# ADMINISTRATIVE LAW AND REGULATION

## THE ABA AND THE PRESIDENTIAL SIGNING STATEMENTS CONTROVERSY

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The big news from the American Bar Association's annual meeting this year was its resolution condemning the misuse of presidential signing statements. This followed a much-ballyhooed report by a blue-ribbon ABA task force and statements from its chair, Neil Sonnett, tying the ABA action to criticism of the Bush Administration.

News media reported the action as a slap to the Administration, rebuffing President Bush's prolific use of signing statements as an abuse of office. Sonnett explained the final resolution—changed from a sweeping condemnation of presidential signing statements to a condemnation only of their "misuse"—clarifying that any use of such statements to assert the unconstitutionality of elements of a statute, or to direct an interpretation inconsistent with clear congressional purpose, is a misuse of presidential power. Other ABA leaders proclaimed that the Constitution gives the President the simple choice of vetoing laws or signing them, adding that if the President signs a bill into law, he cannot qualify that choice. They see signing statements as violations of a constitutionally mandated separation of powers.

A number of prominent conservative critics have condemned this action as politically partisan, noting that the ABA remained silent when President Clinton issued signing statements but is now condemning President Bush. Some liberal groups have seized on the ABA's action as evidence Bush is flaunting the Constitution and undermining the law. Statements by Sonnett and others—refusing to see the change in the final resolution from a sweeping condemnation of presidential signing statements to a condemnation only of their "misuse" as making any difference and continuing to press arguments targeted at the Bush Administration—lend credibility to the conservative criticism.

Whatever the impetus for the ABA action, the actual resolution was not what the news reported. It was not a blanket attack on signing statements, and not simply a slap at President Bush. It may still be ill-advised, but the actual issues surrounding these statements are far more complex and considerably different from media reports.

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Presidential signing statements are formal documents issued by the President, after wide consultation within the executive branch, when he signs an enacted bill into law. They state the President's understanding of the legislation he is signing and also may give instructions to the executive branch regarding how the new law's provisions are to be treated. While such views have been formulated for as long as there has been a veto power to be exercised and the President has served as head of the executive branch of government, it is only recently that they have become readily available public documents. On the whole, this is a desirable development; it is always useful for the citizenry (and Congress) to know how the executive branch understands the laws Congress enacts.

On occasion, however, Presidents have used signing statements to express doubts about the constitutionality of elements of legislation they are nonetheless signing into law, or to state interpretations inconsistent with Congress's understanding of the legislation it sent forward to the President. Signing statements like these generate three separate legal questions.

The first and simplest is whether they are constitutional. Although the Constitution says nothing about signing statements, it also is silent regarding the reports regularly written by congressional committees. The President takes an oath to support the Constitution and laws of the United States and has clear authority to explain how he views the legislation he is signing or deciding not to sign, just as congressional committees have authority to explain their views on the legislation they send forward. Claims that signing statements, as such, violate the Constitution and transgress constitutional separation of powers are either silly or radically overbroad.

The harder questions are what weight courts should give presidential statements when interpreting the laws and how signing statements fit rule-of-law concerns. These are related, but not identical, questions.

The question with judicial interpretation is largely the same as with congressional contributions to legislative history. The best evidence of what a law means almost always is the words used in the law itself. But the size, complexity, and mixed parentage of laws today sometimes produces text that, read literally, is difficult to credit as what could have been reasonably understood by those who enacted it. At times, the law is ambiguous and the legislative history clears up a point. At times, the law is clear enough and the

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legislative history is designed to revise the understanding in ways that never would have commanded majority support in the legislation—which is why lobbyists work so hard to have favorable language that couldn't make it into law inserted into the history.

Presidential signing statements offer the same benefits and the same problems. They can assist in understanding a law or they can state a view that, while capturing the President's view of good law, could never have commanded majority support in the legislature. Like legislative history, and unlike a veto override vote, there is no clear way of testing the congruence of the President's view with the congressional majority. Unlike much legislative history, the signing statement at least is likely to state the clear view of one essential player in the enactment of law.

Courts have developed principles of construction to sort through what weight to give text and history in particular contexts. These do not provide great clarity as to what courts, or even individual judges, will do in any given case. Nor is any set of general rules likely to be able to resolve the difficult issues respecting actual interpretation of law—that is why the canons of construction have been so effectively ridiculed for many years, by Karl Llewellyn and many more. The point is not that there is a simple answer to the weight to be given presidential signing statements. Rather, it is simply that the problems of construction are similar in the legislative history and presidential signing statement contexts.

