The President as a Lawmaker: The Misuse of Presidential Signing Statements Under the Administration of George W. Bush

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“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” As articulated by James Madison in Federalist No. 47, the theory of separation of powers is the most fundamental and essential principle embodied in the U.S. Constitution. In the absence of the division of power between the three branches of the federal government, the United States government would be no less despotic in character than the British monarchy that the American colonists struggled so fervently to break away from. In stark reaction to the recent history of authoritarian rule under the British Crown, the Framers of the Constitution sought to depart with the practices of the Crown and design a democratic government based on the intertwined maxims of separation of powers and checks and balances.

Pursuant to this goal, the Framers expressed their aspiration to divide sovereign power equally between the three branches of government by drafting separate articles for the legislative, executive, and judicial branches respectively. The legislative branch was provided with the power to make the law in Article I; the executive with the power to execute the law in Article

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1 JAMES MADISON, THE FEDERALIST NO. 47 (1788).
2 See id.
3 See U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States.").
II; and the judiciary with the power to interpret the law in order to resolve constitutional disputes in Article III. One of Madison’s primary objectives in ardently pressing for the formation of a constitution based on the doctrine of separation of powers was to prevent the power to create, execute, and interpret the law from becoming disproportionately concentrated in the hands of the executive, as had been the case under the rule of the British Crown. Despite the intention of the Framers in creating three co-equal branches of government, President George W. Bush disregarded this bedrock principle of American constitutional law by issuing numerous presidential signing statements in an effort to aggrandize executive power during his tenure in office.

A presidential signing statement is a statement issued by the president as he signs a piece of legislation, which articulates his interpretation of what the law was intended to convey. Previous presidents have used signing statements for several purposes including to comment on the law generally, describe the bill, explain its purpose, praise members of Congress for their efforts, guide executive branch officials in implementing the law, guide the judiciary in interpreting the law’s provisions, and most controversially, to raise constitutional objections to

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4 See U.S. CONST. art. II, § 1 (“The executive Power shall be vested in a President of the United States of America.”).

5 See U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”). The text of Article III does not expressly provide for the power of judicial review. However, in Marbury v. Madison, 5 U.S. 137, 178 (1803), Chief Justice John Marshall declared that “[i]t is emphatically the province and duty of the judicial department to say what the law is.” The principle of judicial review has been firmly embedded in Article III since Marbury was handed down in 1803.

one or more of the bill’s provisions.⁷ Although the issuance of presidential signing statements dates all the way back to the Monroe administration,⁸ signing statements were rarely used until the time of the Reagan administration.⁹ From the Reagan administration to the present day, signing statements have come into systematic use¹⁰ as an effective vehicle to assert the executive’s prerogatives and ward off congressional attempts to intrude on the sovereign sphere of executive authority.

While legal commentators have developed various approaches for distinguishing between different types of signing statements,¹¹ this Paper divides signing statements into three separate groups. The first type of signing statement is a “rhetorical” signing statement.¹² This type of signing statement is used by the president to articulate his opinion of what he thinks the law means, explain why he is signing the bill into law, or praise members of Congress for their efforts.¹³ Occasionally, this kind of signing statement is also used by the president to inform Congress of his generalized policy or constitutional concerns with respect to the underlying

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⁹ See id. at 467-70; Halstead at 2.


¹¹ See, e.g., Eggspuehler at 465 (distinguishing between “interpretive” and “substantive” signing statements); Bradley at 313-16 (distinguishing between “public relations,” “legislative history,” and “constitutional” signing statements).

¹² See Kelly at 30.

¹³ See id.; Sofia E. Biller, Flooded by the Lowest Ebb: Congressional responses to Presidential Signing Statements and Executive Hostility to the Operation of Checks and Balances, 93 IOWA. L. REV. 1067, 1075 (2008).
legislation, but provides no indication that the president intends not to enforce the law as written.\textsuperscript{14} “Rhetorical” signing statements are primarily ceremonial in nature and have not engendered significant controversy.\textsuperscript{15}

The second type of signing statement is an “interpretive” signing statement.\textsuperscript{16} This type of signing statement is used by the president to articulate how he plans to implement the legislation pursuant to the Take Care Clause,\textsuperscript{17} and is intended to serve as a kind of executive counterpart to the legislative history that is taken into consideration by the courts in statutory construction.\textsuperscript{18} According to Curtis Bradley and Eric Posner, interpretive signing statements are used relatively frequently by modern presidents when Congress passes an ambiguous statute and the president seeks to articulate to Congress and the public that the vague provisions should be construed in a particular manner in order to fully effectuate the legislative purpose.\textsuperscript{19} The final and most controversial type of signing statement is what this Paper refers to as a “constitutional objection” signing statement.\textsuperscript{20} This type of signing statement is used by the president as a vehicle not only to raise constitutional objections against one or more of the statutory provisions that he has contemporaneously signed into law, but more importantly to manifest the president’s

\textsuperscript{14} See Bradley at 313-18; Biller at 1075-76.

\textsuperscript{15} See Biller at 1075 (noting that signing statements were traditionally used mostly for ceremonial purposes).

\textsuperscript{16} See Eggspuehler at 465; Bradley at 313-16; Biller at 1070-77.

\textsuperscript{17} U.S. CONST. art. II, § 3.

\textsuperscript{18} See Kelley at 30-1; Halstead at 3.

\textsuperscript{19} See Bradley at 314 (“[l]nterpretive signing statements argue that ambiguous provisions of a statute have a particular meaning, based on what the president understands (or claims) the purpose of the statute to have been.”).

\textsuperscript{20} See Bradley at 313, 316; Eggspuehler at 470-72, 478-83.
intention to refuse to fully enforce the disputed provisions. As will be discussed later, “constitutional objection” signing statements are effectively an outgrowth of a radical constitutional theory known as unitary executive theory, which challenges the longstanding notion of “judicial supremacy” first articulated by Chief Justice John Marshall in the landmark case of Marbury v. Madison. Since the Bush administration’s regular use of “constitutional objection” signing statements has brought to light the potential for signing statements to be abused in a manner which radically alters the traditional balance of power between the legislative and executive branches, this Paper will focus primarily on the legal and institutional implications of this latter type of signing statement. This Paper argues that although there is nothing constitutionally repugnant about the use signing statements in and of themselves, the issuance of “constitutional objection” signing statements controverts the sacrosanct doctrine of separation of powers and is hence unconstitutional. As Laurence Tribe asserts, “[i]t’s not the statements [themselves] that are the true source of constitutional difficulty,” but rather the use of signing statements in an effort to aggrandize executive power at the expense of Congress and the judiciary. In Part I, this Paper examines the origins of the doctrine of separation of powers and identifies its place in the

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21 See Eggspuehler at 470-72; Neil Kinkopf, Signing Statements and the President’s Authority to Refuse to Enforce the Law (American Constitution Society for Law and Policy, June 2006) at 1-3.


23 See Charlie Savage, Bush Challenges Hundreds of Laws, BOSTON GLOBE, Apr. 30, 2006 (asserting that President Bush has used signing statements in order to disregard more than 750 separate statutory provisions).

American constitutional system, with a special emphasis on what powers the president does and does not possess with respect to the lawmaking process laid out in Article I of the Constitution. Then in Part II, this Paper goes on to study the history of presidential signing statements, from the time President Monroe issued the first ever signing statement all the way up to the end of the Bush administration. In Part III, this Paper conducts a comprehensive legal analysis of “constitutional objection” signing statements along with their foundations in unitary executive theory, and concludes that the position that the president has the legal authority to unilaterally modify or decline to enforce acts of Congress that he believes to be unconstitutional is without basis in the Constitution’s text, the intent of the Framers, and the most pertinent Supreme Court precedents in the area of separation of powers. This Paper concludes by suggesting some recommendations designed to ensure that never again will an American president be permitted to exercise a modern day analog to the “royal prerogative power,” allowing him to nullify duly enacted statutory provisions that he personally disagrees with.

Part I: Separation of Powers and the President’s Role in the Lawmaking Process

Montesquieu and Locke: Foundations of Separation of Powers

The classical model of separation of powers incorporated by the Constitution was originally promulgated by Baron de Montesquieu in *The Spirit of the Laws*. For Montesquieu, the ideal form of government consisted of a clear and relatively simple division of powers between the legislative branch, which enacts the law, the executive branch, which executes the law, and the judicial branch, which particularizes the law by applying and interpreting the law in

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the context of individualized disputes. Foreshadowing the concerns expressed by the Founding Fathers less than four decades later, Montesquieu cautioned that the contravention of this sacred principle of free government would ensure the death of democracy and the triumph of tyranny. Montesquieu stated that “[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty.”

Although Montesquieu was seriously concerned about the consequences of the accumulation of the powers to make, execute, and interpret the law within a single branch of government, he nevertheless did not favor a complete separation of powers. Rather, while Montesquieu steadfastly maintained that no branch of government could usurp the primary function of any other branch, he recognized the notion of blended or concurrent powers as well. If the structure of government provided for a total separation of powers without any countervailing checks and balances, then the three branches would not possess any tangible tools with which to keep each other in check. For example, even though the ultimate power to enact legislation is reserved solely to the legislature, this does not mean that the executive is prohibited

27 See id. at Book 11, § 6, ¶¶ 1-2 (“In every government there are three sorts of power: the legislative … [which] enacts temporary or perpetual laws; the executive … [which] makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions; [and] the judiciary … [which] punishes criminals, or determines the disputes that arise between individuals.”).

28 Id. at ¶4.

29 See id. at ¶¶ 4-5. See also Neuborne at 389 (asserting that one of the key assumptions embodied by Montesquieu’s model was the idea that no single branch should be able to exercise the primary constitutional function of any other branch).

30 See Montesquieu at ¶¶ 42-47.

31 See id. at ¶¶ 41-42. See also, Martin H. Redish & Elizabeth J. Cisar, “If Angels were to Govern: The Need for Pragmatic Formalism in Separation of Powers Theory, 41 DUKE. L.J. 449, 450-65 (1991) (discussing that instead of arguing in favor of an absolute separation, Montesquieu preferred a system in which the powers of the various branches overlap at least to some degree so that they can check each other).
from playing any role whatsoever in the lawmaking process. Montesquieu argued that “[w]ere the executive power not to have a right of restraining the encroachments of the legislative body, the latter would become despotic … it would soon destroy all other powers.”\(^{32}\) In order to prevent the executive from being rendered completely powerless by incessant legislative encroachments, the executive must be provided with a limited veto power over acts of the legislature.\(^{33}\) Therefore, although Montesquieu feared the concentration of sovereign power within the confines of a single department, he nonetheless recognized that through the selective blending of this power it could be ensured that no single branch would gain the ability to wield this authority to an unregulated extent.

Despite the fact that Montesquieu was very well versed in the troublesome history of European monarchical rule, he still asserted that the executive power should be placed in the hands of an individual as opposed to a council, since only a unitary executive would possess the capacity to execute the law in an efficient manner.\(^{34}\) As mentioned before, Montesquieu articulated that the executive should not be completely precluded from participating in the lawmaking process.\(^{35}\) However, Montesquieu adamantly asserted that the executive’s role in the lawmaking process was to be heavily circumscribed. The executive’s function is limited to the vetoing of legislative measures he thinks imprudent or ill-advised, and does not extend to the

\(^{32}\) Id. at ¶ 42.

\(^{33}\) See id. at ¶ 52 (“The executive power … ought to have a share in the legislature by the power of rejecting.”).

\(^{34}\) See id. at ¶ 36 (Articulating that “the executive power ought to be in the hands of a monarch, because this branch of government, having need of despatch, is better administered by one than many.”).

\(^{35}\) See id. at ¶ 52.
authority to unilaterally enact, modify, or repeal the law.\textsuperscript{36} In the words of Montesquieu, “[i]f the prince were to have a part in the legislature by the power of \textit{resolving}, liberty would be lost. But as it is necessary he should have a share in the legislature for the support of his own prerogative, this share must consist in the power of \textit{rejecting}.”\textsuperscript{37} As this Paper will discuss later, Montesquieu’s conception of the executive’s role in the legislative process has crucial implications for the issuance of presidential signing statements, especially the “constitutional objection” statements issued during the Bush administration.

In his \textit{Second Treatise of Government},\textsuperscript{38} which predated Montesquieu’s publication of \textit{The Spirit of the Laws} by sixty years, John Locke promulgated an essential principle of free government, one which the Framers of the Constitution took to heart: laws can only be enacted by the legislature and never by any other entity.\textsuperscript{39} According to Locke, even if the legislature wants to delegate its lawmaking authority to another department or office, such as the executive himself, it is forbidden from doing so.\textsuperscript{40} Locke’s reasoning was that when the people decided to emerge from the state of nature and transfer power to the government for the purpose of safeguarding their rights and ensuring the preservation of society, they only consented to be bound by laws duly enacted by the legislature.\textsuperscript{41} In concurrence with Montesquieu, Locke

\textsuperscript{36} \textit{See id. at ¶ 53}

\textsuperscript{37} \textit{Id.} (emphasis added). \textit{See also id. at ¶ 57 (“The executive power has no other part in the legislative than the privilege of rejecting.”).}

\textsuperscript{38} \textbf{JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT} (1690).

\textsuperscript{39} \textit{See Locke, ch. 11, § 134 (“Nor can any edict of any body elsein what form soever conceived, or by what power soever backed, have the force and obligation of a law, which has not its sanction from that legislative which the public has chosen and appointed.”).}

\textsuperscript{40} \textit{See id. at § 141.}

\textsuperscript{41} \textit{See id.} (“The legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others … And when the people
maintained the necessity of separating the power to enact the laws from the power to enforce them.\(^{42}\)

Although Locke defended key aspects of the doctrine of separation of powers in theory, towards the end of his treatise Locke drew an exception to his previously unassailable maxim that the lawmaking power rests exclusively within the hands of the legislature, one with the potential to swallow the rule in its entirety: the executive’s “prerogative power.”\(^{43}\) Locke defined the “prerogative power” as the executive’s “power to act according to discretion, for the public good, without the prescription of the law, and sometimes even against it.”\(^{44}\) The prerogative power imbues the executive with the sweeping authority to dispense with or suspend the execution of the laws during exigent circumstances.\(^{45}\) Locke justified the exercise of the prerogative power on the basis of the necessity of allowing the executive to exercise a significant amount of discretion during situations in which the law is silent.\(^{46}\)

According to Christopher May, the British monarch historically possessed the unquestioned power to refuse to comply with acts of Parliament up until the Glorious Revolution

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\(^{42}\) See id., ch. 13, at § 143 (“It may be too great a temptation to human frailty, apt to grasp at power, for the same persons, who have the power of making laws, to have also in their hands the power to execute them.”).

\(^{43}\) See id., ch. 14, at § 160.

\(^{44}\) Id.


\(^{46}\) See Locke, ch. 14, at § 159 (“Many things there are, which the law can by no means provide for; and those must necessarily be left to the discretion of him that has the executive power in his hands.”).
of 1688.\textsuperscript{47} During the nearly four hundred years preceding the Glorious Revolution and the concomitant passage of the English Bill of Rights, the royal prerogative effectively empowered the King to “abrogate a statute across the board.”\textsuperscript{48} As will be discussed in great detail later, the Framers explicitly rejected the notion that the American president would be imbued with a similar power to disobey an act of Congress during the debates leading up to the ratification of the Constitution and in the text of the Constitution itself.

\textit{The Incorporation of Montesquieu’s Classical Theory of Separation of Powers into the U.S. Constitution}

Although the words “separation of powers” do not appear in the text of the Constitution itself, Montesquieu’s fundamental doctrine can be readily implied by looking at the structure of Articles I, II, and III as well as the intent of the Framers. After the conclusion of the American Revolution, the newly independent nation was faced with a dilemma of immense importance which would have monumental implications for the future of American government: should the government include an executive branch, and if so, what powers should be accorded to it? The first generation of independent American citizens expressed well-founded skepticism about placing significant power into the hands of a single chief executive.\textsuperscript{49} Thus, when the thirteen states ratified the \textit{Articles of Confederation} in 1781, this founding document did not provide for an executive branch at all,\textsuperscript{50} thereby underscoring the Founders’ substantial fear of creating a powerful institution which would rival the authority of the British monarch. As articulated by


\textsuperscript{48} See \textsc{Christopher N. May}, \textit{Presidential Defiance of “Unconstitutional Laws”: Reviving the Royal Prerogative} 116 (1998).

\textsuperscript{49} See James Madison, \textit{The Federalist No. 47} (1788);

\textsuperscript{50} See \textit{Articles of Confederation} (1781).
Peter Irons, “[i]n understandable reaction to the tyrannical rule against which they had revolted, the drafters of the Articles had replaced one of the strongest governments in the Western world (the British government) with one of the weakest.”

