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# SIGNING STATEMENTS AS DECLARATORY JUDGMENTS: THE PRESIDENT AS JUDGE

Phillip J. Cooper\*

## INTRODUCTION

Even though there had been scholarly consideration of the use and abuse of presidential signing statements earlier,<sup>1</sup> and even an analysis of the George W. Bush administration's particularly aggressive approach to the use of this policy tool in its first four years in office,<sup>2</sup> serious public attention and increased professional and scholarly assessments really began in January 2006. The ongoing conflict between Congress and President Bush over interrogations and conditions of detention at the Guantanamo Bay, Cuba, facility that housed those the administration termed "illegal combatants" had resulted in a very public agreement by the President to address abusive practices.<sup>3</sup> The President, in a White House photo opportunity with Senator John McCain, agreed to sign legislation that would address the problem.<sup>4</sup> However, his signing statement, issued on December 30, 2005, made clear that the administration intended to interpret and implement that legislation as it saw fit and not necessarily as Congress had intended or written.<sup>5</sup> That news broke just as Samuel Alito was preparing to face confirmation hearings in the Senate Judiciary Committee on his nomination to become an Associate Justice of the United States Supreme Court. It became clear from materials released before those hearings that Alito, while at the Justice Department, had issued a now well-known memorandum on February 5, 1986, explaining how signing statements could be used by the White House to enhance presidential power.<sup>6</sup>

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<sup>1</sup> See, e.g., PHILLIP J. COOPER, *BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION* (2002); Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J. ON LEGIS. 363 (1987); William D. Popkin, *Judicial Use of Presidential Legislative History*, 66 IND. L.J. 699 (1991); Brad Waltes, Note, *Let me Tell You What You Mean: An Analysis of Presidential Signing Statements*, 21 GA. L. REV. 755 (1987).

<sup>2</sup> Phillip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 PRESIDENTIAL STUD. Q. 515 (2005).

<sup>3</sup> *McCain, Bush Agree on Torture Ban*, CNN, Dec. 15, 2005, <http://www.cnn.com/2005/POLITICS/12/15/torture.bill/>.

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

<sup>5</sup> Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2005, 41 WEEKLY COMP. PRES. DOC. 1918 (Dec. 30, 2006).

<sup>6</sup> Memorandum from Samuel A. Alito, Jr., Deputy Ass't Att'y Gen. to Litig. Strategy

Since then, scholars, legal practitioners, and legislators have spent considerable energy attempting to understand this policy tool and what its use and abuse mean for the separation of powers and the checks and balances under the U.S. Constitution, as well as to determine its practical implications for public policy.

As interest and concern spread, it became apparent, even to the newcomers to the discussion, that the Bush administration had not been the first to use signing statements to react to the passage of legislation, but that there plainly had been a deliberate expansion of the use of the device, starting with the Reagan administration.<sup>7</sup> That said, from the first study of the George W. Bush administration on, it became clear that this administration was making a more frequent, systematic, and expansive use of the instrument based on extremely broad claims of presidential power that asserted nearly unchecked authority in anything related to foreign or military affairs on the basis of an asserted prerogative power, as well as dramatic assertions of broad domestic power supported by the so-called unitary theory of the executive. Indeed, in its first term, the George W. Bush administration had advanced the unitary theory of the executive as the basis for more of its constitutional objections to provisions in legislation that the President nevertheless signed into law than any other justification.<sup>8</sup>

Not surprisingly, the criticism and controversy surrounding the use and abuse of signing statements centered on the relationship between Congress and the White House, with particular concern for the Presentment Clause of the Constitution, Article I, Section 7. With the use of the signing statement as a kind of substantive line item veto, a practice already rejected by the Supreme Court,<sup>9</sup> and a simultaneous recognition of the utter failure of Congress to pay attention to its own institutional operations and to defend its Article I powers,<sup>10</sup> the focus of discussion was on the ways in which the contemporary use of the signing statement affected the checks and balances and the separation of powers it was designed to protect between these two institutions.<sup>11</sup>

However, there is another set of questions worthy of attention that have to do with White House actions that move into the sphere of judicial powers under Article III.

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Working Group (Feb. 5, 1986), *available at* <http://www.archives.gov/news/samuel-alito/accesion-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf>.

<sup>7</sup> See Popkin, *supra* note 1, at 702.

<sup>8</sup> Cooper, *supra* note 2, at 522.

<sup>9</sup> See *Clinton v. City of New York*, 524 U.S. 417 (1998).

<sup>10</sup> See THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK* (2006).

<sup>11</sup> See AM. BAR ASS'N TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE (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); THE COALITION TO DEFEND CHECKS AND BALANCES, THE CONSTITUTION PROJECT, *STATEMENT ON PRESIDENTIAL SIGNING STATEMENTS*, *available at* [http://www.constitutionproject.org/pdf/Statement\\_on\\_Presidential\\_Signing\\_Statement.pdf](http://www.constitutionproject.org/pdf/Statement_on_Presidential_Signing_Statement.pdf); T.J. HALSTEAD, CONG. RES. SERV., *REPORT FOR CONGRESS: PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS* (2007) *available at* <http://www.fas.org/sgp/crs/natsec/RL33667.pdf>.

Indeed, when one examines the use of signing statements since the Reagan years, it becomes clear that, in addition to its efforts to enhance its powers as against the legislature, the White House has also sought to enhance executive authority in part by acting as if it were a court. This Article examines this aspect of the signing statement phenomenon. The argument proceeds by first examining the reinvigoration of signing statement practice by the Reagan administration and after that, the included intentions, both overtly stated and in practice, to challenge the judiciary. It then turns to several types of court-like action that have been evident in contemporary signing statement practice. These actions include the use of five judicial devices in signing statements, including a kind of declaratory judgment,<sup>12</sup> interpretation of statutes to shape applicable legal tests or standards,<sup>13</sup> application of judicial canons of interpretation to avoid constitutional conflict,<sup>14</sup> pronouncements on Article III cases and controversy issues,<sup>15</sup> and executive findings contrary to judicial rulings as a kind of reversal of judicial action by signing statement.<sup>16</sup>

#### I. THE TARGETS OF MODERN SIGNING STATEMENT STRATEGY INCLUDED JUDICIAL ACTION

The effort to develop the signing statement into an effective instrument of presidential power that would support an expansion of executive power, limit the authority of Congress, and seek to shape and constrain the judiciary was no accident, but rather part of a deliberate strategy aimed at a number of clear goals. Acting in significant part through his trusted, long-time California colleague, Attorney General Edwin Meese, the President sought to restore powers that he thought had been taken from the White House in the wake of the Watergate debacle, to shape the judiciary in an effort to take the law and the courts in a dramatically different direction from what then existed as Reagan partisans saw it, and to reassert presidential leadership as against congressional action. To that end, the administration took great pains with its opportunities to appoint judges who would be effective and, to the extent possible, predictable conservatives in the Reagan sense; to select, train, and direct political appointees to challenge existing legal interpretations, statutes, and rules of which the administration disapproved; and to make effective use of tools of presidential direct action to shape legal interpretations, policy, process, and institutions.<sup>17</sup>

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<sup>12</sup> See *infra* Part II.A.

<sup>13</sup> See *infra* Part II.B.

<sup>14</sup> See *infra* Part II.C.

<sup>15</sup> See *infra* Part II.D.

<sup>16</sup> See *infra* Part II.E.

<sup>17</sup> See Attorney General Edwin Meese III, Address at the National Press Club (Feb. 25, 1986) in U.S. GOV'T PRINTING OFFICE, MAJOR POLICY STATEMENTS OF THE ATTORNEY GENERAL: EDWIN MEESE III 78–79 (1989); EDWIN MEESE III, WITH REAGAN: THE INSIDE STORY (1992).

Although there has been considerable attention paid to the Alito memorandum of 1986, it was only part of the strategic development of presidential signing statements during the Reagan years. In order to understand the targets in that effort and the ways in which these devices would be used, it is helpful to consider further the process of enhancement of signing statement practice.

