The S-Words Mightier than the Pen: Signing Statements as Express Advocacy of Unlawful Action

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The Party said that Oceania had never been in alliance with Eurasia. He, Winston Smith, knew that Oceania had been in alliance with Eurasia as short a time as four years ago. But where did that knowledge exist? Only in his own consciousness, which in any case must soon be annihilated. And if all others accepted the lie which the Party imposed—if all records told the same tale—then the lie passed into history and became truth. "Who controls the past," ran the Party slogan, "controls the future: who controls the present controls the past." And yet the past, though of its nature alterable, never had been altered. Whatever was true now was true from everlasting to everlasting. It was quite simple. All that was needed was an unending series of victories over your own memory. "Reality control," they called it; in Newspeak, "doublethink."[1]

George Orwell's bleaf future, at once so fantastical, now again seems plausible. Congress passes a bill; the president signs the bill into law; the president deems the law (at least a part of it) invalid, or rereads a section of the statute, once thought so clear, now clearly ambiguous. Alas, legislative history and intent cease to be what they were, and yet, they are as they ever have been.

At first blush, this harrowing depiction may overstate the danger posed by the presidential signing statement, but it envisages the perfect storm whereby the power of the present (executive) controls the power of the past (legislative) and future (judicial) to the loss of government accountability and, worse, liberty.[2] This storm has been brewing with fierceness never before seen—more than 750 executive lightning bolts striking constitutional objections upon newly-signed statutes since 2001.[3]

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1. GEORGE ORWELL, NINETEEN EIGHTY-FOUR 35–36 (1949); *cf.* Brad Waites, Note, *Let Me Tell You What You Mean: An Analysis of Presidential Signing Statements*, 21 GA. L. REV. 755, 755 (1987) (introducing the emerging signing statement abuses of the Reagan administration with Humpty Dumpty's assertion "[w]hen *I* use a word, it means just what *I* choose it to mean" (quoting L. CARROLL, ALICE IN WONDERLAND 163 (D. Gray ed. 1971))).

2. *Cf.* Clinton v. City of New York, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) (responding to the dissenting Justices by stating that "[l]iberty is always at stake when one or more of the branches seek to transgress the separation of powers").

3. Charlie Savage, *Bush Challenges Hundreds of Laws*, BOSTON GLOBE, Apr. 30, 2006, at

For many, the legislative process conjures up images of a cartoon bill sitting on the Capitol steps, singing the blues to the tune "I'm just a bill."[4] So prescient in its description of the process, government instructors from the elementary to the college level have utilized this Schoolhouse Rock cartoon to illuminate the lawmaking endeavor. Yet while Bill vividly recounts his trek through the House of Representatives and the Senate, his description of the final phase of his ascendance into law—presidential approval—as a binary decision of approval or veto seems overly simplistic compared to the practice of the current administration.[5]

For the casual bystander, it has been business as usual. However, for the careful observer, presidential approval has appeared anything but normal the past few years.[6] In lieu of the veto, President George W. Bush (hereinafter "Bush II") has made repeated use of the signing statement during this final phase of lawmaking, ostensibly signing the bill into law (a gesture of approval) while issuing statements impugning or ignoring the validity of certain provisions (a sign of disapproval).[7]

Although some form of the signing statement dates back almost to the beginning of the Republic,[8] and the past several presidents have deployed them in one form or

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A1, *available at* http://www.boston.com/news/nation/articles/2006/04/30/bush_challenges_hundreds_of_laws/. By 2007, Savage claimed that the George W. Bush ("Bush II") signing statements had raised constitutional challenges to more than 1,100 statutory sections. CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 230 (2007). *Cf.* Phillip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 PRESIDENTIAL STUD. Q. 515, 521 (2005) (finding the Bush II administration had issued 108 signing statements containing 505 constitutional challenges to provisions of the Bills signed into law during the first term). While not specifying between constitutional, statutory, and other grounds in their final total, the July 2006 data released by Professors Curtis Bradley and Eric Posner indicates that the Bush II administration has challenged more than 800 statutory sections, a number "much higher than any prior president." Curtis A. Bradley & Eric A. Posner, Presidential Signing Statements and Executive Power 14–15 (2006) (unpublished Duke and Chicago Law School paper), *available at* http://ssrn.com/abstract=922400.

4. For a trip down lawmaking memory lane, see the lyrics to the Bill Song at Schoolhouse Rock Site, http://www.school-house-rock.com/Bill.html [hereinafter Bill Song] (last visited Nov. 4, 2007).

5. *Compare id.* ("And if they vote for me on Capitol Hill [w]ell, then I'm off to the White House . . . [a]nd if he signs me, then I'll be a law. . . ."), *with* Christine E. Burgess, Note, *When May a President Refuse to Enforce the Law?*, 72 TEX. L. REV. 631, 631 (1994) ("More sophisticated analysis may include the idea that at times all three branches of the government both make and interpret the law.").

6. Cooper, *supra* note 3, at 516 ("This tour d' force has been carried out in such a systematic and careful fashion that few in Congress, the media, or the scholarly community are aware that anything has happened at all.").

7. *See infra* Part I.C.

8. President James Monroe appears to have issued the first variant of the signing statement in 1821 when, a month after he signed a law ostensibly restricting his discretion in the appointment of military officers, he sent Congress a message detailing his contrary understanding of the statute. CHRISTOPHER N. MAY, PRESIDENTIAL DEFIANCE OF "UNCONSTITUTIONAL LAWS": REVIVING THE

another,[9] criticism has increasingly mounted against the current administration, suggesting the Bush II practice represents a more virulent strain of signing statement.[10] More than a thousand news articles and opinion pieces have pressed the issue.[11] The American Bar Association ("ABA") appointed a special task force in 2006 to investigate the matter, and the resulting report offered a stinging rebuke of the Bush II signing statement method.[12] Subsequent government reports by the non-partisan Congressional Research Service ("CRS") and Government Accountability Office ("GAO") have offered mixed reviews;[13] meanwhile, both houses of Congress have held hearings and introduced bills to curb the President's signing statement power.[14]

ROYAL PREROGATIVE 116 (1998).

9. PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT: THE USE AND ABUSE OF EXECUTIVE DIRECT ACTION 201–09 (2002) (noting that Presidents Eisenhower, Kennedy, Johnson, Carter, Reagan, George H.W. Bush ("Bush I"), and Clinton all issued signing statements objecting to certain legislative provisions); *cf.* Christopher S. Kelley, A Comparative Look at the Constitutional Signing Statement: The Case of Bush and Clinton 2 (Apr. 2003) (unpublished manuscript, on file with author) (recognizing the increased importance of signing statements as a tool for effecting presidential policies in an era of bitterly partisan, divided government and continued "assault on the 'imperial' nature of the presidency" since Watergate).

10. *See infra* Part I.C. *But see* Bradley & Posner, *supra* note 3, at 3 ("The heated nature of this debate is puzzling. Signing Statements provide public information . . . and thus would seem to promote dialogue and accountability."), where the authors found numerous substantive similarities between the Bush II and Clinton signing statement practices. *Id.* at 16-21.

11. A canvass of the LexisNexis news database revealed that, during the period from Jan. 1, 2001, to Sept. 4, 2007, approximately 2566 items (including news stories, editorials, columns, and letters to the editor) contained a reference to presidential signing statements. The following search terms yielded a representative sample from the LexisNexis "News, All" database: "(president! or Bush) w/7 "signing statement!")." The search took place at 22:55 EST, Sept. 4, 2007 [hereinafter Lexis News Search].

12. *See generally* ABA TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE, RECOMMENDATION (2006), http://www.abanet.org/op/signingstatements/ [hereinafter ABA REPORT]. The Report deemed the Bush II signing statement practice an anathema to the Constitution's separation of powers. *See infra* Part I.C.

13. The April 13, 2007 CRS report concluded that the Bush II signing statements "do not have legal force or effect, and have not been utilized to effect the formal nullification of laws" and recommended the remedy of "a robust [Congressional] oversight regime focusing on substantive executive action." CONGRESSIONAL RESEARCH SERVICE, PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS 27 (2007) [hereinafter CRS Report].

Meanwhile, the GAO, while remaining largely agnostic to the debate concerning the legal propriety of signing statements, responded to inquiries by House and Senate committees in a letter documenting Bush II's use of eleven signing statements to challenge 160 provisions in fiscal year 2006 appropriations acts. Letter from the Government Accountability Office to Sen. Robert C. Byrd and Rep. John Conyers, Jr. 1 (June 18, 2007), *available at* http://www.gao.gov/decisions/appro/308603.pdf [hereinafter GAO Report]. After reviewing nineteen of these provisions, the GAO determined that the Bush II administration failed to enforce six. *Id.*

14. *See* H.R. 264, 110th Cong. (2007); S. 3731, 109th Cong. (2006); H.R. 5486, 109th

The signing statement debate, which arguably originated in response to the Reagan administration's strategic use of signing statements to shape statutory interpretation, originally considered their vitality as a form of legislative history.[15] More recently, the debate has shifted to address the constitutionality of signing statements that undermine statutory integrity.[16] Thus, the debate has evolved to address two distinct (though not necessarily mutually exclusive) breeds of signing statement: the interpretive signing statement and the substantive signing statement.[17]

This Note will focus primarily on the latter, joining the debate with the intent to divine the Constitution's dividing line between permissible and impermissible signing statements. Although it will make observations about and utilize examples from the current administration's use of signing statements, this Note will not attempt to make an ultimate assessment of the current or any prior administration.

Part I will trace the historical use and reception of presidential signing statements to provide a better understanding of the current debate regarding the Bush II signing statement practice. This descriptive analysis will provide historical context and demonstrate how the signing statement debate has reached a fever pitch in the past few years, exemplified by an ABA Report tantamount to a cease and desist order for signing statements.

Part II will address the contemporary debate regarding legitimate uses of signing statements and the underlying theories of the president's role in the lawmaking process. This analysis will provide theoretical context for the arguments discussed in this Note, including the recommendations of the ABA and CRS Reports in Part I, the Supreme Court precedent on separations of powers reviewed in Part III, and the model ultimately proposed in Part IV.

Cong. (2006); H.R.J. Res. 87, 109th Cong. (2006); *Hearing Before the Comm. on the Judiciary*, 110th Cong. (2007), *available at* http://judiciary.house.gov/oversight.aspx?ID=267; *Time Change–Presidential Signing Statements: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006), *available at* http://judiciary.senate.gov/hearing.cfm?id=1969. Both H.R. 264 and S. 3731 have stalled in Committee as of the writing of this Note.

15. *See, e.g.*, Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J. ON LEGIS. 363, 363 (1987) (arguing that courts should ignore signing statements in discerning Congressional intent); William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 IND. L.J. 699, 699 (1991) (also arguing courts should ignore signing statements when discerning congressional intent); *cf.* Frank B. Cross, *The Constitutional Legitimacy and Significance of Presidential "Signing Statements"*, 40 ADMIN. L. REV. 209, 224-25 (1988) (defending signing statements as a form of administrative interpretation that courts should treat like agency interpretations, according weight based on the circumstances).

16. *See generally* ABA REPORT, *supra* note 12 (critiquing expansive use of signing statements as a form of presidential review); Timothy E. Flanigan et al., *Separation of Powers, ABA Style: "Signing Statements" Report At Odds with Constitution*, LEGAL BACKGROUNDER, Sept. 22, 2006, *available at* http://www.wlf.org/upload/092206flannigan.pdf (rejecting arguments of the ABA Report); *accord* CRS Report, *supra* note 13; Bradley & Posner, *supra* note 3.

17. *See infra* Part II; *see also infra* note 65 and accompanying text.

Part III will attempt to discern guidance from Supreme Court precedent on similar legislative-executive power struggles. This discussion will not venture down uncharted waters, but will establish the contours of the separation of powers framework wherein the model proposed in Part IV would operate.

Part IV seeks to resolve the ultimate question to this inquiry, one no doubt central to the bills proposed in Congress: at what point do signing statements, a form of expression, so closely resemble unlawful action as to violate the Constitution? Because of the expressive nature of signing statements, First Amendment Free Speech doctrine—specifically, the Clear and Present Danger test—offers unique insight into where a given signing statement sits with regards to the constitutional line.

The model in Part IV not only supposes Congress's ability to challenge suspicious signing statements in court—as pending legislation purports to allow—but also relies on a judiciary competent to separate the "doublespeak" executive power grabs from harmless dicta, ensuring the sort of checks and balances that protect both branches, and, indeed, "We the People,"[18] from the bleak dystopia of Orwell's *1984*.

For the present, this Note shall delve into the forces that control the past, present, and future of the signing statement argument.

I. THE TIMES OF THE SIGN: HISTORICAL USE OF SIGNING STATEMENTS

Although relatively unknown and understudied in the past, prompting one scholar to deem it the "black sheep" of presidential powers,[19] the signing statement has assumed a much greater presence in American politics—on both sides of the political spectrum—since the administration of President Reagan.[20] What was once a "relatively benign and largely ceremonial practice" has arguably become a "systematic and effective weapon to trump congressional action and to influence not only the implementation of law but also its legal interpretation."[21]

This section will briefly examine the historical roots of the signing statement, the revolution of the signing statement under President Reagan, and the controversial, current practice of the Bush II administration.

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18. U.S. CONST. pmbl.

19. Kelley, *supra* note 9, at 2.

20. COOPER, *supra* note 9, at 201; *see* Garber & Wimmer, *supra* note 15, at 366 (noting the Reagan administration's signing statements "[were] both qualitatively and quantitatively different from the traditional presidential statement").

In fairness, the signing statement achieved ungainly status prior to the Reagan administration, but existed as no more than a handful of isolated incidents. COOPER, *supra* note 9, at 201, 209.

21. COOPER, *supra* note 9, at 201. *But see* CRS Report, *supra* note 13, at 24 (viewing the Bush II signing statement practice as more of "a comprehensive strategy to strengthen and expand executive authority generally" than "a de facto line item veto").

A. *From Apologetic Deviations to Common Parlance: the Early Signing Statements*

Although signing statements have traditionally enjoyed a bad reputation in the American political discourse, their actual significance has come a long way from very humble beginnings.

The first interpretive statements recognized as signing statements did not actually accompany the signing of the legislation they concerned. Rather, President Monroe "twice issued statements, long after a bill became law, explaining [to Congress] his understanding of how the legislation should be implemented."[22] Although Congress objected to Monroe's posturing and later implementation, Professor Christopher May characterized the encounters as an interpretive dispute rather than a constitutional struggle.[23]

President Andrew Jackson issued the only two "actual signing statements" in the first half century of the Republic, and President John Tyler's 1842 signing statement questioning the constitutional legitimacy of a statute prompted a select committee of the House of Representatives to "denounce[] his conduct as a 'defacement of the public records and archives' and an 'evil example for the future.'"[24] In the face of such caustic remarks from Congress, the signing statement "remained an anomaly well into the twentieth century," and Presidents Polk, Pierce, and Grant all felt compelled to recognize—almost apologetically—how their use of signing statements grossly deviated from the usual bill-approval practice.[25] Professor May claims that between 1789 and 1900, presidents issued a grand total of twenty-three signing statements.[26]

After World War II, though, presidents began using signing statements at annual rates exceeding this cumulative total.[27] Signing statements spiked under Presidents Ford and Carter, who averaged approximately sixty such statements per year.[28] During this time, constitutional-objection signing statements also surged from approximately one per decade for the period 1789–1945 to one per year during the

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22. MAY, *supra* note 8, at 73, 116.

23. *Id.* at 116. President Monroe issued an explanatory letter to Congress justifying his implementation of the statute in a manner that did not restrict his constitutional authority to select military officers. *Id.* (stating that "[i]f the law imposed such restraint, it would in that case be void. But, according to my judgment, the law imposed none.") (quoting Message of April 13, 1822, *in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 698 (James D. Richardson ed., 1917) (1897)).

24. *Id.* at 73 (quoting H.R. REP. NO. 27-909, at 2, 12 (1842)).

25. *Id.* (endnotes omitted).

26. *See id.*

27. *See id.*

28. *Id.*

Nixon administration.[29] This number rose to more than six per year during the Ford and Carter presidencies.[30]

Notwithstanding the proliferation in the number of signing statements, these post-enactment expressions continued to have relatively little impact.[31] For instance, President Nixon's signing statement opposing provisions in the Voting Rights Act of 1970 (lowering the minimum voting age to eighteen) seemed prescient when the Supreme Court vindicated his constitutional perspective in *Oregon v. Mitchell*.[32] Yet, the Court did not cite the President's signing statement, and the addition of the Twenty-Sixth Amendment to the Constitution in 1971 rendered the argument moot by extending the franchise to eighteen-year-old citizens.[33]

Perhaps President Carter emerges as the "surprise villain"[34] of this Age of Innocence, having issued seven of the twenty signing statements ordering non-enforcement of a statute based upon constitutional grounds between 1789 and 1981 according to one account.[35]

B. *The Reagan Revolution Revitalizes Signing Statements*

As part of a comprehensive policy of reasserting the presidential prerogative in the aftermath of Watergate, the Reagan administration set about issuing signing statements to serve as "a legitimate and authoritative part of . . . legislative history" for courts to rely upon in interpreting statutes.[36] To that end, in 1986, the Reagan

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29. *See id.* at 74–75.

