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Schoolhouse Rock Is No Longer Enough: The Presidential Signing Statements Controversy And Its Implications for Library Professionals

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Schoolhouse Rock Is No Longer Enough: The Presidential Signing Statements Controversy and Its Implications for Library Professionals*

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Presidential signing statements, a potent but previously little-discussed law-making device, have recently become the focus of fierce controversy both inside and outside the academy. The author presents an overview of the debates, identifies informational gaps that characterize the subject area, and reviews practical and policy implications for library professionals.

Introduction

¶1 The process by which the federal government makes, executes, and implements laws is properly a matter of public concern as well as scholarly study in any civil society. Public scrutiny and debate about the legislative process is a crucial bulwark of a democratic republic. An understanding of the respective roles of Congress and the President in the enactment of federal legislation is critical to any informed debate, and recent political developments have suggested that one missing piece of the public's understanding—at least for those not directly involved in study of the institution of the American presidency—is the presidential signing statement, which one political science scholar in 2003 called an "understudied presidential device" for advancing an administration's policy preferences.[1]

¶2 This paper briefly examines the changing perceptions of the presidential signing statement as part of the constitutional structure, discusses the role of information professionals as well as policymakers in ensuring that information about presidential signing statements is transparently accessible to the general public,

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1. Christopher S. Kelley, A Comparative Look at the Constitutional Signing Statement: The Case of Bush and Clinton 2 (paper presented at the 61st annual meeting of the Midwest Political Science Association, Chicago, Ill., April 3–6, 2003) (copy on file with author). Kelley was one of the few scholars actively interested in President George W. Bush's use of presidential signing statements before the issue was launched into prominence in 2006. Charlie Savage, *Introduction: The Last Word? The Constitutional Implications of Presidential Signing Statements*, 16 Wm. & Mary Bill Rts. J. 1, 2 (2007). Since then, as this article explores, the minor explosion of interest in the current administration's use of presidential signing statements has opened up the field to an active and wide-ranging debate about presidential power and the interplay of the three branches and the historical, political, and constitutional implications surrounding the device. *See, e.g.*, Symposium, *The Last Word? The Constitutional Implications of Presidential Signing Statements*, 16 Wm. & Mary Bill Rts. J. 1 (2007).

and presents some suggestions for effective use of currently available resources to research primary and secondary literature regarding this aspect of lawmaking.

The "Issue" of the Presidential Signing Statement: The Controversies

¶3 The Schoolhouse Rock classic, "I'm Just a Bill,"[2] taught many American schoolchildren a catchy, if unsophisticated, version of how federal laws are made—a process that ends, so far as the song is concerned, when the President either vetoes or signs a bill into law. Recent political events have raised public awareness of, as well as academic interest in, presidential signing statements as a part of the lawmaking process. The contrast between the popularly received notion of the legislative process, on the one hand, and the reality (including the frequency, purposes, and manner of the Bush administration's use of the presidential signing statement) on the other, appears to have taken many observers by surprise.

¶4 Historically, Presidents have often issued official statements about legislation when signing a bill into law; many such statements merely contain laudatory, precatory, or similar comments about the passage of an act. Such ceremonial signing statements essentially leave the Schoolhouse Rock account of federal lawmaking undisturbed. However, other signing statements—the ones that have proved problematic for scholars and other observers—are those that condemn a law without the political test of a veto and override vote. Such "don't veto, don't obey"[3] statements—which express anything ranging from doubt as to the constitutionality of a provision, up to and including an express directive to carry out the law in a manner consistent with the President's views (or simply to ignore portions of a law)—can operate in effect as a line-item veto. This article uses the term "OPSS"—objecting presidential signing statements—to denote this latter category of signing statements that express constitutional or other legal objections to the laws they approve (while also creating constitutional questions about the extent of executive authority). The generic term "signing statement" is used to denote any form of bill signing statement issued by a President, whether or not it raises any constitutional or other legal objections.

¶5 Some commentators view the recent debates over George W. Bush's use of OPSSs as exaggerating the exceptionality of the administration's practices.[4] In fact, scholarly literature bears out that OPSSs are a long-standing feature—although a controversial and progressively more utilized one—of the relationship

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2. Schoolhouse Rock, I'm Just a Bill, http://www.school-house-rock.com/Bill.html (last visited July 29, 2008).
3. Editorial, *Don't Veto, Don't Obey*, N.Y. TIMES, June 22, 2007, at A20.
4. As further detailed below, in 2006, articles discussing President Bush's frequent use of OPSSs when signing laws with which he disagreed began appearing in the popular media, in political debate, and scholarly literature. Early commentators included defenders of the administration's use of the device. *E.g.*, Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307 (2006).

between Congress and the executive branch, with roots as far back as 1822. That year, President James Monroe, in a letter to the Senate regarding military appointments, set forth his own construction of a bill he had signed the previous year—a document some scholars view as the first OPSS.[5] Alternatively, other accounts identify the first OPSS as President Andrew Jackson's 1830 addendum to a road appropriation, stating where the road was to be built.[6] Presidents Tyler, Buchanan, and Grant provide other examples of controversial early uses of OPSSs.[7] Despite this long pedigree, the OPSS appears to some as a grave threat to the constitutional structure of our federal government. Indeed, some commentators label President Bush's use of OPSSs as part of a "present constitutional crisis."[8]

Neither Fish nor Flesh nor Fowl: The Presidential Signing Statement as Paradox

¶6 The presidential signing statement does not fit squarely into the standard constitutional structure as understood by most Americans (whether the Schoolhouse Rock version or otherwise). Under a standard view of the President's constitutional role in the enactment of legislation,

> [u]pon receiving the bill, the President has five options: (1) he may sign the bill into law; (2) he may sign the bill into law but return it to Congress with a protest; (3) he may not sign the bill for ten days, after which it automatically becomes law; (4) he may dispose of the bill with a pocket veto; or (5) he may refuse to sign the bill and return it, along with his reasons for noncompliance, to Congress.[9]

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5. Letter from James Monroe to the Senate of the United States (Jan. 17, 1822), *in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 680 (James D. Richardson ed., 1897) [hereinafter RICHARDSON COMPILATION]; Letter from James Monroe to the Senate of the United States (Apr. 13, 1822), *in* 2 RICHARDSON COMPILATION, *supra*, at 698 (explaining position on constitutional issues at greater length); *see* Kelley, *supra* note 1, at 5 (identifying Monroe's letter as first OPSS); *see also* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217, 327 (1994) (identifying Monroe's letter as an early instance of interbranch conflict over interpretation of laws). Others dispute this characterization of Monroe's actions. CHRISTOPHER N. MAY, PRESIDENTIAL DEFIANCE OF "UNCONSTITUTIONAL" LAWS: REVIVING THE ROYAL PREROGATIVE 116 & n.103 (1998) (citing Paulsen, *supra*).
6. Letter from Andrew Jackson to the Senate and House of Representatives of the United States (May 30, 1830), *in* 3 RICHARDSON COMPILATION, *supra* note 5, at 1046; *see* Douglas W. Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337, 345 (1993) (describing Jackson's letter as first OPSS).
7. Letter from John Tyler to the House of Representatives (June 25, 1842), *in* 5 RICHARDSON COMPILATION, *supra* note 5, at 2012; Letter from James Buchanan to the House of Representatives (June 25, 1860), *in* 7 *id*. at 3128; Letter from U.S. Grant to the House of Representatives (Aug. 14, 1876), *in* 10 *id*. at 4331. *See* MAY, *supra* note 5, at 103 (citing Buchanan OPSS as first use); Frank B. Cross, *The Constitutional Legitimacy and Significance of Presidential "Signing Statements,"* 40 ADMIN. L. REV. 209, 210–11 (1988) (citing examples from Tyler and Grant presidencies); Louis Fisher, *Signing Statements: Constitutional and Practical Limits*, 16 WM. & MARY BILL RTS. J. 183, 189–90 (2007) (citing Tyler, a different example from Buchanan administration, and Grant).
8. Leah Halper, Opinion, *Constitution Day with Real Life Lessons*, CHRISTIAN SCI. MONITOR, Aug. 4, 2006, at 9; *see also* AM. BAR ASS'N, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS & THE SEPARATION OF POWERS DOCTRINE, RECOMMENDATION AND REPORT 2 (2006), *available at* http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf [hereinafter ABA TASK FORCE REPORT] (summarizing early reactions to news accounts regarding Bush administration's use of OPSSs).
9. Brad Waites, Note, *Let Me Tell You What You Mean: An Analysis of Presidential Signing Statements*,