*A. The Calabresi and Harrison Roadmap for Turning Signing Statements into Effective Tools to Affect Legal Interpretations and Decisions*

The specific press for the development of the signing statement into an effective tool to advance the administration's agenda came in an August 23, 1985, memorandum for the Attorney General from Steve Calabresi<sup>18</sup> and John Harrison.<sup>19</sup> The memo complained of activist judges and their interpretations of statutes:

The abuse of legislative history is a major way in which legislative power is usurped by activist courts, ideologically [sic] motivated Congressional staffers and lobbying groups. If statutes are to be taken seriously as law, legislative history should be a guide to the interpretation of statutory language, not a substitute for it. Nevertheless, courts bent on reading statutes their own way routinely take advantage of legislative history deliberately created without the full awareness of Congress.<sup>20</sup>

They argued that while it would be useful for the Justice Department to examine carefully "the whole question of legislative reports," there was a device available that could be used in an effort to correct the judiciary and shape statutory interpretation.<sup>21</sup> "[W]e have available a potentially powerful, if so far unused, tool: Presidential signing statements. The President's signing statement represents the basis on which a

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<sup>18</sup> Calabresi, who has described himself as a devotee of presidentialism, has been an ardent advocate of the unitary theory of the executive. See, e.g., Steven G. Calabresi, *The Virtues of Presidential Government: Why Professor Ackerman is Wrong to Prefer the German to the U.S. Constitution*, 18 CONST. COMMENT. 51 (2001); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155 (1992); Christopher S. Yoo, Steven G. Calabresi, & Anthony Colangelo, *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601 (2005); Christopher S. Yoo, Steven G. Calabresi, & Laurence D. Nee, *The Unitary Executive During the Third Half-Century, 1889–1945*, 80 NOTRE DAME L. REV. 1 (2004).

<sup>19</sup> Memorandum from Steve Calabresi & John Harrison to Edwin Meese III, Att'y Gen. (Aug. 23, 1985), in Memorandum from Steve Galebach to Chuck Cooper (Jan. 7, 1988) available at <http://www.archives.gov/news/samuel-alito/accession-060-89-269/accession-060-89-269.zip>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

necessary participant gave his consent to legislation. It is even better than a committee report because it represents an *entire* branch's view of the matter."<sup>22</sup>

Calabresi and Harrison warned, however, that the department had not looked seriously at the possibilities presented by signing statements to "protect the institutional prerogatives of the Executive Branch. Indeed, the Justice Department can probably revolutionize this area of law simply by acting on [its] own initiative."<sup>23</sup> In order to render signing statements important factors in shaping the meaning and application of statutes, they said, it would be necessary to make the process for generating them more regular and systematic, to ensure that the President's interpretations were readily available in places where legal professionals would look for such materials and to develop a sense of the authoritative nature of these opinions.<sup>24</sup> Up to that point, none of these challenges had been addressed. In fact, even "Department of Justice lawyers rarely cite signing statements in their briefs but regularly rely on Congressional legislative history."<sup>25</sup>

### *B. Implementation of the Calabresi and Harrison Strategy: Toward Three Critical Applications*

The Calabresi and Harrison agenda would provide the blueprint over the next several months for the Reagan administration's efforts to transform signing statements into an effective tool of presidential power. First, they suggested that the Attorney General should "[w]rite the West Publishing Company and ask them to publish Presidential signing statements in the same fashion as they publish Congressional Reports. In the unlikely event that West refuses, we should get wider publication and distribution through the Government Printing Office."<sup>26</sup> They also indicated that Meese should "[a]sk the Litigation Strategy Working Group headed by Charles Fried to develop methods for distributing the Presidential signing statements in existence to our staff attorneys."<sup>27</sup> Department of Justice attorneys should then be directed to cite the signing statements as compared to the then current practice in which "[t]he Office of Legal Counsel currently is virtually the only place where signing statements are referred to."<sup>28</sup> Finally, they suggested that the Attorney General could publicize signing statements and bolster their authoritative character by having "the Office of Legal Counsel draft a law review article for your signature" and by giving speeches to legal audiences.<sup>29</sup>

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *See id.*

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

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

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

T. Kenneth Cribb, Counselor to the Attorney General, then to work on that agenda. On September 3, 1985, he wrote a memorandum to Charles Fried, then head of the Litigation Strategy Working Group, indicating that the Attorney General had decided that presidential signing statements

are an underused tool of the Executive, especially as a counter to the abuse of legislative reports by staff, lobbyists and courts. He wants to clarify the conceptual issues associated with the use of signing statements as guides to legislative interpretation and increase their use, by both the Department as well as lawyers, judges and commentators.<sup>30</sup>

Cribb explained that he asked the Office of Legal Policy (OLP) to prepare a paper on key issues and ways in which the use of signing statement interpretations could be encouraged.<sup>31</sup> He also indicated that the Litigation Strategy Working Group should then use the OLP document to prepare a talking paper that could be used to develop the signing statement into a more effective device.<sup>32</sup> Cribb also wrote James M. Spears, Acting Assistant Attorney General of the OLP, calling on his office to move on the West Publishing recommendations and other options as well as to start work on a memorandum on issues relative to the use of signing statements and efforts to “raise the legal community’s awareness” of their significance.<sup>33</sup>

He wrote as well to Ralph Tarr, then Acting Assistant Attorney General of the Office of Legal Counsel, asking him to examine the current process for the preparation of signing statements and how it might be improved:

[S]hould we devote more resources to it, for example, and should we take measures to make sure that signing statements respond to unfavorable material in congressional reports? Also, do you know of anyone other than OLC who ever relies on signing statements? Are they accessible through any of the normal tools of legal research?<sup>34</sup>

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<sup>30</sup> Memorandum from T. Kenneth Cribb, Counselor to Att’y Gen., to Charles Fried, Acting Solicitor Gen., (Sept. 3, 1985), in Memorandum from Steve Galebach to Chuck Cooper (Jan. 7, 1988) available at <http://www.archives.gov/news/samuel-alito/accession-060-89-269/accession-060-89-269.zip>.

<sup>31</sup> *Id.*

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

<sup>33</sup> Memorandum from T. Kenneth Cribb, Counselor to Att’y Gen., to James M. Spears, Acting Ass’t Att’y Gen. (Sept. 3, 1985), in Memorandum from Steve Galebach to Chuck Cooper (Jan. 7, 1988) available at <http://www.archives.gov/news/samuel-alito/accession-060-89-269/accession-060-89-269.zip>.

<sup>34</sup> Memorandum, T. Kenneth Cribb, Counselor to Att’y Gen., to Ralph Tarr, Acting Ass’t Att’y Gen. (Sept. 3, 1985), in Memorandum from Steve Galebach to Chuck Cooper (Jan. 7,

Tarr's reply made it clear that there were at least three important targets for enhanced use of signing statements, including the courts, Congress, and administrative agencies.<sup>35</sup> He was particularly emphatic about the fact that efforts should be made to enhance the role of signing statements as authoritative interpretations of law to be used in courts and other legal arguments, stressing that courts had already employed signing statements in their opinions and that more could and should be done to enhance the process.<sup>36</sup> He attached a memorandum that he had dispatched a few days earlier to the OLP, arguing, "It should be the policy of this Department, and of the Executive Branch generally, to encourage courts to view signing statements as authoritative statutory history."<sup>37</sup> He also urged that they be used as authoritative interpretations of statutes binding on executive branch agencies:

[T]hey can be used to tell agencies how to interpret a statute. The President can direct agencies to ignore unconstitutional provisions or to read provisions in a way that eliminates constitutional or policy problems. This direction permits the President to seize the initiative in creating what will eventually be the agency's interpretation—an interpretation that the courts have traditionally given great deference.<sup>38</sup>

In fact, he attached an April 1985 memorandum from Acting Deputy Attorney General D. Lowell Jensen to Fred Fielding, then Counsel to the President, complaining that there had been difficulties because of the refusal to issue a signing statement with respect to Appointments Clause issues in the Pacific Salmon Treaty Act and insisting that "signing statements perform important functions by placing an interpretation on a statute and by giving instructions to the agency charged with the administration of a statute."<sup>39</sup> In sum, signing statements should be treated as authoritative legal interpretations that should shape decisionmaking in administrative agencies and courts.

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1988) available at <http://www.archives.gov/news/samuel-alito/accession-060-89-269/accession-060-89-269.zip>.

<sup>35</sup> Memorandum, Ralph W. Tarr, Acting Ass't Att'y Gen., to T. Kenneth Cribb, Counselor to Att'y Gen. (Oct. 28, 1985), in Memorandum from Steve Galebach to Chuck Cooper (Jan. 7, 1988) available at <http://www.archives.gov/news/samuel-alito/accession-060-89-269/accession-060-89-269.zip>.

<sup>36</sup> *Id.*

<sup>37</sup> Memorandum from Ralph W. Tarr, Acting Ass't Att'y Gen., to James M. Spears, Acting Ass't Att'y Gen., (Oct. 23, 1985), in Memorandum from Steve Galebach to Chuck Cooper (Jan. 7, 1988) available at <http://www.archives.gov/news/samuel-alito/accession-060-89-269/accession-060-89-269.zip>.

<sup>38</sup> Tarr to Cribb, *supra* note 35.

<sup>39</sup> Memorandum from D. Lowell Jensen, Acting Deputy Att'y Gen., to Fred Fielding, Counsel to the President, (Apr. 2, 1985), in Memorandum from Steve Galebach to Chuck Cooper (Jan. 7, 1988) available at <http://www.archives.gov/news/samuel-alito/accession-060-89-269/accession-060-89-269.zip>.



