

# THE CONSTITUTIONALITY OF PRESIDENTIAL SIGNING STATEMENTS:

## A NOTE ON H.R. 5993 – THE PRESIDENTIAL SIGNING STATEMENTS ACT OF 2008

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### ABSTRACT

This legislative note will examine H.R. 5993, the Presidential Signing Statements Act of 2008, by addressing the history of presidential signing statements, the use of presidential signing statements by recent administrations, and what gave rise to the American Bar Association Task Force on Presidential Signing Statements and Separation of Powers Doctrine. This paper will also discuss the contents of H.R. 5993, the likelihood of it passing muster through Congress and the executive branch, and if so, its impact on current administration and its immediate successor.

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## INTRODUCTION

When Congress reconvenes in September 2008, after its summer recess, legislation will be revisited with the hope of some bills being passed into law. Amongst the many pieces of legislation that will be reviewed is H.R. 5993, the Presidential Signing Statements Act of 2008.<sup>1</sup> Introduced in May 2008 by Representative Walter B. Jones, the purpose of the bill is “to promote congressional and public awareness, understanding, and political accountability of presidential signing statements.”<sup>2</sup> At the heart of this bill is a portion of the findings of the American Bar Association Task Force on Presidential Signing Statements and Separation of Powers Doctrine. In response to the challenges and changing role of presidential signing statements, in June 2006, the ABA Task Force examined the constitutional and legal issues of signing statements.<sup>3</sup> In July 2006, the Task Force presented a resolution on its findings, voicing the need for the current president and his successors to respect the country’s constitutional system of separation of powers and thus accentuate the importance of the doctrine of separation of powers.<sup>4</sup> A portion of the ABA Task Force Report:

[U]rges Congress to enact legislation requiring the President promptly to submit to Congress an official copy of all signing statements he issues . . . to submit to Congress a report setting forth in full the reasons and legal basis for the statement; and further requiring that all such submissions be available in a publicly accessible database.<sup>5</sup>

It is this segment of the ABA Task Force Report that serves as the spirit of H.R. 5993.

There is a long history of presidential signing statements.<sup>6</sup> However, the use of signing statements by recent administrations to make constitutional objections to legislation and push for the signing statement to be recognized as part of the legislative history has triggered closer scrutiny of this process.<sup>7</sup> Through the Presidential Signing Statements Act of 2008, it is hoped that

1. Presidential Signing Statements Act of 2008, H. R. 5993, 110th Cong. (2008).

2. *Id.*

3. Press Release, American Bar Association, ABA to Examine Constitutional, Legal Issues of Presidential Signing Statements (June 5, 2008) [hereinafter ABA June 5, 2008 Press Release], <http://www.abanet.org/media/releases/news060506.html>.

4. ABA TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE REPORT 5 (2006) [hereinafter ABA TASK FORCE REPORT], [http://www.abanet.org/op/signingstatements/aba\\_final\\_signing\\_statements\\_recommendation-report\\_7-24-06.pdf](http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf).

5. *Id.* at 24.

6. LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 123 (5th ed. 2007).

7. PHILLIP J. COOPER, BY ORDER OF THE PRESIDENT, 204-209 (2002); see also Charlie Savage, *Bush Challenges Hundreds of Laws*, BOSTON GLOBE, April 30, 2006, at A1.

political accountability of presidential signing statements will be achieved, along with a greater understanding and awareness of signing statements by Congress and the public.

This legislative note will examine the Presidential Signing Statements Act of 2008 by addressing the history of presidential signing statements, the use of presidential signing statements by recent administrations, and what gave rise to the ABA Task Force. This paper will also discuss the contents of H.R. 5993, the likelihood of it passing muster through Congress and the executive branch, and its potential impact on current administration and its immediate successor.

## I. HISTORICAL BACKGROUND

Presidents use presidential signing statements to voice their opinions about specific provisions of legislation approved by Congress. Presidents use them to speak against provisions of a bill they do not embrace without having to veto the bill.<sup>8</sup> The signing statement usually originates in the counsel's office of the White House or the Justice Department.<sup>9</sup> The signing statement comes into play at the same time as the last step of the law making process.<sup>10</sup> When the statute is signed into law by the president, it is usually the same time that the signed signing statement is issued.<sup>11</sup>

The practice of signing statements dates back to the earliest days of the republic.<sup>12</sup> The constitutionality of this executive practice has often been question and debated.<sup>13</sup> Scholars and commentaries differ as to the effect of a signing statement, some believing that it has the same force as law, and others not.<sup>14</sup> Certain supporters of signing statements believe that a signing statement becomes problematic only if the statute itself is unclear as a result of congressional actions.<sup>15</sup> Their position is that ambiguities in a bill require constitutional interpretation by the courts at a later time.<sup>16</sup> Even before the bill is subjected to judicial review, the executive branch is faced with the task of determining statutory meaning and constitutionality.<sup>17</sup> Others believe that the president should be prohibited from using signing statements in order to avoid enforcing a law of questionable constitutionality.<sup>18</sup> Supporters of this theory claim the usage of signing statements is a directly undermines the separation of powers between the executive branch and legislative branches.<sup>19</sup> The

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8. *The News Hour with Jim Lehr: President's Use of 'Signing Statements' Raises Constitutional Concerns*, (PBS television broadcast July 24, 2006) [hereinafter *News Hour*], transcript available at [http://www.pbs.org/newshour/bb/white\\_house/july-dec06/signing\\_07-24.html](http://www.pbs.org/newshour/bb/white_house/july-dec06/signing_07-24.html).