Even the venerable Library of Congress publication, *How Our Laws Are Made*,[10] omits any mention of signing statements, and limits its enumeration of the options for executive action on passed legislation to signing, non-objection after ten days, a pocket veto, or a veto.[11] Thus, the standard account does not even acknowledge the OPSS as a recognized and legitimate mechanism of direct executive power in the lawmaking process. Only recently has significant discussion of presidential signing statements started appearing in basic reference materials about the executive branch.[12]

¶7 In considering the recent controversies over President Bush's OPSSs and the future of the device as a part of the panoply of executive powers over lawmaking, it is important to keep in mind that the use of this device remained largely a matter of academic curiosity until at least the Reagan administration. At that time, the Justice Department struck a deal with West Group to insert presidential signing statements into West's publication, *United States Code, Congressional and Administrative News* (USCCAN).[13] Even then, much of the debate was over the propriety of including *executive* expressions of opinion about legal interpretation in a publication about *legislative* intent, and was largely confined to academic

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21 GA. L. REV. 755, 760 (1987) (footnotes omitted). Waites's option (2), signing under protest, describes the route that most closely resembles an OPSS, at least in its milder forms. As described by Waites, such protest might express legal doubts or policy objections to a provision, or even pledge nondefense in the event of litigation over the enforceability of the law. But the issue at the time, as framed by Waites, focused on the device's function in influencing further congressional action or the courts' interpretation, rather than as a potential mechanism for direct and unilateral action by the executive branch. *Id.* at 761–66.

10. H.R. DOC. No. 108-93 (2003). The most recent edition of this brochure was issued in 2003, and the publication has been a standard part of the Library of Congress's reference resources since 1953. *Id.* at v. The current, twenty-third edition of the brochure is posted in HTML and PDF formats at the Library of Congress's web site. LIBRARY OF CONGRESS, HOW OUR LAWS ARE MADE (Charles W. Johnson ed., 2003), http://thomas.loc.gov/home/lawsmade.toc.html.

11. *Id.* at 51–53. The Library of Congress account omits the second option that Waites envisions, signing under protest.

12. *See, e.g.*, THE PRESIDENCY A TO Z 463–64 (Gerhard Peters & John T. Woolley eds., Michael Nelson advisory ed., 4th ed. 2008); Andrew Rudalevige, *Unilateral Powers of the Presidency*, *in* 1 GUIDE TO THE PRESIDENCY 511, 520–21 (Michael Nelson ed., 4th ed. 2008); *see also* Mark E. Byrnes, *The President and the Bureaucracy*, *in* 2 GUIDE TO THE PRESIDENCY, *supra*, at 1459, 1498–99. By contrast, previous editions of both of these Congressional Quarterly Press reference books lack any prominent mention of the signing statement. THE PRESIDENCY A TO Z 416 (Michael Nelson advisory ed., 3d ed. 2003) (no entry on signing statements); 2 GUIDE TO THE PRESIDENCY, at Index 64 (Michael Nelson ed., 3d ed. 2002) (no index entry on signing statements).

13. Several authors participating in the 2007 symposium focusing on presidential signing statements (Symposium, *supra* note 1) summarize the history of this decision. *See* Christopher S. Kelley, *A Matter of Direction: The Reagan Administration, the Signing Statement, and the 1986 Westlaw Decision*, 16 WM. & MARY BILL RTS. J. 283 (2007); *see also* Phillip J. Cooper, *Signing Statements as Declaratory Judgments: The President as Judge*, 16 WM. & MARY BILL RTS. J. 253, 255–61 (2007); Neil Kinkopf, *Signing Statements and Statutory Interpretation in the Bush Administration*, 16 WM. & MARY BILL RTS. J. 307, 307 (2007).

circles.[14] Many writers simply treated OPSSs as a seldom-occurring[15] expression of a President's understanding of a statute that may influence how courts interpret it (if the issue is ever litigated).[16] Given that the history of presidential signing statements has been little discussed, until very recently, beyond these rarified circles, it is not surprising that to many observers outside the legal academy, signing statements as used or abused by President George W. Bush may seem like an unprecedented threat to the constitutional system of checks and balances.[17]

Hot Potato: The Presidential Signing Statement as Political Issue

¶8 In mid-2006, the issue of presidential signing statements emerged from the ivory tower described above, and entered public discourse both in the popular press and among lawmakers. Indeed, one observer called 2006 "the year of the presidential signing statement."[18] A search of one large news database, LexisNexis's "News, All (English, Full Text)" file, revealed that in 2006, over 1500 items (including articles, op-ed pieces, and letters to the editor) mentioned the phrase "signing statement" in the same sentence as the word presidential, president, presidency, or administration—compared to twenty-five such documents in 2005.[19] Over 75% (1148 out of 1521) of these pieces appeared after a pair of articles by Charlie Savage[20] appeared

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14. The two major examinations of the presidential signing statement dating from this era are extensive essays in law reviews, one by a law student, and the other by two attorneys. Waites, *supra* note 9; Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J. ON LEGIS. 363 (1987).
15. Panel Discussion, *Presidential Lawmaking Powers: Vetoes, Line Item Vetoes, Signing Statements, Executive Orders, and Delegations of Rulemaking Authority*, 68 WASH. U. L.Q. 533, 550 (1990) (comments of Theodore Olson).
16. *Id.* at 547 (Theodore Olson). As Judge Easterbrook explained in the discussion portion of the symposium, in his view, a signing statement "is not itself authority for later action," but is simply "useful in demonstrating understandings of the law's meaning and scope," and like a statement by a congressional committee is "not entitled to much weight." *Id.* at 552–53 (comments of Frank Easterbrook).
17. *See, e.g.*, Halper, *supra* note 8.
18. A. Christopher Bryant, *Presidential Signing Statements and Congressional Oversight*, 16 WM. & MARY BILL RTS. J. 169, 169 (2007).
19. To compile all data about popular press attention to the presidential signing statement issue, the following search was performed on LexisNexis with date limitations for 2005, 2006, and 2007: **"signing statement" W/S (presiden! OR administration)**. A small number of the results produced by the LexisNexis search were items that did not discuss presidential signing statements as that term is used in this article, since the search algorithm in LexisNexis ignores noise words within phrase searches. Thus, for example, the above search retrieves hits such as "the president, in signing the statement, ..." Because such false drops represented only a handful of the items retrieved for the 2006 search, the data suffice as a rough metric of the surge of popular press interest in this formerly erudite topic.

