PRESIDENTIAL SIGNING STATEMENTS

Like many Presidents before him, President Bush has issued statements on signing legislation into law. Presidents have used these “signing statements” for a variety of purposes. Sometimes Presidents use signing statements to explain to the public, and more particularly to interested constituencies, what the President understands to be the likely effects of the bill.

Presidents throughout history also have issued what some have called “constitutional” signing statements, and it is this use of the signing statement that has recently been the subject of public attention. Presidents are sworn to “preserve, protect, and defend the Constitution,” and thus are responsible for ensuring that the manner in which they enforce acts of Congress is consistent with America’s founding document. Presidents have long used signing statements for the purpose of “informing Congress and the public that the Executive believes that a particular provision would be unconstitutional in certain of its applications,” Office of Legal Counsel, The Legal Significance of Presidential Signing Statements, 17 Op. O.L.C. 131, 131 (1993) (available at http://www.usdoj.gov/olc/signing.htm); Office of Legal Counsel, Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 202 (1994) (“[E]very President since Eisenhower has issued signing statements in which he stated that he would refuse to execute unconstitutional provisions”) (available at http://www.usdoj.gov/olc/nonexecut.htm), or for stating that the President will interpret or execute provisions of a law in a manner that would avoid constitutional infirmities. As Assistant Attorney General Walter Dellinger noted early during the Clinton Administration, “[s]igning statements have frequently expressed the President’s intention to construe or administer a statute in a particular manner (often to save the statute from unconstitutionality).” 17 Op. O.L.C. at 132 (emphasis added).

President Bush, like many of his predecessors dating back at least to President James Monroe, has issued constitutional signing statements. The constitutional concerns identified in these statements often concern provisions of law that could be read to infringe explicit constitutional provisions (such as the Recommendations Clause, the Presentment Clauses, and the Appointments Clause) or to violate specific constitutional holdings of the Supreme Court. Common examples are provided below.

President Bush’s use of “signing statements” is consistent with tradition.

- Presidents have issued constitutional signing statements since the early years of the Republic. One scholar identifies President James Monroe as the first to issue a constitutional signing statement, when he stated that he would construe a statutory provision in a manner that did not conflict with his prerogative to appoint officers. See Christopher Kelley, A Comparative Look at the Constitutional Signing Statement 5 (2003) (available at http://mpsa.indiana.edu/conf2003papers/1031858822). Louis Fisher of the Congressional Research Service notes that in 1830, Andrew Jackson “signed a bill and simultaneously sent to Congress a message” setting forth his interpretation “that restricted the reach of
the statute.” 17 Op. O.L.C. at 138 (quoting Louis Fisher, Constitutional Conflicts between Congress and the President 128 (3d ed. 1991)). Assistant Attorney General Dellinger conducted a thorough study and concluded that “signing statements of this kind can be found as early as the Jackson and Tyler Administrations, and later Presidents, including Lincoln, Andrew Johnson, Theodore Roosevelt, Wilson, Franklin Roosevelt, Truman, Eisenhower, Lyndon Johnson, Nixon, Ford and Carter, also engaged in the practice.” 17 Op. O.L.C. at 138.

- In recent presidencies, the use of the constitutional signing statement has become more common. While the task of counting signing statements is inexact because of difficulties in characterizing some statements, Presidents Reagan, George H.W. Bush, Clinton, and George W. Bush have issued constitutional signing statements with respect to similar numbers of laws. According to one scholar, President Reagan issued constitutional signing statements with respect to 71 laws; George H.W. Bush, 146; Clinton, 105. See Kelley, supra, at 18. By our count, President Bush has issued such statements with respect to 104 laws as of January of this year.

The practice of issuing signing statements does not, as some critics have charged, mean that a President has acted contrary to law.

- The practice is consistent with, and derives from, the President’s constitutional obligations, and is an ordinary part of a respectful constitutional “dialogue” between the Branches.

- The Constitution requires the President to take an oath to “preserve, protect, and defend the Constitution,” and directs him to “take care that the Laws be faithfully executed.” When Congress passes legislation containing provisions that could be construed or applied in certain cases in a manner as contrary to well settled constitutional principles, the President can and should take steps to ensure that such laws are interpreted and executed in a manner consistent with the Constitution.