*C. The Alito Memorandum and the Move Toward Implementation of the Reinigorated Signing Statement*

By the time of the now famous February 1986 Alito memorandum produced for the Litigation Strategy Working Group, the effort to turn the presidential signing statement into an effective and authoritative tool was already well underway. The West Publishing Company had acceded to the request to publish the statements in U.S. Code Congressional and Administrative News; the Attorney General was speaking out publicly on the importance of signing statements; and the Department was debating how to enhance the process for, and effectiveness of, signing statements within the executive branch, within Congress, and in court.<sup>40</sup> The Alito document emphasized what was really new about what the administration was attempting to do in reshaping the device and described cautions that he considered important if the effort was to be successful. Alito began:

Our primary objective is to ensure that Presidential signing statements assume their rightful place in the interpretation of legislation. In the past, Presidents have issued signing statements when presented with bills raising constitutional problems. OLC has played a role in this process, and the present proposal would not substantively alter that process. The novelty of the proposal previously discussed by this Group is the suggestion that Presidential signing statements be used to address questions of interpretation.<sup>41</sup>

He recognized that the approach that the Reagan administration was taking was a significant departure from past practice and that it would enhance presidential power.<sup>42</sup>

From the perspective of the Executive Branch, the issuance of interpretive signing statements would have two chief advantages. First, it would increase the power of the Executive to shape the law. Second, by forcing some rethinking by courts, scholars,

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<sup>40</sup> See *supra* Part I.B.

<sup>41</sup> Alito, *supra* note 6, at 1.

<sup>42</sup> Part of the reason undoubtedly is that Presidents, unlike Congress, do not customarily comment on their understanding of bills. Congress churns out great masses of legislative history bearing on its intent—committee reports, floor debates, and hearings. Presidents have traditionally created nothing comparable. Presidents have seldom explained in any depth or detail how they interpreted the bills they have signed. Presidential approval is usually accompanied by a statement that is often little more than a press release.

*Id.* at 1–2.

and litigants, it may help to curb some of the prevalent abuses of legislative history.<sup>43</sup>

Clearly, he warned, this major move on signing statements would be seen for what it was.

It seems likely that our new type of signing statement will not be warmly welcomed by Congress. The novelty of the procedure and the potential increase of presidential power are two factors that may account for this anticipated reaction. In addition, and perhaps most important, Congress is likely to resent the fact that the President will get in the last word on questions of interpretation.<sup>44</sup>

Among the reasons that the claim to such authority would not likely be missed was that the Attorney General had been involved in a very public battle with Congress and the courts over a very controversial use of a presidential signing statement with respect to the Competition in Contracting Act issued in 1984 that would come to be known as the *Ameron* case discussed later in this Article.<sup>45</sup> For these and other reasons, Alito offered a series of cautions as to how, and how often, signing statements ought to be employed.<sup>46</sup> Indeed, by the time the George W. Bush administration had demonstrated its consistent and sweeping use of signing statements, Alito's warnings had clearly been forgotten, but he recognized early on that the use of signing statements would expand presidential claims to power and would be opposed in significant part because of the White House's attempt to have "the last word on questions of interpretation."<sup>47</sup>

## II. THE PRESIDENCY, SIGNING STATEMENTS, AND JUDICIAL FUNCTIONS

This process of development of signing statements not only raised separation of powers and checks and balances issues with respect to legislative powers, but also with respect to core judicial activities and the devices available to courts for the accomplishment of those tasks. They involved situations in which the chief executive, in issuing signing statements, behaved as if the President was a judge. These judicial devices fall into a number of broad categories and include instruments that purport to provide an authoritative statement of the law and declare the relative powers and

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<sup>43</sup> *Id.* at 2.

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

<sup>45</sup> *Ameron v. U.S. Army Corps of Eng'rs*, 607 F. Supp. 962 (D.N.J. 1985), *cert dismissed*, 488 U.S. 918 (1988); *see also Lear Siegler v. Lehman*, 842 F.2d 1102 (9th Cir. 1988); *see infra* text accompanying note 77.

<sup>46</sup> Alito, *supra* note 6, at 4–6.

<sup>47</sup> *Id.* at 2.

limits of important parties at issue in the debate; statements that purport to tell the court what is or is not a case or controversy within its Article III province or that reject its authority to engage an issue; and tactical devices used to block review. More specifically, consider five such judicial devices employed in presidential signing statements.

*A. Judicial Device One: Signing Statements as Declaratory Judgments*

A variety of presidential signing statements in recent years have gone well beyond a statement of disagreement by the President with Congress to: (1) a declaratory statement by the White House either that provisions in a bill the President is signing are unconstitutional; (2) a statement meant to be definitive and authoritative as to the meaning of language in a bill which is to bind government officials; or even (3) a statement as to the procedural or substantive rights of parties in—or likely to be in—controversy with the federal government. These statements are, in effect, declaratory judgments issued in the form of presidential signing statements.<sup>48</sup>

Certainly one of the most obvious contemporary examples of this phenomenon came in the now famous signing statement on the Detainee Protection Act portion of the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, signed in December of 2005.<sup>49</sup> Although most attention was paid to the presidential assertions about issues of the boundaries of permissible interrogation techniques, there was also a portion of that statement that purported to provide an authoritative interpretation of the ability of the detainees to pursue judicial assessment of the legality of their confinement. The President stated:

The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks. Further, in light of the principles enunciated by the Supreme Court of the United States in 2001 in *Alexander v.*

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<sup>48</sup> A declaratory judgment is “[a] judgment which declares conclusively the rights and duties, or the status of the parties.” *BALLENTINE’S LAW DICTIONARY* 315 (3d ed. 1969); *see Medimmune, Inc. v. Genentech, Inc.*, 127 S. Ct. 764, 770 (2007) (discussing the Declaratory Judgement Act).

<sup>49</sup> Statement on Signing of the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 *WEEKLY COMP. PRES. DOC.* 1918 (Dec. 30, 2005).

*Sandoval*, and noting that the text and structure of Title X do not create a private right of action to enforce Title X, the executive branch shall construe Title X not to create a private right of action. Finally, given the decision of the Congress reflected in subsections 1005(e) and 1005(h) that the amendments made to section 2241 of title 28, United States Code, shall apply to past, present, and future actions, including applications for writs of habeas corpus, described in that section, and noting that section 1005 does not confer any constitutional right upon an alien detained abroad as an enemy combatant, the executive branch shall construe section 1005 to preclude the Federal courts from exercising subject matter jurisdiction over any existing or future action, including applications for writs of habeas corpus, described in section 1005.<sup>50</sup>

Here the President as judge not only provided what purported to be a definitive interpretation of the statute itself, and of the constitutional powers of the President and Congress, but also of the judiciary's power to include what purported to be authoritative interpretations of Title 28 of the U.S. Code. President Bush made plain his view that the Commander-in-Chief power and the vague formulation so often employed in Bush signing statements, known as the unitary executive theory, would justify the administration taking whatever steps the President considered necessary to protect the American public against terrorism as the White House saw it.<sup>51</sup> However, he went beyond that to make a number of points with regard to particular rights of the detainees and limitations on the courts to do anything about the situation. Whereas the clear understanding with Congress was that currently pending cases would be permitted to continue through the process to obtain judicial determination as to the validity of confinement and decisionmaking procedures in use at Guantanamo—but block future cases—the signing statement flatly declared that the legislation barred “past, present, and future actions, including applications for writs of habeas corpus.”<sup>52</sup>

That signing statement further opined that, given the Supreme Court's decision in *Alexander v. Sandoval* and its own interpretation of both the judicial opinion and Title X of the present statute, there was no implied private right of action to bring suit to enforce the provisions of the legislation.<sup>53</sup> Finally, it concluded, on its interpretation of these and other provisions of the statute, that the legislation “preclude[s] the Federal courts from exercising subject matter jurisdiction over any existing or future action, including applications for writs of habeas corpus, described in section 1005.”<sup>54</sup>

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<sup>50</sup> *Id.* at 1919.

