations with foreign powers); provisions that required the submission of proposals or recommendations to Congress⁴⁷ (asserting that they interfere with the President’s authority under the Recommendations Clause to “recommend such Measures as he shall judge

³⁹ *Id.*

⁴⁰ P.L. 109-177, USA PATRIOT Improvement and Reauthorization Act of 2005, Statement of President George W. Bush Upon Signing H.R. 3199, March 9, 2006.

⁴¹ P.L. 109-148, Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act of 2006, Statement of President George W. Bush Upon Signing H.R. 2863, December 30, 2005.

⁴² Bradley and Cooper, n. 12, *supra*, at 317.

⁴³ *Id.* at 9.

⁴⁴ *Id.* at 10.

⁴⁵ *Id.* at 9.

⁴⁶ Cooper, n. 1, *supra*, at 522.

⁴⁷ Bradley and Cooper, n. 12, *supra*, at 317.

necessary and expedient”); provisions that imposed disclosure or reporting requirements (on the ground that such provisions may interfere with the President’s authority to withhold sensitive or privileged information); conditions and qualifications on executive appointments (asserting infringement on the President’s authority pursuant to the Appointments Clause); and legislative veto provisions (on the ground that they violate bicameralism and presentment requirements as established in *INS v. Chadha*).

While the substance of the Bush II signing statements appears to be comparable to that of previous administrations, the nature and sheer number of provisions challenged or objected to indicates that there is nonetheless a qualitative difference to the Bush II Administration’s use of this instrument. As has been widely noted, President Bush “emphatically endorsed the unitariness of the executive branch,”⁴⁸ and took steps to assert sole presidential authority over his Administration. In addition to actions taken to prosecute the War on Terror, President Bush exercised significant control over the agency rulemaking process,⁴⁹ and issued executive orders claiming authority to control the release of presidential records and to classify and reclassify information that implicated national security concerns.⁵⁰ The Bush II Administration also exercised significant control over the release of information relating to internal executive branch deliberations, as in the Vice President’s refusal to disclose information regarding the activities of the National Energy Policy Development Group to the Government Accountability Office (leading to the litigation in *Walker v. Cheney*).⁵¹

When viewed through the prism of the Administration’s actions in these contexts, it seems evident that the Bush II signing statements were an integral part of the Administration’s efforts to further its broad view of presidential prerogatives and to assert functional and determinative control over all elements of the executive decision-making process. Furthermore, the dramatic increase in the number of provisions challenged and objected to by President Bush has been widely seen as being aimed at altering the conception of presidential authority not only in the internal operations of the executive branch, but with respect to Congress, the courts, and the public.

As touched upon above, the large bulk of the signing statements the Bush II Administration issued did not apply particularized constitutional rationales to specific scenarios, nor do they contain explicit, measurable refusals to enforce a law. Instead, the statements made broad and largely hortatory assertions of executive authority that made it effectively impossible to ascertain what factors, if any, might lead to substantive constitutional or interpretive conflict in the implementation of an act. The often vague nature of these constitutional challenges, coupled with the pervasive manner in which they were raised in numerous signing statements could thus be interpreted as an attempt by the Administration to object systematically to any perceived congressional encroachment, however slight, with the aim of inuring the other branches of government and the public to the validity of such objections and the attendant conception of presidential authority that will presumably follow from sustained exposure and acquiescence to such claims of power.

⁴⁸ Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, “The Unitary Executive in the Modern Era,” 90 Iowa L. Rev. 601, 722 (2005).

⁴⁹ Halstead, n. 27, *supra*.

⁵⁰ See E.O. 13233 (November 1, 2001); E.O. 13292 (March 25, 2003).

⁵¹ See CRS Report RL31713, *Walker v. Cheney: District Court Decision and Related Statutory and Constitutional Issues*, by (name redacted) (2004); *Walker v. Cheney*, 230 F. Supp. 2d 51 (D.D.C. 2002).

E. Signing Statements in the Barack Obama Administration

Like its predecessors, the Administration of President Barack Obama has continued to employ presidential signing statements to voice constitutional objections to congressional enactments, or to enunciate the Administration's interpretation of an enactment it has deemed ambiguous. However, the Obama Administration has used the signing statement as a vehicle for asserting constitutional objections to duly enacted statutes with significantly less frequency than prior administrations.⁵² The Administration has issued 20 signing statements, of which 10 (50%) contain constitutional challenges to an enacted statutory provision.⁵³

Upon entering office, President Obama issued a memorandum to the heads of the executive departments outlining the new Administration's policy on the use of signing statements.⁵⁴ While noting that the interpretive instrument "can be abused," the President asserted that using signing statements to raise constitutional objections to statutes serves "a legitimate function in our system, at least when based on well-founded constitutional objections."⁵⁵ Accordingly, the President announced his intent to curb prior abuses and mitigate the commonly articulated objections to the use of the signing statement. The President proceeded to establish the foundational principles of his Administration's approach to signing statements. The Administration would attempt to communicate constitutional objections to Congress in the early stages of the legislative process so as to avoid the necessity of a signing statement; only base objections on "well-founded" interpretations of the Constitution; identify any constitutional objection "with sufficient specificity" to ensure that the legal nature and basis of the objection is clear; and announce an intent to construe a provision so as to avoid a constitutional problem "only if that construction is a legitimate one."⁵⁶ The President also directed all executive branch agencies to "seek the advice of the Attorney General before relying" on previously issued signing statements "as the basis for disregarding, or otherwise refusing to comply with, any provision of a statute."⁵⁷

While the frequency with which the Obama Administration has asserted constitutional objections to enacted statutory provisions represents a departure from previous administrations, the types of objections within the signing statements that the President has issued have generally mirrored those of previous administrations. The Obama Administration has continued to register familiar constitutional objections to perceived infringements on the President's authority in foreign affairs

⁵² While President Obama has yet to complete an entire term in office, if he sustains his current rate of issuing signing statements, it is reasonable to project that he will issue significantly fewer statements than recent presidents.

⁵³ Arguably, 11 of the Obama Administration signing statements have included constitutional objections. A signing statement from January 7, 2011, asserted that restrictions on the use of funds to transfer Guantanamo detainees to the United States constituted a "dangerous and unprecedented challenge to critical executive branch authority" and interfered with "the authority of the executive branch to make important and consequential foreign policy and national security determinations." However, rather than expressly questioning the provision's constitutionality or asserting that the Administration would not be bound by the restrictions, the President only stated that his Administration would "work with the Congress to seek repeal of these restrictions, will seek to mitigate their effects, and will oppose any attempt to extend or expand them in the future." P.L. 111-383, Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Statement of President Barack Obama Upon Signing H.R. 6523, January 7, 2011.

⁵⁴ Memorandum for the Heads of Executive Departments and Agencies: Presidential Signing Statements, March 9, 2009. Available at http://www.whitehouse.gov/the_press_office/Memorandum-on-Presidential-Signing-Statements.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

and as Commander in Chief, as well as violations of the Appointments Clause.⁵⁸ For example, a December 23, 2011, signing statement asserted constitutional challenges based on the President's authority in foreign affairs and as Commander in Chief; infringements on his ability to communicate and negotiate with foreign governments, receive the assistance of senior advisers, and to recommend legislation to Congress; and objections to numerous legislative veto provisions.⁵⁹

In addition to objections associated with the President's authority in foreign affairs, some of the Administration's most common objections have pertained to the President's relationship with Congress and the separation of powers—generally focusing on Congress's authority to obtain information from the executive branch.⁶⁰ Although the Obama Administration signing statements do not refer to “executive privilege” by name as the legal justification for these objections, the context of a number of signing statements indicates that executive privilege is, at least in part, the legal doctrine being asserted. For example, upon signing the Omnibus Appropriations Act of 2009, the President issued a signing statement referencing a provision that prohibited the use of appropriated funds to pay the salary of any federal employee who interferes with communications between Members of Congress and other federal employees.⁶¹ The President noted that he did not “interpret this provision to detract from my authority to direct the heads of executive departments to supervise, control, and correct employees’ communications with the Congress in cases where such communications would be unlawful or would reveal information that is properly privileged or otherwise confidential.”⁶² Additionally, in a May 20, 2009, signing statement, the President asserted that he would interpret a provision in the Fraud Enforcement and Recovery Act that requires the executive branch to provide the Financial Crisis Inquiry Commission with “any information related to any Commission inquiry” as “not to abrogate any constitutional privilege.”⁶³ Finally, the President asserted two objections to the potential disclosure of protected information in an October 7, 2010, signing statement attached to the Intelligence Authorization Act for Fiscal Year 2010.⁶⁴ The two provisions in question require that the President provide to Congress the “legal basis” for conducting covert actions and intelligence activities and mandates that the newly established Inspector General of the Intelligence Community make reports to certain congressional committees with respect to investigations of current or former intelligence officials.⁶⁵ The Obama signing statement asserted that the Administration would interpret these

⁵⁸ See, e.g. P.L. 111-8, Omnibus Appropriations Act of 2009, Statement of President Barack Obama Upon Signing H.R. 1105, March 11, 2009 (asserting constitutional objections based on foreign affairs, commander in chief, legislative aggrandizement, and the Recommendations Clause.); P.L. 11-11, Omnibus Public Land Management Act of 2009, Statement of President Barack Obama Upon Signing H.R. 146, March 30, 2009.

