[H.A.S.C. No. 110–129]

THE IMPACT OF THE PRESIDENTIAL SIGNING STATEMENT ON THE DEPARTMENT OF DEFENSE'S IMPLEMENTATION OF THE FISCAL YEAR 2008 NATIONAL DEFENSE AUTHORIZATION ACT

HEARING

BEFORE THE

OVERSIGHT AND INVESTIGATIONS SUBCOMMITTEE

OF THE

COMMITTEE ON ARMED SERVICES
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

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CONTENTS

CHRONOLOGICAL LIST OF HEARINGS

2008

TUESDAY, MARCH 11, 2008

THE IMPACT OF THE PRESIDENTIAL SIGNING STATEMENT ON THE DEPARTMENT OF DEFENSE'S IMPLEMENTATION OF THE FISCAL YEAR 2008 NATIONAL DEFENSE AUTHORIZATION ACT

STATEMENTS PRESENTED BY MEMBERS OF CONGRESS

WITNESSES

APPENDIX

THE IMPACT OF THE PRESIDENTIAL SIGNING STATEMENT ON THE DEPARTMENT OF DEFENSE'S IMPLEMENTATION OF THE FISCAL YEAR 2008 NATIONAL DEFENSE AUTHORIZATION ACT

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ARMED SERVICES,
OVERSIGHT AND INVESTIGATIONS SUBCOMMITTEE,
Washington, DC, Tuesday, March 11, 2008.

The subcommittee met, pursuant to call, at 12:06 p.m., in room 2212, Rayburn House Office Building, Hon. Vic Snyder (chairman of the subcommittee) presiding.

OPENING STATEMENT OF HON. VIC SNYDER, A REPRESENTATIVE FROM ARKANSAS, CHAIRMAN, OVERSIGHT AND INVESTIGATIONS SUBCOMMITTEE

Dr. SNYDER. The hearing will come to order.

Good afternoon. We appreciate you all being here today.

Our hearing topic today is on the impact of the Presidential signing statement on implementation of the National Defense Authorization Act for Fiscal Year 2008. And by far, though, our concern about this issue is as we look ahead to future defense bills, as Mr. Skelton is here with us, looking at how is this going to impact on the drafting of this year's defense bill.

I want to read this Presidential signing statement that the President issued on January 28, 2008, when he signed the National Defense Authorization Act for Fiscal Year 2008.

"Today I have signed into law H.R. 4986, the National Defense Authorization Act for Fiscal Year 2008. The act authorizes funding for the defense of the United States and its interests abroad, for military construction and for national security-related energy programs. Provisions of the act, including sections 841, 846, 1079 and 1222, purport to impose requirements that could inhibit the President's ability to carry out his constitutional obligations to take care that the laws be faithfully executed to protect national security, to supervise the executive branch and to execute his authority as commander in chief. The executive branch will construe such provisions in a manner consistent with the constitutional authority of the President." And that is the end of this statement.

Two things come to mind. First, there is no detail there at all about any of those four provisions, about what that means. There is no guidance to this committee, as drafters of the defense bill, and so we are hoping to have some insight today from this hearing on what that means.

And then the second concerning provision—the President's statement clearly says "provisions including these four" and with the

clear statement being that perhaps there are another 500 provisions, perhaps there are another three provisions. It is not clear from the statement what that means.

Because of the statements contained in the signing statement, Chairman Skelton requested that this subcommittee hold a hearing to ask a simple question of the Department of Defense: Are you implementing or planning to implement the law, this fiscal year defense bill, as Congress wrote it? Unfortunately, DOD declined to provide a witness for today's hearing.

We also invited the Department of Justice Office of Legal Counsel, but they declined, as well, because they don't testify about specific provisions of law.

We are not the Judiciary Committee. Probably nobody here wants to be in the Judiciary Committee. We are here because we like working on defense issues, and we think it is very important, writing defense bills. But we need some guidance about what does this mean for future drafting of this bill.

I am a little bit—Dr. Gingrey and I had the great honor last night of flying down and witnessing the launch of the space shuttle, which may account, if you see he or I nodding off, since we arrived back in D.C. at 6:30 this morning after being up all night.

It was the second one I went to. The first one I went to was when Eileen Collins was the shuttle commander. And the thing fired up, and with, I don't know, just a few seconds to go, it just shut down, because somebody had seen something and pushed a button that said "stop." And we did not see the launch. That was eight or nine years ago.

Last night, we were watching it. It was just spectacular, and it went without a hitch. And it was just a wonderful thing to see.

But it seems to me that, you know, nobody at NASA put a stick-em note on the side of the space shuttle last night saying, "I may have concerns about this. I will let you know. There are a million-plus moving parts in that thing; we have a problem with three of them. We will let you know what those are down the line." It is either go or no-go. And we are trying to come to some edification about how do we make our defense bill, which we all care about on this committee, be a "go" situation.

We are pleased to have Mr. Skelton here with us today. There is a lot of interest in these issues.

Mr. Tierney and Mr. Allen, who had worked on one of these provisions, the stand-alone bill which Mr. Skelton included in the underlying defense bill, the wartime contracting commission, are very concerned about it, since one of the four provisions is their wartime contracting commission bill. And I would ask unanimous consent that Mr. Tierney and Tom Allen's statement be included as part of the record also.

And any written statements from members, including Mr. Akin and Mr. Skelton, without objection, will be made part of the record.

I would now like to call on Mr. Akin.

Or should I tell another story, Todd, while you——

[The prepared statement of Dr. Snyder can be found in the Appendix on page 43.]

[The joint prepared statement of Mr. Tierney and Mr. Allen can be found in the Appendix on page 108.]

STATEMENT OF HON. W. TODD AKIN, A REPRESENTATIVE FROM MISSOURI, RANKING MEMBER, OVERSIGHT AND INVESTIGATIONS SUBCOMMITTEE

Mr. AKIN. Filibuster another minute. [Laughter.]

No. Thank you very much, Mr. Chairman—and Mr. Senior Chairman and Junior Chairman. We have got all kinds of chairmen here today.

And thank you to our guests and our witnesses.

The hearing addresses an important subject that merits the attention of this committee. And I think it is something that is just, for all of us that once in a while have to deal with the law, it is interesting to see how that works in this particular situation.

Presidential signing statements invoke the constitutional prerogatives of the legislative branch and the executive branch. The House Armed Services Committee, in particular, carries out the specified duty in Article I of the Constitution, and that is to provide for the common defense and to raise and support armies and to provide and maintain a navy and to make rules for the government and regulation of the land and naval forces.

Similarly, the President has the responsibility outlined in Article II to preserve, protect and defend the Constitution and to take care that the laws be faithfully executed.

While we hope that these respective constitutional responsibilities of the legislative and executive branches do not conflict, the reality is that there is frequently disagreement between the two branches. In my view, this is a natural state of affairs that our founders built in to our unique form of government.

The crucial question, therefore, is not if these conflicts are appropriate, as I believe these tensions are built in to our Constitution, but how such disputes are addressed and resolved.

In my view, when the Congress and President do disagree about the constitutionality of a specific provision of the law, the most important equity to be preserved is transparency and communication. If the President believes his independent duties under the Constitution preclude him from implementing the law in the matter Congress prescribed, then I want to know. What I do not want is an executive that does not communicate with the Congress.

Therefore, it seems to me that the Presidential signing statements, like a statement of the Administration's position Statements of Administration Policy (SAP) or so-called "heartburn letters," are important tools of communication so that the legislative branch knows which provisions of law will require increased oversight over executive implementation.

With request to fiscal year 2008 National Defense Authorization Act (NDAA), the President highlighted four provisions in his signing statement. I think the prudent course for this committee is to oversee the implementation of those provisions to ensure that they are carried out consistent with our legislative intent.

My understanding is that measuring exactly how signing statements actually affect implementation is something that has not been studied closely. I would like our witnesses to comment on this point.

Finally, there is the matter of whether courts will give weight to signing statements in a manner similar to legislative history. My

question for the witnesses, particularly Professor Rosenkranz, is whether it is inappropriate for courts to consider the President's constitutional equities when interpreting a statute. Moreover, if courts consult foreign sources of law when implementing U.S. law—something I am deeply skeptical of—shouldn't they take into account at least a President's statement?

Thank you again to our witnesses for being here today. I look forward to your testimony.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Akin can be found in the Appendix on page 45.]

Dr. SNYDER. Thank you, Mr. Akin. And I had to keep Mr. Skelton from lunging for your sandwich there, while you were doing your statement.

We are honored to have Mr. Skelton, our full committee chairman. Mr. Skelton is recognized.

The CHAIRMAN. First, let me compliment you and congratulate you on calling this hearing.

Being the lawyer that I am, it is important, when we pass laws, that the Administration understands our intent. We do know the English language pretty well and try to communicate that not just in the legislative language but also in the report language. And, as I say, with my background, I am concerned when signing statements leave the possibility of, "Part of this will not be fully enforced as you in Congress intend." And that, of course, is the subject of this hearing.

I hope that you will shed light on where we could or should go on this. We do our best to be clear in our language and make it readable and understandable for the Administration to follow. We intend for that to happen. That is our job, to provide for, raise and maintain, as well as write the rules and regulations for the military. And that is what we do, and I think we have done a good job through the years in that department.

I called the Deputy Secretary of Defense the other day, and I called him again today, regarding this issue. And I have his permission to quote him exactly as to what he told me this morning regarding this specific issue, and I share it with our panel.

"The Department of Defense always obeys the law. Questions regarding the constitutionality of laws are the purview of the Justice Department."

So there we are. And I hope that you can help us, because, in the future when we pass law and do report language, we intend for that to be fulfilled. Because that is our constitutional duty and the constitutional duty of the commander in chief and those that work for him, is to carry that out.

So, with that, I thank you again, Dr. Snyder, chairman of the committee, and Mr. Akin, for calling this hearing, as well as the other members of this committee. And I look forward to the witnesses. Thank you.

Dr. SNYDER. Thank you, Mr. Skelton.

Just to be sure everybody understands, that was Secretary England. You did not name a name, but you gave his title. I just wanted to be sure it was——

The CHAIRMAN. Secretary Gordon England.

Dr. SNYDER [continuing]. Secretary Gordon England, right.

Thank you, Mr. Skelton, for your great leadership on this committee.

Let me introduce our four witnesses. We have four great people. We really appreciate you all being here this morning.

T.J. Halstead, legislative attorney, the American Law Division at the Congressional Research Service; Gary L. Kepplinger, general counsel for the U.S. Government Accountability Office; Bruce Fein, constitutional attorney at Bruce Fein & Associates and a member of the American Bar Association Task Force on Presidential Signing Statements; and Nicholas Quinn Rosenkranz, associate professor of law at Georgetown University Law Center.

And what we will do, gentlemen, is we will begin with Mr. Halstead and move down the line, which is the order I introduced you.

We will have the clock put on for five minutes. When you see the red light go off, don't panic. If you have got other things to say, we want to hear from you. But it is to give you a sense of where you are at in your time. And I would probably encourage you to err on the side of brevity, so that we might get to the questions that members have. But feel free to ignore that red light.

Mr. Halstead.

STATEMENT OF T.J. HALSTEAD, LEGISLATIVE ATTORNEY, AMERICAN LAW DIVISION, CONGRESSIONAL RESEARCH SERVICE

Mr. HALSTEAD. Mr. Chairman, members of the subcommittee, my name is T.J. Halstead. I am a legislative attorney with the American Law Division of the Congressional Rresearch Service (CRS). And I thank you for inviting me to testify today regarding the impact of signing statements on national defense authorization acts.

As I explain more fully in my prepared statement, the initial step the subcommittee is taking today to look at the practical impact of a signing statement on a specific congressional enactment is a sound approach from an institutional perspective.

I say this because, until recently, the congressional response to signing statements has focused almost exclusively on the instrument of the signing statement itself, presumably motivated by the current Administration's utilization of these documents, to raise numerous individual objections to statutory provisions, resulting in challenges to well over 1,000 distinct provisions of law in the 157 statements that have been issued by President Bush.

However, there is no constitutional or legal impediment to the issuance of signing statements in and of themselves. And when you look at the language that typifies these statements, it becomes apparent that the objections that are raised are so generalized that they constitute nothing more and nothing less than a broad assertion of Presidential authority over all aspects of executive branch organization and operation.

The President's signing statement accompanying the most recent national defense authorization act provides a good example of this dynamic. The President's statement identifies four provisions of law, as the chairman just noted, that the President deems constitutionally problematic.

And the objections voiced are typical of those raised in signing statements in other contexts, in that they consist of a generalized declaration that the provisions—namely, sections 841, 846, 1079 and 1222—purport, again, to impose requirements that could inhibit the President's ability to carry out his constitutional obligations to: one, take care that the laws be faithfully executed; two, to protect national security; three, to supervise the executive branch; and finally, impair the President's ability to executive his authority as commander in chief.

And, additionally, as in numerous other signing statements, the statement is concluded with the declaration that the executive branch shall construe those provisions in a manner consistent with the constitutional authority of the President.

The nature of these objections is not clarified or substantiated when you look at the actual text of the provisions that have been objected to.

Section 841 establishes a legislative commission that is tasked with studying agency contracting in Iraq and Afghanistan and is similar in composition and authority to numerous other commissions that Congress has created in the past.

Section 846 strengthens whistleblower protections for contractors. And there is, likewise, ample precedent for the imposition of such provisions by Congress.

Section 1079 imposes reporting requirements on certain elements of the intelligence community. And it is, again, well-established that Congress can impose direct reporting requirements of this type.

Finally, Section 1222 prohibits the use of any funds appropriated in the act to establish permanent military bases in Iraq or to exercise control over Iraq's oil resources.

It seems that the President's objection to this provision rests upon a broad reading of his constitutional commander-in-chief powers, which are largely undefined in relation to the powers of Congress to control military operations. However, Congress's power of the purse would appear invested with the prerogative to impose binding restrictions of this type on the use of appropriated funds.

Ultimately, the objections that are raised in the current act are similar to previous signing statements, in that they do not contain explicit, measurable refusals to enforce a law, but instead raise challenges that are largely unsubstantive or are so general that they appear simply to be hortatory assertions of executive power.

These broad assertions of authority carry significant practical and constitutional implications for the traditional relationship between the executive branch and Congress. But those implications will manifest themselves by virtue of the substantive actions taken by the Administration to embed that conception of executive authority into the constitutional framework and not simply as the result of the President's use of the instrument of the signing statement.

Moreover, I think it is unlikely that a reduction in the number of challenges raised in signing statements, whether that is caused by the imposition of procedural limitations or simply through political rebuke, will result in any change in a President's conception and assertion of executive authority.

And, in light of that, I think these signing statements essentially give you a roadmap of provisions of law that the President holds in disregard, in turn affording Congress the opportunity, through focused inquiries of the type this subcommittee is undertaking today, to engage in systematic monitoring to more effectively assert the constitutional prerogatives of Congress, as well as the Congress's oversight prerogatives, and to ensure compliance with congressional enactments.

Mr. Chairman, I will conclude my statement there. I would be happy to answer any questions you or other members of the subcommittee might have. And I look forward to working with all members and staff of the subcommittee on this issue in the future.

[The prepared statement of Mr. Halstead can be found in the Appendix on page 48.]

Dr. SNYDER. Thank you, Mr. Halstead.

Mr. Kepplinger.

STATEMENT OF GARY L. KEPPLINGER, GENERAL COUNSEL, U.S. GOVERNMENT ACCOUNTABILITY OFFICE

Mr. KEPPLINGER. Mr. Chairman, Mr. Akin, members of the subcommittee, thank you very much for inviting me to participate in today's hearing on Presidential signing statements.

I would like to focus my remarks on two issues that we examined last year, at the request of Chairman Conyers and Chairman Byrd of the Senate Appropriations Committee: First, what use and weight has the Judiciary given signing statements? And second, have agencies faithfully implemented statutory provisions to which the President objected in signing statements?

Before discussing these issues, I would like to give some background regarding signing statements.

Historically, Presidents have used signing statements for a variety of purposes, most of them noncontroversial. Some signing statements praise new laws. Others applaud bipartisanship and cooperation that led to a law's passage. These largely ceremonial statements extolling the benefits of a bill are not, and have not been, the cause of public consternation or debate.

Presidents, including the current President, have used signing statements in more controversial ways. Presidents have used signing statements to offer a statutory interpretation of a provision or to explain how agencies will execute the newly signed law. These signing statements may be of no more public moment or controversy than the policy objectives than the policy objectives that the law seeks to further.

Presidents also use signing statements to raise constitutional objections to provisions of law. These constitutional objections typically go to two types of statutory provisions: those which the President believes impinge on his constitutional prerogatives or those that he believes impinge on the constitutional rights of our fellow citizens.

These more controversial signing statements sometimes will announce a refusal to enforce or defend what the President views as an objectionable provision. More frequently, however, the statements do no more than raise objections on broad, abstract grounds

without explicitly directing the agencies not to enforce or defend the laws.

They also frequently offer curative interpretations of objectional provisions, directing implementation, as in the case of the signing statement accompanying the National Defense Authorization Act, "consistent with the President's views of his constitutional authority."

It is with respect to these more controversial uses of signing statements that Congress's constitutional role of enacting the laws duly presented and signed by the President clearly intersect with the President's responsibilities to take care that the laws be faithfully executed.

Add to this the difficulties associated with satisfying Article III standing requirements needed to judicially challenge implementation of many of these provisions, and one can easily appreciate Congress's and others' frustrations with signing statements.

As CRS has reported, one of the objectives associated with the Reagan Administration's increased use of signing statements was—and I will quote my friend here on the right—"to establish the signing statement as part of the legislative history of an enactment and, concordantly, to persuade courts to take the statements into consideration in judicial rulings."

As part of our work for Chairmen Byrd and Conyers, we surveyed Federal case law to determine how Federal courts have treated signing statements. Our search, going back to 1945, found fewer than 140 cases that cited two signing statements.

When cited, the signing statements rarely had any impact on judicial decisionmaking. Rather, courts cited to signing statements to identify the date a bill was signed into law or to provide a short summary of the statute. Sometimes courts have cited to signing statements to note that the statement echoes views expressed about a bill in congressional documents such as committee reports.

In sum, I think it fair to say that signing statements are not part of the legislative history of a law and, hence, generally will not be used in ascertaining Congress's intent in enacting a law. Accordingly, courts only rarely give signing statements any interpretive weight in their construction of the statute.

The second issue we looked at was whether agencies responsible for provisions to which the President had raised constitutional objections had implemented the provisions as written. To do this work, we looked at the implementation of 29 provisions of law. Parenthetically, one provision applied to two agencies, so we examined agency action in 30 instances.

We contacted the responsible 21 agencies and requested and obtained information from them regarding their implementation. In nine of the 30 instances we examined, the agencies responsible for implementing the provision had not done so.

The provisions required a variety of actions on the part of the agencies charged with their implementation. Five of the nine called for agencies to receive congressional approval prior to spending funds—the so-called Chadha provisions—or to provide Congress with information of a certain nature or within a specific timeframe.

A couple limitations: We did not assess the merits of the President's objections, nor did we analyze the constitutionality of the

provisions themselves. We also did not examine provisions to which the President objected that dealt with matters of national security or intelligence, given the difficulties obtaining sensitive information from responsible agencies within the timeframes needed.

In addition, we offered no opinion on whether the President's signing statements actually caused the agencies in question not to execute the provisions as written. Because agency noncompliance could have resulted from a number of factors, we could not determine whether a cause-and-effect relationship existed between the signing statement objections and agency implementation.

But apart from these limitations, the fact remains that, in nine of 30 instances we examined, the responsible agencies had failed to implement the statutory provisions according to the letter of the law. Moreover, the President continues to issue signing statements objecting to provisions that leave the Congress unsure whether the President will carry out the laws as written.

The difficulties associated with obtaining judicial review that I mentioned earlier should not deter Congress from investing its institutional capital to ensure agency compliance with its directions through vigorous oversight. Indeed, while violations of the provisions we reviewed may not always involve matters of great public policy, they do go directly to the tone and tenor of the institutional dialogue between Congress and the executive branch needed for Congress to effectively discharge its responsibilities.

Committee monitoring of agency implementation of statutory provisions about which the President objects or raises concerns in signing statements is a good first step in reasserting congressional control. Depending on the facts and circumstances surrounding implementation, Congress has a variety of tools at its disposal to ensure its expressed will is honored in substance even if not in form.

The concludes my remarks. I would be happy to answer any questions.

[The prepared statement of Mr. Kepplinger can be found in the Appendix on page 70.]

Dr. SNYDER. Thank you, Mr. Kepplinger.

We have a motion to adjourn coming up. Mr. Fein, I think we will have time for your opening statement, and if it, at some point, appears we won't, I will interrupt you. But let's go ahead and try to get your opening statement in now.

Mr. Fein.

STATEMENT OF BRUCE FEIN, CONSTITUTIONAL ATTORNEY, BRUCE FEIN & ASSOCIATES, MEMBER, AMERICAN BAR ASSOCIATION TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS

Mr. FEIN. Thank you, Mr. Chairman and members of the committee.

The hearing today is a question of who exercises power. It is not quibbles over language. The dispute between the executive branch and this committee is a dispute over who gets to decide whether we project military force abroad and we send men and women to die for the United States of America.

I want to refer to a few historical precedents that underscore the importance of the issue that you are examining.

Let's go back to the Stuart days of the British monarch. There was a huge dispute over King Charles I's assertion of authority unilaterally to level a ship tax to fight wars that Parliament opposed. This particular dispute ended up in court, and although Charles I won the litigation, he lost his head soon thereafter.

The dispute over the authority of the executive to spend money unilaterally in order to fight wars that Parliament opposed continued up through the reign of James II. And when he was overthrown, the English Bill of Rights of 1688—and they styled this provision a bill of rights, like our first Bill of Rights—declared that the king would have no power to spend any money to undertake any initiative unless it had been explicitly approved by Parliament.

It was with that background that the founding fathers entrusted the power of the purse to the Congress of the United States. They feared that the executive would inflate danger in order to conduct war abroad to migrate power to the executive, to create bogus and imaginary fears in order to concentrate power and political popularity in the President. That is why James Madison characterized in the "Federalist Papers" the power of the purse as the "invincible instrument" that Congress had to redress grievances against the President.

Now, we don't need to be conjectural about what the Congress intended in the National Defense Authorization Act with regard to permanent military bases in Iraq. Everyone knows the President is now involved in negotiating, perhaps, permanent military bases in Iraq, through executive order or otherwise. Now, that may well be a good or a bad idea, but the founding fathers insisted that if Congress wanted to have its say, it should be obeyed.

Now, let's look at the language of 1222. It is not ambiguous, unless we are in Humpty Dumpty, saying, "A word means whatever I want it to mean." The President says, well, he will construe section 1222 in a manner consistent with his constitutional authority. What is there to construe? It says in plain language, "No monies appropriated under the bill shall be used for the purpose of establishing permanent military bases in Iraq." A schoolchild can understand that. There is no ambiguity. And there is nothing in the signing statement where the President says, "I don't quite understand what Congress is getting at"—nowhere.

What he basically is saying is, "I am ignoring the law, because I think my executive authority enables me to establish bases, to spend money, whether Congress approves it or not, if I think it important for the national security."

You will notice the language of the signing statement is rather sweeping. In fact, quite alarming, he says if anything would "impinge" upon the President's ability to protect the national security, he can ignore that particular provision. That creates a worry. Well, the President may want to establish a new star wars. Congress doesn't appropriate funds. The President would say, "You are impinging on my ability to protect the national security. I will go ahead and establish star wars anyway."

This issue is about the most important power any democracy can exercise, the power to initiate and conduct war—underscore—and send our brave men and women abroad to die. And the founding

fathers wanted this Congress to make the final judgment, not the President of the United States.

And two centuries of practice vindicate that allocation. I remember in the Vietnam War days, the Congress of the United States passed a law that said there is no money to carry the Vietnam War into Laos or Cambodia or Thailand with ground troops, and President Nixon obeyed that. It wasn't controversial; everyone said, certainly, Congress can have the authority under the power of the purse to decide how far to extend the war.

This President, through this signing statement, is seeking to establish a revolutionary change in the idea of what our Constitution is about.

And it is not just rhetoric. I want to call to mind our own revolutionary history. We protested the Stamp Act of 1765 as colonists because we had no representation in the Parliament. Our argument was, "We are not required, and should not be required, to obey laws where we have no role in their enactment."

The next year after the agitation succeeded and the stamp tax was repealed, the Parliament enacted something called the Declaratory Act and said, "By the way, even though we have repealed the stamp tax, we retain authority to legislate with you on any matter whatsoever, even if you have no representation here." And it was that statement of authority that fueled the revolution that led to the Declaration in 1776.

Suppose the President issues a signing statement that says, "I am a monarch. I am like Louis XIV. I am the state." Is Congress supposed to sit idly by and say, "Well, let's wait till the Reichstag burns before we do anything"? That is what this President is saying in that signing statement.

There is no ambiguity in 1222. He knows what it says: no permanent military bases in Iraq with money appropriated under the statute. There is nothing to debate. And he says, "I have to construe it"? And he will implement it in some way that is not clear on its face?

And this is a pattern that has persisted from the Bush Administration from the outset. This signing statement is not in isolation.

And if the only remedy is you put a provision in the law that says it is a criminal violation, you go to jail for ten years if you spend money contrary to this, then there might be a little wake-up in the White House.

But I want to underscore again what this real debate is about. It is over the power to send our men and women abroad to fight. And the President is saying it is his unilateral decision, you have no say.

Thank you.

[The prepared statement of Mr. Fein can be found in the Appendix on page 87.]

Dr. SNYDER. Thank you, Mr. Fein.

Professor Rosenkranz, we are going to wait until we come back after the vote.

Mr. Skelton is not going to be able to join us after the vote, and he wanted to make a brief statement.

Go ahead, Ike.

The CHAIRMAN. Thank you.

And I apologize, Professor Rosenkranz. I am sorry I won't be able to come back for it.

I just want to point out, because, at the end of the day, when we are working with the chairman and the ranking member in the Senate to try to close out every issue on the defense bill before we all sign the statement approving the bill to go to the floor for a final vote, we are working with a document that the President always furnishes us, a document spelling out certain issues that he objects to and potentially would be veto subjects should we press on.

As we know, we had a veto on an issue that was not brought to our attention regarding a lien on Iraqi assets, but we very quickly reworded that provision and passed the bill again and got it signed into law—of course, with the signing statements, which are the subject of discussion today.

We are cognizant, as a legislature, of the objections of potential vetoes by a President. And the issues that were raised, my recollection is that they were not raised in the letter which is normally sent to us prior to our conclusion of our negotiations with the Senate, which I find to be rather interesting.

But I appreciate you gentlemen taking the time and the effort to give us your valued opinion. And I agree, this lawyer has a little difficulty in understanding why something that is very, very clear in the English language is not fully followed.

And, with that, Mr. Chairman, I appreciate your letting me speak out of order.

Mr. Akin, thank you too.

Dr. SNYDER. Thank you, Mr. Chairman. We appreciate you being here.

Professor Rosenkranz, if you will wait here in anticipation of doing your statement, we should be back shortly.

I have asked the staff to let you read one of my Law Review articles, since you are legal scholars. You should find time to read this in the time that we have for the recess. [Laughter.]

[Recess.]

Dr. SNYDER. I apologize. We will not be surprised if we have other votes sometime in the next hour. We will just deal with that, as you have before.

Professor Rosenkranz, we look forward—did you all get to read my Law Review article? [Laughter.]

Mr. ROSENKRANZ. Very well done.

Dr. SNYDER. I thought of it when I was leafing through somebody's footnote that I want to ask about.

But Professor Rosenkranz.