    Due to differences in source coverage, the results produced by searching Westlaw were different, but the dramatic rise in interest reflected by the LexisNexis search is similarly demonstrated by the Westlaw results. The identical searches performed in Westlaw's ALLNEWS database retrieve 1243 news items in 2006, compared to only nine in 2005.
20. Charlie Savage, *Bush Challenges Hundreds of Laws: President Cites Powers of His Office*, BOSTON GLOBE, Apr. 30, 2006, at A1 [hereinafter Savage, *Bush Challenges*]; Charlie Savage, *Three Democrats Slam President over Defying Statutes*, BOSTON GLOBE, May 2, 2006, at A2. The previous spike in press coverage (accounting for 259, or another 17%, of the articles in the LexisNexis database from 2006) occurred in January 2006 and, based upon examination of the headlines of the articles appearing in

in the *Boston Globe* in late April and early May 2006.[21]

¶9 No small part of this wave of public discourse consisted of commentary by public officials—particularly lawmakers on both sides of the congressional aisle eager to defend against encroachment on their turf in the lawmaking arena. Public figures of both major political parties depicted OPSSs as part of an impending constitutional crisis,[22] and the Senate Judiciary Committee convened hearings on the issue.[23] Arguably, at least some of these protests may simply be characterized as partisan posturing—for example, Democratic Senator Charles Schumer's questioning of then-Supreme Court nominee Samuel Alito's position on OPSSs[24]—or territorial rhetoric—such as the legislative branch's claim of supremacy in lawmaking, as expressed by Republican Senator Arlen Specter's condemnation of "a White House power grab."[25] With 2007's turnover of Congress to Democratic party control, political developments on the presidential signing statement issue have, predictably, continued to keep the issue in the public eye.[26] Irrespective of the motivations of the players, the attention-grabbing power of the bipartisan congressional hostility helped ensure that the use of OPSSs by the Bush administration—with occasional mentions of historical antecedents—became and remained a "household term,"[27] even while the swirling controversy arguably obscured or overstated the constitutional issues at stake.[28]

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that month, largely resulted from (1) news about the OPSS on the McCain Amendment (the Detainee Treatment Act of 2005), passed as Title X of the Department of Defense Appropriations Act of 2006, Pub. L. No. 109-148, 119 Stat. 2680, 2739 (codified at 10 U.S.C. § 801 note, 28 U.S.C. § 2241, and 42 U.S.C. §§ 2000dd, 2000dd-1); and (2) publicity around the confirmation hearings on Supreme Court nominee Samuel Alito, who as a Department of Justice lawyer under President Reagan helped in the initial efforts of the White House to have presidential signing statements published in *USCCAN* (as described by Cooper, *supra* note 13, at 260–61). *E.g.*, Charlie Savage, *Bush Could Bypass New Torture Ban*, BOSTON GLOBE, Jan. 4, 2006, at A1; Patty Reinert, *Alito's Future Hinges on Past*, HOUSTON CHRON., Jan. 8, 2006, at A1.

21. The ABA credits Savage, *Bush Challenges*, *supra* note 20, with setting off "a major national controversy." ABA TASK FORCE REPORT, *supra* note 8, at 2 & n.1. Savage would later win a 2007 Pulitzer Prize for his series of reports on the signing statement issue. David Mehegan, *Globe Writer Wins Pulitzer for National Reporting*, BOSTON GLOBE, Apr. 17, 2007, at A1.
22. *E.g.*, 152 CONG. REC. S8189 (daily ed. July 25, 2006) (statement of Sen. Leahy) ("[T]he Bush-Cheney Administration . . . continues its abuse of 'signing statements' as part of a systematic pursuit of power without the checks and balances inherent in our constitutional democracy."); Charlie Savage, *Specter Takes Step to Halt Bush Signing Statements*, BOSTON GLOBE, July 27, 2006, at A3 ("If the president is permitted to rewrite the bills that Congress passes and cherry-pick which provisions he likes and does not like, he subverts the constitutional process designed by our framers.") (quoting Sen. Specter).
23. *The Use of Presidential Signing Statements: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006).
24. Charlie Savage, *Schumer Questions Nominee's Theory on Executive Role*, BOSTON GLOBE, Jan. 10, 2006, at A6.
25. Savage, *supra* note 22.
26. *See* Fisher, *supra* note 7, at 208–09 (noting some of 109th Congress's efforts to restrict presidential signing statements).
27. Savage, *supra* note 1, at 1.
28. Ronald A. Cass & Peter L. Strauss, *The Presidential Signing Statements Controversy*, 16 WM. & MARY BILL RTS. J. 11, 11 (2007).

¶10 Voices of public opinion, as conveyed in letters to the editor published in the spring and summer of 2006, joined those of lawmakers in expressing dire concerns for the state of the republic. Many writers reflected a perception that the OPSS represented a novel, unprecedented, and uniquely dangerous weapon of the Bush administration, as typified by one writer's inclusion of the OPSS as part of a "recipe for seizing power" and "overthrow[ing] a democratic republic."[29] The public furor over the Bush administration's use of the OPSS seems to have been fueled by the impression that the device, in President Bush's hands, has functioned as part of an overall effort to restrict civil liberties and basic human rights, serving as a pretext for avoiding or defying legislation that seeks to limit or prohibit the executive's law enforcement and intelligence agencies from encroaching on the rights of American citizens and others.[30] This impression was no doubt heightened by the fact that some of the most highly publicized uses of the OPSS were those reserving the right—or indeed expressing the outright intention—to ignore important human and civil rights protections such as the McCain Amendment (banning the use of torture on detainees held by the United States),[31] and audit requirements that would scrutinize use of national security letters and other investigatory activities included in the renewal of the USA PATRIOT Act.[32]

Where's the Beef? The Presidential Signing Statement as Predictor

¶11 The presidential signing statement, at least theoretically, can be instrumental in determining whether and how laws get carried out, given that it exists at the intersection of the legislative and executive functions, and given that by design (at least since the Reagan administration) it is intended to influence judicial interpretation. But questions remain as to the degree to which OPSSs, as a practical matter, actually predict, much less determine, the enforcement or interpretation of laws. Certainly, few decisions rely explicitly on presidential signing statements as a principal or even secondary source of legislative history.[33] In some instances the

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29. James D. Woolley, Letter to the Editor, *A Recipe For Seizing Power*, WICHITA EAGLE, Aug. 1, 2006, at A2.
30. *See, e.g.*, *id.*; Halper, *supra* note 8.
31. *See* Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918, 1919 (Dec. 30, 2005).
32. Statement on Signing the USA PATRIOT Improvement and Reauthorization Act of 2005, 42 WEEKLY COMP. PRES. DOC. 425, 425–26 (Mar. 9, 2006).
33. *See, e.g.*, United States v. Ventre, 338 F.3d 1047,1053–54 (9th Cir. 2003) (citing both House Report and signing statement by President Bill Clinton); Taylor v. Heckler, 835 F.2d 1037, 1044 n.17 (3d Cir. 1987) (declining to rely on presidential signing statement cited by agency, but without "determin[ing] what weight, if any, a presidential signing statement deserves in the process of statutory interpretation"). A recent student-authored piece summarizes: "When federal courts refer to signing statements, they often cite to them as a minor piece of legislative history or use them as one factor in analyzing a particular statute. Rarely, if ever, do courts use the signing statement's interpretation of legislation as controlling." Nicholas J. Leddy, Comment, *Determining Due Deference: Examining When Courts Should Defer to Agency Use of Presidential Signing Statements*, 59 ADMIN. L. REV. 869, 871–72 & nn.9–11 (2007) (collecting cases); *see also* Bradley & Posner, *supra* note 4, at 345 n.130 (same);

presidential signing statement cited is simply a rhetorical statement of the president's view on legislation that does not threaten or contemplate nonenforcement, and the court's mere citation to the presidential signing statement (as confirming other authorities cited) does not suggest deference to the executive view of the constitutional or interpretive issues.[34] As to presidential signing statements involving direct clashes between the legislative and executive views on a law, only two Supreme Court cases have cited to OPSSs in any significant way.[35]

