This resolution does not represent the policy of the American Bar Association until it shall have been approved by the House of Delegates. Informational reports, comments and supporting data are nota pproved by the House in its voting and represent only the views of the submitting entity.

AMERICAN BAR ASSOCIATION

TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE

RECOMMENDATION

RESOLVED, That the American Bar Association opposes, as contrary to the rule of law and our constitutional system of separation of powers, the issuance of presidential signing statements that claim the authority or state the intention to disregard or decline to enforce all or parto f a law the Presidenth as signed, or to interpret such a law in a manner inconsistentw ith the clear intento f Congress;

FURTHER RESOLVED, That the American Bar Association urges the President, if he believes thata ny provision of a bill pending before Congress would be unconstitutional if enacted, to communicate such concerns to Congress prior to passage;

FURTHER RESOLVED, That the American Bar Association urges the President to confine any signing statements to his views regarding the meaning, purpose and significance of bills presented by Congress, and if he believes that all or parto f a bill is unconstitutional, to veto the bill in accordance with Article I, § 7 of the Constitution of the United States, which directs him to approve or disapprove each bill in its entirety;

FURTHER RESOLVED, That the American Bar Association urges Congress to enact legislation requiring the Presidentp romptly to submit to Congress an official copy of all signing statements he issues, and in any instance in which he claims the authority, or states the intention, to disregard or decline to enforce all or part of a law he has signed, or to interprets uch a law in a manner inconsistent with the clear intento f Congress, to submit to Congress a report setting forth in full the reasons and legal basis for the statement; and further requiring that all such submissions be available in a publicly accessible database; and

FURTHER RESOLVED, That the American Bar Association urges Congress to enact legislation enabling the President, Congress,o r other entities or individuals, to seek judicial review, to the extent constitutionally permissible, in any instance in which the President claims the authority, or states the intention,t o disregard or decline to enforce all or parto f a law he has signed, or interprets such a law in a manner inconsistent with the clear intent of Congress, and urges Congress and the President to support a judicial resolution of the President's claim or interpretation.

REPORT

The preservation of liberty requires that
the three great departments of power
should be separate and distinct.
– James Madison, FederalistP apers, No. 47.

I. INTRODUCTION

On April 30, 2006, Charlie Savage, a respected veteran reporter for the Boston Globe, wrote a lengthy article on the use of presidential "signing statements" in which he reported that "PresidentB ush has quietly claimed the authority to disobey more than 750 laws enacted since he took office, asserting thath e has the power to set aside any statute passed by Congress when it conflicts with his interpretation of the Constitution."[1] Savage wrote:

> Legal scholars say the scope and aggression of Bush's assertions thath e can bypass laws represent a concerted effort to expand his power at the expense of Congress, upsetting the balance between the branches of government. The Constitution is clear in assigning to Congress the power to write the laws and to the president a duty "to take care thatt he laws be faithfully executed." Bush, however, has repeatedly declared thath e does notn eed to "execute" a law he believes is unconstitutional.

Id. The Savage articles created a major national controversy, with the use – and, as some charged, the abuse – of signing statements drawing both severe critics and staunch defenders, with dozens of newspaper editorials[2] and op-ed pieces published.

Senator Arlen Specter (R-PA), the Chairman of the Senate Judiciary Committee, charged that congressional legislation "doesn't amountt o anything if the presidentc an say, 'My constitutional authority supersedes the statute.' And I think we've got to lay down the gauntlet

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[1] *See* Charlie Savage,*B ush Challenges Hundreds of Laws*, BOSTON GLOBE, April 30, 2006, *at* http://www.boston.com/news/nation/Washington/articles/2006/04/30/bush_challenges_hundreds_of_laws/.