Within a few years of its enactment, the Founders realized that the Articles would ultimately be unable to hold together the newly independent states indefinitely. In order to ensure the survival of the fragile Union, delegates from the thirteen states gathered in Philadelphia in May of 1787 with the ostensible purpose of amending the Articles, but ultimately ended up replacing the articles with a completely new organic document. James Madison expressed serious concern that the Articles failed to incorporate several integral principles of effective democratic governance: chief among these was principle of separation of powers. As Madison wrote in *The Federalist No. 51*, “[i]n a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments.” Additionally, in his June 8, 1789 proposals to Congress, Madison offered a constitutional amendment unequivocally conveying the importance of the doctrine of separation of powers within the American constitutional system:

The powers delegated by this constitution, are appropriated to the departments to which they are respectively distributed: so that the legislative department shall never exercise the powers vested

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52 See id. at 14.

53 See id. (“What Madison actually had in mind was to replace the Articles with a completely new constitution that established a strong national government, with three separate but coordinate branches.”).

54 James Madison, *The Federalist No. 51* (1788).
in the executive or judicial; nor the executive exercise the powers vested in the legislative or judicial; nor the judicial exercise the powers vested in the legislative or executive departments.\textsuperscript{55}

As shown by his proposal of the “separation of powers” amendment, Madison firmly believed that the best way to safeguard individual liberties was not through affirmatively listing specific fundamental rights in text of the Constitution itself, but rather by placing clear constitutional constraints on the powers of the federal government.\textsuperscript{56} In Madison’s view, the most important limitation was a structural one: “provid[ing] such checks, as will prevent [one branch] from encroach[ing] … upon the other.”\textsuperscript{57}

The adoption of Madison’s vision of the national government by the rest of the Framers is evidenced by their calculated decision to allocate sovereign power among three co-equal branches of government by drafting separate articles for the legislative, executive, and judicial branches respectively. Supreme Court Justice Antonin Scalia maintains that the doctrine of separation of powers is undoubtedly implied by the configuration of Articles I, II, and III and represents one of the “main features [of] the constitutional structure of the United States.”\textsuperscript{58}

\textsuperscript{55} JAMES MADISON, PROPOSAL FOR THE BILL OF RIGHTS (June 8, 1789), available at http://patriotpost.us/document/madisons-proposal-for-the-bill-of-rights/.

\textsuperscript{56} See id. (“But whatever may be [the] form which the several states have adopted in making declarations in favor of particular rights, the great object in view is to limit and qualify the powers of government, by excepting out of the grant of power those cases in which the government ought not to act, or to act only in a particular mode.”).

\textsuperscript{57} Id.

\textsuperscript{58} See Antonin Scalia, Foreward: The Importance of Structure in Constitutional Interpretation, Symposium, Separation of Powers as a Safeguard of Federalism (2008). Additional support for this position is provided by evidence from the debates showing that the Framers, who recognized the protection of individual rights as the most important aspect of the Constitution, believed that the best way to accomplish this goal was not to promulgate a list of individual rights but rather to design the structure of the Constitution in such a way as to ensure the preservation of individual liberties. According to Martin Redish and Elizabeth Cisar, “it would be difficult to deny that in establishing [the Constitution’s] complex structure, the Framers were virtually obsessed with a fear-bordering on what some might uncharitably describe as paranoia-of the concentration of political power.” Redish at 450. Thus, the argument that the Framers did not intend to divide power between three co-equal branches of government in the manner
Framers fully shared Montesquieu’s concerns about the concentration of government power and thus cleanly divided the primary constitutional functions of lawmaking, execution, and interpretation among the three branches of the federal government.

On the other hand, however, the Framers avowed that while the three branches would exercise different primary constitutional powers, they acknowledged that certain powers would be blended between the branches. In *The Federalist No. 51*, Madison proclaimed that “the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others … Ambition must be made to counteract ambition.” The Framers thus wholeheartedly adopted Montesquieu’s position that an absolute separation of powers would be a recipe for tyranny since such a scheme would preclude the three branches from checking each other. As the Supreme Court articulated almost two hundred years later, “[the Framers] … saw that a hermetic sealing off of three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively.” Therefore, despite the fact that the Constitution mandates separation of powers, it does not contemplate an absolute separation between the three branches, but rather a government based on the intertwined principles of separation of powers and checks and balances.

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59 See Redish at 460.

60 JAMES MADISON, THE FEDERALIST NO. 51 (1788).

61 Buckley v. Valeo, 424 U.S. 1, 121 (1976). See also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”).
Notwithstanding the Framers’ recognition of the notion of concurrent powers, the structure of the Constitution was intended to ensure that no single branch would be successfully able to exercise the primary constitutional function of any other branch. For example, while the president possesses a qualified veto power over acts of Congress, the Constitution precludes the president from actually formulating and enacting legislation himself. Madison’s writings make clear that the Framers initiated a calculated and determined effort to shift away from the British model, through the promulgation of an array of checks on the executive’s influence over the lawmaking process. Thus, the Framers undeniably refused to provide the president with the royal prerogative power to unilaterally nullify acts of Congress.

For instance, writing in The Federalist No. 69, Alexander Hamilton explicitly rejected the notion of an American prerogative power, stating that it would contravene the doctrine of separation of powers and serve to completely undermine the Framers’ deliberate effort to part with the practices of the British Crown. Comparing the powers of the president with the powers possessed by the governors of the several states, Hamilton noted that some governors actually enjoyed greater security powers than the president himself. For example, the Massachusetts Constitution called for an empowered governor and even went so far as to grant the governor

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64 See May, supra note 47, at 868 (noting that the historical evidence clearly demonstrates that the Framers did not intend to provide the president with the power to suspend the law, even where the president believed that the law was unconstitutional). Although the Constitution does not explicitly bar the president from exercising a nullification power, the text of the Constitution and the debates surrounding its ratification provide strong evidence that the Framers concurred with the English revolutionaries’ view that a statute could only be suspended or repealed by the legislative branch and not the executive. See May at 873.

65 See ALEXANDER HAMILTON, THE FEDERALIST NO. 69 (1788).
monarch-like authority to use the state’s military forces in order to defend the commonwealth from invasion.66 Despite this extraordinary grant of executive authority, the Massachusetts Constitution still stated that the governor’s powers, although expansive, must be “exercised agreeably to the rules and regulations of the constitution and the laws of the land, and not otherwise.”67 Thus, although the Massachusetts Constitution created a chief executive with powers far superior to even those possessed by the U.S. president, it still fell far short of providing the governor with the prerogative power to nullify the law. Hamilton concluded that since the president’s authority under Article II was considerably less than that of the Massachusetts governor, there was undoubtedly no constitutional support for the position that the president had been imbued with the royal prerogative power to nullify acts of Congress.68 Thus, Hamilton declared that “[t]he qualified negative of the President differs widely from this absolute negative of the British sovereign.”69

Wary of the fact that the approval of the prerogative power would serve to greatly enhance the power and influence of the executive at the expense of Congress and the judiciary, the Framers explicitly rebuked the pre-1688 British model through their promulgation in Article II that the president “shall take [c]are that the [l]aws be faithfully exe-

66 See id.

67 See Savage, supra note 45, at 126.

68 See Hamilton; Savage, supra note 45, at 126 (“The Massachusetts governor had no monarchical ‘prerogative power’ to set aside laws in the name of a security necessity. And the U.S. president’s authority as commander in chief, Hamilton said, was even weaker than the Massachusetts governor’s.”).

69 See Hamilton.

70 U.S. Const. art. II, § 3.
provide for an executive of limited and enumerated powers in reaction to the history of the British monarch frequently acting in direct opposition to the clear will of Parliament. Supreme Court Justice Robert Jackson echoed this position in 1952 when he declared “[i]n all parliamentary systems, the representative body is the source of the rules of law. The forefathers did not make George III the model for the presidency. He was not to govern without Congress nor to make rules as he proceeded.” According to William Gwyn, the Take Care Clause was intended not to enhance but rather to limit the president’s Article II powers. The president’s responsibility to faithfully execute the laws “means that the President may not-- whether by revocation, suspension, dispensation, inaction, or otherwise—fail to honor and enforce” statutes enacted by Congress. Therefore, as will be elaborated on later, the Framers’ deliberate decision to provide the executive with a qualified veto power instead of the regal prerogative power to suspend legislative enactments at will undoubtedly demonstrates that the Constitution does not provide the president with the authority to decline to enforce laws that he personally believes to be unconstitutional.

*The Supreme Court’s Separation of Powers Jurisprudence: A Simple, Rigid Approach*

Over the years, the Supreme Court has recognized that Montesquieu’s classical model of separation of powers remains most faithful to the text of the Constitution and the intent of the

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71 See May at 873 (Articulating that the Take Care Clause is a “succinct and all-inclusive command through which the Framers sought to prevent the Executive from resorting to the panoply of devices employed by English kings to evade the will of Parliament.”).


74 See May at 873-74.
Framers. In the area of separation of powers, the Court has traditionally embraced a rigid, formalistic conception of separation of powers that gives little weight to contemporary practical or political considerations. Burt Neuborne has argued that the ideal conception of separation of powers is the straightforward one that we were taught “in the seventh grade. … Congress decide[s] what the laws should be; the President enforce[s] them; and judges resolv[e] disputes about their meaning and applicability.” Therefore, although the Constitution does not deny the notion of concurrent powers, separation of powers is breached when one branch of government assumes the primary constitutional function of another branch. As the Court stated in *Hampton & Co. v. United States*, “It is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President, or to the judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power.” Three of the Court’s most important precedents in the area of the division of powers between the legislative and executive branches, *Little v. Barreme*, *Youngstown Sheet and Tube Company v. Sawyer*, and *Clinton v. City of New York* highlight the Court’s unwillingness to permit the president to intrude upon the primary constitutional function of Congress: lawmaking.

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75 See Eggspuehler at 484-85 (asserting that in its leading separation of powers precedents, the Court has adopted the formalistic conception of the doctrine exemplified in the Schoolhouse Rock cartoon). See also *INS v. Chadha*, 462 U.S. 919 (1983) (invalidating the legislative veto on bicameralism and presentment grounds, despite the fact that the legislative veto had become an indispensible political tool in the context of the modern administrative state).

76 See Neuborne at 385.


79 6 U.S. 170 (1804).

80 343 U.S. 579 (1952).

The 1804 case of *Little v. Barreme* concerned President Adams’ decision to construe the Non-Intercourse Act in a way not intended by Congress, which was designed as originally enacted to prevent any American-owned ships from sailing to French ports.  

Adams interpreted the act broadly and argued that its application should not only be confined to ships sailing to France, but also to ships departing from France en route to the United States. Writing for the Court, Chief Justice Marshall issued a stern rebuke to President Adams. Marshall emphasized that a reasonable interpretation of the statute could lead only to a single conclusion: that Congress excluded from the ambit of the act ships not bound for French ports. President Adams’ construction clearly expanded the activities covered by the statute beyond the extent contemplated by Congress.

Although written all the way back in 1804, Chief Justice Marshall’s opinion in *Little* established a fundamental principle for the resolution of debates over legislative-executive power that continues to be vitally important today: the president does not have the authority to act in a manner which undermines the intention of Congress in enacting a given piece of legislation. Marshall’s pronouncement in *Little* was subsequently reaffirmed a few years later by Justice Paterson in *United States vs. Smith*: “[t]he president of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law

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82 See Irons at 38.

83 See *Little*, 6 U.S. at 177-78; Irons at 38 (Discussing that despite the fact that the statute only permitted the seizure of ships bound to French ports, and not leaving from them, the orders issued by Adams to American privateers applied to “all intercourse, whether direct or circuitous, between the ports of the United States and those of France or her dependencies.”).

84 *Little*, 6 U.S. at 178.

85 Despite the fact that *Little* established a precedent of enormous importance for the future distribution of powers between the legislative and executive branches, it has rarely been cited as precedent in subsequent Supreme Court decisions. See Irons at 39.
forbids.” Therefore, only a year after Chief Justice Marshall’s seminal opinion in *Marbury v. Madison* promulgated the doctrine of judicial review, the Court firmly established the principle that the president cannot unilaterally nullify or modify an act of Congress. If it had ruled otherwise, the Court would have provided the president with the royal prerogative power to dispense with the law as he saw fit, thereby completely undermining the Framers’ tireless efforts to design a much more limited executive than under the British model.

The Supreme Court’s most authoritative and influential precedent with respect to the constitutional distribution of lawmaking authority between the president and Congress was handed down in the 1952 case of *Youngstown Sheet & Tube Co. v. Sawyer*. This landmark case came about as a result of the pending strike initiated by the United Steelworkers Union in the midst of the Korean War. Concerned that the strike could potentially cripple the United States in its effort to defeat North Korea, President Truman issued an executive order directing Secretary of Commerce Charles Sawyer to seize the Nation’s steel mills in order to keep them up and running throughout the war.

To the dismay of President Truman, the Court issued a resounding rebuke of the President’s unilateral action. Writing for the majority, Justice Black held that although the executive possesses somewhat expanded powers during wartime, this power did not extend to unilaterally seizing the steel mills since “[t]he President’s power, if any, to issue the order must

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86 *United States v. Smith*, 27 F. Cas. 1223, 1230 (1804).


88 See *Irons* at 173.

89 See *Youngstown*, 343 U.S. at 583-84. See also *Irons* at 173 (discussing that President Truman’s order effectively transformed the owners of the steel mills into federal employees).
stem either from an act of Congress or from the Constitution itself.”

According to Justice Black, Congress explicitly refrained from providing President Truman with the unilateral authority to nationalize striking industries by rejecting an amendment offered to that very effect during the debates leading up to the passage of the Taft-Hartley Act.

Furthermore, Black easily dismissed Truman’s contention that his action was authorized under either the Commander in Chief Clause or the Vesting Clause of Article II. Black emphatically declared that even during exigent circumstances, the president cannot encroach upon Congress’ power to make the law. “In the framework of our Constitution, 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.” Black articulated that the president plays a minimal role in the lawmaking process, restricted to the conveyance to Congress of his legislative proposals and the outright rejection of measures he deems unconstitutional or ill-advised. Justice Black’s statement implies a fundamental principle going forward: if the

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90 Youngstown, 343 U.S. at 585.

91 See id. at 586 (“When the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency ... Consequently, the plan Congress adopted in that Act did not provide for seizure under any circumstances.”).

92 U.S. CONST. art II, § 2 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”). See Youngstown, 343 U.S. at 587 (“Even though ‘theater of war’ be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation’s lawmakers, not for its military authorities.”).

93 U.S. CONST. art II, § 1 (“The executive Power shall be vested in a President of the United States of America.”).

94 Youngstown, 343 U.S. at 587 (emphasis added).
president believes a bill to be unconstitutional, his only constitutional recourse is to veto the legislation in its entirety. As we will see later, this deep-seated principle has important implications for President Bush’s issuance of “constitutional objection” signing statements in an effort to circumvent the constitutionally prescribed veto process.

In the realm of the allocation of powers between the legislative and executive branches, Justice Jackson’s seminal concurring opinion in Youngstown has since provided a valuable paradigm for understanding the respective constitutional roles and responsibilities of Congress and the president. Jackson created a tripartite framework useful for determining whether a president’s actions fall within the bounds of the Constitution.95 Jackson’s first category deals with situations in which the president “acts pursuant to an express or implied authorization of Congress.”96 In situations falling under this category, the president’s power to act is at its zenith.97 Jackson’s second category covers situations in which the president “acts in the absence of either a congressional grant or denial of authority.”98 In this “zone of twilight in which he and Congress may have concurrent authority,” the president can “rely only upon his own independent powers,” and the Court will take into consideration a number of structural factors in order to evaluate the proper distribution of power.99 Jackson’s third and final category applies when the president “takes measures incompatible with the expressed or implied will of Congress.”100

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95 See Youngstown, 343 U.S. at 636-38 (Jackson, J., concurring); Irons at 176.
96 Youngstown, 343 U.S. at 635-37 (Jackson, J., concurring).
97 See id. at 635.
98 Id. at 637.
99 See id. (Stating that “[i]n this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.”).
100 Id.
Under these circumstances, the president’s power “is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”

Jackson articulated that when the president is acting contrary to the enacted policy of Congress, his decision to do so will be subject to rigorous scrutiny and require the most compelling of justifications. The president’s decision to act inconsistently with the clear intent of Congress will only be upheld if Congress itself did not have the authority to legislate within the given policy area in the first place. Applying this framework to the facts of the present dispute, Jackson concurred with Black’s assessment that Congress’ refusal to enact an amendment to the Taft-Hartley Act that would have provided the president with the unilateral power to settle labor disputes placed Truman’s action squarely within Jackson’s third category.