<sup>51</sup> *Id.*

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

<sup>53</sup> *Id.*

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

Based upon its declaration of law and the status, rights, and duties of any detainee or anyone else, other than an agency of the federal government, who might seek to bring a judicial challenge on their behalf, the administration sent attorneys into court the following week, seeking dismissal of all pending detainee cases.<sup>55</sup> Senator Carl Levin, co-sponsor of the Graham-Levin Amendment that specifically addressed the subject, immediately rejected the signing statement assertion, and condemned the effort to block critical litigation needed to resolve the status of the detainees, among other considerations: "Throughout the consideration of the Graham-Levin amendment, the White House repeatedly urged the inclusion of language that would have applied the amendment retroactively to pending cases. In each case, I objected to this language. As a result, no such language was included in the final version of the legislation."<sup>56</sup> The Supreme Court supported Levin's contentions and rejected what appeared to the Court to be post hoc efforts to modify the legislative history to support the administration's claims.<sup>57</sup> It then went on to reject the existing regime created by the administration's military order for the creation and operation of the detention facility in *Hamdan v. Rumsfeld*.<sup>58</sup>

As for the administration's findings concerning an implied right of action, the *Sandoval* case cited in the signing statement had nothing to do with the present statute or subject matter.<sup>59</sup> It was an appeal of a ruling by the Eleventh Circuit on whether an Alabama English-only constitutional amendment and resulting changes to a program operated by the Department of Motor Vehicles violated Title VI of the Civil Rights Act of 1964.<sup>60</sup> To the extent that the Court rejected a private right of action under Title VI in that case, its action could hardly be considered to announce settled law. Rather, it was a five-to-four ruling with an opinion by Justice Scalia,<sup>61</sup> making a dramatic shift away from a long line of contrary cases. Justice Stevens, writing for the four dissenters, asserted: "Today, in a decision unfounded in our precedent and hostile to decades of settled expectations, a majority of this Court carves out an important exception to the right of private action long recognized under Title VI."<sup>62</sup> The dissenters observed:

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<sup>55</sup> Press Release, Senator Carl Levin, Levin Statement on Administration Announcement It Will Seek Dismissal of Guantanamo Lawsuits (Jan. 4, 2006), available at <http://levin.senate.gov/newsroom/release.cfm?id=250235>.

<sup>56</sup> *Id.*

<sup>57</sup> *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2766 n.10 (2006). In his dissent, Justice Scalia criticized the Court, asserting that "the Court wholly ignores the President's signing statement." *Id.* at 2816 (Scalia, J., dissenting).

<sup>58</sup> *Id.* at 2798 (majority opinion).

<sup>59</sup> See *Alexander v. Sandoval*, 532 U.S. 275 (2001).

<sup>60</sup> *Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999), *rev'd*, *Sandoval*, 532 U.S. 275.

<sup>61</sup> *Sandoval*, 532 U.S. 275.

<sup>62</sup> *Id.* at 294 (Stevens, J., dissenting).

In separate lawsuits spanning several decades, we have endorsed an action identical in substance to the one brought in this case, demonstrated that Congress intended a private right of action to protect the rights guaranteed by Title VI, and concluded that private individuals may seek declaratory and injunctive relief against state officials for violations of regulations promulgated pursuant to Title VI. Giving fair import to our language and our holdings, every Court of Appeals to address the question has concluded that a private right of action exists to enforce the rights guaranteed both by the text of Title VI and by any regulations validly promulgated pursuant to that Title, and Congress has adopted several statutes that appear to ratify the status quo.<sup>63</sup>

The George W. Bush administration is not the first to use such devices. The Reagan White House issued an adamant set of findings in his signing statement following legislative efforts to curb enforcement of the administration's national security directive that imposed nondisclosure requirements on executive branch officials.<sup>64</sup> The signing statement asserted:

This provision raises profound constitutional concerns. Indeed, a provision in last year's omnibus continuing resolution (Public Law 100-202) identical to section 619 was recently declared unconstitutional by the United States District Court for the District of Columbia. The Court concluded that restrictions on the implementation or enforcement of nondisclosure agreements required of Government employees with access to classified information impermissibly interfered with my ability to prevent unauthorized disclosures of our most sensitive diplomatic, military, and intelligence activities.

As President of the United States, I have the constitutional responsibility to ensure the secrecy of information whose disclosure would threaten our national security. Our Nation's security depends upon our success in diplomatic, military, and intelligence activities, and that success depends upon our ability to protect the Nation's secrets. The Supreme Court has recognized my authority in this area. In accordance with my sworn obligation to preserve,

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<sup>63</sup> *Id.* (citations omitted).

<sup>64</sup> Statement on Signing the Treasury, Postal Service and General Government Appropriations Act, 1989, 2 PUB. PAPERS 1204 (Sept. 22, 1988).

protect, and defend the Constitution, section 619 will be considered of no force or effect unless and until the ruling of the District Court is reversed by the Supreme Court.<sup>65</sup>

Here the administration declared unconstitutional provisions of law intended to ensure to Congress the availability of information it needed to conduct oversight of the executive branch. The national security directive in question had included blanket coverage of agencies and officials who clearly had no real involvement in national security matters. The directive was so controversial that some of the leaders within the administration refused to follow it.<sup>66</sup>

The administration relied on a district court opinion not specifically cited in the signing statement and language from the President's oath of office as authority for the declaration that the congressional action was unlawful. Moreover, the administration announced that its declaratory judgment would not be altered if there were to be contrary rulings by other district courts or even by circuit courts.<sup>67</sup> The position would not change unless and "until the ruling of the District Court is reversed by the Supreme Court."<sup>68</sup> Just what legal authority there was for such a dramatic judgment was not provided.<sup>69</sup>

There were other examples in the Reagan administration, including one in which the administration simply decided that "one provision of the bill is unconstitutional."<sup>70</sup> The provision also went on to rule that the offending portion of the legislation was severable such that the rest could go forward.<sup>71</sup> This was a signing statement on legislation concerning construction of facilities on the Salmon and Snake rivers in Idaho.<sup>72</sup>

The administration determined that an intergovernmental cooperation provision of the legislation that prevented the Federal Energy Regulatory Commission from approving a hydroelectric facility unless it had approval from a local governing body was "unconstitutional because it authorizes officials who have not been selected in a manner consistent with the Appointments Clause . . . to perform significant authority pursuant to the laws of the United States."<sup>73</sup> The legal basis for the assertion that this was a violation of the Appointments Clause was not provided.<sup>74</sup> This declaration

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<sup>65</sup> *Id.* at 1205.

<sup>66</sup> COOPER, *supra* note 1, at 186.

<sup>67</sup> Statement on Signing the Treasury, Postal Service and General Government Appropriations Act, 1989, 2 PUB. PAPERS 1204, 1205 (Sept. 22, 1988).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Statement on Signing the Bill Prohibiting the Licensing or Construction of Facilities on the Salmon and Snake Rivers in Idaho, 2 PUB. PAPERS 1525, 1525 (Nov. 17, 1988).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

was asserted as authoritative and final.<sup>75</sup> Just what the President's authority and legal foundation was for issuing a finding of severability from the remainder of the statute that were operative was not indicated.<sup>76</sup>

Courts have been both perplexed by this kind of behavior and unwilling to accept the practice. In *Lear Siegler v. Lehman*, the Ninth Circuit rejected this judicial behavior by the White House with respect to the Reagan administration's determination that the Competition in Contracting Act (CICA) was unconstitutional and its orders through the Office of Management and Budget to executive branch agencies to follow the signing statement's determination:

We also note that in declaring the CICA stay provisions unconstitutional and suspending their operation, the executive branch has assumed a role reserved for the judicial branch. It hardly need be repeated that "it is emphatically the province and duty of the judicial department to say what the law is."<sup>77</sup>

The kind of double-edged declaration noted above was also evident in a signing statement issued by the George W. Bush administration on the Departments of Labor, Health and Human Services, and Education Appropriations Act, 2002. The administration determined that congressional action was partly unconstitutional but valid in terms of conveying budget transfer authority to the executive and that the offending provisions were severable. "Accordingly, the executive branch shall treat the portion of the proviso of section 207 that purports to provide for congressional committee approval of transfers as having no force and severable from the remainder of the proviso of section 207 and the Act."<sup>78</sup>

In its signing statement for the Sarbanes-Oxley Act to address both the practice and perception of financial behavior in the corporate and financial services context, the administration purported to state authoritatively the legislative purpose of three sections of the bill and of one section of the existing U.S. Code.<sup>79</sup> It is not clear where the President found authority for such pronouncements on legislative purpose. The interpretation and its consequences for the meaning of the statute are significant and thus are worthy of quotation at some length.

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102, 1125 (9th Cir. 1988) *rev'd in part* 893 F.2d 205 (9th Cir. 1989) (citations omitted).

<sup>78</sup> Statement on Signing the Department of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2002, 38 WEEKLY COMP. PRES. DOC. 50, 51 (Jan. 10, 2002).

<sup>79</sup> Statement on Signing the Sarbanes-Oxley Act of 2002, 38 WEEKLY COMP. PRES. Doc. 1286, 1286 (July 30, 2002).