¶12 Another, more direct effect of presidential signing statements can be found in administrative agency actions and interpretations. In 2007, the Government Accountability Office conducted a limited investigation to determine the practical effects of OPSSs of the current administration.[36] While some view the report's conclusion that executive agencies had disobeyed six of the nineteen bill provisions included in the study as revealing "the first evidence that the signing statements seemed to be having a real-world impact,"[37] others discount the findings.[38]

Note, *Context-Sensitive Deference to Presidential Signing Statements*, 120 HARV. L. REV. 597, 600 & nn.20–26 (2006) (same).

34. *E.g.*, United States v. Lopez, 514 U.S. 549, 561 n.3 (1995) (quoting President George H.W. Bush's presidential signing statement that asserted Gun-Free School Zone Act improperly federalized a policy matter best left to states). A Third Circuit opinion took an implicit jab at such use of presidential signing statements by noting "in passing" a purely hortatory presidential signing statement in which the same President singled out for praise another law that similarly federalized a state criminal matter. United States v. Bishop, 66 F.3d 569, 585 n.24 (3d Cir. 1995). There, in upholding the federal carjacking statute against a federalism argument, the Third Circuit noted that the presidential signing statement took on significance only because the *Lopez* Court had similarly relied on a presidential signing statement in striking down the Gun-Free School Zone Act on federalism grounds. This battle of footnotes perhaps demonstrates the inaptness of presidential signing statements for statutory interpretation since, often for political reasons—such as when a federal carjacking statute was politically popular enough to gain presidential backing without consideration of the federalism issues potentially raised—they can imply radically inconsistent positions on constitutional issues. In any event, neither decision relied centrally on a presidential signing statement, and neither opined on the legitimacy of using presidential signing statements for statutory interpretation.
35. *See* Kelley, *supra* note 13, at 300–01 (citing INS v. Chadha, 462 U.S. 919 (1983) and Bowsher v. Synar, 478 U.S. 714 (1986)). The *Bowsher* Court not only cited President Reagan's signing statement, but relied on the same reasoning employed by the administration to rule that certain provisions of the Gramm-Rudman balanced budget amendment violated the separation of powers. *Compare* Bowsher v. Synar, 478 U.S. 714, 719 n.1, 734-36 (1986) *with* Statement on Signing the Bill Increasing the Public Debt Limit and Enacting the Balanced Budget and Emergency Deficit Control Act of 1985, 2 PUB. PAPERS 1471–72 (Dec. 12, 1985). The *Chadha* opinion, in finding unconstitutional a provision that gave Congress the power to oversee and veto the actions of administrative agencies, referred to the long history of signing statements (by eleven Presidents, from Wilson to Reagan) who had "gone on record at some point to challenge congressional vetoes as unconstitutional." INS v. Chadha, 462 U.S. 919, 942 n.13 (1983).
36. U.S. GOV'T ACCOUNTABILITY OFFICE, PRESIDENTIAL SIGNING STATEMENTS ACCOMPANYING THE FISCAL YEAR 2006 APPROPRIATIONS ACTS 1 (2007), *available at* http://www.gao.gov/decisions/appro/308603.pdf [hereinafter GAO PSS REPORT].
37. Savage, *supra* note 1, at 4.
38. Nelson Lund, *Presidential Signing Statements in Perspective*, 16 WM. & MARY BILL RTS. J. 95, 108 (2007) ("I believe it is unlikely that the agencies' behavior was affected by the President's constitutional objections."). Although he concedes a potential shortcoming of the GAO report in avoiding assessment of agency compliance with OPSSs invoking national security or foreign relations concerns, *id.* at 107, which have been some of the most broadly used and highly criticized of President

The power of presidential signing statements to influence or predict agency conduct in past administrations is similarly debatable: some OPSSs have formed the basis for an agency's policy determinations, others have been partially relied upon by agencies, and at least one was "completely ignored" by the agency.[39]

A Story with Legs: The Future of the Presidential Signing Statement

¶13 President George W. Bush, whose use of OPSSs has provided the impetus for the current prominence of the issue, will soon leave office. But OPSSs are likely to remain a significant part of the legal and political landscape, even if the notoriety of the device has ensured that future administrations will have to tread lightly and may have to find less aggressive (or less scrutinized) ways of expressing constitutional disputes about enacted legislation.[40] During the primary elections phase, one presidential candidate publicly stated that if elected, he would not use presidential signing statements,[41] but other candidates of both parties stated they would.[42] And the overall growth of OPSSs since at least the Reagan presidency demonstrates that, regardless of who becomes the next President, the issue will remain or return to become a subject of both popular and academic concern.[43]

The "Problem" of the Presidential Signing Statement: Some Informational Gaps

¶14 As alluded to previously, in addition to the recent spate of popular attention to the topic of presidential signing statements, academic scrutiny of the phenomenon has created at least twenty years of literature and debate, reviewing the history

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Bush's OPSSs, Professor Lund deconstructs the agencies' behavior in the case of each of the six provisions identified by the GAO to conclude that presidential objections were not the cause of any noncompliance. *Id.* at 108–10.

39. Leddy, *supra* note 33, at 875 n.27 (citing example where the FDA disregarded President Reagan's objections stated in an OPSS); *see also id.* at 881–86 (summarizing several examples of agency reliance, in whole or in part, on OPSSs from administrations of George H.W. Bush, Bill Clinton, and George W. Bush).
40. Seen in this light, even those who are opposed to the expansive notion of executive power often asserted in OPSSs arguably should welcome the device as throwing a salutary light on the intentions of the executive branch. The President has other, potentially less transparent, ways to resist, subvert, or avoid enacted laws, and thus, as one article reasons: "The attack on the institution of signing statements is puzzling. Signing statements provide public information about a president's views of a statute and thus would seem to promote dialogue and accountability." Bradley & Posner, *supra* note 4, at 310.
41. *See* Charlie Savage & James W. Pindell, *A Tactic of Bush's on Bills Is Assailed*, BOSTON GLOBE, Nov. 20, 2007, at A14.
42. *See* Charlie Savage, *Candidates on Executive Power: A Full Spectrum*, BOSTON GLOBE, Dec. 22, 2007, at A1.
43. Certainly, publicity regarding the administration's continued use of presidential signing statements has not flagged since 2006. The searches described, *supra* note 19, reveal that last year 1234 news items in the LexisNexis database (835 items in Westlaw) mentioned presidential signing statements, with a recent count for 2008 (over 670 items as of the end of September on LexisNexis, and over 340 on Westlaw) showing continued attention to the issue.

of presidential signing statements and focusing on their use by recent Presidents including Reagan,[44] George H.W. Bush,[45] Clinton,[46] and George W. Bush.[47] In the wake of 2006's widely publicized controversies, a fresh round of academic debate has, unsurprisingly, centered on the perceived differences (in breadth, nature, and frequency) of the use of OPSSs by George W. Bush compared to previous presidents. What becomes clear from a review of this literature is that there is ample room for debate as to whether and how the Bush administration's use of the presidential signing statement device differs from or fits into the history of the presidency and the overall constitutional scheme, as well as whether or how the legal effect of OPSSs can be resolved. Several ambiguities and nuances that contribute to this debate are identifiable.