STATEMENT OF NICHOLAS QUINN ROSENKRANZ, ASSOCIATE PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER, WASHINGTON, DC

Mr. ROSENKRANZ. Mr. Chairman, Representative Akin, members of the subcommittee, I thank you for the opportunity to express my views about the President's statement upon signing the National Defense Authorization Act.

In the past, I have testified about the propriety and utility of Presidential signing statements generally, before both the House

and Senate Judiciary Committees. Today, I will discuss how those general points apply to the particular signing statement at issue here.

I will begin with some general observations about the propriety of the signing statement, and then I will consider the specific sections of the bill that it mentions.

The most important word in this signing statement, the operative verb, is the verb "construe." In this signing statement, as in virtually all of this President's signing statements, this verb signals the primary function of the signing statement: to announce to the executive branch and to the public the President's interpretation of the law.

The propriety of such an announcement should be obvious. It is simply impossible, as a matter of logic, to execute a law without determining what it means. As President Clinton's Office of Legal Counsel has explained, this is a generally uncontroversial function of Presidential signing statements: to guide and direct executive officials in interpreting or administering a statute.

The President interprets statutes in much the same way that courts do, with the same panoply of tools and strategies. His lawyers carefully study the text and structure of acts of Congress, aided perhaps by dictionaries, linguistic treatises, other tools of statutory interpretation. And, just like courts, they also apply well-established maxims of statutory interpretation, called canons.

Now, one canon, in particular, is of interest today. This is the canon of constitutional avoidance. This is the canon that the President is applying when he says that he will interpret the National Defense Authorization Act "in a manner consistent with the constitutional authority of the President."

Now, this statement emphatically does not declare the National Defense Authorization Act, or any part of it, unconstitutional. In fact, it declares exactly the opposite. As President Clinton's Office of Legal Counsel explained, these sorts of signing statements are "analogous to the Supreme Court's practice of construing statutes, if possible, to avoid holding them unconstitutional."

What this signing statement says, in effect, is that, if an ambiguity appears on the face of the National Defense Authorization Act or becomes apparent in the course of execution, and if one possible meaning of the statute would render it unconstitutional, then the President will presume that Congress intended the other constitutional meaning, and he will faithfully enforce the statute as so understood.

So there is nothing inherently objectionable in the fact or in the form of the President's signing statements.

For the balance of my time, I will discuss the specific sections of the act that the President chose to single out.

Section 841 creates a Commission on Wartime Contracting in Iraq and Afghanistan and empowers the commission to demand a wide variety of information from executive branch officials.

Section 846 provides increased protection for government contractors from reprisal for disclosure of certain sorts of information.

And section 1079 requires certain executive branch officials to provide "any existing intelligence assessment, report, estimate or legal opinion" to certain congressional committees upon demand.

Now, to the extent that these provisions apply to classified or otherwise privileged information, they might raise significant constitutional concerns. As the Supreme Court has said, "The President's authority to classify and control access to information bearing on national security flows primarily from the constitutional investment of power in the President and exists quite apart from any explicit congressional grants." The authority to protect such information falls on the President, as head of the executive branch and as commander in chief.

This point is one of principle, and it is the sort of thing that Presidents point out in order to preserve their constitutional prerogatives. But in practice, the signing statement is unlikely to have a substantial effect on the implementation of these provisions. The President generally complies, as a matter of comity, with these sorts of provisions whether or not he believes that he is strictly bound by them.

The final section singled out by the President provides that no funds appropriated by this act may be spent to establish a permanent military base in Iraq or to control Iraqi oil resources. This provision implicates the relationship between Congress's appropriations power and the President's power as commander in chief.

Now, of course, Congress possesses broad power over appropriations, but this power is not unlimited. The power to withhold an appropriation altogether does not necessarily imply the power to appropriate money subject to limitless conditions.

For example, Congress probably cannot trench upon the core functions of the executive branch with overly specific spending restrictions. And, in particular, arguably the Congress may not trench upon the power of the President, as commander in chief, with a spending restriction that amounts to a tactical battlefield decision. Just as Congress cannot make specific tactical military decisions by law, it, at least arguably, lacks the power to achieve the same result indirectly with a cunningly crafted spending restriction.

But, again, I must emphasize, the President has not declared this provision unconstitutional on its face in all applications and all circumstances. And he certainly has expressed no intention to spend money in any manner inconsistent with it.

All the President has done here is flagged a potential constitutional concern, one which the facts on the ground in Iraq might never actually present. And he signals that, if necessary, he will interpret the provision in light of this constitutional constraint.

In conclusion, the President's statement upon signing the National Defense Authorization Act is unremarkable in both form and substance. For the most part, the constitutional issues identified are both contingent and, to some degree, theoretical. In practice, this signing statement is unlikely to substantially affect the implementation of the act.

Thank you.

[The prepared statement of Mr. Rosenkranz can be found in the Appendix on page 95.]

Dr. SNYDER. Thank you all for all your thoughtful both oral statements today and also your written statements.

Mr. Akin for five minutes.

Mr. AKIN. Thank you, Mr. Chairman.

It has been an interesting testimony to hear all of you share your thoughts on this.

I guess the first thing I was struck by was the references, Mr. Fein, at least flamboyant in your testimony, I think perhaps quite a bit over the top perhaps—but seemed like the President was just about to become King George and march out and declare himself king over the whole world. But it seemed to me the exact opposite case. It seems to me—Mr. Rosenkranz, I think you are brushing on this—it seemed to, rather, signal a willingness of the executive branch to work with the legislative branch.

My understanding is these statements don't occur in a vacuum; is that correct? In other words, there is an ongoing process between the legislative and executive branch as bills are put together. And as the executive branch says, "Oh, no, we are a little uncomfortable with that," you know, "If you do this, we are going to veto"—so there is this back-and-forth. It seems to me that that is far preferable than a polarized bulkhead where both people are, sort of, lobbing bombs at each other.

So it seemed to me that the signing statements may be an indication of more a sense of cooperation than it is a sense of somebody just, sort of, "my way or the highway" type of thing, and particularly in that there is a procedure. It is not just something that is done. Is that right? It is a long-term process; you are going back and forth. Is that right?

Mr. ROSENKRANZ. Agreed. This is a useful aspect of constitutional dialogue. This is a method that the President uses to express his views to Congress, as well as to the executive branch, to let them know what his concerns are.

Mr. AKIN. Right. Now, we heard that, I guess, the President had done "close to a thousand" of these in the last seven-some years. Is that right?

Mr. ROSENKRANZ. It is actually he has done 100-some signing statements that we were told refer to 1,000-some provisions. I am not sure about that statistic.

Mr. AKIN. Okay. Versus the previous Administration, how many did they do?

Mr. ROSENKRANZ. I believe the number is quite comparable. I don't have that in front of me.

Mr. AKIN. The numbers that I heard was about three times as many. So it is not something that is some new or unusual kind of process.

Mr. ROSENKRANZ. Correct.

Mr. AKIN. So the question is, as you say, is it just simply like a footnote, in a sense?

And then I guess the other question that was not answered was, it didn't seem like anybody was worried about these things from a precedent or that some judge is going to look at them in some dispute down the line. I suppose it is a piece of evidence; it is not the actual law itself. So there doesn't seem to be concern in that regard.

I guess a question I have is, is there anything in these signing statements that is, from a precedent point of view, any different than anything that has been done in the past?

Mr. ROSENKRANZ. No, I don't think there is. This signing statement and this President's signing statements are quite similar to the signing statements of President Clinton and of Presidents stretching back for decades.

Mr. FEIN. Well, if I could interject, I do not think any other President suggested that he, under his commander-in-chief powers, could be required to construe a law as clear as 1222—it says in plain language that you understand and that President Bush understands, "no money appropriated according to the authorizations under the act shall be used to establish permanent military bases in Iraq."

It is the first time I know of where a President has challenged the power of the purse that is expressed in as clear and lucid language as that. And despite what you have suggested about a dialogue over ambiguous language, you will notice, in this signing statement, President Bush never voices a syllable of uncertainty about what section 1222 means. If you can find some ambiguity, you are a better linguist than others.

Mr. AKIN. I hear what you are saying. And, again, I just think the sum of this falls into the zone of exactly where is the legislative, where is the executive authority. And that is something we have dealt with——

Mr. FEIN. But that doesn't relate to ambiguity, Mr. Congressman. If the President thinks something unconstitutional, he can veto it. He didn't veto it. He signed it, which indicates he thought he was executing his authority to defend the Constitution in signing the bill, not in flouting it.

Mr. AKIN. So your point is, then, that the President is—don't you think that, in vetoing it, it would have been a stronger statement than in signing it?

Mr. FEIN. Fine, then the Congress can decide whether or not it wants to override or otherwise. That is how political dialogue occurs.

Mr. AKIN. Right.

Mr. FEIN. And that happens. And he could say to Congress, "I want you to delete this provision, because I think it infringes on my constitutional power." That is entirely appropriate, and Presidents in the past have done that and Congress has responded.

Mr. AKIN. Right. Well, he had a choice.

Yes, go ahead.

Mr. ROSENKRANZ. I should just say that there is nothing new or revolutionary in the President's suggestion that some conditions on appropriations could trench on the President's executive power.

The executive branch has been consistent in that position for at least 70 years. I have a footnote in my written testimony that gives you an enormous string cite, stretching back to the early 1900s, with Office of Legal Counsel opinions making that very same point.

Mr. AKIN. Thank you.

Thank you, Mr. Chairman.

Dr. SNYDER. Mr. Akin, I want you to have time if Mr. Halstead or Mr. Kepplinger have any response to you.

Mr. HALSTEAD. Just if you are curious about the statistics on signing statements, Congressman, the breakdown from the research that we have conducted, as well as from what we have seen

in academic work on the subject, is that President Bush, to date, has issued 157 signing statements compared to, for instance, in the Clinton Administration, 381 signing statements.

So certainly you see a larger number of signing statements from the Clinton Administration, in terms of just signing statements in and of themselves. Where the——

Mr. AKIN. I think that was the number that I had heard, was like 100/300.

Mr. HALSTEAD. Right.

And the distinction comes into play when you look at the number of individual objections to provisions of law that are contained in a signing statement. And so, when you look at that category, of the 157 signing statements that President Bush has issued, roughly 122 of those contain some type of constitutional objection, not just of one type but of multiple provisions of law within that particular enactment. And so that goes to a situation where you have roughly 78 percent of signing statements from the Bush Administration containing some type of constitutional objection to over 1,000 particular specified provisions of law.

When you look at the Clinton signing statements, of those 381 statements, 70 of those statements raised some type of constitutional or legal objection, for a ratio of 18 percent compared to 78 percent.

But one of the things that we have stressed and I lay out in my paper on the subject is that the focus on numbers is largely misplaced; that what you are really looking at are assertions and exercise of Presidential authority over a broad spectrum of issues.

Mr. AKIN. Yes. Good. Well, I appreciate the statistics on that.

And it is interesting, you know, the idea of a permanent base, you know? What exactly is permanent and what is not permanent? I think you could debate that some.

Thank you, Mr. Chairman.

Dr. SNYDER. Thank you, Mr. Akin.

I will take my five minutes now.

One of the issues that we have, Professor Rosenkranz, is, as with Mr. Skelton's presence here today, we are trying to learn from this. You talk about the dance between the executive and legislative. The problem is, we didn't learn much. I mean, what have we learned?

In your statement, you talk about how it is a chance to seek to learn the interpretation of the law. We didn't learn anything. You just list these statements. And, in fact, the total is not a thousand provisions of law—not from the defense bill, but four from this year's defense bill. And I have got the chairman of the committee saying, "Help us," you know? Mr. Skelton doesn't want to do unconstitutional things. Help us.

You suggest that the Congress could go back and do a clarifying law. But where? Where is the information from the executive branch that says, "We have really got a problem understanding whether you mean red light or green light"? Where is the need for clarifying law?

As you all were talking with Mr. Akin about vetoing the bill, the President did veto this bill. This bill was vetoed and was modified in response to the President's veto over language involving litiga-

tion against the government of Iraq, and they were concerned that there would be revenues taken.

So the President knows how to use a veto pen on the defense bill, but, in the course of that, there wasn't any, "Oh, by the way, this could be a good chance to clean up these other provisions. Here are my specific concerns." There wasn't anything like that.

So you use the words "useful" or "unremarkable." Well, no, actually, four provisions of our bill that members care about, including Mr. Tierney and Mr. Tom Allen from Maine, we don't know where it goes.

Now, we do have Secretary England's statement that, "The Department of Defense always obeys the law. Questions regarding the constitutionality of laws are the purview of the Justice Department." I think they are very clear, both publicly now but also informally, they intend to follow the law. We have seen specific information. But what about the President's appointments on the commission, the Tierney commission? And the information we received, via the staff, is that they fully intend to meet the deadline for their two appointments. So, you know, where is the usefulness of this, other than it creates uncertainty about what we are doing?

I wanted to ask, I guess for the panel, we have now, in this defense bill, four provisions, and then we have a total of a thousand provisions. What does it mean for a President to sign a bill if he flat-out believes there is an unconstitutional provision? Not just creates certain uncertainties, but flat-out believes there is—what does it mean if a President signs a bill which he believes is—well, let's start with Mr. Halstead and go down the line here.

Mr. HALSTEAD. Well, that is a very robust area of academic debate, the notion of whether a President should or, some would argue, is he constitutionally required to veto a law that contains a provision he thinks is unconstitutional. And we do not have any dispositive treatment of that issue from the courts.

In current practice, you, for instance, have a situation where large omnibus bills are passed by Congress and then signed into law by the President. And in many of those bills, there are legislative veto provisions that Congress includes, that basically state that one house of Congress can invalidate an executive branch action under certain circumstances.

There is a Supreme Court case from 1983, INS v. Chadha, that states that that is unconstitutional. Congress cannot exercise its legislative power in that fashion. Nonetheless, Congress has utilized the legislative veto provision in possibly over a thousand instances since the decision in Chadha.

And so, for instance, if you have a requirement, a constitutional requirement, that the President is to veto any law that he believes contains an unconstitutional provision, any time you were to see that type of inclusion by Congress, which we see quite commonly, the President would be required to veto an omnibus bill because of that one provision.

And while, from a theoretical perspective, perhaps you could argue that is the way it should be done, that the President should always veto a bill that he thinks is unconstitutional, from a practical perspective it is not done and would also potentially significantly impair the legislative process as it has evolved today.

So it carries from very significant ramifications, both from a practical and constitutional perspective.

Mr. KEPPLINGER. Mr. Chairman, I tend toward the view that the President's decision about whether to veto a bill or not is a function of any number of different factors.

I hearken back to World War II when Franklin Delano Roosevelt was faced with, I think, an emergency appropriation act which was needed to maintain the war effort during the war. And there was a particular provision in that bill that was an attainder. It identified employees in the State Department and basically said, "You can't pay them anymore," to the point of them removing their jobs.

Well, the signing statement that President Roosevelt issued at the time was, he said, you know, "The House insisted, the Senate yielded, and I yield too as well, but I am not going to yield without putting on the records my strong belief that this provision is unconstitutional."

The process that the President and the Administration followed after that was to enforce the law. The individuals were not paid. They were then injured to the extent that they could have resort to the Federal courts, where the matter was adjudicated.

The Administration did not defend that particular statute, because of its views on the constitutionality of it. To me, that was a not-inappropriate outcome, under those circumstances.

Mr. FEIN. The President takes an oath to seek to uphold and defend the Constitution in all his official acts. A signing statement is an official act. Signing a bill is an official act. If the President believes that he is putting into law something that would be unconstitutional, he is obliged, if he is going to be faithful to his oath, to veto it.

Congress can override the veto. It can acquiesce in the President's decision to delete the offending provision. But the President then is scrupulously honoring his constitutional obligation.

That was the understanding President Washington had. He said a President had a duty either to veto or sign a bill in its entirety. And President Washington had been President of the Constitutional Convention, and I think his views of what Presidential authority required are due enormous deference.

Finally, I think that this issue relates to the legislative power of the Congress, in the sense that you all know that you think, by bundling together different provisions, you may be able to force the President into a politically awkward position where he may have to sign the bill even if he dislikes some provisions. Well, by authorizing a signing statement that says I am really not going to enforce those that I think are unconstitutional in his unilateral authority, he is basically removing that leverage you have over him to sign it or take nothing.

And that is an important authority you have in the legislative maneuvering with the executive branch that the founding fathers intended to stay here, because they wanted the popular branch of government to be dominant in deciding the policies of the United States.

Mr. ROSENKRANZ. I should say first that the case that you posit is extremely rare. So in the vast majority of signing statements, even ones that reference the Constitution or constitutional con-

cerns, they take the form of this signing statement, which is to say they are exercises of the canon of constitutional avoidance. They are statements about interpretation of the statute, not at all declarations that any provision of the statute is unconstitutional. So——

Dr. SNYDER. No. And, in fact, I didn't ask about if the President signs a bill in which he attaches a signing statement that says it is unconstitutional. It was more a question of if he knows it is unconstitutional, regardless of whether there is a signing statement or not.

Mr. ROSENKRANZ. Correct. In rare cases, the President may be presented with a bill in which he thinks a provision is flatly unconstitutional—that is, cannot be saved by interpretation, cannot be construed in a way to make it constitutional, it is flatly unconstitutional—but it is part of an enormous omnibus bill that is hugely important, perhaps important to national security.

And the FDR example is a perfect example. So, from at least the time of FDR and the lend-lease bill, the executive branch has taken a position that, in such circumstances, presented with an enormous bill with perhaps a small unconstitutional provision, and the bill itself is of huge important significance to national security, the President has claimed the power to sign such a bill and decline to enforce the unconstitutional provision.

Again, I would say it is very rare. But the executive branch has asserted that power since the 1940's at least.

Dr. SNYDER. It is probably much more common for Members of Congress to vote for bills in which they think there is unconstitutionality at play.

Mr. Jones for five minutes.

Mr. JONES. Mr. Chairman, thank you.

And, Mr. Fein, did you work in the Reagan Administration?

Mr. FEIN. Yes. And I was a strong proponent of executive power there.

Mr. JONES. Right. Well, I wanted to get that. I have seen you on TV a few times and just really wanted all, both Democrats and Republicans, to know that you were in the Reagan Administration, you were a legal advisor in some capacity.

The issue I have—and I really appreciate the intellectual discussion today. I am not sure I fit in that, but I have enjoyed it and I have learned a great deal, so I would say thank you, from this panel as well as you, the presenters.

The issue that many people have, quite frankly, as you know—and this is a little bit away from the Department of Defense (DOD) bill—but the Congress itself—and I am not sure that the President issued a signing statement—but the Congress, in an overwhelming vote, almost 410 to three or four, said that we were opposed to Secretary Peters' allowing Mexican trucks to have free access to America.

And I will tell you, because I have heard this back home—and, again, Mr. Chairman, it may be a little bit off the subject—back home that people, in my district at least, just don't understand how the will of Congress has been vacated as it relates to Mexican trucks having free access to America.

And this does go back, in a way, to the issue of signing statements for this reason—and I understood and appreciated the history that you shared with us, and the discussion about the fact that, you know, this is a way that the President has some authority to not veto a bill but to say that on certain aspects of a bill he is not going to follow the wishes or the dictates of Congress.

And this would be my question, and it is something that one of you said. How do we get, legally speaking, a better check and balance?

I mean, when I look at—Senator McCain says, "If I am the President, I will never sign a signing statement," according to this report. In addition, Mr. Obama and Mrs. Clinton say, if they become the President, that they have been disappointed with how much it has been used by this Administration.

Is there any way to get Congress back into this process, so that we don't have a President, no matter who he or she might be in the future, that can just use their signing statement—and, Mr. Halstead, I believe you said, and said correctly—and this will be my last point—and you gave the exact figures about the fact that George W. Bush, 107, of which 47 express constitutional objections or other concerns. President Clinton had 70, which was 18 percent of all those he signed, were constitutional concerns or objections. And then President George W. Bush, 118, which is 78 percent of his 152 or 154—that 78 percent are constitutional objections or concerns.

If this is going to be such a way of life for the Congresses of the future and the Presidents of the future, is there any way to get any type of—or to strengthen the checks and balances or the limits to how a President can just bypass the will of Congress with signing statements? I don't know.

If everybody would answer that, I would appreciate it.

Mr. HALSTEAD. There is very little that can be done to formally constrain the President from issuing a signing statement. I mean, the notion that Congress could somehow prohibit the President from issuing a signing statement I think is a nonstarter.

Some of the legislative proposals that are out there would, for instance, prohibit the use of any appropriated funds for the President to issue a signing statement. And that gets to Professor Rosenkranz's notion of, are there unconstitutional restrictions that Congress can impose via the appropriations power. That might theoretically be one of those instances. But even more fundamentally, there is nothing that would prevent the President from walking down to the corner drugstore, buying his own pen and paper and saying, "Here you go. Here is your signing statement."

So from that perspective, for Congress to robustly assert its own prerogatives, I think it is essential—and this inquiry today I think is a good example of this—to have a systematic, regular exercise of Congress's oversight prerogatives, to ensure that the executive branch is, in fact, complying with congressional enactments.

And I think that is fundamentally the way that goal will be accomplished. There is very little that you can do to prevent a President from issuing a signing statement or even fundamentally change his conception of his powers. But you can work to ensure

that those enactments that are in question are, in fact, being carried out.

Mr. FEIN. But I think you can add sunshine to this by requiring, by statute, that all decisions by the President or the executive not to enforce a law be either published in the Federal Register or be systematically reported to Congress in a way that enables the press and the public to know exactly what is going on.

The hearings can be hit or miss, and they don't attract the same kind of attention. And then you could require that it be put on special pages or access to the Internet, so every time that there is this decision to ignore a law, everyone knows what is going on.

And then it would enable some reactive legislative to be specially targeted to that one provision. Then you could use the appropriation powers—no money of the United States shall be used not to enforce X, Y or Z statute that has been flagged.

Mr. KEPPLINGER. As I think Mr. Akin and also Dr. Snyder have observed, one of the benefits, if you will, of signing statements is that they will enhance transparency and accountability. That presumes, however, that they are stated with enough specificity so that you understand what the particular concerns are and you are not left guessing.

If you have that particular scenario, then I think a robust—to use T.J.'s word—vigorous oversight can be very, very helpful. And certainly, our limited analysis of the implementation of provisions in the 2006 Appropriations Act tells me that one should not assume compliance, one needs to stay on top of these matters of interest. And you can use these signing statements as a yellow or red flag to help you in that particular area.

I would also point out that there is presently on the statute books in title 28, I think it is 530D, a requirement that the attorney general—and it also extends to, in certain limited circumstances, to the heads of the agencies—report when they are going to adopt a formal or informal program of nonenforcement of a particular statutory provision.

Dr. SNYDER. Although we don't think that has been used. And that provision was accompanied by a signing statement.

Mrs. Davis for five minutes.

Mrs. DAVIS OF CALIFORNIA. Thank you, Mr. Chairman.

I would like to follow up a little bit more on this discussion. And I think we have a vote, so I am going to be quick.

When you talk about being more proactive—and I think you basically said part of this is really monitoring very closely any outcomes as a result of the signing statement.

Is there anything, though, just going back, I think, to what Mr. Halstead said—in this dance between the President and the Congress and I guess the Administration in some way, do you see anything in that process that should be looked at that could be more helpful? Whether or not there is a notice given that—in order to have a signing statement that relates to a certain piece of the legislation, at least some notice would need to be given up front.

Is that way out of line? Can you speak to that a little bit, trying to help us through that?

The other thing to just help me understand a little bit better is, where do these signing statements emanate from? I mean, is this

somebody in the Administration who is the point person, who is looking to try and make those decisions? And I think some of you have experience with this. Where is it that we should be, I guess, focusing our efforts as we are working through some of this legislation, in particular?

Mr. ROSENKRANZ. Well, I guess I would say first, I think the committee may be frustrated, to some extent, by how vague this particular signing statement is. So it is quite true that in this signing statement it is difficult to know exactly what the constitutional objections are.

On this question of separation-of-powers dialogue, I quite agree, I think it would be better if the President were more specific in these signing statements.

On the other hand, you have to understand that the President is interpreting laws ex ante, before any enforcement has happened, unlike courts, which are presented with actual cases and controversies. It is a much harder project to spot constitutional objections on the plain face of a statutory text than it is when you have actual parties in front of you and the thing has been enforced. This is a reason why the President is not as precise as we might like sometimes in his signing statements.

It is nevertheless possible to read these things very carefully in light of prior Office of Legal Counsel opinions, prior Presidential signing statements, and figure out quite what the constitutional objections are and, ideally, to anticipate them for subsequent legislation.

Mr. FEIN. But some of these signing statements are not susceptible to after-the-fact redress, if you will.

Suppose Congress enacts a law similar to 1222 and says, "There shall be no money appropriated to bomb nuclear facilities in Iran." The President issues a signing statement, well, he hasn't done it yet. So then he bombs the nuclear facilities, says, "I don't have to obey that." Well, then do you hold an oversight hearing to decide, gee, whether he had authority to do that? The harm is already done. And that is especially true in national security affairs.

Suppose President Nixon said, "I am not going to obey the limitations on taking the Vietnam War into Laos or Cambodia." He goes in there with 500,000 troops, and then you hold a hearing afterwards? I mean, that is ridiculous.

And one of the dangers about this particular signing statement is that it is so vague, because it suggests there is an unlimited power.

Mrs. DAVIS OF CALIFORNIA. But that is largely by design.

Mr. FEIN. Of course it is. These people who write these statements—because I was in Office of Legal Counsel, which writes these statements—they aren't sitting there, you know, saying, "Well, let's write this off in five minutes." They sit and think about this. Read all the books that have been written by those who served in the Administration. Of course it is calculated.

And you will notice the language: anything that impinges upon what the President thinks are his powers to execute his authority as commander in chief over national security. Well, that covers virtually everything under the sun. "I think I need money in order to build an anti-satellite program. I will just spend it on my own."

Mrs. DAVIS OF CALIFORNIA. Mr. Kepplinger, did you have a—you seem to be responding—is there a way of getting in there before—you know, triggering that early on?

Mr. KEPPLINGER. Well, I mean, somebody had already mentioned the statement of administrative positions when you are drafting a bill. And one would hope that any Administration is closely working with the Congress, if it has any constitutional concerns, before the bill is enacted. I mean, I would think that would be kind of a basic show of respect between equal bodies of our government.

With respect to what particular measures should be brought to bear, it is always a function of the circumstances. But I would remind Mr. Fein that there were all sorts of hearings in anticipation of some of the limitations on President Nixon's authority that led to public awareness of the bombings and the incursions into Cambodia.

But if, for example, there is a clear restriction on the use of appropriated funds, there are remedies.

Thank you, sir.

Dr. SNYDER. We had better—we are short on time, Mrs. Davis.

And it is one vote. Again, a motion to adjourn. We should be back. If any of you need to use phones or have some privacy, the staff would be glad to help you.

[Recess.]

Dr. SNYDER. Dr. Gingrey, you are looking very alert, for having been up all night seeing the space shuttle, and I applaud you for hanging on.

Dr. GINGREY. Looks can be mighty deceiving, Mr. Chairman, mighty deceiving indeed. [Laughter.]

Dr. SNYDER. Dr. Gingrey for five minutes.

Dr. GINGREY. Thank you, Mr. Chairman.

Mr. Fein, your opening remarks, statement, in regard to 1222 in particular, you made a very emphatic statement, that there was no ambiguity whatsoever and that there was no way that the President could misinterpret the precepts of 1222.

And you also stated in a recent op-ed in the Washington Times that, "A combination of congressional inertness and imbecility, when confronted with signing statements like the one attached to the most recent defense authorization act"—and I am assuming you reference mainly 1222——

Mr. FEIN. Yes.

