

# William & Mary Bill of Rights Journal

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Volume 16 (2007-2008)  
Issue 1 *Symposium: The Last Word? The  
Constitutional Implications of Presidential  
Signing Statements*

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Article 14

October 2007

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### Repository Citation

Peter M. Shane, *Presidential Signing Statements and the Rule of Law as an "Unstructured Institution"*, 16 Wm. & Mary Bill Rts. J. 231 (2007), <https://scholarship.law.wm.edu/wmborj/vol16/iss1/14>

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## PRESIDENTIAL SIGNING STATEMENTS AND THE RULE OF LAW AS AN “UNSTRUCTURED INSTITUTION”\*

Peter M. Shane\*\*

Both inside and outside the academy, a debate is raging in the United States about the relative merits of what might be called *presidentialist* and *pluralist* interpretations of the separation of powers. Presidentialism imagines that the Constitution vests in the President a fixed and expansive category of executive authority that is largely immune to legislative control or judicial review.<sup>1</sup> Pluralism sees checks and balances as the principle animating the separation of powers.<sup>2</sup> It disputes the fixed nature of executive power.<sup>3</sup> It sees questions of separation of powers interpretation as calling regularly for the careful calibration of each branch’s authorities, all in the name of government accountability to the law and to the citizenry.<sup>4</sup>

Aggressive presidentialism was a pillar of constitutional understanding in the administrations of both Ronald Reagan and George H.W. Bush. The Clinton administration sometimes tended towards presidentialism in its handling of regulatory oversight, although its professed constitutional doctrine was more often pluralist in tone. Today, we are six years into the most radically presidentialist administration in history, the presidency of George W. Bush. It is an administration that has frequently announced the substance of its views on executive power through an unusual medium—statements that the President releases in connection with his signing proposed legislation into law.

What I want to argue here, however, is an even subtler connection between the radical presidentialism of the current Bush administration and its practice with regard to presidential signing statements. In particular, I want to argue that the Bush administration’s use of signing statements embodies a disturbingly thin and formalistic view of the rule of law that goes hand-in-hand with its vision of the separation of powers.

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\* Portions of this paper are excerpted from PETER M. SHANE, *MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* (forthcoming, University of Chicago Press 2009).

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<sup>1</sup> See Peter M. Shane, Symposium, *Policy at the Intersection of Law and Politics, When Inter-branch Norms Break Down: Of Arms-for-Hostages, “Orderly Shutdowns,” Presidential Impeachments, and Judicial “Coups,”* 12 CORNELL J.L. & PUB. POL’Y 503, 534 (2003).

<sup>2</sup> See Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 ARK. L. REV. 161, 195 (1995).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

The Bush administration's signing statement practice has been notable for two distinct reasons. The first is the extremity of the constitutional vision that these statements typically assert, especially with regard to the so-called "unitary executive."<sup>5</sup> The second is their sheer volume, unmatched in the entire history of the executive.<sup>6</sup> Given the various other ways in which the administration has professed allegiance to its radical view of the separation of powers, the substantive content of the Bush signing statements is not surprising. But the obvious question is, why so many?

To appreciate the puzzle, we have to recall that these views, even if earlier GOP Presidents pushed them less aggressively, were certainly held also by leading legal thinkers under both Presidents Reagan and Bush 41.<sup>7</sup> So why does President Bush 43—as opposed to Reagan or Bush 41—feel compelled so often to resort to signing statements in order to express his extreme constitutional theories? Bush's recent GOP predecessors, facing Congresses controlled by Democrats, certainly had less political room to work their will than he does. One might think that they would have been the more strident in asserting their prerogatives of unilateral action. Is it not odd that President Bush would be so insistent on his prerogatives in the face of Congresses entirely in GOP control from 2003 to 2006,<sup>8</sup> and partially in GOP control from 2001 to 2002?<sup>9</sup>

To grasp this phenomenon, I think we have to understand that presidentialism and pluralism can each operate not just as a constitutional philosophy, but also as an ethos, that is, as a fundamental element of the spirit with which the government conducts business. The Bush administration has operated until recently against the backdrop of Republican-controlled Congresses and a Supreme Court highly deferential to executive power. This political context has enabled the Bush administration not only to elaborate presidentialism as a theoretical stance but also to operate very largely within the premises of presidentialism, as if presidentialism really were what the Constitution envisions. The Bush 43 administration has thus been a supreme laboratory of presidentialism at work. Not only has it insisted, in theory, on a robust constitutional entitlement to operate free of legislative or judicial accountability, but it also has largely gotten away with this stance. And that success—the administration's unusual capacity to resist answering to Congress and to the courts—has fed, in turn, its sense of principled entitlement, its theory that the Constitution envisions a presidency answerable, in large measure, to no one.

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<sup>5</sup> For an example of a signing statement citing the unitary executive power, see Statement on Signing the Coast Guard and Maritime Transportation Act of 2004, 40 WEEKLY COMP. PRES. DOC. 1518 (Aug. 19, 2004).

<sup>6</sup> See Neil Kinkopf & Peter M. Shane, *Signed Under Protest: A Database of Presidential Signing Statements, 2001–2006* (Ohio State Public Law Working Paper No. 106), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1022202](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1022202).

<sup>7</sup> See *id.*

<sup>8</sup> U.S. CENSUS BUREAU, THE 2007 STATISTICAL ABSTRACT 249 (2007).

<sup>9</sup> *Id.*

Critics of the Bush 43 administration have not infrequently charged that the administration's unilateralism is antagonistic to the rule of law.<sup>10</sup> After all, the ideal of "a government of laws, and not of men"<sup>11</sup> seems on its face to contradict President Bush's expansive claims of plenary authority. Yet, no sane President claims to be above the law, and George W. Bush takes pains to defend his controversial actions as legal. These initiatives have included the widespread warrantless electronic surveillance of Americans<sup>12</sup> and the aggressive interrogation of detainees in the war on terror.<sup>13</sup> It is doubtful that President Bush thinks himself antagonistic to the rule of law. He and his legal advocates presumably have a specific idea of what the rule of law consists of. But what the administration seems to believe in is a version of the rule of law as *formalism*. It is a rule of law that claims to be no more and no less than law as rules. Under the Bush administration's conception of the rule of law, Americans enjoy a "government of laws" so long as executive officials can point, literally, to some formal source of legal authority for their acts. They would presumably count this as the rule of law even if no institution outside the executive were entitled to test the consistency of those acts with the source of legal authority cited.

In our checks and balances system, however, the formalist version of the rule of law runs into two more or less immediate problems. The first is that the Constitution, the document that vests the President with whatever core powers he has, is notoriously vague. How is an executive branch formalist able to extract from such Delphic text the constitutional license for virtually unlimited executive power? The answer turns out to be, in effect, "[b]y converting every acknowledged grant of *some* executive power into the most expansive and rigid category of power consistent with that grant." In other words, to convert vague implications into hard and fast rules, extreme presidentialism takes all conceded kernels of presidential power under the Constitution to their furthest analytically plausible limit.