9. *Id.*

10. *Id.*

11. *Id.*

12. FISHER, *supra* note 6 at 123; *see also News Hour, supra* note 8.

13. *News Hour, supra* note 8.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *News Hour, supra* note 8.

19. *Id.*

Constitution affords the president veto power.<sup>20</sup> However, signing statements allow the president to sign a bill into law while declaring a provision of it unconstitutional, all while foregoing his veto power.

A. *Article I Section 7 (2): Legislative Power of the Executive Branch*

The power to veto a bill, although exercised by the executive branch, is legislative in nature.<sup>21</sup> Granted by Article I, Section 7 of the United States Constitution, the veto power affords the president the power to prevent a bill from becoming law.<sup>22</sup> If Congress seeks passage of legislation that the president does not support, the president can veto the legislation with the effect of preventing it from becoming law.<sup>23</sup> The president can withhold his support of a bill due to questions of constitutional compliance, or simply because he believes a bill to be unwise.<sup>24</sup> Whatever reason or reasons the president may have to not support a piece of legislation, he can show his non-endorsement simply by not signing the bill into law. Constitutional power is given to the president to veto the bill if he has concerns about it; whether he does not favor the legislation in its entirety or only certain provisions of the bill.<sup>25</sup>

Thus, the question is: why is it necessary to have a tool that allows the president to “unendorse” a piece of legislation that he previously endorsed? This is essentially the effect of presidential signing statements. All parts of a signing statement are not controversial in nature, as some parts simply recognize and express appreciation to supporters of the bill.<sup>26</sup> However, the parts that are questioned are very controversial. The portions of the signing statements that allow the president to refrain from executing a law that he just previously signed are cloaked with controversy.<sup>27</sup>

The power of Congress to create law is clearly stated in the Constitution; as is the power of the President to enforce law and the power of the judiciary to interpret law.<sup>28</sup> Although not ever specifically mentioned in the Constitution, this “separation of powers” has been recognized since the government’s inception. Specific powers are designated to each of the three branches of government, clarifying powers, duties, and responsibilities.<sup>29</sup> Where powers are granted to a particular branch, that branch has not only the authority, but the responsibility to exercise that authority. The Constitution bestows upon the president an exclusive power that arms him with the authority and

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20. U.S. CONST. art. I, § 7, cl. 2.

21. *Id.*; see also *News Hour*, *supra* note 8.

22. U.S. CONST. art. I, § 7, cl. 2.

23. *Id.*; see also *News Hour*, *supra* note 8; Chad Thompson, *Presidential Signing Statements: The Big Impact of a Little Known Presidential Tool*, 39 U. TOL. L. REV. 185, 196 (2007).

24. *News Hour*, *supra* note 8.

25. *Id.*

26. *Id.*

27. FISHER, *supra* note 6; see also *News Hour*, *supra* note 8.

28. U.S. CONST. art. I, § 1; U.S. CONST. art. II, § 1; U.S. CONST. art. III, § 1.

29. DANIEL E. HALL & RANSFORD C. PYLE, CONSTITUTIONAL LAW: CASES AND COMMENTARY 46 (1997).

responsibility to reject a bill that he believes is unconstitutional.<sup>30</sup> This executive veto power, which is legislative in nature, was created by the framers of the Constitution as part of creating a system of “checks and balances.”<sup>31</sup> Article I, section 7 of the Constitution gives the president the power to veto a bill he does not accept; the power plays a significant role in shaping legislation.<sup>32</sup> If the president believes that Congress is overstepping its bounds, the president may use his or her veto power.<sup>33</sup> It should be noted that this power is not absolute.<sup>34</sup> Congress can override the veto.<sup>35</sup> However, the rate of congressional veto overrides is very low, which gives greater credence to the power and impact of a presidential veto.<sup>36</sup> If the president believes that a bill or a portion of the bill is unconstitutional, or if for some other reason he believes it should not be supported, he needs only to threaten Congress with a presidential veto.<sup>37</sup> The mere threat of a presidential veto has the potential and probability of influencing Congress to make changes that are favorable to the president to ensure passing of the bill.<sup>38</sup> It seems that it would make more sense for the president to challenge a bill before it becomes legislation through the powers granted by Article I of the Constitution. To sign a bill into law and then immediately draft a document that challenges the law and declare its unconstitutionality, followed by non-enforcement of the law, is contrary to what the Constitution’s framers had in mind.<sup>39</sup>

## II. PRACTICE OF PRESIDENTIAL SIGNING STATEMENTS BY RECENT ADMINISTRATIONS

The use of presidential signing statements as an executive power tool to influence the implementation and interpretation of law is relatively new and evolving.<sup>40</sup> Other functions that signing statements are and, until recently, were more frequently used to achieve include: providing explanation to the public, provide legislative interpretation and administration guidance to subordinates, and provide questions and concerns of constitutionality of the enactment.<sup>41</sup> However, the use of presidential signing statements as a means of presidential direct action dates back to the Reagan administration.<sup>42</sup> This recent

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30. U.S. CONST., art. I, § 7, cl. 7.