30. *See id.*; *cf.* Bradley & Posner, *supra* note 3, at 14 tbl.1 (suggesting President Carter issued sixteen signing statements making constitutional claims in his four years in office).

31. *See* COOPER, *supra* note 9, at 203 ("Whatever it was before the Reagan years, the presidential signing statement came of age in the 1980s as a tool and perhaps even a weapon of presidential direct action."); *cf.* MAY, *supra* note 8, at 130 ("It was not until the mid-1970s that presidential defiance of allegedly unconstitutional laws began to reach significant proportions.").

32. Oregon v. Mitchell, 400 U.S. 112 (1970); *see* MAY, *supra* note 8, at 90. Although President Nixon believed the statutory provisions violated the Constitution, he directed the Attorney General to "cooperate fully" in enforcing the statute to bring about a court challenge. *Id.* (quoting Statement of June 22, 1970, *in* 1970 PUB. PAPERS 512–13 (1971)).

The *Mitchell* Court found the provisions of the Voting Rights Act violated states' rights as applied to state and local elections. *Mitchell*, 400 U.S. at 117–18.

33. *See* U.S. CONST. amend. XXVI, § 1; LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: RIGHTS, LIBERTIES, AND JUSTICE 8 (6th ed. 2006).

34. J. Randy Beck, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 16 CONST. COMMENT. 419, 429 (1999) (reviewing Christopher N. May's book with same title, *see* May, *supra* note 8).

35. *See* Beck, *supra* note 34, at 429 (citing MAY, *supra* note 8, at 111-15, 124-25, 129). Coincidentally, as of 1999, President Carter also held the record for the most signing statements issued in a single year at ninety-two. MAY, *supra* note 8, at 73.

36. COOPER, *supra* note 9, at 202–03. Ironically, the administration saw the publication of signing statements as a step in *eliminating* the "'confusion' surrounding the interpretation of federal

administration arranged for West Publishing Company to print the statements in the *U.S. Code Congressional and Administrative News* compendium of legislative history materials.[37]

Although he only issued eighteen more signing statements (247 versus 229) in twice the amount of time than his predecessor,[38] most scholars subscribe to the theory that President Reagan revolutionized the art of the post-enactment expression.[39] Most noteworthy, Reagan's eighty-seven constitutional signing statements roughly equaled the total amount of constitutional signing statements issued by all prior presidents combined (ninety-two).[40]

Presidents Bush I and Clinton have followed the example of President Reagan, incorporating signing statements as strategic policy-shaping tools.[41] In fact, both successors outpaced Reagan in issuing constitutional signing statements—particularly Bush I, who issued 116 of them in just four years.[42]

Reagan's signing statement project did not result in total victory, though. In *AMERON, Inc. v. U.S. Army Corps of Engineers*, the New Jersey Federal District Court twice upheld the Competition in Contracting Act against Reagan signing

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statutes." Waites, *supra* note 1, at 757.

37. COOPER, *supra* note 9, at 203 (noting that publication would "improve statutory interpretation by making clear the president's understanding of legislation at the time he signs a bill").

38. MAY, *supra* note 8, at 74 tbl.5.1; *cf.* Christopher S. Kelley, The Unitary Executive and the Presidential Signing Statement 44 (2003) (unpublished Ph.D. dissertation, Miami University), *available at* http://www.ohiolink.edu/etd/view.cgi?miami1057716977 (claiming that Reagan issued 276 signing statements); Bradley & Posner, *supra* note 3, at 14, tbl.1 (attributing 250 to Reagan and 225 to Carter).

These differences likely reflect the "uncertainty about how to categorize [signing] statements" and differing research methods. *See id.* at 13; Kelley, *supra*, at 44.

39. *See* ABA REPORT, *supra* note 12, at 10 ("For the first time, signing statements were viewed as a strategic weapon in a campaign to influence the way legislation was interpreted by the courts and Executive agencies as well as their more traditional use to preserve Presidential prerogatives."); COOPER, *supra* note 9, at 201–03; Garber & Wimmer, *supra* note 15, at 363, 366–68; MAY, *supra* note 8, at 75, 132; Popkin, *supra* note 15, at 702.

40. MAY, *supra* note 8, at 75. The data set of Professors Bradley and Posner differs on Reagan's constitutional objection figure, placing the number at sixty-one. Bradley & Posner, *supra* note 3, at 14 tbl.1.

41. *See* COOPER, *supra* note 9, at 206, 209; *see generally* Kelley, *supra* note 9.

42. MAY, *supra* note 8, at 74, tbl.5.1. Professor May's data did not have complete statistics for President Clinton, who was still in office at the time of publication. However, Professor Kelley's statistics support these same trends: Reagan: 71, Bush I: 146, Clinton: 105. Kelley, *supra* note 38, at 142, tbl.6.1. These figures also indicate that President Clinton issued the most overall signing statements of the three: 394, compared to 276 from President Reagan and 214 from Bush I. *Id.*; *accord* Bradley & Posner, *supra* note 3, at 14, tbl. 1 (Clinton 381, Reagan 250, Bush I 228).

These statistics have prompted Professors Curtis Bradley and Eric Posner in a recent working paper to remark: "If the critics believe that the signing statement itself is constitutionally problematic, then they should not focus on [George W.] Bush. They should complain about the signing statement practices of Clinton, Reagan, Truman, FDR, and even James Monroe." *Id.* at 22.

statements declaring it unconstitutional and precluding enforcement.[43] In an opinion for the second proceedings, Judge Ackerman scolded the president "[for his] position that [he] can say when a law is unconstitutional" and disregard the ruling of a federal court to the contrary.[44]

Courts have continued to tread lightly with presidential signing statements, no doubt to the chagrin of the Reagan legacy.[45]

C. *By George, Still Bushwhacking Congress?*

In reporting that the Bush II administration "ha[d] quietly claimed the authority to disobey more than 750 laws," Charlie Savage's April 30, 2006 article in the *Boston Globe* exposed what some believe had hitherto been a clandestine signing statement operation[46] and rekindled the signing statement debate first stoked during the Reagan administration.[47] The article, which earned Savage a Pulitzer Prize in 2007,[48] ignited "a major national controversy" and sparked immediate conversation in Congress and among the legal community.[49] The media has continued to follow the story.[50]

Perceiving a threat to the Constitution's separation of powers, the American Bar Association commissioned a bi-partisan task force to investigate the signing statement dilemma. The resulting July 2006 report generally "oppose[d], as contrary to the rule of law and our constitutional system of separation of powers," the use of signing statements "stat[ing] the intention to . . . decline to enforce all or part of the

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43. *See* 607 F. Supp. 962, 967, 974 (D.N.J. 1985); 610 F. Supp. 750, 754, 757 (D.N.J. 1985). The Third Circuit affirmed on appeal. AMERON, Inc. v. U.S. Army Corps of Engineers, 809 F.2d 979, 982 (3d Cir. 1986); *see also* COOPER, *supra* note 9, at 225.

44. *AMERON*, 610 F. Supp. at 755 (quoting United States v. Lee, 106 U.S. 196, 220 (1882) ("No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it.")).

45. *See* CRS Report, *supra* note 13, at 21 (observing courts' apparent reluctance to rely upon signing statements "in the manner hoped for by the Reagan administration"); *see also infra* note 126 and accompanying text.

46. Savage, *supra* note 3; *see also supra* note 3 and accompanying text.

47. *See supra* note 15; *supra* Part I.B; *infra* Part II.A.

48. *See* 2007 Pulitzer Prize Winners—National Reporting, http://www.pulitzer.org/year/2007/national-reporting/ (last visited Dec. 20, 2007).

49. ABA REPORT, *supra* note 12, at 2. In fact, Professor Cooper, whom Savage interviewed for *The Boston Globe* article, *see* Savage, *supra* note 3, shed light on the expansive Bush II signing statement practice in 2005. *See* Cooper, *supra* note 3, at 521 (noting more than 500 constitutional objections during the first term).

50. *See* Lexis News Search, *supra* note 11. Of the 2566 news items, only 95, approximately four percent, were printed during the four-year period marking the first term of the Bush II presidency (applying search for January 15, 2001 through January 15, 2005). The remaining 2471 were published between Jan. 15, 2005 to Sept. 4, 2007.

law he has signed."[51] Among its unanimous recommendations, the report supported the prophylactic measures of: (1) greater pre-enactment communication between the President and Congress, (2) decreased executive reliance on the signing statement in favor of greater reliance on the constitutionally-permissible veto, and (3) passage of legislation mandating public reporting from the Executive branch on the use of signing statements and providing for judicial review of signing statement controversies.[52]

Congress responded with the introduction of three bills and a resolution objecting to the President's abusive use of signing statements and seeking to shield congressional prerogatives in a number of ways.[53] The Presidential Signing Statements Act of 2006, which received the most public attention, would have prohibited judicial reliance on signing statements and enabled Congress to seek declaratory relief in federal court whenever a signing statement lodged constitutional objections to statutory language.[54] The fact that a fellow Republican, Pennsylvania Senator Arlen Specter, introduced this legislation during a Republican administration only added to the intrigue.[55]

At the time, Specter, the chairman of the Senate Judiciary Committee, deplored not only the increasing number of presidential signing statements, but also their greater substantive intrusion on the legislative process.[56] Congress needed to pass protective legislation, he said, "to safeguard our constitution."[57]

Vermont Senator Patrick Leahy, then the ranking Democratic committee member, joined Specter in support of the bill and sent the President a letter requesting a more conciliatory approach from the White House.[58] The letter asserted that the Bush II administration had issued more substantive signing statements challenging

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51. ABA REPORT, *supra* note 12, at 5.

52. *Id.*

53. *See generally* sources cited *supra* note 4.

54. *See* S. 3731, 109th Cong. (2006); 152 CONG. REC. S8271, 8271–72 (daily ed. July 26, 2006) (statement of Sen. Specter) [hereinafter Specter Comments].

55. *See, e.g.*, Charlie Savage, *Specter Takes Step to Halt Bush Signing Statements*, BOSTON GLOBE, July 27, 2006, *available at* http://www.boston.com/news/nation/washington/articles/2006/07/27/specter_takes_step_to_halt_bush_signing_statements/; *Sen. Specter Preparing Bill to Sue Bush: Republican Committee Chairman Fighting Against 'Signing Statements'*, MSNBC.COM, July 25, 2006, http://www.msnbc.msn.com/id/14020234.

56. *See* Specter Comments, *supra* note 54, at 8271–72. Particularly alarming for Specter was "that the way the President has used [signing] statements renders the legislative process a virtual nullity." *Id.* at 8271.

57. *Id.* at 8272.

58. 152 CONG. REC. S8404, 8404-06 (daily ed. July 28, 2006) (statement of Sen. Leahy) [hereinafter Leahy Comments] (beseeching the President "to recognize that our Constitution vests 'All legislative Powers' in the Congress").

the constitutionality of statutory provisions (more than 800) "than all prior Presidents in [U.S.] history combined."[59]

Yet, not all of Congress's ire befell the President. Perhaps Congress was to blame for allowing the President to assume greater control over the legislative process. Representative Barney Frank, a Democrat from Massachusetts, lambasted Congress in July 2006 for the "acquiescence of a Republican majority . . ., driven in part by ideological sympathy, [that has allowed the President] to be the decider."[60] Signing statements, he said, "are an assertion of the plebiscitary power in the domestic area . . . the right of the President to do whatever he wants, to take laws that Congress passed and pay attention to parts of them and not to other parts."[61]

The Bush II administration has remained largely indifferent to Congress's concerns, apparently justifying presidential review and signing statements under broad claims of constitutional authority and its conception of the "unitary executive branch."[62]

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59. *Id.* at 8406.

60. 152 CONG. REC. H5212, 5212 (daily ed. July 13, 2006) (statement of Rep. Frank) [hereinafter Frank Comments]. This tacit consent, Frank noted, has manifested itself in numerous ways—*e.g.* signing statements, executive misuse of military authorization, communication breakdowns between Congress and the President—developing into a "plebiscitary democracy" headed by the President. *Id.* at 5212–15.

Senator Leahy echoed these concerns in speculation that the President would undermine reenactment of the Voting Rights Act with a signing statement:

> Mr. President, I say, for shame. To think that you can use a rubberstamp Congress to renege on this country's proud commitment to human rights is another aspect of the lawlessness of this administration. But it will succeed if the Republican-led Congress continues to act as a wholly owned subsidiary of the White House . . . .

Leahy Comments, *supra* note 58, at 8405. These exchanges also reflect inter-branch political and institutional disagreements extending beyond the signing statement debate.

61. Frank Comments, *supra* note 60, at 5214.

62. For example, President Bush's October 4, 2006 signing statement accompanying his approval of the Department of Homeland Security Appropriations Act of 2007 noted eleven separate provisions which "[t]he executive branch [would] construe . . . in a manner consistent with the President's exclusive constitutional authority, as head of the unitary executive branch." Statement on Signing the Department of Homeland Security Appropriations Act, 2007, 2006 U.S.C.C.A.N. S49, 49–53 (Supp. 10 2006), *available at* http://www.whitehouse.gov/news/releases/2006/10/20061004-10.html; *see also* 152 CONG. REC. E1336 (daily ed. June 29, 2006) (statement of Rep. Conyers) (citing Elizabeth Drew, *Power Grab*, N.Y. REV. BOOKS, June 22, 2006, *available at* http://www.nybooks.com/articles/19092 (describing the Bush II administration's unitary executive theory "as no more than a convenient fig leaf for enlarging presidential power")); *cf.* CRS Report, *supra* note 13, at 27 (noting that the "voluminous challenges lodged by President George W. Bush," like those of recent administrations, "attempt to leverage power and control away from Congress by establishing . . . broad assertions of authority as a constitutional norm"); Kelley, *supra* note 38, at 177–81.

II. "WHO CONTROLS THE PAST, CONTROLS THE FUTURE": CONTROLLING THE SIGNING STATEMENT DEBATE ON TWO BATTLEFRONTS

Despite their lengthy roots, signing statements have engendered vigorous debate at least since President Reagan, whom many credit (or discredit) with revolutionizing the practice.[63]

While much of the initial debate focused on the legitimacy of signing statements as sources of legislative history (the interpretive signing statement), scholarship exploring their use as a tool of executive non-enforcement (the substantive signing statement) has increasingly mounted.[64] This bimodal academic discourse reflects the malleable nature of the signing statement and the multifarious applications presidents have found for them; yet, many signing statements raised flags on both sides of the debate.[65]

Although the arguments for and against signing statements in both contexts are not mutually exclusive, this section will engage in that assumption in order to briefly traverse the two battlefields and take notice of the prevailing arguments for and against signing statements.

A. *The Interpretive Signing Statement: Executing a Legislative History to Court Favor*

Some have argued that President Reagan's increased use of the signing statement to guide statutory implementation and court interpretation reflects the increased hostility of presidents towards an overreaching Congress in the aftermath of Watergate, as well as the rise of the administrative state.[66]

Initially, the Reagan administration took criticism for what many perceived as executive effrontery.[67] Those opposed to the use of signing statements as legislative

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63. *See, e.g.*, COOPER, *supra* note 9, at 201; Cross, *supra* note 15, at 209 ("Indeed, President Reagan has transformed the customary 'photo session' of bill signing into a somewhat more substantive episode."); Garber & Wimmer, *supra* note 15, at 363–67.

64. *E.g.*, COOPER, *supra* note 9, at 203–20; Kelley, *supra* note 9, at 3–6.

65. Professor Cooper analyzed the following uses of signing statements: fiscal line-item veto, substantive line-item veto, boundary-setting for questionable statutory provisions (doctrine of constitutional avoidance), providing executive legislative history, pragmatic veto avoidance, and structuring policy implementation. COOPER, *supra* note 9, at 203–13. Professor Kelley classified the signing statement into three categories: constitutional (raising constitutional objection to a statutory provision), political (directing executive branch officers on how to enforce an ambiguous statutory provision), and rhetorical (scoring points with a constituency). Kelley, *supra* note 9, at 3–6; Kelley, *supra* note 38, at 4. This Note has simplified the framework to label signing statements as either interpretive or substantive.