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<sup>10</sup> See, e.g., Bruce Ackerman, *Bad Party Line: All the Reasons to Hate Bush's Wiretapping Bill*, SLATE, Sept. 18, 2006, <http://www.slate.com/id/2149874/>; Jack Balkin, *No Blank Check For Bush*, HARTFORD COURANT, May 16, 2004, at C1.

<sup>11</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

<sup>12</sup> "In the weeks following the terrorist attacks on our nation, I authorized the National Security Agency, consistent with U.S. law and the Constitution, to intercept the international communications of people with known links to al Qaeda and related terrorist organizations." President's Radio Address (Dec. 17, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051217.html>.

<sup>13</sup> In addition to the terrorists held at Guantanamo, a small number of suspected terrorist leaders and operatives captured during the war have been held and questioned outside the United States, in a separate program operated by the Central Intelligence Agency. . . . This program has been subject to multiple legal reviews by the Department of Justice and CIA lawyers; they've determined it complied with our laws.

President Discusses Creation of Military Commissions to Try Suspected Terrorists (Sept. 6, 2006), available at <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>.

Consider, for example, the implications of the threshold decision by the Framers to make the President chief executive. Everyone agrees, presidentialists and pluralists alike, that the President's position as chief executive implies some scope of constitutionally vested supervisory authority with regard to the rest of the executive branch. But, once that core is conceded, the devotees of presidentialism want to argue that this authority must, as a matter of analytic logic, encompass the power to direct the exercise of any and all discretionary authority vested in any subordinate executive official. In other words, once acknowledged to be the overseer, the President must automatically be regarded as "the Decider."<sup>14</sup> Indeed, according to the formalist mindset, the chief executive power must be extended categorically, or the grant of executive power does not really amount to a rule. The emphasis on rule of law formalism thus seems, at least superficially, to favor analytically expansive interpretation. We will see later what is wrong with this logic.<sup>15</sup>

The second problem, however, is that, as legal formalists, the President's lawyers want to have some piece of paper—parchment might be preferable—to hold up as authoritative legal support for any claim of executive authority. Constitutional text, statutes, and judicial opinions are the pieces of paper that usually serve this kind of function. Unfortunately for the presidentialists, the Constitution is ambiguous at best on the nature of executive power. Congress enacts very few statutes that embody anything like congressional ratification for the executive branch's most prodigious ambitions. There are few judicial opinions supporting the Bush view of the presidency because separation of powers disputes that implicate the President directly are rarely litigated, and the courts have not been receptive to extreme presidentialist claims of executive authority.<sup>16</sup> There are no cases to cite with anything like strong support for many of the President's most frequently asserted claims, and there is frequently strong contrary authority.<sup>17</sup> There is thus a pressing need for the executive branch to manufacture its own legitimating documents, formal pieces of paper that seem to sanction the President's expansive assertions of unilateral power.

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<sup>14</sup> I gratefully borrow the dichotomy of "overseer" and "decider" from the work of Professor Peter Strauss. See Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007).

<sup>15</sup> See *infra* Parts I–III.

<sup>16</sup> For examples of the most significant recent losses for the Bush administration's theories of executive power, see *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (holding that foreign national enemy combatants are entitled to the protections of the Geneva Conventions); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding that a U.S. citizen may be held as an enemy combatant only pursuant to adjudicative procedures to determine his status that are sufficient to meet the constitutional requirement of due process); *Rasul v. Bush*, 542 U.S. 466 (2004) (holding foreign nationals entitled to habeas corpus review of their detention as enemy combatants).

<sup>17</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–38 (1951) (Jackson, J., concurring).

The Bush 43 administration has exhibited both of these behaviors—a tendency towards conceptually rigid interpretations of executive power and a penchant for minting its own currency of formal legal legitimacy. The audaciousness—even bizarreness—of these behaviors paints a clear and unattractive picture of the thin, ideologically driven conception of the rule of law that is a hallmark of modern day presidentialism. But to understand fully what is at stake, it is critical also to contrast rule of law formalism with a more compelling alternative, a version of the rule of law that fits comfortably with checks and balances and respect for constitutional pluralism. I call this alternative the institutionalist conception because it emphasizes the informal norms and processes of official self-restraint that are part of day-to-day government in a checks and balances system. What we count on as the rule of law, under this more attractive conception, depends at least as much on the informal ordering of the three branches' political behavior as it does on the formal rules that purport to delimit each branch's authority.

After laying out the institutionalist version of the rule of law, this Article chronicles the Bush administration's pursuit of its formalist alternative through the proliferation of signing statements in which President Bush has stated constitutional objections to statutes that he proceeds to sign into law. The real world context for these debates may seem tamer than the war powers and national security issues that so often preoccupy our headlines—indeed, obscurity is an essential element of this part of the presidentialist strategy. But the strategy is meant to shore up a power grab in both foreign and domestic policymaking that has huge consequences for the democratic character of our public administration.

#### I. THINKING HARD ABOUT THE FAMILIAR: WHAT DOES THE RULE OF LAW MEAN?

Rule of law is one of those concepts that can seem hopelessly vague to academics but commonsensical to most citizens.<sup>18</sup> Imagine a survey that asks people the meaning of the rule of law or of its close cousin, “a government of laws, and not of men.” It seems a safe wager that the most common answer would be some variant of the following: “The rule of law means that those in power cannot do what they want just because they want to do it, or because they have force on their side. The rule of law means they can do only what the law permits.” Despite the intellectual puzzles that philosophers might extract from that answer—for example, what counts as law?—my brief experience of government<sup>19</sup> also suggests that something like this formulation is deeply ingrained in how most people who work for the government actually think of themselves and of the jobs they do.<sup>20</sup>

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<sup>18</sup> For an exploration of this issue, see Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 *LAW & PHIL.* 137 (2002).

<sup>19</sup> I worked for the Office of Legal Counsel of the United States Department of Justice and for the Office of Management and Budget.

<sup>20</sup> I have earlier explored some of the ideas of this section in Peter M. Shane, *Legal*

Yet, to count as something like plausible common sense, the conventional notion of the rule of law I have just described has to take account of two other equally commonsensical facts. One is that public officials, even if conscientiously attentive to law, will often find the law applicable to their particular problems or opportunities to be genuinely vague. A Federal Communications Commissioner knows, for example, that she cannot impose broadcast licensing conditions that do not serve the “public convenience, interest, or necessity.”<sup>21</sup> But what does that actually mean as a limitation on her decisionmaking?