31. HALL & PYLE, *supra* note 29, at 48.

32. U.S. CONST. art. I, § 7, cl. 2.

33. *News Hour*, *supra* note 8.

34. *Id.*

35. U.S. CONST. art. I, § 7, cl. 2; *Frontline: Cheney’s Law, Signing Statements* (PBS television broadcast Oct. 16, 2007), transcript available at <http://www.pbs.org/wgbh/pages/frontline/cheney/themes/statements.html>.

36. *News Hour*, *supra* note 8.

37. *Id.*

38. *Id.*

39. U.S. CONST. art. I, § 7, cl. 2; *Frontline: Cheney’s Law, Signing Statements*, *supra* note 35.

40. COOPER, *supra* note 7, at 201.

41. Memorandum from Walter Dellinger, Assistant Att’y Gen., Office of Legal Counsel, to Bernard Nussbaum, Counsel to the President (Nov. 3, 1993) [hereinafter OLC 1993 Signing Statement Opinion], available at <http://www.usdoj.gov/olc/signing.htm>.

42. COOPER, *supra* note 7, at 201.

use of presidential signing statements as post-enactment legislative history with the expectation of the courts to give some deference to its content when analyzing the legislation has spawned a great deal of controversy.<sup>43</sup> The Reagan, Bush I, and Clinton administrations have all used presidential signing statements to nullify a statute or provide the reigning president's interpretation of a statute.<sup>44</sup> And more recently, President George W. Bush has used a large number of presidential signing statements to constitutionally challenge new laws rather than exercise his veto power.<sup>45</sup>

During the Reagan Administration, the judiciary was encouraged to defer to presidential signing statements when faced with statutory interpretation. As early as 1986, President Reagan's supported his increased use of signing statements with language from a Justice Department memorandum asserting the importance of the president's understanding of a bill in comparison to Congress' understanding.<sup>46</sup> Under the administration of Attorney General Meese, the signing statement's usage was expanded. It would now be used to play a more active role in judicial interpretation. Strategically, the views of the president as expressed in a signing statement would be presented as a legitimate and authoritative part of the statute's legislative history.<sup>47</sup> This expansive usage was successfully promoted through an agreement between Meese and West Publishing Company to include signing statements in West's *U.S. Code Congressional and Administrative News* publication, a commonly used source of legislative history.<sup>48</sup>

Like the Reagan Administration, President George H. W. Bush's administration also opined that the president has the power to refuse to enforce a bill that he determines to be unconstitutional.<sup>49</sup> The administration could use its interpretation to save legislation that it viewed as constitutionally defective.<sup>50</sup> The administration's position was strategically implemented in passing civil rights legislation in the early 1990's – what ultimately became the Civil Rights Act of 1991.<sup>51</sup> Reacting to a series of Supreme Court interpretations of Title VII that had ultimately weakened the effectiveness of the Civil Rights Act of 1964, Congress found itself negotiating with the Bush administration about 1990 civil rights legislation.<sup>52</sup> What would have been the Civil Rights Act

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43. OLC 1993 Signing Statement Opinion, *supra* note 41; Note, *Context-Sensitive Deference to Presidential Signing Statements*, 120 HARV. L. REV. 597, 602, 603 (2006).

44. COOPER, *supra* note 7, at 200.

45. John W. Dean, *The Problem with Presidential Signing Statements: Their Use and Misuse by the Bush Administration*, FINDLAW.COM, Jan. 13, 2006, <http://writ.news.findlaw.com/dean/20060113.html>.

46. Erin Louise Palmer, *Reinterpreting Torture: Presidential Signing Statements and the Circumvention of U.S. and International Law*, 14 HUM. RTS. BRIEF 21, 21 (2006), available at <http://www.wcl.american.edu/hrbrief/14/1palmer.pdf?rd=1>.

47. COOPER, *supra* note 7, at 202.

48. *Id.* at 203; OLC 1993 Signing Statement Opinion, *supra* note 41; see also *Bowsher v. Synar*, 478 U.S. 717, 719 n.1 (1986) (President Reagan's signing statements cited by the Supreme Court upholding Reagan's challenged Presidential powers).

49. COOPER, *supra* note 7, at 206–07.

50. *Id.* at 207.