⁵⁹ P.L. 112-74, Consolidated Appropriations Act of 2012, Statement of President Barack Obama Upon Signing H.R. 2055, December 23, 2011.

⁶⁰ See, Statement of President Barack Obama Upon Signing H.R. 1105, March 11, 2009 (objecting to §714(1) and §714(2)); Statement of President Barack Obama Upon Signing S. 386, May 20, 2009 (objecting to §5(d)); Statement of President Barack Obama Upon Signing H.R. 2701, October 7, 2010 (objecting to §331 and §405); Statement of President Barack Obama Upon Signing H.R. 1473, April 15, 2011 (objecting to §2262).

⁶¹ P.L. 111-8, Omnibus Appropriations Act of 2009, Statement of President Barack Obama Upon Signing H.R. 1105, March 11, 2009.

⁶² *Id.* In the same signing statement, President Obama asserted that he would treat provisions that purported to “require me and other executive officers to submit budget requests to the Congress in particular forms” as “precatory.” *Id.*

⁶³ P.L. 111-21, Fraud Enforcement and Recovery Act of 2009, Statement of President Barack Obama Upon Signing S. 386, May 20, 2009.

⁶⁴ P.L. 111-259, Intelligence Authorization Act for Fiscal Year 2010, Statement of President Barack Obama Upon Signing H.R. 2701, October 7, 2010.

⁶⁵ P.L. 111-259 §§331, 405.

provisions so as not to require the “disclosure of any privileged advice or information” or the “disclosure of privileged or otherwise confidential law enforcement information.”⁶⁶

President Obama has also consistently used signing statements to object to congressionally imposed limitations on the President’s discretion concerning the disposition of individuals held at the Guantanamo Bay detention center. In 2011 alone, the President objected to statutory provisions restricting the transfer of Guantanamo detainees, either into the United States or to a foreign country, on four separate occasions.⁶⁷ The Obama Administration has asserted that restricting the transfer of detainees into the United States, and therefore restricting the executive branch’s ability to prosecute detainees in federal court, violates the separation of powers by infringing on the “critical executive branch authority to determine when and where to prosecute Guantanamo detainees.”⁶⁸ Likewise, restricting the transfer of detainees to foreign nations would “hinder the executive’s ability to carry out its military, national security, and foreign relations activities and . . . would, under certain circumstances, violate constitutional separation of powers principles.”⁶⁹ In each signing statement, President Obama asserted that he would interpret the restrictions in a manner that would avoid a “constitutional conflict.”⁷⁰

One substantive area in which the Obama Administration’s use of the signing statement has departed from certain previous administrations, especially the Bush II Administration, has been the absence of any references to the “unitary executive.” As noted previously, President George W. Bush “emphatically endorsed the unitariness of the executive branch” and arguably used the signing statement to assert sole presidential authority over his Administration.⁷¹ Whereas the Bush II Administration routinely objected to congressional enactments on the ground that certain provisions infringed on the President’s authority to “supervise the unitary executive,” no such language has appeared in Obama Administration signing statements.⁷² This, however, is not to say that President Obama has not issued signing statements to assert control over the executive branch and executive officials, but only that the Obama Administration has not utilized signing statements to explicitly advance the unitary executive theory of presidential control. For example, in perhaps his most controversial signing statement to date, President Obama expressly objected to a provision of the Department of Defense and Full-Year Continuing Appropriations Act of

⁶⁶ P.L. 111-259, Intelligence Authorization Act for Fiscal Year 2010, Statement of President Barack Obama Upon Signing H.R. 2701, October 7, 2010.

⁶⁷ P.L. 111-383, Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Statement of President Barack Obama Upon Signing H.R. 6523, January 7, 2011; P.L. 112-10, Department of Defense and Full-Year Continuing Appropriations Act for Fiscal Year 2011, Statement of President Barack Obama Upon Signing H.R. 1473, April 15, 2011; P.L. 112-74, Consolidated Appropriations Act of 2012, Statement of President Barack Obama Upon Signing H.R. 2055, December 23, 2011; National Defense Authorization Act for Fiscal Year 2012, Statement of President Barack Obama Upon Signing H.R. 1540, December 31, 2011.

⁶⁸ P.L. 111-383, Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Statement of President Barack Obama Upon Signing H.R. 6523, January 7, 2011; P.L. 112-10, Department of Defense and Full-Year Continuing Appropriations Act for Fiscal Year 2011, Statement of President Barack Obama Upon Signing H.R. 1473, April 15, 2011; National Defense Authorization Act for Fiscal Year 2012, Statement of President Barack Obama Upon Signing H.R. 1540, December 31, 2011.

⁶⁹ National Defense Authorization Act for Fiscal Year 2012, Statement of President Barack Obama Upon Signing H.R. 1540, December 31, 2011.

⁷⁰ *Id.*

⁷¹ Yoo, Calabresi and Colangelo, n.48, *supra* at 722.

⁷² *See, e.g.*, P.L. 109-163, National Defense Authorization Act for Fiscal Year 2006, Statement Upon Signing H.R. 1815 by President George W. Bush, January 6, 2006 (“The executive branch shall implement these provisions in a manner consistent with the President’s constitutional authority to supervise the unitary executive branch . . .”).

2011 that he perceived as infringing on his authority to “supervise and oversee the executive branch.”⁷³ Section 2262 of the act states that no funds made available under the Full-Year Continuing Appropriations “may be used to pay the salaries and expenses” of four specific White House “czars.”⁷⁴ Upon signing the bill into law, President Obama issued a signing statement objecting to the pay restrictions on the grounds that they would impede his ability to receive advice from White House staff. The statement asserted that “[t]he President has well-established authority to supervise and oversee the executive branch, and to obtain advice in furtherance of this supervisory authority.”⁷⁵ The Administration concluded that legislative attempts to influence “the President’s ability to exercise his supervisory and coordinating authorities . . . violate[s] the separation of powers by undermining the President’s ability to exercise his constitutional responsibilities and take care that the law be faithfully executed.”⁷⁶ Accordingly, the Administration would interpret the provision so as “not to abrogate these Presidential prerogatives.”⁷⁷ The Administration repeated these objections with respect to similar provisions of the Consolidated Appropriations Act of 2012, which the President asserted “could prevent me from fulfilling my constitutional responsibilities, by denying me the assistance of senior advisers and by obstructing my supervision of executive branch officials in the execution of their statutory responsibilities.”⁷⁸

The continued use of signing statements has generated a significant degree of controversy, leading some to call for the enactment of a bar to their issuance, or for the conferral upon Congress of the right to challenge statements in court.⁷⁹ However, an analysis of the underlying legal and constitutional issues suggests that such approaches may not have taken full cognizance of the nature of signing statements generally, as well as the nature of the pragmatic and institutional concerns that are posed by the attempts at assertion of executive power underlying the controversy over these instruments.

Legal and Constitutional Implications of Signing Statements

As has been illustrated, there is a long history of presidential issuance of signing statements. These statements provide “one way in which a President may indicate his intent to refuse to enforce a provision of a congressionally enacted law that he believes to be unconstitutional.”⁸⁰

⁷³ P.L. 112-10, Department of Defense and Full-Year Continuing Appropriations Act for Fiscal Year 2011, Statement Upon Signing H.R. 1473 by President Barack Obama, April 15, 2011.

⁷⁴ P.L. 112-10 §2262. The restrictions applied to the vacant positions of Director, White House Office of Health Reform; Assistant to the President for Energy and Climate Change; Senior Advisor to the Secretary of the Treasury assigned to the Presidential Task Force on the Auto Industry and Senior Counselor for Manufacturing Policy; and White House Director of Urban Affairs.

⁷⁵ P.L. 112-10, Department of Defense and Full-Year Continuing Appropriations Act for Fiscal Year 2011, Statement Upon Signing H.R. 1473 by President Barack Obama, April 15, 2011.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ P.L. 112-74, Consolidated Appropriations Act of 2012, Statement of President Barack Obama Upon Signing H.R. 2055, December 23, 2011.

⁷⁹ See, e.g., ABA Task Force Report, n. 3, *supra*; United States Senate, Committee on the Judiciary, Statement of Bruce Fein on Presidential Signing Statements, June 27, 2006.

⁸⁰ Christine E. Burgess, Note, “When May a President Refuse to Enforce the Law?,” 72 Tex. L. Rev. 631, 641 (1994).