Justice Jackson recognized that the key issue in Youngstown was not President Truman’s seizure of the steel mills, but rather the preservation of the proper distribution of constitutional

101 Id.
102 See id. at 637-38 (“Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject.”). See also Edward Lazarus, How Much Authority Does the President Possess When he is Acting as “Commander in Chief?” Evaluating President Bush’s Claims Against a Key Supreme Court Executive Power Precedent, FINDLAW LEGAL NEWS, Jan. 5, 2006, available at http://writ.news.findlaw.com/lazarus/20060105.html. A good example of a situation in which the president’s action would be upheld under Jackson’s third category is if Congress passes a law purporting to restrict the president’s constitutionally-authorized pardon power. In such a situation, the “will” of Congress would not serve to sustain the statute since it undoubtedly encroaches on a clearly enumerated Article II power of the president, and thus Congress has no power to act in the area.

103 See id. at 639-40. Note: It is questionable whether Jackson’s conclusion that Truman’s unilateral seizure of the steel mills fit easily into his third category is actually correct. Jackson said that the fact that Congress refused to enact an amendment to the Taft-Hartley Act which would have provided Truman with the precise power he requested is incontrovertible evidence that Congress intended to deny Truman such a power. As a logical matter however, Congress’ failure to enact a statutory provision authorizing Truman to seize striking industries is not the functional equivalent of expressly prohibiting Truman from exercising this power. The issue involved may have been more appropriately resolved under Jackson’s second category. Therefore, although Jackson’s tripartite framework has served as an essential mechanism for evaluating claims of presidential power going forward, Jackson may have misapplied his own framework in Youngstown itself.
powers between the legislative and executive branches as originally envisioned by the Framers. As shown by the previous examination of the Framers’ deliberate decision to incorporate Montesquieu’s conception of separation of powers into the Constitution, the Framers collectively endeavored to design a system of government that departed significantly from the practices of King George. With the atrocities committed by the British Crown fresh in their minds, the Framers went about designing a revolutionary system of government diametrically opposed to the accumulation of monarch-like power in the hands of a single individual. Justice Jackson’s tripartite framework represents the extension and application of the Framers’ intentions into contemporary debates over the division of authority between Congress and the president. According to Edward Lazarus, Jackson’s concurrence has emerged over time “as the single most influential guidepost for assessing presidential claims of inherent authority.” Therefore, Justice Jackson’s model provides essential insights into what the president can and cannot accomplish by means of presidential signing statements.

In recent years, the Court has continued to apply this rigid Schoolhouse Rock-like conception of separation of powers to rebuff executive encroachments on Congress’ lawmaking authority, most notably in the 1998 case of Clinton v. City of New York. In Clinton, the Court struck down president’s ability to issue line-item vetoes as a violation of separation of powers. The fact that the line-item veto had become a modern day political necessity due to the regularity of omnibus appropriations bills containing thousands of separate sections was completely irrelevant in the eyes of the Court since the fundamental principle of separation of powers was

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104 See Lazarus.

105 See Eggspuehler at 484-85.

106 See Clinton, 524 U.S. at 448-49.
implicated by its use.\textsuperscript{107} According to Justice Stevens, the Constitution does not provide the president with the authority to remove specific sections of a legislative enactment and then execute the remainder without the approval of Congress.\textsuperscript{108} If he were permitted to do so, the president would effectively assume the role of a tyrannical super-legislator, with the unilateral power to modify or repeal statutes at will. The major constitutional defect inherent in the line-item veto is that it “authoriz[es] the President to create a different law—one whose text was not voted on by either House of Congress or presented to the President for signature.”\textsuperscript{109}

Article I, Section 7 of the United States Constitution (“Presentment Clause”) reads in relevant part:

\begin{quote}
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: \textit{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. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.\textsuperscript{110}
\end{quote}

Under the Presentment Clause, the president has two options when a bill is placed on his desk for his signature: he can approve the bill in its entirety or veto it in its entirety.\textsuperscript{111} The Presentment Clause does not provide the president with an in-between option that he can choose to exercise. Since the primary legal and practical effect of a line-item veto is to allow the president to

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\item[\textsuperscript{107}] \textit{See id.} at 449 (“The Constitution’s structure requires a stability which transcends the convenience of the moment.”) (Kennedy, J., concurring).
\item[\textsuperscript{108}] \textit{See id.}
\item[\textsuperscript{109}] \textit{Id.} at 448.
\item[\textsuperscript{110}] \textsc{U.S. Const.} art 1, § 7 (emphasis added).
\item[\textsuperscript{111}] Note: The president technically has a third option: do nothing. In this case, the bill automatically becomes law in ten days unless the president is exercising his pocket veto just prior to a congressional recess.
\end{itemize}
unilaterally alter an act of Congress without congressional approval, thereby bypassing the
normal Article I lawmaking process, it constitutes a clear violation of the Presentment Clause.112
Out of the three crucial separation of powers precedents discussed in this section, Clinton carries
the most important implications for President Bush’s issuance of “constitutional objection”
signing statements. As will be discussed in detail later, from a functional perspective, the
primary effect of line-item vetoes and “constitutional objection” signing statements is identical:
to provide the president with the unilateral power to amend duly enacted statutory provisions at
will. Therefore, the presidential issuance of both line-item vetoes and “constitutional objection”
signing statements is in clear contravention of the sacred doctrine of separation of powers.

**Part III: The History of Presidential Signing Statements**

*The Early Use of Presidential Signing Statements*

The Constitution itself does not address the president’s power to issue presidential
signing statements.113 Nevertheless, since the time of the Monroe administration, presidents have
regularly employed signing statements ceremoniously for “relatively innocuous purposes” such
as “to thank supporters, explain their support for the bill or express satisfaction—or
dissatisfaction—with legislation.”114 According to most presidential historians, President Monroe
was the first president to use presidential signing statements.115 During his tenure in office,
President Monroe issued two signing statements for the purpose of explaining to Congress what

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112 See id. at 438 (“In both legal and practical effect, the President has [by issuing a line-item veto] amended two Acts of Congress by repealing a portion of each.”).


114 Biller at 1075.

115 See, e.g., Kelley at 27; Bradley at 312; May, *supra* note 48, at 116.
steps he would take to implement the legislation.\textsuperscript{116} Under the framework laid out at the beginning of this Paper, the statements issued by President Monroe would be classified as “interpretive” signing statements since they articulated Monroe’s plan for effectuating Congress’ intent.

According to Legislative Attorney T.J. Halstead, the first controversial signing statement was issued by President Andrew Jackson in 1830.\textsuperscript{117} After Congress passed a bill addressing road surveys, President Jackson issued a signing statement upon his signing of the bill declaring that, contrary to Congress’ clear intent, one of the roads should not extend beyond Michigan.\textsuperscript{118} The House subsequently rebuked President Jackson by issuing a report comparing his action to the issuance of a line-item veto.\textsuperscript{119} In a similar manner, a signing statement issued by President Taylor in 1842 articulating his view that a bill dealing with the apportionment of congressional districts was unconstitutional was described by a House committee as “a defacement of the public records and archives.”\textsuperscript{120} In the aftermath of these two instances of admonishment, Presidents Polk and Pierce formally apologized to Congress for the issuance of presidential signing statements, stating that such a practice greatly diverged from the constitutionally mandated bill-approval process.\textsuperscript{121} As a result of these rebukes, presidents employed signing statements very infrequently until the end of the 19th Century. According to Christopher May,

\textsuperscript{116} See Eggspuehler at 467.

\textsuperscript{117} See Halstead at 2.

\textsuperscript{118} See id: Lee at 710-11.

\textsuperscript{119} See Louis Fisher, Constitutional Conflicts Between Congress and the President 132 (University Press of Kansas) (1997).

\textsuperscript{120} See id. at 133.

\textsuperscript{121} See May, supra note 47, at 929; Eggspuehler at 467.
presidents issued only a grand total of twenty-three signing statements from the time of the ratification of the Constitution until the beginning of the 20th Century.\textsuperscript{122}

\textit{The Post-World War II Use of Presidential Signing Statements}

Although signing statements were rarely used until the end of the 19th Century, they had become a common tool for asserting presidential prerogatives by the mid-1950s. For example, President Truman issued approximately sixteen signing statements per year during his tenure in office, amounting to a total of one hundred and eighteen signing statements.\textsuperscript{123} President Truman’s statements were primarily “rhetorical” in nature and were used as a means to articulate his general policy views.\textsuperscript{124} Upon signing the Displaced Persons Act, which granted visas to certain individuals displaced during World War II,\textsuperscript{125} Truman declared that several provisions of the act “form a pattern of discrimination and intolerance wholly inconsistent with the American sense of justice.”\textsuperscript{126} Despite this pronouncement, Truman’s signing statement did not manifest in any way his intention to refuse to enforce the law in its entirety.

During the Ford and Carter administrations, the use of signing statements drastically increased to nearly sixty statements per year.\textsuperscript{127} In addition to the quantitative spike in the number of statements issued during this era, Presidents Ford and Carter began using signing statements in a qualitatively different manner than their predecessors: to raise constitutional

\begin{footnotesize}
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\item[\textsuperscript{122}] See May, \textit{supra} note 48, at 73.
\item[\textsuperscript{123}] See Halstead at 2; Bradley at 312.
\item[\textsuperscript{124}] See Bradley at 313.
\item[\textsuperscript{125}] \textit{Id}.
\item[\textsuperscript{126}] Statement by the President Upon Signing the Displaced Persons Act, 1 \textsc{Pub. Papers} 382, 383 (June 25, 1948).
\item[\textsuperscript{127}] See Eggspuehler at 467-68.
\end{itemize}
\end{footnotesize}
concerns with respect to particular statutory provisions.\footnote{128}{It is important to note that although Presidents Ford and Carter used signing statements as a means to articulate constitutional objections to acts of Congress, in the great majority of these cases they did not manifest any indication of an intention to refuse to enforce the law as written. Therefore, the statements issued by Ford and Carter are not true “constitutional objection” signing statements since unlike the statements issued by President George W. Bush, they did not serve as a mechanism to nullify statutory provisions.} During this period, the use of signing statements as a vehicle for raising general constitutional and policy objections swelled from approximately one per decade from the period of 1789-1945 to six per year.\footnote{129}{See May, supra note 48, at 74-5.} For instance, after Congress added an amendment to an appropriations bill prohibiting the Justice Department from using any funds to carry out President Carter’s full pardon of Vietnam draft resisters,\footnote{130}{See May, supra note 47, at 962-63.} Carter signed the bill but contemporaneously issued a signing statement objecting to the provision as an unconstitutional interference with the presidential pardon power.\footnote{131}{See id.} In the aggregate, President Carter issued a total of seven such signing statements raising objections to duly enacted statutory provisions on constitutional grounds.\footnote{132}{See J. Randy Beck, Presidential Defiance of “Unconstitutional” Laws: Reviving the Royal Prerogative, 16 CONST. COMMENT. 419, 429 (1999) (reviewing Christopher May’s book).} Nevertheless, while signing statements were employed by President Carter as an instrument for articulating his constitutional concerns, not once did Carter manifest an intention to refuse to enforce the law as written.\footnote{133}{See Biller at 1075-78.} Therefore, coinciding with the development of the issuance of signing statements in much greater numbers than in the past in the aftermath of World War II, presidents increasingly began using signing statements not
only to articulate their views on pieces of legislation, but also to express constitutional objections to them.  

*The Reagan Administration’s Expansive Use of Presidential Signing Statements*

In the aftermath of the Vietnam War and the Watergate fiasco, Congress began to forcefully reassert itself in the 1970s especially in the realm of foreign affairs, resulting in the end of the “era of the imperial presidency.”  

The passage of the War Powers Act, the Foreign Intelligence Surveillance Act, and the Anti-Impoundment Act served to significantly curtail the power of the presidency to a level not seen since prior to the start of the World War II.  

According to Dick Cheney, the period of the late 1970s constituted the “low point” of presidential power.  

In response to this congressional resurgence, the Reagan Justice Department initiated a concerted effort to restore the powers of the executive branch to pre-Vietnam levels, by rolling back “unconstitutional” encroachments on the president’s ability to exercise his Article II powers at will. Attorney General Edwin Meese took the first step in pursuance of this ambitious agenda in April 1986, when he commissioned the Justice Department’s Domestic Policy Committee to publish a report on legislative-executive relations during the past two decades.  

The report wholeheartedly agreed with the concerns articulated by the proponents of an expansive conception of executive power and laid out several

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134 See Halstead at 2-3; May, *supra* note 48, at 74-5.

135 See Savage, *supra* note 45, at 22 (“The Watergate scandal, which shocked the country as it unfolded through the media and congressional investigations, combined with disgust over the ill-advised war in Vietnam, temporarily collapsed an imperial presidency that had been building for two decades.”).

136 See Bradley at 316; Arthur M. Schlesinger, Jr., *The Imperial Presidency* 423 (2004).


138 See Savage, *supra* note 45, at 47.
recommendations to be implemented by President Reagan, including issuing signing statements in greater numbers and refusing to enforce statutes that unconstitutionally encroach on the authority of the executive branch.\textsuperscript{139} The most important course of action recommended by the report was the promulgation of a ground-breaking new way of conceptualizing the relationship between the three branches of government: unitary executive theory.\textsuperscript{140}

Unitary executive theory embodies the belief that the traditional Montesquieuan view of the Constitution, as a document creating three co-equal branches of government with an array of blended powers, is incorrect. According to Charlie Savage, the Reagan Justice Department “rejected the mainstream view that the Constitution creates three separate institutions and then gives them overlapping authority over the government as a means of preventing the tyranny of concentrated power. Instead, they said, The Founders cleanly divided the powers of the government, assigning to each institution the exclusive control of its own universe.”\textsuperscript{141} Unitary executive theory is derived from a theory of constitutional interpretation known as “departmentalism.”\textsuperscript{142} Departmentalism holds that all three branches of the federal government have the power and duty to interpret the Constitution.\textsuperscript{143} In its traditional form, this theory provides each branch with the independent and exclusive power to interpret the Constitution.

\textsuperscript{139} See Separation of Powers: Legislative-Executive Relations, National Archives, Dep’t of Justice Files, Edwin Meese Component Correspondence Files (Apr. 1986).

\textsuperscript{140} See id.

\textsuperscript{141} Savage, supra note 45, at 48.


\textsuperscript{143} See id.
within the sphere of its own authority, but holds that each branch’s interpretation is not binding upon the other two.144

According to unitary executive theory, the president should be provided with the exclusive authority to exercise total control over the activities of the executive branch and this authority should not be subject to limitations imposed by Congress and the judiciary. From the perspective of one of the key inventors of unitary executive theory, Edwin Meese, for two hundred years, courts and scholars had misunderstood what the Framers meant to accomplish by designing a constitution founded on the principle of separation of powers.145 Unitary executive theory calls into question Chief Justice Marshall’s longstanding notion of judicial supremacy, originally promulgated in Marbury v. Madison.146 Contrary to the principle of judicial supremacy which has been considered an essential tenet of the American constitutional system since 1803, proponents of unitary executive theory believe that Justice Marshall did not intend to confine the power to interpret the law solely to the judicial branch. Therefore, under unitary executive theory, the Court is effectively removed from its traditional role as the final arbiter of constitutional disputes.147

144 See Kelley at 4 (emphasis added). The reason for this added emphasis is that as this Paper will discuss later, the Bush administration took this theory one step further, asserting that the executive’s construction of a law as unconstitutionally infringing upon the executive’s prerogatives was binding on the other branches and not subject to judicial review. Thus, the Bush administration effectively asserted the notion of executive, as opposed to judicial supremacy, ensuring that the executive would have the “last word” on questions of constitutional interpretation.

145 See Savage, supra note 45, at 47.

146 See Van Bergen.

147 See id.
According to Michael Froomkin, the constitutional basis for unitary executive theory can be found in the Take Care Clause of Article II. Froomkin argues that the Take Care Clause provides the president with the authority to determine which laws are and are not constitutional, in order to fulfill his constitutional duty to faithfully execute the laws of the Nation. The president, being bound to oversee the operations of executive branch agencies to ensure that they are faithfully executing the laws, has a concomitant duty to refuse to enforce a law which he believes to be unconstitutional. Thus, unitary executive theory, at least in the form conceived of by the Reagan Justice Department, challenges Montesquieu’s classical model of separation of powers by promoting the concentration of power within the executive branch of government and refusing to acknowledge the existence of blended powers.

Proponents of unitary executive theory assert that their position receives significant support from the writings of James Madison and Alexander Hamilton, most notably within Federalist No. 49 and Federalist No. 70. In Federalist No. 49, Madison wrote “[t]he several departments being perfectly co-ordinate by the terms of their common commission, none of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers.” Supporters of the notion of a unitary executive equipped with the independent authority to interpret the Constitution point to this statement by Madison as

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148 Id.

149 See id.

150 See Kelley at 8-9.

151 James Madison, The Federalist No. 49 (1788).
evidence that even Madison himself was opposed to the notion that the judiciary should have the final say on questions of constitutional interpretation. Additionally, in *Federalist No. 70*, Hamilton argued that a single person, rather than a council, should be placed at the head of the executive branch. Hamilton was concerned that an executive council would often be unable to swiftly take the decisive actions necessary to ensure the preservation of the newborn Nation.