66. COOPER, *supra* note 9, at 202; *cf.* Kelley, *supra* note 38, at 69–82.

67. Popkin, *supra* note 15, at 704 n.18 (describing the negative response in legal publications).

history saw them as an unpalatable intrusion into legislative and judicial spheres, re-crafting public policy in the vein of a legislature and/or donning the judicial robes by attempting to provide the authoritative interpretation of an ambiguous statutory provision.[68] Echoing the spirit of *Youngstown Sheet & Tube v. Sawyer*,[69] they argued "the President is not a legislator" and asserted the president's limited role in the lawmaking process: propose legislation to Congress, veto or approve the bills they present to him, and faithfully execute the laws.[70] These constitutional powers, they claimed, did not include an "independent interpretive power"[71] to declare "2+2=5."[72]

Inherent in the critics' opposition to the signing statement as legislative history lies a fear in upsetting the constitutional balance of power.[73] For all the criticism the judiciary has taken in recent years for relying on legislative history at all,[74] let alone the Court's concern of being perceived as a super-legislature,[75] the president's selective interpretation and creation of legislative history poses the more alarming dilemma of a singular super-legislator[76]—one that also treads heavily on judicial review.[77] Not coincidentally, many of these critics have invoked the wisdom of the *Federalist Papers* to emphasize their concerns.[78]

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68. *See, e.g.*, Garber & Wimmer, *supra* note 15, at 367–69.

> Rather than being limited in scope to the intent of the Executive in signing a bill, these "executive history" statements purport to ascertain the intent of the Legislature in passing the bill. The danger inherent in such a document is that its author will graft ambiguities and exceptions onto an act that was not so encumbered during the legislative process, thus making law in violation of Article I of the Constitution. Moreover, such statements raise the specter of an executive interpreting law, thereby encroaching on the exclusive authority of the federal courts under Article III.

Id. at 367 (footnotes omitted).

69. 343 U.S. 579 (1952). For further discussion on how this and related cases have recognized the president's limited role in the legislative process, see *infra* Part III.

70. *See, e.g.*, Popkin, *supra* note 15, at 709–14; *see also infra* Part III.

71. Popkin, *supra* note 15, at 709–14.

72. *See* ORWELL, *supra* note 1, at 293.

73. *See generally* Garber & Wimmer, *supra* note 15; ABA REPORT, *supra* note 12.

74. *See, e.g.*, Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 617–23 (1991) (Scalia, J., concurring) (criticizing the Court for selectively relying on legislative history). Notwithstanding this criticism, the eight other Justices joined a footnote recognizing the legitimacy of relying on legislative history materials in discerning legislative intent. *Id.* at 610 n.4 ("[C]ommon sense suggests that inquiry benefits from reviewing additional information rather than ignoring it.").

75. *Compare* Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (writing for the majority, Justice William O. Douglas cautioned "[w]e do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions"), *with* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 996 (1992) (Scalia, J., dissenting) ("The Imperial Judiciary lives.").

76. *See* Garber & Wimmer, *supra* note 15, at 378–80; Popkin, *supra* note 15, at 699–700.

77. Garber & Wimmer, *supra* note 15, at 388–92. Although the Executive branch cannot mandate a particular judicial interpretation, the signing statement "purporting to explain legislative

On the other side of the debate, numerous Executive branch officials from the past several administrations have, not surprisingly, defended the president's use of the signing statement to pronounce his understandings of the bill he signs into law.[79] Legal scholars and judges alike have rallied behind this principle in varying degrees. No less than Justice Antonin Scalia, notorious as a justice who does not consider extrinsic legislative history materials at all,[80] has suggested that presidential legislative history should at least be considered in parity with congressional legislative history materials.[81] His dissent in the landmark 2006 case, *Hamdan v. Rumsfeld,* exemplified this philosophy.[82] Interestingly enough, newly-appointed

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intent exerts a powerful influence on the court's perceptions. The authority and prestige of the President infuse the signing statement with a potent aura of veracity." *Id.* at 391.

78. The ABA Report and the Garber & Wimmer article each begin with a passage from James Madison's Federalist No. 47. The ABA Report commences: "The preservation of liberty requires that the three great departments of power should be separate and distinct." ABA REPORT, *supra* note 12, at 2 (quoting THE FEDERALIST NO. 47 (James Madison)). The Garber & Wimmer article augurs: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, . . . may justly be pronounced the very definition of tyranny." Garber & Wimmer, *supra* note 15, at 363 (quoting THE FEDERALIST NO. 47, at 300 (James Madison) (Henry Cabot Lodge ed., 1888)).

79. COOPER, *supra* note 9, at 210 (noting former Attorneys General Edwin Meese III (Reagan) and William Barr (Bush I), among others, as defenders of the legitimacy of using the signing statement to shape legislative history); *cf.* Memorandum from Walter Dellinger, Assistant Attorney General, to Bernard N. Nussbaum, Counsel to the President (Nov. 3, 1993), *in* 48 ARK. L. REV. 333, 333-34 (1994) (addressing arguments for and against the use of signing statements as a tool for recreating legislative history).

80. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 29–37 (1997).

81. *See* Posting of Vivek Krishnamurthy to The Reaction, http://the-reaction.blogspot.com/2006/11/live-blogging-nino-scalia.html (Nov. 10, 2006, 09:05 EST). During a question-and-answer session with students and faculty at the Yale Law School, Justice Scalia provided the following comments:

> [Presidential signing statements are] legislative history, and I don't look at it. But I find it curious that those who do look at legislative history don't look at the most important voice of all in enacting legislation: the president. Why give greater weight to a committee report than to the voice of the President? The Constitution is not clear on what the President's commander in chief power means. Congress clearly can't tell the President to bomb one city or another. But how should we interpret those powers? We should interpret it in a way consistent with our history.

Id.

In response to a question regarding whether the post-enactment nature of the signing statement would diminish its import, Justice Scalia stated: "No. Unless the President believed the text of the statute to have the meaning which he states in the signing statement, the President would have vetoed the statute." *Id.*

82. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2816 & n.5 (2006) (Scalia, J., joined by Thomas and Alito, JJ., dissenting). Justice Scalia criticized the Court majority for construing the Detainee Treatment Act to provide subject matter jurisdiction to hear Hamdan's case. *Id.* at 2810,

Justice Samuel Alito, who joined the Scalia dissent, had advised the Reagan administration on how to effectively use the signing statement when he served in their Office of Legal Counsel.[83]

Some supporters of interpretive signing statements have conceptualized the argument in terms of *Chevron* deference,[84] arguing that signing statements should receive the same degree of qualified deference from the courts as other administrative agency interpretations of law.[85] This standpoint recognizes the historical involvement of the president as an instigator of the legislative process,[86] a role guaranteed by the

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2816-18. He primarily criticized the majority for "greatly exaggerat[ing] the one-sidedness of portions" of the legislative history while "wholly ignor[ing] the President's signing statement, which explicitly set forth *his* understanding that the DTA ousted jurisdiction over pending cases." *Id.* at 2816.

83. *See* Memorandum from Samuel A. Alito, Jr., Office of Legal Counsel, on Using Presidential Signing Statement to Make Fuller Use of the President's Constitutionally Assigned Role in the Process of Enacting Law 1-2, 4 (Feb. 5, 1986), *available at* http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-Alito toLSWG-Feb1986.pdf.

84. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984). Justice John Paul Stevens writing for a unanimous opinion, formulated *Chevron* deference as follows:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . . Rather, if the statute is silent or ambiguous with respect to a specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842–43. Justice Stephen Breyer has recently suggested that the Court treats the *Chevron* doctrine more as "a rule of thumb" than absolute deference to agency interpretations. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 106–07 (2005).

85. Professors Bradley and Posner support this conclusion with comparisons to the *Chevron* Court's accountability and institutional expertise rationales for giving deference to administrative agencies: "In *Chevron*, the Supreme Court used [accountability and institutional expertise] to justify deference to the interpretations of agencies that have formal rule-making or adjudicatory power. Similarly, the president's expertise and accountability provide courts with a reason to give weight to signing statements . . . ." Bradley & Posner, *supra* note 3, at 39. The president's national constituency further augments this perspective. *See id.* at 38; *see also* Cross, *supra* note 15, at 224–34 ("Deference to agencies but not the President is also unrealistic. Presidents historically have controlled the significant policy judgments of the various federal executive agencies.").

86. Cross, *supra* note 15, at 214–15 (noting that presidential participation in lawmaking originated with President Washington). This influence extended to approximately 80 percent of all bills passed by Congress in the 1960s. *Id.* at 215 (citing Samuel P. Huntington, *Congressional Responses to the Twentieth Century*, *in* THE CONGRESS AND AMERICA'S FUTURE 23 (David B. Truman ed., 1965).

However, some would argue that these figures overstate the degree of presidential involvement

constitutional power to "recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient."[87]

Generally, proponents of the legitimate use of interpretive signing statements place great faith in Congress and the courts to prevent the Executive from abusing this administrative function.[88] Yet even proponents of signing statements—who typically envisage a more active role of the president in the legislative process—seem to recognize a boundary, at which point the president crosses the line from executive to super-legislator.[89] Likewise, opponents don't appear to fault the president for scoring political points that stop short of effecting an actual policy change to a given statute, and some concede a limited executive role to create legislative history arising from post-veto bargaining with Congress.[90]

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in the legislative process, especially in the era of divided government, where one political party controls Congress and another controls the White House. By comparison to, say, the British parliamentary system, the American legislative process allows for less control by the Executive. *See* James J. Brudney, *Below the Surface: Comparing Legislative History Usage by The House of Lords and The Supreme Court*, 85 WASH. U. L. REV. 1, 43-46 (2007).

According to Professor Brudney, the British "lawmaking process is basically linear and efficient," wherein "[t]he government conceives of and introduces virtually all public bills." *Id.* at 43. By comparison, the American system's constitutionally-mandated separations of power between the Executive and Legislative branches, combined with weak party discipline, results in "highly decentralized" agenda-setting for legislation with the Executive "far from the exclusive initiating actor and . . . not even . . . the primary influence during periods when Congress and the presidency are controlled by different parties." *Id.* at 45.

87. U.S. CONST. art. II, § 3.

88. Cross, *supra* note 15, at 229 ("If the courts decline or are otherwise unable to check improper presidential actions, the separation of powers game is already lost, and critics of presidential signing statements are vainly trying to hold back the tides."); *see also* CRS Report, *supra* note 13, at 21–24; Bradley & Posner, *supra* note 3, at 38–39, 44.

89. *See, e.g.*, Cross, *supra* note 15, at 224 (cautioning against "post-enactment" statements that "in effect [would] grant a President the functional power to amend a bill already passed by Congress," because the president "may not possess the power unilaterally to modify legislation"); Bradley & Posner, *supra* note 3, at 26 ("[U]nlike with a veto, the president cannot validly use a signing statement to announce that he will not enforce a statute merely because he disagrees with it as a matter of policy.").

The June 2007 GAO Report found that Bush II made signing statements for eleven of the twelve appropriations acts passed by Congress in 2006, objecting to 160 statutory provisions on constitutional grounds. GAO Report, *supra* note 13, at 3.

90. *See, e.g.*, Popkin, *supra* note 15, at 715 (noting, however, that "Judicial reliance on presidential legislative history . . . should be limited to instances in which it comports with legislative history recorded in committee reports and other typical sources of legislative history"); *see also* COOPER, *supra* note 9, at 221–22.

B. *The Substantive Signing Statement: Return of the "Royal Prerogative"?*

The substantive signing statement recently the subject of public attention asserts a power of presidential review not dissimilar from judicial review.[91] Not only does it permit the president to interpret the Constitution, but, absent the judiciary's ability to invalidate constitutionally infirm statutes, it enables the Executive in the alternative to (1) announce his refusal to enforce the statute or (2) to engage in the judicial function of constitutional avoidance.[92] The arguments in favor of such presidential review derive from practical institutional considerations and an expansive interpretation of the president's constitutional powers.

1. The Pragmatism of Presidential Review

The pragmatist's argument for presidential review acknowledges the countervailing efficiency and political interests preventing the president from repeatedly vetoing every bill presenting constitutionally suspect language.[93] Even if

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91. *See* Edwin Meese III, *Perspective on the Authoritativeness of Supreme Court Decision: The Law of the Constitution*, 61 TUL. L. REV. 979, 985 (1987) (noting that "constitutional interpretation" is "the business of all branches of government"); Kelley, *supra* note 38, at 11–40 (noting that President Lincoln, as well as Justice Scalia, among others, have endorsed broad presidential powers to disregard unconstitutional laws). *See also* Beck, *supra* note 34, at 421 (1999). *See generally* Flanigan et al., *supra* note 16.

92. By constitutional avoidance, this Note means acknowledging a potential or actual constitutional principle prohibiting the necessary statutory directive such that the reviewing authority chooses to interpret ambiguous statutory language in a manner to avoid conflict with the Constitution. For a recent and controversial use of the doctrine of constitutional avoidance by the Court, see Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2769 n.15 (2006). This example demonstrates the potential for conflict when the Executive interprets a statute (here, the Detainee Treatment Act) one way and the Court interprets the statute another way. Yet, if the president had the ability to read a statute with rose-colored glasses coterminous with the Court's authority to construe a statute to avoid a constitutional problem, then the president not only assumes the role of super-legislator, but becomes a super-judiciary of one. *Cf.* Garber & Wimmer, *supra* note 15, at 367 (discussing their concerns that signing statements intruded on the judicial function).

Indeed, Professor Cooper marveled at an impressive two-month docket of the "Reagan Court," wherein President Reagan purportedly issued a series of signing statements nullifying or altering portions of appropriations bills, the Central Intelligence Act, Medical Waste Tracking Act, and the Veterans Benefits Bill of 1988 on constitutional grounds. *See* COOPER, *supra* note 9, at 204–06 (stating "[t]his was quite a term of court . . . ."). Applying this analogy to the present, the *Bush II Court* seems to have compiled an equally impressive docket. *See* Cooper, *supra* note 3, at 520 ("George W. Bush has quietly, systematically, and effectively developed the presidential signing statement to regularly revise legislation and pursue its goal of building the unified executive."); GAO Report, *supra* note 13, at 9 (noting that the Bush II administration had failed to enforce six statutory provisions from a sample of nineteen challenged provisions selected from the 160 objected to in 2006 appropriations bills).

93. *See* Neil Kinkopf, *Signing Statements and the President's Authority to Refuse to Enforce*

the president determines that the constitutional infirmities warrant vetoing the bill, congressional override and/or presentment of a similar bill with similar failings puts the onus on the president to once again expend political capital to veto the bill.

This pressure mounts in the current state of legislative affairs, some say, given the omnibus nature of many bills.[94] Vital appropriations measures include miniscule and disparate unrelated provisions, and the president risks losing political traction to stall the government omnibus engine for ostensibly trivial constitutional considerations. Congress appears valiant by coming together on such a vast legislative undertaking; the president appears recalcitrant and petty for coming undone over a constitutionally questionable provision that will likely receive more press as part of the bill's veto than for its own speculative constitutional legitimacy.[95]

2. Exercise of Enumerated Executive Authority

Proponents of presidential review also rely on broad interpretations of the constitutional grants of executive authority, which they deem to confer discretion on the president to decipher and disregard unconstitutional statutory provisions.[96] The argument roughly premises this discretion on the Article II Vesting and Take Care

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the Law, 1 ADVANCE 5, 6 (2007), *available at* http://www.acslaw.org/node/2965; *see also* Douglas W. Kmiec, *OLC's Opinion Writing Functions: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337, 347–48 (1993). Indeed, "the president can avoid a standoff on critical legislation while using the statement to preserve the administration's position on a particular issue and continue negotiations with respect to that problem." COOPER, *supra* note 9, at 221–22.

94. *See, e.g.*, COOPER, *supra* note 9, at 211; Kinkopf, *supra* note 93, at 6.

95. These practical considerations have prompted many recent presidents to request line-item veto authority, notwithstanding the Supreme Court's 1998 ruling in *Clinton v. City of New York*, 524 U.S. 417 (1997), that the line-item veto violated the Constitution's separation of powers. *See infra* Part III.C (discussing the constitutional ramifications of *Clinton v. City of New York*); *see also* COOPER, *supra* note 9, at 204 ("It has long been tempting for presidents to seek a full-blown line item veto power . . . . Presidents who, like Reagan, had served as governors before coming to Washington particularly missed the kind of power they had possessed in the statehouse."). Not all are convinced that line-item veto authority would cure legislative inefficiency considering congressional statutes' inherently less-itemized nature vis-à-vis state legislation. *See* LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 137 (4th ed., rev. 1997).

Yet, perhaps this reasoning explains the Bush II (and prior) administration's practice of issuing substantive signing statements in the same vein as an item veto in lieu of deploying the traditional veto. *See* Cooper, *supra* note 3, at 515–18 (noting that Bush II did not veto a single bill in his first term); *see also* SAVAGE, *supra* note , at 230–31; *infra* note 179 and accompanying text. It would seem that presidents would prefer "to avoid situations where the wheels of government are brought to a complete stop." CHESTER JAMES ANTIEAU, THE EXECUTIVE VETO 57 (1988).