However, there is little evident support for the notion that objections or concerns raised in a signing statement may be given substantive legal effect. As one commentator has suggested: “Where the President has played a major role in drafting or supporting a particular statutory provision, presidential statements should be granted interpretive significance.... When the President opposed the provision being interpreted, however, his signing statements ... lack persuasive authority.”⁸¹

This observation is buttressed by the analysis of the district court in *Dacosta v. Nixon*, which stated that a bill, when passed by Congress and approved by the President, “establishe[s] ‘the policy of the United States’ to the exclusion of any different executive or administrative policy, and ha[s] binding force and effect on every officer of the Government, no matter what their private judgments of that policy, and illegalize[s] the pursuit of an inconsistent executive or administration policy. No executive statement denying efficacy to legislation could have either validity or effect.”⁸² Irrespective of this maxim, presidents have repeatedly declared their intention to disregard laws that they view as unconstitutional.⁸³

This persistent practice on the part of presidents gives rise to the question of whether a President can refuse to comply with a law he believes to be unconstitutional. The Supreme Court has not directly addressed this issue, but a long line of precedent could be taken to indicate a consistent view on the part of the Court that the Take Care Clause⁸⁴ imposes a duty on the President to ensure that officials obey Congress’s instructions, and, conversely, that the Clause does not imbue the President with the authority to dispense with congressional enactments. In *Kendall v. United States ex rel Stokes*, for instance, the Court declared that where Congress has imposed upon an executive officer a valid duty, “the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the President.”⁸⁵ Underlying the Court’s rejection of the government’s argument that the Take Care Clause carried with it the power to control executive officials was the desire to avoid “clothing the President with a power entirely to control the legislation of Congress ... To contend that the obligation imposed on the President to see the laws faithfully executed implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible.”⁸⁶ Since *Kendall*, the Court has consistently rejected the assertion that the Clause is a substantive grant of power to the President. In *Myers v. United States*, for instance, the Court declared that “[t]he duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.”⁸⁷ Likewise, in *Youngstown Sheet & Tube Co. v. Sawyer*, the Court declared that “the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.”⁸⁸

⁸¹ Frank B. Cross, “The Constitutional Legitimacy and Significance of Presidential ‘Signing Statements,’” 40 *Admin.L.Rev.* 209 (1988).

⁸² 55 F.R.D. 145, 146 (E.D.N.Y. 1972).

⁸³ See Christopher N. May, “Presidential Defiance of ‘Unconstitutional’ Laws: Reviving the Royal Prerogative,” *Contributions in Legal Studies*, No. 86 (1998).

⁸⁴ The Take Care Clause states that the President “shall take Care that the Laws be faithfully executed,” U.S. Const. Art. II, sec. 3, cl. 3.

⁸⁵ 12 Pet. (37 U.S.) 524, 610 (1838).

⁸⁶ *Id.* at 610.

⁸⁷ 272 U.S. 52, 177 (1926).

⁸⁸ 343 U.S. 579, 587 (1952).

Despite these declarations from the Court, the executive branch has consistently maintained that the President possesses authority to decline to enforce enactments he views as unconstitutional.⁸⁹ As enunciated in the Dellinger Memo,⁹⁰ the Department of Justice (DOJ) has pointed to the Court's decision in *Myers v. United States*, for support for this proposition, asserting that since "the Court sustained the President's view that the statute at issue was unconstitutional without any member of the Court suggesting that the President had acted improperly in refusing to abide by the statute," the Court could therefore "be seen to have implicitly vindicated the view that the President may refuse to comply with a statute that limits his constitutional powers if he believes it to be unconstitutional."⁹¹ Additionally, the Dellinger Memo pointed to Justice Jackson's concurrence in *Youngstown* as recognizing the existence of the "President's authority to act contrary to a statutory command," and has likewise cited Justice Scalia's concurrence in *Freytag v. Commissioner*, for the proposition that "the President has the 'power to veto encroaching laws ... or even to disregard them when they are unconstitutional.'"⁹²

It is not at all clear that the reliance of the DOJ on these factors would bear the weight of direct judicial scrutiny. Specifically, as noted above, the Court in *Myers v. United States* evidenced a clear appreciation of the limits of the President's authority under the Take Care Clause. As such, there would appear to be little support for the DOJ's conclusion that *Myers* implicitly validated the notion that the President may refuse to enforce laws he deems unconstitutional, particularly in light of the fact that the Court in *Myers* did not address the President's refusal to enforce the law at issue. As was stated by the Court in *Powell v. McCormack*, "[t]hat an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date."⁹³ It is also difficult to see how Justice Jackson's concurrence in *Youngstown* can be cited as dispositive of the issue. First, while the concurrence contemplates the allocation of power between Congress and the executive in the event that the "President takes measures incompatible with the express or implied will of Congress," it, like the majority opinion in *Myers*, does not give any substantive consideration whatsoever to the President's authority to decline to enforce the law.⁹⁴ Second, the DOJ opinion does not address the holding of the majority in *Youngstown* that the "Constitution limits [the President's] functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad."⁹⁵ Likewise, Justice Scalia's concurrence in *Freytag*, while probative, does not provide any substantive analysis in support of this proposition, and arose in a case that did not involve executive refusal to comply with the law.

While the Court has not had occasion to address the issue directly, the cases discussed above could be taken to indicate a rejection on the part of the Court that the President possesses the power to suspend acts of Congress, instead establishing that the President is bound to give effect to such enactments pursuant to the Take Care Clause. The natural corollary of this proposition, as touched upon by the Court in *Youngstown*, is that the proper course of action for the President,

⁸⁹ See Walter Dellinger, "Presidential Authority to Decline to Execute Unconstitutional Statutes," Office of Legal Counsel, 18 U.S. Op. Off. Legal Counsel 199 (November 2, 1994) ("[o]pinions dating to at least 1860 assert the President's authority to decline to effectuate enactments that the President views as unconstitutional").

⁹⁰ See n. 30 and accompanying text, *supra*.

⁹¹ *Id.* at 199, 201-202.

⁹² *Id.* at 199 (quoting *Freytag v. Commissioner*, 501 U.S. 868, 906 (1991) (Scalia, J., concurring)).

⁹³ 395 U.S. 486, 547 (1969).

⁹⁴ 343 U.S. at 637.

⁹⁵ 272 U.S. at 177.

when faced with a bill he deems unconstitutional, is to exercise his Article I veto authority.⁹⁶ However, as is evidenced by the DOJ opinion discussed above, there are competing viewpoints on this issue. As such it is not possible to state conclusively that the President lacks any authority whatsoever to decline to enforce laws he deems unconstitutional absent a definitive consideration of the issue by the Court.

Substantiality of Constitutional Objections

While presidential authority to refuse to enforce laws the President considers unconstitutional is a matter of significant constitutional importance, the issue is ultimately of little concern with regard to the legality or effect of signing statements themselves. As the judicial maxims discussed above establish, there is little evident support for the notion that signing statements are instruments with legal force and effect in and of themselves. If an action taken by a President in fact contravenes legal or constitutional provisions, that illegality is not augmented or assuaged merely by the issuance of a signing statement. Commentators argue that this dynamic lends credence to the notion that signing statements have been employed by several administrations not to flatly reject congressional enactments, but, rather, are intended to sensitize other parties to the President's conception of executive authority. Moreover, the use of signing statements as an instrument to expand executive authority generally, as opposed to a mechanism by which the President has claimed summary authority to dispense with the laws enacted by Congress, becomes more apparent when the merits of the objections that typify signing statements are examined. In particular, such analysis indicates that while there are instances in which signing statements are predicated on specific and supportable concerns, the majority of the objections raised, especially with respect to the signing statements issued by the Bush II Administration, were largely non-substantive or were so general as to appear to be hortatory assertions of executive authority.

The constitutional and legal principles discussed below are applicable to any signing statement that raises constitutional objections or challenges to congressional enactments based on a general assertion of authority in the specific substantive area identified.

Foreign Affairs Power

As noted above, foreign affairs legislation has been one of the primary areas in which recent Presidents have repeatedly raised constitutional objections or challenges. For example, remarking upon provisions of the Syria Accountability and Lebanese Sovereignty Restoration Act of 2003 that required the imposition of sanctions against Syria absent a presidential determination and certification that certain conditions had been met by Syria or a determination that national security concerns justified a waiver of sanctions, President George W. Bush declared:

A law cannot burden or infringe the President's exercise of a core constitutional power by attaching conditions precedent to the use of that power. The executive branch shall construe and implement [this requirement] in a manner consistent with the President's constitutional authority to conduct the Nation's foreign affairs and as Commander in Chief, in particular with respect to the conduct of foreign diplomats in the United States, the conduct of United

⁹⁶ See *INS v. Chadha*, 462 U.S. 919, 945 (1983) ("Explicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process.").

States diplomats abroad, and the exportation of items and provision of services necessary to the performance of official functions by United States Government personnel abroad.⁹⁷

This signing statement is typical of the Bush II Administration's approach, in that it challenges more than one provision of the bill and voices objections across a range of constitutional principles. While the broad and generalized nature of the President's remarks make it difficult to determine specific objections that might arise in the implementation of the act, it may be assumed that President Bush determined that the requirements imposed by Congress under these portions of the act raised separation of powers concerns to the extent that they could be construed as impinging upon core presidential powers or impairing the President's ability to protect national security information or deliberations with his advisers.