[2] *See, e.g., Veto? Who Needs a Veto?*, Editorial, NEW YORK TIMES, May 5, 2006 at http://www.nytimes.com/2006/05/05/opinion/05fri1.html?th&emc=th; *A White House power grab,* Editorial, SAN FRANCISCO CHRONICLE, June 12, 2006, at http://sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2006/06/12/EDGMSJB0EJ1.DTL; *Signing statements an abuse of power*, Editorial, ASBURY PARK PRESS, June 6, 2006, at http://www.app.com/apps/pbcs.dll/article?AID=/20060606/OPINION/606060313/1032.

and challenge him on it"[3] He denounced the President's use of signing statements as "a very blatant encroachment" on Congress's power to legislate.[4]

At a June 27, 2006 Senate Judiciary Committee hearing on "Presidential Signing Statements,"[5] Senator Patrick Leahy (D-VT), the Ranking Member, stated:

> We are at a pivotal momenti n our Nation's history, where Americans are faced with a President who makes sweeping claims for almost unchecked Executive power. One of the mostt roubling aspects of such claims is the President's unprecedented use of signing statements. Historically, these statements have served as public announcements containing comments from the President, on the enactment of laws.B ut this Administration has taken what was otherwise a press release and transformed it into a proclamation stating which parts of the law the President will follow and which parts he will simply ignore.

Senator Leahy called the broad use of signing statements "a grave threat to our constitutional system of checks and balances."[6]

In light of the importance of these issues,A BA President Michael S. Greco appointed an ABA Task Force on Presidential Signing Statements and the Separation of Powers Doctrine to "examine the changing role of presidential signing statements, in which U.S. presidents articulate their views of provisions in newly enacted laws, attaching statements to the new legislation before forwarding it to the Federal Register" and to "consider whether such statements conflictw ith express statutory language or congressional intent."[7]

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[3] *See* Andy Sullivan, *Specter to grill officials on Bush ignoring laws*," REUTERS, June 21, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/06/21/AR2006062101594.html

[4] *See* Charlie Savage,*S enators Renew Call for Hearings on Signing Statements*, BOSTON GLOBE, June 16, 2006, *at* http://www.boston.com/news/nation/washington/articles/2006/06/16/senators_renew_call_for_hearings_on_signing_statements/.

[5] The statements of all witnesses att he Senate Judiciary Committee hearing on "Presidential Signing Statements," including Task Force members Bruce Fein and Professor Charles Ogletree, can be accessed at: http://judiciary.senate.gov/hearing.cfm?id=1969.

[6] *See* Statement of Senator Patrick Leahy,R anking Member, Judiciary Committee Hearing on Presidential Signing Statements, June 27, 2006, at http://judiciary.senate.gov/member_statement.cfm?id=1969&wit_id=2629

[7] *See* ABA News Release, "ABA to Examine Constitutional, Legal Issues of Presidential Signing Statements" at: http://www.abanews.org/releases/news060506.html

In appointing the Task Force, PresidentG reco stated:

> The issue to be addressed by this distinguished task force is of greatc onsequence to our constitutional system of government and its delicate system of checks and balances and separation of powers. The task force will provide an independent, non-partisan and scholarly analysis of the utility of presidential signing statements and how they comportw ith the Constitution and enacted law.

President Greco took special care to ensure that the membership of the Task Force represented a variety of diverse views and backgrounds. The Task Force members are both conservative and liberal,R epublican and Democrat, and have had substantial experience in government, the judiciary, and constitutional law. [8]

While the Task Force was operating under intense time pressures, itb enefitted from the fact thatt he use of presidential signing statements has been the subject of a variety of scholarly books and articles.[9] In addition, the American Presidency Project, a collaboration between John Woolley and Gerhard Peters at the University of California, Santa Barbara,c ontains the signing statements of all United States Presidents since 1929,[10] and Joyce A. Green, a concerned and public spirited Oklahoma City lawyer, created an annotated website of all of the signing statements since 2001 in order to "provide free convenienta ccess -- for the entire world -- to the text of George W. Bush's presidential signing statements."[11]

The members of the Task Force reviewed a large number of reference materials and discussed and debated the issues in more than a half dozen lengthy conference calls and hundreds of emails. Every word of each recommendation was carefully considered and parsed until there

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[8] The Task Force is chaired by **Neal R. Sonnett**, and includes **Mark D. Agrast, Hon. Mickey Edwards,B ruce Fein, Dean Harold Hongju Koh,P rofessor Charles Ogletree,P rofessor Stephen A. Saltzburg, Hon. William S. Sessions, Professor Kathleen Sullivan, Tom Susman,** and **Hon. Patricia M. Wald. Alan J. Rothstein** serves as a Special Advisor. A short biography of each appears in an Appendix to this Report.