The legislative purpose of sections 302, 401, and 906 of the Act, relating to certification and accuracy of reports, is to strengthen the existing corporate reporting system under section 13(a) and 15(d) of the Securities Exchange Act of 1934. Accordingly, the executive branch shall construe this Act as not affecting the authority relating to national security set forth in section 13(b) of the Securities Exchange Act of 1934. To ensure that no infringement on the constitutional right to petition the Government for redress of grievances occurs in the enforcement of section 1512(c) of title 18 of the U.S. Code, enacted by section 1102 of the Act, which among other things prohibits corruptly influencing any official proceeding, the executive branch shall construe the term “corruptly” in section 1512(c)(2) as requiring proof of a criminal state of mind on the part of the defendant.

Given that the legislative purpose of section 1514A of title 18 of the U.S. Code, enacted by section 806 of the Act, is to protect against company retaliation for lawful cooperation with investigations and not to define the scope of investigative authority or to grant new investigative authority, the executive branch shall construe section 1514A(a)(1)(B) as referring to investigations authorized by the rules of the Senate or the House of Representatives and conducted for a proper legislative purpose.<sup>80</sup>

When the White House asserts such an authoritative judgment on legislative intent, it is commonly the case that the statement asserts only a conclusion and not any basis for it. Given the well-known complexity of legislative history research to determine legislative intent, both the executive assertion of the ability to make an authoritative pronouncement and its basis in terms of its foundation for its decision are troublesome.

These signing statements do not simply state disagreement with Congress and are not simply statements of the executive’s view of legislation. They often specifically direct administrative agencies as to the manner in which they are to implement legislation, and they do so in a manner that may present serious challenges to the ability of the legislative branch to carry out its assigned roles of oversight and enactment of new and needed legislation. Thus, in the signing statement on the 21st Century Appropriation Authorization Act, the administration constrained the requirement for “reporting to the Congress activities of the Department of Justice involving challenges to or nonenforcement of law that conflicts with the Constitution.”<sup>81</sup> It also interpreted the demand for reporting when these actions were taken pursuant to “unclassified

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<sup>80</sup> *Id.*

<sup>81</sup> Statement on Signing the 21st Century Department of Justice Appropriation Authorization Act, 38 WEEKLY COMP. PRES. DOC. 1971, 1971 (Nov. 2, 2002).

Executive Order or similar memorandum or order” as it wished.<sup>82</sup> Executive branch officials were directed to respond to the administration’s authoritative interpretation.

*The executive branch shall construe section 530D of title 28, and related provisions in section 202 of the Act, in a manner consistent with the constitutional authorities of the President to supervise the unitary executive branch and to withhold information the disclosure of which could impair foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive’s constitutional duties. To implement section 202(b)(3) of the Act, the Attorney General, on my behalf, shall advise the heads of executive agencies of the enactment of section 202 and of this direction concerning construction of that section and section 530D of title 28. Furthermore, section 202(a) requires that the President report to the Congress the issuance of any “unclassified Executive Order or similar memorandum or order” that establishes or implements a policy of intra-circuit non-acquiescence or of refraining from enforcing, applying, or administering a Federal statute, rule, regulation, program, or policy on the ground that it is unconstitutional. Based upon the text and structure of this section, the executive branch shall construe this reporting obligation to cover only unclassified orders in writing that are officially promulgated and are not included in the reports of the Attorney General or other Federal officers to whom this section applies.<sup>83</sup>*

The sweeping language used in this statement with respect to the ability of the executive to withhold information has been posited and expanded over the course of the George W. Bush administration. In such cases, the executive branch is asserting as an interpretation meant to be binding its ability to withhold information from the Congress that the legislature requires both in its oversight role as a matter of checks and balances and in its legislative role to enact new or amended legislation as a matter of separation of powers.

### *B. Judicial Device Two: Interpretation of Statutes to Shape Key Tests or Standards*

Although the use of these devices that have many of the characteristics of declaratory judgments is increasingly common, Presidents have employed other types of judicial devices that are perhaps not as frequent or as well-known. One of these devices

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<sup>82</sup> *Id.*

<sup>83</sup> *Id.* (emphasis added).

is the judicial practice of interpretation of statutes to create or reshape legal tests or standards. Clearly, it is one thing for statutes to present policies, but the issues involved often become more focused when one contemplates what officials must plead and prove in an attempt to enforce those provisions of new legislation. Those interpretations are normally provided in judicial opinions that arise in cases brought under the legislation. However, presidential administrations have used signing statements to interpret legal standards associated with a new statute or to amend existing tests in a manner that attempts to shape how the legislation will be used and indeed instructs executive branch agencies and attorneys to employ those standards in its implementation.

In August 1985, President Reagan issued a signing statement on amendments to the Equal Access to Justice Act (EAJA), a statute which permits recovery of attorney fees and other expenses in some instances where administrative agency action was unlawfully delayed or withheld.<sup>84</sup> The administration had come into office with the stated intention of reducing what it considered to be unnecessary and unreasonable regulatory burdens on business and the economy, particularly targeting such bodies as the Environmental Protection Agency (EPA).<sup>85</sup> The administration placed holds on pending rulemaking proceedings and appointed officials who took controversial positions on rulemaking issues, such as EPA Administrator Anne Gorsuch-Burford.<sup>86</sup> Environmental groups and members of Congress reacted sharply against delays in the issuance of rules to implement the superfund toxic cleanup program and moved on other initiatives to facilitate suits against the EPA and other regulatory agencies.<sup>87</sup> The administration created an intra-departmental EAJA task force because of its concerns about how the legislation would be used in response to administration actions.<sup>88</sup> One of the concerns was just what standard would be used in cases where an administrative agency's actions were reversed by a court on judicial review to determine whether EAJA fees would be assessed against that agency.<sup>89</sup>

The signing statement issued by the President sought to interpret the legislation so as to ensure a favorable standard for the determination of whether fees would be levied against the agencies:

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<sup>84</sup> Statement on Signing the Bill Extending Equal Access to Justice Act, 2 PUB. PAPERS 977 (Aug. 5, 1985).

<sup>85</sup> See Dale Whittington & Norton Grubb, *Economic Analysis in Regulatory Decisions: The Implications of Executive Order 12291*, SCI. TECH. & HUM. VALUES, Winter 1984, at 66-68 (describing the effects of the Reagan cost-benefit policies, like those found in Executive Order 12,291, on the EPA).

<sup>86</sup> See, e.g., Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 826 n.33 (1988) (describing Anne Gorsuch-Burford's tenure at the EPA as controversial).

<sup>87</sup> See ROBERT F. DURANT, *THE ADMINISTRATIVE PRESIDENCY REVISITED* (1992).

<sup>88</sup> See Tarr to Spears, *supra* note 37.

<sup>89</sup> See Popkin, *supra* note 1, at 705.

In addition, it is my understanding in signing this bill that the Congress recognized the important distinction between the substantial justification standard in the fee proceeding and a court's finding on the merits that an agency action was arbitrary and capricious or not supported by substantial evidence. The substantial justification standard is a different standard, and an easier one to meet, than either the arbitrary and capricious or substantial evidence standard. A separate inquiry is required to determine whether, notwithstanding the fact that the Government did not prevail, the Government's position or action was substantially justified.<sup>90</sup>

When President Reagan issued his signing statement on the Safe Drinking Water Amendments of 1986, the administration determined that although "the bill uses language that suggests that some enforcement actions are mandatory," such an interpretation would be "unrealistic" and would also interfere with essential executive discretion.<sup>91</sup> Therefore the administration would interpret the statute to provide discretionary enforcement authority and the responsible agency would proceed accordingly.<sup>92</sup> However, the legislation used mandatory language that had been a significant issue during passage.<sup>93</sup>

The administration's action focused on a distinction that was important for a variety of reasons, but that was particularly important because of a decision of the Supreme Court the year before the passage of that statute, having to do with whether and what kind of judicial review would be available under the statute.<sup>94</sup> The Court had held that administrative enforcement discretion was presumptively unreviewable unless Congress had provided mandatory enforcement standards in the legislation.<sup>95</sup> If the administration's reading of the enforcement authority as discretionary rather than mandatory was to be accepted, the implementing agency would face a far more favorable standard of review in court challenges than would otherwise be the case.

There was perhaps a surprising degree of agreement in Congress in reaction to interpretations issued by the Supreme Court in the late 1980s concerning employment

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<sup>90</sup> Statement on Signing the Extension of the Equal Access to Justice Act of 1985, 21 WEEKLY COMP. PRES. DOC. 966, 967 (Aug. 5, 1985). For further discussion of the use of the statement within the administration, see Tarr, *supra* note 37.

<sup>91</sup> Statement on Signing the Safe Drinking Water Amendments of 1986, 22 WEEKLY COMP. PRES. DOC. 831, 832 (June 19, 1986).