“That unity is conducive to energy will not be disputed. Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.”

Supporters of the unitary executive point to *Federalist #70* as evidence of the many virtues of putting a single person in charge of the executive branch. Expanding on Hamilton’s argument, adherents of unitary executive theory argue that from a functional perspective, in order for the federal government to operate efficiently, the president must have absolute control over the activities that occur below him within the executive branch, as well as the independent authority to resist encroachments on the prerogatives of his office. According to Steven Calabresi, while at first blush the idea that the executive branch is empowered to interpret the law may appear dubious in light of Chief Justice Marshall’s longstanding but largely

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152 See Kelley at 4-5.


154 Id.

155 See generally Kelley at 5. According to Christopher Yoo, unitary executive theory consists of three integral components: (1) The president’s power to remove subordinate executive officials; (2) the president’s power to direct the manner in which subordinate officials exercise their discretionary executive power; and (3) the President’s power to nullify or veto such officials’ exercise of discretionary executive power.
unchallenged notion of judiciary supremacy, upon further examination it receives significant support from writings of the Founding Fathers, the text of the Constitution, and practical considerations emanating from the enormous modern-day federal bureaucracy.  

Although unitary executive theory quickly gained support within the Reagan Justice Department, the proponents of this revolutionary view of the Constitution faced a difficult dilemma: how could the key components of this theory, most notably the president’s power to decline to enforce laws that unconstitutionally intrude upon the exclusive sphere of executive authority, be implemented by President Reagan in practice? Attorney General Meese recognized that the presidential signing statement could be used as a powerful tool to advance the president’s interpretation of ambiguous statutory provisions and thereby restore the authority of the presidency to pre-Vietnam levels. Thus, Meese attempted to “transfor[m] the signing statement into a strategic weapon to reclaim executive power.” As a result of Meese’s endeavor, the use of signing statements in general skyrocketed to unprecedented levels during the Reagan administration, along with the qualitative character of the statements issued. In total, President Reagan issued 250 signing statements during his time in office, 86 of which

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156 See Stevens Calabresi, Some Normative Arguments for the Unitary Executive, 48 ARK. L. REV. 23 (1994) (arguing that the “energy” of the executive branch would be significantly curtailed by spreading executive power among a large group of individuals).

157 Lee at 711. See also Morton Rosenberg, 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) (arguing that the use of signing statements was one aspect of a comprehensive strategy employed by the Reagan administration to aggressively assert the constitutional prerogatives of the presidency).

158 See id; Halstead at 3; Biller at 1077-78 (Articulating the under the Reagan administration, signing statements became “aggressively used executive tools.”).
(34%) raised constitutional concerns with respect one or more of the provisions signed into law.\textsuperscript{159}

Pursuant to the objective of providing the president with a potent mechanism to rebuff legislative infringements on the constitutional authority of the executive, Meese arranged for West Publishing Company to include signing statements along with congressional materials in its compilation of legislative history.\textsuperscript{160} Meese’s aim in arguing in favor of the increased use of presidential signing statements was to establish signing statements as a legitimate executive counterpart to the legislative history of a bill, and concomitantly, to persuade the courts to take signing statements into consideration in statutory construction. Since the judiciary takes into consideration the records of congressional debate and committee reports when construing an ambiguous statute, Meese argued, there is no good reason why the courts should be reluctant to take into account the opinion of the president as well.\textsuperscript{161}

It is important to note that the type of signing statement envisioned by Meese was “interpretive” in character, and would not imbue the president with the unilateral authority to disregard or decline to enforce laws which he personally disagreed with. Rather, Meese viewed the signing statement as a way to gradually increase the power of the presidency, primarily

\textsuperscript{159} Halstead at 3. It is important to note that although President Reagan regularly raised constitutional objections to statutory provisions in his signing statements, on only a few occasions did Reagan actually manifest his intent to disregard the provisions. Thus, unlike President George W. Bush, President Reagan did not make regular use of “constitutional objection” signing statements.


\textsuperscript{161} See Savage, supra note 23, at 5; 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, 367 (1987) (discussing that Meese’s primary goal was “[t]o make sure that the President’s own understanding of what’s in a bill is the same … or is given consideration at the time of statutory construction later on by a court.”).
through influencing future Supreme Court decisions. Therefore, although 86 of President Reagan’s signing statements called into question sections of legislative enactments, for the most part these were intended to be general policy statements as opposed to manifestations of the President’s intention to nullify or modify the disputed statutory provisions.\footnote{162See Savage, \textit{supra} note 45, at 234.}

Despite the fact that Attorney General Meese viewed the signing statement as a useful vehicle for the president to project his voice to the Supreme Court and thereby be able to stand on an equal footing with Congress in the context of statutory construction, this moderate stance on signing statements did not sit well with Samuel Alito, who at the time was working within the Justice Department’s Litigation Strategy Working Group.\footnote{163See \textit{id.} at 233-34.} In a 1986 memo, Alito concurred with Meese’s view that signing statements should be accorded weight by the courts in statutory construction, stating that the inclusion of signing statements in the legislative history would “ensure that Presidential signing statements assume their rightful place in the interpretation of legislation.”\footnote{164Samuel A. Alito, Jr., \textit{Using Presidential Signing Statements to Make Fuller Use of the President’s Constitutionally Assigned Role in the Process of Enacting Law} at 1 (Feb. 5, 1986), \textit{available at} http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf.} However, Alito took the concept of the signing statement one step further than Meese and asserted that this tool could be used by the president to circumvent acts of Congress, without making it seem as though the president is blatantly refusing to follow or enforce the law.

Alito asserted that for the time being, the focus of signing statements should be on “points of true ambiguity, rather than issuing interpretations that may seem to conflict with those of Congress. \textit{The first step} will be to convince the courts that Presidential signing statements are
valuable interpretive tools.”165 After this first step had been completed, Alito expressed hope that someday the principle of judicial supremacy would come into disrepute and “the president [would] get in the last word on questions of interpretation.”166 Alito devised a creative plan ultimately geared toward providing the president with the power to effectively nullify statutory provisions that he deems unconstitutional.167 Since this greatly expanded executive power would initially be viewed with skepticism by Congress, Alito recommended that his plan should be implemented gradually over time,168 and thus President Reagan should refrain from issuing signing statements unambiguously declaring sections of legislative enactments unconstitutional and announcing his intention to disregard them. Nevertheless, Alito’s memo laid down the groundwork for future presidents to go beyond the practice of merely issuing “interpretive” signing statements, and to use signing statements for the unprecedented purpose of completely disregarding duly enacted legislation.

Attorney General Meese’s strategy of urging President Reagan to issue an increasing number of “interpretive” signing statements was at least somewhat successful as demonstrated by the Supreme Court’s decision in Bowsher v. Synar.169 In Bowsher, the Court struck down a provision of the Gramm-Rudman-Hollings Deficit Reduction Act giving the comptroller general, who was removable only by Congress, the authority to review budget reports and then make

165 Id. at 4 (emphasis added).
166 Id. at 2.
167 See Savage at 233-34; Eggspuehler at 1079.
168 See Alito at 4.
spending reduction recommendations to the president.\textsuperscript{170} In concluding that the act
unconstitutionally delegated to Congress the exclusive authority to remove an official charged
with the execution of the laws, the Court cited Reagan’s signing statement noting “[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.”\textsuperscript{171} While it is unlikely that the \textit{Bowsher} Court accorded determinative weight to the
President’s signing statement, the fact that the Court cited the signing statement in its opinion
lends credibility to the notion that “interpretive” signing statements represent a legitimate
executive counterpart to the congressional record.\textsuperscript{172}

On the other hand, Samuel Alito’s more radical “constitutional objection” signing
statement, which was subsequently issued by President George W. Bush on a regular basis, met
with less success. Upon signing the Competition in Contracting Act of 1984, President Reagan
issued a signing statement questioning the constitutionality of a provision allowing the
comptroller general to sequester money in the case of a challenge to a government contract.\textsuperscript{173}
Reagan argued that this provision would “unconstitutionally … 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” and therefore he would instruct the
Attorney General to “inform all executive branch agencies … [on] how they may comply with

\textsuperscript{170} \textit{See id.} at 732.

\textsuperscript{171} \textit{Id.} at 419.

\textsuperscript{172} \textit{See Halstead} at 3-4; Eggspuehler at 1081 (“\textit{Bowsher} … legitimized the incorporation of signing
statements into legislative history.”).

\textsuperscript{173} \textit{See Lee} at 712-13.
the provisions of the bill in a manner consistent with the Constitution."174 The key difference between this signing statement and the statements issued during prior administrations is that in stark contrast to the signing statements issued from the time of the Monroe administration until the end of the Carter administration, this statement was used not only to raise constitutional concerns but also to express the President’s intention not to comply with the disputed provision. In fact, prior to eventually acceding in the face of congressional threats to completely eliminate funding for the Attorney General,175 Reagan even went so far as to defy a court order requiring the executive branch to enforce the law as written.176

President Reagan’s argument that he possessed the independent authority to interpret acts of Congress and refuse to enforce them where they unconstitutionally encroach upon the prerogatives of the executive branch was flatly rejected by the federal district court in AMERON, Inc. v. U.S. Army Corps of Engineers.177 The court declared that the President had no authority to independently evaluate the constitutionality of the Competition in Contracting Act.178 That responsibility rested exclusively in the hands of the judiciary and was not a concurrent power shared by the president. Speaking on behalf of the court, Judge Ackerman chastised President Reagan for his absurd position that “[he] can say when a law is unconstitutional.”179 Thus, Samuel Alito’s position, grounded in unitary executive theory, that the president has the

175 See Halstead at 4.
176 See Lee at 713; Cooper at 226-27.
178 See id.
179 Id.
constitutional authority to use signing statements as a means to disregard or nullify statutory provisions that he believes to be unconstitutional, was emphatically rejected as an affront to Montesquieu’s classical model of separation of powers.

Additionally, the Supreme Court itself struck a major blow to unitary executive theory in the 1988 case of *Morrison v. Olsen*,\(^\text{180}\) where the Court upheld a provision of the Ethics in Government Act authorizing a judicial panel to appoint an independent counsel whenever the attorney general had reasonable grounds to believe that a crime had been committed by certain federal officials.\(^\text{181}\) Once appointed, the independent counsel could only be removed by the attorney general “for cause.”\(^\text{182}\) In addition to adjudicating the narrow issue of the constitutionality of the independent counsel provision, in its brief the Reagan administration asked the Court to address the much broader issue of whether or not Congress possessed the constitutional authority to set up independent agencies in the first place.\(^\text{183}\) In line with unitary executive theory, the administration argued that Article II required that all members of the executive branch be subject to removal by the president at will, with no exceptions.\(^\text{184}\)


\(^{181}\) See id. at 696-97.

\(^{182}\) See id.

\(^{183}\) See Savage, supra note 45, at 49.

president possesses a plenary removal power over all executive officials, and concurrently the constitutional underpinnings of unitary executive theory itself. “This rigid demarcation [unitary executive theory]—a demarcation incapable of being altered by law in the slightest degree, and applicable to tens of thousands of holders of offices neither known nor foreseen by the framers—depends upon an extrapolation from general constitutional language which we think is more than the text will bear.”

According to the Court in *Morrison*, unitary executive theory, which provided the foundation for the Reagan administration’s aggressive use of signing statements, has no place in a constitutional system based on the intertwined maxims of separation of powers and checks and balances.

Although unitary executive theory had gained a number of die-hard supporters within the ranks of the Reagan Justice Department, in the aftermath of the Court’s decision in *Morrison*, unitary executive theory was rendered dead for the time being. Alito’s conception of the signing statement as a powerful device that the sitting president could use at will to refuse to implement acts of Congress and to circumvent the usual veto process laid out in Article I, Section 7 did not come to fruition during the tenure of the Reagan administration. Nevertheless, by the end of the Reagan administration, presidential signing statements had finally come into regular, systematic use, and were beginning to be employed in such a manner as to advance the claim that the president possesses the extraordinary authority to decline to enforce duly enacted laws.

*The Use of Presidential Signing Statements During the Bush I and Clinton Administrations*

The signing statements issued by Presidents George H.W. Bush (“Bush I”) and Bill Clinton from 1988-2000 were for the most part very similar in quantity and quality to the

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185 See *Morrison*, 487 U.S. at 690 n.29.

186 See, e.g., Eggspuehler at 468-70; Lee at 711-13; Kelley at 31-2; Biller at 1077-78.
statements issued by Reagan.\textsuperscript{187} During his term in office, President Bush I issued 228 signing statements, 107 of which (47\%) raised constitutional concerns.\textsuperscript{188} The Bush I administration was very sensitive to perceived encroachments upon the exclusive realm of executive authority, as highlighted by an Office of Legal Counsel ("OLC") opinion drafted by Deputy Attorney General William P. Barr. This memo defended the use of presidential signing statements as a mechanism to object to unconstitutional encroachments on executive power, such as congressional attempts to intrude upon the president’s Article II appointment and removal powers.\textsuperscript{189} Despite President Bush I’s relatively aggressive use of signing statements to ward off congressional intrusions in a similar manner to President Reagan, Bush I used signing statements as a vehicle to articulate his constitutional objections to particular statutory provisions, but not to actually nullify or modify these provisions.\textsuperscript{190}

For example, Bush I issued a signing statement upon signing the National and Community Services Act of 1990, expressing his belief that a provision establishing a Board of Directors was unconstitutional due to the restriction that the president could only pick certain appointees from a list of nominees prepared and vetted by the Speaker of the House and Senate Majority Leader.\textsuperscript{191} While articulating his constitutional objections, Bush nevertheless recognized that he did not possess the unilateral power to nullify the provision without the consent of Congress, and thus sought to persuade Congress to remedy the alleged constitutional

\textsuperscript{187} See Lee at 713; Halstead at 5.

\textsuperscript{188} Halstead at 5.


\textsuperscript{190} See Halstead at 5; Lee at 713-15.

\textsuperscript{191} See Halstead at 5.
defect through subsequent legislation. In a similar manner, upon signing the Dayton Aviation Heritage Preservation Act of 1992, Bush issued a signing statement objecting to a provision that purported to grant executive powers to members of a Heritage Commission who were not appointed solely by the president in violation of the Appointments Clause. Bush I nearly set off a separation of powers crisis by declaring that he was signing the bill “on the understanding that the commission will serve only in an advisory capacity and will not exercise Government power,” an interpretation that was clearly at odds with Congress’ intent in enacting the provision. However, this constitutional disaster was narrowly averted when Congress amended the provision to satisfy the President’s objections.

The Clinton administration continued the Bush I administration’s practice of using signing statements to admonish Congress and raise constitutional protestations, but did not claim the authority to issue “constitutional objection” signing statements, allowing the President to rewrite acts of Congress with the stoke of a pen. During his time in office, President Clinton issued 381 signing statements, 70 of which (18%) voiced constitutional concerns. In 1993 and

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192 See Statement on Signing the National and Community Service Act of 1990, 26 Weekly Comp. Pres. Doc. 1833, 1834 (Nov. 16, 1990) (President Bush I further directed the Attorney General “to prepare remedial legislation for submission to Congress ... so that the act can be brought into compliance with the Constitution’s requirements.”).

193 See id.

194 See Halstead at 5; Lee at 715.


196 See Lee at 715.

197 See Kelley at 30-2; Lee at 716-18.

198 Halstead at 6.
1994, Assistant Attorney General Walter Dellinger drafted two memos advocating the use of signing statements, which remain at the center of the current debate over the legal and institutions implications of signing statements. In the first memo, Dellinger urged Clinton that the issuance of signing statements could serve several useful purposes, including allowing the President to express his views on legislation to Congress and the public, improve public relations, and articulate his administration’s hierarchy of policy priorities.\(^{199}\) Dellinger asserted that the issuance of signing statements to “make substantive legal, constitutional, or administrative pronouncements” was well established as legitimate.\(^{200}\) In a much more controversial second memo, Dellinger went one step further and asserted that under some circumstances the president could refuse to enforce a statute that he believes to be unconstitutional:

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 \textit{a provision would violate the Constitution} and that \textit{it is probable that the Court would agree with him}, the President has the authority to decline to execute the statute.\(^{201}\)

Dellinger articulated that the theory that the president possesses the authority to decline to enforce acts of Congress finds significant support in the history of the presidency and the pronouncements of the Court.\(^{202}\) Although Dellinger advocated the use of an executive non-enforcement power, it is crucial to note that Dellinger intended for this power to be heavily

\(^{199}\) \textit{See Biller at 1085-88.}


\(^{201}\) \textit{Walter Dellinger, Presidential Authority to Decline to Execute Unconstitutional Statutes}, 18 U.S. Op. Off. Legal Counsel 199, 200 (1994) \textit{(emphasis added)}.