Dr. GINGREY [continuing]. Has crippled the power of the purse to check executive abuses and craving for perpetual war."

Now, I presume that you are referencing this President and his craving. I presume that—you have made a statement also about sending troops to their death, or something to that effect.

Mr. FEIN. Well, when they fight, they usually die.

Dr. GINGREY. I am paraphrasing a bit, but, I mean, you can clarify if you wanted.

But I think the question I want to ask you, after I make this point—the President, I think, could interpret 1222 in a way to say, "What is the definition of a permanent base?" It was very clear, no permanent bases; no money shall be used in this appropriate to establish permanent bases in Iraq. Well, is that a base that is there

five years? Would that be permanent? One ten years, would that be permanent?

Mr. FEIN. Of course not.

Dr. GINGREY. One six months, would that be permanent? If you will let me finish.

So I think what we need to keep in mind is that veto is not the only exchange that a President can have with the legislative branch. And certainly, the opportunity—and some of your colleagues on the panel I think have pointed this out very clearly—that the opportunity, once something occurs, to say, well, you know, is this constitutional or is this not constitutional—and so, I think that I disagree with you quite emphatically in regard to this President and his intent.

And if you can maybe specify to us even just one or two instances in which you think the President did something unconstitutional in regard to ignoring a statute or a part of a statute that we sent to him that he signed and that he ignored the precepts of.

Mr. FEIN. Let me first explain permanent war. That is what we are in at present, Mr. Congressman. The standard that the Administration has established for permanent war is that if there is any homo sapien anywhere in the Milky Way that threatens an American with a terrorist act, we are at war. And there has been no suggestion that there is any benchmark of terrorism that will ever be satisfied that ends the war. So we are in permanent war.

Second, with regard to——

Dr. GINGREY. Also permanent war with Korea, as an example? We have 35,000 troops there. Are we at permanent war?

Mr. FEIN. I think that there is a truce that has been there since 1953, negotiated by then-President Eisenhower.

Anyway, this is something that is new, with regard to a tactic that will never bring a state of war to an end. And that is global, because terrorists fight everywhere. It is not country-specific.

Now, with regard to provisions of the law that the President may ignore, he oftentimes doesn't flag them, but we know that, with regard to the Foreign Intelligence Surveillance Act, he did decide to flout that particular statute for at least five and a half years.

When the Congress passed the Protect America Act that is now being debated for extension that you may be involved in, this was in August of 2007, I was invited to the Justice Department, asked to help try to interpret some ambiguous provisions in implementation. I said, well, will the President comply with the law? Well, he would like to comply, but if he thinks he needn't comply because it is important to violate it to gather foreign intelligence, he still had authority to do that. I said, well, will you tell us if he decides to violate the law? No, he is not going to flag that.

So, simply because we don't have in the New York Times or The Washington Post yet a disclosure doesn't mean that the law isn't being violated.

And I called to your attention, Mr. Congressman, the years that we had these hearings, then chaired by Senator Frank Church, and there were companion hearings in the House by Otis Pike, which disclosed 30 or 40 years of illegal spying that was never disclosed: opening mail, intercepting international telegrams and otherwise.

The problem is, everything isn't done in the sunshine; we don't know, which is a worrisome element. And when you ask questions of this Administration, they say, "State secrets, executive privilege, we won't tell you."

You now, even two years after the New York Times disclosed the warrantless surveillance program, don't know what its complete ramifications are. So you can't be definitive in giving an answer, whether the President has flouted the laws that Congress has passed.

Dr. GINGREY. Mr. Chairman, I see that my time has expired. I just would wonder if Mr. Fein's level of cynicism toward this President extends to other Administrations as well.

Mr. FEIN. Certainly other Administrations was what caused Congress to enact the Foreign Intelligence Surveillance Act, and that is why we have checks and balances. It is the founding fathers who said we don't have angels; that is why ambition has to be made to counteract ambition. It is not cynicism, it is human nature. Absolute power corrupts absolutely, whether you are in the legislative branch or executive.

Dr. SNYDER. Mr. Conaway for five minutes. Then we will go to Mr. Andrews.

Mr. CONAWAY. Thank you, Mr. Chairman.

And I hate to act like we are piling on, Mr. Fein, but the phrase, "permanent war," where is that in 1222?

Mr. FEIN. No, Congressman, I didn't intend to insinuate that language was in 1222——

Mr. CONAWAY. I only get five minutes.

While trying not to confirm your imbecility—opinion of Congress with my comments, I would like to finish having an exchange with you.

Your unflappable certitude that there is no ambiguity in 1222 is—as an example, Fort Ord, in California, would have at one point in time been a permanent base. Reese Air Force Base, in Lubbock, Texas, would have been a permanent base. Webb Air Force Base in Texas would have been a permanent base. They no longer exist in those forms.

"Control over oil resources," does that mean if we have a squad or a platoon guarding a particular switching station or a pipeline, that we can't do that because that would be exercising control? If we try to encourage the Iraqi legislature to spend the money in certain ways, are we controlling those oil resources?

So, while you—again, I am not a linguist. I come from a part of the country where O-I-L can sometimes be a two- and three-syllable word. I wouldn't presume to be a linguist of any standing whatsoever. Even as naive and uninformed as I am, I can conjure up some ambiguity there that a crafty plaintiff's lawyer might like to take that side of the case.

So when you are so strident in your opinion that there is absolutely no room for a second interpretation of two words, "permanent basing," you know, there is nothing permanent with a facility in Iraq that would ultimately be turned over to the Iraqis, that was of concrete and it would look like permanent structures, that would be for the benefit of our military using it temporarily until it was

turned over to them—would that violate this permanent stationing clause?

That is just editorial comments. You have had a chance for your editorial comments.

You did make one comment about sunshine—you know, President announcing it—I guess your a favorite of the Post or the Times as being the official sunshine of the world. I am not.

But what role would hearings like this have if we found some expenditures for permanent stationing or control that we, in our collective imbecility, thought were in violation of the law, and hauled the folks in here that actually were charged with spending that money? Is that sunshine that you would accept?

Mr. FEIN. Of course. In fact, it is regrettable we don't have Administration officials today testifying about the alleged ambiguity that you find in the statute. But the President didn't suggest, in the signing statement, that he didn't understand what 1222 meant.

Mr. CONAWAY. Well, I don't know that we alleged any ambiguity, but apparently the President does.

Mr. FEIN. He didn't say that it was—do you find the word "ambiguity" in the signing statement, sir?

Mr. CONAWAY. No.

Mr. ROSENKRANZ. Congressman, I think you are quite right that even the clearest provision can—ambiguity can lurk even in what seems like the clearest provision on its face.

And the way that a provision of law will interact with the Constitution, whether it will perhaps raise a constitutional concerns, is going to turn on facts on the ground. So it is very hard to know ex ante whether any given provision is going to raise a constitutional concern, in light of what facts might arise in Iraq, as you point out.

So the President is really just using these statements to flag the possibility that, given a certain set of facts, a certain interpretation of the statute might raise constitutional concerns. That is all these statements really do.

Mr. CONAWAY. I want to make one final comment. I suspect every single once of us thinks our constitutional responsibility varies. And for it to be implied or stated flat-out that I or my colleagues breached our constitutional responsibilities because we voted for something that isn't perfect, isn't—you know, something certainly as large as the Defense Authorization Act or the large omnibus bills, that we somehow breached our constitutional duty—or that the President, for that matter, breached his constitutional duty by pointing that out is very in the extreme.

Mr. FEIN. I never said that, sir.

Mr. CONAWAY. Well, that is what I heard.

Mr. FEIN. Well, you heard something I didn't say.

Mr. CONAWAY. Here is the developing status of forces agreement, which we typically do. Is there no possibility that 1222 couldn't be limiting in that regard?

Mr. FEIN. Congress has the authority to limit what the executive can do. That is part of our Constitution.

Mr. CONAWAY. I appreciate your open-mindedness to other people's opinion.

I yield back.

Dr. SNYDER. Mr. Andrews for five minutes.

Mr. ANDREWS. Thank you.

I thank the panelists. I apologize for not being present for your oral testimony, but I read what you had to say.

I think what we are having here is a discussion about two points there is broad agreement on. I don't think anybody disagrees the President has the authority to interpret ambiguous statutory language and give his own interpretation in direction the executive branch. And I think just about everybody would say here the President has no constitutional authority to disregard a specific statutory mandate.

But, Professor Rosenkranz, I want to test with you how far we can stretch this interpretation-of-ambiguity idea. Is it your position that the President can issue a signing statement in which he disregards a statutory directive only when he thinks it is ambiguous, or any time he feels like it?

Mr. ROSENKRANZ. There are two different kinds of constitutional signing statements the President can issue. One concerns ambiguity in statutes, and in those you usually find the word "construe" or "interpret."

Mr. ANDREWS. Right.

Mr. ROSENKRANZ. "I will construe or interpret this statute consistent with some constitutional provision." That is the vast majority of signing statements.

A small number of signing statements are triggered when there is no ambiguity and this provision is flat-out unconstitutional. He cannot find a constitutional reading of it. There the signing statement might say——

Mr. ANDREWS. Let me ask you a couple hypotheticals. I was a law student. I have always wanted to ask law professors hypotheticals. So this is a great moment for me. [Laughter.]

What if we passed a statute that said the President shall build a missile defense shield capable of knocking down an incoming Inter-Continental Ballistic Missile (ICBM), and the President says, "I am not going to do that. I actually think that makes the country less secure, not more secure, so I am not going to do it. I am going to direct the Secretary of Defense not to implement the planning for this weapons system," and he does so by signing statement? Is that a valid exercise of Presidential prerogative?

Mr. ROSENKRANZ. Well, again, I would have to understand, is that the entire bill, or is that a small provision of an enormous bill?

Mr. ANDREWS. It is a paragraph of an enormous bill, just like the four instances under question here.

Mr. ROSENKRANZ. So, if the President believed that that provision was constitutionally problematic, he could flag that constitutional——

Mr. ANDREWS. Is it only if he believes it is constitutionally problematic, or he just doesn't like it?

Mr. ROSENKRANZ. He has no power to do that if he just doesn't like it. Only if there is a constitutional——

Mr. ANDREWS. In four instances—okay. In the four instances that are before us, did the President find each of these provisions constitutionally problematic, or did he just not like them?

What was constitutionally problematic about the provision that says that we should not have a permanent base in Iraq?

Mr. ROSENKRANZ. He made crystal-clear that his objections here are constitutional objections. And——

Mr. ANDREWS. What were those objections? Constitutionally, what were they?

Mr. ROSENKRANZ. In 1222, his objection, perhaps—well, the signing statements aren't crystal-clear on this point, but——

Mr. ANDREWS. I would argue it doesn't say. I am sorry, what were you going to say?

Mr. ROSENKRANZ. The signing statement does specify that it is a constitutional objection. The constitutional objection I infer is an objection to appropriating money with conditions that impinge on the commander-in-chief powers.

Mr. ANDREWS. But it is kind of contradictory, because one of the arguments you make in favor of the robust use of signing statements is that it lays out the rationale for a Presidential decision. And I think there is something to that. But now you are telling us that you had to infer what the constitutional objection was.

Shouldn't the President, at the very least, be explicit about the basis of his constitutional objection?

Mr. ROSENKRANZ. Congressman——

Mr. ANDREWS. I think he just disagrees with the idea of permanent bases in Iraq, which is his prerogative, in which case he should veto the bill.

Mr. ROSENKRANZ. Congressman, I agree with you that these signing statements should be drafted as clearly as possible. But it is at least clear on this one point, that it is a constitutional objection, not an objection based on policy.

Mr. ANDREWS. What is it? What is the constitutional objection to the bases in Iraq?

Mr. ROSENKRANZ. Again, I think the constitutional objection is that——

Mr. ANDREWS. You think? Or you can get it from reading the four corners of the statement?

Mr. ROSENKRANZ. I can get it from reading the four corners of the statement. I believe that what the President is driving at is that appropriations bills cannot be subject to any and all conditions, that there may be some restrictions——

Mr. ANDREWS. I would——

Mr. ROSENKRANZ [continuing]. On what Congress can do in attaching conditions.

Mr. ANDREWS. You are a vigorous advocate of your position. I just disagree with you, because I think our Constitution is not built on nuance or what we think someone said. We pass statutes that say certain things, and the President either vetoes those statutes or signs them. And his job is to execute.

Now, where there is ambiguity, I agree with you, you need to explicate that. But I think what we really have here is a use of the signing statement process to express policy disagreements, not constitutional disagreements.

And I have searched these four signing statements high and low, and, boy, it is hard to find many shards of constitutional law in there. I mean, I know he wants, probably, permanent bases in Iraq.

He doesn't like this vigorous role for the Inspector General (IG). I think I know why, given the fiasco we have had in Iraq. He doesn't like the mandate that intelligence reports be shared with us when we ask for them. He doesn't like the commission on wartime contracting.

But not liking something is a political decision, not a constitutional one. And I think the remedy is vetoing the bill, not saying you are just not going to enforce it.

Mr. ROSENKRANZ. Again, Congress, the signing statement is only two paragraphs long, and it is crystal-clear that it is making a constitutional objection, not a policy objection.

Mr. ANDREWS. But what is it? What is the constitutional objection?

Mr. ROSENKRANZ. The constitutional objection is that certain provisions of this bill may impinge on the President's——

Mr. ANDREWS. But specifically on the base issue, what is the constitutional objection? Did he say, "I think it is in the national security interest to maintain a base there permanently, and as commander in chief I have made that judgment and you are impairing it"? Did he say that?

Mr. ROSENKRANZ. He said implicitly that this provision could constitute a condition on spending——

Mr. ANDREWS. Sort of like the implicit power for indefinite wiretapping under the Fourth Amendment. I just don't agree with you. A vigorous defense, you get an A in the class, but I don't agree. [Laughter.]

Dr. SNYDER. Mr. Akin.

Mr. AKIN. I don't have any additional questions.

Dr. SNYDER. We will go around again here, with the three of us.

I wanted to read a little bit, if I might, from the statement by Tom Allen and John Tierney that was made a part of the record earlier. Toward the beginning of the statement, they say, "We are baffled that the nature and foundation of the President's objection to the establishment of a bipartisan commission to weed out waste, fraud and abuse by government contractors carrying out missions in the name of the U.S. people and at their expense. We find it deeply troubling that the President's signing statement suggests that the Administration may hinder the work of this anticorruption commission. As a result, we offer this testimony in the hope that the Administration will clarify its intentions and clearly inform U.S. taxpayers that it will fully support the work of this vital commission." That is that paragraph.

And then toward the end of the statement, again quoting from Congressman Allen and Congressman Tierney, "It is our sincere hope that the President's signing statement is merely boilerplate rather than an indication that the Administration will not fully support the establishment and work of the wartime contracting commission. On behalf of the U.S. taxpayers, we will closely monitor the Administration's action in the coming days and weeks. And, with like-minded colleagues, we will use all congressional rights and powers at our disposal to both ensure that the American people receive a full accounting of the President's intentions and, at the end of the day, ensure this commission is quickly constituted

and able to fully conduct its important work." That is the end of the quote.

I may address this to you, Mr. Halstead, and for anyone else. I mean, I think you have referred to this issue that we may just want to take signing statements and say, "This will be our menu for oversight."

And we didn't make a big fuss today when the DOD said they didn't want to come here. They make the argument, "Look, we are not here to do the esoterics of constitutional law." We will make a big fuss if we have a hearing, if Mr. Akin and I decide to have a hearing, or Congressman Tierney, who is the chairman of the oversight committee on national security for the Government Reform Committee under Mr. Waxman, if he decides to have an oversight hearing on this specific provision and DOD says, "We don't think we are going to send witnesses," I guarantee you that Members of Congress are going to go ballistic. Because it will be about a specific provision of law we expect them to carry out.

What do you think about this idea that, in fact, what they have done is the President has given us a menu for oversight and we need to drill down in these areas?

Mr. HALSTEAD. I think that is—it is a point that I have made over the last couple years, as I have been addressing the controversy over Presidential signing statements, because there you have a discrete example in a signing statement regarding a discrete provision of law that creates this task force to study contracting in Iraq and Afghanistan.

From a constitutional perspective, I think anybody would be hard-pressed to attack the constitutionality of this commission. It is not an entity that wields any degree of executive authority, so there are not Appointments Clause implications in that regard.

It doesn't even have subpoena authority, which—it is well-established that legislative commissions can wield subpoena authority. But this entity does not even have that.

Dr. SNYDER. One provision in it, it calls for the——

Mr. HALSTEAD. For the release of information upon request?

Dr. SNYDER [continuing]. That no longer requires it to have a couple appointments.

Mr. HALSTEAD. Right.

Dr. SNYDER. So another possibility in this is we will fine-tooth through this stuff and figure out ways, do we need to write things differently. And we might say, well, to hell with them. You know, it is partly courtesy, partly we would benefit, from having people that both the Secretary of State and the Secretary of Defense wanted. But if it creates these kinds of problems, let's do a commission without the input of the executive branch. That doesn't seem a helpful result either.

It seems like one response to this may be we will write things differently in a way that is not helpful to the executive branch, nor helpful to national security. Do you see that as a possibility also?

Mr. HALSTEAD. That is one potential. Again, from a constitutional perspective, there would be nothing to impair or prevent this commission from being purely a legislative commission in appointment.

It does carry significant practical implications for the work of the commission, because, as a matter of comity, this notion of having a hybrid legislative Presidential appointment gives an imprimatur to this body that it has both executive and legislative officials, or appointees, who share a common goal in identifying issues surrounding contracting in Iraq and Afghanistan.

Dr. SNYDER. I think one of the things—Mr. Andrews left, but the issue about fleshing these things out. I mean, we did have a veto of this bill. There was a veto message that said specifically why the bill wasn't liked. It would have been a perfect time to say, "Oh, by the way, there are four other provisions that I mention in my signing statement. These are the potential areas of concern we have. It would probably be better that you would draft these in such a way that we will not have to specifically enumerate them as potential problems with interpretation."

But that wasn't done. I mean, it doesn't seem, Mr. Rosenkranz, to help your case, in terms of them trying to get better clarification of language, if it is not even included in the veto message.

Mr. ROSENKRANZ. But, Mr. Chairman, the fact of a signing statement flagging certain potential constitutional issues does not necessarily mean that something has gone wrong. It doesn't necessarily tell us that something is wrong with the drafting of the bill or that the bill should have been clearer or something like this.

You just have to imagine, in an enormous bill, its interaction with facts on the ground, potentially infinite. So it is unsurprising to find that a provision of a huge bill, under some set of circumstances, might raise a constitutional issue, and the President just flagging that that is a possibility under some set of facts.

Dr. SNYDER. Yes, but that is—well, my time is—but that is not helpful at all, is it? I mean, to say, "including these provisions." It is not helpful at all to say every provision of law may, at some point, depending on facts on the ground, have constitutional problems.

I can probably take any provision of law, and even my 25 years removed from going to law school, be able to come up with a set of facts that would bring about constitutional issues. I can do that, I think, with about any provision of law. I don't think that is helpful.

The other thing about this—and then we will go to Mrs. Davis—is this is coming at a time when this Congress, in a bipartisan manner, really appreciate the work of Secretary Gates and Secretary England. There is just a night-and-day experience, in terms of our confidence in the Pentagon, the transparency, the information we get, the responsiveness. And so, this was clearly unresponsive.

I mean, we can nitpick it and say, "Yeah, they are just mentioning it is a potential problem"—well, no, that is not helpful.

And, frankly, I think those guys—I don't know—I think they didn't have anything to do with it. I think somewhere some lawyers were sitting there saying, "We need to cite some of these things because we are trying to stake out executive branch authority. And even though we know they are going to be enforced, we are going to throw these few provisions in there anyway." I mean, it is difficult to interpret in any other way.

Mrs. Davis.

Mrs. DAVIS OF CALIFORNIA. Thank you, Mr. Chairman.

Thank you, again, for all of you being here.

Professor Rosenkranz, you said that basically this is rhetorical, that the statements are rhetorical. I think that is what you said.

Mr. ROSENKRANZ. I don't think they are quite rhetorical. They are the President signalling possible constitutional issues with the bill and suggesting that he is going to interpret the bill consistent with his constitutional obligations. So I wouldn't call them quite exactly just rhetoric.

Mrs. DAVIS OF CALIFORNIA. Okay. I think you did say rhetorical, but I may be mistaken.

At what point would it not be rhetorical? Where would you draw the line?

Mr. ROSENKRANZ. Again, I don't think that I said these are rhetorical. And I don't think they are quite just rhetorical. I think they are signalling one of the tools that the President will use when he tries to interpret this act.

Mrs. DAVIS OF CALIFORNIA. Would anybody else like to weigh in? I mean, where would you begin to say, okay, this goes beyond it being a statement that he is signalling? Where is he not signalling? I mean, do you think, is there something more than a signal here? Something more than a signal that even the Supreme Court, at some point, did weigh in on?

Mr. KEPPLINGER. Mrs. Davis, I have been listening to the discussion, and, you know, my view when I first read the President's signing statement with respect to this is—my reaction: What is the point?

To the extent that there are circumstances that may present themselves at some point in the future, where the application of one of these provisions to particular circumstances present an issue, you certainly can deal with it then. You certainly aren't inhibiting your ability to deal with it then by being silent when you signed the statement.

And so, I begin to get—it is a little bit of a Chicken Little reflex of, you know, the sky is falling on Presidential authority, which I don't think is the case at all.

And so, I think it is—the Congressional Research Service (CRS) has made the point in the past that this orchestrated use of signing statements to raise abstract, conjectural constitutional issues is more to, if you will, advance an ideology than it is to deal with any particular issues of the moment.

Mr. FEIN. If I could elaborate, most of the checks and balances, separation of powers law that the Supreme Court embraces comes more from practice in rhetorical exchanges between Congress and the executive branch than by looking at the words of the Constitution, which are blurry at best in this regard.

This is an effort by the President to establish de facto what the Constitution means by saying over and over again, "These are my prerogatives, and you can't encroach on this." And if Congress doesn't respond, he will go into court and say, "See? I have said this all along. And Congress hasn't suggested that I am wrong, and therefore that is what the law is." That is how executive privilege,

actually, was finally endorsed by the U.S. Supreme Court in the U.S. v. Nixon case.

The other issue that is addressed, at least indirectly, by your question is, oftentimes, the nonenforcement is undetectable. The President doesn't come forward and say, "You know, I am violating that law. I am not going to enforce it."

And that has happened with the Foreign Intelligence Surveillance Act (FISA). The President never said after 9/11, "Eh, the act is antiquated. I am just going to go ahead and enforce in other ways." And despite the ridicule of the New York Times, we wouldn't have a discussion about FISA. You wouldn't even be thinking about the Protect America Act if the executive branch hadn't leaked that information to the New York Times. We wouldn't know about it.

Mrs. DAVIS OF CALIFORNIA. Mr. Halstead.

Mr. HALSTEAD. It is essentially part of what I see as a general strategy or position on the part of the executive branch that any time we have the opportunity to assert very expansive assertions of Presidential power, we are going to take that opportunity. And it is designed to inure Congress, the courts, the public to the notion that the executive branch in fact possesses these large swathes of power, upon which Congress and the courts may not intrude.

And in my report, I lay out instances. One of the most common things you see in signing statements is objections to direct reporting requirements that are imposed by Congress. It is well-established that those are not remotely constitutionally problematic in and of themselves. Certainly, if you have a direct reporting requirement that intrudes upon a sphere of privilege, then you may have an issue. But, as a general matter, direct reporting requirements are constitutionally unexceptional.

And so, it is part of an overall position or strategy, I think, on the part of the Administration to forward these claims of power whenever possible.

Mr. ROSENKRANZ. I should just say, I don't see any evidence in this signing statement, or in this President's signing statements generally, of broad strategy to assert some broad swathe of executive power. The statement is only two paragraphs long.

And what it is saying is, "This statute could possibly raise constitutional issues, and I am going to keep that in mind, in particular with regard to these specific provisions. And I want the executive branch to keep this in mind, as well." It doesn't say anything more than that.

Mrs. DAVIS OF CALIFORNIA. But I think that—earlier, I just thought I heard you saying that there is a place for Congress, though, to be more proactive, as it relates to those signing statements. And I am trying to determine the extent to which that is the case.

Mr. ROSENKRANZ. I agree that Congress should read these things carefully.

Dr. SNYDER. Mr. Andrews for five minutes.

Mr. ANDREWS. I wanted to ask each of our two law professors how they reconcile the controversy over signing statements with Justice Scalia's announcement that legislative history has very little to do with anything.

And the reason I ask this—and I think that is perhaps an unfair characterization, but I think it is accurate.

The reason I raise that is, of course, if the Administration is going to continue to preempt litigation or challenges by announcing what it thinks something means without vetoing, then, of course, our corresponding power would be to make it clear in legislative history what we mean.

So let me try this one on. Let's say that in the section 841, commission creation, we had said in the committee report of this committee and again on the floor in a colloquy that, should a situation arise where an executive branch person who is commanded to turn over a document believes that the turning it over would constitute a violation of executive privilege or some other executive constitutional prerogative and that that is shared by the President, that it is not our intention to have that "shall" applied to that. So we disclaim in the legislative history that we are pushing that constitutional envelope. It is only in cases where there is no dispute that they "shall" do it.

I think Justice Scalia has told us that that doesn't mean anything. First of all, do any of you disagree with that characterization of Justice Scalia's position?

Mr. FEIN. He has clearly stated that it is the language of the statute that counts and that legislative history isn't voted on by the Congress and it is not signed or vetoed by the President. And, therefore, it is——

Mr. ANDREWS. So, Professor Rosenkranz, do you agree with my characterization?

Mr. ROSENKRANZ. Justice Scalia would say that legislative history is not very useful to the interpreting of Federal statutes, and also Presidential signing statements are not very useful to the interpreting of Federal statutes.

Mr. ANDREWS. I don't quite know that that issue has reached him yet. But I do know—so what we do have, at least a significant voice on the Supreme Court, if not the majority voice, saying that if we want to say something we had better put it in the statute explicitly.

It seems to me, if—do you think Justice Scalia is right, by the way? If you were sitting on the court, would you agree with that view or disagree with it?

Mr. ROSENKRANZ. I would agree with that.

Mr. ANDREWS. Okay. So if you agree with that view, then shouldn't we make the same thing hold for the executive branch? Shouldn't we say that if the President wants something not to happen, he needs to exercise his veto power; and if he signs a bill, then he really has to execute the law? Shouldn't there be a reciprocal obligation in the executive branch?

Mr. ROSENKRANZ. It is a very good question. There are two different issues here. One is the effect of Presidential signing statements in the executive branch. And the other is the effect of Presidential signing statements in court.

So there is nothing inconsistent about saying a Presidential signing statement should inform how the Defense Department reads——

Mr. ANDREWS. But with all due respect, judgments and decisions of courts then affect the real world. So if the court says, "No, you don't have to turn over this document about contracting in Iraq because it is protected by executive privilege," then the document doesn't get turned over, right? So——

Mr. ROSENKRANZ. Congressman, the Secretary of Defense has to follow the President's interpretation of the law. The Supreme Court doesn't have to follow the President's interpretation of the law. They follow their own interpretation of the law. There is nothing inconsistent in that.

Mr. ANDREWS. It just strikes me as oddly lacking a reciprocity here, when you say you agree with Justice Scalia's view that if the legislative branch wants to really mean something it has to use its common instrument of the statute to do so—its only instrument, I guess he would say—but if the President wants to nullify a statutory direction, he can simply do so without veto; he has this other—it reminds me of the penumbras in Griswold v. Connecticut, just sort of happened one day. But there is this penumbral power of the President to do these signings that are sort of half-fish and half-fowl, right?