The Numbers Game

¶15 First, at the most fundamental level, researchers may have difficulty counting the number of times that OPSSs have been used by various administrations to challenge statutes.[48] The oft-cited figure that George W. Bush has used OPSSs "to disobey more than 750 laws"[49] may often be misunderstood or misused, especially in popular discourse. For example, the writers of some op-ed pieces and letters to the editors have apparently proceeded on the assumption that President Bush has signed more than 750 separate OPSSs attached to 750 affected bills.[50] In fact, the 750 figure was based on the number of separate provisions of law regarding which

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44. *See* Garber & Wimmer, *supra* note 14; Mark R. Killenbeck, *A Matter of Mere Approval? The Role of the President in the Creation of Legislative History*, 48 ARK. L. REV. 239 (1995); Waites, *supra* note 9.
45. *See* Kelley, *supra* note 1; Killenbeck, *supra* note 44; Kmiec, *supra* note 6.
46. *See* PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION 199–230 (2002); Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 7; Kelley, *supra* note 1.
47. *See* Phillip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 PRESIDENTIAL STUD. Q. 515 (2005); Neil Kinkopf, *Signing Statements and the President's Authority to Refuse to Enforce the Law*, ADVANCE: J. ACS ISSUE GROUPS, Spring 2007, at 5, *available at* http://www.acslaw.org/files/Kinkopf-Signing%20Statements-Jun%202006-Advance%20Vol%201.pdf.
48. For example, Bradley & Posner, *supra* note 4, at 323–25 & tbl.1, compare the Carter through George W. Bush administrations by proposing a number of different methods of counting or assessing the impact of presidential signing statements as used by various Presidents.
49. Savage, *Bush Challenges*, *supra* note 20; *see also* Charlie Savage, *Panel Chides Bush on Bypassing Laws: ABA Group Cites Limits to Power*, BOSTON GLOBE, July 24, 2006, at A1 ("Bush has used these so-called signing statements to challenge more than 750 laws that have been enacted since he took office . . . .").
50. *See, e.g.*, Editorial, *Arsenal of Secrecy*, ST. LOUIS POST-DISPATCH, Feb. 19, 2008, at B6 ("[T]he 43rd president has appended 'signing statements' to more than 750 bills . . . ."); Rhonda Chriss Lokeman, Commentary, *White House Treading on Other Branches*, KAN. CITY STAR, July 31, 2006, at B11 ("[H]e has issued more than 750 signing statements . . . ."); Editorial, *Veto? Who Needs a Veto?*, N.Y. TIMES, May 5, 2006, at A22 ("Charlie Savage at *The Globe* reported recently that Bush had issued more than 750 'presidential signing statements' . . . ."); Charles P. Milner, Letter to the Editor, *Remember When?*, SANTA FE NEW MEXICAN, Aug. 4, 2006, at A7 ("He has used this device more than 750 times . . . .").

President Bush had raised constitutional concerns.[51] Commentators may also differ on whether they count each separate constitutional objection raised as to a single provision of law, since often more than one constitutional infirmity is claimed to render a single provision void or unenforceable.[52] The number of OPSSs issued by President Bush as of the end of April 2006 included, by various counts, from 100 to 125 individual documents.[53]

Hide and Seek

¶16 Second, finding presidential signing statement documents themselves can be difficult and time-consuming. Signing statements—especially those by early Presidents—have not been neatly gathered into a single indexed or readily searchable publication.[54] Even for modern signing statements available in searchable electronic formats, the captions vary, depending on the era and the source con-

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51. As the *Boston Globe* clarified, the phrase "750 laws" referred not to whole *bills*, but individual statutes, which "were provisions contained in about 125 bills." Correction, *For the Record*, BOSTON GLOBE, May 4, 2006, at A2. Debate continues both as to how many OPSSs have been issued and how many laws or provisions affected, and as to which number is the appropriate metric for comparing presidents. *See, e.g.*, Kelley, *supra* note 13, at 286 & n.21 (counting 1150 provisions since 2001, based on "my own database" of presidential signing statements); Kinkopf, *supra* note 13, at 308 & n.5 (1042 provisions as of the end of 2006, citing one index that counted both the number of provisions challenged on constitutional grounds and the number of constitutional objections raised); Bradley & Posner, *supra* note 4, at 324. (President Bush "is on the high end but still not outside the historical norm" when counting the bare number of bills per year to which he has appended presidential signing statements expressing constitutional objections, but "has clearly departed from the norm by frequently issuing challenges to numerous statutory provisions within a single signing statement.")
52. *See, e.g.*, ABA TASK FORCE REPORT, *supra* note 8, at 14–15 n.52.
53. Professors Neil Kinkopf and Peter Shane have compiled a detailed, chronological table listing the documents they consider to be OPSSs by President Bush. NEIL KINKOPF & PETER SHANE, INDEX OF PRESIDENTIAL SIGNING STATEMENTS: 2001–2007 (2007), http://www.acslaw.org/node/5309 (synopsis and link to index). For the period leading up to the Savage articles that seem to have originated the 750 OPSSs figure—that is, from the beginning of the first George W. Bush term through and including the OPSS issued March 9, 2006, on the USA PATRIOT reauthorization—a manual count of the items listed in the second column ("Cite to Signing Statement") shows some 101 individual statements, *see id.* at 1–139; whereas the *Boston Globe* described (without citation to a source) the number as 125. Correction, *supra* note 51.
54. Some limited collections are publicly accessible. U.C. Santa Barbara hosts a useful web site, created as a collaboration between John Woolley and Gerhard Peters, that includes a collection of presidential signing statements going back to President Hoover. The American Presidency Project, Document Archive: Presidential Signing Statements, http://www.presidency.ucsb.edu/signingstatements.php (last visited July 30, 2008). More detailed finding aids exist for identifying signing statements by the Bush administration alone, but these are not useful in locating other Presidents' signing statements. As noted above, KINKOPF & SHANE, *supra* note 53, have created an annotated index that lacks full text of the signing statements but provides citations to full text. Similarly, an Oklahoma City attorney has established a web site containing a searchable collection of presidential signing statements by Bush. Joyce A. Green, Signing Statements: George W. Bush, http://www.coherentbabble.com/signing statements/signstateann.htm (last visited July 30, 2008). Tantalizingly, Professor Kelley has assembled his own database of presidential signing statements going back to President Monroe, but it does not appear to be publicly available. Kelley, *supra* note 13, at 286 n.21.

sulted, from "Statement on Signing"[55] or "Statement About Signing,"[56] to a phrase like "President Signs," or "President's Statement on," followed by the name or the bill number of the statute being signed.[57] This means that, even with a searchable database, researchers may find it difficult to identify these statements and must instead rely on a compiler's selection of presidential documents as representing the known universe of presidential signing statements. Even more significant to historical research on the institution of the presidential signing statement, early antecedents do not necessarily take the form of a formally issued statement relating to the signing of a bill. For example, the widely discussed Monroe and Jackson statements cited as precedent for OPSSs were compiled and captioned as letters to Congress. President Monroe's two letters—which are often cited, even in scholarly articles, to secondary sources that do not identify the date, much less set forth the actual text of the letters[58]—were not even sent in connection with the signing (on March 2, 1821),[59] but the next year when the President made military appointments pursuant to the law.[60] These discrepancies and nuances may affect