The second fact is that, with regard to a great deal of—perhaps most—government activity, the chances are remote that law can and will be enforced against nonconforming behavior. Thus, for example, the officials who review Freedom of Information Act requests know that the law imposes a specific obligation to respond within twenty business days.<sup>22</sup> They also know, if they dally for an extra day or two—and probably, much longer than that—nothing adverse will happen to them. They will not be imprisoned, fined, or even reprimanded. Yet, as citizens, we still want and expect them to obey the law. We expect the rule of law to operate even when the prospects of sanction are remote.

The kind of government we have will clearly depend, to a significant degree, on how government officials respond to the inevitability of legal uncertainty and lax enforcement. Government officials might profess allegiance to the rule of law but still interpret every legal ambiguity to favor their personal political preferences. They may indulge their preferences as much as possible even in the implementation of clear rules, so long as they can do so with impunity. As citizens, however, we can safely dismiss this as an illegitimate view of the rule of law for one simple reason: it is unimaginable that any government official would be willing to declare in public, “This is actually how I am behaving.” What government officials want us to believe, even when law is vague and enforcement is uncertain, is that they are behaving in a legally accountable fashion. They want to appear to be guided by reasons they would be willing to declare publicly, and these reasons must be consistent with the law they are charged with implementing. They are thus mindful not only of what makes them personally better off but also of the needs and interests of the public more generally and of all the critical institutions of government. For this account to be plausible, however, the written documents of law have to be buttressed by a set of norms, conventional expectations, and routine behaviors that lead officials to behave as if they are accountable to the public interest and to legitimate sources of legal and political authority, even when the written rules are ambiguous and even when they could probably get away with merely self-serving behavior.

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*Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461, 485 (1987).

<sup>21</sup> 47 U.S.C. § 303 (2000).

<sup>22</sup> 5 U.S.C. § 552(a)(6)(A)(I) (2000).

What I am describing is a version of the rule of law that is not formalistic but institutional. Checks and balances, in operation, depend on an assemblage of norms, cooperative arrangements, and informal coordination activities that actually fit the political science definition of an unstructured institution. James March and Johan Olsen have usefully defined an institution as “a relatively enduring collection of rules and organized practices, embedded in structures of meaning and resources that are relatively invariant in the face of turnover of individuals and relatively resilient to the idiosyncratic preferences and expectations of individuals and changing external circumstances.”<sup>23</sup> Sometimes the relevant “rules and organized practices” are exceedingly clear and documented, like the rules inside the cover of a board game. But sometimes, as political scientist Kenneth Shepsle has pointed out, these rules and practices “are more amorphous and implicit rather than formalized.”<sup>24</sup> We still recognize them as institutions because they “may be described as practices and recognized by the patterns they induce,”<sup>25</sup> but compared to, say, a game of golf, they are, relatively speaking, “unstructured institutions.”<sup>26</sup> Understanding the rule of law as an unstructured institution provides a far more attractive account of what citizens expect from a “government of laws” and a far more plausible account of why they might just get it.

An excellent example of what I have in mind is provided by the traditional stance of Attorneys General with regard to assessing the constitutionality of congressional enactments. For many decades, Attorneys General have advised their executive branch clients that, outside of the separation of powers context, they will not call into question the constitutionality of any congressional enactment unless the law is so patently unconstitutional that no defense of it could be mounted in good conscience.<sup>27</sup> Such deference might be regarded as formally in conflict with the President’s own oath to protect and defend the Constitution<sup>28</sup>—a promise that might entail a more searching

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<sup>23</sup> James G. March & Johan P. Olsen, *Elaborating the “New Institutionalism,”* in THE OXFORD HANDBOOK OF POLITICAL INSTITUTIONS 3, 3 (R.A.W. Rhodes et al. eds., 2006) [hereinafter OXFORD HANDBOOK].

<sup>24</sup> Kenneth A. Shepsle, *Rational Choice Institutionalism*, in OXFORD HANDBOOK, *supra* note 23, at 27.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 30.

<sup>27</sup> Ordinarily, I would be content to say that it is not within the province of the Attorney General to declare an act of Congress unconstitutional—at least, where it does not involve any conflict between the prerogatives of the legislative department and those of the executive department—and that when an act like this, of general application, is passed it is the duty of the executive department to administer it until it is declared unconstitutional by the courts.

Rendition of Opinions on Constitutionality of Statutes—Federal Home Loan Bank Act, 39 Op. Att’y Gen. 11, 16 (1937) (quoting Income Tax-Salaries of President and Federal Judges, 31 Op. Att’y Gen. 475, 476 (1919)).

<sup>28</sup> U.S. CONST. art. II, § 1, cl. 8.



independent judgment. Yet, Attorneys General have realized that, in balancing this independent obligation with the constitutional charge to take care that the laws be faithfully executed,<sup>29</sup> government works better, in the ordinary case, if issues of constitutionality are left for the resolution of a disinterested judicial branch.

In late 2004, a group of former Office of Legal Counsel (OLC) attorneys, led by former Assistant Attorney General Walter Dellinger, were deeply upset by several national security opinions issued by the Bush 43 Justice Department—most notably, the so-called “torture memo” that defined with implausible narrowness the categories of severe physical injury that count legally as torture<sup>30</sup>—and felt compelled to distill their criticisms in the form of recommended prescriptions to guide future OLC attorneys in the process of legal analysis on behalf of the executive branch.<sup>31</sup> Their ten recommendations are all loose norms, not highly specified commands, such as: “OLC’s obligation to counsel compliance with the law, and the insufficiency of the advocacy model, pertain with special force in circumstances where OLC’s advice is unlikely to be subject to review by the courts,”<sup>32</sup> or “Whenever time and circumstances permit, OLC should seek the views of all affected agencies and components of the Department of Justice before rendering final advice.”<sup>33</sup> But the lawyers’ statement does not merely assert these recommendations as future-oriented prescriptions. They purport to be descriptive, “based in large part on the longstanding practices of the Attorney General and the Office of Legal Counsel, across time and administrations.”<sup>34</sup> What they are describing is part of the rule of law as an unstructured institution.

Once we make ourselves aware of the institutionalist version of the rule of law—which I believe to be critical to democratic governance in a society as complex as ours—yet another reason becomes clear for its unattractiveness to the right-wing presidentialists of post-Reagan America. To the Reaganites and their successors, the norms prevailing in American government as of 1980 were ineluctably associated with a public policy regime that they considered too liberal, too egalitarian, too regulatory, too internationalist in outlook, and too oriented towards civil and human rights at home and abroad. Anything based in pre-Reagan institutional norms of governance was thus automatically suspect by virtue of its guilt by historical association with the governing philosophy of the New Deal. This, I think, is a necessary part of the explanation behind a wide range of right-wing norm-breaking initiatives since 1981—including

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<sup>29</sup> *Id.* art. II, § 3.

<sup>30</sup> Memorandum from Jay S. Bybee, Ass’t Att’y Gen., U.S. Dep’t of Justice, for Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A, *reprinted in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 172 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).