They are half-veto but half-signature. Isn't that an odd contradiction?

Mr. ROSENKRANZ. Again, there is nothing inconsistent here. It is the difference between intra-branch communication and inter-branch communication. If you——

Mr. ANDREWS. Professor Fein, why am I right? [Laughter.]

Mr. FEIN. I think Professor Rosenkranz is flawed in the sense that the majority of these cases will never get into court.

Let's take the situation that we have with 1222. Suppose if the President spends money to establish a permanent military base in Iraq, who has standing to go into court? You don't. I don't. The Supreme Court standing rules make it impossible.

So the fact is, the President's word is the final word, short of impeachment or some other retaliation, through not confirming someone or whatever.

And that is most of the cases concerning these claims that the President makes in signing statements, raise issues that will never get to court because you will never have standing.

Mr. ANDREWS. I think the same is true of the intelligence mandate. I think if the President refused to turn over an intelligence report and we went to Federal district court to compel him to do so, we would get kicked out for lack of standing.

So our remedies, apparently, would be to impeach him or, I guess, shut the government down and not fund the executive branch or some really radical approach.

Whereas, I would think that if he thinks that this requirement that intelligence reports turned over impair his ability as commander in chief, he should veto the legislation and make us do it over. That is what I think.

Dr. SNYDER. Mr. Akin, anything further?

Mr. AKIN. No. I think we have pretty much plowed the field.

Dr. SNYDER. Well, I know, but I am not going to let that stop me from going ahead one more time.

I have here the President's veto message from December 28, 2007, of the bill. And it is a two-page statement, most of which discusses section 1083 that dealt with Iraqi monies and the litigation.

And then at the very end, he says, "This legislation contains important authorities for the Department of Defense, including authority to provide certain additional pay and bonuses to service members. Although I continue to have serious objections to other provisions of this bill, including section 1079 relating to intelligence matters, I urge the Congress to address the flaw in section 1083 as quickly as possible so I may sign into law the National Defense Authorization Act for Fiscal Year 2008 as modified." And that is the last paragraph.

So now we have a situation in the most recent message from the President about that bill is that only one of the provisions are mentioned as warranting consideration.

I mean, Professor Rosenkranz, what does that do to your analysis, that the other three provisions are not specifically mentioned? Does it do anything? Are these just, like, messages to be ignored, boilerplate, that one day it is going to be four provisions, a few days later it is going to be one provision?

Mr. ROSENKRANZ. I have not seen that prior statement, so I don't know what——

Dr. SNYDER. Okay. This is the veto message that came from the President when he vetoed. But my point is——

Mr. ROSENKRANZ. And were these provisions identical then to the ones that were passed?

Dr. SNYDER. Yes. Yes.

Mr. ROSENKRANZ. I see.

Dr. SNYDER. I mean, because my point is he specifically talks about serious objections to other provisions of this bill but then does not mention three of the four. I don't know what it means. I think it is just part of this confusion that we have right now.

Before seeing if Mrs. Davis or Mr. Andrews have anything further, I do want to mention I actually do have another Law Review article. You have already read my one today from Vanderbilt University. And, in fairness to Vanderbilt University, I should acknowledge my one-page Law Review article by Vanderbilt University. I actually did write another one that I actually thought was a real Law Review article about the congressional oath of office and what does it mean as a member of the Congress to take the congressional oath of office. So if you can't sleep at night, take that one.

Mrs. Davis, anything further?

Mrs. DAVIS OF CALIFORNIA. No, Mr. Chairman. You were just a perennial student.

Dr. SNYDER. Yes.

Mr. Andrews.

Mr. ANDREWS. I am going to wait and see the movie. [Laughter.]

Dr. SNYDER. All right. Anything further, Mr. Andrews?

Mr. ANDREWS. No, thank you, Mr. Chairman.

Dr. SNYDER. Mr. Akin.

Mr. AKIN. No, thank you.

Dr. SNYDER. Thank you all for being here. I am sorry this took longer because of the votes. We appreciate your patience with us. I think your information has been helpful. Thank you.

And I will also give you as an open question for the record, if anybody has anything that they are dying to submit in written form to be appended to this, I would be glad to do that in response to this question.

Thank you. We are adjourned.

[Whereupon, at 2:36 p.m., the subcommittee was adjourned.]

A P P E N D I X

MARCH 11, 2008

PREPARED STATEMENTS SUBMITTED FOR THE RECORD

MARCH 11, 2008

Opening Statement of
Chairman Dr. Vic Snyder
Subcommittee on Oversight and Investigations

The Impact of the Presidential Signing Statement on Implementation of the National Defense Authorization Act for FY 2008

March 11, 2008

The hearing will come to order. Good afternoon and welcome.

Our hearing topic today is "The Impact of the Presidential Signing Statement on Implementation of the National Defense Authorization Act for FY 2008."

The intent for this hearing was for the Subcommittee to have an opportunity to hear from the Department of Defense regarding how they intend to implement the National Defense Authorization Act for FY 2008. As many of you are aware, when the President signed the act into law on January 28th of this year, he included a signing statement in which he asserted that certain provisions of the act - four of them in particular - could inhibit his ability to carry out his constitutional obligations, and that the executive branch would "construe such provisions in a manner consistent with the constitutional authority of the President." Given the reservations expressed in that statement, Chairman Skelton requested that this subcommittee hold a hearing to ask a simple question of the Department of Defense: DOD, are you implementing or planning to implement the law as Congress wrote it?

Unfortunately, DOD declined to provide a witness for today's hearing. We also invited the Department of Justice Office of Legal Counsel, but they declined as well because they do not testify about specific provisions of law.

We have and will continue to seek a direct answer to our question, because the underlying issue here is such an important one. [In fact, in conversations with DOD legislative affairs, we have informally been assured that DOD does intend to fully implement the Defense Authorization Act as written.]

For purposes of today's hearing, without administration witnesses, our conversation will obviously be more general than was our original intent. But this panel brings before us a tremendous range of experience and expertise with respect to signing statements. I expect that today's hearing will allow us to address how signing statements typically affect an Administration's implementation of the law, how the most recent signing statement to the NDAA for FY08 might affect how it is carried out, and how Congress should react to signing statements in an effort to ensure that Presidents obey the law as written.

On our panel today we are joined by:

T.J. Halstead
Legislative Attorney
American Law Division
Congressional Research Service

Gary L. Kepplinger
General Counsel
U.S. Government Accountability Office

Bruce Fein
Constitutional Attorney
Bruce Fein & Associates
Member, American Bar Association Task Force on Presidential Signing Statements

Nicholas Quinn Rosenkranz
Associate Professor of Law
Georgetown University Law Center

Welcome to all of you and thank you for being here. After opening remarks from our ranking member, Todd Akin, you will each have an opportunity to make a brief statement before we go to questions. Your prepared statements will be made part of the record.

I would also like to note that I have a statement for the record provided to me by Representatives John Tierney and Tom Allen with respect to implementation of the Wartime Contracting Commission, which was one of the provisions singled out in the recent signing statement. I would like to ask for unanimous consent to enter this statement into today's record as well.

I'll remind our members that we will use our customary five-minute rule today for questioning, proceeding by seniority and arrival time.

With that, let me turn it over to Mr. Akin for his opening statement.

Statement of Ranking Member Todd Akin
Subcommittee on Oversight and Investigations
House Armed Services Committee

Signing Statements and the National Defense Authorization Act (NDAA) for FY 2008

March 11, 2008

Thank you, Chairman Snyder, and good afternoon to our witnesses – we appreciate you being here today.

Today's hearing addresses an important subject that merits the attention of this committee. I commend the Chairman for holding this hearing.

Presidential signing statements involve the constitutional prerogatives of the legislative branch and the executive branch. The House Armed Services Committee, in particular, carries out a specified duty in Article I of the constitution: "to provide for the common defence", "to raise and support armies", "to provide and maintain a Navy", and "to make rules for the government and regulation of the land and naval forces." Similarly, the President has a responsibility, outlined in Article II, "to preserve protect, and

defend the constitution" and "to take care that the laws be faithfully executed." While we hope that these respective constitutional responsibilities of the legislative and executive branch do not conflict, the reality is that there is frequently disagreement between the two branches. In my view, this is a natural state of affairs that our Founders built into our unique form of government.

The crucial question, therefore, is ***not if*** these conflicts are appropriate, as I believe these tensions are built into our constitution, but ***how*** such disputes are addressed and resolved? In my view, when the Congress and President ***do*** disagree about the constitutionality of a specific provision of law, the most important equity to be preserved is transparency and communication. If the President believes his independent duties under the constitution preclude him from implementing a law in the manner Congress prescribed ***then I want to know***. What I do not want is an Executive that does not communicate with the Congress.

Therefore, it seems to me that Presidential signing statements, like a Statement of the Administration's Position (SAP) or so-called "Heartburn" letters, are important tools of communication so that the Legislative Branch knows which provisions of law will require increased oversight over Executive implementation.

With respect to the FY 08 NDAA, the President highlighted four provisions in his signing statement. I think the prudent course for this Committee is to oversee the implementation of these provisions to ensure they are carried out consistent with our intent. My understanding is that measuring exactly how signing statements actually affect implementation is something that has not been studied closely – I'd like our witnesses to comment on this point.

Finally, there is the matter of whether courts will give weight to signing statements in a manner similar to legislative history. My question for the witnesses, particularly Professor Rosenkranz, is whether it is inappropriate for courts to consider the President's constitutional equities when interpreting a statute? Moreover, if courts consult foreign sources of law when interpreting US law – something I am deeply skeptical of – shouldn't they take into account a President's statement?

Again, thank you to our witnesses for being here today. I look forward to your testimony.

[Yield to Chairman Snyder]

Statement of T.J. Halstead
Legislative Attorney, American Law Division
Congressional Research Service

Before

The Committee on Armed Services
Subcommittee on Oversight & Investigations
House of Representatives

March 11, 2008

on

"The Impact of the Presidential signing statement on the Department of Defense's implementation of the National Defense Authorization Act for Fiscal Year 2008"

Mr. Chairman and Members of the Subcommittee:

My name is T.J. Halstead. I am a Legislative Attorney with the American Law Division of the Congressional Research Service at the Library of Congress, and I thank you for inviting CRS to testify today regarding signing statements and National Defense Authorization Acts.

Presidential signing statements have been a significant source of controversy during the tenure of the current Administration, and the President's most recent signing statement, issued in conjunction with the enactment into law of the National Defense Authorization Act for Fiscal Year 2008, has renewed congressional interest in this subject. Before addressing the provisions to which the President has specifically objected in that statement, it is useful to provide an overview of what signing statements are, with a specific focus on the constitutional and legal considerations that adhere to presidential issuance of, and congressional responses to, these instruments.

At their core, presidential signing statements are pronouncements issued by a President contemporaneously to the signing of a bill into law that, in addition to commenting on the law generally, may be used to forward the President's interpretation of statutory language; to assert constitutional objections to provisions contained therein; and, concordantly, to announce that the provisions of the law will be administered in a manner that comports with the Administration's conception of the President's

constitutional prerogatives.[1] While the history of presidential issuance of signing statements dates to the early 19th century, the practice has become the source of significant controversy in the modern era as Presidents have increasingly employed the statements to assert constitutional objections to congressional enactments.[2] President Reagan initiated this practice in earnest, transforming the signing statement into a mechanism for the assertion of presidential authority and intent. President Reagan issued 250 signing statements, 86 of which (34%) contained declarations objecting to one or more of the statutory provisions signed into law. President George H. W. Bush continued this practice, issuing 228 signing statements, 107 of which (47%) raised particularized objections. President Clinton's conception of presidential power proved to be largely consonant with that of the preceding two administrations. In turn, President Clinton made aggressive use of the signing statement, issuing 381 statements, 70 of which (18%) raised constitutional or legal objections. President George W. Bush has continued this practice, issuing 157 signing statements, 122 of which (78%) contain some type of challenge or objection. The significant rise in the proportion of constitutional objections made by President Bush is compounded by the fact that these statements are typified by multiple objections, resulting in over 1,000 challenges to distinct provisions of law.

The number and scope of such assertions in the George W. Bush Administration in particular has given rise to extensive debate over the issuance of signing statements, with the American Bar Association (ABA) declaring in a 2006 report that these instruments are "contrary to the rule of law and our constitutional separation of powers" when they "claim the authority or state the intention to disregard or decline to enforce all or part of a law...or to interpret such a law in a manner inconsistent with the clear intent of Congress."[3]

However, in analyzing the constitutional basis for, and legal effect of, presidential signing statements, it becomes apparent that no constitutional or legal deficiencies adhere to the issuance of such statements in and of themselves. Rather, it appears that the appropriate focus of inquiry in this context is on the assertions of presidential authority contained therein, coupled with an examination of substantive executive action taken or forborne with regard to the provisions of law implicated in a presidential signing statement. Applying this analytical rubric to the current controversy, it seems evident that the issues involved center not on the simple issue of signing statements, but rather on the view of presidential authority that governs the substantive actions of the Administration in question. Moreover, it should be noted that while there is no explicit constitutional provision authorizing the issuance of presidential signing statements, presidents have issued such statements since the Monroe Administration, and there is little evident constitutional or legal support for the proposition that the President may be constrained from issuing a statement regarding a provision of law.

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[1] Philip J. Cooper, "George W. Bush, Edgar Allen Poe and the Use and Abuse of Presidential Signing Statements," Presidential Studies Quarterly 35, no. 3, at p. 517 (September 2005).

[2] Christopher N. May, "Presidential Defiance of 'Unconstitutional' Laws: Reviving the Royal Prerogative," 21 Hastings Const. L.Q. 865, 932 (1994).

[3] American Bar Association, Report of the Task Force on Presidential Signing Statements and the Separation of Powers Doctrine at p. 5 (August 2006).

Irrespective of their presumptive constitutionality, signing statements have been criticized on the basis that the objections and challenges raised therein improperly circumvent the veto process delineated in the Constitution. According to this argument, the President, by refusing to veto a bill that contains provisions he does not intend to enforce, expands the presidential role in lawmaking beyond the constitutional parameters of "recommending ... laws he thinks wise and ... vetoing ... laws he thinks bad,"[4] thereby depriving Congress of the opportunity to override a presidential veto.

While this position has a degree of intuitive appeal, it arguably misapprehends the nature of signing statements as presidential instruments as well as the substantive concerns that underlie their issuance. First, it is exceedingly rare for a President to make a direct announcement that he will categorically refuse to enforce a provision he finds objectionable. Instead, the concerns voiced in the statements are generally vague, with regard both to the nature of the objection and what circumstances might give rise to an actual conflict. Concerns relating to this point also seem to assume that the interpretation and application of congressional enactments is a black and white issue, when, in reality, inherent ambiguity in the text often allows for competing interpretations of what the provision at issue requires. Given this dynamic, it is not surprising that a President's interpretation of a law, as announced in a signing statement, would be informed by a broad conception of executive authority. More fundamentally, a signing statement does not have the effect of a veto. A bill that is vetoed does not become law unless reenacted by a supermajority vote of the Congress. Conversely, a bill that is signed by the President retains its legal effect and character, irrespective of any pronouncements made in a signing statement, and remains available for interpretation and application by the courts (if the provision is justiciable) and monitoring by Congress.

A closely-related argument is that signing statements that raise objections to provisions of an enactment constitute the exercise of a line-item veto.[5] In *Clinton v. New York*, the Supreme Court held that the Line Item Act violated the constitutional requirement of bicameralism and presentment by authorizing the President to essentially create a law which had not been voted upon by either House or presented to the President for approval and signature.[6] Accordingly, this argument posits that when the President issues a signing statement objecting to certain provisions of a bill or declaring that he will treat a provision as advisory so as to avoid a constitutional conflict, he is, in practical effect, exercising an unconstitutional line-item veto. The counterpoints to this argument are similar to those adhering to the premise that signing statements constitute an abuse of the veto process. While an actual refusal of a President to enforce a legal provision may be characterized as an "effective" line-item veto, the provision nonetheless retains its full legal character and will remain actionable, either in the judicial or congressional oversight contexts.

Ultimately, both of these objections, as with the general focus of concern on signing statements as presidential instruments, may obscure the substantive issue that has apparently motivated the increased use of the constitutional signing statement by

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[4] *Youngstown*, 343 U.S. at 587.

[5] ABA Task Force Report, n. 3, *supra*, at 18; *See also,* Bradley and Posner, n. 12, *supra*, at 339.

[6] *Clinton*, 524 U.S. at 446.

President Bush: an expansive conception of presidential authority, coupled with a willingness to utilize fully mechanisms that will aid in furthering and buttressing that philosophy. Moreover, given the general and hortatory nature of the language that characterizes most signing statements, it seems apparent that President Bush is using this instrument as part of a comprehensive strategy to strengthen and expand executive authority generally, as opposed to a de facto line item veto.

Despite these factors, four bills have been introduced in the 110th Congress with the goal of restraining the issuance of signing statements. Section 3(a) of H.R. 264 provides that "[n]one of the funds made available to the Executive Office of the President, or to any Executive agency ... from any source may be used to produce, publish, or disseminate any statement made by the President contemporaneously with the signing of any bill or joint resolution presented for signing by the President."[7] This section does not give any indication as to when such a statement would cease to be "contemporaneous" with the signing of a bill, but, under a practical interpretation of the term, it seems unlikely that this section would impose a substantial impediment to the issuance of signing statements. This section would also not appear to prevent contemporaneous declarations by Executive Branch agencies. Section 4 of H.R. 264 goes on to state that "[f]or purposes of construing or applying any Act enacted by the Congress, a governmental entity shall not take into consideration any statement made by the President contemporaneously with the President's signing of the bill or joint resolution that becomes such Act." This command indicates that the first section may not necessarily prevent a President from issuing a signing statement. Furthermore, nothing in the bill would prevent a President from issuing memoranda or other declarations aimed at guiding agency interpretation and implementation.[8]

Additionally, two identical bills, S. 1747 and H.R. 3045, would attempt to prohibit any Federal or State court from relying on or deferring to a presidential signing statement as a source of authority "[i]n determining the meaning of any Act of Congress."[9] The bills further provide that both the House and the Senate, acting respectively through Office of General Counsel for the House of Representatives and the Office of Senate Legal Counsel, shall be permitted to participate as amicus curiae in any case arising in Federal or State court that involves the construction, constitutionality, or both, of "any Act of Congress in which a signing statement was issued." Finally, the bills would establish that in any suit involving a signing statement, Congress may pass a concurrent resolution clarifying congressional intent or findings of fact, and that such a resolution shall be submitted "into the record of the case as a matter of right." The potential effect and utility of a provision forbidding courts from relying on, or deferring to, presidential signing statement is unclear; apart from the potential constitutional issues adhering to congressional attempts to restrict courts from considering such information, there is little indication that signing statements have played any substantive role in influencing judicial rulings. Likewise, the impact of a provision allowing for the submission of a "clarifying"

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[7] H.R. 264, 110th Cong., 1st sess. (2007). Section 3(b) of H.R. 264 provides that section 3(a) "shall apply only to statements made by the President regarding the bill or joint resolution presented for signing that contradict, or are inconsistent with, the intent of Congress in enacting the bill or joint resolution or that otherwise encroach upon the Congressional prerogative to make laws."

[8] *See* Louis Fisher, "Signing Statements: What to Do?," *The Forum*: Vol. 4: No. 2, Article 7 (2006).

[9] S. 1747, § 4, 110th Cong., 1st Sess. (2007); H.R. 3045, § 4, 110th Cong., 1st Sess. (2007).

concurrent resolution is open to speculation. Any such clarification by Congress would not have the force and effect of law, and could be viewed by the judiciary as a species of post-enactment legislative history .[10] Finally, section 6 of H.R. 3835 would attempt to vest either House of Congress with standing "to challenge the constitutionality of a presidential signing statement that declares the President's intent to disregard provisions of a bill he has signed into law because he believes they are unconstitutional."[11] It seems unlikely that this provision would satisfy either the "case or controversy" or standing requirements of Article III of the Constitution.[12]

Turning to signing statements issued in relation to National Defense Authorization Acts, it appears that the large majority of objections raised therein mirror the generalized and hortatory nature typical of signing statements in other contexts. For instance, a survey of signing statements relating to such Acts during the Clinton and George W. Bush Administrations reveals several instances where both Presidents raised vague objections on the basis of presidential authority to conduct foreign affairs, the Commander in Chief power, and presidential power under the Appointments Clause, among others.

While signing statements that raise constitutional objections or signal an intention to refuse to enforce a provision in law are usually generalized in nature, President Clinton's statement accompanying the National Defense Authorization Act for Fiscal Year 2000 provides a stark example of a substantive presidential directive being included within a statement itself. The act established the National Nuclear Security Administration (NNSA), a new, semi-autonomous agency within the Department of Energy to manage and oversee the operational and security activities of the Department's nuclear weapons laboratories.

In his signing statement, the President expressed misgivings with respect to structural arrangements within the new agency and the limitations on the Secretary of Energy's ability to direct and control the activities and personnel of the NNSA, but did not suggest that the legislation raised constitutional issues. In particular, the President objected to what he saw as the isolation of the personnel and contractors of the NNSA from direction by Department officials outside the new agency; the limitation on the Secretary's ability to employ his statutory authorities to direct the activities and personnel of the NNSA both personally and through designated subordinates; the uncertainty whether the Department's duty to comply with the procedural and substantive requirements of environmental laws would be fulfilled under the new arrangement; the removal of the Secretary's direct authority over certain sensitive classified programs; and the potentially deleterious effect of the creation of redundant support functions in the areas of procurement, personnel, public affairs, legal affairs, and counterintelligence. To ensure that these perceived deficiencies did not, in his view, undermine the Secretary's statutory responsibilities in the area, the President directed the Secretary to assume the

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[10] *See Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n. 13 (1980) (stating "even when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment.").

[11] H.R. 3835, § 6, 110th Cong., 1st Sess. (2007).

[12] *See, e.g., Raines v. Byrd*, 521 U.S. 811 (1997). *See also*, Laurence H. Tribe, "Signing Statements are a Phantom Target," The Boston Globe, Aug. 9, 2006.

duties and functions of the new office of Under Secretary for Nuclear Security and to "guide and direct" all NNSA personnel by using his authority, "to the extent permitted by law," to assign any Departmental officer or employee to a concurrent office within NNSA. The Secretary was also directed to "mitigate" the risks to the chain of command between him and subordinate agency personnel presented by the legislation's redundant functions "to the extent permissible under law." The President indicated that he might not submit a nominee for Under Secretary for Nuclear Security until action was taken by Congress to remedy the identified deficiencies and to "harmonize" the Secretary's authorities with those vested in the Under Secretary.[13]

Whereas signing statements almost exclusively raise generalized, passive objections to measures contained in a bill, President Clinton's NNSA statement was uncharacteristically direct, laying out the specific actions that were to be taken in order to ensure the vitiation of the provisions President Clinton deemed objectionable. As noted by Professor Philip J. Cooper, this statement did not simply raise a generalized constitutional objection or signal an intent to refuse to enforce the provisions at issue, but, rather, constituted an "order to do that which the Congress had expressly rejected."[14]

Turning to the current Administration, the language employed in signing statements issued by President Bush is similar, but, as has been his practice with these instruments, the Bush National Defense Authorization Act signing statements are typified by the voicing of general constitutional objections to several provisions within a given enactment. For instance, while the signing statement accompanying the Bob Stump National Defense Authorization Act for Fiscal Year 2003 raised general objections based on the President's asserted authority to withhold information, to conduct the foreign affairs of the United States, and to "supervise the unitary executive branch," the statement additionally identified approximately 40 specific provisions of law that were deemed problematic.[15]

President Bush's most recent signing statement was issued contemporaneously with the enactment into law of the National Defense Authorization Act for Fiscal Year 2008 (P.L. 110-181). While the signing statement specifically identifies four provisions of law that the President deems constitutionally problematic, the objections voiced are typical of those raised in signing statements, consisting of a generalized declaration that "[p]rovisions of the Act, including sections 841, 846, 1079, and 1222, purport to impose requirements that could inhibit the President's ability to carry out his constitutional obligations to take care that the laws be faithfully executed, to protect national security, to supervise the executive branch, and to execute his authority as Commander in Chief. Additionally, as in numerous other signing statements, the President declared that the executive branch "shall construe such provisions in a manner consistent with the constitutional authority of the President." It is not clear whether the President intended for these objections to apply to the specified provisions respectively or in concert, and it

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[13] It should be noted that a combination of oversight hearings and legislative responses to the President's signing statement ultimately resulted in President Clinton's compliance with the law as written.

[14] Phillip J. Cooper, "By Order of the President: The Use and Abuse of Executive Direct Action," University of Kansas Press, at p. 228 (2002).

[15] Pub. L. 107-314.

would likewise appear from the text of the statement that the President finds additional, unspecified provisions to be similarly problematic.

The vague nature of the objections raised in the statement is not clarified by analyzing the specific provisions at issue. First, section 841 establishes a legislative commission that is charged with various aspects relating to federal agency contracting activity pertaining to reconstruction, logistical support, and security functions in Iraq and Afghanistan. The commission is not vested with any powers that may be considered executive in nature, obviating any separation of powers concerns regarding the appointment of members of the commission or the exercise of any authority vested in the commission by its members. It is well settled that Congress may establish investigative legislative commissions of this type, and there does not appear to be any discernible basis upon which the President may argue that the commission composition or functions present concerns of a constitutional magnitude. Section 846 amends 10 U.S.C. § 2409 to provide additional protections from reprisals (such as discharge or demotion) for employers of contractors who disclose information that they reasonably believe evidences gross mismanagement or illegal activity. Just as with the establishment of legislative investigative commissions, there is ample precedent for the congressional imposition of statutory provisions that protect the right of persons to provide information to a Member or committee of Congress or another designated federal entity, and that such a right may not be interfered with or impeded.[16]

Section 1079 directs the Director of the National Counterterrorism Center, the Director of a national intelligence center, or the head of any element of the intelligence community, to make certain categories of intelligence information available to an authorized requesting committee within 45 days. To the extent that the President's objection to this provision rests on the assertion that such direct reporting requirements are constitutionally suspect, it is without any substantial merit. While numerous signing statements issued by President Bush assert such objections, they are unsupported by established legal principles governing Congress' authority to compel and receive information directly from Executive Branch agencies.[17] Congress has imposed direct reporting requirements on Executive Branch officials since the first Congress. Legislation establishing the Treasury Department required the Secretary to report to Congress and to "perform all such services relative to the finances, as he shall be directed to perform."[18] Additionally, the Supreme Court has long recognized the validity of reporting requirements,[19] and in *INS v. Chadha*,[20] the Court explicitly affirmed Congress' authority to impose "report and wait" provisions, distinguishing them from the unconstitutional legislative veto provisions under review in that case. The Administration might argue that a congressional request for information under this provision could implicate national security concerns, despite the fact that it is generally recognized that Congress's authority

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[16] *See, e.g.*, 5 U.S.C. § 7211; 5 U.S.C. § 2302; 10 U.S.C. § 1034.

[17] *See* "Legal Substantiality of Direct Reporting Requirements," CRS Congressional Distribution Memorandum, by Morton Rosenberg (2006) (copy on file with CRS).

[18] Act of Sept. 2, 1789, Ch. 12, §2, 1 Stat. 65, 66.

[19] *See, e.g., Sibbach v. Wilson & Co.*, 312 U.S. 1, 14-15 (1941).

[20] 462 U.S. 919, 935 n. 9 (1983).

to access classified information is of a constitutional magnitude.[21] However, the potential impact of this requirement is ameliorated by the provision's implicit acknowledgment that a constitutionally based claim of presidential privilege may preclude congressional access to such information under certain circumstances.

