

http://writ.news.findlaw.com
/dean/20060113.html

[FILE /includes/writ/writ.news.findlaw.com/includes/breadcrumb.shtml NOT FOUND]



The Problem with Presidential Signing Statements: Their Use and Misuse by the Bush Administration

By [JOHN W. DEAN](#)

Friday, Jan. 13, 2006

Presidential signing statements are old news to anyone who has served in the White House counsel's office. Presidents have long used them to add their two cents when a law passed by Congress has provisions they do not like, yet they are not inclined to veto it. Nixon's statements, for example, often related to spending authorization laws which he felt were excessive and contrary to his fiscal policies.

In this column, I'll take a close look at President Bush's use of signing statements. I find these signing statements are to Bush and Cheney's presidency what steroids were to Arnold [Schwarzenegger's body building](#). Like Schwarzenegger with his steroids, Bush does not deny using his signing statements; does not like talking about using them; and believes that they add muscle.

But like steroids, signing statements ultimately lead to serious trouble.

Relying On Command, Rather Than Persuasion

Phillip Cooper is a leading expert on signing statements. His 2002 book, [By Order of the President: The Use and Abuse of Executive Direct Action](#), assesses the uses and abuses of signing statements by presidents Ronald Reagan, George H.W. Bush and Bill Clinton. Cooper has updated his material in a recent essay for the *Presidential Studies Quarterly*, to encompass the use of signing statements by now-President Bush as well.

By Cooper's count, George W. Bush issued 23 signing statements in 2001; 34 statements in 2002, raising 168 constitutional objections; 27 statements in 2003, raising 142 constitutional challenges, and 23 statements in 2004, raising 175 constitutional criticisms. In total, during his first term Bush raised a remarkable 505 constitutional challenges to various provisions of legislation that became law.

That number may be approaching 600 challenges by now. Yet Bush has not vetoed a single bill, notwithstanding all these claims, in his own signing statements, that they are unconstitutional insofar as they relate to him.

Rather than veto laws passed by Congress, Bush is using his signing statements to effectively nullify them as they relate to the executive branch. These statements, for him, function as directives to executive branch departments and agencies as to how they are to implement the relevant law.

President Bush and the attorneys advising him may also anticipate that the signing statements will help him if and when the relevant laws are construed in court - for federal courts, depending on their views of executive power, may deem such statements relevant to their interpretation of a given law. After all, the law would not have passed had the President decided to veto it, so arguably, his view on what the law meant ought to (within reason) carry some weight for the court interpreting it. This is the argument, anyway.

Bush has quietly been using these statements to bolster presidential powers. It is a calculated, systematic scheme that has gone largely unnoticed (even though these statements are published in the Weekly Compilation of Presidential Documents) until recently, when President Bush's used a signing statement to attempt to nullify the recent, controversial McCain amendment regarding torture, which drew some media attention.

Pumping Up the Bush Presidency With Signing Statements

Generally, Bush's signing statements tend to be brief and very broad, and they seldom cite the authority on which the president is relying for his reading of the law. None has yet been tested in court. But they do appear to be bulking up the powers of the presidency. Here are a few examples:

Suppose a new law requires the President to act in a certain manner - for instance, to report to Congress on how he is dealing with terrorism. Bush's signing statement will flat out reject the law, and state that he will construe the law "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 upshot? It is as if no law had been passed on the matter at all.

Or suppose a new law suggests even the slightest intrusion into the President's undefined "prerogative powers" under Article II of the Constitution, relating to national security, intelligence gathering, or law enforcement. Bush's signing statement will claim that notwithstanding the clear intent of Congress, which has used mandatory language, the provision will be considered as "advisory."

The upshot? It is as if Congress had acted as a mere advisor, with no more formal power than, say, Karl Rove - not as a coordinate and coequal branch of government, which in fact it is.

As Phillip Cooper observes, the President's signing statements are, in some instances, effectively rewriting the laws by reinterpreting how the law will be implemented. Notably, Cooper finds some of Bush's signing statements - and he has the benefit of judging them against his extensive knowledge of other President's signing statements -- "excessive, unhelpful, and needlessly confrontational."

The Constitutional and Practical Problems With Bush's Use of Signing Statements

Given the incredible number of constitutional challenges Bush is issuing to new laws, without vetoing them, his use of signing statements is going to sooner or later put him in an untenable position. And there is a strong argument that it has already put him in a position contrary to Supreme Court precedent, and the Constitution, vis-à-vis the veto power.

Bush is using signing statements like line item vetoes. Yet the Supreme Court has held the line item vetoes are unconstitutional. In 1988, in [Clinton v. New York](#), the High Court said a president had to veto an entire law: Even Congress, with its Line Item Veto Act, could not permit him to veto provisions he might not like.

The Court held the Line Item Veto Act unconstitutional in that it violated the Constitution's Presentment Clause. That Clause says that after a bill has passed both Houses, but "before it become[s] a Law," it must be presented to the President, who "shall sign it" if he approves it, but "return it" - that is, veto the bill, in its entirety-- if he does not.