[9] *See, e.g.,* PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION (2002); Christopher S. Kelley, "A Comparative Look att he Constitutional Signing Statement: The Case of Bush and Clinton," Paper presented att he 61st Annual Meeting of the MidwestP olitical Science Association (April 2003), at http://mpsa.indiana.edu/conf2003papers/1031858822.pdf; Philip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 PRESIDENTIAL STUD. Q. 515 (2005).

[10] *See* http://www.presidency.ucsb.edu/signingstatements.php?year=2006&Submit=DISPLAY.

[11] *See* http://www.coherentbabble.com/signingstatements/about.htm

was unanimous consensus by the members. Among those unanimous recommendations,t he Task Force voted to:

- oppose, as contrary to the rule of law and our constitutional system of separation of powers, a President's issuance of signing statements to claim the authority or state the intention to disregard or decline to enforce all or part of a law he has signed, or to interpret such a law in a manner inconsistent with the clear intento f Congress;

- urge the President, if he believes that any provision of a bill pending before Congress would be unconstitutional if enacted,t o communicate such concerns to Congress prior to passage;

- urge the President to confine any signing statements to his views regarding the meaning, purpose, and significance of bills, and to use his veto power if he believes thata ll or part of a bill is unconstitutional;

- urge Congress to enact legislation requiring the Presidentp romptly to submit to Congress an official copy of all signing statements, and to report to Congress the reasons and legal basis for any instance in which he claims the authority, or states the intention, to disregard or decline to enforce all or parto f a law he has signed, or to interprets uch a law in a manner inconsistent with the clear intento f Congress, and to make all such submissions be available in a publicly accessible database.

- urge Congress to enact legislation enabling the President, Congress, or other entities or individuals, to seek judicial review of such signing statements to the extentc onstitutionally permissible, and urge Congress and the President to support a judicial resolution of the President's claim or interpretation.

Our recommendations are not intended to be, and should not be viewed as,a n attack on the current President. His term will come to an end and he will be replaced by another President, who will, in turn, be succeeded by yeta nother.

To be sure, itw as the number and nature of the current President's signing statements which generated the formation of this Task Force and compelled our recommendations. However, those recommendations are directed not just to the sitting President, butt o all Chief Executives who will follow him, and they are intended to underscore the importance of the doctrine of separation of powers. They therefore represent a call to this President and to all his successors to fully respect the rule of law and our constitutional system of separation of powers.

II. PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE

According to Professor Neil Kinkopf, signing statements have historically served "a largely innocuous and ceremonial function" to explain the President's reasons for signing a bill into law and to serve to "promote public awareness and discourse in much the same way as a veto message"[12] And Professor Christopher Kelley,I n his 2003 doctoral dissertation on this issue, noted that:

> . . . iti s what the president does with the signing statement thatm akes this an area of interest to those studying presidential power. The president can use the signing statement to reward constituents, mobilize public opinion toward his preferred policies or against his political opponents, decline to defend or enforce sections of the bill he finds to be constitutionally objectionable, reward political constituents by making political declarations regarding the supposed constitutional veracity of a section of a bill, and even move a section of law closer to his preferred policy.[13]

According to Kinkopf, "there is nothing inherently wrong with or controversial about signing statements." However, the controversy arises when "a signing statement is used not to extol the virtues of the bill being signed into law, butt o simultaneously condemn a provision of the new law as unconstitutional and announce the President's refusal to enforce the unconstitutional provision."[14]

Since several recent studies have concluded that the Bush Administration has used signing statements to claim the authority or state the intention to disregard or decline to enforce all or parto f a law he signed more than all of his predecessors combined,[15] we believe thata short history of the use of such statements will provide background, context, and perspective to this report.

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[12] Neil Kinkopf, *Signing Statements and the President's Authority to Refuse to Enforce the Law* 2 (June 15, 2006), at http://www.acslaw.org/node/2965.

[13] Christopher Kelley,*T he Unitary Executive and the Presidential Signing Statement* (2003) (unpublished Ph.D. dissertation, Miami University), *at* http://www.ohiolink.edu/etd/send-pdf.cgi?miami1057716977.

[14] *Id.*

[15] *Id.* at 3; Savage, *supra*, note 1.