Finally, section 1222 imposes limitations on the availability of funds for certain purposes relating to Iraq, prohibiting the obligation or expenditure of funds to establish any military installation or base for the purpose of providing for the permanent stationing of military personnel in Iraq or to exercise U.S. control of the oil resources of Iraq. While it may be difficult to ascertain what actions would run afoul of these restrictions, it appears that the President's objection to these provisions rests upon an expansive conception of his constitutional Commander in Chief powers. While the parameters of this authority are largely undefined in relation to the power of Congress to control military operations, Congress's power of the purse would appear to vest it with the prerogative to impose binding restrictions of this type on the use of appropriated funds.[22]

Ultimately, the vast majority of presidential signing statements that have been issued in response to National Defense Authorization Acts appear to be characterized by extremely broad and generalized assertions of presidential authority that are typical of signing statements that have been issued in other contexts. Given the largely unsubstantive nature of the objections that have been raised in signing statements, including the most recent statement accompanying the National Defense Authorization Act for Fiscal Year 2008, it does not appear that presidents are using these instruments to formally negate provisions of law, but are instead employing them in an attempt to leverage power and control from Congress by seeking to establish these expansive claims of executive authority as a constitutional norm. While the voluminous challenges lodged by President Bush carry significant practical and constitutional implications for Congress in light of the broad claims of authority consistently forwarded therein, that increased usage does not render signing statements unconstitutional. By focusing its efforts on attempts to constrain the issuance of signing statements, Congress arguably risks leaving unaddressed the threats posed to its institutional power by the broad conception of presidential authority that motivates their issuance. It does not seem likely that a reduction in the number of challenges raised in signing statements, whether caused by procedural limitations or political rebuke, will necessarily result in any change in a President's conception and assertion of executive authority. Finally, it should be noted that these signing statements are arguably beneficial, in that they alert Congress to the universe of provisions that are held in disregard by the Executive Branch, in turn affording Congress the opportunity not only to engage in systematic monitoring and oversight to ensure that its enactments are complied with, but to assert its prerogatives to counteract the broad claims of authority that undergird the statements.

A more effective option for Congress could be to focus on these claims of presidential power and the substantive actions taken to establish and embed that authority in the constitutional framework, as opposed to focusing on the instrument of the signing

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[21] *See* "The Protection of Classified Information: The Legal Framework," CRS Report RS21900, by Jennifer Elsea (2006).

[22] *See, e.g.*, "Congressional Authority to Limit U.S. Military Operations in Iraq," CRS Report RL33837, by Jennifer K. Elsea, Michael John Garcia and Thomas J. Nicola.

statement itself. A robust and sustained oversight regime of the type the Committee is undertaking today would allow Congress to assert its constitutional prerogatives more effectively and ultimately ensure compliance with its enactments.

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Mr. Chairman, that concludes my prepared statement. I would be happy to answer any questions that you or other Members of the Subcommittee might have, and I look forward to working with all Members and staff of the Subcommittee on this issue in the future.

Appendix: Provisions from Signing Statements Accompanying National Defense Authorization Acts That Object to One or More Provisions of Law, 1994-2008.

National Defense Authorization Act for Fiscal Year 1995:[23]

"To the extent that section 1404 could be construed to require the President or other executive branch officers or employees to espouse or refrain from espousing certain substantive positions, it would be inconsistent with my constitutional authority for the conduct of foreign affairs. I will accordingly interpret the provision as not applicable to efforts that are diplomatic in nature."

"In the Classified Annex, incorporated into S. 2182 by reference, section 101 directs that the Secretary of Defense provide a weekly National Operations Summary to the Committees on Armed Services of the House and Senate. Implementation of this provision must be consistent with my constitutional authority as Commander in Chief and my constitutional responsibility for the conduct of foreign affairs."

"I also point out that section 232, relating to modifications to the Anti-Ballistic Missile Treaty, cannot restrict the constitutional options for congressional approval of substantive modifications of treaties."

"Finally, I note that section 1304 could be interpreted as specifically directing the President how to proceed in negotiations with European countries regarding cost-sharing arrangements for U.S. military installations in host nations. I support the policy underlying section 1304 to encourage these countries to increase their contributions, direct and indirect, of the nonpersonnel costs described in the provision. However, my constitutional authority over foreign affairs necessarily entails discretion over these and similar matters."

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[23] Pub. L. 103-337.

National Defense Authorization Act for Fiscal Year 1996:[24]

"...I am strongly opposed, as is the Department of Defense, to the provision requiring the discharge of military personnel living with the Human Immunodeficiency Virus (HIV), where such discharge is not required by any medical, public health, or military purpose. This provision is blatantly discriminatory and highly punitive to service members and their families. People living with HIV can and do lead full and productive lives, provide for their families, and contribute to the well-being of our Nation. The men and women affected by this provision are ready, willing and able to serve their country with honor and should be allowed to continue to do so.

Therefore, I strongly support the current efforts in the Congress to repeal this provision before a single service member is discharged from the armed forces.

Moreover, the Secretary of Defense and the Chairman of the Joint Chiefs of Staff have advised me that the arbitrary discharge of these men and women would be both unwarranted and unwise; that such discharge is unnecessary as a matter of sound military policy; and that discharging service members deemed fit for duty would waste the Government's investment in the training of these people and would be disruptive to the military programs in which they play an integral role.

I agree.

Consequently, I have concluded that this discriminatory provision is unconstitutional. Specifically, it violates equal protection by requiring the discharge of qualified service members living with HIV who are medically able to serve, without furthering any legitimate governmental purpose. As President Franklin D. Roosevelt said in 1943, explaining his decision to sign an important appropriations bill notwithstanding the fact that it contained a provision that infringed upon individual rights, 'I cannot . . . yield without placing on record my view that this provision is not only unwise and discriminatory, but unconstitutional.'

In accordance with my constitutional determination, the Attorney General will decline to defend this provision. Instead, the Attorney General will inform the House and Senate of this determination so that they may, if they wish, present to the courts their argument that the provision should be sustained.

Further, to mitigate any unfair burden that this legislation could place on these service members and their families pending any repeal or judicial invalidation, I have directed the Secretaries of Defense, Veterans Affairs, and Transportation, in carrying out the provisions of this Act, to take all steps necessary to ensure that these service members receive the full benefits to which they are entitled—including, among other things, disability retirement pay, health care coverage for their families and transition benefits such as vocational education."

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[24] Pub. L. 104-106.

National Defense Authorization Act for Fiscal Year 1997:[25]

"...[P]rovisions of the Act raise serious constitutional concerns. Provisions purporting to require the President to enter into or report on specified negotiations with foreign governments, as well as a provision that limits the information that could be revealed in negotiations, intrude on the President's constitutional authority to conduct the Nation's diplomacy and the President's role as Commander in Chief. I will interpret these provisions as precatory."

"Further, the bill's method for appointing the National Ocean Leadership Council would violate the Appointments Clause of the Constitution. I urge the Congress to pass amendments at the earliest possible time to provide for a constitutional means of appointing this Council. Until this correction is made, the Council should not exercise significant governmental authority."

"Another provision of the Act could be read to require intra-branch consultations before the Secretary of Defense could make recommendations to me regarding certain appointments. This provision is constitutionally questionable, and I therefore will construe it consistent with my authorities under the Constitution. I anticipate implementing the intent of the provisions with an Executive order."

"The Act would overturn organizational arrangements in the Department of Energy's nuclear weapons complex that have served the Nation well for over 50 years. Because this micromanagement provision would severely limit the Secretary's ability to determine and control the best way to manage the Department's personnel, budget and procurement functions, I have directed the Secretary to study the provision's effects and to report to me and to the Congress on the study's results before implementing this provision. If reorganization is appropriate, the Secretary of Energy should use existing statutory authority to assure that the Department is organized in a way that is most efficient for carrying out the Department's business."

National Defense Authorization Act for Fiscal Year 1998:[26]

"...[P]rovisions of H.R. 1119 raise serious constitutional issues. Because of the President's constitutional role, the Congress may not prevent the President from controlling the disclosure of classified and other sensitive information by subordinate officials of the executive branch (section 1305). Because the Constitution vests the conduct of foreign affairs in the President, the Congress may not dictate the President's negotiations with foreign governments (section 1221). Nor may the Congress place in its own officers, such as the Comptroller General, the power to execute the law (section 217). These provisions will be construed and carried out in keeping with the President's constitutional responsibilities."

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[25] Pub. L. 104-201.

[26] Pub. L. 105-85.

Strom Thurmond National Defense Authorization Act for Fiscal Year 1999:[27]

"I am disappointed that the Congress, in a well-meaning effort to further protect nuclear weapons information, has included an overly broad provision that impedes my Administration's work to declassify historically valuable records. I am committed to submitting the plan required under this Act within 90 days. In the meantime, I will interpret this provision in a manner that will assure the maximum continuity of agency efforts, as directed by my Executive Order 12958, to declassify historically valuable records."

"I am also concerned that several provisions of the Act could be interpreted to intrude unconstitutionally on the President's authority to conduct foreign affairs and to direct the military as Commander-in-Chief. These provisions could be read to regulate negotiations with foreign governments, direct how military operations are to be carried out, or require the disclosure of national security information. I will interpret these provisions in light of my constitutional responsibilities."

National Defense Authorization Act for Fiscal Year 2000:[28]

"The most troubling features of the Act involve the reorganization of the nuclear defense functions within the Department of Energy. The original reorganization plan adopted by the Senate reflected a constructive effort to strengthen the effectiveness and security of the activities of the Department of Energy's nuclear weapons laboratories. Unfortunately, the success of this effort is jeopardized by changes that emerged from the conference, which altered the final product, making it weaker in enhancing national security. Particularly objectionable are features of the legislative charter of the new National Nuclear Security Administration (NNSA) that purport to isolate personnel and contractors of the NNSA from outside direction, and limit the Secretary's ability to employ his authorities to direct—both personally and through subordinates of his own choosing—the activities and personnel of the NNSA. Unaddressed, these deficiencies of the Act would impair effective health and safety oversight and program direction of the Department's nuclear defense complex.
Other provisions of S. 1059 have been faulted by the Attorneys General of over 40 States as placing in question the established duty of the Department of Energy's nuclear defense complex to comply with the procedural and substantive requirements of environmental laws. Moreover, the Act removes from the Secretary his direct authority over certain extremely sensitive classified programs specified in the Atomic Energy Act, and establishes in the NNSA separate support functions—such as contracting, personnel, public affairs, and legal—that are redundant with those now within the Department. This redundancy even extends to the counterintelligence office reporting directly to the Secretary that was established in accordance with my Presidential Decision Directive 61, and which was designed to be the single authoritative source of counterintelligence guidance throughout the Department. The Act establishes a companion counterintelligence entity within the NNSA, compounding simple redundancy with the blurring of lines of authority that can too readily result because the NNSA is largely immunized from outside direction within the Department.

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[27] Pub. L. 105-261.

[28] Pub. L. 106-65.

Experience teaches that these are not abstract deficiencies. As the Hoover Commission concluded half a century ago, the accountability of a Cabinet Department head is not complete without the legal authority to meet the legal responsibilities for which that person is accountable. The Act's provisions summarized above skew that authority. These provisions blur the clear and unambiguous lines of authority intended by Presidential Decision Directive 61, and impair the Secretary of Energy's ability to assure compliance at all levels within the Department of Energy with instructions he may receive in meeting his national defense responsibilities under the Atomic Energy Act.

The responsibilities placed by S. 1059 in the National Nuclear Security Administration potentially are of the most significant breadth, and the extent of the Secretary of Energy's authority with respect to those responsibilities is placed in doubt by various provisions of the Act. Therefore, by this Statement I direct and state the following:

1. Until further notice, the Secretary of Energy shall perform all duties and functions of the Under Secretary for Nuclear Security.

2. The Secretary is instructed to guide and direct all personnel of the National Nuclear Security Administration by using his authority, to the extent permissible by law, to assign any Departmental officer or employee to a concurrent office within the NNSA.

3. The Secretary is further directed to carry out the foregoing instructions in a manner that assures the Act is not asserted as having altered the environmental compliance requirements, both procedural and substantive, previously imposed by Federal law on all the Department's activities.

4. In carrying out these instructions, the Secretary shall, to the extent permissible under law, mitigate the risks to clear chain of command presented by the Act's establishment of other redundant functions by the NNSA. He shall also carry out these instructions to enable research entities, other than those of the Department's nuclear defense complex that fund research by the weapons laboratories, to continue to govern conduct of the research they have commissioned.

5. I direct the Director of the Office of Personnel Management to work expeditiously with the Secretary of Energy to facilitate any administrative actions that may be necessary to enable the Secretary to carry out the instructions in this Statement.

The expansive national security responsibilities now apparently contemplated by the Act for the new Under Secretary for Nuclear Security make selection of a nominee an especially weighty judgment. Legislative action by the Congress to remedy the deficiencies described above and to harmonize the Secretary of Energy's authorities with those of the new Under Secretary that will be in charge of the NNSA will help identify an appropriately qualified nominee. The actions directed in this Statement shall remain in force, to continue until further notice."

"I intend to implement the China provisions of the bill in a manner consistent with this policy, including, where appropriate, combining several of the reporting requirements."

"In order to avoid any confusion among our allies or elsewhere regarding the new NATO Strategic Concept, I feel compelled to make clear that the document is a political, not a legal, document. As such, the Strategic Concept does not create any new commitment or obligation within my understanding of section 1221(a) of the Act, and therefore, will not be submitted to the Senate for advice and consent."

"I am concerned about section 1232, which contains a funding limitation with respect to continuous deployment of United States Armed Forces in Haiti pursuant to Operation Uphold Democracy. I have decided to terminate the continuous deployment of forces in Haiti, and I intend to keep the Congress informed with respect to any future deployments to Haiti; however, I will interpret this provision consistent with my constitutional responsibilities as President and Commander in Chief."

"A number of other provisions of this bill raise serious constitutional concerns. Because the President is the Commander in Chief and the Chief Executive under the Constitution, the Congress may not interfere with the President's duty to protect classified and other sensitive national security information or his responsibility to control the disclosure of such information by subordinate officials of the executive branch (sections 1042, 3150, and 3164). Furthermore, because the Constitution vests the conduct of foreign affairs in the President, the Congress may not direct that the President initiate discussions or negotiations with foreign governments (section 1407 and 1408). Nor may the Congress unduly restrict the President's constitutional appointment authority by limiting the President's selection to individuals recommended by a subordinate officer (section 557). To the extent that these provisions conflict with my constitutional responsibilities in these areas, I will construe them where possible to avoid such conflicts, and where it is impossible to do so, I will treat them as advisory. I hereby direct all executive branch officials to do likewise."

Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001:[29]

"I am concerned with two provisions of H.R. 4205 relating to the Department of Energy. First, the Act would limit to 3 years the term of office for the first person appointed to the position of Under Secretary for Nuclear Security at the Department of Energy and would restrict the President's ability to remove that official to cases of 'inefficiency, neglect of duty, or malfeasance in office.' Particularly in light of the sensitive duties assigned to this officer in the area of national security, I understand the phrase 'neglect of duty' to include, among other things, a failure to comply with the lawful directives or policies of the President."

"...I am deeply disappointed that the Congress has taken upon itself to set greatly increased polygraph requirements that are unrealistic in scope, impractical in execution, and that would be strongly counterproductive in their impact on our national security. The bill also micromanages the Secretary of Energy's authority to grant temporary waivers to the polygraph requirement in a potentially damaging way, by explicitly directing him not to consider the scientific vitality of DOE laboratories. This directs the Secretary not to do his job, since maintaining the scientific vitality of DOE national laboratories is essential to our national security and is one of the Secretary's most important responsibilities. I am therefore signing the bill with the understanding that it cannot supersede the Secretary's responsibility to fulfill his national security obligations."

"The Act also raises other constitutional concerns. The constitutional separation of powers does not allow for a single Member of Congress to direct executive branch officers to take specified action through means other than duly enacted legislation. Thus, I

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[29] Pub. L. 106-398.

will instruct the Secretaries concerned to treat congressional members' requests for the review and determination of proposals for posthumous or honorary promotions or appointments as precatory rather than mandatory. Another provision establishes a Board of Governors for the Civil Air Patrol. Insofar as this Board is an office of the Federal Government exercising significant authority, the provision for the appointment of the Board's members would raise concerns under the Appointments Clause. Accordingly, I will instruct the Secretary of the Air Force, in issuing the regulations authorized by this provision, to retain a degree of control over the Board that appropriately limits its authority. Finally, because the Constitution vests in the President the authority and responsibility to conduct the foreign and diplomatic relations of the United States, the Congress cannot purport to direct the executive branch to enter into an agreement with another country, and thus I will treat such language as advisory only."

"With respect to Government Information Security Reform, the Act directs the Director of the Office of Management and Budget to delegate certain security policy and oversight authorities to the Secretary of Defense, the Director of Central Intelligence, and another agency head. The policies, programs, and procedures established by the Secretary of Defense, the Director of Central Intelligence, and other agency heads will remain subject to the approval of and oversight by the President and by offices within the Executive Office of the President in a manner consistent with existing law and policy."

National Defense Authorization Act for Fiscal Year 2002:[30]

"Several provisions of the Act, including sections 525(c), 546, 705, and 3152 call for executive branch officials to submit to the Congress proposals for legislation. These provisions shall be implemented in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to recommend to the Congress such measures as the President judges necessary and expedient."

"Section 1404 vests in the Secretary of Defense authority to appoint a chief operating officer for the Armed Forces Retirement Home, but purports to limit the qualifications of the pool of persons from whom the Secretary may select the appointee in a manner that rules out a large portion of those persons best qualified by experience and knowledge to fill the office. The Secretary shall implement section 1404 in a manner consistent with the Appointments Clause of the Constitution."

"Under section 1002 of the Act, the Congress has stated that it incorporates a classified annex into the statute. That annex contains authorizations of appropriations for specified classified programs. My Administration discourages enactment of secret law as part of annual defense authorization acts and instead encourages appropriate use of classified annexes to committee reports and the joint statement of managers that accompanies the final legislation."

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[30] Pub. L. 107-107.

Bob Stump National Defense Authorization Act for Fiscal Year 2003:[31]

"A number of provisions of the Act establish new requirements for the executive branch to furnish sensitive information to the Congress on various subjects, including sections 221, 1043, 1065 (enacting 10 U.S.C. 127b(f)(2)(C)(ii) and (iii)), 1205, 1206, 1207, and 1209 (enacting section 722 of Public Law 104-293). The executive branch shall construe such provisions in a manner consistent with the President's constitutional authority 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."

"Many provisions of the Act call for executive branch officials to submit recommendations and plans to the Congress, including sections 112(b), 142(c), 221(c), 231 (enacting 10 U.S.C. 196), 234(c), 241(c)(3)(D), 366, 404(c), 513(e), 534(c), 582, 721 (enacting 38 U.S.C. 8111(c)(4) and (f)(2)(C) and (F)), 723, 813, 924, 1043(b)(2), 1061 (enacting 10 U.S.C. 113a), 1207, 1208 (enacting section 1503(b)(8) of Public Law 103-337), 3141(e), 3143, 3176(b)(4) and (d), and 3504(c)(4). The executive branch shall construe such provisions in a manner consistent with the President's constitutional authority to supervise the unitary executive branch. In addition, with respect to provisions that purport to require executive branch officials to submit legislative proposals to the Congress, including sections 513(e), 813, 1061, and 3143, the executive branch also shall construe such provisions in a manner consistent with the President's constitutional authority to submit for the consideration of the Congress such measures as the President judges necessary and expedient."

"The executive branch shall construe section 133(2)(B) of the Act as requiring only notification to the Congress and not any form of congressional approval following notification, as any other construction would be inconsistent with the constitutional principles enunciated by the Supreme Court in 1983 in INS v. Chadha."

"The executive branch shall construe section 2308(e)(1) of title 10 of the United States Code, as enacted by section 801 of the Act, as neither giving the force of law to any quantity set forth in a table, chart, or explanatory text in a joint explanatory statement of a House- Senate committee of conference or in any congressional committee report, nor requiring the exercise of waiver authority under section 2308 to acquire more than a quantity specified in such a table, chart, or explanatory text. Construing the section otherwise would not be consistent with the bicameralism and presentment requirements of the Constitution for the making of a law."

"The executive branch shall implement section 2323 of title 10 of the United States Code, as extended through fiscal year 2006 by section 816 of the Act, in a manner consistent with the equal protection requirements of the Due Process Clause of the Fifth Amendment to the Constitution."

"Section 242 of the Act vests authority to direct the provision of funds for designated projects, and to select certain projects for funding, in an official who is to be designated by the Under Secretary of Defense for Acquisition, Technology, and Logistics. Under the

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[31] Pub. L. 107-314.

Constitution, such authority should be exercised only by officers of the United States appointed in accordance with the provisions of the Appointments Clause. Accordingly, the Secretary of Defense shall ensure that the official designated by the Under Secretary under this section is a duly appointed constitutional officer or that the official's exercise of the authority vested is supervised and reviewed by the Under Secretary or another appropriate constitutional officer."

"Finally, the executive branch shall construe sections 3155, 3156, and 3160, which purport to require executive branch officials to conduct programs with a foreign country, in a manner consistent with the President's constitutional authority to conduct the foreign affairs of the United States."

National Defense Authorization Act for Fiscal Year 2004:[32]

"Section 541(a) of the Act amends section 991 of title 10 of the United States Code to purport to place limits on the number of days on which a member of the Armed Forces may be deployed, unless the Secretary of Defense or a senior civilian or military officer to whom the Secretary has delegated authority under section 541(a) approves the continued deployment. Section 1023 purports to place restrictions on use of the U.S. Armed Forces in certain operations. The executive branch shall construe the restrictions on deployment and use of the Armed Forces in sections 541(a) and 1023 as advisory in nature, so that the provisions are consistent with the President's constitutional authority as Commander in Chief and to supervise the unitary executive branch."

"Section 903 amends section 153 of title 10 to require the Secretary of Defense to provide for a report to the Congress by the Chairman of the Joint Chiefs of Staff of a plan for mitigating risks identified by the Chairman. The executive branch shall construe this provision in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and as Commander in Chief."

"Section 924 places restrictions upon the exercise of certain acquisition authority by the Director of the National Security Agency (NSA). The reference in section 924(b) to section 2430 of title 10, United States Code, authorizes the Secretary of Defense to exclude from the scope of section 924(b) highly sensitive classified programs as determined by the Secretary of Defense. Moreover, the exercise by the Under Secretary of Defense for Acquisition, Technology, and Logistics of authority described in section 924 remains subject to the statutory authority of the Secretary of Defense to exercise authority, direction, and control of the Department of Defense under section 113(b) of title 10. The executive branch shall construe and execute section 924 in a manner consistent with these statutory authorities of the Secretary of Defense, the authority of the Director of Central Intelligence under section 103(c)(7) of the National Security Act to protect intelligence sources and methods from unauthorized disclosure, and the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief."

"Section 1442(b)(2)(C) requires executive agency heads to furnish certain reports to the chairman and ranking minority member of "[e]ach committee that the head of the

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[32] Pub. L. 108-136.

executive agency determines has legislative jurisdiction for the operations of such department or agency to which the information relates." The executive branch shall, as a matter of comity and for the very narrow purpose of determining to whom a department or agency will submit a report under this provision, determine the legislative jurisdiction of congressional committees."

"Section 3622 purports to establish an interparliamentary working group involving up to 40 Members of Congress and the legislature of the Russian Federation on nuclear nonproliferation and security. Consistent with the President's constitutional authority to conduct the Nation's foreign relations and as Commander in Chief, the executive branch shall construe section 3622 as authorizing neither representation of the United States nor disclosure of national security information protected by law or Executive Order."

"Several provisions of the Act, including sections 320(b)(5) and (e), 335, 528, 647(c)(2), 923(d)(1)(F), and 1051, call for executive branch officials to submit to the Congress proposals for legislation. These provisions shall be implemented in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to recommend for the consideration of the Congress such measures as the President judges necessary and expedient."

"A number of provisions of the Act, including sections 111(c), 903, 924, 1202, 1204, 1442(b)(2)(C), 1504(b), and 2808, require the executive branch to furnish information to the Congress or other entities on various subjects. The executive branch shall construe such provisions in a manner consistent with the President's constitutional authority to withhold information the disclosure of which could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties."

Ronald Reagan National Defense Authorization Act for Fiscal Year 2005:[33]

"Section 326 of the Act, amending sections 3551, 3552, and 3553 of title 31, United States Code, purports to require an executive branch official to file with the Comptroller General a protest of a proposed contract for private sector performance of agency functions previously performed at higher cost by Federal employees, whenever a majority of those Federal employees so requests, unless the official determines, free from any administrative review, that no reasonable basis exists for the protest. The executive branch shall construe section 326 in a manner consistent with the President's constitutional authority to supervise the unitary executive branch, including the making of determinations under section 326."

"Section 574 of the Act amends sections 3037, 5046, 5148, and 8037 of title 10, United States Code, to prohibit Department of Defense personnel from interfering with the ability of a military department judge advocate general, and the staff judge advocate to the Commandant of the Marine Corps, to give independent legal advice to the head of a military department or chief of a military service or with the ability of judge advocates assigned to military units to give independent legal advice to unit commanders. The executive branch shall construe section 574 in a manner consistent with: (1) the

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[33] Pub. L. 108-375.

President's constitutional authorities to take care that the laws be faithfully executed, to supervise the unitary executive branch, and as Commander in Chief; (2) the statutory grant to the Secretary of Defense of authority, direction, and control over the Department of Defense (10 U.S.C. 113(b)); (3) the exercise of statutory authority by the Attorney General (28 U.S.C. 512 and 513) and the general counsel of the Department of Defense as its chief legal officer (10 U.S.C. 140) to render legal opinions that bind all civilian and military attorneys within the Department of Defense; and (4) the exercise of authority under the statutes (10 U.S.C. 3019, 5019, and 8019) by which the heads of the military departments may prescribe the functions of their respective general counsels."

"The executive branch shall construe section 1021, purporting to place restrictions on the use of the U.S. Armed Forces in certain operations, and sections 1092 and 1205, relating to captured personnel and to contractor support personnel, in a manner consistent with the President's constitutional authority as Commander in Chief and to supervise the unitary executive branch."

"Section 1203 of the Act creates a Special Inspector General for Iraq Reconstruction, under the joint authority of the Secretaries of State and Defense, as a successor to the Inspector General of the Coalition Provisional Authority under title III of Public Law 108-106. Title III as amended by section 1203 shall be construed in a manner consistent with the President's constitutional authorities to conduct the Nation's foreign affairs, to supervise the unitary executive branch, and as Commander in Chief of the Armed Forces. The Special Inspector General shall refrain from initiating, carrying out, or completing an audit or investigation, or from issuing a subpoena, which requires access to sensitive operation plans, intelligence matters, counter-intelligence matters, ongoing criminal investigations by administrative units of the Department of Defense related to national security, or other matters the disclosure of which would constitute a serious threat to national security. The Secretary of State and the Secretary of Defense jointly may make exceptions to the foregoing direction in the public interest."

"The executive branch shall construe as advisory section 1207(b)(1) of the Act, which purports to direct an executive branch official to use the U.S. voice and vote in an international organization to achieve specified foreign policy objectives, as any other construction would impermissibly interfere with the President's constitutional authorities to conduct the Nation's foreign affairs and supervise the unitary executive branch. The executive branch also shall construe the phrase "generally recognized principles of international law" in sections 1402(c) and 1406(b) to refer to customary international law as determined by the President for the Nation, as is consistent with the President's constitutional authority to conduct the Nation's foreign affairs."