\(^{202}\) \textit{See id.}
circumscribed and exercised only under extraordinary circumstances. Dellinger unambiguously stated that such a power would only come into existence when two necessary conditions were met: (1) the president personally believes that a provision is unconstitutional and more importantly (2) it is very likely that the Supreme Court would agree with the president’s legal conclusion.\(^{203}\) Therefore, in stark contrast to the position subsequently taken by President George W. Bush, that the president has the unilateral authority to refuse to enforce a statute any time he believes that it encroaches upon the powers of the “unitary executive” branch, Dellinger would only authorize such an expansive power when Congress enacts a statute that is in clear violation of a Supreme Court precedent.

President Clinton’s concurrence with the view laid out by Dellinger can be seen by examining the way in which Clinton used signing statements. President Clinton’s most well-known signing statement was issued upon his approval of the National Defense Authorization Act for Fiscal Year 1996.\(^{204}\) This bill included a controversial provision requiring the Pentagon to discharge all HIV-positive soldiers, which Clinton strongly opposed on equal protection grounds.\(^{205}\) In his signing statement, Clinton articulated that he considered the provision to be “blatantly discriminatory and highly punitive to service members and their families.”\(^{206}\) Despite his deep-seated disagreement with the provision, Clinton nevertheless acknowledged that the Take Care Clause obligated him to respect and enforce the law in its entirety. In strict conformance with the sacred doctrine of separation of powers, Clinton decided to pursue the

\(^{203}\) *See* Dellinger, *supra* note 192, at 200.

\(^{204}\) *See* Lee at 716.

\(^{205}\) *See* Savage, *supra* note 45, at 235.

only constitutionally permissible course of action available to him under the circumstances: to seek the repeal of the provision through the usual Article I legislative process.\textsuperscript{207} Clinton concluded his signing statement by noting “I strongly support the current efforts in the Congress to \textit{repeal} this provision before a single service member is discharged from the armed forces.”\textsuperscript{208} Congress subsequently adopted Clinton’s recommendation.\textsuperscript{209}

Another good illustration of the way in which President Clinton used signing statements can be seen by examining the statement accompanying the President’s signing of the Balanced Budget Act of 1997. Clinton objected to an ambiguous provision possibly requiring the Secretary of Health and Human Services to develop certain legislative proposals, stating that he would “construe this provision in light of my constitutional duty … to recommend to the Congress such legislative measures as I judge necessary and expedient, and to supervise and guide my subordinates.”\textsuperscript{210} Clinton did not use this signing statement as a mechanism to subvert the intent of Congress; rather, in light of the ambiguous nature of the disputed provision, Clinton used this “interpretive” statement as a forum to articulate to Congress, the public, and possibly also the judiciary how he planned to implement the law. Nothing in the statement manifested Clinton’s intention to refuse to enforce the provision as written.\textsuperscript{211} President Clinton’s justifiable purpose in issuing this statement was a far cry from President George W. Bush’s use of signing statements in a manner that undermined the clear intent of Congress.

\textsuperscript{207} \textit{See id.}

\textsuperscript{208} \textit{Id.} (emphasis added).

\textsuperscript{209} \textit{See Lee at 716.}


\textsuperscript{211} \textit{See Halstead at 7.}
Instead of using the signing statement as a tool by which to nullify or alter duly enacted statutory provisions, as his successor would do, Clinton simply used it as a means to project his own views to Congress and the public. Therefore, it is clear that by the end of the Clinton administration, Samuel Alito’s far-reaching version of the signing statement had been rendered obsolete for the time being. Alito had succeeded in planting the seeds of unitary executive theory during his years in the Reagan administration. However, those seeds had thus far failed to blossom. By the time President George W. Bush assumed the presidency in January 2001, the radical theory of the unitary executive branch along with its brainchild, the “constitutional objection” signing statement, appeared to be a mere figments of history.

*The Use of Presidential Signing Statements During the Administration of George W. Bush: The Power to Make the Law*

Due to the fundamental inconsistency of unitary executive theory with Montesquieu’s classical model of separation of powers, the acceptance of this radical theory was contingent upon the unlikely occurrence of a crisis, a national catastrophe of extraordinary magnitude, which could potentially convince Congress and the public to put aside their fears in the name of national security. Only eight months after the inauguration of President George W. Bush, the horrific attacks of September 11, 2001 presented such a circumstance. 9/11 provided the Bush administration with the exigency it needed to continue where the Reagan administration had left off.\(^{212}\) The Bush administration immediately initiated a calculated effort to seize this unique opportunity to supplement the powers of the presidency, through the full-scale implementation of unitary executive theory. According to Philip Cooper, “[a] study of the first [term of the] Bush administration reveals wide-ranging assertions of exclusive authority and court-like

\(^{212}\) See Savage, *supra* note 45, at 93.
pronouncements that redefine legislative powers under the Constitution. They reveal a systematic effort to define presidential authority in terms of the broad conception of the prerogative both internationally and domestically under the unitary executive theory.”\textsuperscript{213} With respect to the use of presidential signing statements, President Bush completely ignored the Framers’ unambiguous desire to place the lawmaking power primarily in the hands of Congress, and effectively assumed the royal prerogative power to dispense with the law as he saw fit.\textsuperscript{214}

President Bush revolutionized the use of the signing statement as a vehicle not only to raise constitutional objections to one or more of a bill’s provisions, but additionally to unambiguously declare his intention to refuse to enforce the “unconstitutional” provisions.\textsuperscript{215} President Bush substantially departed from the practices of his predecessors by enthusiastically adopting Samuel Alito’s “constitutional objection” signing statement and frequently issuing signing statements including an express refusal to carry out the law.\textsuperscript{216} The Bush administration took the Reagan administration’s conception of unitary executive theory one step further, asserting not only that the president has the independent authority to interpret the Constitution within the sphere of his own authority, but additionally that the president’s interpretation of a law as unconstitutionally encroaching on the prerogatives of the executive branch is binding on the other branches and not subject to judicial review.\textsuperscript{217} Unlike the signing statements issued by

\textsuperscript{214} See id.
\textsuperscript{215} See Kinkopf at 6.
\textsuperscript{216} See Biller at 1090.
\textsuperscript{217} See Van Bergen; Eggspuehler at 478 (arguing that the use of this type of signing statement effectively asserts an executive analog to the power of judicial review).
Presidents Reagan, Bush I, and Clinton, the statements authored by President Bush were not intended to merely raise constitutional or policy objections to statutory provisions, but rather were intended to serve as binding interpretations of the law, thereby frequently modifying or nullifying duly enacted provisions.\textsuperscript{218} Thus, the Bush administration effectively asserted the notion of executive, as opposed to judicial supremacy, in an effort to ensure that the president would have the last word on questions of constitutional interpretation, just as Alito had intended back in 1986.

During his first term in office alone, President Bush issued 152 signing statements, 118 of which (78\%) contained constitutional objections.\textsuperscript{219} Bradley and Posner note that although the quantity of signing statements issued by President Bush was not substantially greater than the number issued by his immediate predecessors, Bush’s statements were qualitatively unique insofar as they typically raised multiple constitutional objections to a single bill.\textsuperscript{220} According to Charlie Savage, by the end of his presidency Bush had used signing statements to challenge an astonishing 1,100 separate statutory provisions.\textsuperscript{221} By contrast, all previous presidents combined had used signing statements as a means to raise constitutional objections to approximately 600 statutory provisions in the aggregate.\textsuperscript{222} Also, President Bush issued a grand total of twelve presidential vetoes during his tenure in office, which is by far the lowest total number of vetoes

\textsuperscript{218} See Savage, \textit{supra} note 23.

\textsuperscript{219} Halstead at 9.

\textsuperscript{220} See Bradley at 324 (“Bush has departed from the norm by frequently issuing challenges to numerous statutory provisions within a single signing statement.”).

\textsuperscript{221} See Savage, \textit{supra} note 45, at 230.

\textsuperscript{222} See \textit{id}. 
issued since the administration of Warren Harding all the way back in 1923. Therefore, throughout his presidency, President Bush effectively used the “constitutional objection” signing statement as a more powerful substitute for the traditional presidential veto. Unlike the exercise of the veto power, the issuance of a signing statement is not subject to being overridden by a two-thirds vote of both chambers of Congress.

Furthermore, the Bush administration’s signing statements diverged from the practices of previous administrations in another important respect: they explicitly referenced unitary executive theory and manifested in crystal clear terms the President’s intention to unilaterally alter or nullify the disputed statutory provisions. In the words of Christopher Yoo, President Bush “emphatically endorsed the unitariness of the executive branch.” In his first term alone, President Bush issued 82 signing statements containing the phrase “unitary executive.” President Bush’s unconditional adoption of Samuel Alito’s radical notion of the “constitutional objection” signing statement as a legitimate vehicle to re-write or decline to enforce duly enacted acts of Congress, coupled with Bush’s decision to use this device as often as possible, demonstrates that the hopes and ambitions of the unitary executive proponents had finally come

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223 See Vetoes by President George W. Bush, U.S. Senate Virtual Reference Desk, available at http://www.senate.gov/reference/Legislation/Vetoes/BushGW.htm. For example, the next lowest total number of vetoes issued is 21 by the Kennedy administration.

224 See Savage at 231 (Asserting that the signing statement is “an absolute power because, unlike when there is a regular veto, Congress ha[s] no opportunity to override [the president’s] legal judgments.”).

225 See Biller at 1076 (Stating that the Bush administration’s signing statements “explicitly apply the theory of the unitary executive and stake out the furthest limits to executive authority.”); Jess Bravin, Judge Alito’s View of the Presidency: Expansive Powers, WALL ST. J., Jan. 5, 2006 (“In written statements issued when he signs legislation, Mr. Bush routinely cites his authority to ‘supervise the unitary executive branch’ to disregard bill provisions he considers objectionable.”).

226 Yoo at 722.

227 See Kinkopf at 9.
to fruition by the end of President Bush’s first term in office. As a result, Congress’ longstanding constitutional role as the Nation’s exclusive lawmaking body was effectively transformed into a mere paper power, and Montesquieu’s classical model of separation of powers was turned on its head. According to Senator Arlen Specter, President Bush’s use signing statements as a vehicle to enlarge his role in the legislative process “render[ed] the legislative process a virtual nullity.”

Therefore, both the quantity and quality of President George W. Bush’s signing statements represent a significant deviation from the practices of the previous forty-two chief executives.

One of the most telling illustrations of the implications of President Bush’s “constitutional objection” signing statements can be seen by examining the statement issued upon signing the Detainee Treatment Act. After threatening to use his executive authority to veto a defense appropriations bill containing an anti-torture amendment, President Bush signed the bill into law on December 30, 2005. However, he issued a “constitutional objection” signing statement that targeted an amendment championed by Senator John McCain (“McCain Amendment”), requiring the U.S. military to refrain from torture or cruel, inhumane, or degrading treatment during the interrogation of prisoners. While this provision was technically codified at the moment Bush signed the legislation, it was effectively nullified by the signing statement issued along with it:

The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and


230 See id.; Lee at 718-19.
the President, evidenced in Title X, of protecting the American people from further terrorist
attacks.\textsuperscript{231}

Bush’s signing statement singled out the McCain Amendment for only selective
enforcement on the grounds that it could potentially hamstring the efforts of U.S. interrogators
and intrude on the president’s power to supervise the unitary executive branch.\textsuperscript{232} According to
David Golove, “the signing statement is saying ‘I will only comply with this law when I want to,
and if something arises in the war on terrorism where I think it’s important to torture or engage
in cruel, inhuman, and degrading conduct, I have the authority to do so and nothing in this law is
going to stop me.’”\textsuperscript{233} The practical effect of this signing statement was to unilaterally excise the
McCain Amendment from the remainder of the original bill, thereby creating a different law than
the one enacted by Congress, without first obtaining the approval of Congress. Through the
issuance of this signing statement, Bush distorted the meaning of an arguably unambiguous
statutory provision, thereby completely undermining the will of Congress.

Furthermore, Bush stated that he would enforce the law “consistent with the
constitutional limitations on the judicial power,”\textsuperscript{234} manifesting Bush’s belief that his
interpretation of the McCain Amendment as merely “advisory” in character was intended to be
binding on the courts. This incident demonstrates that under the Bush administration’s

\textsuperscript{231} Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to
Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act of 2006, 41 Weekly Comp. Pres.

Bush administration official stating that the administration would not ignore the law altogether but
acknowledging that a situation could arise in which the president might have to waive the McCain
Amendment’s restrictions in order to protect national security).

\textsuperscript{233} See \textit{id.} (quoting David Golove).

\textsuperscript{234} 41 Weekly Comp. Pres. Doc. 1918.
conception of unitary executive theory, not only does the president have the power to interpret acts of Congress, but he has the final say in disputes over the constitutionality of these measures as well. President Bush’s unilateral annulment of the McCain Amendment lends credence to the idea that “the basic civics lesson that there are three co-equal branches of government that provide checks and balances on each other [was] fundamentally rejected” by the Bush administration. 235

While the nullification of the McCain Amendment exemplifies an egregious usurpation of legislative authority, it by no means represents the only time during which President Bush attempted to substantively alter an act of Congress by means of a signing statement. In fact, President Bush attached a signing statement raising constitutional objections to more than one out of every ten bills that he signed between 2001 and 2006. 236 One of these statements was issued on March 9, 2006, when President Bush signed into law the USA PATRIOT Improvement and Reauthorization Act. The congressional Democrats agreed to vote in favor of the bill, but only on the condition that administration would accept an amendment to the bill requiring the Justice Department to make regular reports to Congress about how it was using its expanded powers. 237 President Bush accepted the Democrats’ compromise and signed the legislative package. However, once again Bush simultaneously issued a “constitutional objection” signing statement quashing the disputed provision: “The executive branch shall construe the provisions of H.R. 3199 that call for furnishing information to entities outside the executive branch in a


236 See Savage, supra note 23.

237 See Savage, supra note 45, at 229.
manner consistent with the President’s authority to supervise the *unitary executive branch* and to withhold information the disclosure of which could impair national security."  

President Bush’s signing statement manifested the President’s intention to enforce the law in general, but reserved the power to suspend the reporting requirements if he deemed it necessary for national security purposes.  

From the perspective of President Bush, requiring the Justice Department to disclose this information threatened to undermine his constitutional duty as the head of the unitary executive branch to take all necessary measures to protect the Nation from potential terrorist attacks, and was thus unconstitutional. Again, this example shows that the validation of the “constitutional objection” signing statement would allow the president to disobey a duly enacted statutory provision on the flimsy basis that he personally believes it to be an unconstitutional encroachment on the sovereign sphere of executive authority. Therefore, as the controversy over the reauthorization of the USA PATRIOT Act further exemplifies, throughout his tenure in office President Bush held that he as president, rather than the legislative or judicial departments, possessed the ultimate power to determine what is, and what is not, constitutional.

In contrast to President Clinton, who never used the phrase “unitary executive branch” in his signing statements, President Bush invoked the phrase on a regular basis in order to (1) express his categorical opposition to statutory provisions impinging upon executive authority and more importantly (2) manifest his intention to refuse to enforce the law as written. Although

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239 See Halstead at 9.

240 See Bradley at 328.

241 See Eggspuehler at 472; Biller at 1069-70.
Walter Dellinger previously acknowledged the president’s authority to decline to enforce the law when two necessary conditions were met. President Bush went a step further by abandoning the second prong of Dellinger’s test altogether and replacing it with a requirement that statutory provisions be consistent with unitary executive theory in order to be enforced. In other words, under the Bush administration’s revised version of Dellinger’s framework, the president possesses the absolute power to suspend a statutory provision whenever he personally believes that the provision is unconstitutional, regardless of whether the judiciary would concur with the president’s legal conclusion. A few examples of Bush administration signing statements containing the phrase “unitary executive branch” include the following:

- On four separate occasions during President Bush’s tenure in office, Congress enacted laws forbidding U.S. troops from engaging in combat in Columbia, where the U.S. military was advising the incumbent government in its battle against the Marxist rebels. After signing each bill into law, Bush issued a signing statement informing Congress that he would treat the restrictions as merely “advisory in nature” since they unconstitutionally interfered with his powers as Commander in Chief.

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242 (1) The president personally believes that a provision is unconstitutional and (2) it is very likely that the Supreme Court would agree with the president’s legal conclusion. See Dellinger, supra note 192, at 200.

243 See Biller at 1088.

244 See Savage, supra note 45, at 237.

245 Id.
• The Postal Accountability and Enhancement Act of 2006 included a provision prohibiting the opening of first-class mail in the absence of a warrant. President Bush issued a signing statement declaring that the executive branch would construe this section “in a manner consistent … with the need to conduct searches in exigent circumstances, such as to protect human life and safety against hazardous materials, and the need for physical searches specifically authorized by law for foreign intelligence collection.” Through the issuance of this statement, the Bush administration reserved the authority to open first-class mail without first obtaining a warrant, in direct contravention of the plain language of the act.