A. A History of the Use of Signing Statements

1. The First Two Centuries

The Constitution says nothing about the President issuing any statement when he signs a bill presented to him. If he vetoes the bill, Article 1, §7 requires him to tell Congress what his objections are, so that Congress can reconsider the bill and accommodate him or repass itb y a two-thirds vote of both Houses in which case it becomes law without his signature.

Nonetheless Presidents have issued statements elaborating on their views of the laws they sign since the time of PresidentJ ames Monroe who, a month after he signed a bill into law which mandated reduction in the size of the army and prescribed the method by which the President should select military officers, issued a statementt hat the President, not Congress, bore the constitutional responsibility for appointing military officers.[16]

In 1830, PresidentA ndrew Jackson signed an appropriations bill providing for a road from Detroit to Chicago he objected to,b uti nsisted in his signing statementt hat the road involved was not to extend beyond Michigan. The House of Representatives vigorously objected to his limitation buti n fact acceded to it.[17]

In 1840, PresidentJ ohn Tyler issued a signing statement disagreeing quite respectfully with certain provisions in a bill dealing with apportionment of congressional districts. As spokesman for the House, John Quincy Adams wondered why such an "extraneous document" was issued ata ll and advised thatt he signing statement should "be regarded in no other lightt han a defacement of the public records and archives."[18]

No signing statements announcing a President's intent not to comply with a law were issued until 70 years after the Constitution was ratified. Although after the Jackson and Tyler contretemps, Presidents seemed to shy away from statements denouncing provisions in bills they signed, the practice of identifying their differences with the Congress continued throughoutt he 19th century.[19] There is, additionally, at least one example of a 19th century signing statement by

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[16] Kelley, *supra* note 9, at 5.

[17] *Id.* at 5-6.

[18] *Id.* at 5.

[19] *Id.* The practice was recognized by the Supreme Court in *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 454 (1899). Butt he characterization in the 1994 Office of Legal Counsel memorandum authorized by Walter Dellinger on Presidential Authority to Decline to Execute Unconstitutional Statutes (hereafter Dellinger Declination Memorandum), *at* http://www.usdoj.gov/olc/nonexcut.htm (pagination according to the printed version), of a

President Ulysses S. Grant that "interpreted" a bill in a way that would overcome the Presidential constitutional concern, a technique that would frequently be employed by later 20th century Presidents to mold legislation to fit their own constitutional and statutory preferences.A n appropriation bill had prescribed the closing of certain consular and diplomatic offices. President Grant thought it" an invasion of the constitutional prerogatives and duty of the Executive" and said he would accordingly construe ita s intending merely "to fix a time at which the compensation of certain diplomatic and consular officers shall cease and not to invade the constitutional rights of the Executive."[20]

This pattern continued basically into the first80 years of the 20th century. President Theodore Rooseveltp roclaimed his intention in 1909 to ignore a restriction on his power to establish volunteer commissions in a signing statement; President Woodrow Wilson advised in a signing statement that executing a particular provision would result in violation of 32 treaties which he refused to do; and in 1943 PresidentF ranklin Roosevelt vehemently lashed back at a rider in an appropriation bill which barred compensation to three governmente mployees deemed "subversive" by the Congress. Roosevelt" place[d] on record my view thatt his provision is not only unwise and discriminatory, butu nconstitutional" and was thus not binding on the Executive or Judicial branches. This signing statement was later cited by the Supreme Courti n *United States v.L ovett*,[21] where it held the law unconstitutional. Roosevelt indicated he would enforce the law but thatw hen the employees sued, he would instructt he Attorney General to side with them and attack the statute,w hich he did. Congress had to appoint a special counsel to defend it, unsuccessfully.[22]

"consistent and substantial executive practice" of Presidential noncompliance with provisions in signed bills has been challenged by some commentators. *See* William C. Banks, *Still the Imperial Presidency*, 2 JURIST BOOKS-ON-LAW BOOK REVS, No. 3 (March 1999), reviewing CHRISTOPHER N. MAY, PRESIDENTIAL DEFIANCE OF "UNCONSTITUTIONAL" LAWS: REVIVING THE ROYAL PREROGATIVE (1998), *at* http://jurist.law.pitt.edu/lawbooks/revmar99.htm#Banks. An earlier 1993 Dellinger memorandum on the Legal Significance of Presidential Signing Statements (hereafter Dellinger Signing Memorandum), *at* http://www.usdoj.gov/olc/signing.htm (pagination according to the printed version), lists Presidents Jackson, Tyler, Lincoln and Johnson as issuing signing statements dealing with constitutional objections to bills they signed.
These statements in the main noted the Presidents' objections and urged Congress to address them (which it often did). Buts ome, however,s uch as Jackson's road limitation, were read by Congress as signifying an intent not to follow the law and, in Jackson's case, labeled an "item veto."