<sup>31</sup> Principles to Guide the Office of Legal Counsel, *reprinted in* 81 IND. L.J. 1345, 1348 (2006).

<sup>32</sup> *Id.* at 1350.

<sup>33</sup> *Id.* at 1353.

<sup>34</sup> *Id.* at 1349.

the Iran-Contra affair,<sup>35</sup> the 1995 threat of government shutdown,<sup>36</sup> the impeachment of Bill Clinton,<sup>37</sup> and *Bush v. Gore*.<sup>38</sup> One can add to this list the imprisonment of Americans as enemy combatants, the GOP upending of traditional congressional procedures between 2003 and 2006, and much more. Whether consciously or not, the Right has placed no value on norms of governance that evolved between 1945 and 1980, and often earlier, to make interbranch friction manageable. Put bluntly, the Right wants to jar the national government rightward and assumes that pre-1981 norms are antagonistic to that aim. If long-standing norms of institutional behavior—including rule of law norms—obstruct immediate accomplishment of the right-wing agenda, they are abandoned.

A hallmark of the Bush administration's aggressive presidentialism has thus been a seeming indifference to the informal ordering mechanisms that give life to the rule of law. The administration's professed adherence to the rule of law purports to be based predominantly on compliance with legal documents although, as it turns out, their analysis is coherent only if we accept certain other informal background norms as appropriate—norms that turn out to be deeply unpersuasive. Before turning to that analysis, however, it will be helpful to explore the administration's formalism and indifference to rule of law as expressed in presidential signing statements.

## II. SIGNING STATEMENTS AND THE FLOWERING OF FAUX LAW

Rule of law formalism, in the presidentialist mode, is characterized by two conspicuous impulses. They are the insistence on the expansion of every claim of executive power to the outer limits of analytic logic, and the imperative to generate what looks like legal authority for even utterly unprecedented claims. The most audacious display of these impulses has come with the administration's expanded use of presidential "signing statements" to interpose constitutional objections to congressional bills that the President was actually signing into law. When the President vetoes a bill, the Constitution directs him to return Congress's bill to the first house that voted on it, along with his objections.<sup>39</sup> There is no constitutional requirement for the President to make any statement with regard to those bills he actually signs. Yet, Presidents have long taken various occasions to promulgate signing statements for legislation they are approving. These statements often tout the benefits that the legislation is projected to achieve but may also state the President's policy reservations with respect to aspects of the new law. On occasions that were relatively

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<sup>35</sup> See JOHN PATRICK DIGGINS, RONALD REAGAN: FATE, FREEDOM, AND THE MAKING OF HISTORY 293–302 (2007).

<sup>36</sup> See NIGEL HAMILTON, BILL CLINTON: MASTERING THE PRESIDENCY 569–72 (2007).

<sup>37</sup> H.R. Res. 611, 105th Cong. (1998).

<sup>38</sup> 531 U.S. 98 (2000).

<sup>39</sup> U.S. CONST. art. I, § 7, cl. 2.

rare—until the Bush administration—Presidents also used signing statements to indicate doubts about the constitutionality of particular provisions of the newly enacted statutes they were signing. In such cases, Presidents typically say that they will implement or interpret the statutory provision in question to minimize the perceived constitutional difficulty.

The propriety of this practice is debatable. After all, each President swears to protect and defend the Constitution.<sup>40</sup> If he thinks part of some bill is unconstitutional, should he not feel duty-bound to veto what Congress has enacted? There are good reasons, however, why Presidents may think differently. Most obviously, a great deal of legislation takes the form of a fairly complex package, some of which a President may think is urgently required for the good of the country. Requiring him to veto an entire bill because some narrow feature of the package is arguably unconstitutional may be exacting too high a price in terms of sacrificing the public interest as embodied in those parts of the new law that the President thinks are salutary. Moreover, a President might responsibly take the position that, in the ordinary case, the courts are available to address questions of law. Courts are perhaps better positioned to decide questions of unconstitutionality. If a provision of an enacted bill is unconstitutional in a way that inflicts harm on particular members of the public, anyone harmed can sue to vindicate their rights. A court most often can effectively excise the offending provision from the law.

On a number of occasions, however, Presidents have stated constitutional objections precisely because the law is arguably objectionable in a way that would be very difficult for a private party to challenge in court. In such cases, the President may object because there would not be an effective judicial alternative to test the constitutionality of the offending legal provision. Prior to the Bush administration, a fairly common constitutional objection in signing statements involved a legislative practice called the legislative veto.<sup>41</sup> Congress, from the late 1920s on, started inserting

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<sup>40</sup> *Id.* art. II, § 1, cl. 8.

<sup>41</sup> The following is typical of the genre:

While I am signing S. 1192, it contains a legislative veto provision which the Attorney General advises is unconstitutional. Section 114(e) of the bill would purport to authorize either of two committees of Congress to pass a resolution disapproving the expenditure of any sums in excess of \$29 million from certain rail programs for the rehabilitation of Union Station. However, committees of Congress cannot bind the executive branch in the execution of the law by passing a resolution that is not adopted by both Houses of Congress and presented to the President for approval or veto. Accordingly, this language of section 114(e) must be objected to on constitutional grounds. The Secretary of Transportation will not, consistent with this objection, regard himself as legally bound by any such resolution.

Statement on Signing the Union Station Redevelopment Act of 1981, 1981 PUB. PAPERS 1207 (Dec. 29, 1981).

so-called “legislative veto” provisions into laws that extended some significant administrative authority to the executive branch.<sup>42</sup> Under a legislative veto provision, if Congress delegates administrative authority to an executive agency and then decides it is unhappy with how the executive branch implements that authority, it can nullify what the executive branch has done without enacting a new law.<sup>43</sup> Under a two-house veto, the executive action would be nullified so long as both the House and the Senate disapprove it, even though their disapproval would take the form of a concurrent resolution that would not be sent to the President for *his* signature or veto.<sup>44</sup> Under a one-house veto, either the House or the Senate alone could nullify executive action through its own resolution, again without giving the President any further say in the matter.<sup>45</sup>

Legislative vetoes are all but literally in contradiction with the normal legislative process that the Constitution spells out. Imagine that Congress enacts a law that originally allows the President to implement any of four options for effecting some public policy, A, B, C, or D. If he does D and Congress disapproves, Congress—following the usual legislative process—could always seek to enact a law that amends the first statute, so that, henceforth, only options A, B, and C are authorized. The political difficulty facing Congress, however, would be that the second, amending bill would also get sent to the President for his signature or veto before it could become law. The amendment barring the executive branch from pursuing Option D would become law only if the President signed the second statute, or if Congress enacted the amendment over his veto. It is this opportunity for *presidential* veto that is precisely what the *legislative* veto was trying to avoid. Under a legislative veto provision, Congress would give itself permission to nullify Option D without having to send a new law to the President for his review. Understandably, Presidents reacted adversely to departures from the constitutionally designed legislative process that would undercut their veto power, which is the executive’s primary check on the legislative branch. This would seem to be a separation of powers violation of a high order.