<sup>92</sup> *Id.*

<sup>93</sup> See Popkin, *supra* note 1, at 705-06 (noting that Reagan's interpretation of the Safe Drinking Water Amendments directly contradicted both a Senate Committee report on the statute and the language of the statute itself).

<sup>94</sup> Heckler v. Chaney, 470 U.S. 821 (1985).

<sup>95</sup> *Id.* at 827-35.

discrimination prohibitions in Title VII of the Civil Rights Act of 1964.<sup>96</sup> In particular there was a concern with what the Court found was required to prove a case of discrimination and what constituted acceptable defenses against such claims. In fact, in enacting what became the Civil Rights Act of 1991, Congress made clear in section 2 its intention to reject the Court's interpretations in *Wards Cove Packing Co. v. Atonio*,<sup>97</sup> which the Congress found had "weakened the scope and effectiveness of Federal civil rights protections."<sup>98</sup> Congress actually presented a bill<sup>99</sup> to President George H. W. Bush in 1990, but he vetoed it along with an indication of a willingness to reopen negotiations leading to passage of an acceptable statute.

He ultimately agreed to sign the legislation passed in 1991 but, in so doing, indicated that the use of the "disparate impact" standard might be applied in an inappropriate and unfair manner against businesses and that it might lead businesses to adopt policies that the administration considered illegal quota or preference programs.<sup>100</sup> The administration opposed affirmative action programs. The signing statement sought to constrain the interpretation of that language in the statute, to influence likely judicial opinions on that language, and to control how the new law would be implemented by federal officials. The bill, he wrote:

resolves the most significant of these controversies, involving the law of "disparate impact," with provisions designed to avoid creating incentives for employers to adopt quotas or unfair preferences. It is extremely important that the statute be properly interpreted—by executive branch officials, by the courts, and by America's employers—so that no incentives to engage in such illegal conduct are created.<sup>101</sup>

In particular, the President argued that the correct interpretation had been given in analyses offered during legislative debate by Senator Robert Dole and the Bush administration.<sup>102</sup> President Bush held, "These documents will be treated as authoritative

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<sup>96</sup> Pub. L. No. 88-352, tit. VII, 78 Stat. 241, 253-66 (codified in scattered sections 42 U.S.C. & 25 U.S.C.) (making it unlawful for employers to discriminate against individuals because of their race, color, religion, sex, or national origin).

<sup>97</sup> 490 U.S. 642 (1989), *aff'd in part, vacated in part* 10 F.3d 1485 (9th cir. 1993), *cert. denied*, 513 U.S. 809 (1994).

<sup>98</sup> Civil Rights Act of 1991, Pub. L. 102-166, § 2(2), 105 Stat. 1071, 1071 (codified at 41 U.S.C. § 1984 (2000)).

<sup>99</sup> S. 2104, 101st Cong. (1990).

<sup>100</sup> Statement on Signing the Civil Rights Act of 1991, 27 WEEKLY COMP. PRES. DOC. 1701, 1701-02 (Nov. 25, 1991).

<sup>101</sup> *Id.*

<sup>102</sup> See 137 CONG. REC. S15, 953 (daily ed. Nov. 5, 1991) (statement of Sen. Dole); 137 CONG. REC. S15, 472-78 (daily ed. Oct. 30, 1991) (statement of Sen. Dole).

interpretive guidance by all officials in the executive branch with respect to the law of disparate impact as well as the other matters covered in the documents.”<sup>103</sup>

More recently, President George W. Bush, in signing the Sarbanes-Oxley Act of 2002, offered an interpretation as to the proof required under section 1102 of the Act.<sup>104</sup> The President said:

To ensure that no infringement on the constitutional right to petition the Government for redress of grievances occurs in the enforcement of section 1512(c) of title 18 of the U.S. Code, enacted by section 1102 of the Act, which among other things prohibits corruptly influencing any official proceeding, the executive branch shall construe the term “corruptly” in section 1512(c)(2) as requiring proof of a criminal state of mind on the part of the defendant.<sup>105</sup>

Section 1512(c)(1) addresses anyone who “corruptly—(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object’s integrity or availability for use in an official proceeding,”<sup>106</sup> but (c)(2) adds or “otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so.”<sup>107</sup> The standard was therefore set for the manner in which the executive branch would implement the broad language of (c)(2).

### *C. Judicial Device Three: The Practice of Construction of Legislative Language to Avoid Constitutional Issues*

This discussion of the language of the signing statement on Sarbanes-Oxley provides an example of the common phenomenon in which the White House construes the language of a statute so as to avoid presenting a constitutional issue. This is certainly a standard canon of judicial construction, but just how and on what authority the President employs the technique is less than clear.

Another example, again going back to President George H. W. Bush, arose with respect to the signing of the Energy and Water Development Appropriations Act of 1992.<sup>108</sup> That law included a ban on the expenditure of funds appropriated under

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<sup>103</sup> See Statement on Signing the Civil Rights Act of 1991, 27 WEEKLY COMP. PRES. DOC. 1701, 1702 (Nov. 25, 1991).

<sup>104</sup> Pub. L. No. 107-204, §1102, 116 Stat. 745, 807 (codified in 18 U.S.C. § 1512 (2000)).

<sup>105</sup> Statement on Signing the Sarbanes-Oxley Act of 2002, 38 WEEKLY COMP. PRES. DOC. 1286 (July 30, 2002).

<sup>106</sup> 18 U.S.C. § 1512(c)(1) (Supp. IV 2004).

<sup>107</sup> *Id.* § 1512(c)(2).

<sup>108</sup> Statement on Signing the Energy and Water Development Appropriations Act, 1992, 27 WEEKLY COMP. PRES. DOC. 1143 (Aug. 17, 1991).

the Act for the purpose of conducting studies on the pricing of hydroelectric power. The President dismissed that prohibition:

Article II, section 3, of the Constitution grants the President authority to recommend to the Congress any legislative measures considered "necessary and expedient." Accordingly, in keeping with the well-settled obligation to construe ambiguous statutory provisions to avoid constitutional questions, I will interpret section 506 so as not to infringe on the Executive's authority to conduct studies that might assist in the evaluation and preparation of such measures.<sup>109</sup>

This kind of limitation has often been employed since the Reagan administration's reconstruction of the signing statement device.

Clearly, the judiciary employs this and other rules of restraint based largely on longstanding concerns about the use of its dramatic power to overturn statutory provisions found in violation of the Constitution.<sup>110</sup> However, if the President is acting pursuant to his constitutional obligation to ensure that the laws be faithfully executed in issuing such statements, and if his basis for action in this case is a clear conclusion that the flat prohibition in the statute of the kind of action the President seeks to take on grounds of a particular provision of the Constitution that, in his judgment, is violated by that statutory language, then it is not clear how he can avoid a constitutional conflict. The Article I, section 7 opportunity to veto the bill would appear to be needed in such a situation.<sup>111</sup>

#### *D. Judicial Device Four: Pronouncements on Article III Case or Controversy or Jurisdictional Issues*

Some Presidents have decided not only to declare the law with respect to Article I and Article II powers, but also to do so with respect to the Article III powers of the judiciary. The judiciary is expected to carry out the task of determining whether a particular dispute presents a case or controversy cognizable under Article III, determine whether the dispute has appropriate parties and is at an appropriate stage of development for adjudication or judicial review, and assess the questions of jurisdiction that must be confronted.<sup>112</sup> However, Presidents sometimes make determinations like these in signing statements.

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<sup>109</sup> *Id.*

<sup>110</sup> *See, e.g.,* *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288 (1936) (exercising judicial restraint in limiting holding to one specific question).

<sup>111</sup> U.S. CONST. art. I, § 7.

<sup>112</sup> *Id.* art. III, § 2; *see also* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

For example, when President Reagan signed the Medical Waste Tracking Act, he opined that a particular provision of the legislation authorized a case or controversy where one could not exist.<sup>113</sup> The legislation allowed the President to provide an exemption for federal facilities from enforcement of the requirements of the statute under certain conditions,<sup>114</sup> but the signing statement warned that there could not in any circumstances be an enforcement action brought by the EPA against an executive branch agency.<sup>115</sup> He explained that any such enforcement action could not proceed because it would not be a legitimate “case or controversy” because both parties would be part of the executive branch.<sup>116</sup> The language that the President is using is, of course, taken from the Article III definition of judicial powers under the Constitution and not the Article II powers of the President.<sup>117</sup>

President Clinton issued his own interpretation of the requirements for standing and the limitations of justiciability under Article III. One of the controversial discussions of the provisions of the Departments of Commerce, Justice, and State, the Judiciary, and Related Appropriations Act of 1998 had to do with the methods by which the 2000 census would be conducted.