The Obama Administration's signing statements have also registered objections to perceived congressional encroachments into the President's constitutional authority in foreign affairs. These objections, however, have more narrowly focused on congressional attempts to direct negotiations with foreign states or international organizations.⁹⁸ Additionally, the Obama signing statements on foreign affairs, in making more particular objections to specific provisions, have arguably departed from the broad and generalized objections contained within the Bush II signing statements. For example, President Obama specifically objected to various provisions in the Supplemental Appropriations Act of 2009 which directed the Secretary of the Treasury to order U.S. representatives to certain international financial institutions to take specific policy positions.⁹⁹ The Obama signing statement asserted that the provision would "interfere with my constitutional authority to conduct foreign relations by directing the Executive to take certain positions in negotiations or discussions with international organizations and foreign governments."¹⁰⁰ The signing statement thus concluded that the President would not "treat these provisions as limiting my ability to engage in foreign diplomacy or negotiations."¹⁰¹

Regarding the concerns voiced over the executive's foreign affair prerogatives, it should be noted that the Supreme Court has proscribed legislative attempts to extend congressional power into what could be called the "core functions" of the executive branch.¹⁰² However, presidential

⁹⁷ Statement of President George W. Bush Upon Signing H.R. 1828, December 12, 2003.

⁹⁸ See, P.L. 111-8, Omnibus Appropriations Act of 2009, Statement of President Barack Obama Upon Signing H.R. 1105, March 11, 2009 (objecting to various provisions of the bill that would "unduly interfere with my constitutional authority in the area of foreign affairs by effectively directing the Executive on how to proceed or not proceed in negotiations or discussions with international organizations and foreign governments."); P.L. 111-32, Supplemental Appropriations Act of 2009, Statement of President Barack Obama Upon Signing H.R. 2346, June 24, 2009; P.L. 112-74, Consolidated Appropriations Act of 2012, Statement of President Barack Obama Upon Signing H.R. 2055, December 23, 2011 ("Certain provisions . . . restrict or require particular diplomatic communications, negotiations, or interactions with foreign governments or organizations."); National Defense Authorization Act for Fiscal Year 2012, Statement of President Barack Obama Upon Signing H.R. 1540, December 31, 2011 ("[S]ections 1235, 1242, and 1245 would interfere with my constitutional authority to conduct foreign relations by directing the Executive to take certain positions in negotiations or discussions with foreign governments.").

⁹⁹ P.L. 111-32, Title XI §§1110, 1112, Title XIV §§1403-1404.

¹⁰⁰ P.L. 111-32, Supplemental Appropriations Act of 2009, Statement of President Barack Obama Upon Signing H.R. 2346, June 24, 2009.

¹⁰¹ *Id.*

¹⁰² In *Bowsher v. Synar*, 478 U.S. 714 (1986), for instance, the Court interpreted the separation of powers doctrine as it applied to the Gramm-Rudman Deficit Reduction Act. Under the act, the Comptroller General was empowered to review deficit estimates from the Office of Management and Budget and the Congressional Budget Office, and to mandate spending reductions to meet a specified deficit level. This report by the Comptroller General would then be forwarded to the President who was required to issue an order enforcing the spending reductions. The order would (continued...)

assertions of this maxim in signing statements could be seen as a hortatory assertion of broad executive authority regarding the conduct of foreign affairs that does not acknowledge the substantial authority that is likewise possessed by Congress in this context. Specifically, while it is generally conceded that there are some powers enjoyed by the President alone regarding foreign affairs,¹⁰³ it is likewise evident that Congress possesses wide authority to promulgate policies respecting foreign affairs.¹⁰⁴ Congress has often exercised this authority to determine policy objectives for the United States in international negotiations and to require subsequent legislative approval of international agreements before they may enter into force for the United States.¹⁰⁵

Executive Privilege

Executive privilege has also formed the constitutional basis for a significant number of presidential signing statements. For example, in remarking upon provisions that required the Secretary of State to submit reports regarding Syria's compliance with the conditions of the act and that nation's dealings with terrorists, President George W. Bush declared:

The executive branch shall construe [this requirement] in a manner consistent with the President's constitutional authority to withhold information the disclosure of which could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties.¹⁰⁶

(...continued)

become effective unless Congress passed legislation which reduced spending to meet deficit estimates. Furthermore, the Comptroller General could only be removed by Congress, via a joint resolution. *Id.* at 728. The Supreme Court found that the act imbued the Comptroller General, an official appointed by the President, but removable by Congress, with the power to interpret provisions of the act, and to dictate the means by which the executive branch implemented budget reduction measures. *Id.* at 728. Accordingly, the Court determined that the Comptroller General, a legislative branch officer, was, in essence, performing the functions of an executive officer in executing a law passed by Congress, a duty constitutionally committed to an officer of the executive branch. *Id.* at 733. This dynamic rendered the act unconstitutional, as the Court explained, because of the maxim that "once Congress makes its choice in enacting legislation, its participation ends." *Id.* at 733. Subsequent to enactment, Congress may "control the execution of its enactment only indirectly ... by passing new legislation." *Id.* at 734. The Court determined that by placing the authority to implement the act in an officer subject only to congressional removal, Congress in effect "retained control over the execution of the act" and unconstitutionally "intruded into the executive function." *Id.* at 734. *See also, Plaut v. Spendthrift Farm*, 514 U.S. 211 (1995) (striking down legislative assumption of judicial power).

¹⁰³ The President's fundamental authority to decide whether or not to recognize foreign states or governments and to maintain diplomatic relations with them, "is implied in the President's express constitutional power to appoint Ambassadors ... and to receive Ambassadors ... and his implied power to conduct the foreign relations of the United States." American Law Institute, Restatement (Third) of the Foreign Relations of the United States," §204, Comment A (1987).

¹⁰⁴ Congress, in which is vested "[a]ll legislative powers," Article I, §1, is authorized to tax and spend "to ... provide for the common Defence," *id.* §8 cl. 1, "[t]o regulate Commerce with foreign Nations," *id.*, §8 cl. 3, and to make all laws that are necessary and proper to execute the foregoing powers as well as all other powers vested by the Constitution in the U.S. government or in any government department or officer. *Id.*, §8 cl. 18.

¹⁰⁵ American Law Institute, "Restatement (Third) of the Foreign Relations of the United States," (1987) at §303(2) ("the President, with the authorization or approval of Congress, may make an international agreement dealing with any matter that falls within the powers of Congress and of the President under the Constitution."). *See also*, Congressional Research Service, "Treaties and Other International Agreements: The Role of the United States Senate; A Study Prepared for the Senate Committee on Foreign Relations," 78-86 (January 2001) (S.Rept. 106-710).

¹⁰⁶ Statement of President George W. Bush Upon Signing H.R. 1828, December 12, 2003.

As mentioned previously, President Obama has not specifically referenced executive privilege in any of his signing statements. However, he has registered objections to provisions that require the President to provide information to Congress. As noted, the Obama Administration utilized a signing statement to object to a requirement in the Fraud Enforcement and Recovery Act of 2009 that agencies furnish the Financial Crisis Inquiry Commission with information related to any commission inquiry. Rather than expressly invoking executive privilege, the statement asserted that the executive branch would construe the provision “not to abrogate any constitutional privilege.”¹⁰⁷

Both of these signing statements would appear to constitute a generalized declaration of executive power, given that neither statement raised any specific objection to the provision, nor provided any substantive analysis of how its requirements might impinge upon executive authority. To the extent objections based on executive privilege might be taken to indicate a position on the part of the executive that it possesses an absolute right to withhold documents from Congress, it should be noted that judicial and historical precedents run to the contrary. For example, it is well established that Congress may impose reporting requirements upon executive branch officials,¹⁰⁸ and nothing in the act purports to strip the President of his authority to assert a valid claim of privilege, or to withhold documents on the basis of national security. Regarding claims of privilege with regard to presidential communications, the Court held in *United States v. Nixon* that the notion of privilege is constitutionally rooted, and that when invoked by the President, the materials at issue are deemed “presumptively privileged.”¹⁰⁹ However, the Court further held that the privilege is qualified, not absolute, and may be overcome by an adequate showing of need.¹¹⁰

The Court in *Nixon* indicated that the President’s authority to “protect military, diplomatic or sensitive national security secrets” was significantly greater than his power to protect the confidentiality of executive communications.¹¹¹ This statement by the Court was consistent with previous decisions recognizing presidential authority with regard to military and diplomatic matters. In *C. & S. Airlines v. Waterman Corp.*, for instance, the Court stated that it would be “intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.”¹¹² It is important to note, however, that principles governing judicial deference to the executive in this context do not apply to access by Congress. In *United States v. American Telephone and Telegraph Co.*, the Court of Appeals for the District of Columbia rejected the argument that “the Constitution confers on the executive absolute discretion in the area of national security.”¹¹³ In support of this holding, the court explained:

¹⁰⁷ P.L. 111-21, Fraud Enforcement and Recovery Act of 2009, Statement of President Barack Obama Upon Signing S. 386, May 20, 2009.

¹⁰⁸ See Walter Dellinger, Assistant Att’y Gen., Memorandum for the General Counsels of the Federal Government, “The Constitutional Separation of Powers between the President and Congress,” at 54-56 (May 7, 1996) (available at 1996 WL 876050).

¹⁰⁹ *United States v. Nixon*, 418 U.S. 683, 705 (1974). For a thorough overview of the executive privilege issues, see CRS Report RL30319, *Presidential Claims of Executive Privilege: History, Law, Practice, and Recent Developments*, by (name redacted) and (name redacted).