51. *Id.*

52. *Id.*

of 1990 was vetoed, but it was followed by the passage of the Civil Rights Act of 1991.<sup>53</sup> The Act was accompanied by a signing statement that recognized the administration's analysis as "authoritative interpretive guidance."<sup>54</sup>

As did its predecessors, the Clinton administration also supported presidential signing statements. Although President Clinton's use of signing statements was diminutive when he had a Democratic Congress, the success of the Republican Party during the 1994 mid-term elections presented him with legislative challenges.<sup>55</sup> Clinton's practice of using signing statements changed in response to the new challenges.<sup>56</sup> Walter Dellinger, who served as Assistant Attorney General and acting Solicitor General during the Clinton administration, presented historical and constitutional justification for a President's refusal to follow "unconstitutional" legislation.<sup>57</sup> Recognizing and supporting appropriate cause to use signing statements, Dellinger concluded that a President's refusal to enforce a legislative provision was justified when the provision encroached on the President's constitutional powers.<sup>58</sup> In his *Statement on Signing the Coast Guard Authorization Act of 1996*, President Clinton stated that the Act's restriction on the powers of appointment of the executive branch was not permitted by the Appointments Clause.<sup>59</sup> President Clinton raised an objection to a portion of the Act that restricted the executive branch's powers of appointment of committee members, arguing that the restriction raised constitutional concerns.<sup>60</sup> President Clinton interpreted the restrictions as non-binding with only an advisory status.<sup>61</sup>

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53. *Id.*

54. Statement on Signing the Civil Rights Act of 1991, 2 PUB. PAPERS 1504, 1504 (Nov. 21, 1991); see also COOPER, *supra* note 7, at 207 (explaining the impact of the signing statement: "(1) established the administration's reading for the legislative history, (2) sought to influence future judicial interpretations, (3) set boundaries on the meaning of the relevant sections of the statute, and (4) controlled implementation").

55. COOPER, *supra* note 7, at 215; ABA TASK FORCE REPORT, *supra* note 4, at 13.

56. COOPER, *supra* note 7, at 215; ABA TASK FORCE REPORT, *supra* note 4, at 13.

57. OLC 1993 Signing Statement Opinion, *supra* note 41, at 133.

58. *Id.*; FISHER, *supra* at note 6, at 124-125; ABA TASK FORCE REPORT, *supra* note 4, at 13.

59. Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 326 (2006); Statement on Signing the Coast Guard Authorization Act of 1996, 2 PUB. PAPERS 1869, 1869-1870 (Oct. 19, 1996) (explaining how the President believes the Act presents a constitutional problem and how he will interpret it).

60. Bradley & Posner, *supra* note 59, at 326-27.

61. Statement on Signing the Coast Guard Authorization Act of 1996. *supra* note 59, at 1870 ("One section of the Act, Section 1002, raises a constitutional concern. This section establishes a committee empowered to select the entities to which certain historic lighthouses will be conveyed. Because the committee members will hold a Federal office and because this section vests them with significant authority, they must be appointed as officers pursuant to the Appointments Clause of the Constitution. The Act, however, provides that the Secretary of Transportation "shall" appoint four of the committee's five members from among persons recommended or designated by certain Maine officials or organizations. The Appointments Clause does not permit such restrictions to be imposed upon the executive branch's powers of appointment. Therefore, I will not interpret section 1002(d) (3) (A) of the Act as binding, and I direct the Secretary of Transportation to regard the designations and recommendations arising from it as advisory only.")

### III. THE ADVENT OF THE AMERICAN BAR ASSOCIATION TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND SEPARATION OF POWERS DOCTRINE

As referenced earlier, signing statements date as far back as Andrew Jackson in the 1800s,<sup>62</sup> but it is the current usage of signing statements that has generated a significant amount of controversy. Presidents of both political parties have used signing statements devoid of protest to express their intent not to enforce a legislative provision they recognized as unconstitutional without vetoing the bill in its entirety.<sup>63</sup> Commentators have defended the use of presidential signing statements to articulate the executive branch's comprehension of a law and to guide judicial interpretation.<sup>64</sup> Nevertheless, former President George W. Bush has spawned an insurmountable level of interest and concern through his signing statements practice. Triggered by an article on the use of presidential signing statements that appeared in the *Boston Globe*,<sup>65</sup> the controversy surrounding President Bush's signing statements drew national attention from both critics and supporters. Approximately two months following the publication of the article, the Senate Judiciary Committee held a hearing on Presidential signing statements.<sup>66</sup> Responding to the intensity and the topical concern surrounding President Bush's constitutional challenges, the American Bar Association created a task force (the "ABA Task Force").<sup>67</sup> Under the direction of ABA President Michael S. Greco, the ABA appointed a diverse panel to the ABA Task Force on Presidential Signing Statements and the Separation of Powers Doctrine.<sup>68</sup> The directive given to the ABA Task Force required the committee to "examine the changing role of presidential signing statements, in which U.S. presidents articulate their views of provisions in newly enacted laws, attaching statements to the new legislation before forwarding it to the Federal Register" and to "consider whether such statements conflict with express statutory language or congressional intent."<sup>69</sup>

#### A. George W. Bush's Use of Signing Statements

In April 2006, an article appeared in the *Boston Globe* highlighting the unprecedented use of signing statements by President George Bush.<sup>70</sup> It was reported that President Bush had aggressively used signing statements to

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62. COOPER, *supra* note 7, at 203 ("Some of the earliest signing statements concerned efforts to alter spending legislation, such as Andrew Jackson's modification in 1830 of an appropriation for roads.").

63. Laurence H. Tribe, 'Signing Statements' are a Phantom Target, BOSTON GLOBE, Aug. 9, 2006, at A9, available at [http://www.boston.com/news/nation/washington/articles/2006/08/09/signing\\_statements\\_ar\\_e\\_a\\_phantom\\_target/](http://www.boston.com/news/nation/washington/articles/2006/08/09/signing_statements_ar_e_a_phantom_target/).