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55. This formulation is used in recent editions of both the *Weekly Compilation of Presidential Documents* and *Public Papers of the Presidents of the United States*. *See, e.g.*, Statement on Signing the 21st Century Department of Justice Appropriations Authorization Act, 2 PUB. PAPERS 2010, 2010–11 (Nov. 2, 2002); Statement on Signing the 21st Century Department of Justice Appropriations Authorization Act, 38 WEEKLY COMP. PRES. DOC. 1971 (Nov. 2, 2002). But older editions vary, both volume to volume and within volumes. *Compare, e.g.*, Energy Supply and Environmental Coordination Act of 1974: Statement by the President upon Signing the Bill into Law, 10 WEEKLY COMP. PRES. DOC. 722 (June 26, 1974), *with* Summer Jobs Programs for Youth: Statement by the President After Signing Bill Funding the Programs, 10 WEEKLY COMP. PRES. DOC. 599 (June 11, 1974).
56. Some of the earlier presidential signing statements collected by Woolley and Peters's web site fall under such a heading. For example, the two Nixon-era presidential signing statements cited *supra* note 55 are captioned, respectively "Statement About Signing the Energy Supply and Environmental Coordination Act of 1974" and "Statement About Signing an Appropriations Bill Including Funds for Summer Jobs Programs for Youth." The American Presidency Project, *supra* note 54.
57. The White House's web site—which currently posts many signing statements as releases from the Office of the Press Secretary—is more widely and readily accessible and more quickly updated than publications like the *Public Papers of the Presidents of the United States*, or often even the *Weekly Compilation of Presidential Documents*, but typically uses more informal descriptions, and does not employ standard captioning, making it more difficult to identify and search for signing statements. *See, e.g.*, George W. Bush, Statement by the President, *President Signs Justice Approps Authorization Act*, Nov. 4, 2002, http://www.whitehouse.gov/news/releases/2002/11/20021104-3.html.
58. *See, e.g.*, Ryan McManus, Note, *Sitting in Congress and Standing in Court: How Presidential Signing Statements Open the Door to Legislator Lawsuits*, 48 B.C. L. REV. 739, 759 n.170 (2007) (citing ABA TASK FORCE REPORT, *supra* note 8, at 7); Kelley, *supra* note 13, at 283 n.6 (citing Christopher S. Kelley, The Unitary Executive and the Presidential Signing Statement 57 (2003) (unpublished Ph.D. dissertation, Miami University), *available at* http://www.ohiolink.edu/etd/view.cgi?miami1057716977).
59. The statute President Monroe cites in the letter is found at 3 Stat. 615, 615–16 (1821).
60. *See* Letter from James Monroe to the Senate of the United States, *supra* note 5. As indicated *supra* notes 5–7, the Monroe letters, like the Jackson signing statement and other presidential documents from the Washington through Wilson presidencies, can be found in the RICHARDSON COMPILATION, *supra* note 5. This chronological compilation, along with further editions extending coverage through the Coolidge administration, is available at many academic libraries and law libraries in print and on the HeinOnline database (in the U.S. Presidential Library), but can be unwieldy to search because of the captioning problem as well as the lack of uniform or boilerplate language used in early OPSSs, limitations of the database's search mechanism, and lack of detailed topical indexing. In print, the

the degree to which a person researching the topic is able to quickly find and identify documents as presidential signing statements, and to find underlying related information, and thus to evaluate trends about how various Presidents have used signing statements.

Some Qualitative Distinctions

¶17 Third, even once signing statements are located, a more subtle discrepancy emerges in the debate, having to do with the grounds claimed and action or inaction contemplated by an OPSS. Signing statements can be sorted into the categories of constitutional (that is, asserting a claim that a provision is unconstitutional or infringes constitutionally defined prerogatives of the executive), political (explained as "tak[ing] advantage of a contentious issue . . . that left a section of a bill ambiguous or undefined" in order to insert the presidential policy stance on the issue[61]), and rhetorical (attempting to mobilize public support for the presidential view). The latter two categories, like the merely ceremonial or hortatory statements often issued upon a bill-signing, create little controversy. It is constitutional presidential signing statements (which are included here under the umbrella OPSS), and particularly those that threaten or direct nonenforcement by executive agencies that are at the heart of recent controversy and debate.

¶18 But even the OPSS category can be further subdivided. Some OPSSs that direct noncompliance with a particular provision rely on settled law that clearly deems provisions of that type unconstitutional.[62] In such cases, a directive to ignore the provision is relatively uncontroversial in that it may be viewed as valid in light of the presidential oath of office to "preserve, protect and defend the Constitution of the United States,"[63] as well as falling under the President's Article II duty to "take Care that the Laws be faithfully executed."[64] More noteworthy and troubling are the OPSSs that set forth a presidential view on constitutionality that is not backed by clear Supreme Court precedent.

¶19 Even as to this subcategory, however, views differ as to what constitutes a "challenge" to the constitutionality of a statute. For example, at least one scholar

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compilation is also available at some large public libraries. Adding to the confusion, the differing pagination of various editions of this compilation means that citations found in articles cannot always be easily found in the edition available to a researcher, and the precise date of the document is a key element, since the compilations are ordered chronologically. All citations to the *Richardson Compilation* in this article are to the version available on HeinOnline.

61. Kelley, *supra* note 1, at 4.
62. For example, since the Supreme Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983), Congress has passed numerous laws requiring congressional pre-approval of executive department actions, in direct contravention of *Chadha*. *See* GAO PSS REPORT, *supra* note 36, at 17–19 (seventy individual provisions challenged under the *Chadha* rationale by President Bush in eleven appropriations acts). Presidential "defiance" of such provisions is arguably unproblematic since any attempted enforcement would be stricken under existing constitutional precedent and "all Presidents find [such provisions] troubling." Cass & Strauss, *supra* note 28, at 15; *see also* Kinkopf, *supra* note 13, at 312.
63. U.S. CONST. art. II, § 1, cl. 8.
64. *Id.* § 3.

counts as "apocryphal" the notion that President Monroe's pair of letters (discussed above[65]) constituted an OPSS, explaining that Monroe's statement only set forth his view that a provision would be unconstitutional *if* it imposed a restraint on his appointment of certain military officers, and his view (with which Congress disagreed) that there was no such restraint.[66] But for others, this is precisely the problem posed by the OPSS: if the President and Congress disagree as to what interpretation avoids a constitutional breach, then the President *ipso facto* oversteps Article II by asserting his or her own view.[67]

¶20 A fourth distinction that can be drawn in determining which presidential signing statements "matter" has to do with how the constitutional issues raised in an OPSS are intended or likely to be carried out in practice. As one author puts it, "one issue has to do with whether and when the President may refuse to enforce a law that the President regards as unconstitutional; the other issue is whether the courts should take into account the views of the President when reviewing the legislative history of a statute."[68] In view of this distinction, mere expressions of doubt as to the constitutionality of a law, although they at least symbolically impinge on Congress's role as the maker of laws and the Supreme Court's role as final arbiter of the constitutionality of laws, arguably need not "count" because—in one approach to the issue—OPSSs are problematic only when they represent a unilateral refusal to carry out a law. To another view, however, the symbolism of the OPSS, even if it does not threaten or result in nonenforcement of a law, is precisely what matters: it "encourage[s] the belief that the law is not what Congress puts in public law but what the administration decides to do later on,"[69] and promotes "the flowering of faux law."[70]