¹¹⁰ *Id.* at 705, 706, 708.

¹¹¹ *Id.* at 706.

¹¹² 333 U.S. 103, 111 (1948).

¹¹³ 567 F.2d 121, 128 (D.C. Cir. 1977).

While the Constitution assigns to the President a number of powers relating to national security, including the function of commander in chief and the power to make treaties and appoint Ambassadors, it confers upon Congress other powers equally inseparable from the national security, such as the powers to declare war, raise and support armed forces and, in the case of the Senate, consent to treaties and the appointment of ambassadors.¹¹⁴

While acknowledging the powers conferred upon both branches in this context, it is important to note that the court in *AT&T* rejected the notion that disputes over such information were “‘political questions’ beyond the jurisdiction or proper role of [a] court.”¹¹⁵ Rather, the court left open the possibility that disputes over information pertaining to national security could be resolved by the judiciary in the event that Congress and the executive could not reach a compromise on a given issue.¹¹⁶ Thus, while the aforementioned cases establish that the President has inherent constitutional authority to protect the confidentiality of executive communications and national security information, it is likewise apparent that these powers are not absolute, with Congress possessing concordant authority to investigate and inquire into such matters. Accordingly, it seems apparent that any all-encompassing or generalized concern regarding executive privilege is not buttressed by any underlying definitive right to withhold information from Congress.

Direct Reporting Requirements

Recent Presidents have also employed the signing statement to object to direct reporting requirements that have been imposed by Congress.¹¹⁷ However, these signing statements are likewise generally unsupported by established legal principles governing Congress’s authority to compel and receive information directly from executive branch agencies. Congress has imposed direct reporting requirements on executive branch officials since the first Congress. Legislation establishing the Treasury Department required the Secretary to report to Congress and to “perform all such services relative to the finances, as he shall be directed to perform.”¹¹⁸ Alexander Hamilton, serving as the first Secretary of the Treasury, submitted reports to the House of Representatives pursuant to this command, and began each report with an acknowledgment of the order of the House that had directed him to report.¹¹⁹ Furthermore, prior to the establishment of the President’s authority over the executive branch budget process in the Budget and

¹¹⁴ *Id.* at 128.

¹¹⁵ *Id.* at 126 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

¹¹⁶ *Id.* at 127.

¹¹⁷ ABA Task Force Report, n. 3, *supra*, at 16. Obama Administration objections to direct reporting requirements have related to intelligence activities and covert actions. See, P.L. 11-259, Intelligence Authorization Act for Fiscal Year 2010, Statement Upon Signing H.R. 2701, October 7, 2010. P.L. 112-74, Consolidated Appropriations Act of 2012, Statement of President Barack Obama Upon Signing H.R. 2055, December 23, 2011 (relating to a requirement that the Secretary of Defense notify certain committees 30 days in advance of a proposed military exercise involving U.S. personnel anticipated to require construction expenditures of more than \$100,000); National Defense Authorization Act for Fiscal Year 2012, Statement of President Barack Obama Upon Signing H.R. 1540, December 31, 2011 (relating to a requirement that the President submit a report to congress 60 days before “sharing any U.S. classified ballistic missile defense information with Russia.”).

¹¹⁸ Act of September 2, 1789, Ch. 12, §2, 1 Stat. 65, 66.

¹¹⁹ See, e.g., 2 Annals of Cong. 1991 (1790) (report on Public Credit); *id.* at 2031 (Report on a National Bank); 3 Annals of Cong. 971 (1791) (Report on Manufactures) (noting that “[t]he Secretary of the Treasury, in obedience to the order of the House of Representatives ...”).

Accounting Act of 1921,¹²⁰ each agency submitted its annual budget request directly to Congress.¹²¹ Finally, the Supreme Court has long recognized the validity of reporting requirements,¹²² and in *INS v. Chadha*,¹²³ the Court explicitly affirmed Congress's authority to impose "report and wait" provisions, distinguishing them from the unconstitutional legislative veto provisions under review in that case. In light of these factors, it seems apparent that signing statements objecting to direct reporting requirements represent an attempt to sensitize executive personnel to the wishes of the President and to assert a broad conception of presidential power in the face of congressional enactments, rather than a definite and substantive refusal to enforce a congressional enactment.

Legislative Veto Provisions

Recent Presidents have also been quite active in issuing signing statements that object to bills passed by Congress that impose a legislative veto over actions taken by the executive branch. Presidential action in this context is particularly interesting, as it provides an example of a context in which the Presidents' declarations are on solid constitutional footing, as well as the opportunity to analyze two conceptually related arguments that have been raised against the issuance of signing statements generally.

As noted above, the Supreme Court's holding in *INS v. Chadha* invalidated the use of a legislative veto by Congress by virtue of the Court's determination that such action violates the Bicameralism and Presentment Clause of the Constitution. Despite this ruling, Congress has continued to pass legislation imposing facially invalid legislative veto provisions. Prior administrations objected to these provisions in signing statements, including President George W. Bush, who issued approximately 47 statements that contain objections to provisions in legislation passed by Congress that it claims violate the separation of powers principles delineated in *Chadha*.¹²⁴ An example of this approach may be found in President Bush's signing statement accompanying the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act. There, the President declared that "[t]he executive branch shall construe certain provisions of the act that purport to require congressional committee approval for the execution of a law as calling solely for notification, as any other construction would be inconsistent with the principles enunciated by the Supreme Court of the United States in *INS v. Chadha*."¹²⁵ President Obama has continued the practice of objecting to legislative vetoes in violation of *Chadha*. In a March 11, 2009, statement, President Obama objected to various provisions of the Omnibus Appropriations Act of 2009 that "condition the authority of officers to spend or reallocate funds on the approval of congressional committees."¹²⁶ Presumably relying on *Chadha*, the Administration asserted that although it would notify the relevant committee before

¹²⁰ Ch. 18, 42 Stat. 20 (1921) (amended 1974).

¹²¹ See (name redacted), "Congress's Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive," 57 Geo. Wash. L. Rev. 627, 674 (1989).

¹²² See, e.g., *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14-15 (1941).

¹²³ 462 U.S. 919, 935 n. 9 (1983).

¹²⁴ See United States Senate, Committee on the Judiciary, Statement of Michelle E. Boardman, Deputy Assistant Attorney General, Office of Legal Counsel, United States Department of Justice, on Presidential Signing Statements, June 27, 2006.

¹²⁵ *Id.*

¹²⁶ P.L. 111-8, Omnibus Appropriations Act of 2009, Statement of President Barack Obama Upon Signing H.R. 1105, March 11, 2009.

taking action, “spending decisions shall not be treated as dependant on the approval of congressional committees.”¹²⁷

While signing statements that raise broad assertions of executive authority and general constitutional objections to bills passed by Congress may indicate an overly broad conception of presidential power, statements that object to legislative vetoes are supported by Supreme Court precedent. Relatedly, it could be argued that the apparent purpose behind the continued congressional practice of imposing such requirements in turn illustrates the dynamic underlying the objections and assertions of authority that characterize signing statements. Despite the apparent facial unconstitutionality of such provisions, relatively little complaint has been voiced concerning Congress’s persistence in passing bills that contain legislative veto provisions. The apparent motivation for this practice arises from the fact that while Congress and its committees may not anticipate formal legal compliance with such provisions and often do not expect to be able to enforce them, pragmatic political considerations oftentimes result in substantive acquiescence by the agencies involved.¹²⁸ In essence, the passage of legislative veto provisions subsequent to *Chadha* constitutes an attempt by Congress to leverage informal compliance from executive agencies, the implicit message being that the affected agency may face difficulties in the legislative, oversight or budgetary processes if it does not accede to congressional will in this context. Accordingly, a presidential signing statement objecting to a legislative veto provision serves not only as a response to perceived encroachment on executive branch prerogatives, but also as a declaration that the administration expects, and will be supportive of, the rejection of such congressional assertions of authority by affected agencies.

Institutional Implications of Signing Statements

The generalized nature of the constitutional objections and assertions of authority that pervade signing statements, coupled with the fact that such instruments do not have any legal force or effect in and of themselves, lends support to the notion that presidential administrations may employ these instruments as a means by which to make broad claims to extensive and exclusive authority. This approach necessarily raises questions regarding the impact of signing statements on the exercise of executive authority in relation to the traditional roles of Congress and the judiciary.

Statutory Construction and the Courts

With regard to the judicial branch, the primary consideration is whether the courts have in fact begun to give a degree of determinative weight to signing statements in a manner akin to traditional sources of legislative history. As noted above, one of the factors that appears to have motivated the increase in the issuance of signing statements beginning in the Reagan Administration was to encourage judicial reliance upon the viewpoints contained therein. After persuading West Publishing Company to include signing statements along with legislative histories contained in the *United States Code Congressional and Administrative News*, Attorney

¹²⁷ *Id.*

¹²⁸ *See* (name redacted), “The Legislative Veto: Invalidated, It Survives,” 56-AUT Law & Contemp. Probs. 273 (1993).

