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Presidential Signing Statements: How to Find Them, How to Use Them, and What They Might

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Presidential Signing Statements: How to Find Them, How to Use Them, and What They Might Mean

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The Constitution of the United States provides, in Article I,

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it.[2]

From time to time, presidents have done more than this, making public statements of their reasons for signing a bill rather than issuing a statement of reasons only when sending it back unsigned.

This practice of the president issuing a statement, often a largely rhetorical exercise, has grown increasingly robust in the Reagan and later administrations. Some statements have become lengthy policy documents, which, among other things, expressed the administration's view of the purposes of the legislation signed as well as other aspects of its development.[3] Statements also included rejections of portions of the signed legislation that the president asserted were unconstitutional, a practice that was defended by officials in the Department of Justice.[4]

[1]This note is modified from a Continuing Legal Education presentation at the University of Arkansas in 2006. My thanks for questions and comments go to the participants.

[2]U.S. CONST. Art. I § 7, cl. 2. (Later editions have altered "become" to "becomes;" it is "becomc" in the original printing.).

[3]*See* 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).

[4]*See, e.g.*, Walter Dellinger, *Memorandum for Bernard N. Nussbaum, Counsel to the President, reprinted at* 48 ARK. L. REV. 333 (1995).

The effect of these rejections was sometimes to suspend enforcement or implementation of those sections by executive agencies.[5]

In recent years, President George W. Bush has signed legislation with a series of statements that have rejected portions of the legislation as unconstitutional, doing so both with unprecedented frequency and on the basis of a theory of the presidency that rejects much direction by Congress. The result has been, depending on how one counts, over five hundred presidential claims that Congress has passed legislation during the Bush presidency that may be unconstitutional and must be construed as the president interprets it or rejected.[6] Most of these objections or constructions are based on the "unitary presidency," an idea that the president is uniquely vested by the Constitution with the powers to carry out many functions of office, and these powers are largely independent of the powers of Congress.[7] Others are based on assertions that the Congress was requiring executive conduct or legislative oversight beyond its authority, in the manner that the Supreme Court had barred when it overturned the legislative veto a one-house override of executive decisions.[8]

These statements have grown increasingly controversial. It does not take much, after all, for the "unitary presidency" to be a recipe for unlimited executive power, and the breadth of the applications offered by President Bush has raised grave concerns among many observers, indeed, even for at least one of the architects of signing statements.[9] The American Bar Association has convened a committee of the great and the good to examine these statements this year.[10] Regardless not only the expression of such concerns by lawyers and scholars but also of the rejection by a majority of the U.S. Supreme Court of many ideas central to the idea of unitary executive,[11] the president seems quite likely to continue both to promote the idea of the unitary executive and to employ signing statements that would affect the implementation or interpretation of the statute signed.

The task for lawyers, then, is to recognize the existence of these statements and to determine how to use them. Thus, this note will very briefly describe how to find and how to use them.

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[5]These practices, as illustrated by then-Assistant Attorney General Dellinger, had all predated the Reagan administration. *Id.* Indeed, Presidents Carter and Clinton suspended or ignored statutes they argued violated the Constitution. *See, e.g.*, LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT (1997); CHRISTOPHER MAY, PRESIDENTIAL DEFIANCE OF "UNCONSTITUTIONAL" LAWS: REVIVING THE ROYAL PREROGATIVE(1998).

[6]Phillip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 PRESIDENTIAL STUDIES QUARTERLY 515 (2005), on line temporarily at http://0-www.blackwell-synergy.com.library.uark.edu/doi/full/10.1111/j.1741-5705.2005.00262.x

[7]Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995). My searches of the signing statements in Lexis suggest the following pattern: President George H.W. Bush invoked the unitary executive as a basis for rejecting some element of a statute six times, and President George W. Bush has invoked it 59 times. President Clinton does not appear to have referred to the unitary executive when signing statutes.

[8]*See* Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983). My searches of the signing statements in Lexis suggest the following pattern: President Ronald Reagan invoked *Chadha* 12 times, as did George H.W. Bush, 16 times, President William J. Clinton, 12 times, and President George Bush, 34 times.