[20] Dellinger Signing Memorandum, at 5.

[21] 238 U.S. 303 (1946).

[22] Kelley, *supra* note 9, at 7-8.

President Roosevelt also employed the "constitutional avoidance" technique pioneered by President Grant of interpreting a controversial provision so as nott o raise constitutional concerns. When he issued a signing statement for the Emergency Price Control Act of 1942,h e objected to certain "protectionist measures for farmers," butc ontinued that "nothing contained therein . . . can be construed as a limitation on existing powers of government agencies such as the Commodity CreditC orporation to make sales of agricultural commodities in the normal conduct of their operations." Either Congress should remove the provision or he would treat ita s a nullity. Congress removed it.[23] President Truman followed suit in a signing statementr egarding a provision in a 1951 appropriations act, saying: "I do not regard this provision as a directive, which would be unconstitutional, but instead as an authorization . . ."[24] And in signing the Portal to Portal Act, President Truman took the then unusual step of defining the term "compensable labor" in a way so as to benefitt he interests of organized labor, an interpretation later accepted by the courts.[25]

Presaging the formulaic signing statements of the current era refusing to follow laws mandating intelligence disclosures, PresidentDw ight Eisenhower in 1959 signed the Mutual Security Act,b uts tated, "I have signed this bill on the express promise that the three amendments relating to disclosure are not intended to alter and cannota lter the Constitutional duty and power of the Executive with respect to the disclosure of information, documents and other materials. Indeed any other construction of these amendments would raise grave constitutional questions under the historic Separation of Powers Doctrine."[26]

President Nixon in turn objected to a 1971 military authorization bill which seta date for withdrawal of U.S. forces from Indochina as being "without binding force or effect."[27] And prior to the Supreme Court's 1983 decision in *INS v.C hadha*,[28] invalidating the legislative veto, Presidents Eisenhower, Nixon, Ford and Carter objected to variations of those vetoes in signing statements and said they would not abide by them. Presidents John F. Kennedy and Lyndon Johnson construed such legislative vetoes as "request[s] for information."[29]

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[23] Kelley, *supra* note 9, at 7; Dellinger Signing Memorandum, Appendix, at 6.

[24] Dellinger Signing Memorandum, Appendix, at 6.

[25] Kelley, *supra* note 9, at 4.

[26] Dellinger Signing Memorandum, Appendix at 6.

[27] *Id.*

[28] 462 U.S. 919 (1983). In its opinion the Supreme Court noted that eleven Presidents had indicated in signing statements and otherwise thatt he legislative veto was unconstitutional.

[29] Dellinger Signing Memorandum, Appendix, at 6; Dellinger Declination Memorandum,

As a general matter, President Jimmy Carter made greater use than his predecessors of signing statements, refusing, as President Grant had done before him, to follow the mandate of Congress to close certain consular posts and indicating his intent to construe the provision as only "precatory."[30] He also issued a statement accompanying his signing of a 1978 appropriations act which contained a provision forbidding use of funds to implementh is amnesty program for Vietnam draft resisters; he maintained that the provision was a bill of attainder, denied due process and interfered with the President's constitutional pardoning power. He then proceeded in defiance of the law to use funds to process reentry visas for the Vietnam resisters and when critics sued the governmentt o enforce the law his administration successfully defended his actions on the ground that the challengers had no standing to sue.[31]

2. The Reagan, Bush I and Clinton Years

The Administration of President Ronald Reagan is credited by many commentators as a period in which the use of signing statements escalated both quantitatively and qualitatively. The firsto bservation is only moderately accurate; the second is quite true.F or the first time,s igning statements were viewed as a strategic weapon in a campaign to influence the way legislation was interpreted by the courts and Executive agencies as well as their more traditional use to preserve Presidential prerogatives.[32] President Reagan's Attorney General Edwin Meese secured an agreement from WestP ublishing Company to include signing statements along with traditional legislative history in the United States Code Congressional and Administrative News for easy availability by courts and implementing officials.[33]

Appendix, at6.