General Edwin Meese stated that this inclusion would facilitate the use of signing statements by courts “for future construction of what the statute actually means.”¹²⁹

Despite these efforts, it does not appear that courts have incorporated signing statements in the manner hoped for by the Reagan Administration, presumably due to traditional practice as motivated by constitutional precepts. In particular, it could be argued that while there is little support for the notion that the Constitution somehow implicitly forbids the issuance of signing statements, the nature of the President’s role in vetoing or approving legislation has nonetheless militated against courts granting interpretive weight to signing statements. Specifically, while the Constitution provides that the President is to note his objections upon the veto of a bill, there is no corresponding requirement that he announce his reasons for its approval. In turn, there is a constitutionally prescribed procedure by which Congress is to consider objections raised by a President in formulating a response to a veto, but not for congressional response to a signing statement. While this dichotomy does not require that courts disregard signing statements (as there is likewise no corresponding constitutional validation of committee reports, floor debates and other legislative history),¹³⁰ it arguably lends weight to the notion that presidential signing statements should be discounted when they conflict with congressional explanations that have traditionally enjoyed judicial deference. In particular, a well established rule for resolving conflicts in legislative history establishes that when the two houses have disagreed on the meaning of identical language in a bill that did not go to conference, the explanation that was before both houses prevails in the event that the court turns to the legislative history. The rationale is that congressional intent should depend upon the actions of both houses. Accordingly, given that Congress has no opportunity to act in response to interpretations set forth in signing statements, there is lessened support for the notion that courts should rely upon them to interpret the aim of a congressional enactment.¹³¹

A related issue arising from this constitutional provision centers on the fact that the President may only approve or veto a bill in its entirety. The President does not possess inherent line item veto authority, and it is well established that Congress cannot grant the President such authority by statute.¹³² Thus, it could be argued that if the courts were to give determinative weight to signing statements in negating statutory provisions a President would effectively possess power analogous to a line item veto.¹³³ However, there is no indication that this has occurred, rendering this dynamic of greater interest in relation to the impact of signing statements on executive branch interaction with Congress.

Information contained in signing statements may be entitled to more significant judicial consideration if the President or his Administration worked closely with Congress in developing the legislation, and if the approved version incorporated the President’s recommendations.¹³⁴ This

¹²⁹ See CRS Report 97-589, *Statutory Interpretation: General Principles and Recent Trends*, by (name redacted).

¹³⁰ *Id.* at 49.

¹³¹ *Id.* at 49-50.

¹³² *Clinton v. City of New York*, 524 U.S. 417 (1998) (invalidating the Line Item Veto Act as inconsistent with the Presentment Clause of Art. I, §7, cl. 2).

¹³³ Marc N. Garber and Kurt A. Wimmer, “Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power,” 24 *Harv. J. on Legis.* 363, 376 (1987).

¹³⁴ “It may ... be appropriate for the President, when signing legislation, to explain what his (and Congress’s) intention was in making the legislation law, particularly if the Administration has played a significant part in moving the legislation through Congress.” 17 *Op. Off. Legal Counsel*, n. 29, *supra*, at 136.

principle can be applied not only to bills introduced at the Administration's behest, but also to bills the final content of which resulted from compromise negotiations between the Administration and Congress.¹³⁵ In such circumstances, of course, signing statements are used to explain rather than negate congressional action, and are most valuable as lending support to congressional explanations.

Although signing statements are not generally treated as a significant part of legislative history by the courts,¹³⁶ they nonetheless affect interpretation by virtue of the effect of directives contained therein on actions taken by administering agencies. Courts grant a high degree of deference to interpretations of agencies charged with implementing statutes, premised on the notion that Congress has authorized the agency to "speak with the force of law" through a rulemaking or other formal process. Congress has not authorized the President to speak with the force of law through signing statements. So, although signing statements may influence or even control agency implementation of statutes, it is the implementation, and not the signing statement itself, that would be measured against the statute's requirements. At most, signing statements might be considered analogous to informal agency actions, entitled to respect only to the extent that they have the power to persuade.¹³⁷

Ultimately, it does not appear that the courts have relied on signing statements in any appreciably substantive fashion. As touched upon above, the references made to signing statements in the Supreme Court's decisions in *Bowsher v. Synar* and *INS v. Chadha* were perfunctory in nature. Furthermore, in *Hamdan v. Rumsfeld*, the Supreme Court made no reference whatsoever to the President's signing statement in rejecting the contention that the Detainee Treatment Act did not apply to pending habeas petitions of Guantanamo detainees.¹³⁸ Finally, in *U.S. v. Stevens*, the Court noted that a presidential signing statement that pledged to confine prosecutions under an animal cruelty statute to only those cases of "wanton cruelty to animals designed to appeal to a prurient interest in sex" was not sufficient to save the otherwise unconstitutionally overbroad statute.¹³⁹

¹³⁵ "[T]hough in some circumstances there is room for doubt as to the weight to be accorded a presidential signing statement in illuminating congressional intent ... , President Reagan's views are significant here because the Executive Branch participated in the negotiation of the compromise legislation." *United States v. Story*, 891 F.2d 988, 994 (2d Cir. 1989).

¹³⁶ This is not to say that there have not been judicial opinions that have looked to presidential signing statements for guidance in gleaning legislative history. See, *Yousuf v. Samantar*, 2007 U.S. Dist. LEXIS 56227 (E.D. Va. 2007) (citing President George H. W. Bush's signing statement accompanying the Torture Victim Protection Act in a discussion of the statute's legislative history). However, in *Hovila v. Tween Brands, Inc.*, after accepting for purposes of argument the defendant's assertion that a presidential signing statement was "probative of legislative intent" the federal district court opined in a footnote that such an assumption was "doubtful." The court went on to state that "[i]n our system of government, the Congress makes the laws, the judiciary interprets them, and the President enforces them. Allowing the President to determine what a law means when adding his signature to a completed piece of legislation imperils the constitutionally-mandated roles of both Congress and the Judiciary." 2010 U.S. Dist. LEXIS 34861 (W.D. Wash. 2010).

¹³⁷ See CRS Report 97-589, *Statutory Interpretation: General Principles and Recent Trends*, by (name redacted).

¹³⁸ *Hamdan v. Rumsfeld*, No. 05-154, slip op. (U.S. June 29, 2006). It is interesting to note, however, that Justice Scalia chided the Majority for "wholly ignor[ing]" the President's signing statement in his dissent. *Id.* at 113-14.

¹³⁹ 130 S. Ct. 1577, 1591 (2010).

Impact on Congress

One of the main complaints lodged by the ABA Task Force in opposition to the issuance of presidential signing statements is based on the viewpoint that the objections and challenges raised therein improperly circumvent the veto process delineated in the Constitution.¹⁴⁰ According to this argument, the President, by refusing to veto a bill that contains provisions he does not intend to enforce, expands the presidential role in lawmaking beyond the constitutional parameters of “recommending ... laws he thinks wise and ... vetoing ... laws he thinks bad,”¹⁴¹ and deprives Congress of the opportunity override a presidential veto.

While this position has a degree of intuitive appeal in light of the maxims pronounced in cases such as *Youngstown*, it could misconstrue the nature of signing statements as presidential instruments as well as the actual substantive concerns that underlie their issuance. First, as the signing statements discussed above illustrate, it is exceedingly rare for a President to make a direct announcement that he will categorically refuse to enforce a provision he finds troublesome. Instead, the concerns voiced in the statements are generally vague, with regard both to the nature of the objection and what circumstances might give rise to an actual conflict. The ABA Task Force Report’s concern on this point also seems to assume that the interpretation and application of congressional enactments is a black and white issue, when, in reality, inherent ambiguity in the text almost always allows for competing interpretations of what the provision at issue requires. Given this dynamic, it is not surprising that a President’s interpretation of a law, as announced in a signing statement, would be informed by a broad conception of executive authority. More fundamentally, a signing statement does not have the effect of a veto. A bill that is vetoed does not become law unless reenacted by a supermajority vote of the Congress. Conversely, a bill that is signed by the President retains its legal effect and character, irrespective of any pronouncements made in a signing statement, and remains available for interpretation and application by the courts (if the provision is justiciable) and monitoring by Congress.

A closely related argument, also raised in the ABA Report, is that signing statements that raise objections to provisions of an enactment constitute the exercise of a line-item veto.¹⁴² In *Clinton v. New York*, the Supreme Court held that the Line Item Act violated the constitutional requirement of bicameralism and presentment by authorizing the President to essentially create a law which had not been voted upon by either House or presented to the President for approval and signature.¹⁴³ Accordingly, this argument posits that when the President issues a signing statement objecting to certain provisions of a bill or declaring that he will treat a provision as advisory so as to avoid a constitutional conflict, he is, in practical effect, exercising an unconstitutional line-item veto. The counterpoints to this argument are similar to those adhering to the premise that signing statements constitute an abuse of the veto process. While an actual refusal of a President to enforce a legal provision may be characterized as an “effective” line-item veto, the provision nonetheless retains its full legal character and will remain actionable, either in the judicial or congressional oversight contexts.