Indeed, some have argued that the signing statement has evolved into the modern day line-item veto. *See* COOPER, *supra* note 9, at 203-04; MAY, *supra* note 8, at 72. Similarities abound, but some key differences remain. *See* Bradley & Posner, *supra* note 3, at 26-27 (outlining key differences between signing statements and line-item vetoes); *infra* Part IV.A.

96. *See* Beck, *supra* note 34, at 421-22.

Clauses[97] and the Article VI Supremacy and Oath Clauses of the Constitution.[98] Accordingly, the president, as a constitutional actor entrusted to faithfully execute the laws—which include the supreme law of the Constitution—should possess the authority to refuse to enforce a statute that contravenes constitutional prerogatives,[99] particularly when it encroaches upon a matter traditionally entrusted to executive discretion (*e.g.*, foreign affairs) or a practice previously struck down by the Supreme Court.[100] This greater power of presidential review necessarily permits the lesser (and comparatively harmless) power of announcing such objections in a signing statement,[101] itself a beneficial communication from the president that fosters transparency and inter-branch comity by forewarning Congress and the public of impending non-compliance by the president.[102]

Detractors object that this argument reads too much from a constitutional framework designed to constrain executive power and distance the fledgling United States government from the abuses of the British monarchy.[103] According to Professor May, the historical underpinnings of this originalist argument predate the American Revolution; rather, the story begins with England's Glorious Revolution of 1688 that resulted in the English Bill of Rights of 1689.[104]

The English Bill of Rights of 1689 "forever stripped from the English Crown" the "royal prerogative" to suspend and/or dispense with statutes on constitutional grounds.[105] Prior to the Glorious Revolution, "[t]he constitutional history of England"

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97. U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); *id.* § 3 ("[The President] shall take Care that the Laws be faithfully executed . . . .").

98. *Id.* art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . ."); *id.* cl. 3 ("[A]ll executive and judicial Officers . . . of the United States . . . , shall be bound by Oath or Affirmation, to support this Constitution . . . .").

99. *See* Kelley, *supra* note 38, at 26–28. *See generally* Beck, *supra* note 34, at 421-22. *But see* MAY, *supra* note 8, at 16–21 (expressing doubts that the Founders intended the Take Care Clause, Vesting Clause, Supremacy Clause, and Oath Clause to authorize such broad powers of presidential review considering their experience with the British Crown's control of the English colonies). *Cf.* Bradley & Posner, *supra* note 3, at 23–24 (describing the historical disagreement among scholars and government officials regarding the president's authority, if any, to disregard unconstitutional statutes).

100. *See* Burgess, *supra* note 5, at 645–46.

101. Although Professors Bradley and Posner reserved judgment on the matter of presidential non-enforcement of unconstitutional statutes, they posited, "If it is proper for presidents to at least sometimes refuse to enforce statutes that they think are unconstitutional, then announcing such an intention in a signing statement cannot be illegal." *See* Bradley & Posner, *supra* note 3, at 25.

102. *See id.* at 25.

103. *See* MAY, *supra* note 8, at 37; Garber & Wimmer, *supra* note 15, at 364–66, 371–73.

104. *See* MAY, *supra* note 8, at 6–8, 11.

105. *Id.* at 3. As Professor May notes, John Locke defined the "royal prerogative" as the Crown's "power to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it," but Professor May generally uses the term more narrowly to

dating to the Middle Ages "[was] in large measure the story of Parliament's efforts to limit the scope of the royal prerogative" and protect the sovereignty of the laws that they passed.[106] According to Professor May, when the American colonies declared independence in 1776, they considered themselves the heirs of the Glorious Revolution[107] and set about crafting a government system with separated powers to prevent the return of the royal prerogative.[108] The best evidence of this design derives from the Framers' debates leading up to their adoption of a qualified, rather than absolute, presidential veto power in Article I of the Constitution.[109]

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refer to the British Crown's former powers of suspension and dispensation. *See id.* at 3–4 (quoting JOHN LOCKE, TWO TREATISES ON GOVERNMENT 375 (Peter Laslett ed., student ed., Cambridge Univ. Press 1988) (1690)). The power of suspension "abrogated a statute across the board"; the power of dispensation "was also known as the *non obstante*" and referred to royally-assigned as-applied exceptions to the rule of law. *Id.* at 4–5.

106. *Id.* at 3. Parliament's ascension took time; it achieved legislative superiority slowly, step by step. *See id.* at 3–8. For instance, "[t]he royal prerogative had once included a power to revoke statutes . . . , but by the late thirteenth century, this was no longer deemed proper . . . ." *Id.* at 4 (noting that King Edward III sought Parliament's acquiescence when he attempted to revoke an act in 1341).

107. *Id.* at 11 (citation omitted).

108. *See id.* at 11–24. Although the Constitution of 1789 and the Bill of Rights that followed in 1791 did not explicitly forbid the president from utilizing the powers of suspension and dispensation, Professor May asserts that delegates at the state ratifying conventions, including future "Great Chief Justice" John Marshall, apparently deemed such prohibitions unnecessary because the Constitution had not restored the royal prerogative. *Id.* at 11, 24–26. Further, he relies on the Framers' rejection of an absolute veto power for the Executive, their approval of a qualified pardon power (as opposed to a power of dispensation), the language of the Take Care Clause and the Vesting Clause, and the implicit placement of the suspension power (with regards to writs of habeus corpus) in the Article I prerogative of Congress. *Id.* at 11–22; *see* U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeus Corpus shall not be *suspended*, unless when in Cases of Rebellion or Invasion the public Safety may require it.") (emphasis added).

109. *See* MAY, *supra* note 8, at 11–15. Professor May notes the American colonists distaste for the "absolute veto that the king and his American governors had exercised over colonial legislation." *Id.* at 11 (endnote omitted). This theme resonated in the first article of the Declaration of Independence, which decried the king for "refus[ing] his assent to laws most wholesome and necessary for the public good." *Id.*

At the time of the American Revolution, only New York and Massachusetts provided their governors with a qualified executive veto, and South Carolina's brief foray with an absolute veto ended in 1776 after only two years of effect. *Id.* at 11–12. By the time of the Constitutional Convention, many participants resisted measures to provide a qualified veto at all, and the Committee of the Whole unanimously rejected future Supreme Court Justice James Wilson's absolute veto proposal on June 4, 1787. *Id.* at 12 (citing 1 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 98–103 (1966)). Indeed, "[t]he forefathers' anticipation of a limited use of the veto demonstrates just how circumscribed the legislative role of the President was to be under article I." Waites, *supra* note 1, at 770 (footnotes omitted).

This history, Professor May writes, suggests that the Framers intended to provide the president with a limited, defensive shield to protect the Executive from encroachments by the Legislative branch. MAY, *supra* note 8, at 13 (citing THE FEDERALIST NO. 73 (Alexander Hamilton)).

Viewed in this light, it would appear that Bush II's expansive use of the signing statement obfuscates concerted efforts by the Executive to usurp the authority of the Legislative and Judicial branches of government, fostering the return of a monarchical decision-maker.[110] This position, taken to its logical extent, would seemingly reject the president's authority to refuse to enforce an unconstitutional statute.[111] At a minimum, this position would embrace a policy of executive restraint akin to judicial restraint, reserving statements of executive non-compliance as a method of last resort.[112]

3. Any Substance to the Signing Statement Debate?

Political interests and criticisms inherently attach to this debate whenever it takes place, making it difficult to find middle ground on the matter.[113] In an August 2006 *Boston Globe* editorial, Professor Laurence Tribe's critique of the ABA Report and signing statement debate recognized the political dimension of this debate.[114] While empathetic with the critique that the Bush II administration "has abused the practice of using signing statements," practical legal considerations prompted Tribe to assert that the ABA Report "barks up a constitutionally barren tree. It's not the statements that are the true source of constitutional difficulty."[115] An April 2007 report by the non-partisan Congressional Research Service and July 2006 working paper by

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Conspicuously, the veto provisions found in Article I permit Congress to override the president's veto by 2/3-votes in both houses of Congress. U.S. CONST. art. I, § 7, cl. 2.

This conception of the veto also comports with Professor Chester Antieau's description of the veto power. *See* ANTIEAU, *supra* note 95, at 6–7 ("The executive veto is a negative aspect of legislation and executives cannot by veto accomplish affirmative legislation. Accordingly, executives cannot use their veto power to affirmatively create legislation different than that enacted by the legislatures."); *see also* Waites, *supra* note 1, at 770 ("Still, the veto is the final arbiter of legislation only when it defeats a bill; it registers disapproval but does not embody a presidential power to modify Congress's final product.").

110. *Cf.* MAY, *supra* note 8, at 11–22. Bush II did not help matters when in April 2006 he referred to himself as "the decider" in response to requests for the resignation of then-Secretary of Defense Donald Rumsfeld. *Bush: 'I'm the decider' on Rumsfeld*, CNN.COM, Apr. 18, 2006, http://www.cnn.com/2006/POLITICS/04/18/rumsfeld/index.html; *see also* Frank Comments, *supra* note 60, at 5212-13 (bemoaning the rise of a "plebiscitary democracy"). *Infra* Part III.

111. Yet Professor May stops just shy of this absolute position by arguing that Executive non-enforcement may be necessary to ensure judicial review—a "test case"—of a questionable statute. *See* MAY, *supra* note 8, at 149.

112. *See id.* at 147-48.

113. *See generally supra* Part I (discussing the historical reaction to signing statements, and the increasingly volatile debate that has emerged since the Reagan administration).

114. Laurence H. Tribe, *'Signing statements' are a Phantom Target*, BOSTON GLOBE, Aug. 9, 2006, at A9 ("It's about time to take the Constitution seriously rather than playing it for whatever partisan advantage its symbols appear to offer.").

115. *Id.*

Professors Curtis Bradley and Eric Posner arrived at a similar conclusion, arguing that Congress and the public have misplaced their focus on inherently harmless signing statements.[116] The CRS Report, as well as Professors Bradley and Posner, justified this conclusion by noting critics' inability to "identif[y] a single instance where the Bush administration followed through on the language in the signing statement and refused to enforce the statute as written."[117]

Nevertheless, the non-partisan GAO sent a letter to Congress in July 2007 detailing six instances among nineteen challenged provisions from fiscal year 2006 appropriation acts where signing statements directly forecasted presidential non-enforcement of the law.[118] Although six instances of executive non-compliance may seem trivial, this number looms large compared to the mere twelve instances of signing statement non-enforcement occurring between 1789 and 1981 that Professor May documented in his 1998 book *Presidential Defiance of "Unconstitutional Laws": Reviving the Royal Prerogative*.[119] Thus, although the GAO sample size was small (examining nineteen provisions of 160 challenged in eleven signing statements to 2006 appropriations acts) and the proffered signing statement rationales varied,[120] the GAO findings suggest that presidential signing statements might deserve closer and continuing scrutiny.

The proposal put forth in this Note remains largely agnostic to the persuasive arguments of Professors Tribe, Bradley, and Posner that signing statements have not assumed undue power. Rather, this Note contemplates a method for judicial resolution, predicting the Constitution's response to signing statements that have done just that. With the Supreme Court a potential player in this dispute—and in this Note, the final arbiter of the separation of powers concerns and/or the justiciability of the matter altogether[121]—the next section will revisit the past of Supreme Court precedent before Section IV ponders the future of legal resolution.

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116. *See* CRS Report, *supra* note 13, at 22-24, 26–27; Bradley & Posner, *supra* note 3, at 44 ("The critics confuse the medium and the message. . . . Like all tools, the signing statement can be used for good or for ill. Confusion about this point is evident in the debate about whether Bush has challenged 'too many' statutory provisions in signing statements, when the appropriate but neglected question is whether Bush's views about executive power are justified.").

117. CRS Report, *supra* note 13, at 24 (quoting Bradley & Posner, *supra* note 3, at 21).

118. GAO Report, *supra* note 13, at 1, 3, 9-10.

119. *See* MAY, *supra* note 8, at 101.

120. *See* GAO Report, *supra* note 13, at 4–10 (attributing three of the examples of non-enforcement to compliance with the Supreme Court's holding in *Chadha v. INS*, 462 U.S. 919 (1983), that the Constitution does not permit legislative vetoes. Claims of presidential authority to supervise the Unitary Executive led to non-enforcement of two statutory provisions, and the claim of Executive authority over law enforcement functions jettisoned one statutory provision).

121. *See infra* Part IV.B.2.a.

III. SIGNS FROM THE COURT: LAWMAKING A "FINELY WROUGHT" PRACTICE

Early on, the Marshall Court recognized the principle that the president could not revise duly enacted law in *Little v. Barreme*.[122] The 1804 case concerned President Adams' interpretation of the "non-intercourse law" to provide jurisdiction for American ship captains to seize ships "bound to or from France."[123] Although the Court acknowledged that the President's "construction [was] much better calculated to give [the law] effect," it recognized that the statute, as the final expression of Congress's legislative will, "exclude[d] a seizure of any vessel not bound to a French port."[124] Thus, it would seem the pragmatic president could not circumvent a bungling Congress.

Despite the dramatic increase in the number of presidential signing statements in the last thirty years, Supreme Court reliance on them has been consistently inconsistent.[125] The Court has cited signing statements approvingly in separation of powers cases like *Bowsher v. Synar*[126] and *United States v. Lopez*,[127] while in *Hamdan v. Rumsfeld*, the majority "conspicuously declined to do so."[128] The Court has also failed to address the constitutionality of substantive signing statements threatening to suspend or dispense with certain statutory provisions.[129] As Senator Specter lamented in July of 2006, "[t]his inconsistency has the unfortunate effect of rendering the interpretation of Federal law unpredictable."[130]

Although the Supreme Court has yet to address the constitutionality of the presidential signing statement and its myriad manifestations head-on, its leading precedents regarding the lawmaking functions delegated by the Constitution have

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122. 6 U.S. (2 Cranch) 170 (1804).

123. *Id.* at 177–78; *see also* CRS Report, *supra* note 13, at 12 ("[T]he [Supreme] Court declared that where Congress has imposed upon an executive officer a valid duty, 'the duty and responsibility grow out of an are subject to the control of the law, and not the direction of the President.'" (quoting Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 610 (1838)).

124. *Little*, 6 U.S. (2 Cranch) at 178.

125. *See* Specter Comments, *supra* note 54, at 8272 (noting that "[t]he Supreme Court's reliance on Presidential signing statements has been sporadic and unpredictable").

126. 478 U.S. 714, 719 n.1 (1986). Yet the CRS Report doubted that the *Bowsher* Court "relied upon [the signing statement] in any determinative degree." CRS Report, *supra* note 13, at 4.

127. 514 U.S. 549, 561 n.3 (1995).

128. Specter Comments, *supra* note 54, at 8272; *see supra* note 82 and accompanying text. Perhaps the Court in *Hamdan* declined to consider the signing statement because it disposed of the case on statutory grounds. *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2786 (2006).

129. For instance, the Court avoided an opportunity to address this matter when it withdrew certiorari in *U.S. Army Corps of Engineers v. AMERON, Inc.*, 488 U.S. 918 (1988). *See supra* Part I.B.

130. Specter Comments, *supra* note 54, at 8272; *cf.* Garber & Wimmer, *supra* note 15, at 389 n.137 ("To date, the courts have considered signing statements in deciding cases, without giving them any special consideration . . . .").

embraced the formalistic, separation of powers formulation of the legislative and executive functions simplified to syllogism by the Schoolhouse Rock cartoon.[131] Taken together, these cases stand for a limited executive role in the formal lawmaking process.

First, in the 1952 case *Youngstown Sheet & Tube Co. v. Sawyer*,[132] the Court responded to the President's unilateral conscription of the steel industry by recognizing the Constitution's limited role for presidents in the formal lawmaking enterprise.[133] Later, the Court extended this diffuse account to bar both the Legislative and Executive branches from acquiescing to the other's attempt to augment their role in the legislative arena. In the 1983 case *INS v. Chadha*,[134] the Court rejected Congress's attempt to wield post-enactment authority over Executive branch enforcement.[135] Fifteen years later in *Clinton v. City of New York*,[136] the Court proscribed the president from manipulating the veto power to assume greater lawmaking authority.[137]

Understanding these developments will assist in measuring the competing signing statement theories advanced by contemporary scholars, as well as the model proposed below. This section will discuss each case in turn.

A. Youngstown Sheet & Tube: *President's Steel Will Defies Constitution*

When President Truman issued an executive order seizing control of the nation's striking steal mills in 1952, he notified Congress of the policy, and Congress did nothing to stop him.[138] Beset by the Korean War and the threat of Communist aggression, the country could hardly endure a stalled engine in the steel industry.[139] Nevertheless, the Supreme Court soundly rejected the President's coup in *Youngstown Sheet & Tube Co. v. Sawyer*, noting: "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."[140]

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131. *See generally* Bill Song *supra* note 4.

132. 343 U.S. 579 (1952).

133. *See generally infra* Part III.A.

134. 462 U.S. 919 (1983).

135. *See infra* Part III.B.