There are at least two settings in which the question might arise whether the interpretive view offered in a signing statement has *legal*, not simply persuasive, force when construction of the law is contested. The arguments in favor of their having such force distinguish presidential signing statements interpreting law from the issues surrounding the use of legislative history. They may help to understand the ABA's overstated concerns.

The first setting arises from the possible use of signing statements within an administration to resolve disputable questions of interpretation. One common view of the constitutional and practical order of executive life accepts that officials in cabinet departments and other governmental bodies are obliged to accept the President's interpretation of law in carrying out their duties, because as Chief Executive he is entitled to give them instructions of this sort. The President appoints the cabinet members, is the person in whom executive authority is entrusted by the Constitution, and has the authority to remove executive officers who do not carry out their duties to the President's satisfaction. In short, his interpretation governs within the administration because he is the boss. This view of the unitary executive has gained a stronger following over the past two decades. Under it, cabinet officials and other executive officials could be obliged to regard presidential interpretations stated in signing statements as legally binding upon them.

The opposing view is that although the Constitution does make the President chief executive, outside the military and foreign relations contexts its text repeatedly imagines (as is of course the case in practice) that the responsibilities for law administration will be placed in the hands of others. In this view, his duties in respect of ordinary domestic administration are those of an overseer, not decision-maker. With limited exceptions, the President can remove from office those whose administration displeases him—but Congress has placed the responsibilities for decision-making in their hands and not the President's; removal may carry a high political cost (including notifying Congress about the treatment the President is seeking for its work), and the President will have to get congressional approval of the successors he appoints. People holding this view note the many historical struggles between Presidents and their appointees reflecting this understanding. They fear that if high officials believe that they have a legal obligation to let the President decide disputed points within their statutory responsibilities, the result will be a concentration of enormous power in one place, and that the President may often be successful in exercising that power confidentially and without public process. This they see as the road to presidential tyranny. When statutes confer regulatory authority on agencies, not on the President, they conclude, actual interpretation is the business of the agencies and outside the President's authority directly to determine.

Remarkably, the question of how strong is the character of our unitary executive remains contested, after more than 200 years. The growing acceptance, in practice and in the literature, of the view that our Constitution creates a strong, unitary executive gives weight to the argument for presidential control over interpretations of law, but it also helps understand the ABA's concern. It marks only a direction—but not necessarily an endpoint—in the argument about presidential authority.

The second setting in which legal force might be claimed for the President's view can arise in court. Courts have said that when statutory language is ambiguous and has been reasonably interpreted by an administrative agency charged to administer the statute, the courts must accept that interpretation rather than engage in their own independent analysis. Later decisions have qualified this principle as limited to interpretations that emerge from public procedures or other contexts in which Congress has clearly envisioned the responsible agency exercising such authority. But the exact contours of that limitation are anything but precise.

Given the current state of play on judicial deference to the executive branch's interpretations of law, one can imagine the government arguing that a signing statement announcing the President's reasonable interpretation of an ambiguous provision is entitled to the same treatment as an agency's. Yet such statements are *not* products of public procedures such as are used in agency notice-and-comment rulemaking. Thus, they would seem to fall outside the ambit of interpretations that the courts have thus far identified as meriting judicial deference. While this issue has yet to be presented, one Supreme Court decision last year (upholding the Oregon assisted suicide statute in the face of a similar kind of interpretation made by then Attorney General John Ashcroft) suggests that the Court would agree. But three Justices dissented from that holding, and Justice Alito, who in other contexts has voted to uphold strong executive claims, did not participate. Ascendancy of the unitary executive

theory would, at the least, make the interpretive effect of signing statements an important issue. This possibility, too —giving the President's unilateral interpretation legal force —may well underpin the ABA's overstated alarm.

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The greatest controversy, and most serious issue, attaches to statements asserting that provisions of a law the President is signing are unconstitutional and, hence, will not be enforced or respected by the president. The question here is what the President properly may do when he believes a statutory provision is contrary to constitutional command. This is a question of congruence with rule-of-law precepts, rather than with any express or implied constitutional limitation on the president. But it is a serious question in its own right.

One pole of the controversy is marked by the simple, sweeping assertion that the President should never sign legislation if he believes it has provisions that are unconstitutional. This is the analytical twin to the sweeping assertion of signing statements' unconstitutionality. It is similarly bold, broad, and wrong. Presidents, just as much as judges, are responsible for upholding the Constitution; they take an oath to do so. They have independent constitutional authority for asserting views of constitutional meaning. And, just like every other officer with similar constitutional authority, they are responsible for doing what best advances their view of constitutional command.