[9]Walter Dellinger, *Still "The Most Important Decision on Presidential Power Ever,"* SLATE, June 30, 2006, on line at http://www.slate.com/id/2144476/ (Last visited July 4, 2006).

[10]The ABA Task Force on Presidential Signing Statements and the Separation of Powers Doctrine will have reported by the time this note is published. http://www.abanet.org/media/releases/news060506.html (Last visited July 4, 2006). For a report, see www.abanet.org.

[11]Hamdan v. Rumsfeld, 2006 U.S. LEXIS 5185 (No. 05-184, June 29, 2006).

How to Find Them

Very simply, so many federal statutes passed in the last decade have a signing statement that a careful lawyer is well advised to look for one before relying on a recent federal act. Locating them is not hard, and like many legal materials, they are available both from the government and, with slightly greater ease, from proprietary content providers.

The official texts of presidential signing statements are published in the *Weekly Compilation of Presidential Documents*, which is available on line.[12] The government printing office, which publishes the *Weekly Compilation*, has a search engine that allows searches both by phrase and boolean connectors. Using it requires a searcher to designate the year of the search and a phrase. The most useful search is, of course, of the name of the statute signed. Otherwise, a list of major signing statements in a year can be gathered by searching for "statement on signing."

Signing statements are in both Lexis and in Westlaw. Lexis files them in "Public Papers of the Presidents," which is a sub-file of "Legislation & Politics – U.S. & U.K.," which is in turn a sub-file of "U.S. Executive Branch (Non Legal)," which is on the search directory page, in most formats on the lower left panel. Westlaw files them as part of the United States Code, Congressional and Administrative News service, which is a database identified by USCCAN-MSG (U.S. Code Congressional and Administrative News – Presidential Messages and Signing Statements). At this writing, Westlaw's coverage only extends backward through 1986 (only to 2000 for President's Messages), and earlier signing statements can be retrieved from the print edition of *U.S.C.C.A.N.* Lexis extends back to 1981. For all of them, a search for "statement on signing" brings up the signing statements, and a search by the bill number or statutory name will bring up the statement, if there is one, for that bill. A careful researcher would perform both searches.

How to Use Them

Presidential signing statements are most influential to a government agency, which is bound by the chain of command to give effect to all constitutionally valid orders from the president. It is less influential in other domains of the law, such as before the courts.

A presidential signing statement offers its greatest opportunity to the lawyer whose client would like to avoid regulation required by a statute, and the president has declared such regulation unconstitutional or, as is more often the case, only advisory. Thus, for instance, when Congress ordered that no funds in a bill may be used for an agriculture official to divulge information about the Department of Agriculture budget process, one might imagine that a FOIA request for such information would be denied.[13] Yet President Bush has signaled that such decisions are not congressional but executive. If such a request were denied on these grounds, a lawyer might negotiate a different result in the light of the president's statement.[14]

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[12]*See* http://www.gpoaccess.gov/wcomp/search.html.

[13]Section 715 of Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2006 provides:

> None of the funds appropriated or otherwise made available to the Department of Agriculture shall be used to transmit or otherwise make available to any non-Department of Agriculture employee questions or responses to questions that are a result of information requested for the appropriations hearing process.

P.L. 109-97, H.R. 2744, p. 151.

[14]*See* Statement on Signing the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2006, 2005 Presidential Documents Online 1701, online at http://frwebgate2.access.gpo.gov/cgi-bin/waisgate.cgi? WAISdocID=050207266527+4+0+0&WAISaction=retrieve (last visited July 4, 2006).

A signing statement may be used as a basis for argument in court along similar lines. In a judicial proceeding, however, there ought to be no basis for agreement with the statement based upon the chain of command. Indeed, the fact of the argument being made in a signing statement might give no more influence to it than being made on behalf of the government in court pleadings.

Signing statements that reflect the participation of executive agencies in the drafting or promotion of legislation may be relied upon for this purpose, in the same manner as any other source of legislative history, and with similar caveats.[15] In this use, the signing statement is a basis for judicial determination of congressional intent.