136. 524 U.S. 417 (1998).

137. *See infra* Part III.C.

138. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 583 (1952).

139. *See id.* at 583.

140. *Id.* at 587. The *Youngstown* Court primarily relied on the following constitutional provisions: "*All* legislative Powers herein granted shall be vested in a Congress of the United States . . . ," U.S. CONST. art. I, § 1 (emphasis added); "[Congress shall have the power] [t]o make *all* Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and *all* other Powers vested by this Constitution . . . ," *id.* § 8, cl. 18 (emphasis added); "The executive Power shall be vested in a President of the United States of America," *id.* art. II, § 1, cl. 1; "[The President] shall

The *Youngstown* decision clearly articulated the Constitution's separation of powers as it pertained to lawmaking. The president plays a minimal role, limited to "the recommending of laws he thinks wise and the vetoing of laws he thinks bad."[141] Congress alone could create the laws.[142] Despite justifying the command on public expedience and national security, President Truman's executive order ran afoul of the Constitution because it "d[id] not direct that a congressional policy be executed in a manner prescribed by Congress—it direct[ed] that a presidential policy be executed in a manner prescribed by the President."[143]

Although it did not command a majority of the Court at the time, Justice Robert Jackson's seminal concurrence from *Youngstown* has since provided an essential framework for gauging the validity of unenumerated, or implied, presidential powers.[144] For Justice Jackson, American constitutional governance presented a less compartmentalized endeavor, and the matter of presidential powers demanded a more nuanced consideration vis-à-vis the contemporaneous acts of Congress.[145]

> The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.[146]

Under Justice Jackson's formulation, presidential power reaches its "zenith" "[w]hen the President acts pursuant to an express or implied authorization of Congress" and plummets to "its lowest ebb" when the president acts contrary to Congress's manifest will.[147] In the event of "Congressional inertia" failing to address

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from time to time . . . recommend to [Congress'] Consideration such Measures as he shall judge necessary and expedient . . . [and] he shall take Care that the Laws be faithfully executed . . . ," *id.* § 3.

141. *Youngstown*, 343 U.S. at 587. Note that Justice Jackson reached this same conclusion in his concurrence. *Id.* at 655 (Jackson, J., concurring) ("The Executive, except for recommendation and veto, has no legislative power.").

142. *Id.* at 588 (majority opinion).

143. *Id.*; *cf.* Justice Jackson's determination that "[t]he executive action we have here originates in the individual will of the President and represents an exercise of authority without law." *Id.* at 655 (Jackson, J., concurring).

144. *See* PETER M. SHANE & HAROLD H. BRAFF, SEPARATION OF POWERS LAW: CASES AND MATERIALS 65-83 (2d ed. 2005).

145. *Id.* at 636 (Jackson, J., concurring).

146. *Id.*

147. *Id.* at 635, 637.

a policy matter of public import, and when the president's action thereupon does not prompt the dog to bark, the "actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[148]

Thus, it seems that *Youngstown* presents the following considerations for lawmaking powers: What is the ultimate source of the policy, Congress or the president? What is the nature of that policy, legislative or executive? These inquiries subsume Justice Jackson's framework of presidential power, because if Congress directs the president, by concurrent resolution (implicit authorization) or bill (express authorization once the president signs the bill into law), to carry out a particular legislative policy—in effect, falling into Justice Jackson's first tier of "maximum" presidential power[149]—Congress appropriately serves as the ultimate source of the policy, with the lawmaking function of Congress split from the administrative function of the Executive. However, the president acting alone cannot provide the policy by fiat, no more than he can issue the policy (lawmaking) and demand Congress to enforce it (executive).

B. Chadha*: Congress May Vote, Not Veto*

By the time the Court addressed the constitutionality of the "legislative veto"[150] in *INS v. Chadha*, Congress had utilized the procedure in nigh two hundred statutes covering the entire spectrum of legislative affairs.[151] The president had signed the bills into law with language authorizing Congress (whether by the vote of one house or both houses) unilaterally to assert a revisionist power to the implementation of law in each case.[152] Justice Byron White, who dissented from the Court's holding, perceived the legislative veto as a gesture of inter-branch comity, recognizing Congress's "Hobson's choice: either to refrain from delegating the necessary authority, leaving itself with a hopeless task of writing laws with the requisite specificity to cover endless special circumstances across the entire policy landscape, or in the alternative, to abdicate its law-making function to the Executive branch and independent agencies."[153]

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148. *Id.* at 637.

149. *See id.* at 635.

150. Based on the description of the "one-House veto" provided in *Chadha*, Congress designs the legislation so that at least one House of Congress retains the ability to invalidate the Executive branch's implementation of the statute by passing a resolution impervious to presidential review. *See* INS. v. Chadha, 462 U.S. 919, 924-25, 925 n.2 (1983). The author instead chooses to refer to this procedure as a "legislative veto" to more easily differentiate the mechanism from the veto forms employed by presidents.

151. *Id.* at 967-68 (White, J., dissenting).

152. *See supra* note 150 (describing the *Chadha* Court's description of the legislative veto).

153. *Chadha*, 462 U.S. at 968 (White, J., dissenting).

Notwithstanding the practical appeal of the legislative veto, the Court categorically struck it down as violative of the Constitution.[154] The *Chadha* Court described the lawmaking process contained in Article I, § 7 of the Constitution as a linear progression—a force to "be exercised in accord with a single, finely wrought and exhaustively considered, procedure."[155] With four express exceptions provided in Article I of the Constitution, the Constitution mandated a two-step process for the exercise of Congress's lawmaking powers: first, both houses of Congress had to pass the legislation (the bicameralism requirement); and second, the president had to approve by signing it into law (the presentment requirement).[156] Only initiation of impeachment, conducting impeachment trials, approving executive appointments, and ratifying treaties differed from the norm, with the Constitution specifically entrusting the former solely to the House of Representatives and the latter three to the Senate.[157]

Permitting one House of Congress to supersede the Executive's enforcement of a formally enacted law defied both the bicameralism requirement and the presentment requirement.[158] The *Chadha* Court mused that both houses of Congress could have redressed what they deemed an error in the Executive's implementation of the policy, but "in only one way[:] bicameral passage followed by presentment to the President."[159]

Although he deemed the legislative veto a "convenient shortcut" to the "step-by-step, deliberate and deliberative process" prescribed by the Constitution, Chief Justice Warren Burger, writing for the majority, admonished Congress to resist "[t]he hydraulic pressure . . . to exceed the outer limits of its power, even to accomplish

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154. *Id.* at 959 (majority opinion) ("With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.").

155. *Id.* at 951.

156. *Id.* at 945–51, 955. Of course, Congress could override a president's veto by the re-approval of the bill by two-thirds of both houses. U.S. CONST. art. I, § 7, cl. 2. There are two Presentment Clauses in Article I, § 7: one for bills, the other for resolutions. The Bill Presentment Clause reads: "Every Bill which shall have passed the House of Representatives *and* the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated . . . ." *Id.* (emphasis added). The "Order, Resolution, or Vote" Presentment Clause roughly tracks this design later in the same section. *Id.* cl. 3. The bicameralism requirement inheres from Article I, §§ 1 and 7, which describe the legislative branch and function as a joint venture of the House of Representatives and Senate. *See id.* §§ 1, 7; *Chadha*, 462 U.S. at 948–51.

157. U.S. CONST. art. I, § 2, cl. 5 (noting the House of Representatives' "sole Power of Impeachment"); *id.* § 3, cl. 6 (granting the Senate the "sole Power to try all Impeachments"); *id.* art. II, § 2, cl. 2 (predicating the presidential treaty-making and appointment powers on the "Advice and Consent of the Senate"); *see Chadha*, 462 U.S. at 955.

158. *Chadha*, 462 U.S. at 954–58.

159. *Id.* at 954–55.

desirable objectives."[160] Thus, even with the acquiescence of the president and the imperatives of responsive government, Congress could not tilt the legislative power further in its favor via the legislative veto.

C. Clinton v. City of New York*: Court Pockets Line-Item Veto*

In an attempt to reduce the federal deficit, Congress passed the Line Item Veto Act in 1996, providing the President with a limited ability to "cancel in whole" certain spending and tax benefit provisions.[161] As in *Chadha*, pragmatism could not save the new veto procedure because it departed from the "'finely wrought' procedure commanded by the Constitution."[162] The Constitution would only bear such a departure from the Article I procedures by an Article V constitutional amendment.[163]

The Court recognized important differences between the constitutional veto and the statutory line-item veto: "The constitutional return takes place *before* the bill becomes law; the statutory cancellation occurs *after* the bill becomes law. The constitutional return is of the entire bill; the statutory cancellation is of only a part."[164] Following the formalistic approach of *Chadha*, the Court saw this variation as granting "the President the unilateral power to change the text of duly enacted statutes,"[165] and recognized "[o]ur first President understood the text of the Presentment Clause as requiring that he either 'approve all the parts of a Bill, or reject it in total.'"[166]

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160. *Id.* at 951, 958–59.

161. Clinton v. City of New York, 524 U.S. 417, 436 (1998).

162. *Id.* at 447 (quoting *Chadha*, 462 U.S. at 951).

163. *Id.* at 446, 449.

164. *Id.* at 439.

165. *Id.* at 447. The *Clinton v. City of New York* Court echoed the *Youngstown* inquiry of the policy origin, noting "[t]he [line-item veto] authorizes the President himself to effect the repeal of laws, for *his own policy reasons*, without observing the procedures set out in Article I, § 7." *Id.* at 445 (emphasis added). Further, the Court differentiated the discretionary nature of the line-item veto, which accorded the president sole policy discretion at the moment of presentment, from prior occasions where Congress statutorily mandated the president to take a certain course of action if he determined in his expertise that certain conditions had been met. *Id.* at 442–44 (citing Field v. Clark, 143 U.S. 649 (1892)). The latter, constitutional practice charged the president with a *duty* to suspend—rather than cancel—Congress's policy "contingent upon a condition that did not exist when the Tariff Act was passed." *Id.* at 443 (the Court relied on the difference between duty and discretion in determining the true source of the policy).

166. *Id.* at 440 & n.30 (quoting 33 WRITINGS OF GEORGE WASHINGTON 96 (John C. Fitzpatrick ed., 1940)). The *Clinton v. City of New York* Court also noted that President William Howard Taft, who would become Chief Justice of the Supreme Court, repudiated the idea that the president could exercise a partial veto. *Id.* at 440 n.30 (citing WILLIAM HOWARD TAFT, THE PRESIDENCY: ITS DUTIES, ITS POWERS, ITS OPPORTUNITIES AND ITS LIMITATIONS 11 (1916) ("[The President] has no power to veto part of the bill and allow the rest to become a law.")). The Court also

Congressional authorization of the greater presidential veto power in *Clinton v. City of New York*, like the Executive's acquiescence to the legislative veto in *Chadha*, could not overcome the constitutional mandate.[167] Thus, it appears Justice Jackson's *Youngstown* formulation of "maximum" presidential power—authority enhanced by express congressional delegation—does not suffice for an alteration of the "finely wrought" lawmaking process when it supplants policy discretion for faithful execution.

IV. WHEN SIGNING STATEMENTS PRESENT A "CLEAR AND PRESENT" CONSTITUTIONAL VIOLATION

Vetoing a bill—conduct.

Signing a bill into law—conduct.

Line-item veto—unconstitutional conduct.

Signing a bill into law with a signing statement—conduct and *expression*. But is that expression constitutional if it signals the undoing of specific statutory language?

Both houses of Congress have expressed an interest in this question, as demonstrated by recent bills introduced (1) to provide Congress standing to challenge signing statements and (2) to authorize the courts to disregard them.[168]

Alas, the difficulty posed by the debate over the legitimacy of signing statements arises from the fact that the Constitution delegates lawmaking powers in terms of actions,[169] and any given signing statement intrudes on these active processes, permissibly or not, as extra-constitutional expression.[170] Appropriately, this conduct-expression dynamic prompts revisiting First Amendment principles.

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noted that, historically, English law had followed the same maxim. *Id.* (citing WILLIAM BLACKSTONE, 1 COMMENTARIES *154) ("The crown cannot begin of itself any alterations in the present established laws; but it may approve or disapprove of the alterations suggested and consented to by the two houses.").

167. *See id.* at 445–46 ("The fact that Congress intended such a result is of no moment.").

168. *See* S. 3731, 109th Cong. (2006); *see also* H.R. 264, 110th Cong. (2007); H.R. 5486, 109th Cong. (2006); H.R.J. Res. 87, 109th Cong. (2006).

169. *See* U.S. CONST. art. I, § 7 (describing the elements of the lawmaking process as passage in both houses (bicameralism), presentment to the president, and the president's signature or return).

170. Although one could imagine the president issuing a formal veto orally without a paper record, and the Constitution's express distinction between the functions of approval—"he shall *sign* it"—and disapproval—"he shall *return* it, with his Objections"—suggests the veto could so deviate from formal acts, this matter presents another constitutional question for another day. *Id.* cl. 2 (emphasis added). Meanwhile, although today's signing statement will likely come in the form of a written document appearing in U.S.C.C.A.N., its extra-constitutional nature diminishes the formal component of what otherwise constitutes expression. Perceiving the Constitution to delegate powers of action, this distinction somewhat resembles the actus reus/mens rea distinction in criminal law. For

Before setting down this path, it bears reminder that extra-constitutional does not *a fortiori* connote unconstitutional. The Supreme Court has recognized numerous "implied powers" inherent to each of the branches of government, from Congress's power to establish a national bank[171] to the president's power as Commander-in-Chief to engage in military events without Congress's declaration of war,[172] not to mention the Court's own power of judicial review.[173]

This section will first dissect the delegated constitutional powers in play when the president issues a signing statement. The second part of this section will propose a First Amendment Free Speech model—premised on the *Brandenburg* formulation of the landmark "Clear and Present Danger" test—for assessing the constitutionality of signing statements.

Suggesting a model for judicial resolution of a challenge brought against a signing statement presumes that Congress has Article III standing to bring the claim as a valid "case or controversy."[174] This contention remains dubious, even in the face of proposed legislation purporting to provide such standing.[175] Although it examines the arguments for and against standing, this Note presumes that Congress would have standing in order to lay out the adjudicative model.

A. *Signing Statements Toe Line of Item Veto: the Fig Leaf and the Chisel*

The line-item veto struck down by the Supreme Court in *Clinton v. City of New York*, like an executive eraser, had the functional effect of permanently excising provisions from the statute at the president's discretion.[176] It permitted the president to chisel away from Congress's sculpture. By comparison, even the most malevolent signing statement could not formally accomplish such a result because all relevant portions of the statute "remain[] on the books."[177] The signing statement, at most, places a convenient fig leaf to cover Congress's unmentionables.[178] From a functional

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clarity sake, this Note proceeds on the assumption that a veto constitutes a formal constitutional act and a signing statement, whatever form it may take, constitutes extra-constitutional expression tantamount to varying degrees of conduct.

171. *See* M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

172. *See* The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635 (1862).

173. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

174. *See* U.S. CONST. art. III, § 2, cl. 1; *see also infra* Part IV.B.2.a.

175. *See, e.g.*, COOPER, *supra* note 9, at 222, 277 n.78 (noting the "difficulty of launching a challenge to a signing statement," specifically the standing requirement); Tribe, *supra* note 114.

176. Clinton v. City of New York, 524 U.S. 417, 445–47 (1998).

177. Bradley & Posner, *supra* note 3, at 26.

178. *See* Elizabeth Drew, *Power Grab*, N.Y. REV. BOOKS, June 22, 2006, *available at* http://www.nybooks/articles/19092 (describing the unitary executive theory as "a convenient fig leaf").

Ironically, though, the signing statement exposes Congress's "unmentionables" in plain sight by *mentioning* them. *See* Garber & Wimmer, *supra* note 15, at 366 ("It is, however, unusual for such an

perspective, the Constitution empowered the pen (enactment) to be mightier than s-words (signing statement words).

However, just because a signing statement could not effect an actual, textual change to the statute on the books, this distinction should not categorically rescue the signing statement from the line-item veto's fate.[179] The signing statement has the ability to inflict real, institutional injury by undermining or disregarding the laws Congress passes.[180] Signing statements "can and have been used as line-item vetoes of legislation,"[181] and Congress has little power to overcome them. Congress can always try to pass new legislation to replace the chiseled statute; yet, the president can always threaten to veto or move the fig leaf from one statute to another.[182]

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attempt to be made explicitly and openly; usurpations of constitutional power are most comfortably accomplished in a clandestine manner.").

Nevertheless, many believe that signing statements operate surreptitiously rather than for the sake of transparency. In fact, one scholar has compared the Bush II signing statement practice to Edgar Allen Poe's infamous *Purloined Letter*, "[t]he Bush administration has indeed hidden its bold political and legal actions in plain sight . . . ." Cooper, *supra* note 3, at 516; *see also supra* note 6 and accompanying text. Indeed, "[a]s the public becomes accustomed to hearing White House objections to particular statutory provisions, presidential defiance of those laws may in the end pass unnoticed." MAY, *supra* note 8, at 136. *But see* Bradley & Posner, *supra* note 3, at 3 (discussing how signing statements increase transparency).