Ultimately, both of these objections, as with the general focus of concern on signing statements as presidential instruments, may obscure the substantive issue that has apparently motivated the

¹⁴⁰ ABA Task Force Report, n. 3, *supra*, at 21.

¹⁴¹ *Youngstown*, 343 U.S. at 587.

¹⁴² ABA Task Force Report, n. 3, *supra*, at 18; *See also*, Bradley and Posner, n. 12, *supra*, at 339.

¹⁴³ *Clinton*, 524 U.S. at 446.

increased use of the constitutional signing statement by President Bush: an expansive conception of presidential authority, coupled with a willingness to utilize fully mechanisms that will aid in furthering and buttressing that philosophy. Given the general and hortatory nature of the language that characterizes these signing statements, it seems apparent that President Bush used this instrument as part of a comprehensive strategy to strengthen and expand executive authority generally, as opposed to a de facto line item veto. Indeed, while the breadth and number of provisions called into question by President Bush drew attention to the institution of the signing statement itself, Professors Curtis A. Bradley and Eric A. Posner have stated that “critics of the Bush Administration’s use of signing statements have not identified a single instance where the Bush Administration followed through on the language in the signing statement and refused to enforce the statute as written.”¹⁴⁴

This declaration is arguably contradicted by a report from the Government Accountability Office (GAO) that identified six provisions of law that were addressed in various signing statements that it determined were not “executed as written” by the executive branch.¹⁴⁵ Specifically, GAO reviewed 11 signing statements that accompanied appropriations acts for FY2006, and identified 160 specific provisions that were addressed in the signing statements. GAO then examined 19 of these provisions “to determine whether the agencies responsible for their execution carried out the provisions as written.”¹⁴⁶ Of the six provisions identified by GAO as not having been executed as written, the first three arose from agency failures or refusals to seek committee approval prior to taking certain actions; the fourth stemmed from the Department of Defense (DOD) failing to include separate budget justifications to Congress on various operations in its 2007 budget submission; the fifth stemmed from GAO’s determination that the DOD responded to a congressional inquiry in 38 days instead of the 21-day period specified in law; and the sixth example of noncompliance stemmed from GAO’s finding that the Customs and Border Patrol (CBP) did not relocate checkpoints in the Tucson sector every seven days as directed in the relevant appropriations act.¹⁴⁷ In addition to those provisions identified by GAO, there is evidence of other instances in which statutory provisions that were addressed in a signing statement were not enforced. For example, in 2009, President Obama reportedly ignored a provision restricting the use of funds to pay the expenses of sending a U.S. representative to any United Nations body presided over by a country that the Department of State has determined is a sponsor of terrorism by sending U.S. officials to participate in U.N. bodies chaired by Iran.¹⁴⁸

While these examples may be cited in support of the proposition that presidential signing statements constitute the effective exercise of a line item veto, it should be noted that GAO stated

¹⁴⁴ Bradley and Posner, n. 12, *supra*, at 333.

¹⁴⁵ Government Accountability Office, “Presidential Signing Statements Accompanying the Fiscal Year 2006 Appropriations Acts,” B-308603, June 18, 2007.

¹⁴⁶ *Id.* at 1.

¹⁴⁷ *Id.* at 10.

¹⁴⁸ Charlie Savage, “Ignoring a Law on Foreign Relations” N.Y. Times, September 16, 2009. However it is not clear that the funds used to pay the expenses of sending representatives were drawn from the 2009 Foreign Appropriations Act. In an additional example, the State Department has not followed a provision included in the Foreign Relations Authorization Act for Fiscal Year 2003 which directed that, upon request, U.S. citizens born in Jerusalem could have their place of birth identified as Israel. P.L. 107-228 §214(d). Upon signing the bill, President George W. Bush issued a signing statement asserting that the provision would “impermissibly interfere with the President’s constitutional authority to formulate the position of the United States, speak for the in international affairs, and determine the terms on which recognition is given to foreign states.” Statement of President George W. Bush Upon Signing H.R. 1646, September 30, 2002. *See*, *Zivotofsky v. Secretary of State*, 571 F.3d 1227 (D.C. Cir. 2009)(dismissing the claim as nonjusticiable under the political question doctrine) *Cert. granted*, 2011 U.S. LEXIS 3528 (2011).

in its report that “[a]lthough we found the agencies did not execute the provisions as enacted, we cannot conclude that agency noncompliance was the result of the President’s signing statements.”¹⁴⁹ This statement is significant, in that while it may of course be argued that these examples of noncompliance constitute prima facie evidence that signing statements are being given substantive legal effect under the current Administration, the fact remains that the GAO report presents no particularized information, beyond their existence, that these departments and agencies were relying on the relevant presidential signing statements as a basis to support such noncompliance. Specifically, the GAO report does not identify any declarations or documents that indicate that presidential signing statements played a role in the actions taken by the aforementioned departments and agencies. Furthermore, it could be argued that the scope and nature of the noncompliance in the provisions identified by GAO militates against a summary conclusion that the pertinent signing statements motivated such noncompliance.

While the report stressed that GAO “did not examine the constitutionality of the provisions to which the President objected,”¹⁵⁰ the first three examples cited in the GAO report all appear to involve congressional imposition of legislative vetoes of the type expressly rejected by the Supreme Court in *INS v. Chadha*.¹⁵¹ Accordingly, both the signing statements and executive noncompliance as to these three provisions appear to be supported by explicit Supreme Court precedent.¹⁵² Regarding the fourth provision, the DOD’s justification for noncompliance was based on its determination that the costs of the covered operations were “difficult to predict because of the continuing insurgent activity,” and that it was thus “not able to estimate with a great certainty,” preventing its inclusion in the budget submission.¹⁵³ While the DOD’s submission constitutes a failure to comply with the literal terms of the appropriations act, there is no clear evidence that the relevant signing statement played a determinative role in the noncompliance, and the GAO report does not contain any information that serves to rebut the veracity of the DOD’s reasons for not including the budgetary information as directed. The fifth example cited by GAO illustrates a literal failure on the part of the DOD to respond to a congressional inquiry within a specified time frame. However, there are numerous examples of agency failures to meet statutory deadlines, irrespective of the presence of a correlating signing statement. Furthermore, given the brief delay period (38 days as opposed to the 21 required by law), it seems unlikely that this incidence of noncompliance may be successfully described as a departmental refusal to enforce the law on the basis of a presidential signing statement. Finally, regarding the sixth example identified by GAO, the CBP justified its noncompliance on its determination that following the congressional directive would be inconsistent with “Border Patrol mission requirements.” The CBP additionally noted that only one location had been approved for some checkpoints in the Tucson sector, rendering relocation impossible. The CBP stated that these checkpoints were often shut down for a “short period in an endeavor to satisfy the advisory provision” contained in the pertinent appropriations act.¹⁵⁴ This instance of noncompliance is perhaps the most explicit example of a signing statement being given substantive effect by a department, as the language used by the CBP closely mirrors the President’s declaration in his signing statement that “the executive branch shall construe the

¹⁴⁹ *Id.* at 9.

¹⁵⁰ *Id.* at 4.

¹⁵¹ 462 U.S. 919 (1983).

¹⁵² See n. 118 and accompanying text, *supra*.

¹⁵³ See GAO Report, n. 145, *supra* at 24.

¹⁵⁴ See GAO Report, n. 145, *supra* at 35.

relocation provision as advisory rather than mandatory.”¹⁵⁵ However, the GAO report does not elaborate on this apparent link, and does not contain any information that may be used to evaluate the substance of the CBP’s justifications for noncompliance. Thus, while the provisions identified by GAO may be cited as examples of executive refusal to enforce the law subsequent to the issuance of a signing statement, the information contained above could be interpreted as providing reasons for noncompliance that are not directly attributable to the existence of a presidential signing statement.

In light of these factors, some might argue that the practice of issuing signing statements is beneficial, in that the statements alert Congress to the universe of provisions that are held in disregard by the executive branch, in turn affording Congress the opportunity not only to engage in systematic monitoring and oversight to ensure that its enactments are complied with, but to assert its prerogatives to counteract the broad claims of authority that undergird the statements. In particular, while the focus on the institution of the presidential signing statement as a source of controversy may be misplaced, congressional interest in the protection of its own institutional prerogatives could ultimately motivate a reaction to an expansive view of presidential authority as expressed not only in signing statements, but also in executive orders, OLC opinions, internal White House Memoranda, and refusals to accede to congressional and legislative branch agency requests for information. All of these tools have been used by recent Presidents to exert control over executive personnel in their administration of statutory obligations and interaction with Congress. Additionally, the broad and persistent nature of the claims of executive authority forwarded, for example, by President Bush appear designed to inure Congress, as well as others, to the belief that the President in fact possesses expansive and exclusive powers upon which the other branches may not intrude.