On the other hand, when the statement purports to reject that intent, or presents a conclusory statement of the meaning of a statute, or mandates a construction of the statute, the matter is quite different. The merits of the argument put forward in the statement are at issue, not that the argument was made by the president at signing.

In such a case, the merits might be based on more than the constitutional limits of the congress or the constitutional limits of the executive. The merits could include difficulties of drafting, application, or enforcement of the statute. They could include problems of justiciability and the exercise of the powers of the court. And, of course, they may be an amalgam of various concerns threaded through the constitutional powers of the branches, the language of the statute, and the problems of judicial oversight.[16] Yet what must matter then is the judicial determination of the merits, not the executive assertion of one view or another. In a debate between the Congress and the president, the president is owed no deference by the courts.[17]

What They Might Mean

The Courts are independent of the President and of the Congress. This independence is justified in part by the idea that the courts ought to carry out an independent application of the Constitution to questions that arise between the other branches.

On the other hand, recent statements by younger justices of the Supreme Court might suggest that this balance will alter. An important touchstone of executive power, just decided by the Supreme Court, suggests that Justices Scalia, Thomas, and Alito and perhaps Chief Justice Roberts share a broad view of executive power unfettered of judicial enforcement of either the implied or the explicit dictates of Congress. *Hamdan v. Rumsfeld* was a significant case, in which the majority of the court rejected the approach taken by the Chief Justice when on the court of appeals, to set aside the procedures of military commissions unilaterally created by the executive. The majority, per Justice Stevens, found the commissions violated the Uniform

[15]See, on this, Professor Killenbeck's argument, cited above in note 2. For the view that judicial reliance on presidential signing statements has almost nothing to recommend it, see William D. Popkin *Judicial Use of Presidential Legislative History: A Critique*, 66 IND. L.J. 699 (1991). For an illustration of reasonable reliance, see United States v. Story, 891 F.2d 988 (2d Cir. 1989). For an illustration of a reasonable refusal of such reliance, see Taylor v. Heckler, 835 F.2d 1037 (3d Cir. 1987).

[16]See, e.g., the problems with judicial application of a Congressional mandate to the executive to consult international entities in the protection of maritime stocks in Southern Offshore Fishing Ass'n v. Daley, 995 F. Supp. 1411, 1427-28(M.D. Fla. 1998).

[17]This question has been before the Supreme Court. Question of the Chief Justice, Oral Argument on Behalf of the Petitioner, Williams v. Taylor, 1999 U.S. Trans. LEXIS 73, at 10-11 (Oct. 4, 1999). It has yet to be squarely addressed there.

Code of Military Justice, an act of Congress. Justice Scalia in dissent believed with the President that the court had no jurisdiction. This argument for the administration was in part that, contrary to its apparent language and congressional history, cases of this sort were barred by Congress when it adopted the Detainee Treatment Act.[18] Applying by analogy a similar argument to the role of presidential signing statements is not difficult. If deference to executive interpretations of law becomes the order of the day, there is a substantial danger worthy of all of the concerns expressed by the ABA and other observers.

It is certainly possible for the Courts to defer to the President as a matter of course. There are many countries in which such deference is the case. Yet the President himself has argued for the "Rule of Law" as a hallmark not only of the American system but also as an integral aspect of democracy worldwide.[19] That ideal requires judicial independence from the executive, and such independence cannot survive deference to presidential construction of an act of Congress.[20]

Thus, what I hope signing statements mean is useful and undramatic. They are sensibly reports of executive participation with the Congress in drafting legislation. They are useful in identifying purposes when the two branches act in concert. Yet when the statement signals opposition to the legislation, it is important to remember that Congress makes laws, and the president is obliged to carry them out.

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[18]Hamdan v. Rumsfield, 2006 U.S. LEXIS 5185 (Scalia, J., dissenting).

[19]*See, e.g.*, Joint Statement by the European Union and the United States Working Together To Promote Democracy and Support Freedom, the Rule of Law and Human Rights Worldwide, Public Papers of the Presidents, June 27, 2005.

[20]It is worth noting what I hope is obvious, that there is a great difference between deference to the President in an argument to limit a Congressional statute and deference to an agency interpretation of a statute under which it has particular responsibility.