64. Palmer, *supra* note 46.

65. Savage, *supra* note 7.

66. *Presidential Signing Statements: Hearing Before the S. Judiciary Comm.*, 109th Cong. (2006), <http://judiciary.senate.gov/hearings/hearing.cfm?id=1969>.

67. ABA June 5, 2008 Press Release, *supra* note 3.

68. *Id.*

69. *Id.*

70. Savage, *supra* note 7.



disobey in excess of 750 laws, asserting that his Constitutional power as head of the executive branch gives him the right to ignore numerous sections of legislative bills.<sup>71</sup> The exact number of bills that were challenged has been debated; and in fact, it is documented that contemporary administrations that employed the practice of issuing signing statements issued more signing statements than President George W. Bush.<sup>72</sup> Recent administrations dating back to President Reagan have all used signing statements. President Reagan issued 250 signing statements, President George H. W. Bush issued 228 signing statements, President Clinton issued 381 signing statements, and President George W. Bush issued 152 signing statements.<sup>73</sup> However, it is the alarming, disproportional use of signing statements by incumbent President Bush to make constitutional and legal objections in comparison to the other modern era presidents that has given rise to concern.<sup>74</sup> In comparison, 34% of President Reagan's signing statements raised constitutional objections, 47% of President George H. W. Bush's signing statements raised constitutional objections, and 18% of President Clinton's signing statements raised constitutional objections. 78% of President George W. Bush's signing statements raised constitutional objections.<sup>75</sup> This unparalleled trend has brought with it a significant amount of controversy. Even firm supporters who champion the constitutionality and informative value of signing statements indisputably recognize the abusive use of signing statements by the current administration.<sup>76</sup>

### B. *Key Legislation Impacted by President Bush's Signing Statements*

A significant percentage of President George W. Bush's signing statements have been used to make constitutional and legal objections.<sup>77</sup> President Bush's signing statements have impacted legislation addressing whistle-blowers employed by the Department of Energy,<sup>78</sup> diversity promotion in the hiring practices of the intelligence community,<sup>79</sup> and independent education research and publication.<sup>80</sup> However, it was the signing statements of two laws that were issued in December 2005 and March 2006 that drew attention and an overall closer examination.<sup>81</sup>

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71. *Id.*

72. T.J. HALSTEAD, CONGRESSIONAL RESEARCH SERVICE, PRESIDENTIAL SIGNING STATEMENTS: CONSTITUTIONAL AND INSTITUTIONAL IMPLICATIONS CRS-9 (Sep. 17, 2007), available at <http://www.fas.org/sgp/crs/natsec/RL33667.pdf>.

73. *Id.* at CRS-2.

74. *Id.* at CRS-9.

75. *Id.* at CRS-2.

76. Tribe, *supra* note 63.

77. HALSTEAD, *supra* note 72, at CRS-2.

78. Statement on Signing the Energy Policy Act of 2005, 41 WEEKLY COMP. PRES. DOC. 1267 (Aug. 8, 2005).

79. Statement on Signing the Intelligence Reform and Terrorism Prevention Act of 2004, 40 WEEKLY COMP. PRES. DOC. 2993, 2993-94 (Dec. 17, 2004).

80. Statement on Signing Legislation to Provide for Improvement of Federal Education Research, Statistics, Evaluation, Information, and Dissemination, and for Other Purposes, 2 PUB. PAPERS 2037, 2037-38 (Nov. 5, 2002).

81. Charlie Savage, *Bush Could Bypass New Torture Ban*, BOSTON GLOBE, Jan. 4, 2006, at A1 [hereinafter Savage, *Torture Ban*], available at

President Bush's signing statement upon signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006 challenged the law's outlawing the torture of detainees.<sup>82</sup> President Bush's signing statement reads:

The executive branch shall construe [the law] in a manner consistent with the constitutional authority of the President . . . as Commander in Chief and consistent with the constitutional limitations on the judicial power, which will assist in achieving the shared objective of the Congress and the President . . . of protecting the American people from further terrorist attacks.<sup>83</sup>

Thus, in effect, President Bush reserved his right to disregard restrictions limiting the use of harsh torture tactics on detainees. As one expert on presidential signing statements asserted, President Bush "will comply with this law when [he] wants to, and if something arises in the war on terrorism where [he] think it's important to torture or engage in cruel, inhuman, and degrading conduct, [he] [has] the authority to do so and nothing in this law is going to stop [him]."<sup>84</sup>

President Bush issued another signing statement in March 2006. Signing Statement on H.R. 199 was issued, challenging a requirement that the president provide Congress with reports detailing his use of the Patriot Act.<sup>85</sup> The purpose of the bill was to assure that the special terrorism-related powers afforded to the FBI were not abused.<sup>86</sup> Oversight provisions were included, requiring the administration to provide information about how the FBI was using the Patriot Act's expanded police powers.<sup>87</sup> Nevertheless, President Bush stated notwithstanding the law's requirements, he would withhold information. President Bush stated:

The executive branch shall construe the provisions of [the law] that call for furnishing information to entities outside the executive branch... in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to withhold information the disclosure of which

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[http://www.boston.com/news/nation/washington/articles/2006/01/04/bush\\_could\\_bypass\\_new\\_torture\\_ban/](http://www.boston.com/news/nation/washington/articles/2006/01/04/bush_could_bypass_new_torture_ban/); Charlie Savage, *Bush Shuns Patriot Act Requirement*, BOSTON GLOBE, March 24, 2006, at A1 [hereinafter Savage, *Patriot Act*], available at [http://www.boston.com/news/nation/washington/articles/2006/03/24/bush\\_shuns\\_patriot\\_act\\_requirement/](http://www.boston.com/news/nation/washington/articles/2006/03/24/bush_shuns_patriot_act_requirement/).

82. Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918, 1918-19 (Dec. 30, 2005).

83. *Id.* at 1919.

84. Savage, *supra* note 81 (quoting David Golove).

85. Statement on Signing USA PATRIOT Improvement and Reauthorization Act of 2005, 42 WEEKLY COMP. PRES. DOC. 425, 425 (Mar. 9, 2006).

86. See USA PATRIOT Improvement and Reauthorization Act of 2005 § 106A, 120 Stat. 192, 200-02; see also, Charlie Savage, *Bush Shuns Patriot Act Requirement*, BOSTON GLOBE, March 24, 2006, available at [http://www.boston.com/news/nation/washington/articles/2006/03/24/bush\\_shuns\\_patriot\\_act\\_requirement/](http://www.boston.com/news/nation/washington/articles/2006/03/24/bush_shuns_patriot_act_requirement/).

87. USA PATRIOT Improvement and Reauthorization Act of 2005 § 106A, 120 Stat. at 200-02.

could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties.<sup>88</sup>

Once again, Bush cited to his constitutional authority to support his power to bypass a law. The quandary is the constitutional authority that President Bush relies on to support his legal and constitutional legislative challenges is founded upon his subjective interpretation of the Constitution and his executive powers.

### C. *Presidential Challenges Expressed in Signing Statements Draw Scrutiny*

On the heels of the April 2006 *Boston Globe* article<sup>89</sup> was harsh criticism from some lawmakers.<sup>90</sup> Coupled with the presidential challenges brought by President Bush against recent legislation, this new interest and concern surrounding President Bush's signing statements gave rise to the ABA Task Force on Presidential Signing Statements and the Separation of Powers Doctrine. The Task Force would be charged with the duty to "examine constitutional and legal issues raised by presidents of the United States attaching legal interpretations to federal legislation they sign."<sup>91</sup>

Shortly after the creation of the Task Force, in June 2006, the United States Senate Committee on the Judiciary held a hearing to address presidential signing statements.<sup>92</sup> Two members of the Task Force provided testimony before the Senate Committee.<sup>93</sup> During his appearance before the Committee, Professor Charles Ogletree stated, "When the President refuses to enforce a law on constitutional grounds without interacting with the other branches of government, it is not only bad public policy, but also creates a unilateral and unchecked exercise of authority in one branch of government without the interaction and consideration of the others."<sup>94</sup> Bruce Fein testified, "[i]f all other avenues have proved unavailing, Congress should contemplate impeachment for signing statements that systematically flout the separation of powers and legislative prerogatives."<sup>95</sup>

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88. Statement on Signing USA PATRIOT Improvement and Reauthorization Act of 2005, 42 WEEKLY COMP. PRES. DOC. at 425.

89. Savage, *supra* note 7.

90. See Charlie Savage, 3 *Democrats Slam President Over Defying Statues*, BOSTON GLOBE, May 2, 2006, at A2, available at [http://www.boston.com/news/nation/articles/2006/05/02/3\\_democrats\\_slam\\_president\\_over\\_defying/](http://www.boston.com/news/nation/articles/2006/05/02/3_democrats_slam_president_over_defying/).

91. See ABA June 5, 2008 Press Release, *supra* note 3.

92. *Presidential Signing Statements: Hearing Before the S. Comm. On the Judiciary*, 109th Cong. (2006) (statements of Charles Ogletree and Bruce Fein), available at <http://judiciary.senate.gov/hearings/hearing.cfm?id=1969>.

93. *Id.*

94. *Use of Presidential Signing Statements: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Charles J. Ogletree, Jr.), available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=1969&wit\\_id=5480](http://judiciary.senate.gov/hearings/testimony.cfm?id=1969&wit_id=5480).

95. *Use of Presidential Signing Statements: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Bruce Fein), available at [http://judiciary.senate.gov/hearings/testimony.cfm?id=1969&wit\\_id=5482](http://judiciary.senate.gov/hearings/testimony.cfm?id=1969&wit_id=5482).