[30] Dellinger Signing Memorandum, Appendix, at 6.

[31] Kelley, *supra* note 9, at 3. Professor May contends thato f the 101 statutory provisions challenged by Presidents through 1981, the Presidenta ctually "disregarded" only 12; of those 12, seven occurred between 1974 and 1981. President Carter accounted for five of those. *Banks*, *supra*.

[32] Now Supreme Court Justice Samuel Alito wrote a memorandum while in the Office of Legal Counsel in 1986 counseling some modest experimentation with signing statements construing "ambiguous" statutory terms butr ecommended avoiding interpretive conflicts with Congress where the meaning of the law was clear. *See* Samuel A. Alito, Jr., Using Presidential Signing Statement to Make Fuller Use of the President's Constitutionally Assigned Role in the Process of Enacting Law (Feb. 5, 1986) (Office of Legal Counsel memorandum), at http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf

[33] Kelley, *supra* note 9, at 8-9.

President Reagan succeeded in having his signing statements cited in several Supreme Court cases which upheld his Presidential powers against challenges by the Comptroller General in *Bowsher v. Synar*,[34] involving deficits pending limits and in the final denouement of the legislative veto in the *Chadha* case.[35] In his statementa ccompanying the signing of the Competition in Contracting Act in 1984, he had refused to abide by the provision which allowed the Comptroller General to sequester money in the evento f a challenge to a government contract. His nonenforcement was challenged by a losing bidder, and the courts found the Act constitutional. His continued refusal to obey the court order resulted in a judicial tongue lashing and Congressional threats to eliminate funding, whereupon he changed course.[36]

Two of the mosta ggressive uses of the signing statementb y President Reagan to control statutory implementation occurred in the Immigration Reform and Control Acto f 1986 in which Congress legislated thata "brief, casual and imminenta bsence" of a deportable alien from the United States would not terminate the required "continuous physical presence" required for an alien's eligibility for legalized status. PresidentR eagan announced in the signing statement, however, that an alien would be required to apply to the INS before any such brief or casual absence, a requirement totally absentf rom the bill. He also reinterpreted the Safe Drinking Water Act so as nott o make several of its provisions mandatory.[37]

President George Herbert Walker Bush ("PresidentB ush I") overtook President Reagan in the number of signing statement challenges to provisions in laws presented to him—232 in his four years in office compared to 71 in the two-term Reagan Administration.[38] A third of President Bush I's constitutional challenges were in the foreign policy field. An Office of Legal Counsel opinion prepared for the President listed 10 types of legislative encroachments on Presidential prerogatives and urged they be countered in signing statements.[39]

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[34] Kelley, *supra* note 9, at 8; *Bowsher v. Synar*, 478 U.S. 717, 719 n.1 (1986).

[35] *INS v. Chadha*, 462 U.S. 919 (1983) n.13. Though noti nvolving a signing statement the Reagan push to influence legislative interpretation received a boostf rom the Supreme Court's decision in *Chevron U.S.A. Inc. v. NRDC*, 462 U.S. 919 (1983), which ruled that unless the text or Congressional intent was clear, any "permissible," *aka* reasonable, interpretation by the agency of statutory language would prevail even if the court's own interpretation might be different.

[36] Kelley, *supra* note 9, at 8-9.

[37] Marc V. Garber and Kurt A. Williams, *Presidential Signing Statement as Interpretation of Legislative Intent: An Executive Aggrandizement ofP ower*, 24 Harv. J. on Legis. 363 (1987), at 2 and n.14.

[38] Kelley, *supra* note 9, at 10.