  - The Constitution contemplates that Presidents interpret laws in the course of implementing them. The Supreme Court specifically has stated that the President has the power to “supervise and guide [Executive officers’] construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone,” Myers v. United States, 272 U.S. 52, 135 (1926); see also Bowsher v. Synar, 478 U.S. 714, 733 (1986) (“Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of ‘execution’ of the law.”).
Employing signing statements to advise Congress of constitutional objections is actually more respectful of Congress’s role as an equal branch of government than the alternatives proposed by some critics.

- Recent administrations, including the Reagan, George H.W. Bush, and Clinton Administrations, consistently have taken the position that “the Constitution provides [the President] with the authority to decline to enforce a clearly unconstitutional law.” 17 Op. O.L.C. at 133 (opinion of Assistant Attorney General Dellinger) (noting that understanding is “consistent with the view of the Framers” and has been endorsed by many members of the Supreme Court); 18 Op. O.L.C. at 199 (opinion of Assistant Attorney General Dellinger) (noting that “consistent and substantial executive practice” since “at least 1860 assert[s] the President’s authority to decline to effectuate enactments that the President views as unconstitutional”); Attorney General’s Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55, 59 (1980) (opinion of Benjamin R. Civiletti, Attorney General to President Carter) (“the President’s constitutional duty does not require him to execute unconstitutional statutes”); see also 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution 446 (2d ed. 1836) (noting that just as judges have a duty “to pronounce [an unconstitutional law] void . . . In the same manner, the President of the United States could . . . refuse to carry into effect an act that violates the Constitution.”) (statement of James Wilson, signer of Constitution from Pennsylvania). Rather than tacitly placing limitations on the enforcement of provisions (or declining to enforce them), as has been done in the past, signing statements promote a constitutional dialogue with Congress by openly stating the interpretation that the President will give certain provisions.

- It is not the case, as some have suggested, that the President’s only option when confronting a bill containing a provision that is constitutionally problematic is to veto the bill. Presidents Jefferson (e.g., the Louisiana Purchase), Lincoln, Theodore Roosevelt, Wilson, Franklin Roosevelt, Truman, Eisenhower, Kennedy, Lyndon Johnson, Ford, and Carter have signed legislation rather than vetoing it despite concerns that the legislation posed constitutional concerns. See 17 Op. O.L.C. at 132 nn.3 & 5, 134, 138; see INS v. Chadha, 462 U.S. 919, 942 n.13 (1983) (“it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds”).
Compared to vetoing a bill, giving constitutionally infirm provisions a “saving” interpretation through a signing statement gives fuller effect to the wishes of Congress by giving complete effect to the vast majority of a law’s provisions. This approach is not, as some have suggested, an affront to Congress. Instead, it gives effect to the well established legal presumption that Congress did not enact an unconstitutional provision. As Assistant Attorney General Dellinger explained, this practice is “analogous to the Supreme Court’s practice of construing statutes, where possible, to avoid holding them unconstitutional.” A veto, by comparison, would render all of Congress’s work a nullity, even if, as is often the case, the constitutional concerns involve relatively minor provisions of major legislation.

This approach is also fully consistent with past practice. As Assistant Attorney General Dellinger explained early during the Clinton Administration: “In light of our constitutional history, we do not believe that the President is under any duty to veto legislation containing a constitutionally infirm provision.” Rather, giving problematic provisions a “saving” construction in a signing statement “serve[s] legitimate and defensible purposes.”

Many of President Bush’s constitutional signing statements have sought to preserve three specific constitutional provisions that are sometimes overlooked in the legislative process: the Recommendations Clause; the Presentment Clauses; and the Appointments Clause. While critics claim that the President has used signing statements in “unprecedented fashion,” his constitutional signing statements are completely consistent with those of his predecessors.

- **Recommendations Clause.** Presidents commonly have raised objections when Congress purports to require the President to submit legislative recommendations, because the Constitution vests the President with discretion to do so when he sees fit, stating that he “shall from time to time . . . recommend to [Congress’s] Consideration such Measures as he shall judge necessary and expedient.” U.S. Const., Art. II, § 3, cl. 1.