But there was another reason for objecting to legislative vetoes. There was a good case to be made that they were not only unconstitutional—a conclusion that the Supreme Court did, in fact, come to when a legislative veto case finally reached the Court in 1983<sup>46</sup>—but that they were also genuinely detrimental to the public interest.<sup>47</sup> The existence of a legislative veto in an administrative statute creates legal uncertainty. Agencies effectively do not know the scope of their authority until they

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<sup>42</sup> *INS v. Chadha*, 462 U.S. 919, 968 (1983) (White, J., dissenting).

<sup>43</sup> See generally RICHARD J. PIERCE, JR. ET AL., *ADMINISTRATIVE LAW AND PROCESS* 62–68 (4th ed. 2004) (discussing objections to, and litigation over, the legislative veto).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Chadha*, 462 U.S. 919.

<sup>47</sup> See generally Harold H. Bruff & Ernest Gellhorn, *Congressional Control of Administrative Regulation: A Study of Legislative Vetoes*, 90 HARV. L. REV. 1369 (1977) (discussing problems with legislative vetoes).

determine what will pass muster with the current Congress. The President cannot know fully the scope of the authority he originally signed into law. Giving Congress time to decide whether to veto administrative action adds delay to the regulatory process. In promulgating regulations, the executive branch is ordinarily required to publish a notice of its intentions and to allow the public to comment on the regulations in proposed form. The legislative veto process can make a sham out of this process because an agency knows that, no matter what the public says, the agency has to please the current Congress not the public. There are other arguments to be made, pro and con, on the policy merits of legislative vetoes, but the fundamental point is this: in objecting to legislative vetoes, Presidents were objecting to a practice that threatened to undermine their own central role in the scheme of checks and balances, and their objections were based on both strong constitutional argument and strong arguments of public policy.

By one count, the total number of statutory provisions to which Presidents objected on constitutional grounds between the administration of George Washington and the beginning of the first Reagan administration was 101.<sup>48</sup> The advent of the Reagan administration, however, marked both a significant increase in the frequency of the device and a dramatic departure in terms of its intended institutional significance. Attorney General Edwin Meese persuaded West Publishing, which publishes federal laws, also to publish the President's signing statements.<sup>49</sup> The signing statements were intended to become, as one report explained, "a strategic weapon in a campaign to influence the way legislation was interpreted by the courts and Executive agencies."<sup>50</sup>

Over the course of two administrations, President Reagan, through his signing statements, objected to or unilaterally reinterpreted seventy-one statutory provisions.<sup>51</sup> In a single term, President George H. W. Bush objected to 146.<sup>52</sup> Most of the objections involved the President's asserted foreign policy powers, although many reflected the administration's full embrace of the unitary executive theory and some of the more expansive claims of presidentialist constitutionalism.<sup>53</sup> President Clinton used the signing statement device also; his objections to 105 statutory provisions<sup>54</sup> exceeded the record of President Reagan but were more modest than the record of President

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<sup>48</sup> CHRISTOPHER N. MAY, *PRESIDENTIAL DEFIANCE OF "UNCONSTITUTIONAL" LAWS: REVIVING THE ROYAL PREROGATIVE* 76 (1998).

<sup>49</sup> AM. BAR ASS'N, *TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE* 10 (2006), available at [http://www.abanet.org/op/signing-statements/aba\\_final\\_signing\\_statements\\_recommendation-report\\_7-24-06.pdf](http://www.abanet.org/op/signing-statements/aba_final_signing_statements_recommendation-report_7-24-06.pdf).

<sup>50</sup> *Id.*

<sup>51</sup> T. J. HALSTEAD, *CONG. RESEARCH SERV., REPORT FOR CONGRESS: PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS* 3 (2007) available at <http://www.fas.org/sgp/crs/natsec/RL33667.pdf>.

<sup>52</sup> *Id.* at 5.

<sup>53</sup> *See id.*

<sup>54</sup> *Id.* at 6.

Bush 41. In terms of robust presidentialism, however, none of these three Presidents can compete with the record of the Bush 43 administration. In his first six years in office, President George W. Bush raised over 1400 constitutional objections to roughly 1000 statutory provisions, over three times the total of his forty-two predecessors combined.<sup>55</sup> But it is not just the numbers that make the Bush signing statements distinctive. Unlike the long-standing presidential objections to legislative vetoes, the Bush objections are frequently based on no legal authority whatever and have nothing to do with any plausible version of the public interest.

So many examples exist of the bizarreness of this practice that I take, almost at random, the President's signing statement for the 2006 Postal Accountability and Enhancement Act.<sup>56</sup> That Act amends the law describing an agency called the Postal Regulatory Commission. As amended, this rather undramatic law now reads as follows:

The Postal Regulatory Commission is composed of 5 Commissioners, appointed by the President, by and with the advice and consent of the Senate. The Commissioners shall be chosen solely on the basis of their technical qualifications, professional standing, and demonstrated expertise in economics, accounting, law, or public administration, and may be removed by the President only for cause. Each individual appointed to the Commission shall have the qualifications and expertise necessary to carry out the enhanced responsibilities accorded Commissioners under the Postal Accountability and Enhancement Act. Not more than 3 of the Commissioners may be adherents of the same political party.<sup>57</sup>

In signing the act, the President objected to this provision as one of two in the act that "purport to limit the qualifications of the pool of persons from whom the President may select appointees in a manner that rules out a large portion of those persons best qualified by experience and knowledge to fill the positions."<sup>58</sup> He then went on to state that the executive branch would construe these provisions "in a manner consistent with the Appointments Clause of the Constitution."<sup>59</sup> In other words, President Bush wanted to go on record as objecting to this innocuous statute as a violation of his power to nominate and appoint officers of the United States and said he would read the law in some unspecified manner that would be consistent with his authority.

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<sup>55</sup> Kinkopf & Shane, *supra* note 6.

<sup>56</sup> Pub. L. No. 109-435, 120 Stat. 3198 (2006).

<sup>57</sup> Postal Accountability and Enhancement Act, 39 U.S.C.A. § 502(a) (West Supp. 2007).

<sup>58</sup> Statement on Signing the Postal Accountability and Enhancement Act, 42 WEEKLY COMP. PRES. DOC. 2196, 2196 (Dec. 20, 2006).