[39] *Id.*

He responded forcefully to his perception of such threats in laws, both great and small. The Dayton Aviation Heritage and Preservation Acto f 1992, for example, directed the Secretary of the Interior to make appointments to a commission which would exercise Executive power though the appointees were not confirmed as Executive branch officers. Appraising this as an affront to Presidential power under the Appointments Clause, President Bush I refused to appoint anyone until Congress changed the law. He acted similarly with respectt o nominations under the National and Community Services Act which had designated the Speaker and Senate Majority Leader to make appointments.[40]

President Bush I advanced the Reagan interpretive agenda further in two instances in which his administration firsta rranged to have colloquies inserted into the congressional debates and then in signing statements relied on those colloquies to interpret statutory provisions despite stronger legislative evidence in favor of contrary interpretation. The first case involved a foreign affairs appropriations bill in which the Congress had forbidden sale of arms to a foreign government to further a foreign policy objective of the United States which the United States could nota dvance directly. Stating first that he intended to construe "any constitutionally doubtful provisions in accordance with the requirements of the Constitution," PresidentB ush I said he would restrict the scope of the ban to the kind of "*quid pro quo*" exchange discussed in a specific colloquy his administration had arranged with Congressional allies rather than credit the broader range of transactions clearly contemplated by the textual definition which included deals for arms "in exchange for" furthering of a U.S. objective. "My decision to sign this bill," he said in the statement, "is predicated on these understandings" of the relevant section, referring to the colloquy.[41]

In the 1991 Civil Rights Act,a piece of legislation President Bush I could not afford politically to veto, Congress said quite clearly thati tw ished to return to an interpretation of what constituted "disparate impact" for Title VII discrimination purposes that existed prior to the Supreme Court's cutback in the *Ward's Cove* case.[42] The President's signing statement, however, labeled by one commentator as the mostc ontroversial signing statemento f his term, again relied on a colloquy inserted in the record of the congressional debate and concluded thatt he Act "codifies" rather than "overrules" *Ward's Cove*.[43]

A look att he Clinton record of the use of the presidential signing statements hows that President Clinton used the constitutional signing statementl ess in his two terms than did his

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[40] Kelley, *supra* note 9, at 11-12.

[41] Kelley, *supra* note 9, at 12-14.

[42] *Ward's Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989).

[43] Kelley, *supra* note 9, at 14-16.

predecessor in one (105 to 146),b uts till more than the Reagan administration (105 to 71).[44] For the Clinton Administration, "the signing statement was an important cornerstone of presidential power, as outlined by Walter Dellinger in his 1993 OLC memo.I t would become particularly important after the 1994 mid-term elections when the Congress became Republican and more polarized."[45]

In a 1993 memorandum, the then head of OLC, later acting Solicitor General Walter Dellinger,j ustified on historical and constitutional bases, a President's refusal to follow a law that is "unconstitutional" on its face. In a second memorandum in 1994 to White House Counsel Abner Mikva, he said the President had an "enhanced responsibility to resistu nconstitutional provisions that encroach upon the constitutional power of the Presidency." But he cautioned:

> As a general matter, if the President believes that the Court would sustain a particular provision as constitutional, the President should execute the statute, notwithstanding his own beliefs aboutt he constitutional issue. If, however, the President, exercising his independent judgment, determines both that a provision would violate the Constitution and thati ti s probable that the Courtw ould agree with him, the Presidenth as the authority to decline to execute the statute.
>
> [I]n deciding whether to enforce a statute the President should be guided by a careful weighing of the effect of compliance with the provision on the constitutional rights of affected individuals and on the executive branch's constitutional authority. Also relevanti s the likelihood that compliance or noncompliance will permitj udicial resolution of the issue.[46]

Over half of President Clinton's constitutionally related signing statements were in the realm of foreign policy. In the 1996 National Defense Authorization Act, which followed his prior veto of a provision requiring discharge of HIV positive service members, the same provision resurfaced. This time Clinton declared in the signing statementt hat the provision was unconstitutional and instructed his Attorney General not to defend the law if it were challenged.

However, President Clinton's advisors made it clear that, if the law were not struck down, the President would have no choice but to enforce it. At a White House briefing on February 9, 1996,[47] White House Counsel Jack Quinn explained that "in circumstances where you don't have

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[44] *Id.* at 19.

[45] *Id.* at 23.

[46] Dellinger Declination Memorandum.

[47] *See Special White House Briefing on Provision in the FY1996 Defense Authorization Bill Relating to HIV-positive Armed Services Members,* February 9, 1996, Federal News Service,

the benefit of such a prior judicial holding, it's appropriate and necessary to enforce it. . ." AssistantA ttorney General Walter Dellinger added:

> When the president's obligation to execute laws enacted by Congress is in tension with his responsibility to acti n accordance to the Constitution, questions arise that really go to the very heart of the system, and the presidentc an decline to comply with the law, in our view, only where there is a judgment thatt he Supreme Court has resolved the issue.