  - President Bush raised this objection 55 times in his 104 constitutional signing statements.
  - Bush: “To the extent that provisions of the Act, such as sections 614 and 615, purport to require or regulate submission by executive branch officials of legislative recommendations to the Congress, the executive branch shall construe such provisions in a manner consistent with the President’s constitutional authority to
supervise the unitary executive branch and to submit for congressional consideration such measures as the President judges necessary and expedient.” Statement on Signing the Intelligence Authorization Act for Fiscal Year 2005 (Dec. 23, 2004).

- Clinton: “Because the Constitution preserves to the President the authority to decide whether and when the executive branch should recommend new legislation, Congress may not require the President or his subordinates to present such recommendations (section 6). I therefore direct executive branch officials to carry out these provisions in a manner that is consistent with the President's constitutional responsibilities.” Statement on Signing the Shark Finning Prohibition Act (Dec. 26, 2000).

- **Presentment Clauses/Bicameralism/INS v. Chadha.** Presidents commonly raise objections when Congress purports to authorize a single House of Congress to take action on a matter in violation of the well established rule, embodied in the Supreme Court’s decision in *INS v. Chadha*, 462 U.S. 919, 958 (1983), that Congress can act only by “passage by a majority of both Houses and presentment to the President.” See U.S. Const., Art. I, § 7 (requiring that bills and resolutions pass both Houses before being presented to the President).

  - President Bush raised this objection 44 times in his 104 constitutional signing statements.
  - Bush: “The executive branch shall construe certain provisions of the Act that purport to require congressional committee approval for the execution of a law as calling solely for notification, as any other construction would be inconsistent with the constitutional principles enunciated by the Supreme Court of the United States in *INS v. Chadha*.” Statement on Signing the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act (Dec. 30, 2005).
  - Clinton: “There are provisions in the Act that purport to condition my authority or that of certain officers to use funds appropriated by the Act on the approval of congressional committees. My Administration will interpret such provisions to require notification only, since any other interpretation would contradict the Supreme Court ruling in *INS v. Chadha*.” Statement on Signing the Consolidated Appropriations Act, FY 2001 (Dec. 21, 2000).

- **Appointments Clause.** The Appointments Clause of the Constitution, U.S. Const., Art. II, § 2, provides that the President, with the advice and consent of the Senate, shall appoint principal officers of the United States (heads of agencies, for example); and that “inferior officers” can be appointed only by the President, by the heads of “Departments” (agencies), or by the courts. Presidents commonly raise an objection when Congress purports to restrict the President’s ability to
appoint officers, or to vest entities other than the President, agency heads, or courts with the power to appoint officers.

- President Bush raised this objection 19 times in his 104 constitutional signing statements.
- Bush: “The executive branch shall construe the described qualifications and lists of nominees under section 4305(b) as recommendations only, consistent with the provisions of the Appointments Clause of the Constitution.” Statement on Signing the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Aug. 10, 2005).
- Clinton: “Under section 332(b)(1) of the bill, the President would be required to make such appointments from lists of candidates recommended by the National Association of Insurance Commissioners. The Appointments Clause, however, does not permit such restrictions to be imposed upon the President's power of appointment. I therefore do not interpret the restrictions of section 332(b)(1) as binding and will regard any such lists of recommended candidates as advisory only.” Statement on Signing Legislation To Reform the Financial System (Nov. 12, 1999).

Many of President Bush’s constitutional signing statements have sought to preserve the confidentiality of national security information.

- The Supreme Court has held that the Constitution gives the President authority to control the access of Executive Branch officials to classified information. The President’s “authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant.” Dep’t of Navy v. Egan, 484 U.S. 518, 527 (1988).

Presidents commonly have issued signing statements when newly enacted provisions might be construed to involve the disclosure of sensitive information.

- President Bush raised this objection 60 times in his 104 constitutional signing statements.
- Bush: “Sections 2(5) and 2(6) of the Act purport to require the annual report of the Secretary of the Treasury to include a description of discussions between the United States and Mexican governments. In order to avoid intrusion into the President's negotiating authority and ability to maintain the confidentiality of diplomatic negotiations, the executive branch will not interpret this provision to require the disclosure of either the contents of diplomatic communications or specific plans for particular negotiations in the future.” Statement on Signing Legislation on

- Clinton: “A number of other provisions of this bill raise serious constitutional concerns. Because the President is the Commander in Chief and the Chief Executive under the Constitution, the Congress may not interfere with the President's duty to protect classified and other sensitive national security information or his responsibility to control the disclosure of such information by subordinate officials of the executive branch (sections 1042, 3150, and 3164) . . . . To the extent that these provisions conflict with my constitutional responsibilities in these areas, I will construe them where possible to avoid such conflicts, and where it is impossible to do so, I will treat them as advisory. I hereby direct all executive branch officials to do likewise.” Statement on Signing the National Defense Authorization Act for Fiscal Year 2000 (Oct. 5, 1999).