This observation would explain the ostensible delay of the mainstream press in recognizing the massive influx of constitutional-objection signing statements appearing during the Bush II administration. *See supra* note 50. "And yet the past, though of its nature alterable, never had been altered. Whatever was true now was true from everlasting to everlasting." ORWELL, *supra* note 1, at 35.

179. Especially if the signing statement has evolved as part of "an underhanded quest for a de facto item veto." *See* MAY, *supra* note 8, at 135, 192 n.52 (quoting H.R. REP. NO. 99–138, at 16 (1985)).

180. *See infra* Part IV.B.2.a.

181. Cooper, *supra* note 3, at 531. Professor Cooper claims that the President has exercised this item veto authority over numerous statutes addressing national security, foreign affairs, and law enforcement in addition to employing affirmative action programs and affecting the presidential appointment power. *Id.* at 524, 526; *accord* GAO Report, *supra* note 13, at 1-10; MAY, *supra* note 8, at 101 (reporting twelve instances of signing statements portending Executive non-enforcement of statutes between 1789 and 1981).

182. *See* Cooper, *supra* note 3, at 518. Professor Cooper described the signing statement as "an excellent device to get around the Congress" because it "leaves Congress with few options to respond unless it is willing to pass entirely new legislation in an effort to retaliate for the president's actions." *Id.* "If Congress does try to retaliate, there is a clear, if perhaps implied, threat of a veto." *Id.*

Although the "fig leaf" of the substantive signing statement seemingly causes less harm than the item veto chisel that permanently mars the statute, Congress conditioned the exercise of the item veto in *Clinton v. City of New York* to certain circumstances. Clinton v. City of New York, 524 U.S. 417, 436 (1998). While, hypothetically, Congress could have redrafted legislation to preclude the item veto, and the Constitution provides that Congress can override the ordinary veto by supermajority two-third votes in both houses, U.S. CONST. art I, § 7, cl. 2, "[c]hanging the wording of a statute simply is not a viable method of counterattack; the legislative process is overly time-

In this sense, interpretive signing statements pose as much of a danger to Congress's institutional power as its substantive brethren by steering the implementation of legislation away from Congress's collective intent and beyond its institutional control.[183] The worry with interpretive signing statements "is that its author will graft ambiguities and exceptions onto an act that was not so encumbered during the legislative process, thus making law in violation of Article I of the Constitution."[184]

As with the substantive signing statement, Congress's likely inability to trump the interpretive signing statement with further legislative action only compounds the problem presented. The president could simply veto Congress's objections.[185] Alas, such is the *raison d'être* for the royal prerogative.[186]

Whether unmaking law with a substantive signing statement or remaking law with an interpretative signing statement, or some combination thereof, such a malleable, extra-constitutional presidential tool[187] demands particularized, contextual review.

Proponents and opponents of signing statements would probably agree that benign signing statements—e.g., of the more traditional press release variety—do not offend the Constitution. Politics of the matter aside, it is unlikely that anyone would chide a president for issuing the following signing statement: "Today, I signed the renewal of the Voting Rights Act." Yet, even most defenders of signing statements would recoil from the prospect of a president signing the same law with a statement refusing to enforce the law because of personal objections to the policy Congress adopted.[188] It would seem that these two hypothetical signing statements, though functionally equivalent, differ substantively. The former, a mere press release, poses absolutely no threat to the integrity of the enacted law; the latter purports to treat as non-law unsavory portions of the law.

As Professor May recognized, the problem with the signing statement arises from the uncertainty it creates for the enforcement of a statute. "[W]hether a

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consuming, and the outcome is often uncertain." Waites, *supra* note 1, at 784–85. Because the president would seemingly have an endless supply of fig leaves for Congress's new statutes and impeachment "is a drastic measure, ill-suited for all but the most extreme encroachments" by the president, "Congress is forced into a passive acceptance of presidential desires." *Id.* at 785.

183. *See* COOPER, *supra* note 9, at 203–13 (discussing how signing statements can be used to guide the implementation of a statute); Cooper, *supra* note 3, at 518 (same); Kelley, *supra* note 9, at 5, 9–10.

184. Garber & Wimmer, *supra* note 15, at 367 (footnote omitted). Notably, these same concerns have animated many of the critiques of the judiciary's power to interpret statutes in recent years. *See, e.g.*, SCALIA, *supra* note 80, at 17–18.

185. *See supra* note 181 and accompanying text.

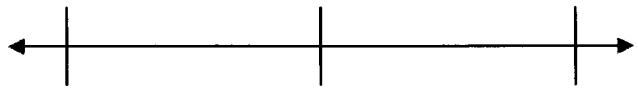
186. *See supra* Part II.B. "At one time, the Crown claimed that the royal prerogative included both the power to make laws and the power to set them aside." MAY, *supra* note 8, at 3.

187. *Cf.* Cooper, *supra* note 3, at 518 ("It is a very flexible tool. . . .").

188. *Cf. supra* note 89.

constitutionally based signing statement will operate as a surgical veto ultimately turns on whether the president decides to honor or to ignore the statutory provision in question."[189] Thus, it appears that a given signing statement falls somewhere on a spectrum of post-enactment executive expression. On one end, certain signing statements represent nothing more than mere expression bearing no consequence on the president's constitutional duty to administer the laws.[190] On the other end, certain signing statements, *qua* specific presidential policy directives, directly presage executive non-enforcement—conduct that would expressly contravene that duty.[191] This latter form—the fig leaf—mirrors the line-item veto chisel substantively, only differing in permanence.

Spectrum of Signing Statements



"Press Release" / Announcement Signing Statement	"2 + 2 = 5" Interpretive Signing Statement	"Fig Leaf" / Item Veto Substantive Statement

From a formal standpoint, defenders of broad signing statement powers are correct to note that the signing statement directly implicates the constitutional power found in the Take Care Clause, while the line-item veto concerned a formal post-enactment lawmaking function contrary to the Article I reservation of "[a]ll legislative powers" in Congress.[192] However, the line-item veto chisel and the signing statement fig leaf both engage in a form of censorial artistic license rejected by this Court's adherence to the "finely wrought" legislative process in *Clinton v. City of New York*.[193] These signing statements transcend expression to become conduct.[194]

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189. MAY, *supra* note 8, at 72. This uncertain *expression* of the signing statement, contrasted with the certain *action* of non-enforcement, has prompted some commentators to dismiss constitutional critiques of the signing statement. *See, e.g.*, CRS Report, *supra* note 13, at 1 ("[N]o constitutional or legal deficiencies adhere to the issuance of such statements in and of themselves. Rather, it appears that the appropriate focus of inquiry . . . is on the . . . substantive executive action taken or forborne with regard to the provisions of law implicated in a presidential signing statement."); Tribe, *supra* note 114; Bradley & Posner, *supra* note 3, at 25–27.

190. *See* U.S. CONST. art. II, § 3 ("he shall take Care that the Laws be faithfully executed").

191. The CRS Report concedes the rare instance where "a President [makes] a direct announcement that he will categorically refuse to enforce a provision he finds troublesome," and notes that signing statements may "nonetheless affect interpretation by virtue of the effect of directives contained therein on actions taken by administering agencies." CRS Report, *supra* note 13, at 22-23.

192. U.S. CONST. art I, § 1.

193. *See supra* Part III.C.

The next portion of this section will propose a model for how to separate the unconstitutional fig leaf from less flagrant signing statements.

B. *Discerning the Clear and Present Danger of Executive Lawmaking*

Finding that *Youngstown* and *Clinton v. City of New York* generally stand for the proposition that the president may not take action tantamount to lawmaking[195] and that substantive signing statements as a subgenre of post-enactment executive announcements drift perilously close to this thin red line,[196] how does one separate the unconstitutional from the benign?

The Clear and Present Danger test.

Why the Clear and Present Danger test? Because, as applied in this Note to the analysis of signing statements, it allows for the appropriate balance of executive discretion and the separation of powers emphasized in *Youngstown*, *Chadha*, and *Clinton v. City of New York*.[197] Before addressing the *why*, it will help to revisit the *what* with an assessment of *how*.

1. The Road to the Unclear Present Danger Test (The What)

Established by Justice Oliver Wendell Holmes in the 1919 seditious pamphlet case *Schenck v. United States*,[198] the Clear and Present Danger Test set a high bar for government regulation of subversive expression: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent."[199] Although the Court temporarily abandoned this test[200] for adjudging the application of the First Amendment's proscription that

194. *See* COOPER, *supra* note 9, at 230 ("Clearly, presidential signing statements have come to be a potent, and a potentially very dangerous, tool of presidential direct *action* . . . .") (emphasis added).

195. *See supra* Part III.

196. *See also supra* Parts II.B, IV.A.

197. *See supra* Part III. By comparison, the less-speech-protective Bad Tendency test, as applied to presidential signing statements, would potentially eviscerate presidential expressive and enactment discretion by setting the bar too low. *Cf.* Abrams *v.* United States, 250 U.S. 616, 621 (1919) (applying the Bad Tendency test despite Justice Holmes' vociferous dissent, noting that "[m]en must be held to have intended, and to be accountable for, the effects which their acts were likely to produce"); *see* GEOFFREY R. STONE ET AL., THE FIRST AMENDMENT 25 n.2, 33 nn.2–3 (2d ed. 2003) (distinguishing between the traditional Bad Tendency test of and the emergence of the more speech-protective Clear and Present Danger test in the aftermath of the *Abrams* Court's use of the Bad Tendency test); *see also* EPSTEIN & WALKER, *supra* note 33, at 219 (same).

198. 249 U.S. 47 (1919).

199. *Id.* at 52 (emphasis added).

200. The Court abandoned the Clear and Present Danger test the same year. *See* Abrams v. United States, 250 U.S. 616 (1919).

"Congress shall make no law . . . abridging the freedom of speech,"[201] the Court had seemingly revived the doctrine by the 1951 case *Dennis v. United States*[202] and distilled the test to its current form in the 1969 case *Brandenburg v. Ohio*.[203] As presently constituted, a clear and present danger warranting governmental regulation

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201. U.S. CONST. amend. I.

202. 341 U.S. 494 (1951) (plurality opinion); *see also* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943) (recognizing the continuing vitality of the Clear and Present Danger test). Professor Bernard Schwartz has argued that the *Dennis* plurality adopted "an alloyed version of the Clear and Present Danger test" that diminished the requirement of an imminent danger stemming from the expression. Bernard Schwartz, *Holmes Versus Hand: Clear and Present Danger or Advocacy of Unlawful Action?*, 1994 SUP. CT. REV. 209, 231–34; *see also Dennis*, 341 U.S. at 510 (articulating the test as "whether the gravity of the 'evil,' discounted by its improbability, justifie[d] such invasion of free speech as is necessary to avoid the danger" (quoting United States v. Dennis, 183 F.2d 201, 207 (2d Cir. 1950))). "[T]he dross was largely the handiwork of Judge Hand, whose lower court version of the Holmes test was adopted by Chief Justice Vinson's opinion." Schwartz, *supra*, at 231. Professor James Simon described the Clear and Present Danger analysis in less enthusiastic terms: "The Vinson opinion made a mockery of the Clear and Present Danger test. Under the Chief Justice's test, once the danger was recognized—communism in this case—the government could do whatever it considered necessary to control it." JAMES F. SIMON, The ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA 199 (1989).

203. 395 U.S. 444 (1969) (per curiam). It bears mentioning that the *Brandenburg* Court did not refer to its test as the Clear and Present Danger test, and Justices Hugo Black and William O. Douglas, in concurring opinions, expressed their dissatisfaction with the misnomer. *See id.* at 449–50 (Black, J., concurring); *id.* at 450–57 (Douglas, J., concurring) (stating that "I see no place in the regime of the First Amendment for any 'clear and present danger' test, whether strict and tight as some would make it, or free-wheeling as the Court in *Dennis* rephrased it"); *cf.* Greer v. Spock, 424 U.S. 828, 863 (1976) (Brennan, J., joined by Marshall, J., dissenting) (criticizing the majority's implementation of a "clear danger test," noting "[t]his Court long ago departed from 'clear and present danger' as a test for limiting free expression").

However, Justice Abe Fortas' initial draft of *Brandenburg* before his resignation and Justice William Brennan's redrafting of the per curiam opinion apparently did frame the decision on the Clear and Present Danger doctrine. *See* Schwartz, *supra* note 202, at 237 & n.156, 240 & n.181 (citing *Brandenburg v. Ohio*, draft opinion of Justice Fortas, April 11, 1969, p.5, Thurgood Marshall Papers, Library of Congress). Further, *Brandenburg*'s incitement-based model suggests an immediacy requirement very similar to Justice Holmes's re-articulation of the Clear and Present Danger standard in his *Abrams* dissent: "intended to produce a clear and *imminent* danger." *See id.* at 239 (quoting *Abrams*, 250 U.S. at 627); *cf.* STONE ET AL., *supra* note 197, at 19–65 (describing the development of these First Amendment doctrines); *see also* EPSTEIN & WALKER, *supra* note 33, at 210–44 (also describing the First Amendment doctrines).

Regardless of whether the Clear and Present Danger test, or some derivative thereof, represents the free speech doctrine *du jour*, its various articulations lend themselves well to a thoughtful consideration of presidential signing statements. For clarity sake, and with apologies to Justices Black and Douglas, this Note will refer to the Court's amalgam of free speech formulations, most recently articulated in the *Brandenburg* model, as the Clear and Present Danger test. This nomenclature most succinctly depicts the countervailing interests at stake in the free speech analysis of signing statements.

consists of express advocacy of immediate unlawful conduct in such circumstances that the law violation must be imminent.[204]

2. Revising the Reach and Remedy of "Clear and Present Danger" (The How)

Granted, the Clear and Present Danger model does not make a seamless transition to the analysis of signing statements. For one, the First Amendment test does not contemplate a constitutional actor exercising his or her delegated authority; it contemplates a private citizen exercising the fundamental right of free speech. A president performing constitutional duties, however reckless, simply does not present the same problem as the private citizens participating in the Ku Klux Klan rally in *Brandenburg*.[205] Further, the doctrine premises unlawful conduct on the basis of a government regulatory decision (usually legislative) and then counterbalances the government interests in regulation against otherwise protected expression that, because of its manner, transcends mere expressive status to become inchoate unlawful conduct.[206] As Chief Justice Fred Vinson postulated for the plurality in *Dennis*:

> [T]he literal problem which is presented is what has been meant by the use of the phrase "clear and present danger" of the utterances bringing about the evil within the power of Congress to punish.
>
> Obviously, the words cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited.[207]

But this proposition—applying the Clear and Present Danger test to signing statements—fits more neatly than "[pounding] square pegs . . . into round holes."[208] Presidential signing statements have the potential to provide all the necessary elements for this type of analysis: (1) express advocacy of (2) unlawful conduct, in such circumstances that (3) the unlawful conduct is likely to occur. Moreover, when these elements come together, the signing statement bears the same transcendent qualities as the incitement contemplated in *Brandenburg*.[209] No longer mere expression, the signing statement would signal unlawful executive intrusion into the

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204. *Brandenburg*, 395 U.S. at 447.

205. *See id.* at 445–46.

206. *See supra* Part IV.B.1 (discussing the development of the Clear and Present Danger doctrine).

207. *Dennis*, 341 U.S. at 509.

208. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 426 F.3d 1162, 1193 (9th Cir. 2005) (Kozinski, J., concurring).

209. *See Brandenburg*, 395 U.S. at 447.

lawmaking process—a substantive evil every bit as worrisome to a Congress virtually powerless to stop it.

To apply the *Brandenburg* formulation of the Clear and Present Danger test to this context requires two significant changes: (1) the unlawful conduct element must originate elsewhere, and (2) the disposition requires a judicial remedy. Consideration of these adjustments will also reveal the myriad benefits of the Clear and Present Danger test for signing statement review. Yet in order for the federal courts to have jurisdiction to hear such a claim, an injured party must have "standing" to bring a valid "case or controversy."[210] Discussion of these matters follows below.

a. Standing Up for the Separation of Powers Case

Perhaps the greatest inhibition to judicial review of signing statements arises from the Article III standing requirement.[211] Standing consists of constitutional and prudential components.[212] Although "not susceptible of precise definition," the constitutional standing requirement generally insists upon: (1) a concrete or imminent, non-conjectural personal injury (2) that is "'fairly' traceable to the challenged" conduct, and (3) "relief from the injury must be 'likely' to follow from a favorable decision."[213] Prudential standing considerations generally entail "the . . . prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that [the complaint] fall within the zone of interests protected by the law invoked."[214] Meanwhile, the Court has recognized that it engages in more "rigorous" review in cases like the hypothetical signing statement dispute that "force [the Court] to decide whether an action taken by one of

210. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 750–51 (1984). This limitation on federal court jurisdiction derives from Article III and prudential concerns about the limited role of courts in the federal system of government. *See* U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority . . . ."); Allen, 468 U.S. at 750-51.