¶21 Finally, for many critics of the administration of George W. Bush, the counting of OPSSs (or more precisely, of the number of constitutional challenges posed in OPSSs) does not matter: the issue is not the quantity, but the informational quality of the OPSSs deployed by President Bush. These commentators fault the administration for the use of boilerplate, "ritualistic, mechanical" phraseology in its OPSSs, as well as for the lack of citation to legal authority supporting the constitutional positions advocated.[71] In particular, the lack of cited authority for the objections advanced arguably renders an OPSS useless as a tool for statutory interpretation.[72]

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65. *See supra* ¶ 5.
66. MAY, *supra* note 5, at 116.
67. *E.g.*, ABA TASK FORCE REPORT, *supra* note 8; *but see* Paulsen, *supra* note 5.
68. Kinkopf, *supra* note 47, at 5.
69. Fisher, *supra* note 7, at 210.
70. Peter M. Shane, *Presidential Signing Statements and the Rule of Law as an "Unstructured Institution,"* 16 WM. & MARY BILL RTS. J. 231, 239 (2007).
71. ABA TASK FORCE REPORT, *supra* note 8, at 17 (citing Kinkopf, *supra* note 47, at 6, and Cooper, *supra* note 47, at 521).
72. Kinkopf, *supra* note 13, at 311 ("They are stated in such vague and conclusory terms that they offer nothing useful to the enterprise of interpretation.").

¶22 Regardless of one's position on the issue, this category of criticism re-emphasizes some of the research and access problems noted above. To apply this more qualitative measure to the OPSSs issued by the Bush administration as compared to past presidents, researchers need a broad pool of the text of current and historical signing statements in order to evaluate whether in fact the OPSSs of this administration differ in content and nature—as well as sheer frequency—from other administrations' uses of the device.

The Implications for Library Professionals

¶23 The recent controversies and potential for ongoing development of the presidential signing statement issue have practical consequences for library professionals who work with legal and government information, and more generally for those involved with shaping governmental information policy. As recently as 1999, the leading library and information sciences textbook in the field of government information mentioned presidential signing statements only in passing, describing them briefly as part of the legislative history of a bill.[73] This portrayal of signing statements is consistent with many other accounts of the institution of the signing statement prior to the Bush administration, in that "[h]istorically, signing statements have served a largely innocuous and ceremonial function."[74] It is now clear that presidential signing statements are no longer a topic "relegated to law students and in law journals,"[75] but have entered the public consciousness as well as reignited scholarly debate on the constitutional issues involved. Given the dramatic rise in interest in the topic, it is a timely juncture for information professionals to educate themselves about researching in this hitherto quiet corner of presidential and legislative study. The current controversy also raises significant information policy implications.

Library Implications

¶24 As observed by one compiler of the Bush administration's signing statements, "presidential signing statements are not numbered or neatly indexed on the White House web site."[76] The Government Printing Office has included signing statements in the *Public Papers of the Presidents of the United States* (which began publishing in 1945) and the *Weekly Compilation of Presidential Documents* (which began in 1965), but, as discussed below, there is no requirement that presidential documents be submitted for publication, even where they direct executive agencies

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73. Joe Morehead, Introduction to United States Government Information Sources 161–62 (6th ed. 1999).
74. Kinkopf, *supra* note 47, at 1.
75 Kelley, *supra* note 1, at 2.
76. Joyce A. Green, About This Website: Numbering for Signing Statements, Signing Statements: George W. Bush, http://www.coherentbabble.com/signingstatements/about.htm#Numbering (last visited Aug. 4, 2008) (referring to http://www.whitehouse.gov).

not to enforce a signed provision or only to enforce a law in accordance with the President's interpretation (sometimes at odds with Congress's own express interpretation) of the provision. Further, the statements, letters, and other presidential documents that have been characterized as the historical and constitutional precedent for modern signing statements and that predate the *Public Papers* or the *Weekly Compilation* can be more difficult to find—both because of the limited number of research sources and because of the difficulties, described above, created by nonstandard captioning, classification, and citation of the documents themselves.

¶25 It also is worth noting that the rise to prominence of presidential signing statements in the public discourse is only gradually permeating the literature of library professionals generally and government and legal information librarians specifically. A recent search of the Library Literature and Information Science Fulltext database revealed only a single item on the topic—a brief, unsigned notice regarding the Campaign for Reader Privacy's protest against President Bush's OPSS on the USA PATRIOT Act reauthorization.[77] However, library professionals are beginning to address this void, for example, by posting research guides on library web sites.[78] To perform or support research on both modern and historical signing statements, information professionals would do well to have not only familiarity with the variety of print and electronic resources referenced in this growing literature, but also some understanding of the wide range of perspectives being brought to bear on the issue in the underlying current debate (some of which have been outlined here) and the nuances of searching for and identifying documents that constitute OPSSs under various approaches to the question.

Policy Implications

¶26 The 2006 controversy over OPSSs has elicited at least three important policy responses designed to ensure that information about presidential signing statements is disseminated regularly and transparently. Initially, in 2002, Congress enacted legislation to require the attorney general to report to Congress any

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77. *Groups Criticize Bush's PATRIOT Act Signing Statement*, AM. LIBR., May 2006, at 17, 17. The notice somewhat blandly described a signing statement as "an official document in which a president spells out his understanding of a bill he is signing into law." *Id.* A slightly longer version of the item appeared two months later. *Groups Criticize Bush's PATRIOT Act Signing Statement*, NEWSL. ON INTELL. FREEDOM, July 2006, at 175, 175, *available at* https://members.ala.org/nif/v55n4/patriot.html.

78. Some libraries have added full-length research guides about presidential signing statements. *E.g.*, Georgetown Law Library, Presidential Signing Statements Research Guide, http://www.ll.georgetown.edu/guides/presidentialsigningstatements.cfm (last visited Aug. 4, 2008); Law Library of Congress, Research Help: Presidential Signing Statements, http://www.loc.gov/law/help/statements.html (last visited Aug. 4, 2008). Others have included some guidance on presidential signing statements within existing guides on federal legislative history. *E.g.*, Marquette University Law Library, Federal Legislative History: A Research Guide, http://law.marquette.edu/cgi-bin/site.pl?2130&pageID=3543 (last visited July 30, 2008).

instance in which the Justice Department formally or informally adopted a policy to defy any enacted federal statute on constitutional grounds.[79] President Bush signed the law but, in an ironic twist, appended a boilerplate OPSS stating an intention to withhold any information whose disclosure "could impair," among other vaguely outlined risks, "the deliberative processes of the Executive, or the performance of the Executive's constitutional duties."[80] Despite this rebuff, the American Bar Association, in adopting the resolutions proposed by its bipartisan Task Force on Presidential Signing Statements and the Separation of Powers Doctrine, urged a farther-reaching, two-pronged policy initiative, seeking legislation to (1) require submission of any OPSS to Congress and to make them "available in a publicly accessible database," and (2) give Congress, the President, other entities or individuals legal standing to seek judicial review of any OPSS.[81]