Legislative Proposals

No bills to restrict the use of signing statements have yet been introduced in the 112th Congress. Three bills, however, were introduced in the 111th Congress with the aim of restraining the use of signing statements—though it does not appear that any of these proposals would appreciably alter or confine the President’s ability to issue signing statements. Section 3(a) of H.R. 258, the Congressional Lawmaking Authority Protection Act of 2009, provided that “[n]one of the funds made available to the Executive Office of the President, or to any Executive agency ... from any source may be used to produce, publish, or disseminate any statement made by the President contemporaneously with the signing of any bill or joint resolution presented for signing by the President.”¹⁵⁶ This section does not give any indication as to when such a statement would cease to be “contemporaneous” with the signing of a bill, but under a practical interpretation of the term, it seems unlikely that this section would impose a substantial impediment to the issuance of signing statements. This section would also not appear to prevent contemporaneous declarations by executive branch agencies. Section 4 of H.R. 258 goes on to state that “[f]or purposes of construing or applying any Act enacted by the Congress, a governmental entity shall not take into consideration any statement made by the President contemporaneously with the President’s signing of the bill or joint resolution that becomes such Act.” This command indicates that the

¹⁵⁵ See GAO Report, n. 145, *supra* at 35.

¹⁵⁶ H.R. 258, 111th Cong., 1st sess. (2009). Section 3(b) of H.R. 258 provides that section 3(a) “shall apply only to statements made by the President regarding the bill or joint resolution presented for signing that contradict, or are inconsistent with, the intent of Congress in enacting the bill or joint resolution or that otherwise encroach upon the Congressional prerogative to make laws.”

first section may not necessarily prevent a President from issuing a signing statement. Furthermore, nothing in the bill would prevent a President from simply issuing memoranda or other declarations aimed at guiding agency interpretation and implementation.¹⁵⁷ A bill essentially identical to H.R. 258 was introduced in the 110th and 109th Congresses.¹⁵⁸

Additionally, S. 875, the Presidential Signing Statements Act of 2009, would purport to prohibit any federal or state court from relying on or deferring to a presidential signing statement as a source of authority “[i]n determining the meaning of any Act of Congress.”¹⁵⁹ The bill further provides that both the House and the Senate, acting respectively through Office of General Counsel for the House of Representatives and the Office of Senate Legal Counsel, shall be permitted to participate as *amicus curiae* in any case arising in federal or state court that involves the construction, constitutionality, or both, of “any Act of Congress in which a presidential signing statement was issued.”¹⁶⁰ Finally, the bill would establish that in any suit involving a signing statement, Congress may pass a concurrent resolution clarifying congressional intent or findings of fact, and that such a resolution shall be submitted “into the record of the case as a matter of right.”¹⁶¹ The potential effect and utility of a provision forbidding courts from relying on, or deferring to, presidential signing statement is unclear; apart from the potential constitutional issues adhering to congressional attempts to restrict courts from considering such information, there is little indication that signing statements have played any substantive role in influencing judicial rulings.¹⁶² Likewise, the impact of a provision allowing for the submission of a “clarifying” concurrent resolution is open to speculation. Any such clarification by Congress would not have the force and effect of law, and could be viewed by the judiciary as a species of post-enactment legislative history.¹⁶³ Similar bills were also introduced in the 110th Congress.¹⁶⁴

Finally, H.R. 149, also known as the Presidential Signing Statements Act of 2009, attempted to ensure public awareness and access to presidential signing statements. The bill would require the President to transmit each signing statement that “declares or insinuates the intention of the President to disregard” any provision he believes to be unconstitutional to the House and Senate leadership.¹⁶⁵ Such signing statements would also have to be published in the Federal Register and made available on the Library of Congress’s Thomas website. Additionally, the bill would require that the administration send a high level official to testify at the request of either the House or Senate Judiciary Committees “to explain the meaning and justification of every presidential signing statement covered by this Act.”¹⁶⁶ Although the bill would prohibit any invocation of executive privilege with respect to this testimony, such a restriction raises

¹⁵⁷ See e.g., M. Elizabeth Magill, *The First Word*, 16 Wm. & Mary Bill Rts. J. 27 (2007).

¹⁵⁸ H.R. 264, 110th Cong. (2007); H.R. 5486, 109th Cong. (2006).

¹⁵⁹ S. 875 §3, 111th Cong., 1st Sess. (2009).

¹⁶⁰ *Id.* at §4.

¹⁶¹ *Id.*

¹⁶² See n. 131 and accompanying text, *supra*.

¹⁶³ See *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n. 13 (1980) (stating “even when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment.”).

¹⁶⁴ S. 1747, 110th Cong., 1st Sess. (2007); H.R. 3045, 110th Cong., 1st Sess. (2007).

¹⁶⁵ H.R. 149, 111th Cong., 1st sess. (2009).

¹⁶⁶ *Id.*

constitutional concerns with respect to Congress's authority to abrogate a constitutional privilege of the executive. A similar bill was also introduced in the 110th Congress.¹⁶⁷

Various other bills were introduced in the 109th Congress that would have attempted to constrain the issuance, or limit the effect, of signing statements. H.J.Res. 87¹⁶⁸ and H.J.Res. 89¹⁶⁹ would have required the President to provide notification to Congress "[i]f at the time of enactment of a law the President makes a determination not to carry out any duly enacted provision of the law," and would have established expedited procedures in the House for consideration of legislation developed in response to such a determination.¹⁷⁰ The scope of this legislation is not entirely clear. As touched upon above, it is quite rare for a signing statement to contain a specific declaration that a law will not be enforced. Furthermore, the generalized nature of the language that is employed in such statements would usually make it difficult to assert that the President had made a concrete determination to not enforce the law (raising the additional possibility that the President would simply ignore this requirement on the grounds that no such determination had been made).

Finally, S. 3731¹⁷¹ would have attempted to imbue both chambers of Congress with legal standing to challenge a signing statement, providing that any court of the United States would be authorized to rule on the legality of a signing statement "upon the filing of an appropriate pleading by the United States Senate, through the Office of Senate Legal Counsel, and/or the United States House of Representatives, through the Office of General Counsel for the United States House of Representatives."¹⁷² It is not clear that this provision would satisfy either the "case or controversy" or standing requirements of Article III of the Constitution.¹⁷³ This bill would likewise have prohibited any state or federal court from relying on, or granting deference to, a presidential signing statement as a source of authority.¹⁷⁴

While continuing assertions of executive authority in numerous signing statements have the potential to impact Congress at a practical and institutional level, both by discouraging federal officials from engaging in open interaction with congressional committees and staff and by arguably discounting the constitutional prerogatives enjoyed by Congress, the aforementioned legislative proposals may be seen as failing to address the purpose and impact of these instruments. By focusing its efforts on attempting to constrain the President from issuing signing statements that call the validity of its enactments into question, Congress could leave unaddressed any risks posed to its institutional power by the broad conception of presidential authority that arguably motivates their issuance. It does not seem likely that a reduction in the number of

¹⁶⁷ H.R. 5993, 110th Cong., 2nd sess. (2008).

¹⁶⁸ H.J.Res. 87, 109th Cong., 2nd sess. (2006).

¹⁶⁹ H.J.Res. 89, 109th Cong., 2nd sess. (2006).

¹⁷⁰ These bills are identical, except that H.J.Res. 89 provides that the President would only be required to submit a notification to the congressional intelligence committees with regard to determinations involving classified materials. Section 3 of both resolutions also provide that any Member of the House would be authorized to request a report from the General Counsel of the House describing any legal actions that could be brought to challenge the President's refusal to enforce a provision of law.

¹⁷¹ S. 3731, 109th Cong., 2nd sess. (2006).

¹⁷² *Id.* at §5.

¹⁷³ *See, e.g., Raines v. Byrd*, 521 U.S. 811 (1997). *See also*, Laurence H. Tribe, "Signing Statements are a Phantom Target," *Boston Globe*, August 9, 2006.

¹⁷⁴ S. 3731, §4.

challenges raised in signing statements, whether caused by procedural limitations or political rebuke, will necessarily result in any change in a President's conception and assertion of executive authority. Accordingly, a more effective congressional response might be to focus on any substantive actions taken by a President that are arguably designed to embed that conception of presidential power in the constitutional framework.

Conclusion

Presidential signing statements have a long historical pedigree and there is no discernible constitutional or legal impediment to their issuance. While from the Reagan Administration to the George W. Bush Administration such statements had become increasingly common and were increasingly utilized to raise constitutional or interpretive objections to congressional enactments, the Obama Administration's decreased use of signing statements may signify a break from this trend. Nevertheless, utilizing signing statements to raise constitutional objections to enacted statutes remains a tool of presidential authority. While the broad assertions of executive authority contained in many signing statements carry significant implications, both practical and constitutional, for the traditional relationship between the executive branch and Congress, they do not have legal force or effect, and have not been utilized to effect the formal nullification of laws. Instead, it appears that recent administrations, as made apparent by the voluminous challenges lodged by President George W. Bush, have employed these instruments in an attempt to leverage power and control away from Congress by establishing these broad assertions of authority as a constitutional norm. It can be argued that the appropriate focus of congressional concern should center not on the issuance of signing statements themselves, but on the broad assertions of presidential authority forwarded by Presidents and the substantive actions taken to establish that authority. Accordingly, a robust oversight regime focusing on substantive executive action, as opposed to the vague and generalized assertions of authority typical of signing statements, might allow Congress in turn to more effectively assert its constitutional prerogatives and ensure compliance with its enactments.

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