[I]n providing for a right of action to challenge the use of sampling before completion of the 2000 Census, the Act does not, nor could it, modify the “immutable requirements” of Article III of the Constitution regarding ripeness and standing to sue. Representatives of my Administration informed the Congress while it was considering the census provisions of their doubts whether the right to sue in the Act satisfies Article III requirements.<sup>118</sup>

#### *E. Judicial Device Five: Executive Finding Contrary to Judicial Rulings*

There have even been cases in which Presidents have asserted authoritative interpretations in their signing statements when the controlling case law was plainly contrary to their positions, though they hoped for a new direction. That happened in a number of cases with respect to affirmative action provisions in legislation. President George H. W. Bush issued a signing statement when he approved legislation

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<sup>113</sup> Statement on Signing the Medical Waste Tracking Act of 1988, 2 PUB. PAPERS 1430 (Nov. 2 1988).

<sup>114</sup> Medical Waste Tracking Act of 1988, Pub. L. No. 100-582, § 11006, 102 Stat. 2950, 2955 (codified in scattered sections of 42 U.S.C.).

<sup>115</sup> Statement on Signing the Medical Waste Tracking Act of 1988, 2 PUB. PAPERS 1430 (Nov. 2, 1988).

<sup>116</sup> *Id.*

<sup>117</sup> U.S. CONST. art. III, § 2.

<sup>118</sup> Statement on Signing the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1988, 33 WEEKLY COMP. PRES. DOC. 1926, 1927 (Nov. 26, 1997).



with respect to the controversial Superconducting Super Collider slated to be built in Texas. The legislation called for the Department of Energy to employ affirmative action in contracting for the project,<sup>119</sup> a practice the Bush administration argued was discriminatory and therefore unconstitutional. The President wrote: "I therefore direct the Secretary . . . to administer the section in a constitutional manner."<sup>120</sup>

However, at the time that the administration was asserting this constitutional conclusion and relevant directions to administrators, the Supreme Court had indeed upheld federal government affirmative action programs.<sup>121</sup> It is true that the Court had issued a strongly worded opinion in the Richmond, Virginia, contract set-aside program in 1989, but the majority opinion by Justice O'Connor differentiated federal programs, which it had upheld, from state and local programs, which the Court concluded stood in a different constitutional position.<sup>122</sup> In fact, the Court upheld another federal affirmative action program in 1990 in *Metro Broadcasting v. FCC*.<sup>123</sup> Some years later, the Court did take a more restrictive approach to federal government affirmative action programs as well as the state and local variety, but at the time of his signing statement, the Court had unambiguously upheld the kind of program that President Bush declared was unconstitutional and not to be implemented as written by administration officials.<sup>124</sup> Here again, the question is just what the basis was for the administration in a number of its signing statements to effectively overrule the Supreme Court.

### III. THE NEED TO CONSIDER PRESIDENTIAL JUDICIAL BEHAVIOR MORE CAREFULLY

Certainly, there are several different criticisms and arguments that have been leveled against the kinds of troublesome uses of presidential signing statements that have been so common in the years since the Reagan administration, culminating in the very expansive and even audacious use of the device by the George W. Bush administration. While recognizing the Supreme Court's oft repeated admonition that the Framers of our Constitution intentionally created a separation of powers and checks and balances to preserve them with ongoing debates over the boundary lines of power,

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<sup>119</sup> Pub. L. No. 102-04, § 304, 105 Stat. 510, 532 (codified in scattered sections of 38 U.S.C.).

<sup>120</sup> Statement on Signing the Energy and Water Development Appropriations Act, 1992, 27 WEEKLY COMP. PRES. DOC. 1143, 1143 (Aug. 17, 1991).

<sup>121</sup> See *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (upholding validity of the "minority business enterprise" provision of the Public Works Employment Act of 1977), *overruled by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

<sup>122</sup> *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989). While the Court overturned the Richmond, Virginia program, it reaffirmed *Fullilove*. *Id.*

<sup>123</sup> 497 U.S. 547 (1990) (affirming constitutionality of two FCC minority preference policies), *overruled by Adarand*, 515 U.S. 200.

<sup>124</sup> See *Adarand*, 515 U.S. at 200.

the Justices have also repeatedly recognized that “[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.”<sup>125</sup> That tension is to be expected. The Court has also often repeated the fact that the Constitution did not create departments of government that were “‘hermetically’ sealed from one another.”<sup>126</sup> However, “[w]hen any Branch acts, it is presumptively exercising the power the Constitution has delegated to it.”<sup>127</sup> The White House, which has been so fond in recent years of pointing out that language in legislation often runs afoul of *INS v. Chadha* because it interferes with the powers of the executive, seems to forget that a careful reading of the Court’s opinion makes clear that, notwithstanding the recognition of these realities, the separation of powers applies to all of the branches.<sup>128</sup>

It is important to be clear and to stress that the Court, in varying degrees at different times, has recognized the truth provided by Louis Fisher’s now classic argument that there is an ongoing constitutional dialogue.<sup>129</sup> That does not, however, mean that there are no boundaries. When the dialogue breaks down and when lines must be drawn, there is a need to define the limits of the authority of each of the branches. Thus, when the Court in its separation of powers rulings quotes the language from *Marbury v. Madison*<sup>130</sup> about the function of the judiciary and the nature of judicial power, it does so with a level of sophistication appropriate to serious jurists with considerable experience in the federal government and in dealing with the pull and haul that the Framers clearly anticipated would be with the nation long after they had departed. The statement about the province and duty of the judiciary to say what the law is, particularly when that phrase is quoted some two centuries after *Marbury*, is not used lightly or naively.

The criticism of the abuse of signing statements has tended, for obvious reasons, to focus on tensions between the legislative and executive branches with attention to the Presentment Clause and concerns about the creation and continued use of what is clearly a kind of line item veto—rejected even in a case in which Congress had cooperated with the creation of the device—as compared to the unilateral assertion of such a device in the current context.<sup>131</sup>

With those caveats in mind, it is time to begin to ask about issues concerned with the relationships between the executive and the judicial powers as well as those between the executive and the legislature. The preceding discussion in this Article has provided a variety of examples in which Presidents have behaved like judges, not

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<sup>125</sup> *INS v. Chadha*, 462 U.S. 919, 951 (1983).

<sup>126</sup> *Id.* at 951 (quoting *Buckley v. Valeo*, 424 U.S. 1, 121 (1976)).

<sup>127</sup> *Id.*

<sup>128</sup> *See id.*

<sup>129</sup> *See* LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS (1988).

<sup>130</sup> 5 U.S. (1 Cranch) 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

<sup>131</sup> *Clinton v. City of New York*, 524 U.S. 417 (1998) (addressing the constitutionality of the Line Item Veto Act, passed by Congress in 1996).

merely offering criticism, but asserting what purport to be authoritative judgments as to the constitutional validity and meaning of legislative provisions, along with directions to relevant administrative officials to obey the rulings of the President, even in some cases as compared to those of the courts.<sup>132</sup> Justice Alito recognized in 1986 that the type of use of signing statements at issue was and would be seen to be an attempt to ensure that “the President will get in the last word on questions of interpretation.”<sup>133</sup> That discussion was taking place at the very time that the Attorney General was involved in a public conflict with both the courts and Congress over the signing statement on the Competition in Contracting Act.<sup>134</sup>

Groups that have explored the difficulties with the abuse of signing statements have begun to recognize that this is an area of concern. Thus, the ABA Task Force report incorporated in Resolution 304 concluded:

[T]he Task Force opposes the use of presidential signing statements to effect a line-item veto or to usurp judicial authority as the final arbiter of the constitutionality of congressional acts. Definitive constitutional interpretations are entrusted to an independent and impartial Supreme Court, not a partisan and interested President. That is the meaning of *Marbury v. Madison*. A President could easily contrive a constitutional excuse to decline enforcement of any law he deplored, and transform his qualified veto into a monarch-like absolute veto. The President’s constitutional duty is to enforce laws he has signed into being unless and until they are held unconstitutional by the Supreme Court or a subordinate tribunal. The Constitution is not what the President says it is.<sup>135</sup>

A range of academics and practitioners of varied political perspectives and affiliations who came together in a coalition to preserve checks and balances through the Constitution Project issued a *Statement on Presidential Signing Statements*. They concluded in part:

By signing a particular bill into law, but then issuing a signing statement that declares that he will not give effect to it, or to a provision of it, the President is effectively vetoing the law without affording Congress the opportunity to override the veto, as the Constitution requires. He is effectively asserting unilateral power to repeal and amend legislation. He also displaces the judiciary as

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<sup>132</sup> See *supra* notes 110–24 and accompanying text.

<sup>133</sup> See Alito, *supra* note 6, at 2.

<sup>134</sup> See *supra* note 45 and accompanying text.