<sup>59</sup> *Id.*

Putting aside constitutional issues for a moment, what exactly could the President be thinking here? The statute invites the President to nominate new commission members “on the basis of their technical qualifications, professional standing, and demonstrated expertise in economics, accounting, law, or public administration.”<sup>60</sup> What “large portion of those persons best qualified by experience and knowledge” could possibly be excluded by this requirement? The statute does say the President may not appoint more than three of the five commission members from any one political party. He thus has to find at least two Democrats, two Republicans, two independents or some combination in addition to any three Commission members who belong to the same party. It boggles the mind to think of this as a substantial limit on the President’s capacity to identify the best qualified person for any given opening. For it to be any limit at all, there would have to be fewer than two members of the Democratic or Republican parties whom the President would regard as among his favorite candidates for the Postal Regulatory Commission. Because Congress’s specifications are so broad and commonsensical, there is no plausible objection to be made that Congress’s new version of the law compromises the public interest in a serious way. The only tenable reason for objecting would be the formalist syllogism: Congress may not constitutionally demand that the President nominate John Smith or Jill Jones, in particular, for any particular office. To the presidential formalist, this implies that Congress may impose no constraints on the President at all regarding his choice of nominee.

The strangeness of the President’s insistence is all the more apparent, however, if one considers the institutional context we are discussing. The statutory qualifications for postal rate commissioners are legally unenforceable. If the President fails to nominate someone meeting the statutory standards, no one can sue him. Senators might decline to confirm a nominee they believe falls short of the statutory standard, but Senators are entitled to vote no on any nominee for any reason they want, so this hardly leaves the President worse off. To object to a statutory specification of qualifications in this context is really to say to Congress,

I, the President of the United States, am offended, constitutionally speaking, that you think I even have to listen to you with regard to the qualifications of potential office holders. It is irrelevant that this office operates directly to fulfill Congress’s constitutionally vested authorities with regard to interstate commerce and the post.

Many of President Bush’s constitutional objections fall within areas about which Presidents are typically protective. Of the over 1400 objections lodged in signing statements between 2001 and 2006, seventy-six mention potential interference with Commander-in-Chief powers, 147 mention interference with his constitutional authorities regarding diplomacy and foreign affairs, and another 170 point to alleged

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<sup>60</sup> 39 U.S.C.A. § 502(a).

violations of the President's constitutional authorities to withhold or control access to information to protect foreign relations or national security, sometimes mentioning also his power to protect executive branch deliberative processes or the performance of the executive's constitutional duties.<sup>61</sup>

Even in these traditional contexts, however, the substance of the President's objections is often extreme and hypertechnical. For example, one provision alleged to raise issues regarding executive privilege<sup>62</sup> was a legal requirement in the Intelligence Authorization Act for Fiscal Year 2002 that certain reports to congressional intelligence committees must be in writing and include an executive summary.<sup>63</sup> Similarly, the President found a violation of his foreign affairs powers<sup>64</sup> in provisions of the so-called Syria Accountability and Lebanese Sovereignty Restoration Act of 2003 that required him to take certain actions against Syria unless the President either determines and certifies to the Congress that the Government of Syria has taken specific actions or "determines that it is in the national security interest of the United States to" waive such requirements and reports the reasons for that determination to the Congress.<sup>65</sup> In other words, Congress violates the Constitution—according to President Bush—when it requires him to either perform an act or not perform it, at his sole discretion.

For comic constitutionalism, however, it is hard to beat the following: a statutory provision allegedly in potential conflict with the President's Commander-in-Chief powers would put limits on the number of Defense Department civilian and military personnel who could be assigned to the Pentagon's Legislative Affairs office.<sup>66</sup> According to the President, Congress

cannot constitutionally restrict the authority of the President to control the activities of members of the armed forces, including whether and how many members of the Armed Forces assigned to the office of the Chairman of the Joint Chiefs of Staff, the combatant commands, or any other element of the Department of Defense shall perform legislative affairs or legislative liaison functions.<sup>67</sup>

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<sup>61</sup> Kinkopf & Shane, *supra* note 6, at 177.

<sup>62</sup> Statement on Signing the Intelligence Authorization Act for Fiscal Year 2002, 37 WEEKLY COMP. PRES. DOC. 1834 (Dec. 28, 2001).

<sup>63</sup> 50 U.S.C. § 413(a) (Supp. IV 2004).

<sup>64</sup> Statement on Signing the Syria Accountability and Lebanese Sovereignty Restoration Act of 2003, 39 WEEKLY COMP. PRES. DOC. 1795 (Dec. 12, 2003).

<sup>65</sup> Department of Defense Appropriations Act, Pub. L. No. 108-175, § 5(a)(b), 117 Stat. 2482, 2487-88 (2003).

<sup>66</sup> Department of Defense Appropriations Act, Pub. L. No. 107-117, § 8098, 115 Stat. 2230, 2269 (2002).

<sup>67</sup> Statement on Signing the Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, 2002, 38 WEEKLY COMP. PRES. DOC. 46, 48 (Jan. 10, 2002).



Apparently, lobbying Congress is an executive act of war.

Going beyond these somewhat astonishing claims in areas of traditional presidential concern, there are hundreds in wholly novel areas. For example, the President objected to 212 legally imposed reporting requirements as interfering with his constitutional authority to recommend measures to Congress.<sup>68</sup> Apparently, President Bush believes that the President's entitlement to speak his mind to Congress entails a prohibition on Congress demanding any other reports or recommendations from the executive branch. This is an historically baseless argument, as our original Secretary of the Treasury, Alexander Hamilton—the most presidentialist of the Framers—clearly found himself as responsible for filing reports with Congress as to the President.<sup>69</sup> Any constitutional infirmity in the requirement of executive reports to Congress is entirely a figment of the contemporary presidentialist imagination.

In his first six years in office, President George W. Bush lodged 363 objections based on Congress's alleged interference with the President's control over the "unitary executive."<sup>70</sup> Many of these assertions seem to be merely "piling on" with regard to other, narrower objections. Thus, when the President objects to a congressional mandate that some executive branch official do something with regard to foreign affairs, the President may object on both the foreign affairs ground—i.e., Congress may not make foreign policy—and the unitary executive ground—i.e., Congress may not instruct the President how to use his subordinates.<sup>71</sup> Likewise, when the President objects to a congressional requirement that a subordinate member of the executive branch file a report with Congress on the ground that this violates the President's "recommendations" power, he may also object on unitary executive grounds, again, that Congress is telling someone subordinate to the President what to do.<sup>72</sup>

Beyond these merely cumulative "unitary executive" objections, some invocations of the unitary executive appear to be distinctively rooted in the Bush administration's imagined authority to direct personally the discretionary activity of every member of

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<sup>68</sup> Kinkopf & Shane, *supra* note 6, at 177.

<sup>69</sup> See Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 240–42 (1989) (explaining the increased role of Congress in the Treasury Department); see also Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1284–87 (2006) (noting that Congress claimed a greater role in the Treasury Department than in other executive departments).

<sup>70</sup> Kinkopf & Shane, *supra* note 6, at 177.