- Eisenhower: “I have signed this bill on the express premise that the three amendments relating to disclosure are not intended to alter and cannot alter the recognized Constitutional duty and power of the Executive with respect to the disclosure of information, documents, and other materials. Indeed, any other construction of these amendments would raise grave Constitutional questions under the historic Separation of Powers Doctrine.” Pub. Papers of Dwight D. Eisenhower 549 (1959).

President Bush also has used signing statements to safeguard the President’s well-established role in the Nation’s foreign affairs and the President’s wartime power. These signing statements also are in keeping with the practice of his predecessors.

- While some critics have argued that President Bush has increased the use of Presidential signing statements, any such increase must be viewed in light of current events and the legislative response to those events. While President Bush has issued numerous signing statements of this sort, the significance of legislation affecting national security has increased markedly since the September 11th attacks and Congress’s authorization of the use of military force against the terrorists who perpetrated those attacks. Even before the War on Terror, President Clinton issued numerous such statements. One scholar identified this objection as the most common use of the constitutional signing statements by Presidents Clinton and George H.W. Bush, because it is in this area “where presidential power is at its zenith.” Kelley, supra, at 18.

- Bush: “Section 107 of the Act purports to direct negotiations with foreign governments and international organizations. The executive branch shall implement section 107 in a manner consistent with the Constitution's grant to the President of the
authority to conduct the foreign affairs of the United States.”

- Bush: “The executive branch shall construe subsection 1025(d) of the Act, which purports to determine the command relationships among certain elements of the U.S. Navy forces, as advisory, as any other construction would conflict with the President's constitutional authority as Commander in Chief.” *Statement on Signing the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act, 2005* (May 11, 2005).

- Clinton: “Section 610 of the Commerce/Justice/State appropriations provision prohibits the use of appropriated funds for the participation of U.S. armed forces in a U.N. peacekeeping mission under foreign command unless the President's military advisers have recommended such involvement and the President has submitted such recommendations to the Congress. The ‘Contributions for International Peacekeeping Activities’ provision requires a report to the Congress prior to voting for a U.N. peacekeeping mission. These provisions unconstitutionally constrain my diplomatic authority and my authority as Commander in Chief, and I will apply them consistent with my constitutional responsibilities.” *Statement on Signing the Omnibus Consolidated and Emergency Supplemental Appropriations Act* (Oct. 23, 1998).

- Clinton: “I also oppose language in the Act related to the Kyoto Protocol . . . . My Administration's objections to these and other language provisions have been made clear in previous statements of Administration policy. I direct the agencies to construe these provisions to be consistent with the President's constitutional prerogatives and responsibilities and where such a construction is not possible, to treat them as not interfering with those prerogatives and responsibilities.” *Statement on Signing the Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriations Act* (Dec. 21, 2000).

- Carter: Congress “cannot mandate the establishment of consular relations at a time and place unacceptable to the President.” *Statement on Signing the FY 1980-81 Department of State Appropriations Act*, see 2 Pub. Papers of Jimmy Carter 1434 (1979).

- Nixon: Mansfield Amendment setting a final date for the withdrawal of U.S. Forces from Indochina was “without binding force or effect.” Pub. Papers of Richard Nixon 1114 (1971).

- Truman: “I do not regard this provision [involving loans to Spain] as a directive, which would be unconstitutional, but instead as an authorization, in addition to the authority already in existence under which loans to Spain may be made.” *Statement on Signing*

- Wilson: Expressed an intention not to enforce a provision on the grounds it was unconstitutional because doing so “would amount to nothing less than the breach or violation” of some thirty-two treaties. Louis Fisher, Constitutional Conflicts between Congress and the President 134 (4th ed. 1997).