<sup>135</sup> See AM. BAR. ASS’N, *supra* note 11, at 23–24.

the final expositor of the Constitution and undermines the principle of judicial review crucial to our system of checks and balances.<sup>136</sup>

Beyond academics and advocates, however, judges have been concerned as well that, at some point, there are dangers from efforts to construct various policy instruments, because there would be violations of the separation of powers in terms of intrusion into the judicial powers, not only the legislative and executive powers. These concerns were expressed rather clearly, if not always in terms, with respect to considerations of the legislative veto and the line item veto cases. The arguments raised there are relevant to the discussion of signing statements.

The Supreme Court in the *Chadha* case warned:

There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President. With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.<sup>137</sup>

Writing of that *Chadha* ruling, the Court in *Clinton v. City of New York* noted: “There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes.”<sup>138</sup> That included efforts to single out pieces of statutes for change or elimination at the pleasure of the President.

Justice Powell, in his *Chadha* concurring opinion, however, was more direct with respect to his concern that these activities not only raised legislative and executive powers issues. He focused his concurring opinion on the finding that when Congress, and presumably a President, makes the kind of determination that it did in *Chadha*, it implicates a judicial function.<sup>139</sup> Powell was, of course, referring to the fact that Congress had made determinations about the status and rights of particular individuals when it exercised its legislative veto in that case.<sup>140</sup> Even so, he went on to speak broadly about the dangers involved when political branches assume that they can behave like judges.

When, for example, the George W. Bush administration undertook to pronounce not only its understanding of the powers of the executive and the legislature with respect to Guantanamo detainees, but also to determine their rights under federal and

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<sup>136</sup> See THE CONSTITUTION PROJECT, *supra* note 11, at 2.

<sup>137</sup> *INS v. Chadha*, 462 U.S. 919, 959 (1983) (citation omitted).

<sup>138</sup> 524 U.S. 417, 438 (1998).

<sup>139</sup> *Chadha*, 462 U.S. at 960 (Powell, J., concurring).

<sup>140</sup> *Id.*

international law and to decide that even those detainees with cases currently pending before the courts had no basis to maintain their litigation. The President was clearly attempting to determine authoritatively, based upon statutory and constitutional interpretation, a set of specific pending cases as well as pronouncing his holding with respect to the state of the law.<sup>141</sup> Speaking of the legislative actions in *Chadha*, Justice Powell wrote, “the separation-of-powers doctrine generally, reflect[s] the Framers’ concern that trial by a legislature lacks the safeguards necessary to prevent the abuse of power.”<sup>142</sup> The same assertion could be maintained with respect to Presidents who seek to behave like judges in signing statements. Powell argued that one means of violating the separation was to “interfere impermissibly with the other’s performance of its constitutionally assigned function.”<sup>143</sup> “Alternatively,” he wrote, “the doctrine may be violated when one branch assumes a function that more properly is entrusted to another.”<sup>144</sup> To the argument that there are certainly statutes under which executive agencies engaged in quasi-judicial behavior, he added, “[t]his function, however, forms part of the agencies’ execution of public law and is subject to the procedural safeguards, including judicial review, provided by the Administrative Procedure Act.”<sup>145</sup>

In his understanding of the issue of setting these boundaries, Powell and others have looked to the admonition provided by a unanimous Court in *United States v. Nixon*:

Notwithstanding the deference each branch must accord the others, the “judicial Power of the United States” vested in the federal courts by Art. III, § 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government.<sup>146</sup>

This discussion about judicial behavior has continued in lower courts as well. While the greatest attention on legislative veto matters is paid to *Chadha*, the fact is that the far more typical problem in legislative veto matters was decided by the D.C. Circuit in *Consumer Energy Council v. FERC*, a case concerning legislative veto provisions in natural gas deregulation legislation.<sup>147</sup> That court specifically found

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<sup>141</sup> See, e.g., *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (analyzing the President’s unilateral determination that certain detainees were eligible for trial by military commission for then-unspecified crimes).

<sup>142</sup> *Id.* at 962.

<sup>143</sup> *Id.* at 963.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 966 n.10.

<sup>146</sup> *United States v. Nixon*, 418 U.S. 683, 705 (1974).

<sup>147</sup> 673 F.2d 425 (D.C. Cir. 1982).

that the one house veto at issue there violated the separation of powers because of intrusion into executive powers, but also because it “intruded upon the exercise of judicial powers.”<sup>148</sup> To the degree that Congress could “alter the meaning of a statute,” without using the proper Article I process, their action “diminishes the role of the Judiciary and expands that of Congress. Accordingly, it violates the separation of powers doctrine.”<sup>149</sup> The court made clear that the problem existed whether the legislature was passing judgment on particular parties, reviewing administrative rule-making, or engaging in what purported to be authoritative statutory interpretation.<sup>150</sup> The same is true of the kinds of signing statements addressed earlier.

Of course, the most direct judicial responses to the signing statement intrusion into the judiciary came in the *Ameron* and *Lear Siegler* cases concerning the declaration by the Reagan White House that provisions of the Competition in Contracting Act were unconstitutional.<sup>151</sup> These cases are discussed in more detail elsewhere, but it is sufficient for the present to note that, having lost in its argument on the subject in the district court, the administration, speaking through the Attorney General, made it quite clear that it considered its interpretation more authoritative and would not be bound by the court’s ruling.<sup>152</sup> To that assertion, Judge Ackerman replied:

In reviewing the position of the Executive Branch in events both before and after my March 27th decision, I am forced to conclude that the fundamental role of this Court in stating what the law is has now been challenged by the Executive Branch. Almost as disconcerting as the facts of such a confrontation, which I find to be grievous, is the fact that the Executive Branch has mounted this assault elsewhere rather than in filings submitted to this Court.<sup>153</sup>

He was particularly upset that Attorney General Meese had declared that the administration would not respond until the case was decided by a court competent to decide the matter. Ackerman said:

The Executive Branch’s position that they can say when a law is unconstitutional equates the powers of mere executive officials with those of the Judiciary. It flies in the face of the basic tenet laid out so long ago by the United States Supreme Court in *United States v. Lee*. The Court said, “No man in this country is so high

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<sup>148</sup> *Id.* at 477–78.

<sup>149</sup> *Id.* at 478.

<sup>150</sup> *Id.* at 450–51.

<sup>151</sup> See *supra* note 45; see also Statement on Signing the Deficit Reduction Act of 1984, 20 WEEKLY COMP. PRES. DOC. 1037 (July 18, 1984).

<sup>152</sup> See COOPER, *supra* note 1, at 225–27.

<sup>153</sup> *Ameron, Inc. v. U.S. Army Corps of Eng’rs*, 610 F. Supp. 750, 754 (1985), *cert. dismissed* 488 U.S. 918 (1988).

that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it.”<sup>154</sup>

He added, “Any possible doubt about the matter was resolved in the historic case of *Kendall v. United States*,” in which the Court rejected the assertion that a President could make a unilateral and conclusive assertion that officials of the executive branch would not execute the law as enacted.<sup>155</sup>

While the court of appeals narrowed the injunction issued by the district court, it did note that “[i]t should be too obvious even to require restating that the district court, as an Article III court, has the power to rule on the constitutionality of an act of Congress and to impose appropriate remedies to compel compliance with an act found to be constitutional.”<sup>156</sup> The Ninth Circuit responded to the administration’s arguments as well, stating that “we also note that in declaring the CICA stay provisions unconstitutional and suspending their operation, the executive branch has assumed a role reserved for the judicial branch.”<sup>157</sup> The court underscored the concern with intrusion into Article III territory.

Passing on the constitutionality of statutory provisions and, at times, severing constitutionally infirm provisions from the operable remainder of a validly enacted law, is a function that is inherently judicial. The executive branch’s attempt to arrogate to itself the power of judicial review is a paradigmatic violation of our system of separation of powers and checks and balances. . . . “If the essential, constitutional role of the judiciary is to be maintained, there must be both the appearance and the reality of control by Article III judges over the interpretation, declaration and application of federal law.”<sup>158</sup>

For all these reasons, it is time to look carefully and think seriously not only about the degree to which contemporary signing statement practice has intruded upon the Article I powers, but also to consider the ways in which it intrudes upon, and in some cases even appears intended to preempt, the proper role of the judiciary under Article III.

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<sup>154</sup> *Id.* at 755 (citation omitted).

<sup>155</sup> *Id.* at 756; *see also* *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet) 524 (1838).

<sup>156</sup> *Ameron*, 787 F.2d at 890 (3d Cir. 1986).

<sup>157</sup> *Lear Siegler, Inc. v. Lehman*, 842 F.2d 1102, 1125 (9th Cir. 1988).

<sup>158</sup> *Id.* (quoting *Pacemaker Diagnostic Clinic of Am. v. Instromedix, Inc.*, 725 F.2d 537, 544 (9th Cir. 1984)).