"The executive branch shall construe section 3147 of the Act, relating to availability of certain funds if the Government decides to settle certain lawsuits, in a manner consistent with the Constitution's commitment to the President of the executive power and the authority to take care that the laws be faithfully executed, including through litigation and decisions whether to settle litigation."

"Several provisions of the Act, including sections 315, 343(2) amending section 391 of Public Law 105-85, 506(b), 517(c), 571(b), 574(d)(8), 576(c), 577(c), 643(c) and (e), 651(g)(2), 666(c), 841(c), 3114(d)(2), and 3142(c) call for executive branch officials to submit to the Congress proposals for legislation. The executive branch shall implement

these provisions in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to recommend for the consideration of the Congress such measures as the President judges necessary and expedient. Also, the executive branch shall construe section 1511(d) of the Act, which purports to make consultation with specified Members of Congress a precondition to the execution of the law, as calling for, but not mandating such consultation, as is consistent with the Constitution's provisions concerning the separate powers of the Congress to legislate and the President to execute the laws."

"A number of provisions of the Act, including sections 112(b)(6), 213(c), 513(e)(1), 912(d), 1021(f), 1022(b), 1042, 1047, 1202, 1204, 1207(c) and (d)(2), 1208, 1214, and 3166(a) amending section 3624 in Public Law 106-398, call for the executive branch to furnish information to the Congress, a legislative agent, or other entities on various subjects. The executive branch shall construe such provisions in a manner consistent with the President's constitutional authority to withhold information the disclosure of which could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties."

National Defense Authorization Act for Fiscal Year 2005:[34]

"Several provisions of the Act, including sections 352, 360, 403, 562, 818, and 2822, call for executive branch officials to submit to the Congress proposals for legislation, including budget proposals for enactment of appropriations, or purport to regulate or require disclosure of the manner in which the President formulates recommendations to the Congress for legislation. The executive branch shall implement these provisions in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to recommend for the consideration of the Congress such measures as the President judges necessary and expedient. Also, the executive branch shall construe section 1206(d) of the Act, which purports to regulate formulation by executive branch officials of proposed programs for the President to direct, in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to require the opinions of heads of executive departments. In addition, the executive branch shall construe section 1513(d) of the Act, which purports to make consultation with specified Members of Congress a precondition to the execution of the law, as calling for but not mandating such consultation, as is consistent with the Constitution's provisions concerning the separate powers of the Congress to legislate and the President to execute the laws."

"A number of provisions of the Act, including sections 905, 932, 1004, 1212, 1224, 1227, and 1304, call for the executive branch to furnish information to the Congress on various subjects. The executive branch shall construe such provisions in a manner consistent with the President's constitutional authority to withhold information the disclosure of which could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties."

"Section 1222 of the Act refers to a joint explanatory statement of a committee of conference on a bill as if the statement had the force of law. The executive branch shall

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[34] Pub. L. 109-163.

construe the provision in a manner consistent with the bicameral passage and presentment requirements of the Constitution for the making of a law."

John Warner National Defense Authorization Act for Fiscal Year 2007:[35]

"Several provisions of the Act call for executive branch officials to submit to the Congress recommendations for legislation, or purport to regulate the manner in which the President formulates recommendations to the Congress for legislation. These provisions include sections 516(h), 575(g), 603(b), 705(d), 719(b), 721(e), 741(e), 813, 1008, 1016(d), 1035(b)(3), 1047(b), and 1102 of the Act, section 118(b)(4) of title 10, United States Code, as amended by section 1031 of the Act, section 2773b of title 10 as amended by section 1053 of the Act, and section 403 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (Public Law 108-375) as amended by section 403 of the Act. The executive branch shall construe these provisions in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to recommend for the consideration of the Congress such measures as the President deems necessary and expedient."

"The executive branch shall construe sections 914 and 1512 of the Act, which purport to make consultation with specified Members of Congress a precondition to the execution of the law, as calling for but not mandating such consultation, as is consistent with the Constitution's provisions concerning the separate powers of the Congress to legislate and the President to execute the laws."

"A number of provisions in the Act call for the executive branch to furnish information to the Congress or other entities on various subjects. These provisions include sections 219, 313, 360, 1211, 1212, 1213, 1227, 1402, and 3116 of the Act, section 427 of title 10, United States Code, as amended by section 932 of the Act, and section 1093 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (Public Law 108-375) as amended by section 1061 of the Act. The executive branch shall construe such provisions in a manner consistent with the President's constitutional authority 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."

"The executive branch shall construe as advisory section 1011(b)(2) of the Act, which purports to prohibit the Secretary of the Navy from retiring a specified warship from operational status unless, among other things, a treaty organization established by the U.S. and foreign nations gives formal notice that it does not desire to maintain and operate that warship. If construed as mandatory rather than advisory, the provision would impermissibly interfere with the President's constitutional authority to conduct the Nation's foreign affairs and as Commander in Chief."

"The executive branch shall construe section 1211, which purports to require the executive branch to undertake certain consultations with foreign governments and follow certain steps in formulating and executing U.S. foreign policy, in a manner consistent

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[35] Pub. L. 109-364.

with the President's constitutional authorities to conduct the Nation's foreign affairs and to supervise the unitary executive branch."

National Defense Authorization Act for Fiscal Year 2008:[36]

"Provisions of the Act, including sections 841, 846, 1079, and 1222, purport to impose requirements that could inhibit the President's ability to carry out his constitutional obligations to take care that the laws be faithfully executed, to protect national security, to supervise the executive branch, and to execute his authority as Commander in Chief. The executive branch shall construe such provisions in a manner consistent with the constitutional authority of the President."

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[36] Pub. L. 110-181.

United States Government Accountability Office

GAO

Testimony

Before the Subcommittee on Oversight and Investigations, Committee on Armed Services, House of Representatives

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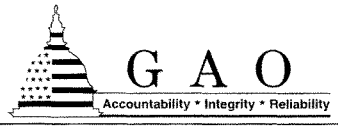
PRESIDENTIAL SIGNING STATEMENTS

Agency Implementation of Selected Provisions of Law

Statement of Gary L. Kepplinger
General Counsel



GAO-08-553T

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Highlights

Highlights of GAO-08-553T, a testimony before the subcommittee on Oversight and Investigations, Committee on Armed Services, House of Representatives

Why GAO Did This Study

Both Republican and Democratic Presidents have issued signing statements since the early nineteenth century. Signing statements usually take the form of a presidential statement or press release issued in connection with the President's signing of a bill. Some signing statements praise the newly signed law and those involved in its passage. In other signing statements, Presidents have offered their interpretation of or explained how agencies will execute a new law. Presidents have also raised constitutional concerns or objections to new statutes in signing statements.

The Chairmen of the Senate Appropriations Committee and the House Judiciary Committee asked us to examine the fiscal year 2006 appropriations acts and the President's accompanying signing statements to identify the provisions in the acts to which the President took exception, to identify the presidential concern, and to determine how the agencies executed those provisions. We also examined how the federal courts have treated presidential signing statements in their published opinions. In a second request, the same requestors asked us to examine an additional 10 provisions to determine how the agencies were executing them.

Based on this work, the Subcommittee invited GAO's General Counsel to testify on the use of signing statements.

To view the full product, including the scope and methodology, click on GAO-08-553T. For more information, contact Susan Poling at (202) 512-2667 or polings@gao.gov.

March 11, 2008

PRESIDENTIAL SIGNING STATEMENTS

Agency Implementation of Selected Provisions of Law

What GAO Found

In our opinions, we examined how agencies were implementing certain provisions to which the President objected in the signing statements. In developing our first opinion, we examined all the signing statements accompanying the fiscal year 2006 appropriations acts, identified 160 specific provisions of law to which the President objected, and categorized each provision according to the nature of the President's stated concern. The President's objections to a majority of provisions fell under broad categories, four of which we summarize in the testimony: President's theory of the unitary executive, President's constitutional role, *INS v. Chadha*, and Fifth Amendment.

We then chose 19 provisions to learn whether the agencies were executing the provisions as written. In considering which provisions would be appropriate for further inquiry, we excluded provisions for which it would be difficult to determine whether the President was executing the provision, either because of the breadth of the executive action covered or because the information would not be readily available due to national security or foreign relations concerns. GAO also looked at 10 other provisions from various laws identified by congressional requestors to which the President objected in order to ascertain how agencies were executing the provisions.

In total, GAO examined how 21 agencies executed 29 different provisions of law. GAO determined that in all but 9 cases the agencies had either taken actions to execute the provisions as written, or conditions requiring agency action had not occurred. In the remaining 9 cases, GAO found that the agencies had not executed the provisions as written. We did not assess the merits of the President's objections or examine the constitutionality of the provisions to which the President objected. Although we found that agencies did not execute 9 provisions as written, we could not conclude that agency noncompliance was the result of the President's signing statements. We also examined the extent to which federal courts have relied on signing statements in their interpretation of federal statutes. GAO found that only in rare instances have courts treated presidential signing statements as authoritative sources of statutory interpretation.

While GAO's prior work did not involve any provisions in the recently enacted National Defense Authorization Act (NDAA) for fiscal year 2008, three provisions in the NDAA to which the President objected are similar to provisions we examined in our earlier opinions. We found that agencies had not executed two of these earlier provisions as written.

To reduce any effect signing statements may have on agency execution of statutes, Congress may wish to focus its oversight work to include those provisions to which the President objects to ensure that the laws are carried out.

Chairman Snyder, Representative Akin, and Members of the Subcommittee:

We appreciate the opportunity to be here to participate in today's hearing on the use of presidential signing statements. Signing statements usually take the form of a presidential statement or press release issued in connection with the President's signing of a bill. Some signing statements praise the newly signed law and those involved in its passage. In other signing statements, presidents have offered their interpretation of or have explained how agencies will execute a new law. Presidents have also raised constitutional concerns or objections to new statutes in signing statements. These concerns or objections are rooted in the President's understanding of his constitutional role and powers. Not all laws have accompanying signing statements.

My testimony today focuses on the practical consequences of the President's objections to particular provisions of certain acts, specifically, (1) categories of presidential concerns or objections, (2) agency actions, (3) courts' use of signing statements, (4) application of our findings to the 2008 National Defense Authorization Act, and (5) observations. These remarks are based on two legal opinions issued last year.[1] In developing our first opinion, we examined the signing statements accompanying the fiscal year 2006 appropriations acts, identified 160 specific provisions of law to which the President objected, and then categorized each of these provisions according to the nature of the President's stated concern. We then chose 19 provisions to find out whether the agencies were executing the provisions as written. In the second opinion, we examined 10 provisions identified by the requestors to which the President objected to determine how the agencies were carrying them out.

In total, we examined how 21 agencies executed 29 different provisions of law. As explained in detail later in my testimony, we determined that in 16 cases the agencies had taken actions to execute the provisions as written. In 5 cases we found that the provisions were not triggered. In the remaining 9 cases we determined that the agencies had not yet executed the provisions or had not executed the provisions as written.[2] In neither

[1] *Presidential Signing Statements Accompanying the Fiscal Year 2006 Appropriations Acts*, B-308603, June 18, 2007; *Presidential Signing Statements—Agency Implementation of Ten Provisions of Law*, B-309928, Dec. 20, 2007.

[2] One provision we examined for our second opinion applied to two different agencies, so we examined agency action in 30 instances rather than 29.

opinion did GAO assess the merits of the President's objections or examine the constitutionality of the provisions to which the President objected. Although we found that agencies did not execute some provisions as written, we could not conclude that agency noncompliance was the result of the President's signing statements.

Background

Both Republican and Democratic Presidents have issued signing statements since the early nineteenth century. According to the Congressional Research Service, signing statements became increasingly common since the Reagan Administration and have been used by Presidents to raise constitutional objections to congressional enactments.[3]

Of particular concern to this committee is the statement issued by the President when he signed the National Defense Authorization Act for Fiscal Year 2008 (2008 NDAA).[4] In it, the President objected to four provisions of law because they "purport to impose requirements that could inhibit the President's ability to carry out his constitutional obligations to take care that the laws be faithfully executed, to protect national security, to supervise the executive branch, and to execute his authority as Commander in Chief."[5] The President stated, "The executive branch shall construe such provisions in a manner consistent with the constitutional authority of the President."[6]

Presidential Concerns and Objections

In our prior work on signing statements, we categorized the provisions we examined by the specific wording the President used in his signing statement to identify his concern or objection. We found that the

[3] Library of Congress, Congressional Research Service, *Presidential Signing Statements: Constitutional and Institutional Implications*, No. RL33667 (Sept. 17, 2007), at 2. According to CRS, as of September 17, 2007, President Bush had issued 152 signing statements, 118 of which (78%) raised constitutional concerns or objections. In comparison, President Clinton issued 381 statements in 8 years, 70 of which (18%) raised constitutional concerns, and President George H. W. Bush issued 228 signing statements over 4 years, 107 of which (47%) raised constitutional concerns or objections. *Id.*

[4] Pub. L. No. 110-181, 122 Stat. 3 (Jan. 28, 2008).

[5] *President Bush Signs H.R. 4986, the National Defense Authorization Act for Fiscal Year 2008 into Law* (Jan. 28, 2008) *available at* www.whitehouse.gov/news/releases/2008/01/20080128-10.html (last visited Mar. 7, 2008).

[6] *Id.*

President's objections to a majority of provisions fell under broad categories, four of which I will briefly summarize.[7]

The President's Theory of the Unitary Executive

In signing statements the President has often objected to provisions on the ground that the provisions interfere with "the President's constitutional authority to supervise the unitary executive branch."[8] The Constitution does not mention the "unitary executive," nor do the signing statements in which the term appears explain its meaning. The theory of the unitary executive is rooted in Article II of the Constitution and, specifically, in the vesting in the President of the executive power[9] and the President's duty to "take Care that the Laws be faithfully executed."[10] The Office of Legal Counsel has asserted that because the Constitution entrusts the President with the executive power, executive branch employees and officers exercise this power through delegation from the President. Thus, the President has an exclusive right to supervise and rely on his subordinates which may not be burdened by the other branches of government without impermissibly interfering with the President's constitutional authority.[11] Provisions to which the President objects on this ground require some action, such as transmittal of information to Congress or consultation with Congress or its committees.

The President's Constitutional Role

Many of the President's objections relate to government functions for which the President asserts primary constitutional authority. For example, the President commonly objects to provisions regarding command and control of the Armed Forces and the handling of intelligence information on the grounds that such provisions impermissibly burden his authority as

[7] Other presidential objections are discussed in greater detail in our two opinions.

[8] *See, e.g., Statement on Signing the Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006*, 41 Weekly Comp. Pres. Doc. 1800 (Dec. 5, 2005).

[9] U.S. Const. art. II, § 1, cl. 1.

[10] U.S. Const. art. II, § 3.

[11] Letter Opinion for the General Counsel, Department of Health and Human Services, *Authority of Agency Officials to Prohibit Employees from Providing Information to Congress*, OLC Opinion, May 21, 2004, *available at www.usdoj.gov/olc/crsmemoresponsese.htm* (last visited Feb. 22, 2008); *Statute Limiting the President's Authority to Supervise the Director of the Centers for Disease Control in the Distribution of an AIDS Pamphlet*, 12 Op. Off. Legal Counsel 47 (1988).

Commander-in-Chief.[12] The President also asserts that his authority as Commander–in-Chief grants him control over the disclosure of information related to national security.[13]

The President has also asserted a primary constitutional role in the conduct of the foreign relations of the United States. No single constitutional provision establishes such authority, although the President does have specific constitutional authority to make treaties and appoint ambassadors with the advice and consent of the Senate, and to receive ambassadors.[14] The President in his signing statements often objects to provisions that "purport to direct or burden the President's constitutional authority to conduct foreign relations."[15] The President also has stated that decisions on deployment and redeployment of law enforcement officers are constitutionally vested in the President. The signing statement states that statutory provisions that dictate such decisions are advisory rather than mandatory.[16]

The U.S. Supreme Court Decision INS v. Chadha

In our previous work, we have identified 170 provisions to which the President objected in signing statements. The President objected to 70 of these on the grounds that they were inconsistent with the Constitution's bicameralism and presentment clause, as interpreted by the U.S. Supreme Court in its 1983 decision *Immigration and Naturalization Service v. Chadha*.[17] The bicameralism and presentment clause provides that before a bill becomes law it must pass both the House of Representatives and the

[12] *See, e.g., Statement on Signing 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 (Jan. 2, 2006) (stating that "the executive branch shall construe [two provisions regarding command and control relationships within the Armed Forces] as advisory, as any other construction would be inconsistent with the constitutional grant to the President of the authority of Commander in Chief").

[13] *See, e.g., Statement on Signing the Department of Homeland Security Appropriations Act, 2006*, 41 Weekly Comp. Pres. Doc. 1558 (Oct. 24, 2005) (declaring that "the executive shall construe [a provision relating to access to national security information] in a manner consistent with the President's exclusive constitutional authority . . . to classify and control access to national security information").

[14] U.S. Const. art. II, § 2, cl. 2; § 3.

[15] *Statement on Signing the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2006*, 41 Weekly Comp. Pres. Doc. 1718 (Nov. 21, 2005).

[16] *Statement on Signing the Department of Homeland Security Appropriations Act, 2006.*

[17] 462 U.S. 919 (1983).

Senate (bicameralism) and be presented to the President for his signature (presentment). At issue in *Chadha* was a statute allowing a resolution passed by the House of Representatives to override decisions of the Attorney General made pursuant to statutory authority. The Court held the statute unconstitutional as it allowed one house to overrule the executive branch's lawful action instead of requiring a bicameral vote to overturn the action, followed by presentment to the President for signature.

Many provisions to which the President objects on *Chadha* grounds require executive agencies to obtain congressional approval prior to making certain expenditures. Others direct agencies to submit reports to Congress for congressional approval.

The Fifth Amendment

The Fifth Amendment to the Constitution prohibits the federal government from depriving anyone of life, liberty, or property without due process of law.[18] The U.S. Supreme Court has held that if a law categorizes people by certain traits such as race, ethnicity, or gender, the law may implicate the Fifth Amendment.[19] The President has noted in signing statements that the executive branch will construe provisions relating to race, ethnicity, or gender consistent with the Fifth Amendment's due process requirement.[20]

Mr. Chairman, I would now like to turn to how GAO approached the work it issued to provide some perspective on what we found when we looked at presidential signing statements.

Agency Actions

In our opinions, we examined how agencies were implementing certain provisions to which the President objected in signing statements. In developing our first opinion, we examined all the signing statements accompanying the fiscal year 2006 appropriations acts, identified 160 specific provisions of law to which the President objected, and then categorized each of these provisions according to the nature of the

[18] U.S. Const. amend. V.

[19] *Johnson v. California*, 543 U.S. 499 (2005) (race); *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006) (ethnicity); *United States v. Virginia*, 518 U.S. 515 (1996) (gender).

[20] *See, e.g., Statement on Signing 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 (Jan. 2, 2006).

President's stated concern. We then chose 19 provisions to learn whether the agencies were executing the provision as written.

In considering which provisions would be appropriate for further inquiry, we excluded provisions for which it would be difficult to determine whether the President was executing the provision, either because of the breadth of the executive action covered by the provision or because the information would not be readily available due to national security or foreign relations concerns. As a result, we did not examine any provisions to which the President objected solely on the grounds that they interfered with his authority as Commander-in-Chief. We then chose a provision for each appropriation act and representing each type of objection from the President. These 19 provisions represented at least one provision from each appropriations act for which the President issued a signing statement[21] and, as far as possible, at least one provision representing the various grounds for objection we identified, as discussed above. In the second opinion, we examined 10 provisions identified by the requestors to which the President objected to determine how the agencies were carrying them out.

For both opinions, we contacted the agencies responsible for implementing the provisions. Based on their responses, we determined that in 16 cases the agencies had taken actions to execute the provisions as written. In 5 cases we found that the provisions were not triggered. In the remaining 9 cases we determined that the agencies had not yet executed the provisions or had not executed the provisions as written.[22]

These nine instances are summarized below, sorted by the grounds on which the President objected.

- **Unitary Executive:** Section 8100 of the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act directed the President to include in his budget for fiscal year 2007 separate budget justification documents for costs of the Armed Forces' participation in contingency

[21] The President did not issue a signing statement for the fiscal year 2006 Legislative Branch Appropriations Act.

[22] One provision we examined for our second opinion applied to two different agencies, so we examined agency action in 30 instances rather than 29.

operations.[23] DOD submitted a separate budget justification document for contingency operations as part of its fiscal year 2007 budget submission to Congress, but this document contained data only for operations in the Balkans and Guantanamo Bay. It did not contain information for operations in such locales as Iraq and Afghanistan.

- **Unitary Executive:** DOD was required to respond to questions or inquiries from the Chairman of the Subcommittee on Military Quality of Life and Veterans Affairs, House Committee on Appropriations, within 21 days.[24] DOD identified two inquiries it received subject to this requirement. DOD responded to one such inquiry in 38 days.

- **Unitary Executive:** The Energy Policy Act of 2005 extended certain whistleblower protections to Department of Energy (DOE) employees and required DOE to post information about the new protections in DOE offices.[25] DOE had not yet posted such notification at the time of GAO's inquiry into the matter.

- **Primary Constitutional Role:** The Department of Homeland Security Appropriations Act, 2006, required the Customs and Border Patrol (CBP) to relocate its checkpoints in the Tucson sector every 7 days to minimize detection of the checkpoints.[26] CBP did not relocate its checkpoints in this manner. CBP told us that such relocations were not always consistent with CBP's mission requirements, because its checkpoints were stationary and could not be relocated to other spots. Instead, CBP shut down its checkpoints for short periods in an effort to comply with what CBP termed the "advisory provision" in the appropriations act.

- **Chadha:** The Pension Benefit Guaranty Corporation (PBGC) was required to obtain approval from the Office of Management and Budget (OMB) and the congressional appropriations committees before incurring obligations greater than $296,978,000 for administrative

[23] Pub. L. No. 109-148, § 8100, 119 Stat. 2680, 2721 (Dec. 30, 2005).

[24] Military Quality of Life and Veterans Affairs Appropriations Act, 2006, Pub. L. No. 109-114, § 126, 119 Stat. 2372, 2380 (Nov. 30, 2005).

[25] Pub. L. No. 109-58, § 629, 119 Stat. 594, 785 (Aug. 8, 2005).

[26] Pub. L. No. 109-90, title II, 119 Stat. 2064, 2067 (Oct. 18, 2005).

expenses.[27] Although PBGC obtained OMB approval as required by statute, PBGC only notified the committees after incurring obligations for administrative expenses beyond the specified level.

- **Chadha:** The Department of Agriculture was required to obtain prior approval from the congressional appropriations committees for a transfer of funds to the Office of the Chief Information Officer.[28] The Department did not seek approval as required by statute, but it did notify the committees prior to transferring the funds and responded to a subsequent congressional request for information.

- **Chadha:** The Federal Emergency Management Agency (FEMA) was required to submit for appropriations committee approval a proposal and expenditure plan for housing.[29] FEMA did not submit such a plan because, according to FEMA, it does not normally produce such plans.

- **Fifth Amendment:** FEMA was directed to take reasonable steps to ensure diversity in the student body of a new graduate-level homeland security program.[30] The program was designed to provide educational opportunities to senior federal officials and selected state and local officials with homeland security and emergency management responsibilities.[31] Fourteen months after this provision was enacted, FEMA had not taken steps to ensure diversity in the student body.

- **Fifth Amendment:** FEMA was required to create a registry of contractors willing to perform certain disaster or emergency relief services.[32] The registry was to list, among other information, whether the contractor is a small business owned and controlled by socially or

[27] Department of Labor, Health and Human Services and Education, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-149, title I, 119 Stat. 2833, 2837 (Dec. 30, 2005).

[28] Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-97, § 716, 119 Stat. 2120, 2151 (Nov. 10, 2005).

[29] Emergency Supplemental Appropriations Act for Defense, the Global War on Terror and Hurricane Recovery, 2006, Pub. L. No. 109-234, title II, ch. 4, 120 Stat. 418, 459 (June 15, 2006).

[30] Department of Homeland Security Appropriations Act, 2007, Pub. L. No. 109-295, § 623, 120 Stat. 1355, 1418 (Oct. 4, 2006).

[31] *Id.*

[32] *Id.* §697, 120 Stat. at 1461.

economically disadvantaged individuals or women, among others.[33] Fourteen months after this provision was enacted, FEMA had not yet created this registry.

Of the 29 provisions we looked at in our previous work, 3 involved DOD. We found that DOD did not execute 2 of these provisions as written, as noted in the first two bullets above. The President objected to both of these provisions on unitary executive grounds.

We also examined one provision that DOD did implement as written, section 1205 of the 2005 national defense authorization act.[34] The provision required the Secretary of Defense to issue guidance on how DOD would manage contractor personnel who support deployed forces. The President noted in his signing statement that the "executive branch shall construe . . . [section 1205] . . . in a manner consistent with the President's constitutional authority as Commander in Chief and to supervise the unitary executive branch."[35] We found that DOD's issuance of Instruction 3020.41 and revised Instruction 7730.64 satisfied the statutory requirement.[36]

Federal Courts Have Rarely Used Signing Statements to Aid Their Interpretation of the Law

As part of our first signing statements opinion, we examined the extent to which federal courts have referred, or cited, to signing statements. We found that between 1945 and May 2007, 137 federal court decisions referred in some way to signing statements. The courts have used the signing statements for various purposes, such as supplementing legislative history, establishing a law's enactment date, or as factual evidence that the President objected to a provision. Only in rare instances have courts treated signing statements as sources of statutory interpretation.

For example, a federal district court used President George H. W. Bush's signing statement accompanying the Civil Rights Act of 1991[37], combined

[33] *Id.*

[34] Ronald W. Reagan National Defense Authorization Act for Fiscal year 2005, Pub. L. No. 108-375, § 1205, 118 Stat. 1811, 2083 (Oct. 28, 2004).

[35] *Statement on Signing the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005*, 40 Weekly Comp. Pres. Doc. 2673-74 (Nov. 1, 2004).

[36] B-309928 at 15.

[37] Pub. L. No. 102-166, 105 Stat. 1071 (Nov. 21, 1991).

with an EEOC policy statement and a highly conflicted legislative history, to interpret whether that Act applied retroactively.[38]

National Defense Authorization Act for Fiscal Year 2008

In his signing statement accompanying the 2008 NDAA, the President proclaimed that:

"Provisions of the Act, including sections 841, 846, 1079, and 1222, purport to impose requirements that could inhibit the President's ability to carry out his constitutional obligations to take care that the laws be faithfully executed, to protect national security, to supervise the executive branch, and to execute his authority as Commander in Chief. The Executive Branch shall construe such provisions in a manner consistent with the constitutional authority of the President."[39]

The President's objections were general, conditional ("could inhibit"), and did not relate particular objections to the four provisions listed. Indeed, the signing statement suggests that the President objects to numerous provisions in the 2008 NDAA, and the four listed provisions are but examples.

Three of the provisions in the 2008 NDAA to which the President objected are similar to provisions we examined in our prior work. For example, section 1079 of the 2008 NDAA requires certain members of the intelligence community to respond to Armed Services Committee requests for existing intelligence assessments, reports, estimates, or legal opinions within 45 days, subject to presidential assertion of privilege.[40] In our previous work, we examined a provision with time frames that required DOD to respond to certain questions or inquiries from a congressional committee within 21 days. We determined that DOD had not executed this provision as written because it responded to one of the two inquiries covered by the provision in 38 days.

Section 846 of the 2008 NDAA increased certain whistleblower protections for DOD contractors.[41] In our work we examined a provision extending

[38] *Ribando v. United Airlines, Inc.*, 787 F. Supp. 827 (N.D. Ill. 1992).