In a world of large, complex laws—some running to hundreds of pages—no official is tied to a simple, two-choice model of possible actions. Legislators need not vote against a large, complex law because they believe one of its provisions to be unconstitutional. They may support the law and trust that the problematic provision will not be enforced or will be struck down in court in an appropriate case. Judges, similarly, are not always required to invalidate in its entirety legislation that has one or two unconstitutional provisions. So, too, a President is not limited to either vetoing legislation that has one or two provisions he believes to be unconstitutional or signing it without objection. The President—like any individual legislator—well might decide that, on balance, a law is beneficial, even if he believes that one or more provisions violate constitutional strictures.

If that is his view, the President is not then bound simply to go along with every aspect of the law. The President is not obliged to enforce all laws, even those contrary to constitutional command. He should be expected to place constitutional command over legislative command, and decisions by the President and other executive branch officials respecting law enforcement generally have been given extraordinary deference by other branches. He especially should be expected to protect the constitutional powers of the presidency and to tailor executive branch implementation of laws accordingly.

So, for example, if Congress includes a legislative veto provision in a complex law—as it has done numerous times since the Supreme Court ruled such provisos unconstitutional in *INS v. Chadha*, 462 U.S. 919 (1983)—the President might properly choose to sign the legislation, but also properly choose not to respect the unconstitutional legislative veto provision. In those circumstances, a signing statement indicating the President's view that the provision is unconstitutional advances rule-of-law interests. It puts others on notice of his intentions with respect to the law, accords with respectable views of constitutionality, and comports with institutional interests of the executive branch. All of those elements advance the predictability and legitimacy of the law. In the main, this has been the pattern of presidential uses of signing statements.

There is, however, a use of presidential signing statements that is properly criticized as undermining the rule of law. If the law put before the President is one that at its core would command conduct that the President believes to be unconstitutional, the President sends a clear message by vetoing the law—he is willing to stand on principle and reject legislation that is fundamentally not in line with his view of the Constitution. If the President signs such a law while suggesting that its core provisions are unconstitutional, he reduces the clarity and predictability of the law.

The line between the proper and improper use of the veto versus signing statements obviously can be argued over. It is not a bright line. But we believe that there are relatively good examples of signing statement misuse in presidencies of the left *and* of the right.

Consider, for example, President Bill Clinton's signing the Social Security Independence and Program Improvements Act of 1994, which made the Social Security Administration an independent agency. Although the law made other changes, a central provision—as widely noted in contemporaneous accounts—was to make the agency independent of the President. It gave the agency's single administrator a six-year term of office—longer than a presidential term—and provided that that administrator could be removed only for cause. President Clinton did not veto the law, but his signing statement indicated that he viewed this change as an unconstitutional encroachment on the power of the presidency.

Similarly, President George W. Bush chose to sign the Detainee Treatment Act of 2005, sponsored by Senators McCain and Graham, among others, despite his clear disagreement with the law's core provisions. The Act recommits the United States to observance of the Geneva Conventions and other laws respecting torture and the humane treatment of prisoners. In signing the bill into law, President Bush expressed concern that it intruded on constitutionally reserved presidential authority and reserved the choice to refuse enforcement of key portions of the law. His objection was not to an incidental aspect of otherwise desirable legislation, but went to the very heart of what Congress had done.

In both cases, the Presidents' decisions to sign the laws while condemning central provisions sent decidedly mixed messages, seeming to give with one hand and take back almost as much with the other. In the second case, this concern is compounded by the probability that presidential actions inconsistent with the statute will be taken out of

public view, and that judicial review of those actions is unlikely. But this difference is ultimately one of degree. Both actions are hard to defend as preferable to vetoes of legislation the President believes violates the Constitution at its core. Without recourse to a signing statement indicating strong disagreement with the law, it is hard to imagine that the Presidents would have signed these bills.

Such uses of signing statements constitute the limited set that can properly be addressed under the heading of "misuse." We underscore, in light of other pronouncements about the ABA resolution, that this label properly attaches to a small subset of presidential signing statements—and that it is important to avoid tarring other presidential signing statements with an overly broad brush.

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After all is said and done, the ABA's resolution can be understood as accepting the use of presidential signing statements as an appropriate, often helpful—and certainly a constitutional—tool of presidential participation in the process of enacting and enforcing our laws. The resolution can be understood as well as properly identifying a smaller set of signing statements that are not consistent with rule of law values. But so long as ABA leaders continue to portray a great many signing statements as suspect, they will seem to be on a political mission divorced from thoughtful analysis of the legal and jurisprudential issues surrounding signing statements.