Id. Congress subsequently repealed the provision before any courtc hallenge was mounted.[48]

In another 1995 appropriations act, the President took aim att he GovernmentP rinting Office's attempts to control Executive branch printing through a provision that" no funds appropriated may be expended for procurement of any printing of government publications unless through the GPO." Clinton instructed his subordinates to disregard the provision and his defiant stance was never putt o the test.[49] Clinton followed his predecessors in repudiating and refusing to enforce the series of legislative vetoes declared illegal in 1984 by the Supreme Court that Congress nevertheless continued to attach to legislation.[50] Clinton issued signing statements objecting to140 constitutional incursions on his Presidential authority.[51]

3. The Bush II Era

From the inception of the Republic until 2000, Presidents produced signing statements containing fewer than 600 challenges to the bills they signed. According to the mostr ecent update, in his one-and-a-half terms so far, President George W. Bush (Bush II) has produced more than 800.[52]

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available on Lexis-Nexis. *See also*,A lison Mitchell, *President Finds a Way to Fight Mandate to Oust H.I.V. Troops*, NEW YORK TIMES, February 10, 1996 (Clinton "once signing the overall legislation, would have no choice but to enforce the law, in the absence of a courtr uling against it").

[48] Kelley, *supra* note 9, at 19.

[49] *Id.* at 20-21.

[50] Neil Kinkopf, Signing Statements and the President's Authority to Refuse to Enforce the Law (2006), 3-4, at http://www.acslaw.org/files/kinkopf-Signing%20statements%20and%20President's%20Authority.pdf.

[51] Savage, *supra*, note 1.

[52] It is important to understand thatt hese numbers refer to the number of **challenges** to provisions

He asserted constitutional objections to over 500 in his first term: 82 of these related to his theory of the "unitary executive," 77 to the President's exclusive power over foreign affairs, 48 to his power to withhold information required by Congress to protect national security, 37 to his Commander in Chief powers.[53]

Whereas President Clinton on occasion asked for memoranda from the Office of Legal Counsel on his authority to challenge or reject controversial provisions in bills presented to him, it is reported that in the Bush II Administration all bills are routed through Vice President Cheney's office to be searched for perceived threats to the "unitary executive"— the theory that the President has the sole power to control the execution of powers delegated to him in the Constitution and encapsulated in his Commander in Chief powers and in his constitutional mandate to see that "the laws are faithfully executed."[54]

Some examples of signing statements in which President Bush has indicated he will not follow the law are: bills banning the use of U.S. troops in combat against rebels in Colombia; bills requiring reports to Congress when money from regular appropriations is diverted to secret operations; two bills forbidding the use in military intelligence of materials "not lawfully collected" in violation of the Fourth Amendment; a post-Abu Ghraib bill mandating new regulations for military prisons in which military lawyers were permitted to advise commanders on the legality of certain kinds of treatment even if the Departmento f Justice lawyers did not agree; bills requiring the retraining of prison guards in humane treatmentu nder the Geneva Conventions, requiring background checks for civilian contractors in Iraq and banning contractors from performing security, law enforcement, intelligence and criminal justice functions.[55]

Perhaps the most prominents igning statements which conveyed refusals to carry out laws involved:

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of laws rather than to the number of signing statements; a single signing statement may contain multiple such challenges. *See* Kelley, *A Signing Statement Update*, Media Watch Blog, July 11, 2006 at http://www.users.muohio.edu/kelleycs/2006/07/signing-statement-update.html. As of July 11, 2006, the total was 807. *See* http://www.users.muohio.edu/kelleycs/mediablog.html.

[53] Philip J. Cooper, *George W. Bush, Edgar Allan Poe,and the Use and Abuse of Presidential Signing Statement,* 35 Presidential Studies Quarterly (2005), at515 , 522.

[54] Charlie Savage," Cheney Aide is Screening Legislation," BOSTON GLOBE, May 28, 2006 at http:///www.boston.com/news/nation/articles/2006/05/28/cheney_aide_is_screening_legislation/.

[55] Savage, *supra* note 1.