• In October 2004, President Bush signed the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, a section of which prohibited Defense Department personnel from interfering with the ability of military lawyers to give their commanders independent legal advice on whether enhanced interrogation methods constituted torture. Bush issued a signing statement articulating that

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248 See Chad Thompson, Presidential Signing Statements: The Big Impact of a Little Known Presidential Tool, 39 U. Tol. L. Rev. 185, 188 (2007); Bush: Mail Subject to Warrantless Searches: Presidential Signing Statement Claims Feds Can Open Mail in Certain Circumstances, CBSNEWS.COM, Jan. 4, 2007, available at http://www.cbsnews.com/stories/2007/01/04/politics/main2330382.shtml (“I don’t think the White House would have included this language into a signing statement unless the feds were either already searching mail without a warrant or planning to do so.”).

249 See Savage, supra note 45, at 238.
the administration would construe the disputed section “in a manner consistent with … the President’s constitutional authorities to take care that the laws be faithfully executed, to supervise the unitary executive branch, and as Commander in Chief.” This statement effectively removed the disputed section from the bill and ordered military lawyers not to contradict the legal advice offered by the Bush administration’s politically-appointed lawyers.

- In December 2004, President Bush signed into law the Department of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 2006. A provision of this act required scientific information prepared by government researchers to be presented to Congress uncensored. Nevertheless, Bush issued a signing statement reserving the right to withhold such information if he believed that it could “impair foreign relations, national security, [or] the deliberative processes of the Executive.”

- Upon signing the Sarbanes-Oxley Act of 2002, which strengthened whistleblower protections for federal employees, President Bush issued a signing statement narrowly construing the new whistleblower protections: “Given that the legislative purpose of [the disputed sections] is to protect against company retaliation for lawful cooperation with investigations and not to define the scope of investigative authority or to grant new investigative authority, the executive

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251 See Savage, supra note 45, at 239.

branch shall construe [the disputed sections] as referring to investigations
authorized by the rules of the Senate or the House of Representatives and
conducted for a proper legislative purpose." The bill’s sponsors, Senators
Charles Grassley and Patrick Leahy, objected that President Bush’s interpretation
of the section was unequivocally at odds with Congress’ intent and would create a
chilling effect on potential whistleblowers. Although the bill’s sponsors
unambiguously manifested their intent to apply federal whistleblower protections
not only to whistleblowers who report alleged wrongdoing to investigative
congressional committees, but also to whistleblowers who make a report to any
member of Congress, Bush’s signing statement effectively nullified this portion of
the legislation. Charles Grassley stated that Bush’s extremely narrow
construction would lead to an absurd result that obviously was not intended by
Congress: “[The President’s interpretation] would limit protections to only those
whistleblowers lucky enough to find one member of Congress out of 535 who is
the Chairman of the appropriate committee who also just happens to be already
conducting an investigation.” Although Sarbanes-Oxley was legally approved
at the moment President Bush affixed his signature to the bill, the President’s

255 See Kelley at 35-6.
concomitant signing statement effectively functioned as a line-item veto of the disputed sections.\textsuperscript{257}

These examples all serve to illustrate that President Bush employed signing statements for a very different purposes than that of his predecessors. The above statements were not intended to serve as a vehicle for merely expressing the President’s policy priorities and raising general constitutional concerns: rather, they were intended to aggrandize the president’s role in the lawmaking process and impose the will of the executive on both Congress and the judiciary. Never before had an American president regularly used signing statements as a means to refuse to enforce duly enacted statutory provisions.\textsuperscript{258}

In opposition to the position advanced by this Paper, Bradley and Posner argue 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.”\textsuperscript{259} In other words, they assert that President Bush’s “constitutional objection” signing statements contain idle threats to refuse to enforce the law in its entirety, which have not been acted on. However, a report issued by the Government Accountability Office (“GAO”) completely repudiates Bradley and Posner’s position.\textsuperscript{260} In its report, the GAO examined a sample of nineteen provisions addressed by President Bush in various signing statements in order to determine whether and to what extent

\begin{itemize}
\item \textsuperscript{257} See Thomas Devine, \textit{Letter to the Honorable George W. Bush}, GOVERNMENT ACCOUNTABILITY PROJECT, Aug. 1, 2002, available at \url{http://www.whistleblower.org/corporate/sox_bush_letter.htm} (asserting that President Bush’s construction was akin to a presidential veto).
\item \textsuperscript{258} See Biller at 1089-92.
\item \textsuperscript{259} Bradley at 332.
\end{itemize}
the Bush administration had enforced the disputed provisions.\textsuperscript{261} The GAO report determined that six out of the nineteen statutory provisions (31.6\%) were not “executed as written” by the Bush administration.\textsuperscript{262} Although six instances of executive non-compliance may seem inconsequential at first blush, Christopher May reports that from 1789 to 1981, U.S. presidents had used signing statements only twelve times in the aggregate to articulate their intention to decline to enforce an act of Congress.\textsuperscript{263} This number looms even larger in light of the fact that the GAO examined a mere nineteen of the well over 1,000 instances in which President Bush employed signing statements as a mechanism to raise constitutional objections to statutory provisions. Even assuming a very low rate of non-enforcement (10\% as compared with the 31.6\% rate of non-enforcement found in the GAO study),\textsuperscript{264} extrapolating from the results of the GAO report to the 1,100 instances in which Charlie Savage found that President Bush had raised constitutional objections in a signing statement,\textsuperscript{265} we can estimate that the Bush administration declined to enforce an astronomical 110 separate statutory provisions.

Contrary to the assertion of Bradley and Posner, signing statements were frequently used by President George W. Bush for the unprecedented purpose of disregarding substantive law. As will be discussed in greater detail below, the GAO report demonstrates that “constitutional objection” signing statements are indistinguishable from line-item vetoes from a functional perspective: both provide the president with the unilateral authority to re-write duly enacted

\textsuperscript{261} See id. at 1-2.

\textsuperscript{262} See id. at 1; Halstead at 25.

\textsuperscript{263} See May, supra note 48, at 101.

\textsuperscript{264} Applying the rate of non-enforcement found by the GAO (31.6\%), the number of incidents of non-enforcement skyrockets to 347.

\textsuperscript{265} See Savage, supra note 45, at 230.
statutes in clear violation of Article I, Section 7. In stark contrast to the practices of the previous forty-two presidents, President Bush used the signing statement as a vehicle to modify or nullify acts of Congress, in clear subversion of the legislative purpose. Sofia Biller provides a succinct but complete summary of President Bush’s use of signing statements: “Bush administration signing statements treat all legislative actions that merely touch upon ‘the areas of national security, foreign affairs, Defense Department matters, intelligence policy, or law enforcement’ as presumptively unconstitutional.” The Bush administration’s willingness to annul essentially any legislative enactment that encroached, no matter how slightly, on the prerogatives of the executive diminished Congress’ legislative authority to a level not contemplated by the Framers, thereby undermining Montesquieu’s classical model of separation of powers plainly incorporated by Articles I, II, and III. Therefore, President Bush’s recurrent use of “constitutional objection” signing statements effectively replaced the Framers’ vision of a democratic government based upon the division of governmental power among three co-equal branches of government, with an autocratic executive possessing the prerogative power to dispense with the law at will.

**Part III: Legal Analysis of “Constitutional Objection” Signing Statements**

*The President Does not Have the Power to Refuse to Enforce a Statutory Provision That he Believes to be Unconstitutional*

Before discussing the main constitutional objection against the use of “constitutional objection” signing statements, asserting that such statements violate Article I, Section 7’s exclusive procedure for making federal law, we need to examine a crucial threshold issue: does the president possess the authority, under the guise of unitary executive theory, to refuse to enforce laws that he believes to be unconstitutional? As highlighted vividly by the practices of

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266 Biller at 1091 (emphasis added).
the Bush administration, signing statements provide one way for a president to express his intent to refuse to enforce a statutory provision that he believes to be unconstitutional. This Paper takes the position that the assertion of a presidential power to decline to enforce a law that the sitting president personally disagrees with contravenes the doctrine of separation of powers as well as the explicit intent of the Framers in taking measures to ensure against the perpetuation of an American prerogative power.

According to Halstead, “[w]hile the Court has not had occasion to address the issue directly, the cases … 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 enactment pursuant to the Take Care Clause.” The Take Care Clause imposes a duty on the president to ensure that subordinate executive officials take measures to effectuate Congress’ clear intent. Therefore, the Take Care Clause does not imbue the president with the authority to decline to implement congressional enactments. This construction of the Take Care Clause finds substantial support in the Court’s decision in Kendall v. United States ex rel Stokes, in which the Court held that where Congress has by legislation imposed a duty upon an executive officer, that duty is subject to the control and limitation of the law, not the opinion of the sitting president. “To contend that the obligation imposed on the President to see the laws faithfully

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268 Halstead at 14.

269 See Halstead at 12.
executed implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissible.”

Halstead asserts that the Court has unequivocally rejected the notion that the Take Care Clause constitutes a grant of substantive lawmaking power to the president. For example, in Myers v. United States, the Court announced 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.” In a similar manner, Justice Black’s pronouncement in Youngstown that “the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker” militates strongly against the existence of an executive non-enforcement power. By indisputably rejecting the view that the Take Care Clause confers expansive lawmaking powers on the president, Myers and Youngstown lend credence to William Gwyn’s theory that the Take Care Clause was intended not to supplement but rather to restrict the president’s Article II powers. Therefore, the Court’s narrow construction of the Take Care Clause establishes beyond any doubt that unlike the British monarch, the president does not possess the prerogative power to disregard the law at will.

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271 See Halstead at 13.

272 272 U.S. 52 (1926).

273 Myers, 272 U.S. at 295.

274 Youngstown, 343 U.S. at 587.

275 See Gwyn at 491 n.82.

276 See Kinkopf at 6 (“The assertion of a presidential power to refuse to enforce a law stands in deep tension with the Constitution.”).
An additional argument in opposition to the constitutional legitimacy of an unbounded executive non-enforcement power is that it contravenes a fundamental principle of American constitutional law announced by the Court in *Cooper v. Aaron*. In *Cooper*, the Court held that the Court’s prior landmark decision in *Brown v. Board of Education* was binding on all of the states, regardless of any state laws to the contrary. In so holding, the Court unequivocally declared that pursuant to Article VI of the Constitution (“Supremacy Clause”), the Court’s constitutional decisions are the “supreme law of the land” and must be obeyed under all circumstances, by state and federal actors alike. By issuing “constitutional objection” signing statements with the intention of getting in the last word on questions of statutory interpretation, President Bush turned *Cooper*’s longstanding principle on its head. Bush effectively declared that the president’s interpretation of a law as infringing upon his Article II powers is non-reviewable and binding upon the other branches. The validation of President Bush’s radical position would render the judiciary’s role as the final arbiter of constitutional disputes nonexistent and concomitantly imbue the president with the unqualified authority to disregard the written law at will.

Despite these precedents, as shown by the historical examination of presidential signing statements, executive branch officials, not only under the administration of George W. Bush but under previous presidents as well, have maintained that the president has the power to decline to enforce laws that he views as unconstitutional. For instance, a number of presidents have

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279 *See Cooper*, 358 U.S. at 2.

280 *See id.* at 18.
asserted that they are not bound by the War Powers Resolution because it unconstitutionally infringes upon the president’s powers as Commander in Chief. Some well-known legal scholars, such as Frank Easterbrook, assert that the president has no constitutional obligation to enforce a statute he believes to be unconstitutional. In a similar vein, Malinda Lee makes the claim that “[t]he Constitution’s text, history, and structure provide no direct prohibition … of presidential refusals to enforce constitutionally objectionable laws.” According to this view, the president possesses the absolute power to refuse to enforce a law in whole or in part whenever he makes an independent legal judgment that it is unconstitutional. In other words, the president effectively possesses a power of “presidential review.”

These scholars subscribe to a very different view of the Take Care Clause than the one adopted by the Court in *Myers* and *Youngstown*. According to the Take Care Clause, they argue, the president is charged with faithfully executing the laws of the Nation. Therefore, pursuant to this clause, the president must concomitantly possess the authority to refuse to enforce a statutory provision that contravenes the Constitution, especially when it impinges upon a matter traditionally committed to the sole discretion of the executive branch. Easterbrook and Lee are correct that the text of the Constitution itself does not expressly prohibit the president from

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281 See Richard F. Grimmett, Cong. Research Service, War Powers Resolution: Presidential Compliance (Nov. 15, 2004) (articulating that every president since President Nixon has taken the position that the War Powers Resolution is unconstitutional).


283 Lee at 721-22.

284 See Eggspuehler at 478.

285 See id. at 478-80.

exercising a non-enforcement power. However, this argument is misguided since it ultimately fails to consider that the aggrandizement of the executive’s role in the legislative process to this extent is clearly at odds with the Framers’ calculated endeavor to create a government consisting of three co-equal branches, no one of which would be permitted to usurp the primary constitutional function of any other branch. Pursuant to this goal, the Framers provided for an executive of limited powers in Article II and were careful to ensure that the American president would not possess a power in any way resembling the royal prerogative power.

The claim advanced by Lee is rendered wholly unsubstantiated when examined in its historical context. Christopher May argues that the historical underpinnings of the Framers’ deliberate decision to reject the royal prerogative power date all the way back to the Glorious Revolution of 1688 that led to the ratification of the English Bill of Rights during the following year. The English Bill of Rights unconditionally stripped the King of the prerogative power to suspend statutes on constitutional grounds. The first article of the English Bill of Rights declares that “the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of Parliament, is illegal.”

[An act of parliament] cannot be altered, amended, dispensed with, suspended, or repealed, but in the same forms, and by the same authority of parliament … It is true, it was formerly held, that the king might, in many cases, dispense with penal statutes: but now, by statute … it is declared that the suspending or dispensing with laws by regal authority, without consent of parliament, is illegal.

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287 See May, supra note 48, at 873.
288 See May, supra note 48, at 6-12.
289 See id. at 3.
290 May, supra note 47, at 872.
291 1 William Blackstone, Commentaries, Ch. 2, at 185 (1765).
According to May, when the American colonists declared their independence from England in 1776, they perceived themselves as heirs of the Glorious Revolution. Therefore, the Framers sought to design a system of government composed of three co-equal branches in order to prevent the return of the royal prerogative. Incontrovertible evidence for the supposition that the Framers were diametrically opposed to granting the American president a similar prerogative power can be found in the fact that the Framers granted the president only a qualified, as opposed to an absolute veto power, that could be overridden by an affirmative vote of two-thirds of both houses of Congress. May notes that “[o]ne of the colonists’ principal grievances with the crown was the absolute veto which the king and his American governors could exercise over colonial legislation.” Thus, attempts by delegates to the Constitutional Convention to grant the president such a power were resoundingly defeated.

Furthermore, the Framers’ deliberate decision to reduce from three-fourths to two-thirds the majority needed for Congress to override a presidential veto just prior to the ratification of the Constitution demonstrates the lengths to which the delegates went to stamp out any remnants of the royal prerogative power under the letter of the U.S. Constitution. The Framers’ decision to make it easier for Congress to override a presidential veto was prompted by the

292 See id.
293 See Eggspuehler at 481.
294 See May, supra note 48, at 876-81.
295 Id. at 876.
296 For example, a motion by James Wilson to imbue the president with absolute veto authority was unanimously defeated by the Committee of the Whole on June 4, 1787. See 1 The Records of the Federal Convention of 1787 98-100 (Max Farrand ed. 1966).
297 See May, supra note 48, at 876-77.
concern that a three-fourths requirement “put too much in the power of the president.” Finally
and most convincingly, the Framers flatly rejected Pierce Butler’s proposal to provide the
president with a temporary suspension power. Elbridge Gerry objected on the grounds that in
light of the recent history of British colonial rule, he was shocked to hear a motion that would
effectively provide the American president with the royal prerogative power to dispense with the
law at will: “a power of suspending might do all the mischief dreaded from the negative of useful
laws; without answering the salutary purpose of checking unjust or unwise ones.”

In reaction to the historical abuse of the executive non-enforcement authority by the
British Crown, the Framers intended to provide the president with a heavily circumscribed veto
power similar to a defensive shield which would allow the president to repel legislative
encroachments on his exclusive authority. As May puts it, “[r]ead in the light of history, the
requirement that the President ‘take Care that the Laws be faithfully executed’ is a succinct and
all-inclusive command through which the Framers sought to prevent the Executive from
resorting to the panoply of devices employed by English kings to evade the will of
parliament.” Thus, the reading of the Take Care Clause advanced by Easterbrook, Lee, and the
Bush administration is clearly refuted by the history of the debates during the Constitutional
Convention. Viewed in its proper historical context, the Bush administration’s expansive use of
“constitutional objection” signing statements, as an American analog to the British royal
prerogative power, subverts the clear intent of the Framers in guarding against the usurpation of

298 Farrand, supra note 281, at 585 (quoting Mr. Williamson).
299 See May, supra note 48, at 877.
300 Farrand, supra note 281, at 103 (quoting Mr. Gerry).
301 May, supra note 48, at 873.
legislative authority by the president and the revival of a monarchical conception of executive power.