Following the Court's logic, and the spirit of the Presentment Clause, a president who finds part of a bill unconstitutional, ought to veto the entire bill -- not sign it with reservations in a way that attempts to effectively veto part (and only part) of the bill. Yet that is exactly what Bush is doing. The Presentment Clause makes clear that the veto power is to be used with respect to a bill in its entirety, not in part.

The frequency and the audacity of Bush's use of signing statements are troubling. Enactments by Congress are presumed to be constitutional - as the Justice Department has often reiterated. For example, take what is close to

boilerplate language from [a government brief](#) (selected at random): "It is well-established that Congressional legislation is entitled to a strong presumption of constitutionality. See [United States v. Morrison](#) ('Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt.')."

Bush's use of signing statements thus potentially brings him into conflict with his own Justice Department. The Justice Department is responsible for defending the constitutionality of laws enacted by Congress. What is going to happen when the question at issue is the constitutionality of a provision the President has declared unconstitutional in a signing statement?

Does the President's signing statement overcome the presumption of constitutionality? I doubt it. Will the Department of Justice have a serious conflict of interest? For certain, it will.

Should thus Congress establish its own non-partisan legal division, not unlike the Congressional Reference Service, to protect its interests, since the Department of Justice may have conflicts? It's something to think about.

These are just a few practical and constitutional problems that arise when a president acts as if there is his government, and then there is the Congress' government. Signing statements often ignore the fact the only Congress can create all the departments and agencies of the Executive Branch, and only Congress can fund these operations.

And the power to create and fund is also, by implication, the power to regulate and to oversee. Congress can, to some extent, direct how these agencies will function without infringing on presidential power.

Impact Of Presidential Signing Statements

The immediate impact of signing statements, of course, is felt within the Executive Branch: As I noted, Bush's statements will likely have a direct influence on how that branch's agencies and departments interpret and enforce the law.

It is remarkable that Bush believes he can ignore a law, and protect himself, through a signing statement. Despite the McCain Amendment's clear anti-torture stance, the military may feel free to use torture anyway, based on the President's attempt to use a signing statement to wholly undercut the bill.

This kind of expansive use of a signing statement presents not only Presentment Clause problems, but also clashes with the Constitutional implication that a veto is the President's only and exclusive avenue to prevent a bill's becoming law. The powers of foot-dragging and resistance-by-signing-statement, are not mentioned in the Constitution alongside the veto, after all. Congress wanted to impeach Nixon for impounding money he thought should not be spent. Telling Congress its laws do not apply makes Nixon's impounding look like cooperation with Congress, by comparison.

The longer term impact of signing statements is potentially grave - and is being ignored by the Bush administration. But it cannot be ignored forever. Defiance by Bush of Congressional lawmaking will come back to haunt this President.

Watergate was about abuse of power. Nixon, not unlike Bush, insisted on pushing the powers of the presidency to, and beyond, their limits. But as Nixon headed into his second term with even grander plans than he'd had in the first term, the Congress became concerned. (And for good reason.)

Bush, who has been pushing the envelope on presidential powers, is just beginning to learn what kind of Congressional blowback can result.

First, there are the leaks: People within the Executive branch become troubled by a president's overreaching. When Nixon adopted extreme measures, people within the administration began leaking. The same is now happening to Bush, for there was the leak about the use of torture. And, more recently, there was the leak as to the use of warrantless electronic surveillance on Americans.

Once the leaks start, they continue, and Congressional ire is not far behind. The overwhelming Congressional support for Senator John McCain's torture ban suggests, too, that Congress will not be happy if leaks begin to suggest the President - as his signing statement foreshadows - is already flouting the ban.

In short, Bush's signing statements, which are now going over the top, are going to cause a Congressional reaction. It is inevitable. If Republican lose control of either the House or Senate - and perhaps even if they don't, if the subject is torture or an egregious violation of civil liberties -- then the Bush/Cheney administration will wish it had not issued all those signing statements.

Indeed, the Administration may be eating its words - with Congress holding the plate out, and forcing the unconstitutional verbiage back down. That, in the end, is the only kind of torture Americans ought to countenance.

Interested readers may also want to consult several recent Findlaw columns that have addressed President Bush's use of signing statements. [Edward Lazarus](#) noted Bush's use of a signing statements as an example of his "interpret[ing] away constraints on his power," such as Senator John McCain's amendment prohibiting American forces from engaging in torture and the applications of the Foreign Surveillance Intelligence Act to electronic surveillance of Americans. [Jennifer Van Bergen](#) addressed signing statements in the broader context of the Bush's Administration's embrace of the so-called "unitary executive" concept, the claim that a president totally controls the executive branch and has standing equal to the courts in interpreting the constitution as it relates to his branch. --Ed.

John W. Dean, a FindLaw columnist, is a former counsel to the president. He wishes to thank Professor Phillip J. Cooper, Portland State University, for his research into the use of signing statements by Ronald Reagan, George H.W. Bush, Bill Clinton, and George W. Bush.

[Company](#) | [Privacy Policy](#) | [Disclaimer](#)

Copyright © 1994-2008 FindLaw