<sup>71</sup> See, e.g., Statement on Signing the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, 40 WEEKLY COMP. PRES. DOC. 2673 (Oct. 28, 2004) (objecting to the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1207(b)(1), 118 Stat. 1811, 2085 (2004)).

<sup>72</sup> See, e.g., Statement on Signing the Coast Guard and Maritime Transportation Act of 2004, 40 WEEKLY COMP. PRES. DOC. 1518 (Aug. 9, 2004) (objecting to the Coast Guard and Maritime Transportation Act of 2004, Pub. L. No. 108-293, §§ 217, 708(c)(2), 803(c)(11), 118 Stat. 1028, 1038, 1077, 1081 (2004)).

the executive branch on any subject, regardless of what the law prescribes. For example, one statutory provision to which the President objected on “unitary executive grounds” is section 115 of the 2002 Act “to provide for improvement of federal education research, statistics, evaluation, information, and dissemination and for other purposes.”<sup>73</sup> The Act creates an Institute of Education Sciences within the Department of Education, to be run by a director and a board.<sup>74</sup> Section 115 requires the director to propose Institute priorities for board approval.<sup>75</sup> The President of the United States, of course, has no inherent constitutional power over education. Yet, executive branch lawyers seem to imagine that it somehow violates the separation of powers either to allow the director to recommend priorities or for the board to decide on those priorities without presidential intervention.<sup>76</sup> In a similar vein is a “unitary executive” objection to a statutory provision requiring the Secretary of Agriculture to consider, in preparing his annual budget, the recommendations of an advisory committee on specialty crops.<sup>77</sup> Although the law does not require the Secretary actually to implement those recommendations, but merely to take them into account, the President implicitly believes that he has inherent authority to forbid subordinates from giving any weight whatsoever to public policy input from any source other than the White House.<sup>78</sup>

These examples all demonstrate the expansive interpretive tendency described above with regard to the President’s appointment power. The strategy is to insist, in bright-line terms, on the most ambitious and rigid assertions of any conceded executive power. But why have these signing statements proliferated now? The views they embody, even if earlier GOP Presidents pushed them less aggressively, were certainly held also by leading legal thinkers under both Presidents Reagan and Bush 41. As legal formalists, the lawyers in earlier administrations would surely have appreciated, as much as Bush 43 lawyers, the existence of some formal documents embodying their presidentialist claims that could be cited as a species of legal precedent for their arguments. Moreover, Bush’s recent GOP predecessors, facing Congresses controlled by Democrats, actually had less political room to work their will than he had until 2007. One thus might have expected to find them even more strident than Bush 43 in asserting their prerogatives of unilateral action.

As it happens, however, what seems to have tempted Bush 43 to use signing statements so aggressively is not their political necessity but, rather, the fact that he

<sup>73</sup> Pub. L. No. 107-279, § 115, 116 Stat. 1940, 1948 (2002) (codified at 20 U.S.C. § 9511(a) (Supp. IV 2004)).

<sup>74</sup> *Id.* § 111(a), 116 Stat. at 1944.

<sup>75</sup> *Id.* § 115(b), 116 Stat. at 1948.

<sup>76</sup> See Statement on Signing Legislation to Provide for Improvement of Federal Education Research, Statistics, Evaluation, Information, and Dissemination, and for Other Purposes, 38 WEEKLY COMP. PRES. DOC. 1995 (Nov. 5, 2002).

<sup>77</sup> Specialty Crops Competitiveness Act of 2004, Pub. L. No. 108-465, § 1408A(d), 118 Stat. 3882, 3886 (2004).

<sup>78</sup> Statement on Signing the Specialty Crops Competitiveness Act of 2004, 40 WEEKLY COMP. PRES. DOC. 3009 (Dec. 21, 2004).

could get away with them in the face of a largely quiescent Congress. From 2001 to 2006, and especially after Republicans took the Senate in 2002, Congress most often did not stand up to the President on his claims of unilateral power. The President set forth his objections so frequently because Congress was not pushing back. Had Congress been standing up for its own prerogatives with customary institutional vigor, one would have expected ambitious signing statements to be matched with equally robust rhetorical responses—or more—from the House and Senate. That simply did not happen.

The 2006 election, returning congressional control to Democrats, has the potential to alter this dynamic. Consider again the 2006 Postal Accountability and Enhancement Act, which we have already noted for the President's objections to the specification of qualifications for Postal Rate Commissioners.<sup>79</sup> A more newsworthy section of the statute provided for the maintenance of a class of domestic sealed mail, which could not "be opened except under authority of a search warrant authorized by law, or by an officer or employee of the Postal Service for the sole purpose of determining an address at which the letter can be delivered, or pursuant to the authorization of the addressee."<sup>80</sup> With regard to this provision, the President's signing statement responded: "The executive branch shall construe [this] subsection . . . to the maximum extent permissible, 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."<sup>81</sup> In other words, this Bush signing statement asserts that the President retains authority to open first-class mail without a warrant, notwithstanding the plain statutory language.

The November 2006 ouster of so many right-wing Republicans from Congress, however, emboldened not only Democrats, but also the few remaining Republican moderates to push back. One such GOP member, Senator Susan Collins of Maine, introduced a resolution in January 2007 reaffirming the Constitution's protection of sealed mail from warrantless search.<sup>82</sup> Should such a resolution be enacted, any future presidentialist who wanted to cite the 2006 Bush signing statement as some sort of legal legitimation for the President's authority to inspect the mail would have to acknowledge Congress's formal disagreement. Whether responses like this would temper signing statement practice is uncertain, but they can certainly diminish the utility of the signing statement mechanism as an opportunity for the President to erect without challenge an edifice of unilateral utterances to stand as ersatz legal authority for unsubstantiated claims of executive authority. What happened from 2001 to 2006 was the Bush administration's exploitation of congressional passivity to generate a series of

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<sup>79</sup> See *supra* notes 56–60 and accompanying text.

<sup>80</sup> Postal Accountability and Enhancement Act, Pub. L. No. 109-435, § 1010(e), 120 Stat. 3198, 3262 (2006) (amending 39 U.S.C. § 404 (2000)).

<sup>81</sup> Statement on Signing the Postal Accountability and Enhancement Act, 42 WEEKLY COMP. PRES. DOC. 2196, 2196 (Dec. 20, 2006).

<sup>82</sup> S. Res. 22, 110th Cong. (2007).

documentary artifacts that can impersonate legal authority for unilateral presidentialist legal interpretation.