In contrast to the absolute position taken by Easterbrook and Lee, that the president can always choose to suspend a law whenever he makes an independent legal judgment that it is unconstitutional, other legal analysts have taken a more moderate position. For instance, in his 1994 memo, Walter Dellinger argued that under limited circumstances, the president could sometimes refuse to enforce a statute on constitutional grounds.\footnote{See Dellinger, supra note 192, at 200.} Dellinger articulated that executive branch “[o]pinions dating to at least 1860 assert the President’s authority to decline to effectuate enactments that the President views as unconstitutional.”\footnote{See Dellinger, supra note 192, at 199.} For example, Dellinger, along with Bradley and Posner, argues that the Court’s decision in \textit{Myers} actually provides modest support for the notion that the president enjoys the authority to disregard at least some statutory provisions.\footnote{See Dellinger, supra note 192, at 201-02; Bradley at 336-37.} They assert that in \textit{Myers}, in which Court found that a statute requiring Senate approval for the removal of the postmaster was unconstitutional,\footnote{See \textit{Myers}, 272 U.S. at 176-77.} special emphasis should be placed on the fact that the Court \textit{did not comment negatively} upon the president’s refusal to comply with the statute in the first place.\footnote{See Dellinger at 199; Bradley at 336-37.} Therefore, Dellinger maintains, the Court “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.”\footnote{Dellinger, supra note 192, at 199.}
Dellinger’s construction of *Myers* relies on speculation and is entirely unsupported. As discussed earlier, the *Myers* Court took special care to emphasize the constitutional limits of the president’s power under the Take Care Clause. There is little support for Dellinger’s conclusion that *Myers* implicitly approved the notion that the president possesses an independent non-enforcement power, particularly in light of the fact that the *Myers* Court did not even address the President’s refusal to abide by the law at issue. As a logical matter, it certainly does not follow from the Court’s refusal to explicitly disapprove of the President’s action that it must therefore have condoned his conduct. In addition, the executive non-enforcement power that Dellinger derives from this strained reading of *Myers* is wholly inconsistent with Justice Black’s declaration in *Youngstown* that the president’s role in the lawmaking process is strictly limited to (1) proposing measures that he supports and (2) vetoing measures that he disagrees with. Neither Dellinger’s memo, nor Bradley and Posner’s law review article on the subject, addresses how their position comports with the holding of *Youngstown*. Therefore, we can conclude that the weight of the evidence clearly demonstrates that the position that the president has the constitutional authority to decide to suspend a statutory provision based solely on his independent legal judgment that the provision is unconstitutional, finds no support in the text of the Constitution, the intent of the Framers, or the decisions of the Court. Rather, as the Court

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308 See Halstead at 14.

309 See id.

310 See *Youngstown*, 343 U.S. at 587.
declared in *INS v. Chadha*, the proper course of action for a president who is faced with a bill that he believes to be unconstitutional is to exercise his veto power.\(^{311}\)

*The Use of “Constitutional Objection” Signing Statements Improperly Circumvents the Constitutionally Required Lawmaking Process Laid Out in Article I, Section 7*

President George W. Bush’s issuance of “constitutional objection” signing statements, as a vehicle for unilaterally nullifying duly enacted statutes, was in clear violation of the exclusive procedure laid out in Article I, Section 7 for making federal law. The president unlawfully circumvents the constitutionally required legislative process when he signs a bill instead of vetoing it, and simultaneously indicates by means of a signing statement his intention not to enforce the bill in its entirety. Under these circumstances, the president effectively creates a new law, one which was never enacted by Congress.\(^{312}\) The American Bar Association (“ABA”) concurred with this position, declaring in its report that signing statements 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.”\(^{313}\) President Bush effectively considered his authority to issue presidential vetoes and “constitutional objection” signing statements as one in the same, and categorically preferred to exercise the latter power in order to diminish Congress’ ability to override his legal judgments. Therefore, President Bush’s frequent use of signing statements as a substitute for the traditional presidential veto, in an effort to


\(^{312}\) *See* Thompson at 195; Lee at 723.

circumvent the constitutionally mandated lawmaking process, violated the sacrosanct doctrine of separation of powers.

Supporters of the expansive use of presidential signing statements respond to this argument in two ways. First, they argue that in order for the president to uphold his oath to “preserve, protect and defend” the Constitution, he may only sign a bill into law if he believes the measure to be constitutional. This argument is unpersuasive since it is disingenuous to say that the president is truly “upholding” his constitutional oath by engaging in such a practice. Rather, what the president is really doing is “cherry-picking” the statutory provisions he approves of, while simultaneously nullifying other sections of the same piece of legislation that he finds objectionable. This executive appropriation of the legislative process is compounded by the fact that a bill modified by a “constitutional objection” signing statement is not subsequently returned to Congress to give it an opportunity to override the president’s objections.

Additionally, supporters attempt to distinguish the legal effect of a “constitutional objection” signing statement from a presidential veto. For instance, Bradley and Posner assert that unlike a presidential veto, which prevents a bill from becoming law in the first place, a bill that is signed by the president retains its legal effect, regardless of any pronouncements made in the president’s signing statement. In other words, a statutory provision that has been annulled

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314 U.S. CONST. art. II. § 1, cl. 8.
316 See id. (statement of Charles J. Ogletree).
317 See Thompson at 195.
318 See Bradley at 338-39; Halstead at 24.
in effect by a “constitutional objection” signing statement still remains on the books, available for application by the courts or by a subsequent president with different constitutional views.\textsuperscript{319} Although this argument has merit in a formalistic sense, from a functional perspective “constitutional objection” signing statements and presidential vetoes can only be differentiated in a single respect: while the latter can be overridden, the former cannot. Contrary to the assertion of Bradley and Posner, a legislative enactment that has been modified by a signing statement does not really remain “on the books,” insofar as it deviates from the original version of the bill enacted by Congress. For instance, it would be futile to argue that the Detainee Treatment Act retained its fully-intended legal effect after President Bush expressly manifested his intention to suspend the McCain Amendment. The position taken by Bradley and Posner would, at least in a practical sense, “authorize the President to create a different law—one whose text was not voted on by either House of Congress or presented to the President for signature.”\textsuperscript{320}

Furthermore, “constitutional objection” signing statements constitute line-item vetoes, which were invalidated by the Court on Presentment Clause grounds in \textit{Clinton v. City of New York}.\textsuperscript{321} Under the reasoning of \textit{Clinton}, such signing statements contravene separation of powers since the Presentment Clause requires to the president, once a bill has been placed on his desk, to either sign or veto the measure in its entirety.\textsuperscript{322} By approving provisions that he likes

\textsuperscript{319} See Bradley at 338-39. See also Lee at 724 (“[S]igning statements have no independent legal effect, unlike a veto ... The signing statement is not a self-executing document but instead requires the president additionally to direct his subordinates to disregard the law.”).

\textsuperscript{320} \textit{Clinton}, 524 U.S. at 448.

\textsuperscript{321} See \textit{id}.

\textsuperscript{322} See \textit{id}. at 438.
and excising provisions that he dislikes through the issuance of a signing statement, the president is in effect exercising line-item veto authority.  

Proponents of “constitutional objection” signing statements counter with essentially the same reply offered in the context of the general Article I, Section 7 objection: while the president’s use of a signing statement to refuse to enforce a particular statutory provision constitutes an “effective” line-item veto, the provision nonetheless retains its “full legal character.” Once again, this attempt to distinguish the primary effect of signing statements from line-item vetoes is unconvincing. Since the principal effect of both line-item vetoes and “constitutional objection” signing statements is to imbue the president with the extraordinary authority to unilaterally alter duly enacted acts of Congress, the two devices cannot be differentiated in any practical sense. As Chad Eggspuehler puts it, “just because a signing statement could not effect an actual, textual change to a statute on the books, this distinction should not categorically rescue the signing statement from the line-item veto’s fate. The signing statement has the ability to inflict real, institutional injury by undermining or disregarding the laws Congress passes.” Additionally, Philip Cooper notes that signing statements “can and have been used as line-item vetoes,” leaving Congress with essentially no recourse to overcome them.

On a different note, Michelle Broadman, Deputy Assistant Attorney General during the Bush administration, asserts that there is a key practical reason why the president should not be

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323 See Eggspuehler at 492.
324 See Halstead at 24; Lee at 723-24.
325 Eggspuehler at 492.
326 Cooper, supra note 210, at 531.
required to veto in whole every bill that he believes to be unconstitutional. While in past decades the veto power may have served as an adequate tool, today it would be extremely inefficient for the president to veto in its entirety every bill containing a single constitutionally objectionable provision. Especially in light of the fact that the modern president is regularly presented with omnibus appropriations bills that are hundreds of pages in length and contain thousands of distinct provisions, from a pragmatic point of view the president cannot afford to veto a such a bill on the basis of one or two constitutionally suspect provisions. The issuance of a veto under such circumstances would “senselessly force Congress to spend months redoing what it already did, simply because the President took issue with a single provision in a bill that is hundreds of pages long.”

While Broadman’s argument may have some practical appeal in the context of the modern age of omnibus legislation, her position nevertheless has no bearing on the Supreme Court’s separation of powers analysis. As highlighted by the Court’s decisions in Little, Youngstown, Chadha, and Clinton, the Court has taken Montesquieu’s classical model very seriously and adopted a rigid Schoolhouse Rock-like separation of powers jurisprudence that gives little weight to contemporary political considerations. Applying this firm conception of separation of powers, Justice Stevens easily concluded in Clinton that the line-item veto usurped the primary function of the legislative branch and was thus unconstitutional, irrespective of any

327 See Signing Statements Hearing, supra note 309 (statement of Michelle Broadman).
328 See id.; Cooper, supra note 157, at 221-22.
329 Thompson at 196. See also, Signing Statements Hearing, supra note 309 (statement of Michelle Broadman).
330 See Eggspuehler at 484-85.
countervailing political benefits.\textsuperscript{331} Thus, although Broadman’s recommendation would in all likelihood increase the convenience and efficiency of the legislative process, it clearly does not comport with the Court’s holding in \textit{Clinton} that the president cannot “cherry-pick” legislation.

The only real distinction between the line-item veto and the “constitutional objection” signing statement is that once the president exercises his line-item veto authority, the specific alteration is explicitly written into the piece of legislation itself. On the other hand, the procedure for issuing a signing statement is more informal, since the president’s disagreement with the original form of the bill is not officially written into the legislation itself. However, from a functional perspective, this distinction is meaningless since both tools serve the same primary purpose: granting the president the “unilateral power to change the text of duly enacted statutes.”\textsuperscript{332} Therefore, “constitutional objection” signing statements are effectively a cloaked version of line-item vetoes, which President Bush claimed were not subject to judicial review. Just like in the case of line-item vetoes, the Presentment Clause unquestionably prohibits the president from suspending a particular provision of a bill while concomitantly approving the remainder of it. When the president engages in such a practice, he usurps the primary function of the legislative branch: to enact the laws of the Nation.

As one final point on the constitutionality of “constitutional objection” signing statements, it is clear that the issuance of such statements is inconsistent with the limitations placed on presidential power in \textit{Youngstown}. The key implication of \textit{Youngstown} for analyzing the validity of signing statements is that when the president decides to implement his own prerogatives rather than the law as written by Congress, he fails to satisfy his constitutional duty

\textsuperscript{331} See \textit{Clinton}, 524 U.S. at 447-48.

\textsuperscript{332} See \textit{Clinton}, 524 U.S. at 447.
to take care that the laws be faithfully executed. The belief grounded in unitary executive theory that the president can unilaterally alter an act of Congress is almost as constitutionally repugnant as the idea that the president can enact a law and then compel Congress to enforce it. If this belief were to hold true, then Montesquieu’s basic division of constitutional powers between the legislature, executive, and judiciary would henceforth cease to exist.

The application of Justice Jackson’s tripartite framework to the situation of the Detainee Treatment Act exemplifies the extent to which the issuance of “constitutional objection” signing statements contradicts the explicit will of Congress. By issuing a signing statement as a vehicle to suspend the McCain Amendment, President Bush acted in direct opposition to the will of Congress, hence placing his conduct in Jackson’s third category. It necessarily follows from this classification that the President’s power to act was at “its lowest ebb.” In fact, this situation fits more clearly into Jackson’s third category than President Truman’s seizure of the steel mills itself. Although Congress rejected an amendment to the Taft-Hartley Act that would have provided the President with the unilateral authority to settle labor disputes, it did not expressly prohibit President Truman from exercising the power to nationalize striking industries in the text of the bill itself. On the other hand, here Congress explicitly prohibited the President from engaging in cruel, inhumane, or degrading treatment in the text of the legislation itself, which was the precise power that President Bush sought to exercise. If the members of Congress had

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333 See Eggspuehler at 487 (“The president acting alone cannot provide the policy by fiat, no more than he can issue the policy (lawmaking) and demand Congress to enforce it (executive).”).

334 See Youngstown, 343 U.S. at 637 (Jackson, J., concurring). There is essentially no chance that the Court would have upheld President Bush’s action under Jackson’s third category since there is no indication that Congress did not possess the Article I authority to enact legislation regulating the treatment of detainees by the military. For example, Article I, Section 8 authorizes Congress to “make Rules for the Government and Regulation of the land and naval Forces.” U.S. CONST. art. 1, § 8. Additionally, there is no indication that the McCain Amendment encroached on an exclusive power of the president under Article II.
intended for the McCain Amendment to be treated as merely advisory in nature or suspended altogether at the behest of the president, then why would they have included it in the original bill?

The administration responded to the allegation that the President’s signing statement had the effect of undermining the unambiguous intent of Congress by asserting unconvincingly that the situation of the Detainee Treatment Act fell into Jackson’s second, as opposed to third, category. Reflecting on the use of signing statements by the Bush administration at a 2006 panel discussion held at Duke Law School, Walter Dellinger insightfully pointed out the primary flaw in the administration’s argument. “The president has sweeping authority to act when Congress has been silent and there is no legislation restricting the president’s abilities. But … the administration is wrong in asserting … that Congress can’t place restrictions on presidential powers in areas where it has legislated.” According to Dellinger, the Bush administration mistakenly conflated the second and third categories of Jackson’s legal framework. Prior to Congress’ decision to act in the area of the treatment of detainees, the administration may have been justified in establishing and implementing its own interrogation procedures under Jackson’s second category. However, once Congress decided to include an amendment expressly prohibiting the use of torture in the final bill and that bill had subsequently been signed into law by the President, the administration was constitutionally required to respect and enforce the will of Congress. Therefore, this discussion of the constitutionality of President Bush’s attempt to nullify the McCain Amendment leads to an unavoidable conclusion: under the simple but

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336 Id.
indispensable Montesquieuan conception of separation of powers embodied by the structure of Articles I, II, and III, if the president believes that a particular provision of a bill presented to him is unconstitutional, then the proper course of action is for him to veto it.\footnote{See Kinkopf at 6.}

Conclusion: The Use of “Constitutional Objection” Signing Statements Should be Discontinued

Due to the fact that the issuance of “constitutional objection” presidential signing statements represents a blatant violation of constitutional separation of powers, this device should never again be used as a vehicle to nullify acts of Congress. It appears as though Samuel Alito’s conception of the signing statement has already been abandoned as a matter of fact, as shown by the fact that President Bush himself discontinued the use of signing statements intended to bind Congress and the judiciary to respect the president’s interpretation toward the end of his tenure in office. For example, on October 14, 2008, President Bush issued his last signing statement upon approving the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009. This act authorized funding for national defense, military construction, and national security-related energy programs.\footnote{See Statement on Signing the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, 42 Weekly Comp. Pres. Doc. 1346 (Oct. 14, 2008).} Bush issued a signing statement upon signing the legislation expressing his disagreement with certain provisions, but this one differed significantly from many of his prior statements.