In late July 2006, the ABA Task Force produced a thirty-two page report.<sup>96</sup> The findings of the ABA Task Force included recommendations, which were later adopted by the American Bar Association's policy-making House of Delegates.<sup>97</sup>

#### D. ABA Task Force Recommendations

The bipartisan panel, chaired by Neal R. Sonnett and comprised of a diverse group of legal specialists, unanimously concluded that President Bush should discontinue the use of signing statements to decline to enforce a law.<sup>98</sup>

Specifically, the ABA Task Force Report states:

RESOLVED, That the American Bar Association opposes, as contrary to the rule of law and our constitutional system of separation of powers, the issuance of presidential signing statements that claim the authority or state the intention to disregard or decline to enforce all or part of a law the President has signed, or to interpret such a law in a manner inconsistent with the clear intent of Congress;

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

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

FURTHER RESOLVED, That the American Bar Association urges Congress to enact legislation requiring the President promptly to submit to Congress an official copy of all signing statements he issues, and in any instance in which he claims the authority, or states the intention, to disregard or decline to enforce all or part of a law he has signed, or to interpret such a law in a manner inconsistent with the clear intent of Congress, to submit to Congress a report setting forth in full the reasons and legal basis for the statement; and

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96. ABA TASK FORCE REPORT, *supra* note 4.

97. Press Release, American Bar Association, ABA Adopts New Policy on Presidential Signing Statements, Attorney Client Privilege and Inspector General for the Federal Judiciary (Aug. 8, 2006), [http://www.abanet.org/media/releases/news080806\\_1.html](http://www.abanet.org/media/releases/news080806_1.html).

98. ABA TASK FORCE REPORT, *supra* note 4, at 1. See also Charlie Savage, *Panel Chides Bush on Bypassing Laws*, BOSTON GLOBE, July 7, 2006, at A1.

further requiring that all such submissions be available in a publicly accessible database; and

FURTHER RESOLVED, That the American Bar Association urges Congress to enact legislation enabling the President, Congress, or other entities or individuals, to seek judicial review, to the extent constitutionally permissible, in any instance in which the President claims the authority, or states the intention, to disregard or decline to enforce all or part of a law he has signed, or interprets such a law in a manner inconsistent with the clear intent of Congress, and urges Congress and the President to support a judicial resolution of the President's claim or interpretation.<sup>99</sup>

Supporting the principles and intentions of the draftsmen of the Constitution that require the president to either sign and enforce congressional legislation or veto the entire bill, the report stated, "The Founding Fathers contemplated bills with both attractive and unattractive features packaged in one bill with heterogeneous provisions . . . [t]he president nonetheless was expected to veto even 'urgent' bills that he believed were unconstitutional in part. . . ." <sup>100</sup> A member of the Task Force also acknowledged the importance of limiting the president's authority.<sup>101</sup> The Recommendation noted that the creation of the Task Force was prompted by the "number and nature" of President Bush's signing statements, but pointed out that the recommendations of the Task Force are intended to emphasize the gravity of the doctrine of separation of powers, and are directed both to President Bush, and to all who will succeed him in the presidential office.<sup>102</sup>

A little less than a year after the release of the ABA Task Force Report, a letter was drafted by the United States Government Accountability Office (GAO).<sup>103</sup> The letter was directed to the Chairman of the Senate Committee on Appropriations and the Chairman of the House Committee on the Judiciary, and addressed the application of presidential signing statements to the fiscal year 2006 appropriations acts.<sup>104</sup> GAO also examined the use of signing statements by federal courts.<sup>105</sup> The findings revealed that all but one of the twelve appropriations acts for the 2006 fiscal year included a signing statement identifying constitutional concerns.<sup>106</sup> The letter also indicated that federal

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99. ABA TASK FORCE REPORT, *supra* note 4, at 1.

100. *Id.* at 23.

101. See Savage, *supra* note 98 ("[The Task Force is] saying that the president of the United States has an obligation to follow the Constitution and exercise only the authority the Constitution gives him. That's a central tenet of American conservatism – to constrain the centralization of power.").

102. ABA TASK FORCE REPORT, *supra* note 4, at 5.

103. Letter from Gary L. Keppinger, Gen. Counsel, U.S. Gov't Accountability Office, to Robert C. Byrd, Chairman, Comm. on Appropriations, U.S. Senate, and John Conyers, Jr., Chairman, Comm. on the Judiciary, U.S. House of Representatives (June 18, 2007), <http://www.gao.gov/decisions/appro/308603.pdf>.

104. *Id.* at 1.

105. *Id.*

106. *Id.* at 3.

courts infrequently cited to signing statements and only rarely used them to interpret the law.<sup>107</sup> However, the GAO did not assess the merits of the President's challenges, or the constitutionality of the challenged legislative provisions.<sup>108</sup>

#### IV. HOUSE BILL 5993, THE "PRESIDENTIAL SIGNING STATEMENTS ACT OF 2008"

On May 8, 2008, Representative Walter B. Jones (R-NC) introduced House Bill 5993, the Presidential Signing Statements Act of 2008, which largely adopts the Task Force's legislative recommendations. The purpose of the bill was "to promote congressional and public awareness, understanding, and political accountability of presidential signing statements."<sup>109</sup> To achieve its purpose, House Bill 5993 requires that the president transmit copies of signing statements to congressional leadership within three days of the issuance of the statement, that the statements be published in the Federal Register, that the executive staff testify as to the meaning and justification for presidential signing statements upon the request of the House or Senate Judiciary Committee, and that no monies be authorized or expended to implement any law accompanied by a signing statement if these requirements are not met.<sup>110</sup> As of July 28, 2008, before the commencement of the summer congressional recess, House Bill 5993 was referred to the House Subcommittee on the Constitution, Civil Rights, and Civil Liberties.<sup>111</sup>

#### V. THE PROBABILITY THAT HOUSE BILL 5993, THE PRESIDENTIAL SIGNING STATEMENTS ACT OF 2008, WILL PASS MUSTER AND BECOME LAW

What is the likelihood that H.R. 5993 will become law? Considering that the enactment of the Presidential Signing Statements Act of 2008 will depend upon the endorsement of the president whose actions have instigated the call for House Bill 5993, the probability is minimal.