### III. PRESIDENTIALIST NORMS AND INSTITUTIONAL IMPLICATIONS

Given our Delphic constitutional text, a paucity of supportive judicial opinions, and obviously little congressional ratification for the executive branch's most prodigious ambitions, it is easy enough to imagine why Presidents would want to invent legal authority for their initiatives. Yet the interpretive theory embodied in so many of the Bush 43 signing statements—a kind of categorical formalism that reads every constitutional kernel of executive power as a signal of broad and unregulable presidential authority—is open to an exceedingly obvious objection as a method of reading the Constitution. That is, if Article II, which creates the presidency, can and should be read so rigidly and expansively, should that not also be the way we read Article I, which vests the authorities of Congress? How can the Commander-in-Chief Clause imply so much and the power to declare war imply so little? How can the President's implicit authority to protect executive branch information convey more authority to withhold testimony and documents than Congress's implicit authority to investigate government operations conveys the power to demand them? Of course, if we read both articles this way, the powers of Congress and the President will come frequently into conflict. But, then, the constitutional text would seem to specify clearly who is supposed to win such battles. It expressly authorizes Congress "To make all Laws . . . necessary and proper for carrying into Execution" the authorities vested by the Constitution in any officer of the United States.<sup>83</sup> Given this express congressional power over the Presidents, should not a constitutional formalist always favor congressional power over the executive? How can presidentialism ignore this obvious problem?

A candid presidentialist response to this would require an acknowledgment that pure formalism cannot work as a complete theory of what the rule of law entails. Recent Republican administrations have been hostile to the prevailing norms of checks and balances governance, and they seem to disregard informal norms generally as a critical element in their thinking about the rule of law. Yet, to explain their preference for reading Article II more expansively than Article I, presidentialists have to rely on an implicit normative understanding of the Constitution. They have to have some kind of informal understanding of how to read the Constitution that is not actually contained in its text, but that justifies always coming down on the side of the presidency. If we read the academic work of the presidentialists, this informal understanding becomes clear: presidentialists feel justified in elevating Article II over Article I because they regard the executive branch as a *better* institution than Congress. They think it better at making decisions because it is more centralized and hierarchical.<sup>84</sup>

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<sup>83</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>84</sup> See Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94

They may think it is better at handling sensitive information because of the same structural features. And, most notably, they think it more reliable in pursuing the national interest because the President, unlike his legislative colleagues, is accountable to a national constituency, thus supposedly fostering an accountability to the general interest that is less parochial and less factional than the perspectives of individual members of Congress.<sup>85</sup>

These normative claims are important to evaluate, especially because the last does not hold water, and the others are easily overstated.<sup>86</sup> In considering the implications of presidentialism for the rule of law, however, it is important for the moment to point out that the Framers did not share this sense of executive branch superiority for making policy decisions. On the contrary, they designed an elaborate and pluralistic legislative process out of the conviction that Congress's structural characteristics—its size and bicameral design—were superior for resolving issues of public policy because they would insure due discussion and thorough deliberation. State legislative abuses during the 1780s had undoubtedly prompted a rethinking of the importance of executive power and of reliable checks against legislative excess.<sup>87</sup> But this rethinking did not entail any rethinking of the basic legislative role and its primacy. Whether privileging executive power in the making of public policy makes contemporary sense may be debatable, but it would not have made sense to the founding generation. To the extent presidentialism embraces informal norms of governance or legal interpretation that disrespects the role and perspective of Congress, presidentialism is at odds with constitutional originalism.

Still, it might well be asked how much all of this lawyerly complexity really matters. Even if we concede that the President is fabricating baseless constitutional objections to the statutory qualifications for Postal Rate Commissioners or the obligation of the Secretary of Agriculture to listen to an advisory board on specialty crops, this may not seem worthy of public agitation. But it does matter, in two important respects.

First, the signing statements are intended to help legitimate a specific form of presidentialist initiative that is less known to the public than such matters as wire-tapping and war-making, but, in terms of day-to-day governance, arguably more significant. This is the recent revolution in the President's relationship to the policymaking bureaucracy—the agencies that regulate virtually every aspect of Americans' social and economic activity, including critical matters of public health and safety. Our recent

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COLUM. L. REV. 1, 106 (1994) (discussing the Framers' structural choices).

<sup>85</sup> See generally Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995) (explaining the debate between presidentialists and anti-presidentialists).

<sup>86</sup> See generally Edward Rubin, *The Myth of Accountability and the Anti-administrative Impulse*, 103 MICH. L. REV. 2073 (2005) (criticizing the conflicting ideas about securing accountability); Shane, *supra* note 2 (tracing the stances of modern administrations on the assertion of executive power).

<sup>87</sup> See Frank Goodman, *Mark Tushnet on Liberal Constitutional Theory: Mission Impossible*, 137 U. PA. L. REV. 2259, 2310 (1989) (book review).

Presidents have asserted unprecedented authority to determine how all such policy is made, and their signing statements could be used as something that looks like legal authority for executive usurpation.<sup>88</sup> They are formal documents, officially anthologized and electronically searchable. They are connected to an assigned presidential role in the constitutional order. Legally speaking, their content is discretionary with the President. If they say something often enough, these presidential utterances, thus solemnized, may begin to look like law. They are duly executed and ceremonially delivered. They are citable. They are precedents of a sort. One is tempted, however, to say that they are faux law in just the way creation science is faux science. Left unchallenged, they may still have the power to cow Congress and shape the behavior of executive underlings.

But the second point is that the Bush 43 signing statements and the administration's litigiousness over executive privilege are part of the more general presidentialist ethos of government. Presidentialism is a form of institutional ambition that feeds on itself, and presidential signing statements are both a reflection of and encouragement for a psychology of constitutional entitlement. The future of specialty crops may be less newsworthy than Guantanamo or NSA wiretapping, but the sense of unilateral authority that fuels the President's stance on obscure matters helps to maintain the attitudes—the norms of governance—that lead to other, more consequential claims of unilateral executive authority. An important function of the Bush 43 signing statements is that they serve as reminders to administration members, and especially to administration lawyers, of how the President wants the administration to behave: claim maximum power, concede minimum authority to the other branches.

This is how the thin, formalist rule of law reflected in the signing statements relates to the slipshod, sometimes unethical government lawyering revealed in such extreme episodes as the "torture memo."<sup>89</sup> The Bush 43 administration's repeated utterance of its constitutional philosophy shapes executive branch behavior by solidifying allegiance to norms of hostility to external accountability. Like the torture memo or the rationalizations for warrantless NSA wiretapping of domestic telephone calls, the Bush 43 signing statements embody both a disregard for the institutional authorities of the other branches—especially Congress—and a disregard for the necessity to ground legal claims in plausible law. They are best understood as an attempt to invent law and as an exploitation of Congress's unwillingness, at least while in Republican hands, to allow the administration's more extreme theories of presidential authority to go unchallenged.

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<sup>88</sup> See generally Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (defending the system of "presidential administration" embraced by the Clinton administration).

<sup>89</sup> Memorandum from Jay S. Bybee, Ass't Att'y Gen., U.S. Dep't of Justice, for Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A, reprinted in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 172 (Karen J. Greenberg & Joshua L. Dratel eds., 2005).