¶27 Congress took up the latter initiative with proposed legislation introduced in 2006,[82] and reintroduced in the 110th Congress,[83] to allow the legislature to sue or otherwise participate in litigation involving the constitutionality of OPSSs. These bills sought to allow Congress to obtain judicial review of a particular signing statement that in its view threatened abrogation of its legislative intent through a contrary executive interpretation, or to commence suit asking the courts to decide once and for all the legal status and authority of OPSSs.[84] Of course, even if such a law were enacted, it is unclear how a congressional suit against the executive branch would fare. As a threshold matter, ripeness, as well as standing, could present a substantial barrier.[85] Moreover, as a practical matter, it is doubtful how the Justices of the current Supreme Court might view the substantive issues. Justice

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79. Twenty-First Century Department of Justice Appropriations Authorization Act of 2002, Pub. L. No. 107-273, sec. 202, 116 Stat. 1758, 1771 (amending 28 U.S.C. § 530D).
80. Statement on Signing the 21st Century Department of Justice Appropriations Authorization Act, 2 PUB. PAPERS 2010, 2010 (Nov. 2, 2002).
81. ABA TASK FORCE REPORT, *supra* note 8, at 5.
82. Presidential Signing Statements Act of 2006, S. 3731, 109th Cong. §§ 5–6 (2006) (giving Senate or House standing to file suit as to "legality" of an OPSS, or to intervene in any action involving construction or constitutionality of any law to which an OPSS was attached).
83. American Freedom Agenda Act of 2007, H.R. 3835, 110th Cong. § 6 (2007) (giving House and Senate, collectively, standing to bring declaratory action on constitutionality of OPSSs); *see also* Presidential Signing Statements Act of 2007, S. 1747, 110th Cong. § 5(a) (2007) (giving Congress right to participate as amicus curiae in any case regarding construction or constitutionality of law to which presidential signing statement was attached); Presidential Signing Statements Act of 2007, H.R. 3045, 110th Cong. § 5(a) (2007) (same).
84. *See* 152 CONG. REC. S8271 (daily ed. July 26, 2006) (statement of Sen. Specter) ("[I]t permits the Congress to seek what amounts to a declaratory judgment on the legality of Presidential signing statements that seek to modify—or even to nullify—a duly enacted statute.").
85. Standing could be difficult to establish even if Congress passed a statute conferring it. *See* McManus, *supra* note 58, at 743–44. Others view ripeness as an additional obstacle. *See* Michele Estrin Gilman, *Litigating Presidential Signing Statements*, 16 WM. & MARY BILL RTS. J. 131, 133–37 (2007). Yet another commentator questions the wisdom of putting all of Congress's oversight eggs in the single basket of judicial review, arguing that Congress's other powers of influence over the executive branch (notably its purse string power) are more effective checks and balances than a declaratory action would be. *See* Bryant, *supra* note 18, at 171–75, 181–82.

Alito, when he was a Justice Department lawyer under President Ronald Reagan, advocated the use of signing statements as part of legislative history, and it is unknown how he would view them from the judge's, rather than the advocate's, perspective. Justice Antonin Scalia—who in past opinions has derided any use of legislative history in the interpretation of statutes[86]—in his dissenting opinion in one of the Guantánamo detainee cases (in which he was joined by Justices Thomas and Alito), criticized the Court's opinion for "wholly ignor[ing] the President's signing statement, which explicitly set forth *his* understanding that the [Detainee Treatment Act] ousted jurisdiction over pending cases."[87] Some observers interpret the reference as indicating a favorable view toward consideration of presidential signing statements, at least as part of a law's legislative history.[88]

¶28 The more directly information-oriented of the ABA's resolutions is the one requiring prompt submission and web publication of signing statements, and submission of a fully articulated report giving the reasons and legal bases for the objections stated in any OPSS. This addresses a gap in the law, since (other than the ambiguously enforceable 2002 legislation relating to Justice Department policies) there are no legal requirements guaranteeing that signing statements be published in a way that makes them accessible to the public. The currently, publicly available resources for finding the text of signing statements exist only by voluntary disclosure, and due to incompleteness (e.g., USCCAN's selective compilation), lack of timely indexing (*Weekly Compilation of Presidential Documents*), delayed publication (*Public Papers of the Presidents*), or lack of any indexing at all (the White House web site), these sources are less than optimally reliable. A law mandating prompt disclosure would prevent future administrations from engaging in obfuscatory tactics—not an entirely remote scenario in the highly charged political atmosphere which now surrounds the presidential signing statement device. Moreover, requiring a report stating the legal basis of any OPSS would address qualitative criticisms of the Bush administration's OPSSs such as those mentioned above.[89]

¶29 Congress has been slower to take up this part of the ABA Task Force's recommendations. Although it has passed two joint resolutions requiring notification of Congress[90]—an arguably superfluous step since "[m]embers of Congress

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86. *E.g.*, Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) ("The greatest defect of legislative history is its illegitimacy."); *see also* Vt. Agency of Natural Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 783 n.12 (2000) (quipping that the dissent's reliance on a committee report demanded "even a greater suspension of disbelief than legislative history normally requires"); City of Chi. v. Envtl. Def. Fund, 511 U.S. 328, 337 (1994) ("[I]t is the statute, and not the Committee Report, which is the authoritative expression of the law . . . .").
87. Hamdan v. Rumsfeld, 548 U.S. 557, 666 (2006) (Scalia, J., dissenting).
88. *See* Charlie Savage, *Scalia's Dissent Gives 'Signing Statements' More Heft*, BOSTON GLOBE, July 15, 2006, at A3.
89. *See supra* ¶ 21.
90. H.R.J. Res. 89, 109th Cong. (2006) (requiring President to notify Congress, including reasons for objection, of any determination to ignore an enacted provision); H.R.J. Res. 87, 109th Cong. (2006) (same).

and their staffs already know the content of signing statements"[91]—no bill has sought to make publication mandatory or reliably web-accessible. Indeed, one proposed law (initially introduced in 2006 and then re-introduced in 2007) would probably have made it harder to find OPSSs, by denying funding for the dissemination of any OPSS.[92] Although the evident aim of this proposal is to eliminate OPSSs altogether by tightening the purse strings, it seems more likely—in view of the many alternative means the executive branch has in its powers to influence the enforcement of laws—simply to drive presidential statutory interpretation underground, making information about the executive branch's intentions only more difficult to locate.

Conclusion

¶30 Recent events have catapulted presidential signing statements into public discourse as well as reigniting academic interest in the device. Despite recent legislative attempts to rein in the practice, OPSSs will probably continue to have a role in the interplay between the executive and legislative branches. Both administrative practice and case law arguably demonstrate that signing statements from past and current administrations have influenced how laws are implemented and interpreted, and the debate over the degree of influence exercised through OPSSs will likely continue as academics and public officials turn their attention to the issue.

¶31 In view of these facts, researchers and other participants in the public discourse—those examining the issuance of, agency adherence to, and judicial and legislative responses to signing statements—will continue to demand timely, accessible, and accurate information about this device. Librarians can further that aim both by learning about currently available information resources, and by advocating for stronger policies and practices that will keep this potent and controversial aspect of government information accessible and transparent.

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91. Fisher, *supra* note 7, at 209.
92. Congressional Lawmaking Authority Protection Act of 2007, H.R. 264, 110th Cong. § 3 (2007) (prohibiting use of public funds "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" where the statement is "inconsistent with" the intent of Congress); H.R. 5486, 109th Cong. § 1 (2006) (prohibiting the use of public funds to "produce, publish, or disseminate" any presidential statement, not limited to those that are inconsistent with the intent of Congress).