211. Professor Tribe certainly doubts that the standing requirement can be met. *See* Tribe, *supra* note 114 ("Nothing Congress could possibly do seems to me capable of generating a ripe 'case or controversy,' within the meaning of Article III . . . , out of the President's mere issuance of the underlying threat [in a signing statement]. Nor is it clear that Congress could endow anyone with the proper legal interest in a matter, without which Article III's standing to press such a challenge would be absent . . . ."); *see also* CRS Report, *supra* note 13, at 26; MAY, *supra* note 8, at 101–03, 149.

212. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 11 (2004) [hereinafter Elk Grove].

213. *See Allen*, 468 U.S. at 751 (citations omitted); *Elk Grove*, 542 U.S. at 12; *accord* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

214. *Elk Grove*, 542 U.S. at 12 (quoting *Allen*, 468 U.S. at 751); *cf.* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346–47 (1936) (Brandeis, J., concurring) (discussing the Court's "series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it," including the requirement that the complaining party "show that he is injured by [the law's] operation").

the other two branches of the Federal Government was unconstitutional."[215] After all, "the law of [Article] III standing is built on . . . the idea of separation of powers."[216]

On the basis of these standards, who could possibly have standing to sue on behalf of Congress? Does this scenario really present a valid case or controversy?

The former question has only one answer: Congress. The only party feasibly injured by a signing statement—a mere "threat" according to Professor Tribe[217]—is Congress,[218] the institution vested with artistic license by Article I of the Constitution to wield "all legislative Powers."[219] Since the threat, as construed in this Note, teeters on the expression/conduct demarcation line,[220] the constitutional threshold questions become: (1) does the president's fig leaf sufficiently injure Congress by distorting the statute it has created contrary to the Constitution's separation of powers, and (2) would a favorable ruling remedy the injury? On top of these questions, the reviewing court must deal with the following prudential considerations: (1) whether it should adjudicate such a politically volatile matter at all, and (2) what sort of numerical threshold should it impose for Congress to bring suit?

Although the Supreme Court has yet to recognize that members of Congress have generally applicable "institutional" standing[221] to challenge government practices that undermine their legislative authority, it apparently has not closed the door on such standing. In fact, a narrowly divided Court recognized an analogous institutional standing claim for Kansas state legislators in the 1939 case *Coleman v. Miller*,[222] and, notwithstanding its own conclusion to deny a claim of institutional standing almost sixty years later, the *Raines* Court accepted that "*Coleman* stands . . . for the proposition that legislators whose votes would have been sufficient to . . . [affect] a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified."[223]

Raines v. Byrd predated *Clinton v. City of New York* as a challenge to the constitutionality of the Line Item Veto Act.[224] Six congressmen who had opposed the

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215. Raines v. Byrd, 521 U.S. 811, 819-20 (1997).

216. *Allen*, 468 U.S. at 752.

217. *See supra* note 211 and accompanying text.

218. *See infra* notes 235-239 and accompanying text (discussing third parties' inability to challenge signing statements in court).

219. U.S. CONST. art. I, § 1.

220. *See supra* Part IV.A.

221. "Institutional" standing suggests that members of a group have suffered an institutional injury as opposed to the usual standing prerequisite of a personal injury. *See* Raines v. Byrd, 521 U.S. 811, 821 (1997) ("[T]he injury claimed by the Members of Congress here is not claimed in any private capacity but solely because they are Members of Congress.").

222. 307 U.S. 433, 446 (1939).

223. *Raines*, 521 U.S. at 823.

224. *Id.* at 813–14.

legislation brought the suit asserting an institutional injury to the integrity of Congress's legislative votes in lieu of the line-item veto authority the Act granted the President.[225] Chief Justice William Rehnquist, writing for the majority, distinguished the facts of the case from the circumstances in *Coleman* in dismissing the congressmen's claim for lack of standing.[226] In particular, the *Raines* Court found that the Line Item Veto Act, at least absent the President's actual use of the line-item veto, did not effect the institutional injury of vote nullification because it had not yet altered the congressional voting process.[227] The Act had not annulled the votes of these congressmen on any matter—rather, they had simply voted against the Act's passage and failed—and the item veto would not necessarily affect future legislative votes, including votes to repeal the Act.[228] Thus, the Court deemed the alleged threat to vote integrity to be a speculative injury in that case.[229]

By contrast, the state senators in *Coleman*—whose votes against endorsement of a federal constitutional amendment would have defeated the state's ratification under Article V of the Constitution—suffered the concrete institutional injury of vote nullification when the Lieutenant Governor cast a tie-breaking vote not contemplated by Article V's amendment procedure.[230] The executive action directly impaired the

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225. *Id.* at 814, 825.

226. *Id.* at 823–30.

227. *Id.*

228. *Id.* at 824, 829. The Court paid particular attention to the fact that Congress was not challenging an actual use of the item veto and that the Act had not disrupted the legislative process.

> [The Congress Members] have not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated. In the vote on the Act, their votes were given full effect. They simply lost that vote [resulting in the passage of the Line Item Veto Act]. Nor can they allege that the Act will nullify their votes in the future in the same way that the votes of the *Coleman* legislators had been nullified. In the future, a majority of Senators and Congressmen can pass or reject appropriations bills; the Act has no effect on this process. In addition, a majority of Senators and Congressmen can vote to repeal the Act, or to exempt a given appropriations bill (or a given provision in an appropriations bill) from the Act; again, the Act has no effect on this process.

Id. at 824 (footnote omitted). Justices David Souter and Ruth Bader Ginsburg, who concurred in the judgment, relied on the availability of a private suit, which they deemed preferable to an inter-branch dispute, in denying the claim. *See id.* at 834–35 (Souter, J., joined by Ginsburg, J., concurring in the judgment).

Yet, according to the data in Professor May's 1998 study, this reliance may have been misplaced. Unilateral executive actions have often hindered the ability of private parties to bring lawsuits. *See* MAY, *supra* note 8, at 115–16, 149; *infra* notes 234–238 and accompanying text.

229. *Raines*, 521 U.S. at 824–29. "[W]e think [the Congress Members'] argument pulls *Coleman* too far from its moorings." *Id.* at 825. "There is a vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power that is alleged here." *Id.* at 826.

230. *Id.* at 822 (distinguishing the facts from *Coleman*). Article V of the Constitution premises one of the two amendment processes on "Application of the *Legislatures* of two thirds of

"effectiveness" of the *Coleman* legislators' votes by reversing the natural legislative outcome.[231]

Between the two poles, one could argue that the signing statement review proposed herein more closely aligns with the narrow standing grounds recognized in *Coleman*. Signing statements have the potential to temporarily nullify all legislative action at the pleasure of the Executive branch.[232] Although it would not change the statutory text on the books, as an executive policy directive, the signing statement would undermine the effectiveness of Congress's prior approval of the statute and could forestall all future legislative attempts at statutory remediation: extension, clarification, alteration, exemption, repeal, etc.[233] The president would not even have to issue a subsequent signing statement in order to continue the nullifying effect of the previous signing statement. These dire consequences, pursuant to a policy directive to disregard part of a statute, reflect the actual institutional harms undermining the rule of law generally and nullifying Congress members' votes to pass the legislation in particular.

Critics, with good reason, might argue that this outcome describes a speculative injury no different than that encountered by the threat of the line-item veto because the injury would depend upon a president's action to enforce.[234] However, the "fig leaf" signing statement contemplated in this Note, which would essentially effect an irreversible line-item veto by executive order, no longer presents a speculative injury. Unlike the circumstances in *Raines*, where the threat of a line-item veto had not materialized and did not compromise a prior legislative process, this signing statement exceeds a mere threat by setting in motion the undoing of the legislative process altogether.

Further, the inability of third parties to bring suit to challenge the executive maneuver in many cases further supports Congress's claim for standing. In his 1998 book, Professor May catalogued a number of instances where presidents' non-compliance with statutes insulated the statutory debate from judicial review.[235] Of the twelve signing statements pronouncing executive non-enforcement between 1789 and 1981, Professor May reported that seven of these substantive signing statements

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the several States." U.S. CONST. art. V (emphasis added).

231. *See* Coleman v. Miller, 307 U.S. 433, 438–46 (1939).

232. *See generally* GAO Report, *supra* note 13, at 1–10; May, *supra* note 8, at 101; *supra* Parts II.B, IV.A.

233. *See supra* Part IV.A. Although one could argue the transient nature of the signing statement diminishes the argument that Congress has suffered a concrete injury of vote nullification, the fact that Congress would remain powerless to undo the non-enforcement signing statement order supports such a finding because its vote ceases to have legal effect vis-à-vis the challenged statutory provision.

234. Professors Tribe, Bradley, and Posner might very well make this argument. *See generally* Tribe, *supra* note 114; Bradley & Posner, *supra* note 3, at 1-5.

235. *See* MAY, *supra* note 8, at 115–17, 149.

precluded judicial review.[236] On only two occasions did non-enforcement allow for judicial review.[237] Part of the problem stems from the fact that not all statutory provisions inure to the benefit of third parties,[238] so executive alterations would not always result in an injured private party. If Congress cannot sue for a vindication of its constitutional role as the lawmaking body, and third parties cannot intervene to protect their own legal interests, then presidents can intrude on the formal lawmaking function without reproach.[239]

Confronted with this uncertainty, Congress could attempt to satisfy the Article III "case or controversy" requirement with legislation granting itself standing to sue (e.g., S. 3731). Last term, a divided Court in *Massachusetts v. EPA* suggested that Congress could statutorily establish constitutional standing so long as it identified a particularized injury and the class of persons entitled to sue.[240] However, it remains uncertain whether this pronouncement explicitly overruled the Court's previous contrary holding in *Lujan v. Defenders of Wildlife*.[241] Consequently, the extent of the *Massachusetts v. EPA* ruling remains as problematic as the *Coleman* rule, and even if Congress attempted to pass such legislation, they would almost certainly encounter a presidential veto.[242]

Presuming Congress can satisfy the burden of showing a concrete personal injury, this model for signing statement review would adequately relieve Congress's claim—and vindicate statutory integrity in the rule of law—via declaratory relief.[243] With both prongs of the constitutional standing requirement satisfied, only prudential considerations stand in the way of Congress's declaratory relief.

The vote nullification theory of *Coleman*, as illuminated by *Raines*, pertains to an undefined group of legislators whose combined votes would have constituted a

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236. *Id.* at 115-16.

237. *Id.*

238. For example, statutory provisions requiring Executive branch agencies to make reports to Congress on various matters do not affect third parties. Of the six provisions not enforced following a signing statement listed in the GAO Report, two imposed such reporting requirements on the Department of Defense. *See* GAO Report, *supra* note 13, at 10.

239. This consideration appears to explain Professor May's argument that the president should exercise executive restraint, utilizing executive defiance only where necessary for judicial review. *See* MAY, *supra* note 8, at 147–49.

240. 127 S.Ct. 1438, 1453 (2007) ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before. . . . Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." (citations and internal quotation marks omitted)).

241. 504 U.S. 555, 577–78 (1992) (suggesting that Congress could not establish constitutional standing premised upon an injury to generalized public rights).

242. The veto threat looms large over the legislation proposed by Congress in 2006 to limit presidential signing statement power. However, Congress may never encounter this threat, as the high-profile proposed legislation has stalled in committee, suggesting that the legislative measures were more symbolic than practical.

243. *See infra* Part IV.B.2.c.

specific legislative outcome but for the acts of the defendant that rendered their votes nugatory.[244] The Court has not clarified the minimum number of legislators that need to bring suit in order to have standing, though one could fairly speculate that the reviewing court's prudential standing concerns would decrease as the number of Congress members challenging the signing statement increased.[245] One can imagine that Congress might impose its own threshold for the minimum number of members to bring a suit challenging the constitutionality of signing statements.

Based on the *Coleman* and *Raines* rationale, it appears that Congress members who voted in favor of the enacted statute would have a stronger case for standing than members who voted against the legislation, for, although both parties would have the institutional interests of Congress at heart, only the approving members would suffer the personalized injury of vote nullification as a consequence of the signing statement. Finding an injury to non-approving members that voted against a bill would seemingly run afoul of the *Allen* Court's general rejection of permitting litigants to bring a case on behalf of other injured parties.[246]

Meanwhile, presuming Congress meets the constitutional standing requirements, *Raines* suggests that Congress could diminish, if not eliminate, prudential standing considerations by passing legislation (e.g., S. 3731) granting itself standing to bring signing statement claims.[247]

Notwithstanding these arguments in favor of standing, the Article III and prudential standing limitations present a significant roadblock to the applicability of any model for signing statement review.[248]

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244. *See* Raines v Byrd, 521 U.S. 811, 823 (1997).

245. This speculation follows from the Court's concern about unnecessarily taking a case that would increase inter-branch tension. *See id.* at 829 ("We attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit."). However, a single Congress member could argue in favor of standing that the signing statement undermines the majority votes of both houses *and* the president's approval, and supplement that point with the policy argument that Congress should not have to pass an act twice for it to have effect. Granted, one might imagine that political pressures would prevent a rogue Congress member from challenging a signing statement on Congress's dime, especially in light of the detrimental effect such a decision might have on the standing argument and inter-branch relations with the Executive and Judicial branches.

246. *See* Allen v. Wright, 468 U.S. 737, 751 (1984).

247. *See Raines*, 521 U.S. at 820 n.3 ("We acknowledge, though, that Congress's decision to grant a particular plaintiff the right to challenge an Act's constitutionality . . . eliminates any prudential standing limitations and significantly lessens the risk of unwanted conflict with the Legislative Branch when that plaintiff brings suit.") (citations omitted); *accord* Fed. Election Comm'n v. Akins, 524 U.S. 11, 20 (1998). Granted, review of the constitutionality of a statute differs from review of the constitutionality of a signing statement, but if Congress passed legislation granting itself standing, the president would have to sign it for it to become law, thereby tacitly consenting to Congress's standing the same way Congress consents in the *Raines* footnote.

248. For a brief description of federal courts' reluctance to recognize Congressmembers' standing to challenge executive authority, *see* SHANE & BRUFF, *supra* note 144, at 111 n.5. Of the

b. Finding the Fig Leaf: the Unlawful Conduct of Executive Lawmaking

As far as substantive changes to the *Brandenburg* test, the reviewing court cannot measure a signing statement against statutorily prohibited unlawful conduct. The statement itself concerns the propriety of a particular statute or statutory provision. How can a court determine whether the signing statement's express advocacy endorses imminent lawless conduct unless the law prohibits the conduct as unlawful? Fortunately, Supreme Court precedent can establish the unlawful conduct element—the formalistic separation of powers doctrine underpinning *Youngstown*, *Chadha*, and *Clinton v. City of New York* clearly proscribe presidential lawmaking.[249] That which defies the Constitution must qualify as unlawful conduct. Thus, the reviewing court would have to determine if the challenged signing statement violated this proscription.

The test for spotting the unlawful fig leaf stems from the Executive's justification of the revisionary interpretation. If the president relies on clear Supreme Court precedent to justify non-enforcement of a statute, as expressed in the signing statement, the signing statement would not constitute unconstitutional executive lawmaking under the revised *Brandenburg* framework because it did not expressly advocate unlawful activity. This reasoning would permit the president to object to the numerous legislative veto provisions enacted since *Chadha*.[250] It would not permit the president to pronounce his intended non-enforcement of statutory provisions based on the mere subjective belief that those provisions flout constitutional objectives.[251]

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current Court, Justices Stevens and Breyer have appeared more willing than their brethren to recognize Congress's claims of standing. *See Raines*, 521 U.S. at 835 (Stevens, J., dissenting); *id.* at 838-43 (Breyer, J., dissenting); *see also* Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316, 358 (1999) (Stevens, J., dissenting, joined by Souter and Ginsburg, JJ., with regards to parts I and II, and Breyer, J., with regards to parts II and III).

249. *See supra* Part III.

250. *See* FISHER, *supra* note 95, at 152–59. According to Professor Fisher's work, Congress passed more than four hundred legislative vetoes between the *Chadha* decision in June of 1983 and 1996. *Id.* at 157; *see also* COOPER, *supra* note 9, at 209; KINKOPF, *supra* note 93, at 6–7 ("After the *Chadha* decision, no one has criticized the Presidents (of both parties) who have refused to enforce the thousands of legislative vetoes that remain on the books.").