[39] *President Bush Signs H.R. 4986, the National Defense Authorization Act for Fiscal Year 2008 into Law.*

[40] Pub. L. No. 110-181, § 1079, 122 Stat. 3, 334 (Jan. 1, 2008).

[41] Pub. L. No. 110-181, § 846, 122 Stat. at 241.

certain whistleblower protections to employees of the Department of Energy. At the time of our work, we found that the Department of Energy had not implemented this provision.

Another provision that the President objected to in the 2008 NDAA was section 841, establishing a Commission on Wartime Contracting in Iraq and Afghanistan.[42] Section 841 specifies that congressional leaders will appoint six of the eight Commission members, and the President will appoint the remaining two in consultation with the Secretaries of Defense and State. As part of our earlier work, we examined a provision establishing the Rio Grande Natural Area Commission.[43] The Secretary of the Interior was directed to appoint all nine Commission members, each of whom was to have certain qualifications. The President objected to this provision on the grounds that it might impinge on his powers under the Appointments Clause of the Constitution. We learned that 2 years after the provision establishing the Rio Grande Natural Area Commission was enacted, its members still had not been appointed.

Given our findings regarding these similar provisions, the Subcommittee may wish to stay abreast of DOD's implementation of the provisions in the 2008 NDAA to which the President objected in his signing statement.

Concluding Observations

In summary, Mr. Chairman, we found that many agencies executed the laws as written, some provisions were not triggered and, in some instances, agencies did not execute the laws as written. In our review, we did not assess the merits of the President's objections, nor did we examine the constitutionality of the provisions to which the President objected.

Our inquiry was limited to only 30 instances of agency action and did not include a close examination of provisions involving national security, intelligence, or foreign relations matters, because of our limited access to such information and the time constraints on our work. We found that in 9 of these 30 instances, agencies had not executed the provisions as written. Importantly, we also found that federal courts are not using signing statements as common sources of authority for statutory interpretation.

[42] Pub. L. No. 110-181, § 841, 122 Stat. at 230.

[43] B-309928 at 16–17.

To reduce any effect signing statements may have on agency execution of statutes, Congress may wish to focus its oversight work to include those provisions to which the President objects to ensure that the laws are carried out. We note that the Attorney General is required to submit a report to Congress of any instances in which the Attorney General or the Department of Justice implements a formal or informal policy to refrain from enforcing or defending a federal law or regulation on the grounds that such provision is unconstitutional.[44] This reporting requirement also extends, albeit more narrowly, to the President himself with respect to any unclassified executive order or similar memorandum, and to the heads of executive agencies and military departments that establish or implement a nonenforcement policy.[45]

Mr. Chairman, this concludes my prepared statement. I would be happy to respond to any questions that you or the committee may have.

[44] 28 U.S.C. § 530D. For examples where the Department of Justice has submitted litigation reports to Congress under section 530D, see Letter to the Honorable Patrick J. Leahy, Chairman, Committee on the Judiciary, U.S. Senate, from Richard A. Hertling, Acting Assistant Attorney General at 103–8, January 18, 2007, responding to Questions for the Record for Attorney General Alberto Gonzales, Senate Judiciary Committee DOJ Oversight Hearing on July 18, 2006.

[45] President Bush objected to 28 U.S.C. § 530D in a signing statement when he signed the provision into law and stated that "[t]he executive branch shall construe section 530D of title 28 . . . 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." *Statement on Signing the 21st Century Department of Justice Appropriations Authorization Act*, 38 Weekly Comp. Pres. Doc. 1971-73 (Nov. 11, 2002). Interestingly, the Office of Legal Counsel, citing to a prior, narrower version of section 530D, states that the Attorney General "must" notify Congress if the Attorney General decides not to defend the constitutionality of certain provisions. Memorandum Opinion for the Attorney General, *Recommendation that the Department of Justice not defend the Constitutionality of Certain Provisions of the Bankruptcy Amendments and Federal Judgeship Act of 1984*, 8 Op. O.L.C. 183 (1984).

GAO Contacts And Staff Acknowledgments

For further information about this testimony please contact Susan A. Poling, Managing Associate General Counsel, at 202-512-2667 or at polings@gao.gov. Other key contributors to this statement were Pedro Briones, Carlos Diz, Wesley Dunn, and A.J. Stephens.

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STATEMENT OF BRUCE FEIN

BEFORE THE HOUSE ARMED SERVICES COMMITTEE

RE: PRESIDENTIAL SIGNING STATEMENT REGARDING THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2008

MARCH 11, 2008

Dear Mr. Chairman and Members of the Committee:

I am pleased to share my views on President George W. Bush's signing statement issued on January 28, 2008 in conjunction with H.R. 4986, the National Defense Authorization Act for Fiscal Year 2008 (NDAA). The statement signaled to Congress and the public that he would ignore four provisions of the bill that he had signed into law because he believes they unconstitutionally encroach on presidential powers, for example, his claimed authority as Commander in Chief to initiate warfare anywhere in the Milky Way against any perceived danger to the United States, whether imaginary or authentic. The theory of executive power implicit in the signing statement indicates that President Bush believes Congress is impotent to prevent him from a preemptive war against Iran to crush or cripple its nuclear ambitions.

I recently served on the American Bar Association's Task Force on Presidential Signing Statements, which culminated in a report sharply protesting their issuance as unconstitutional. They are tantamount to absolute line-item vetoes, which the United States Supreme Court held violated the Constitution's provisions for the enactment of laws in Clinton v. New York. President George Washington, who was present at the Constitution's creation, understood that a bill passed by Congress must be either signed or vetoed in its entirety, just as Members vote in favor or against a bill in its entirety. A President presented with a bill that he believes is unconstitutional in whole or in part is obligated to veto the entire legislation. He may ask Congress to delete the allegedly offending provisions. Congress may override the veto by two-thirds majorities, make the requested deletions, or acquiesce in the veto, simpliciter. Signing statements unconstitutionally frustrate the legislative option of Congress to bundle various provisions in a single bill and confront the President with an awkward political choice of either "taking the good with the bad" or vetoing the entire legislation. I have testified

before the Senate Judiciary Committee on presidential signing statements and suggested methods for blunting their mischief or challenging their use through litigation.

I consider the NDAA signing statement the most alarming in President Bush's mushrooming roster. If accepted as a correct interpretation of executive power, the Republic would retrogress more than three centuries to the Stuart Monarchs in Great Britain. The congressional power of the purse—a power which James Madison celebrated as an invincible instrument for redressing grievances against the President—would be crippled or dead.

Mr. Bush's signing statement may seem innocuous to the uninitiated in power struggles between the Congress and the President, but it is not. The statement declares:

"Today, I have signed into law H.R. 4986, the National Defense Authorization Act for Fiscal Year 2008...

Provisions of the Act, including sections 841, 846, 1079, and 1222, purport to impose requirements that could inhibit the President's ability to carry out his constitutional obligations to take care that the laws be faithfully executed, to protect the national security, to supervise the executive branch, and to execute his authority as Commander in Chief. The executive branch shall construe such provisions in a manner consistent with the constitutional authority of the President."

It speaks volumes that the President does not assert that the identified sections are ambiguous, i.e., he does not know what they mean. On that score, the President is truthful. Section 841 establishes a legislative-executive commission to study reconstruction, logistical, and security contracting for Iraq and Afghanistan; and, to conduct hearings and take testimony towards that end. It does not seek to override any putative executive privilege to withhold information. Section 846 expands whistleblower protection for government contractor employees for providing information reasonably believed to be

evidence of gross mismanagement of a DOD contract or grant, a gross waste of DOD funds, a substantial and specific danger to public health or safety, or a violation of law related to a DOD contract (including the competition for or negotiation of a contract) or grant. Section 1079 regulates the assertion of executive privilege by various heads of the intelligence community by requiring its invocation by the President when the House or Senate Armed Services Committee requests intelligence assessments, reports, estimates, or legal opinions. Section 1222 speaks in exceptionally lucid language in prohibiting expenditures authorized by the NDAA to establish permanent military bases in Iraq or to control its oil resources, foreign policy or national security judgments well within the jurisdiction of Congress. The section declares:

"No funds appropriated pursuant to an authorization of appropriations of this Act may be obligated or expended for a purpose as follows:

(1) To establish any military installation or base for the purpose of providing for the permanent stationing of United States Armed Forces in Iraq.

(2) To exercise United States control of the oil resources of Iraq."

The signing statement does not say that President Bush does not know what section 1222 means. It protests, however, that it may inhibit or circumscribe his decisions as Commander in Chief to fight the ongoing war against Iraq or to protect the national security. But insofar as President Bush is insinuating section 1222 may unconstitutionally invade his prerogatives, the insinuation is fatuous.

Article I, section 8, clause 18 of the Constitution—the Necessary and Proper Clause—empowers Congress to regulate the exercise of all constitutional authorities in whatever branch, including the President's exercise of national security or war powers. The only limitation is that Congress must avoid

exercising an "overriding" influence over a presidential prerogative, as James Madison explained in describing the Constitution's separation of powers in The Federalist Papers.

The Constitution, moreover, makes Congress a full partner with the President in national security affairs. A law that restricts the president's military or national security discretion does not raise constitutional eyebrows. Laws setting personnel ceilings on the armed forces may be contrary to what the President believes is prudent for national security or fighting wars, but they have never been deemed unconstitutional for that reason. Congress may slash the DOD budget proposed by the President in a manner which he believes will jeopardize the national security, but the slashes have never been held unconstitutional for that reasons. Congress declares war, raises, supports, and enacts rules for the military, and determines what military expenditures are permitted. In each endeavor, the President may believe Congress has undermined the national security. But that does not make the legislation unconstitutional. The Founding Fathers gave the President a qualified veto as a safeguard against imprudent legislation. They did not create an absolute monarch with powers asserted by the Stuart Kings to tax and spend for military purposes without parliamentary authority and to suspend the enforcement of laws they disliked. Both practices were explicitly prohibited by the English Bill of Rights of 1688—a full century before the drafting of the United States Constitution.

Practice confirms what the plain language of the Constitution indicates: Congress is empowered to enact laws that circumscribe the President's national security or Commander in Chief powers. An early Congress limited the power of President John Adams to seize ships sailing from France. Congress established the policy for Reconstruction after the Civil War. Congress prohibited President McKinley from annexing Cuba. Congress enacted neutrality legislation in the 1930s which inhibited President Roosevelt's ability to aid forces fighting fascism or dictatorship abroad. Congress decides on the draft, not the President. Congress decides on whether to make the CIA's budget public, not the President.

Congress prohibited President Nixon from extending the Vietnam War into Laos, Cambodia, or Thailand. Congress prohibited covert CIA action in Angola with the Clark Amendment. The various iterations of the Boland Amendment limited President Reagan in assisting the Nicaraguan resistance to Daniel Ortega and the Sandanistas. The Supreme Court in Hamdan v. Rumsfeld held that Congress had denied President Bush authority to create military commissions for the trial of war crimes allegedly perpetrated by Al Qaeda detainees. The Military Commissions Act of 2006 was necessary to justify the President's exercise of that power.

In sum, Congress routinely enacts laws that limit the President's national security strategy or tactics. But these limitations raise no constitutional anxieties. Congress was under no constitutional obligation to fund the Manhattan Project irrespective of how essential FDR thought an atomic bomb would be to ending World War II. The aggregate number of congressional national security or war limitations on the President since the inception of the Constitution may be as high as several thousand.

The signing statement declares that the executive branch "shall construe [the enumerated sections] in a manner consistent with the constitutional authority of the President." But the sections leave nothing for construction. The English language is not capable of greater exactitude. Section 1222, for instance, plainly prohibits the expenditure of money authorized by the NDAA for the purpose of establishing permanent United States military bases in Iraq. Even a child could discern the demarcation line between authorized and unauthorized expenditures pivoting on whether a permanent military base in Iraq was the objective. What the signing statement really means is that President Bush will interpret section 1222 as a nullity and ignore its limitations on the absurd constitutional theory that Congress is powerless to enact any law that the President believes might "inhibit" his ability to safeguard the national security or to wage war. In customary usage, inhibit means to hold back or restrain. The core purpose of the Constitution's checks and balances, however, is to insure that each branch hold back or

restrain the other branches to prevent tyranny or abuses short of exercising an "overriding" influence. President Bush's signing statement reads checks and balances out of the Constitution in favor of an omnipotent executive, a revolutionary shift that might be likened to the Roman Republic's bow to Roman Emperors.

Suppose Congress determines that a United States invasion of Iran to destroy its nuclear facilities would be folly. It would unify the Iranian people behind the fanatical or corrupt mullahs; and, it would frustrate a democratic dispensation in Iran building on the model of Prime Minister Mohammed Mossadegh, whom the United States overthrew in 1953. Congress thus enacts a law prohibiting the expenditure of any monies of the United States to invade Iran. Under the theory of executive power asserted in the signing statement accompanying H.R. 4986, President Bush would ignore the prohibition and invade Iran if he believed the invasion would bolster the national security.

President Bush believes whatever the President does under the umbrella of Commander in Chief is legal even if in contravention of what Congress has ordained, just as President Nixon maintained that if the President does it, it's legal, a proposition that occasioned three articles of impeachment by the House Judiciary Committee. There might be some solace in presidential supremacy if presidents were infallible; and, congressional vetting and regulation were invariably vexatious. But presidents chronically and monumentally err: the overthrow of Mossadegh in favor of the Shah; the Bay of Pigs; the Vietnam War; post-Saddam Iraq, etc. It took the Fulbright hearings to expose the delusions of President Johnson's Vietnam War road map. Without congressional checks, presidents will inflate danger manifold and project the United States military everywhere because executive power expands in times of real or perceived emergencies. The downfall of every empire has been executive arrogance and usurpations.

The instruments available to Congress to overcome President Bush's signing statement are uninviting, but necessary if the Constitution is to be preserved undefiled, a preservation which every Member of Congress has taken an oath to ensure. The President or his designated representative should be asked to testify before this Committee whether section 1222 is constitutional and will be faithfully enforced by the executive branch, for example, by a presidential instruction to the Secretary of Defense to spend no money authorized by the NDAA with the objective of permanent military bases in Iraq and requiring periodic audits to insure compliance. If the executive branch insists on silence, then impeachment by the House of Representatives would be in order. Silence would signal the President's intent to violate his oath to faithfully execute the laws. And the Nixon impeachment proceedings established that the President's non-responsiveness to congressional requests for information when impeachment is at stake is itself an impeachable offense.

The Committee could also recommend that no executive official who declines to answer congressional questions about the implementation of section 1222 shall receive a salary or other compensation from funds appropriated by Congress.

Supreme Court decisions make clear that constitutional practice far more than logic or text is decisive in interpreting checks and balances and the separation of powers. If President Bush's signing statement goes unchallenged and unrebuked by Congress, it will be the law. Congress will have been reduced to an ink blot in national security matters. It will possess lesser power to check the executive than was granted the British Parliament in 1688, or three hundred and twenty years ago.

U.S. House of Representatives
Armed Services Subcommittee on Oversight and Investigations

Hearing:
The President's Signing Statement Upon Signing
The National Defense Authorization Act for Fiscal Year 2008

March 11, 2008

Prepared Statement
of

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Mr. Chairman, Representative Akin, Members of the Subcommittee: I thank you for the opportunity to express my views about the President's statement upon signing the National Defense Authorization Act for Fiscal Year 2008.

In the past, I have testified about the propriety and utility of presidential signing statements generally, before both the House and Senate Judiciary Committees.[1] Today, I will discuss how those general points apply to the particular signing statement of interest here—the one issued by the President on January 28, 2008,[2] regarding the National Defense Authorization Act for Fiscal Year 2008.[3] That presidential signing statement reads, in full, as follows:

> Today, I have signed into law H.R. 4986, the National Defense Authorization Act for Fiscal Year 2008. The Act authorizes funding for the defense of the United States and its interests abroad, for military construction, and for national security-related energy programs.
>
> Provisions of the Act, including sections 841, 846, 1079, and 1222, purport to impose requirements that could inhibit the President's ability to carry out his constitutional obligations to take care that the laws be faithfully executed,

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[1] *See Presidential Signing Statements Under the Bush Administration: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Nicholas Quinn Rosenkranz, Assoc. Prof. of Law, Georgetown University Law Center); *Presidential Signing Statements: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Nicholas Quinn Rosenkranz, Assoc. Prof. of Law, Georgetown University Law Center).

[2] Statement on Signing the National Defense Authorization Act for Fiscal Year 2008, 44 WEEKLY COMP. PRES. DOC. 115 (Jan. 28, 2008).

[3] Pub. L. No. 110-181, 122 Stat. 3 (2008).

> to protect national security, to supervise the executive branch, and to execute his authority as Commander in Chief. The executive branch shall construe such provisions in a manner consistent with the constitutional authority of the President.[4]

I will begin with some general observations about the propriety of this signing statement, and then I will consider the specific sections of the bill that it mentions.

I. Executive Interpretation

The most important word in this signing statement, the operative verb, is the verb "construe." In this signing statement, as in virtually all of this President's signing statements, this verb signals the primary function of the signing statement: to announce—to the Executive Branch and to the public—the President's interpretation of the law.[5] The propriety of such an announcement should be obvious.[6] There is an oft-repeated canard that the President has no business interpreting federal statutes—his job is to *execute* the laws, and *interpretation* should be left to the courts.[7] A moment's reflection reveals that

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[4] Statement on Signing the National Defense Authorization Act for Fiscal Year 2008, 44 WEEKLY COMP. PRES. DOC. 115 (Jan. 28, 2008).

[5] Virtually every paragraph of every signing statement by this President uses the word "construe," emphasizing that the purpose of the statement is to interpret the statute. *See, e.g.*, Statement on Signing the USA PATRIOT Improvement and Reauthorization Act of 2005, 42 WEEKLY COMP. PRES. DOC. 423, 425 (Mar. 9, 2006) ("The executive branch shall *construe* the provisions of H.R. 3199 that call for furnishing information to entities outside the executive branch . . . in a manner consistent with the President's constitutional authority to . . . withhold information the disclosure of which would impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties. . . . The executive branch shall *construe* section 756(e)(2) of H.R. 3199 . . . in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to recommend for the consideration of the Congress such measures as he judges necessary and expedient.") (emphasis added); Statement on Signing the Deficit Reduction Act of 2005, 42 WEEKLY COMP. PRES. DOC. 215 (Feb. 8, 2006) ("The executive branch shall *construe* section 1936(d)(2) of the Social Security Act . . ., which purports to make consultation with a legislative agent a precondition to execution of the law, to call for but not mandate such consultation, as is consistent with the Constitution's provisions concerning the separate powers of the Congress to legislate and the President to execute the laws.") (emphasis added); Statement on Signing the Trafficking Victims Protection Reauthorization Act of 2005, 42 WEEKLY COMP. PRES. DOC. 39 (Jan. 10, 2006) ("The executive branch shall *construe* this reporting requirement in a manner consistent with the President's constitutional authority as Commander in Chief and the President's constitutional authority to conduct the Nation's foreign affairs.") (emphasis added).

[6] *See, e.g.*, Curtis A. Bradley & Eric Posner, *Presidential Signing Statements and Executive Power* 23 CONST. COMMENT. 307, 310 (2006) (noting that if the President misinterprets statutes in signing statements, the problem is "the underlying views expressed in the statements, not the statements themselves"); Marty Lederman et al., *Untangling the Debate on Signing Statements*, *available at* http://gulcfac.typepad.com/georgetown_university_law/2006/07/thanks_to_the_p.html ("There is nothing inherently wrong with signing statements as such—including those that contain constitutional objections.").

[7] *See, e.g.*, Editorial, *Veto? Who Needs a Veto?*, N.Y. TIMES, May 5, 2006, at A22 ("[No former presidents] have used [signing statements] so clearly to make the president the interpreter of a law's intent, instead of Congress, and the arbiter of constitutionality, instead of the courts."); Bob Egelko, *How Bush Sidesteps Intent of Congress*, S.F. CHRON., May 7, 2006, at A1 ("The civics-book answer is clear: Congress passes the laws, the president carries them out, and the courts decide whether they're constitutional.").

this view is unsound. It is simply impossible, as a matter of logic, to execute a law without determining what it means.

Every execution of a statute implies an interpretation. And the President cannot simply flip a coin. He has a constitutional duty to "take Care that the Laws be faithfully executed,"[8] and this faithfulness inherently and inevitably includes a good faith effort to determine what "the Laws" *mean*. In short, as the Supreme Court has explained, "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."[9]

Nor is the President obliged to leave the interpretive choices to the Department of Defense. It is entirely appropriate for the President to declare how "the executive branch shall construe"[10] the National Defense Authorization Act. The Supreme Court has rightly said that the President can and should "supervise and guide [executive officers'] construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone."[11] And as Walter Dellinger, Assistant Attorney General for the Office of Legal Counsel under President Clinton, has explained, this is a "generally uncontroversial . . . function of presidential signing statements"—"to guide and direct executive officials in interpreting or administering a statute."[12]

Of course, the President was not required to make his interpretation of the National Defense Authorization Act public; he could have quietly instructed the Secretary of Defense and have done with it. But there are many good reasons why, in most circumstances, a public statement of interpretation is desirable. First, if the President's interpretation is public, then those who believe that his interpretation is erroneous can better and more quickly structure a challenge in court. Second, a public statement of interpretation reduces legal uncertainty; if people know the President's interpretation, they are better able to organize their affairs accordingly.[13] Third, and

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[8] U.S. CONST. art. II, § 3.

[9] Bowsher v. Synar, 478 U.S. 714, 733 (1986).

[10] Statement on Signing the National Defense Authorization Act for Fiscal Year 2008, 44 WEEKLY COMP. PRES. DOC. 115 (Jan. 28, 2008).

[11] Myers v. United States, 272 U.S. 52, 135 (1926).

[12] The Legal Significance of Presidential Signing Statements, 17 Op. Off. Legal Counsel 131, 132 (1993).

[13] *See* Frank B. Cross, *The Constitutional Legitimacy and Significance of Presidential "Signing Statements"*, 40 ADMIN. L. REV. 209, 227-28 (1988) (arguing that the President's decision to announce his interpretation of a statute in a signing statement beneficially increases the transparency of executive branch decision-making); Lederman et al., *supra* note 6 ("The signing statement is a *good* thing: a manifestation of the Executive's intentions that helps us to understand the heart of the problem. . . . [I]t is much *better* that [the President] tell Congress and the public of his intentions, rather than keep it secret . . . ."); *see also* John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965 (1984) (analyzing the types of costs arising from uncertainty about legal rules); Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789, 822-36 (2002) (analyzing the costs that arise from uncertainty when new statutes are enacted and the importance of interpretive rules for reducing that uncertainty).

perhaps most important, a public statement informs Congress of the President's interpretation, and if Congress disagrees, it may pass a bill clarifying the matter.

In short, in the United States, we have a strong preference for sunlight in government.[14] Once it is clear that interpreting the law is essential to executing it, there can be no independent objection to the President making his interpretations public. This is the primary function of presidential signing statements, and President Clinton's Office of Legal Counsel was quite right to call this function "uncontroversial."[15]

II. The Canon of Constitutional Avoidance

The President interprets statutes in much the same way that courts do, with the same panoply of tools and strategies. His lawyers carefully study the text and structure of Acts of Congress,[16] aided perhaps by dictionaries, linguistic treatises, and other tools of statutory interpretation. In addition, just like courts, they also apply well-established maxims of statutory interpretation, called canons.[17]

One canon in particular is of interest today. As Justice Holmes explained in 1927, "[T]he rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act."[18] This is known as the canon of constitutional avoidance,[19] and

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[14] *Cf.* Buckley v. Valeo, 424 U.S. 1, 67 (1976) (per curiam) ("Sunlight is said to be the best of disinfectants . . . .") (quoting LOUIS DEMBITZ BRANDEIS, OTHER PEOPLE'S MONEY (1933)).

[15] The Legal Significance of Presidential Signing Statements, 17 Op. Off. Legal Counsel at 132.

[16] *See, e.g.*, Statement on Signing the Miscellaneous Trade and Technical Corrections Act of 2004, 40 WEEKLY COMP. PRES. DOC. 2912, 2913 (Dec. 3, 2004) ("The executive branch shall construe the repeal, in section 1561(c) of the Act, of section 127 of the Treasury and General Government Appropriations Act, 2003, as contained in the Consolidated Appropriations Act, 2003 (Public Law 108-7) as repealing the amendments that were made to title 19 of the United States Code by section 127. Such a construction of section 1561(c) is *consistent with the text and structure* of amendments to title 19 made by section 1561.") (emphasis added); Statement on Signing 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) ("*[N]oting 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.") (emphasis added); Statement on Signing the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, 41 WEEKLY COMP. PRES. DOC. 1273 (Aug. 10, 2005) ("The executive branch shall construe section 5305(g)(3) of the Act to be a statute to which section 552(b)(3)(A) of title 5, United States Code, refers, *as the text and structure of section 5305(g) indicate*.") (emphasis added). *See also* Alexander v. Sandoval, 532 U.S. 275, 289 n.7 ("[O]ur methodology is not novel, but well established in earlier decisions . . ., which explain that *the interpretive inquiry begins with the text and structure* of the statute . . . .") (emphasis added).

[17] For example, compare Statement on Signing Communications Legislation, 40 WEEKLY COMP. PRES. DOC. 3013 (Dec. 23, 2004) (applying "the principle of statutory construction of giving effect to each of two statutes addressing the same subject whenever they can co-exist") with Morton v. Mancari, 417 U.S. 535, 551 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.").

[18] Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J.).

[19] *See, e.g.*, Artichoke Joe's California Grand Casino v. Norton, 353 F.3d 712, 730 (9th Cir. 2003).

it "is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations."[20]

This is the canon that the President is applying when he says that he will interpret the National Defense Authorization Act "in a manner consistent with the constitutional authority of the President."[21] This is a very common form of signing statement,[22] and it is crucial to understand what this sort of signing statement does and does not say. This signing statement does not "reserve the right to disobey"[23] the law. It does not "amount to [a] partial veto[]."[24] It does not "declare[the President's] intention not to enforce anything he dislikes."[25] And it does not declare the National Defense Authorization Act, or any part of it, unconstitutional.

In fact, it declares exactly the opposite. As President Clinton's Office of Legal Counsel has explained, these sorts of signing statements are "analogous to the Supreme Court's practice of *construing* statutes, if possible, to *avoid* holding them unconstitutional . . . ."[26] What this signing statement says, in effect, is that if an ambiguity appears on the face of the National Defense Authorization Act or becomes apparent in the course of execution, and if one possible meaning of the statute would render it unconstitutional, then the President will presume that Congress intended the other, constitutional meaning—*and he will faithfully enforce the Act so understood.*[27]

Similarly, there is nothing portentous in the President's declaration that "[p]rovisions of the Act . . . purport to impose requirements that could inhibit the President's ability to carry out his constitutional obligations to take care that the laws be faithfully executed, to protect national security, to supervise the executive branch, and to execute his authority as Commander in Chief."[28] Again, this is emphatically not a declaration that any part of the Act is unconstitutional. To the extent that this sentence makes a constitutional claim, it is a doubly contingent one. Provisions "purport"—on some conceivable interpretation—"to impose requirements," and those requirements "could"—in some conceivable circumstances—impinge on the President's constitutional

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[20] Rust v. Sullivan, 500 U.S. 173, 190-91 (1991). *See also* Ex parte Randolph, 20 F.Cas. 242, 254 (C.C.D.Va. 1833) (No. 11,558) (Marshall, C.J.).

[21] Statement on Signing the National Defense Authorization Act for Fiscal Year 2008, 44 WEEKLY COMP. PRES. DOC. 115 (Jan. 28, 2008).