The congressional findings of House Bill 5993 lay out the very hurdles that the bill will have to overcome prior to becoming law.<sup>112</sup> President Bush's assertion of this prerogative follows from his subjective interpretation of the Constitution.<sup>113</sup> President Bush claims that he is operating within the boundaries of his executive powers afforded by the Constitution,<sup>114</sup> and often defends his use of signing statements by referring to Article II.<sup>115</sup>

Thus, it is foreseeable that President Bush will not endorse legislation that

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107. *Id.* at 1.

108. *Id.* at 2.

109. Presidential Signing Statements Act of 2008, H.R. 5993, 110th Cong. § 2 (2008).

110. *Id.* § 4-6.

111. THOMAS Status Report for H.R. 5993, <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR05993:@@X> (last visited Feb. 11, 2009).

112. H.R. 5993 § 3.

113. Tribe, *supra* note 63.

114. Savage, *supra* note 7.

115. *Id.*

calls for action to stop him from doing what he believes he has the right to do through the executive powers conferred on him in the Constitution.<sup>116</sup> President Bush is more likely to exercise his legislative veto power, a tool that he has used only twelve times since he became president.<sup>117</sup> Or, in the unlikely event that he signs the bill, House Bill 5993, like bills that came before it, could be challenged with a signing statement. The outcome: an “unendorsed” piece of legislation.

## VI. IMPACT ON CURRENT ADMINISTRATION AND THE 2008 PRESIDENTIAL CANDIDATES

For the sake of argument, what would be the effect if House Bill 5993 passed? Would its passage have an impact on the Bush Administration? With less than 150 days left in President Bush’s second term, and approximately two months left in the last session of the 110th Congress, the passage of such legislation would not have a significant impact on President Bush. Even high-profile bills are more likely to be hampered by filibusters, preventing the bills from getting out of Congress. Ultimately, since 2008 is a presidential election year, many bills may return in the forthcoming congressional session.

As to presidents, if House Bill 5993 were passed, they too would be expected to adhere to the requirements of the law. The two 2008 presidential candidates for the Democratic Party and the Republican Party have already articulated their views regarding presidential signing statements. The nominee for the Democratic Party, Senator Barack Obama, defends the legitimacy of presidential signing statements, but condemns the use of signing statements to evade laws or avoid accountability.<sup>118</sup> On the other hand, Republican presidential candidate John McCain has publicly denounced President Bush’s use of signing statements. Responding to a question regarding the use of signing statements, John McCain stated, “It is wrong, and it should not be done.”<sup>119</sup>

## CONCLUSION

The President’s unbridled use of signing statements, stemming from his “larger-than-life” view of presidential prerogative, has resulted in an expansion of executive power that challenges our balance of government.<sup>120</sup> Nevertheless, there is a place for signing statements. History, long-standing and

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116. U. S. CONST. art. II, § 1 cl. 1.

117. United States Senate, Vetoes by President George W. Bush, <http://www.senate.gov/reference/Legislation/Vetoes/BushGW.htm> (last visited Jan. 29, 2009).

118. See Charlie Savage, *Barack Obama’s Q&A*, THE BOSTON GLOBE, Dec. 20, 2007, <http://boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/>. Subsequent to the completion of this article, President Barack Obama was elected and sworn into office as the 44<sup>th</sup> President of the United States.

119. See Charlie Savage & James W. Pindell, *A Tactic of Bush’s on Bills is Assailed*, THE BOSTON GLOBE, Nov. 20, 2007, at A14 (“[I] would never issue a signing statement . . . [I] would only sign [the legislation] or veto [it].”)

120. Tribe, *supra* note 63.

contemporary, has provided signing statements with functions that are both acceptable and necessary. The use of presidential signing statements is not unconstitutional; rather, it is their abuse that has resulted in constitutional questions. It is the unparalleled number of signing statements used by President Bush to make constitutional and legal objections that has prompted scrutiny and led to the introduction of legislation such as House Bill 5993.

House Bill 5993's overall goal is to strike a balance—to preserve the separation of powers created by the forefathers of our democracy. Whether House Bill 5993 (or other legislation with similar purposes) will become law remains to be seen. However, perhaps it is not legislation that is needed to strike this balance and prevent an abuse of power. Perhaps what is simply needed is a person who is willing, in his or her capacity as the President of the United States and in the absence of any legislation or judicial declaration, to “preserve, protect and defend the Constitution of the United States,”<sup>121</sup> and to “take Care that the Laws be faithfully executed.”<sup>122</sup>

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121. U.S. CONST., art II, § 1, cl. 7.

122. U.S. CONST., art II, § 3.