Provisions of the Act, including sections 851, 902, 1211(2), and 1508(b), purport to impose requirements that could inhibit the President's ability to carry out his constitutional obligations to take care that the laws be faithfully executed, to protect national security, to conduct diplomatic negotiations, to supervise the executive branch, to appoint officers of the United States, and to execute his authority as Commander in Chief. The executive branch shall continue to construe
such provisions in a manner consistent with the constitutional authority and obligations of the President.\textsuperscript{339}

A significant omission is apparent upon reading this statement, at least when viewed comparatively with President Bush’s previous signing statements: the term “unitary executive branch” is nowhere to be found. In significant contrast to his earlier statements, Bush did not claim that he would construe these provisions in line with his authority to supervise the unitary executive branch, but rather simply “with the constitutional authority and obligations of the President.”\textsuperscript{340} There is no indication that this signing statement was intended to nullify the contested provisions, but rather to serve as a forum for President Bush to convey his policy views to Congress and the public. In fact, the final signing statement authored by President Bush containing the phrase “consistent with the constitutional authority of the President to supervise the unitary executive branch” was issued upon his approval of the Office of National Drug Council Policy Reauthorization Act of 2006, all the way back on December 29, 2006.\textsuperscript{341} The great majority of the President’s statements issued prior to this date referenced unitary executive theory,\textsuperscript{342} while not a single one issued after this date appealed to this radical theory. Therefore, due to intense media scrutiny of President Bush’s issuance of signing statements in the aftermath of Bush’s nullification of the McCain Amendment,\textsuperscript{343} President Bush eventually realized that he could no longer afford to circumvent acts of Congress by employing a “unitary executive”

\textsuperscript{339} Id.

\textsuperscript{340} Id.


\textsuperscript{342} See Kinkopf at 9.

\textsuperscript{343} See, e.g., Savage, supra note 23; Veto? Who Needs a Veto?, N.Y. TIMES, May 5, 2006 (“This president seems determined not to play by any rules other than the ones of his own making.”).
version of the signing statement. Even President Reagan’s Solicitor General, Charles Fried, has conceded that “[d]espite its ‘perfect logic’ and ‘beautiful symmetry’ Unitary Executive Theory is ‘not literally compelled by the words of the Constitution. Nor [does] the framers’ intent compel this view”\textsuperscript{344}. Thus, it logically follows that “constitutional objection” signing statements, as the outgrowth of unitary executive theory, have no basis in the language of the Constitution or the intent of the Framers as well.

The use of “constitutional objection” signing statements, intended to nullify acts of Congress without giving Congress an opportunity to override the president’s objections as required by the Presentment Clause, should thus be discontinued by future administrations. However, this does not mean that the concept of signing statements as a whole is constitutionally repugnant. There is no constitutional problem with the use of the signing statement in and of itself, but rather the way in which it is used.\textsuperscript{345} As Neil Kinkopf articulates, “[t]he controversy, then, is not over the use of signing statements but over the assertion of a non-enforcement power that is sometimes declared in signing statements.”\textsuperscript{346}

For one, “rhetorical” signing statements serve a useful informational role, by providing a convenient way for the president to articulate his views about the meaning and constitutionality of legislation to both Congress and the public.\textsuperscript{347} As exemplified during the Clinton years, there

\textsuperscript{344} Savage, \textit{supra} note 45, at 50.

\textsuperscript{345} See Halstead at 1 (“No constitutional or legal deficiencies adhere to the issuance of such statements in and of themselves.” Rather, the problem is “the assertions of presidential authority contained therein [and] the substantive executive action taken or forborne with regard to the provisions of law implicated in a presidential signing statement.”).

\textsuperscript{346} Kinkopf at 5.

\textsuperscript{347} See Bradley at 307.
is nothing constitutionally suspect about allowing future presidents to issue signing statements for the sole purpose of announcing their policy views. The continued issuance of Clinton-era signing statements would not only benefit the presidency, but Congress and the public as well. This type of signing statement could provide the president with a forum that he could use in order to express his policy views in a clear and unambiguous manner, which could in turn reduce confusion among both Congress and the public. By making the president’s views on a piece of legislation more accessible to the general public, “rhetorical” signing statements promote public discourse and accountability. Additionally, Halstead notes that the issuance of “rhetorical” signing statements plays an essential role by alerting Congress to the types of statutory provisions that are held in disregard by the sitting president, in turn influencing Congress to initiate systematic monitoring and oversight programs in these areas in order to ensure executive compliance. Thus, “rhetorical” signing statements are no more offensive to the letter and spirit of the Constitution than traditional press releases.

348 See Halstead at 27. There is certainly some merit in the argument put forth by Bradley and Posner among others, that the issuance of “constitutional objection” signing statements is useful insofar as it puts Congress, the judiciary, and the public on notice of the president’s intention to refuse to enforce a statute in its entirety. See Bradley at 310. If Congress and the judiciary are made aware of the president’s desire to nullify a law, then they could potentially take steps to prevent the president from doing so, thereby thwarting a separation of powers crisis. Therefore, as long as signing statements themselves do not have any independent legal effect, it might actually be beneficial from the perspective of ensuring the perpetuation of separation of powers, for the president to issue a “constitutional objection” signing statement when he plans on declining to enforce a particular statutory provision. If the president is planning on violating the law, isn’t it preferable that he declare his intention to do so publicly than to simply refuse to faithfully execute the law surreptitiously, far removed from the watchful eye of the American public? While Bradley and Posner’s argument is somewhat persuasive, it implicitly relies on huge assumption, and one which may turn out to be unwarranted: the existence of a powerful mandamus remedy to halt the president in his tracks. In other words, the purported “notice-awareness” benefit of “constitutional objection” signing statements would only be realized if after the president manifested his intention to refuse to enforce a statutory provision through the issuance of such a statement, the judiciary would actually have the power to enjoin him from carrying out his intentions. What would be the benefit of such notice in the absence of a mechanism to actually restrain the president from violating the law? In all likelihood, such a mandamus remedy carrying the potential to enjoin the president currently does not exist. In the first place, writs of mandamus have only been issued by the courts under very limited
Furthermore, there is certainly some value inherent in Edwin Meese’s formulation of the “interpretive” signing statements as a way for the president to express his opinion about a piece of legislation to the Supreme Court. “The President's intent is, in some circumstances, relevant to determining the intent of the legislation.” For example, Bradley and Posner suggests that if the president served as a key player in the legislative process by working closely with Congress on developing the legislation at issue, then the president’s views are just as relevant as those of circumstances. See Tracey A. Hardin, *Rethinking Independence: The Lack of an Effective Remedy for Improper For-Cause Removals*, 50 VAND. L. REV. 197, 221 (1997). The Supreme Court itself has never directly addressed the question of whether a writ of mandamus could be used to enjoin the president himself. However, the Court has indicated that it would most likely refuse to sanction such a powerful mandamus remedy, in light of the fact that (1) lawsuits against the president raise much more serious separation of powers concerns than suits filed against other executive officers and (2) the Court should usually defer to the president’s judgment of his Article II powers in order to facilitate the effective performance of his duties. See *Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992); Hardin at 222-23. Furthermore, it is a well established rule that courts can only issue writs of mandamus against executive officials to mandate the performance of “ministerial” but not “discretionary” duties. See *Wilbur v. U.S. ex rel. Kadrie*, 281 U.S. 206, 218-19 (1930). Since the president’s decision to refuse to fully implement a statutory provision does not implicate a mere “ministerial” duty, defined as “a simple, definite duty … in respect of which nothing is left to discretion,” *State of Mississippi v. Johnson*, 71 U.S. 475, 498 (1866), the Court would have to abandon this longstanding principle in order to allow a writ of mandamus to effectively enjoin the president from carrying out his stated desire to disobey the law. At least at the current time, there is no indication that the Court would be willing to go down this controversial road. Even if such a mandamus remedy did exist, it is questionable whether the judiciary would actually be willing to assert its power to step in and restrain the president on a regular basis. Especially during wartime and other instances of national exigency, the Court would be very reluctant to flex its judicial muscles and would be inclined to dismiss the matter on political question grounds. See Laura Krugman Ray, *From Prerogative to Accountability: The Amenability of the President to Suit*, 80 KY. L.J. 739, 757 (1992). Thus, although Bradley and Posner assert that the president’s issuance of “constitutional objection” signing statements provides some benefit to Congress, the judiciary, and the public in terms of notice, this benefit is largely illusory and is clearly outweighed by the irreparable institutional harm that would result from the regular issuance of “constitutional objection” signing statements.

349 See Eggspuehler at 493.

Congress. It could be argued that allowing the president to articulate his view to the Court, as a counterpart to the congressional record, actually serves to advance the Montesquieuan conception of separation of powers by minimizing the likelihood that the Court will simply rubber stamp Congress’ interpretation of the legislation at issue, thereby abdicating its constitutional role “to say what the law is.” Why only allow Congress, and not the president, to convey its opinion on a piece of legislation to the Court?

However, it is imperative to note that although the judiciary should consider “interpretive” signing statements in statutory construction, it should not accord them decisive weight. According “interpretive” signing statements determinative weight would undermine separation of powers to the same extent as the issuance of “constitutional objection” signing statements, by effectively allowing the president to legislate through a “judicial construction” alternative to the exclusive legislative process set forth in Article I, Section 7. Additionally, due to the fact that interpretive signing statements may be prompted by opportunistic motives, they should be accorded only little weight in statutory construction. Richard Epstein persuasively argues that due to the potential for opportunism, signing statements should be given no more weight in statutory interpretation than ordinary law review articles or op-ed pieces. Nevertheless, the theory that according any weight whatsoever to signing statements

351 See Bradley at 364 (“Because he is usually a pivotal member of the legislative coalition, because he is usually charged with enforcement in the statute, and because his enforcement of the statute is politically constrained, his statement will often provide useful information about the meaning of the statute.”).

352 Marbury, 5 U.S. at 178.

353 See Garber at 375.

impermissibly permits the president to participate in the lawmaking process, misinterprets the American conception of separation of powers. It is not a violation of the sacrosanct principle of separation of powers for the president to play any role, no matter how small, in the legislative process. Montesquieu’s classical model of separation of powers incorporated by the Constitution does not contemplate a total separation between the three branches but rather recognizes the existence of blended powers. In stark contrast to the power claimed by President Bush to speak with the force of law and compel the other branches to abide by his constitutional interpretation, the validation of “interpretive” signing statements would merely authorize the president to do what he already does on a daily basis: interpret the law within the confines of the executive branch. Therefore, unlike “constitutional objection” signing statements, the issuance of “interpretive” signing statements does not raise noteworthy separation of powers concerns.

This Paper appears to take the position that the president can never refuse to enforce a law, regardless of his personal views about its constitutionality. While this view seems to be compelled by the Constitution’s text, the intent of the Framers, and the decisions of the Court, this stance may under special circumstances counterproductively lead to the enforcement of patently unconstitutional laws with no means for recourse. Kinkopf notes that in some cases, a president’s decision to enforce a law that he believes to be obviously unconstitutional may serve to deprive the judiciary of the opportunity to resolve the legal question altogether. For example, if President Wilson had enforced the provisions of the Tenure in Office Act, the Court never

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356 See Kinkopf at 7 (“The absolutist position can actually lead to a situation in which unconstitutional laws are enforced with no meaningful opportunity for judicial review.”).
would have decided *Myers* since the issue would have been rendered moot.\(^\text{357}\) Consequently, one key exception must be drawn to this otherwise categorical rule: the president has the authority to refuse to enforce a statutory provision that clearly violates a Supreme Court precedent. Thus, the overarching rule can be restated as follows: the president has an obligation to always enforce a statute regardless of whether or not he believes it to be constitutional, unless and until the courts hold the statute unconstitutional.\(^\text{358}\) This narrow exception is needed for situations in which Congress enacts a statutory provision that patently violates a Supreme Court precedent. For instance, in the aftermath of *Chadha*, hardly anyone has levied criticism against presidents who have refused to enforce subsequently enacted legislative veto provisions. If presidents did not have the authority to ignore legislative veto provisions, then *Chadha* would be rendered a nullity.

However, this Paper takes the position that the determination of whether or not a particular statutory provision is in clear violation of a Supreme Court precedent should not be left to the president alone, since such a power could be subject to abuse. Instead, the president should be imbued with the authority to seek a declaratory judgment by an Article III court on whether a specific provision enacted by Congress violates a clearly established Supreme Court precedent. In this way, the president would be provided with a limited non-enforcement mechanism in the context of statutes that indisputably contravene constitutional doctrine, while still remaining true to Montesquieu’s classical model of separation of powers.

\(^{357}\) See id.

It could be argued at this point that allowing future presidents to continue the use of signing statements, even under the Clinton model, still leaves open the possibility of their abuse. In order to prevent this, it is imperative to develop standards by which to distinguish between appropriate and inappropriate uses of signing statements. These standards should include the following. The signing statement:

- Cannot be used in order to manifest the president’s intention to refuse to enforce a law in its entirety.\(^{359}\)
- Cannot be used in order to nullify an act of Congress in its entirety.
- Cannot be used as the functional equivalent of a line-item veto, thereby excising a specific section of an act of Congress and unilaterally modifying the legislation in violation of *Clinton v. City of New York*.
- Must be issued for the sole purpose of clarifying or expressing the president’s view on an issue of relative importance.
- Must not attempt to create a binding interpretation of law on the other two branches of government.

This list of standards is not meant to be exhaustive, but rather is intended to serve as the fundamental underpinnings of a more comprehensive framework governing the use of presidential signing statements. However, this framework standing alone will be unable to curtail the power of the presidency. A body must be created in order to add to this list of standards and decide on a case-by-case basis whether or not a sitting president’s issuance of a signing statement violates the Constitution. One suggestion is for Congress to establish such a body in

\(^{359}\) Subject to the “declaratory judgment” limitation previously mentioned.
order to ensure that the president is not overstepping his bounds. John Dean proposes that “Congress [should] establish its own non-partisan legal division, not unlike the Congressional Research Service, to protect its own interests, since the Department of Justice may have conflicts.” This Paper concurs with Dean that this division should be housed in Congress, as opposed to the Justice Department, since the high-level officials in the Justice Department may be indebted to the sitting president. Such a division should be composed of both practicing lawyers and those working in academia, and should seek to accommodate a diverse range of legal ideologies. Every time a future president issues a signing statement, this body should make note of it, in order to ensure that the sitting president is not using the statement for a forbidden purpose. At the end of each calendar year, this division should also issue a comprehensive report detailing the current president’s use of signing statements and analyzing any significant trends in their use. In this way, the president would be provided with enough flexibility to issue signing statements in order to express his policy priorities and raise constitutional concerns, but would be strictly prohibited from using them in a manner that contravenes separation of powers.

The creation of this body in and of itself is not enough, however, to prevent the sitting president from simply ignoring the division’s decrees and continuing to issue signing statements manifesting the president’s intention to refuse to enforce the law as written. Therefore, the creation of this division needs to be coupled with a corollary proposal: conferring upon Congress legal standing to challenge presidential signing statements before the Supreme Court whenever the president manifests his unwillingness to fully enforce a statutory provision. Senator Arlen

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Specter proposed a similar measure in the Presidential Signing Statements Act of 2006.\textsuperscript{361} Congress should thus enact a measure providing for the expedited judicial review of “constitutional objection” signing statements in order to prevent future presidents from running roughshod over the sacrosanct principle of separation of powers as President Bush did. “The broad assertions of unitary-executive authority that President Bush has made in his signing statements negatively impact Congress by usurping its power of oversight and, in some instances, nullifying the laws that it has enacted in the absence of a presidential veto.”\textsuperscript{362} Under this framework regulating the use of presidential signing statements, never again will a president be permitted to assume the extraordinary authority to nullify an act of Congress by simply referring to an obscure legal theory. The “constitutional objection” version of presidential signing statements designed by Samuel Alito and subsequently adopted by President Bush represents a serious threat to the principle of separation of powers and thus should be discarded in the future.

“In America, the law is king. For as in absolute governments the King is law, so in free countries the law ought to be king; and there ought to be no other.”\textsuperscript{363} In his pamphlet \textit{Common Sense}, Thomas Paine stated that unlike in England where the Crown ruled supreme by means of the royal prerogative power, in America, the rule of law was to reign over the land. By issuing numerous “constitutional objection” signing statements during his time in office as a vehicle for modifying or nullifying duly enacted statutory provisions, President George W. Bush reversed Paine’s timeless principle. President Bush marginalized the role of Congress during his

\textsuperscript{361} S. 3731, 109th Cong. (2nd sess. 2006). \textit{See also} Savage, \textit{supra} note 23.

\textsuperscript{362} Biller at 1132.

\textsuperscript{363} \textsc{Thomas Paine}, \textit{Common Sense} (1776).
presidency by unilaterally exercising the power to substantively alter acts of Congress without providing Congress an opportunity to override his objections, in clear violation of the Presentment Clause. The Framers would be outraged by the way in which President Bush has attempted to consolidate the power to create, enforce, and interpret the law into the hands of a single monarch-like individual. Future presidents should unconditionally abandon the use of “constitutional objection” signing statements in order to avoid what Montesquieu feared most: “[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty.” On a somewhat promising note, President Obama’s use of signing statements has thus far remained true to Montesquieu’s classical model of separation of powers: not a single one contains the worrisome phrase *unitary executive branch.*

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364 Montesquieu at ¶4.

365 See Daphne Eviatar, *Controversy Grows Over Obama Signing Statements*, WASHINGTON INDEPENDENT, Aug. 10, 2009 (articulating that instead of issuing the controversial “unitary executive” signing statements of the Bush years, Obama’s signing statements have generally comported with the law).