251. This analysis roughly comports with the principles stated in Walter Dellinger's 1994 memo to Abner Mikva when Dellinger served as head of the Office of Legal Counsel under President Clinton. The memo provided as follows:

> As a general matter, if the President believes that the Court would sustain a particular provision as constitutional, the President should execute the statute, notwithstanding his own beliefs about the constitutional issue. If, however, the President, exercising his independent judgment, determines both that a provision would violate the Constitution and that it is probable that the Court would agree with him, the President has the authority to decline to execute the statute.

Memorandum from Walter Dellinger, Assistant Attorney General, to Abner Mikva, Counsel to the

c. Revising the Remedy to Remove the Fig Leaf

The adjustment to the unlawful conduct prong of the doctrine necessitates a secondary change in the form of remedy. Without a statutory baseline for the unlawful conduct, the case would not reach the Court as a private speaker's challenge to the executive enforcement of the statute or regulatory policy; rather, the case comes to the Court as Congress's challenge to the president's expression.

In the former scenario, the Court may simply uphold or reverse the conviction because the Legislative and Executive branches have coordinated their efforts thus far to establish public policy and prosecute offenders.[252] The circumstances in the latter scenario render the same remedy inapposite because the instigating party under this model challenges the expression itself—like a civil plaintiff in a libel suit. The Court does not have a conviction before it to reverse or uphold.

The Court would have to enforce the Constitution's policy via injunctive relief, probably in a manner similar to the writ of mandamus.[253] Essentially, the Court would order the president to remove the fig leaf in the enforcement of the statute.

President, on Presidential Authority to Decline to Execute Unconstitutional Statutes (Nov. 2, 1994), *available at* http://www.usdoj.gov/olc/nonexcut.htm.

252. This process refers to the "traditional 'as applied' mode of judicial review" which examines "the constitutionality of legislation as it is applied to particular facts on a case-by-case basis." STONE ET AL., *supra* note 197, at 117 n.1. A finding that the policy interfered with protected speech in a particular case does not result in the facial invalidation of the statute or regulation. *See id.* Rather, "[u]nder 'as applied' review, [the challenged] law could constitutionally be applied to any expression that satisfies the requirements of *Brandenburg*." *Id.*

The Supreme Court's preference for "as applied" review, as opposed to the "overbreadth" review for facial invalidation, stems from "the general rule that an individual has no standing to litigate the rights of third persons." *See id.*; *see also id.* at 121 n.6 (citing Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985), to suggest the Court's preference for "partial, rather than facial, invalidation").

253. The writ of mandamus also has its origins in English law. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803). Quoting the recent Blackstone treatise in 1803, Chief Justice Marshall described the writ as

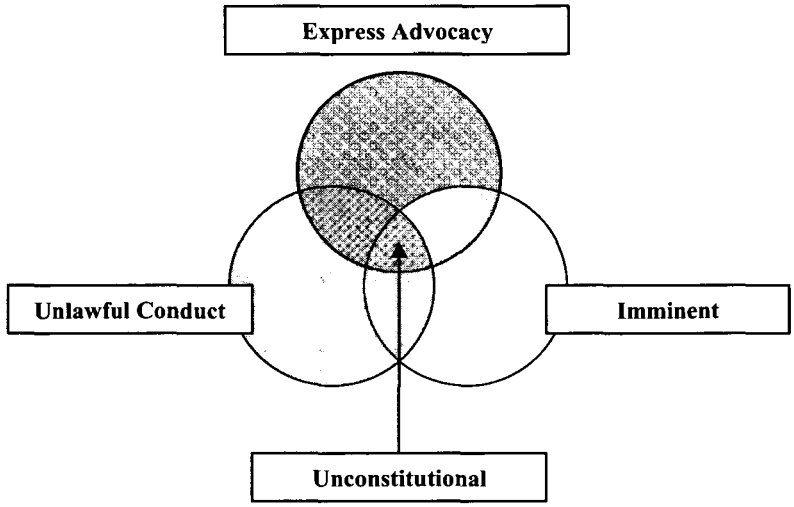
> [A] command issuing in the king's name from the court of king's bench, and directed to any *person*, corporation or inferior court, requiring them to do some particular thing therein specified, *which appertains to their office and duty*, and which the court has previously determined, or at least supposes, to be consonant to right and justice. It is a writ of a most extensively remedial nature, and issues in all cases where the party has a right to have any thing done, and *has no other specific means of compelling its performance.*

Id.

3. So that He, Who Controls the Present, May Not Control the Past and Future (The Why)

With these adjustments in mind, the revised Clear and Present Danger test would invalidate signing statements expressing a: (1) clear command, (2) to disregard statutory authority, (3) unless the president justified the policy on clear Supreme Court precedent. The unconstitutional signing statement would entail an order of non-enforcement (express advocacy) lacking sufficient constitutional justification (the unlawful activity of executive lawmaking). The president's position as the head of the Executive branch enables clear signing statement directives to present an imminent danger of unlawful activity.[254]

The Clear and Present Danger of Presidential Signing Statements



The reviewing court would have to ascertain whether Supreme Court precedent would reasonably sustain the president's non-enforcement of the statutory provision. Such an inquiry, like Justice Holmes' consideration of seditious expression in the 1919 case *Schenck v. United States*, "is a question of proximity and degree"—"the character of every act depends upon the circumstances in which it [was] done."[255]

The key thing to remember is that this framework does not adjudge the constitutionality of presidential non-enforcement; rather, it assesses the constitutionality of a form of expression particularly adept at inciting an unlawful

254. *See* Burgess, *supra* note 5, at 642 ("Signing statements expressing a President's intention to refuse to enforce provisions of certain laws because of their purported unconstitutionality are not idle threats. Presidents act on their intentions.").

255. Schenck v. United States, 249 U.S. 47, 52 (1919).

suspension of the laws. Yet, while a finding upholding a signing statement does not necessarily allow for presidential non-enforcement of the law—for instance, when the signing statement does not provide a clear command for non-enforcement—a finding striking down a signing statement would necessarily speak to the illegitimacy of non-enforcement as well.

Like most burdens of proof, this proxy raises the bar for the president's justification of the signing statement. It would likely rein in broad claims to presidential review in a manner consistent with formalistic conceptions of separation of powers[256] and the Constitution's exclusive reservation of constitutional interpretation with the judiciary.[257] Yet, this model of signing statement review does not entirely remove executive signing statement discretion. In fact, the *Brandenburg* test's requirement of express advocacy—the burden of proof that Congress must bear to establish their challenge—would exempt most modest signing statements expressing doubt in a statute's constitutional validity.[258] Most interpretive signing statements would also survive revised Clear and Present Danger review. Generally speaking, executing a statute requires interpreting a statute. The interpretive statement would have to include a substantive component indicating imminent non-enforcement of the provision to subject itself to reversal under this paradigm.

Whether this model would exempt the oft-appearing boilerplate language "[to interpret a statute] in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch"[259] would depend on the context

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256. *See supra* Parts II.B, III.

257. *Compare Marbury*, 5 U.S. (1 Cranch) at 177 ("It is emphatically the province and duty of the judicial department to say what the law is."), *with* City of Boerne v. Flores, 521 U.S. 507, 524 (1997) (asserting that "[t]he power to interpret the Constitution in a case or controversy remains in the Judiciary"). *See* MAY, *supra* note 8, at 24–25 (suggesting the Framers entrusted the judiciary to serve as final arbiter of constitutional disputes); *see also* CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 120–24 (1997) (same). For Professor Black, it seems this matter does not merit debate. *Id.* at 120 ("When somebody at a cocktail party says that such review is not mandated or contemplated by the Constitution, I tell them to take two aspirin and get a good night's sleep.").

However, some are not convinced that *Marbury* established a judicial power "to trump the constitutional powers of the other two branches." *See* Kelley, *supra* note 38, at 19 (citing Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanation for Judgments*, 15 CARDOZO L. REV. 43, 51 (1993)).

258. Compared to adopting a Bad Tendency test for signing statements, the revised Clear and Present Danger test seems somewhat deferential. *See supra* note 197 and accompanying text.

259. Statement on Signing the Department of Homeland Security Appropriations Act, 2007, *supra* note 62; *see supra* note 62 and accompanying text. The CRS Report emphasized that "the large bulk or the signing statements the Bush II Administration has issued to date do not apply particularized constitutional rationales to specific scenarios, nor do they contain explicit, measurable refusals to enforce a law." CRS Report, *supra* note 13, at 11. *But see supra* notes 179-186 and accompanying text. *Cf.* GAO Report, *supra* note 13, at 1, 9–10 (noting six instances of non-enforcement subsequent to signing statements indicating that statutory provisions would not be

of the statutory provision. In the instance of a very clear statutory provision and an equally clear signing statement directive to disregard that provision, a signing statement may present a clear and present danger of executive lawmaking (here, law-unmaking) notwithstanding the presence of otherwise vague language in the signing statement.

For instance, Bush II's signing statement of December 20, 2006 concerning the Postal Accountability and Enhancement Act ostensibly directs executive branch agencies (namely the United States Postal Service) not to permit federal postal workers to sue the Postal Regulatory Commission,[260] notwithstanding statutory provisions expressly allowing for such actions.[261] The signing statement thus pronounces the demise of postal service employees' statutory rights of appeal and is arguably a clear and present danger of statutory nullification.

This limitation of the model—that it is too protective of speech—might prompt some signing statement critics to question its substantive worth altogether. For all its complexity, the rule poses little danger to most signing statements. Others still may criticize the application of such a malleable test in the review of signing statements. The Clear and Present Danger test has struggled to maintain authority in the First Amendment sphere,[262] critics may say, so why apply it in a completely different constitutional forum? Moreover, even if a reviewing court found this standard judicially practicable, strong doubts persist as to whether Congress would have standing to pursue such a claim.[263] These are valid criticisms.

However, this Note has presented reasons for why federal courts might recognize Congress's standing to challenge a fig leaf signing statement. With these arguments in mind, a more restrictive standard providing relief from vague signing statements

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honored); Cooper, *supra* note 3, at 531 (arguing that the language "[c]ontrol of the unitary executive" in Bush II signing statements "is not empty language").

260. The signing statement asserted:

> The executive branch shall construe sections 3662 and 3663 of title 39, United States Code, as enacted by section 205 of the Act, *not to authorize an officer or agency* within the executive branch to institute proceedings in Federal court against the Postal Regulatory Commission, which is another part of the executive branch, as is consistent with the constitutional authority of the President to supervise the unitary executive branch and the constitutional limitation of Federal courts to deciding cases or controversies.

Statement on Signing the Postal Accountability and Enhancement Act, 2006 U.S.C.C.A.N. S76, 76 (2006) (emphasis added).

261. *See* Postal Accountability and Enhancement Act, Pub. L. No. 109-435, § 205, 120 Stat. 3198, 3216-17 (2006) (codified at 39 U.S.C. §§ 3662-63). Section 3663 of the Act provides the option of appellate review for "[a] person, including the *Postal Service*, adversely affected . . . by a final order or decisions of the Postal Regulatory Commission." *Id.* § 205, 120 Stat. at 3217 (emphasis added).

262. *See supra* note 203 and accompanying text (describing the Clear and Present Danger test's questionable viability).

263. *See supra* Part IV.B.2.a.

would unduly confine executive discretion and undermine Congress's claim to an imminent (rather than conjectural) injury-in-fact for the purposes of standing.

In its most basic form, the paradigm premised herein as a model for judicial review of signing statements operates as a means to elucidate the true dangers of signing statements. Contrary to the views of Professors Tribe, Bradley, and Posner,[264] this Note envisions continuing exploitation of signing statements to the point that certain signing statements would cross the line of expression and engage in the unlawful practice of "executive lawmaking." When that happens, the veto power would likely shield this super-legislation from congressional revision, and the statutory design might foreclose private party court challenges.[265]

This model would allow Congress to seek judicial relief from such unlawful conduct by recognizing the limitations on executive discretion contemplated in *Youngstown* and *Clinton v. City of New York*. Either way, it dispels concerns of a renewed royal prerogative by burdening the president to justify his pronouncement of non-enforcement when the signing statement teeters on the edge of becoming a line-item veto.

This burden, whether in court or the court of public opinion, would act to deter abuses of signing statement discretion. This deterrent effect could reverberate across the entire spectrum of interpretive and substantive signing statements.

Which begs consideration of two final questions: does this deterrence come at the cost of transparency?[266] Might future presidents take the unitary agenda underground to even more disastrous consequences?

Hopefully not. Yet this consideration—concern of engaging the Executive branch in an antagonistic manner—would caution responsible Congress members from bringing frivolous suits to challenge signing statements. Further, the model for signing statement review proposed herein does nothing to detract from CRS's recommendation of a "robust oversight regime focusing on substantive executive action."[267]

V. CONCLUSION: RESTORING THE FOUNDERS' PREROGATIVE: SEPARATION OF POWERS

Viewed in the context of recent presidential practice, the Bush II administration's signing statement practice no longer seems so heretical. Rather, presidents have

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264. *E.g.*, Tribe, *supra* note 114 (stating that Congress's proposed legislation "presuppose[s] that issuing signing statements represents 'executive lawmaking' in 'defiance of the powers of Congress,' a premise I cannot share").

265. *See supra* notes 182-186, 235-239 and accompanying text.

266. *See generally* Garber & Wimmer, *supra* note 15; Bradley & Posner, *supra* note 3; *supra* note 6 and accompanying text.

267. CRS Report, *supra* note 13, at 27.

increasingly utilized signing statements to encroach upon the separation of powers, and Bush II simply represents the next alarming manifestation of this trend.

Signing statements will not go away. Even if Congress and the judiciary acted to implement every step of this proposal, one has reason to believe that presidents would still issue signing statements. Yet, perhaps they would issue fewer and less ambitious signing statements, giving greater credence to their constitutional administrative capacity, knowing that Congress could demand justification in a court of law. In a perfect world, the signing statements that would remain would serve a benign, informative purpose, facilitating inter-branch comity.

Professors Bradley, Posner, and Tribe, as well as the CRS Report, present persuasive arguments that Congress and the public have overstated the threat of signing statements. Yet at the same time, the limited GAO canvass of 2006 appropriations legislation found six instances of executive branch non-compliance directly foreshadowed by signing statements. That's roughly half of the number of post-signing statement unenforced statutes accumulated from the first two hundred years of presidential practice in just one year.[268] These findings suggest that the critics' fears might not be so far-fetched.

From a public policy perspective, if the non-enforcement of statutory provisions precluded the ability for a third-party court challenge, then Congress ought to have the ability to challenge the substantiated threat of the signing statement on the basis that it nullified their institutional power to legislate.

Perhaps the true import of the CRS Report and the work of these professors derives from the emphasis on the inter-branch politicking for institutional power. Notwithstanding the dubious prospects of the legislation Congress has proposed to authorize judicial review of signing statements—which appears destined to die in committee, even though a president would surely veto these bills if given the chance—Congress's legislative efforts (hearings, public statements, proposed legislation) symbolically conveyed to the Executive branch that it has drifted past its constitutional moorings. In the meantime, expanded analysis of the correlation between signing statements and non-enforcement of statutes, like that found in the GAO Report, would help interested parties determine if the proliferation of signing statements in recent years has really had a deleterious effect on legislative legitimacy.

The revised Clear and Present Danger test proposed in this Note for the adjudication of claims challenging signing statements would protect both the Legislative and Judicial branches from submission to an unfettered royal prerogative without compromising justifiable executive discretion. The Supreme Court has carefully and consistently extracted unconstitutional executive lawmaking from valid

268. *Compare* GAO Report, *supra* note 13, at 1, 9-10 (detailing six instances of Executive branch non-enforcement among 2006 appropriations statutes), *with* MAY, *supra* note 8, at 101 (finding twelve instances of signing-statement-announced non-enforcement between 1789 and 1981).

executive discretion. This test would permit the federal courts to do the same with signing statements.

As noted above, this test does not completely resolve the problem of executive non-enforcement. Expression and enforcement present two distinct propositions, and most agree that the latter should be actionable. This test merely assesses when the signing statement expression transcends speech to become the unlawful conduct of executive lawmaking.

Although it may be naïve to expect the president to keep his or her hands entirely off Congress's statute consistent with the legend of the "sincere statue,"[269] Congress should have a way to remove fig leaves it did not intend. Our Constitution ought not be so modest as to allow the chief executive final legislative artistic license.

Lest the Constitution seeks solace from Room 101[270] and the unification of the powers of past, present, and future, it should acknowledge the Clear and Present Danger of unrestricted signing statements.

269. A now-discredited legend traced the origin of the word "sincere" to the Latin roots *sins* (without) *cerus* (wax), owing to the fact that sculptors would use wax to fill in imperfections. Thus, a "sincere statue," or a statue without wax, would be a flawless statue.

270. *See* ORWELL, *supra* note 1, at 286 ("You asked me once . . . what was in Room 101. I told you that you knew the answer already. Everyone knows it. The thing that is in Room 101 is the worst thing in the world."). Special thanks to Mrs. Sammie Clay, the high school English teacher who introduced me to the wonders of Orwell's masterpiece, coincidentally, in Room 101.