[22] *See* Bradley & Posner, *supra* note 6, at 341-42 ("When presidents have constitutional concerns, it is rare for them to announce in a signing statement that they will decline to enforce a statutory provision. Instead, they frequently state that they will interpret the provision in a way that will avoid the purported constitutional problem."). Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1217-20 (2006) (describing executive branch use of the avoidance canon).

[23] Charlie Savage, *Bush Challenges Hundreds of Laws*, THE BOSTON GLOBE, Apr. 30, 2006, at A1.

[24] Bob Egelko, *How Bush Sidesteps the Intent of Congress*, S.F. CHRONICLE, May 7, 2006, at A1.

[25] Editorial, *Veto? Who Needs a Veto?*, N.Y. TIMES, May 5, 2006, at A22.

[26] The Legal Significance of Presidential Signing Statements, 17 U.S. Op. Off. Legal Counsel 131, 133 (1993) (emphasis added).

[27] *See* Bradley & Posner, *supra* note 6, at 343 ("Many of the statements appear simply to be placeholders to preserve an executive viewpoint about the Constitution, not an indication that the Executive will decline to fully enforce a statute.").

[28] Statement on Signing the National Defense Authorization Act for Fiscal Year 2008, 44 WEEKLY COMP. PRES. DOC. 115 (Jan. 28, 2008).

prerogatives. The statement simply declares that—if such circumstances should arise and an alternative, constitutional interpretation of the Act is available—the executive branch will choose the alternative, constitutional interpretation.

Again, this amounts to nothing more than a straightforward application of a canon of statutory construction that was already well established when Justice Holmes elaborated it in 1927,[29] a canon that finds its entire rationale in "a just respect for the legislature"[30] and the faithfulness of Representatives and Senators to their constitutional oaths.[31] If a statute is ambiguous, we—the President, the Court, the People—presume that Congress intended it to be constitutional.[32]

III. The Particular Provisions Singled Out By The Signing Statement

So, there is nothing inherently objectionable in the fact, or in the form, of the President's signing statement. Like many signing statements of this President and prior Presidents, it simply declares an intention to use the well-established canon of constitutional avoidance in interpreting the Act. It declares that if circumstances should arise in which a particular interpretation of certain provisions would be constitutionally problematic, and another interpretation is plausible, the President will choose the alternative, constitutional interpretation.

It remains to be seen precisely which provisions of the Act raised these (theoretical) constitutional concerns for the President. Again, he declared:

> Provisions of the Act, *including sections 841, 846, 1079, and 1222*, purport to impose requirements that could inhibit the President's ability to carry out his constitutional obligations to take care that the laws be faithfully executed, to protect national security, to supervise the executive branch, and to execute his authority as Commander in Chief.[33]

It is unfortunate that the President chose to give a *non-exclusive* list of the potentially problematic provisions of the National Defense Authorization Act—saying only that the

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[29] *See* Blodgett v. Holden, 275 U.S. 142, 148 (1927) (Holmes, J.).

[30] *Ex parte Randolph*, 20 F.Cas. 242, 254 (C.C.D.Va. 1833) (No. 11,558) (Marshall, C.J.).

[31] See U.S. Const. art. VI ("The Senators and Representatives before mentioned ... shall be bound by Oath or Affirmation, to support this Constitution."); 5 U.S.C.A. § 3331 (West 1966) (establishing the oath for all elected and appointed officials: "I . . . do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God."); United States v. Verdugo-Urquidez, 494 U.S. 259, 274 (1990) ("The Members of the ... Legislative Branch[] are sworn to uphold the Constitution, and they presumably desire to follow its commands.").

[32] *See* Rust v. Sullivan, 500 U.S. 173, 190-91 (1991).

[33] Statement on Signing the National Defense Authorization Act for Fiscal Year 2008, 44 WEEKLY COMP. PRES. DOC. 115 (Jan. 28, 2008) (emphasis added).

list "*includ[es]* sections 841, 846, 1079, and 1222." But a careful reading of the provisions that he did specify may reveal the sort of constitutional concerns that he has in mind. Therefore, the remainder of this testimony will examine those four provisions.

A. Section 841

Section 841 creates a Commission on Wartime Contracting in Iraq and Afghanistan.[34] This Commission is a somewhat odd hybrid, in that six of its members are to be appointed by members of Congress and two are to be appointed by the President.[35] But such an arrangement is probably not constitutionally problematic, so long as the Commission is purely advisory and exercises no executive power. This Commission does appear to be purely advisory, but it does have some powers that could potentially raise constitutional issues.

The Act provides:

> The Commission may secure from . . . any . . . department or agency of the Federal Government any information or assistance that the Commission considers necessary to enable the Commission to carry out the requirements of this section. Upon request of the Commission, the head of such department or agency shall furnish such information expeditiously to the Commission.[36]

This provision could potentially raise constitutional issues, particularly if the Commission were to request privileged or classified information. As the Supreme Court has said:

> The President . . . is the "Commander in Chief of the Army and Navy of the United States." U.S. Const., Art. II, § 2. His authority to classify and control access to information bearing on national security . . . flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant. . . . This Court has recognized the Government's "compelling interest" in withholding national security information from unauthorized persons in the course of executive business.... The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief.[37]

The Act attempts to address this issue with the following provision:

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[34] *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 841 (2008).
[35] *See id.* at § 841(b)(1).
[36] *Id.* at § 841(e)(3).
[37] Dep't of Navy v. Egan, 484 U.S. 518, 527 (1988) (citations omitted).

> The appropriate departments or agencies of the Federal Government shall cooperate with the Commission in expeditiously providing to the Commission members and staff appropriate security clearances to the extent possible pursuant to existing procedures and requirements, except that no person shall be provided with access to classified information under this section without the appropriate security clearances.[38]

This provision certainly ameliorates the President's constitutional concern for classified information, but, depending on how it is interpreted, it may not obviate the concern altogether. This provision holds that the Federal Government "shall cooperate" in "expeditiously" providing security clearances "to the extent possible." If this language were read to require the President to issue security clearances where he would otherwise deny them, then this provision—coupled with the Commission's power to demand information from the executive branch[39]—would arguably impinge on the President's power and duty to control the flow of classified information, and thus "inhibit [his] ability . . . to execute his authority as Commander in Chief."[40] Moreover, this section makes no exception for (non-classified) privileged information. Thus, the President's reference to this section in his signing statement probably signals only this: He will interpret this subsection to leave untouched his constitutional executive privilege and his constitutional discretion to control the flow of classified information.

The point is one of principle, and it is the sort of thing that Presidents point out in order to preserve their constitutional prerogatives. But the Subcommittee is probably most interested in how the point would play out on the ground. In practice, the signing statement is unlikely to have any effect on the implementation of this provision. Nothing in this statement suggests that the President will deny the Commission any appropriate security clearances or classified information. Indeed, nothing in the signing statement suggests that he will give anything but complete cooperation to the Commission on Wartime Contracting in Iraq and Afghanistan.

B. Section 846

This section provides increased protection for government contractors from reprisal for disclosure of certain information.[41] Complaints of such reprisals are, as before, to be submitted to an Inspector General in the first instance. But section 846 increases the power of the Inspector General in the handling of such complaints. Under this provision, when the Inspector General submits a report concerning such a complaint, the report triggers an *obligation* in the head of the relevant agency. As amended by

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[38] National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 841(e)(6) (2008).
[39] *See id* at § 841(e)(3) (2008).
[40] Statement on Signing the National Defense Authorization Act for Fiscal Year 2008, 44 WEEKLY COMP. PRES. DOC. 115 (Jan. 28, 2008).
[41] *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 846 (2008).

section 846, the relevant provision provides: "Not later than 30 days after receiving an Inspector General report pursuant to subsection (b), the head of the agency concerned *shall* determine whether there is sufficient basis to conclude that the [complaint is meritorious] and *shall* either issue an order denying relief or *shall*" order the contractor to take one of three possible actions.[42] And if a person fails to comply with such an order, "the head of the agency *shall* file an action for enforcement of such order in ... United States district court."[43]

The President perhaps singled out this provision in part because of this increase in the power of Inspectors General. The Office of Legal Counsel long ago opined that Inspectors General are constitutionally permissible only the extent that they serve "as . . . executive officer[s] subject to the supervision of the agency head and subject to the ultimate control of the Chief Executive Officer."[44] Empowering Inspectors General to compel the action of the head of a department might be thought to unconstitutionally elevate an inferior officer above a principal officer.

And this provision raises another issue as well. To the extent that it could be interpreted to forbid reprisals for the unauthorized disclosure of classified information, this provision would be in significant tension with the principle that "[t]he authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief."[45] As the Office of Legal Counsel has opined in an analogous context, "a congressional enactment would be unconstitutional if it were interpreted to divest the President of his control over national security information in the Executive Branch by vesting lower-ranking personnel in that Branch with a 'right' to furnish such information to a Member of Congress without receiving official authorization to do so."[46] If executive branch personnel cannot be vested with such a right, then government contractors probably cannot either.

Again, however, these constitutional concerns seem somewhat theoretical. After all, under the terms of this section, the head of the agency still appears to have full discretion to issue an order denying relief to someone complaining of such reprisals.[47] So, again, it seems that the presidential signing statement is unlikely to affect the implementation of this provision to any great degree.

C. Section 1079

Section 1079(a) requires certain executive branch officials to provide "any existing intelligence assessment, report, estimate, or legal opinion" to certain congressional committees upon demand. To the extent that these committees may

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[42] 10 U.S.C.S. § 2409(c)(1) (2008) (emphasis added).
[43] 10 U.S.C.S. § 2409(c)(4) (2008) (emphasis added).
[44] *See Memorandum Opinion for the Attorney General Re. Inspector General Legislation*, 1 Op. Off. Legal Counsel 16 (1977). *See also* 5 U.S.C.A. § 3 (1978) ("Each Inspector General shall report to and be under the general supervision of the head of the establishment involved.").
[45] Dep't of Navy v. Egan, 484 U.S. 518, 527 (1988) (citations omitted).
[46] *Access to Classified Information*, 20 Op. Off. Legal Counsel 402 (1996) (internal quotations omitted).
[47] 10 U.S.C.S. § 2409(c)(1) (2008).

demand classified information under this section, it potentially raises the same constitutional concern discussed above.[48] Again, the Supreme Court has made clear that the President has constitutional authority to control the dissemination of classified information.[49] Thus, in certain circumstances, the President might find that this provision would "inhibit [his] ability . . . to execute his authority as Commander in Chief."[50] Likewise, to the extent that congressional committees might demand internal executive branch deliberations under this provision, it might "inhibit the President's ability to carry out his constitutional obligations to take care that the laws be faithfully executed [and] to supervise the executive branch."[51] These concerns are probably what led the President to single out section 1079 in his signing statement.

True, subsection 1079(b) greatly ameliorates these concerns. It provides an exception, if "the President determines that such document or information shall not be provided because the President is asserting a privilege pursuant to the Constitution of the United States."[52] But this provision might not entirely obviate the constitutional concerns, because even the disclosure of information that is not strictly "privileged" might, in some circumstances, impair the President's exercise of his core executive functions.[53]

Again, however, the point is largely theoretical. In practice, the relevant committees will presumably demand only appropriate information under this section, with appropriate solicitude for the President's constitutional authority. Likewise, Congress will presumably respect any reasonably assertion of privilege under subsection 1079(b). If so, no constitutional issue will arise under this section, and the signing statement probably will not affect the implementation of the provision. To be perfectly clear, nothing in this signing statement suggests that the President intends to withhold any relevant and appropriate information whatsoever from the Armed Services Committees.

D. Section 1222

The final section singled out by the President provides:

> No funds appropriated pursuant to an authorization of appropriations in this Act may be obligated or expended . . . (1) [t]o establish any military installation or base for the

[48] See supra Part III-A.

[49] *See* Dep't of Navy v. Egan, 484 U.S. 518, 527 (1988)

[50] Statement on Signing the National Defense Authorization Act for Fiscal Year 2008, 44 WEEKLY COMP. PRES. DOC. 115 (Jan. 28, 2008).

[51] *Id. See also* Memorandum for Robert M. McNamara, Jr., General Counsel, Central Intelligence Agency, from Todd D. Peterson, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Legal Authority to Withhold Information from Congress* at 3 (Sept. 9, 1988) ("application of [statutory] reporting requirements . . . is limited by a constitutional restraint—the executive branch's authority to control the disclosure of information when necessary to preserve the Executive's ability to perform its constitutional responsibilities.").

[52] National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1079(b)(1) (2008).

[53] *See, e.g., Authority of Agency Officials to Prohibit Employees from Providing Information to Congress*, Op. Off. Legal Counsel, 2004 WL 3554702 (2004) (suggesting that even the disclosure of non-privileged information to Congress might, in some circumstances, raise constitutional concerns).

> purpose of providing for the permanent stationing of United States Armed Forces in Iraq [or] (2) [t]o exercise United States control of the oil resources of Iraq.[54]

This provision implicates the relationship between Congress's appropriations power and the President's power as Commander in Chief. Of course, Congress possesses broad power over appropriations,[55] but this power is not unlimited. The power to withhold an appropriation altogether does not necessarily imply the power to appropriate money subject to limitless conditions. For example, Congress probably cannot trench upon the core functions of the executive branch with overly specific spending restrictions.[56] As the Office of Legal Counsel has opined, "Broad as the spending power of the legislative branch undoubtedly is, . . . Congress may not deploy it to accomplish

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[54] National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1222 (2008).

[55] See U.S. Const. Art. I, § 9 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

[56] While the Court has only alluded to this point, *see* United States v. Lovett, 328 U.S. 303, 313 (1946); South Dakota v. Dole, 483 U.S. 203, 207 (1987) ("The spending power is of course not unlimited, but is instead subject to several general restrictions articulated in our cases. . . . [W]e have noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds."), the Executive Branch has taken this position clearly and consistently for more than 70 years, *see* Constitutional Issues Raised by Commerce, Justice and State Appropriations Bill, 2001 WL 34907462 (O.L.C.) ("[I]t is unconstitutional for Congress to place conditions, whether substantive or procedural, on the President's exercise of his constitutional authority."); 20 Op. Off. Legal Counsel 232 (1996) ("While Congress has broad authority to grant, limit, or withhold appropriations, that power may not be used . . . to circumvent the steps required by the Constitution for Congress to enact a law or regulation binding on persons outside the legislative branch."); 20 Op. Off. Legal Counsel 189 (1996) ("The past practice of the Executive branch demonstrates its refusal to comply with unconstitutional spending conditions that trench on core Executive powers."); 19 Op. Off. Legal Counsel 123 (1995) ("[I]t does not matter in this instance that Congress has sought to achieve its objectives through the exercise of its spending power, because the condition it would impose on obligating appropriations is unconstitutional."); 16 Op. Off. Legal Counsel 18, 28 (1992) ("That section 503 was enacted as a condition on the appropriation of money for the State Department does not save it from constitutional infirmity."); 14 Op. Off. Legal Counsel 37, 41 n.3 (1990) ("Nor can section 102(c)(2) be viewed as a legitimate exercise of congressional power over the appropriation of public funds. Congress may not use that power to attach conditions to executive branch appropriations requiring the President to relinquish his constitutional discretion in foreign affairs."); 13 Op. Off. Legal Counsel 258 (1989) ("[T]he fact that Congress appropriates money for the army does not mean that it can constitutionally condition an appropriation on allowing its armed services committees to have tactical control of the armed forces. Nor does it follow from Congress' legislative establishment of executive branch departments and its appropriation of money to pay the salaries of federal officials that Congress can constitutionally condition creation of a department or the funding of an officer's salary on being allowed to appoint the officer."); 4B Op. Off. Legal Counsel 731, 733 (1980) ("It is well established that Congress cannot use its power to appropriate money to circumvent general constitutional limitations on congressional power."); 41 U.S. Op. Att'y Gen. 507, 508 (1960) ("Congress cannot by direct action compel the President to furnish to it information the disclosure of which he considers contrary to the national interest. It cannot achieve this result indirectly by placing a condition upon the expenditure of appropriated funds."); 37 U.S. Op. Att'y Gen. 56, 61 (1933) ("Congress may not, by conditions attached to appropriations, provide for a discharge of the functions of Government in a manner not authorized by the Constitution."). *See also* Symposium, *The Appropriations Power and the Necessary and Proper Clause*, 68 WASH. U. L.Q. 623, 628-29 (1990) (William Barr) ("[The] appropriations power cannot be used to circumvent or intrude on the President's inherent authority.").

unconstitutional ends."[57] Thus, "Congress cannot use the appropriations power to control a Presidential power that is beyond its direct control."[58]

And in particular, Congress arguably may not trench upon the power of the President as Commander in Chief with a spending restriction that amounts to a tactical battlefield decision. Just as Congress cannot make specific, tactical, military decisions by law, it arguably lacks the power to achieve the same result indirectly with a cunningly crafted spending restriction.[59] According to the Office of Legal Counsel: "Congress cannot . . . place impediments on the President's ability to deploy United States forces abroad for purposes he deems vital to the national security.... The fact that ... Congress is placing a condition on the President's exercise of his constitutional authority indirectly, through the appropriations process, rather than as a direct mandate, does not change our conclusion."[60]

Now, it must be said that this last constitutional point is debatable, and many scholars would disagree. My own view is that a spending restriction which amounts to a tactical battlefield order would indeed impermissibly trench upon the President's Commander-in-Chief power. But it is admittedly difficult to find the limit of that principle. Under ordinary circumstances, it might be thought that Congress may forbid spending money on the establishment of permanent military bases abroad or on the control of foreign oil resources. But on the other hand, it is not difficult to imagine military exigencies in which spending money on such things is absolutely essential to our national security. In such circumstances, the President's constitutional point might be well taken indeed.

And the President's signing statement makes no claim about quite how extreme those military exigencies would need to be. The President has not declared this provision unconstitutional on its face, in all circumstances. And he has certainly expressed no intention to spend money in any manner inconsistent with it. It is safe to assume that no President would lightly spend money in the face of such a statutory spending restriction. All the President has done here is flagged a *potential* constitutional concern—one which the facts on the ground in Iraq might never actually present—and signaled that, if necessary, he will interpret the provision in light of this constitutional constraint.

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[57] *Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995*, 20 Op. Off. Legal Counsel 253, 266 (1996).

[58] *Id.* at 267 (internal quotation omitted).

[59] See Reid Skibell, *Separation-of-Powers and the Commander in Chief: Congress's Authority to Override Presidential Decisions in Crisis Situations*, 13 GEO. MASON L. REV. 183, 195 (2004) ("[S]ome scholars have argued that appropriations are an all-or-nothing grant: Congress can decide what to fund, but it cannot use funding as an excuse to dictate how items bought with those funds are utilized. They contend that although Congress provides the money for a tank, it shouldn't necessarily decide where that tank should be located.")

[60] *Constitutional Issues Raised by Commerce, Justice and State Appropriations Bill*, 2001 WL 34907462 (O.L.C.) (2001).

Conclusion

In conclusion, the President's statement upon signing the National Defense Authorization Act is unremarkable in both form and substance. Formally, it merely signals an intent to apply the well-established canon of constitutional avoidance—a canon born of "a just respect for the legislature"[61]—when interpreting the Act. Countless signing statements by many Presidents have taken precisely this form.

Substantively, the statement flags a few provisions of the National Defense Authorization Act that raise a number of potential constitutional issues. But it does not declare any of those provisions unconstitutional. Rather, the President merely states that these constitutional concerns will inform the executive branch's *interpretation* of the Act.

Moreover, for the most part, the constitutional issues identified are both contingent and theoretical. So there is nothing particularly portentous in the President's declaration that "[t]he executive branch shall construe [the Act] in a manner consistent with the constitutional authority of the President."[62] In practice, this signing statement is unlikely to affect substantially the implementation of the National Defense Authorization Act.

[61] *Ex parte Randolph*, 20 F.Cas. 242, 254 (C.C.D.Va. 1833) (No. 11,558) (Marshall, C.J.).
[62] Statement on Signing the National Defense Authorization Act for Fiscal Year 2008, 44 WEEKLY COMP. PRES. DOC. 115 (Jan. 28, 2008).

Testimony of Representatives John F. Tierney and Thomas H. Allen before the House Armed Services Committee, Subcommittee on Oversight and Investigations

The Impact of the Presidential Signing Statement on the Wartime Contracting Commission contained in the Department of Defense's implementation of the Fiscal Year 2008 National Defense Authorization Act

March 11, 2008

We would like to thank Chairman Snyder, Ranking Member Akin, and the Members of the Subcommittee on Oversight and Investigations for accepting our written testimony for the record.

This testimony was prompted by the troubling and extremely vague constitutional assertions contained in the signing statement issued by the President in connection with the National Defense Authorization Act for Fiscal Year 2008 (the "Act"). Specifically, we noted with great dismay and confusion the President's assertion that the establishment of a Wartime Contracting Commission (the "Commission") "purport[s] to impose requirements that could inhibit the President's ability to carry out his constitutional obligations." We commend the Subcommittee in providing leadership in convening this important forum to explore the effect of the President's assertions.

Frankly, we are baffled at the nature and foundation of the President's objection to the establishment of a bipartisan Commission to weed out waste, fraud, and abuse by government contractors carrying out missions in the name of the U.S. people and at their expense. We find it deeply troubling that the President's signing statement suggests that the Administration may hinder the work of this anti-corruption Commission. As a result, we offer this testimony in the hope that the Administration will clarify its intentions and clearly inform U.S. taxpayers that it will fully support the work of this vital Commission

For several years, we have worked hard with our House and Senate colleagues on both sides of the aisle to establish this critical and long-overdue Commission. It received broad bipartisan support in both chambers of Congress. Such widespread support should not be a surprise since the need to protect taxpayers from waste, fraud, and abuse is so clearly in the national interest. Even more important, contractor misconduct can endanger – and, at times, has endangered – our soldiers and their mission.

The Commission, composed of eight members, will be independent and bipartisan. Its experts will study the matters related to government contracting for reconstruction of Iraq and Afghanistan, logistical support of coalition forces operating in Iraq and Afghanistan, and performance of security functions in Iraq and Afghanistan. Thereafter, it will formulate recommendations and report to the President and Congress. With tens of billions spent to date on private contractors in our efforts in Iraq and Afghanistan, surely public policy will be served by a comprehensive review of contracting practices and performance.

We need look no further in our history than the efforts of the Truman Committee during World War II. Senator Truman and his colleagues established credibility and respect for their oversight efforts by prohibiting the committee from becoming a partisan political instrument. More important, however, were the fruits of their labor. They saved American taxpayers an estimated $15 billion dollars by identifying defective weapons systems and other war supplies, and saved countless lives by ensuring that our soldiers were properly equipped when we called on them for battle.

Fast-forward to this new millennium. Standing Congressional committees have recently stepped up to the plate, and they have exposed a magnitude of waste in defense procurement that is truly staggering. We have watched in horror as our soldier-heroes were sent into battle without sufficient body and vehicle armor. And we watched widespread mismanagement of our reconstruction efforts in Iraq and Afghanistan. The total costs of our operations in those two countries now approach $1 trillion.

The need for a neutral, credible, and comprehensive Wartime Contracting Commission to point the way forward is clear. The President's purported objections, however, are not.

The vague objections to § 841, among other provisions, are lumped together into a hodgepodge of purported constitutional objections. The President merely notes that:

> ...[S]ection 841...purport[s] to impose requirements that could inhibit the President's ability to carry out his constitutional obligations to take care that the laws be faithfully executed, to protect national security, to supervise the executive branch, and to execute his authority as Commander in Chief. The executive branch shall construe such provisions in a manner consistent with the constitutional authority of the President.[1]

Since no attempt was made to match this laundry list of objections to purported encroachments on executive authority to the specific provisions of the Act lumped in with Section 841, we will address each argument in turn.

As the President acknowledges in his signing statement, he has an unwavering constitutional obligation to "take Care that the Laws be faithfully executed."[2] The word "Laws" under the Take Care Clause emphatically includes legislation that has been duly enacted, including, of course, provisions passed by both the House of Representatives and Senate and signed by the President. Section 841 of the Defense Authorization Act has obtained such constitutional imprimatur as a "law" of the United States. Therefore, by definition, the President cannot invoke the Take Care clause as a valid objection to the establishment of the Wartime Contracting Commission.

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[1] Signing Statement of President George W. Bush on H.R. 4986, the National Defense Authorization Act for Fiscal Year 2008 (Jan. 28, 2008).
[2] U.S. Const. art. II, § 1.

Therefore, any objection on the President's part may only be grounded in the Constitution itself. And, again, without benefit of a meaningful – much less satisfying – explanation of the objections expressed in his signing statement, we are at a loss as to a colorable constitutional objection to the establishment, composition, or duties of the Wartime Contracting Commission.

This is truly the worst of all worlds. The American people are left with justifiable concerns that the President may not do his part to establish and support this Commission, and, at the same time, are left devoid of any intelligible reasoning or rationale.

Section 842 cannot offend the Appointments Clause.[3] In *Buckley v. Valeo*,[4] the Supreme Court offered an exhaustive analysis of the powers a commission comprised of members appointed by both the executive and legislative branches may constitutionally exercise. *Buckley* states:

> Insofar as the powers confided in the [Federal Election] Commission are essentially of an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees, there can be no question that the Commission as presently constituted may exercise them.[5]

Here, Congress granted the Wartime Contracting Commission only powers of an investigative and informative nature, and conferred no enforcement powers that would run afoul of the Appointments clause. Rather, the Commission is merely charged with reporting, recommendation, and referral duties.

Furthermore, we fail to see how the Commission, with its limited duties, could interfere with the President's ability to "supervise the executive branch." Section 841 does not grant the Commission any powers to hire, fire, or otherwise alter terms of employment for any executive branch employee or officer. It does not invade the province of prosecutorial discretion; rather, it merely grants the Commission with discretion to refer "any violation or potential violation of law" to the Attorney General. The provision requiring the Attorney General to report on the disposition of such referrals is a commonplace, and non-invasive, legislative provision.

Nor is there anything in the Commission's composition or duties that could infringe on the President's powers as Commander-in-Chief.[6] The Commission is not inserted into the chain of command. It moves no armies. It cannot even, without parallel and specific Congressional action, subpoena documents from the executive branch.

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[3] *Id.* at art. II, § 2 (He shall have Power...by and with the Advice and Consent of the Senate, shall appoint...all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law).

[4] 424 U.S. 1 (1976). The Federal Election Commission, at issue in Buckley, was similarly comprised of commissioners chosen, in part, by the President, the Senate, and the House of Representatives.

[5] 424 U.S. at 137.

[6] *See* U.S. Const. art II, § 2.

The same is true for the assertion that the Commission might hinder the President's ability "to protect national security." The suggestions that responsible oversight would hinder United States efforts in wartime are particularly disturbing, especially when there is nothing in this Commission that could be construed to interfere with combat efforts. If history is any guide, the Truman Committee was a huge support for the war effort. By exposing waste, fraud, and abuse during World War II, taxpayer money could be spent more efficiently and the war effort would be strengthened, not weakened.

Credible and constructive oversight of wartime contracting is not only a matter of fiscal responsibility, but a patriotic duty to ensure that government contractors do not compromise our values, waste U.S. taxpayers' money, or endanger our brave men and women in uniform.

It is our sincere hope that the President's signing statement is merely boilerplate rather than an indication that the Administration will not fully support the establishment and work of the Wartime Contracting Commission. On behalf of U.S. taxpayers, we will closely monitor the Administration's actions in the coming days and weeks, and, with like-minded colleagues, will use all Congressional rights and powers at our disposal to both ensure that the American people receive a full accounting of the President's intentions and, at the end of the day, ensure that this Commission is quickly constituted and able to fully conduct its important work.

Again, we would like to thank the Chairman, Ranking Member, and Members of the Subcommittee for the courtesy of accepting this written testimony into the record.

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