RECENT DEVELOPMENTS

SIGNING STATEMENTS: A PRACTICAL ANALYSIS OF THE ABA TASK FORCE REPORT

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INTRODUCTION

In August 2006, an American Bar Association (ABA) Task Force issued a report (the Report) criticizing the recent Administration's practice of issuing signing statements, which accompany the signing of legislation and inform the public of provisions the President believes are unconstitutional on separation of powers grounds.[1] While the Report discussed the records of several recent Presidents, the Task Force focused on signing statements issued by George W. Bush who, by its count, has challenged the constitutionality of more provisions than all of his predecessors combined.[2]

The Task Force concluded that if the President believes part of a bill presented for his consideration is unconstitutional, he should either sign or veto the measure—he should not follow the approach adopted by his predecessors of signing the bill while announcing his belief that a provision is unconstitutional and that the administration will interpret it, if possible, to avoid constitutional problems.[3] The Report recommended enacting legislation that would allow "Congress, or other entities or individuals, to seek judicial review of such signing statements, to the extent constitutionally permissible," of a signing statement that asserts that an enacted provision is unconstitutional.[4] Senator Arlen Specter introduced such a bill in the last Congress. It would have vested federal courts with jurisdiction to entertain declaratory judgment actions concerning the legality of any presidential signing statement and given the House or the Senate standing to bring such a lawsuit.[5] Days into the new Congress the president of the ABA submitted a letter to the leaders of Congress

1. AM. BAR ASS'N, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE (2006), *available at* http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf [hereinafter TASK FORCE REPORT].
2. TASK FORCE REPORT, *supra* note 1, at 6, 14 & n.52.
3. *Id.* at 5.
4. *Id.* at 5, 25-26.
5. S. 3731, 109th Cong. § 5 (2006).

reiterating the recommendation that Congress adopt legislation allowing judicial review of signing statements to the extent constitutionally permissible.[6]

The Task Force's conclusions are misguided in three fundamental respects. First, they mistakenly focus on one method by which recent Presidents have communicated their constitutional concerns to the public—the signing statement—rather than on the merits of their substantive positions. Signing statements have no legal force and effect. They have the same legal significance as other mechanisms the President could use to deliver the same message, such as a speech, a radio address, or an answer to a question at a press conference: none at all.

Second, the Task Force's recommended solution would not work. Under Article III of the Constitution, only a person who has suffered concrete harm from a government action may invoke judicial review. No individual will suffer particularized harm from the issuance of a signing statement; an injury can occur only when a government agency acts consistent with a President's construction, and that agency action generally is already subject to judicial review. Further, since a signing statement has no legal effect, there is no harm that could be redressed by a court overturning the statement's interpretation of separation of powers principles.

Third, the Task Force restricted the level of its analysis to constitutional theory. It ignored the practical question of whether successive administrations have been willing to work around their formal separation of powers objections to congressional action and have accommodated the Legislative Branch's interests in practice.

Most signing statements that raise separation of powers concerns inform the public that the President will interpret the potentially objectionable provision in the narrower manner that he believes to be constitutional and that he will try to address congressional interests. Successive administrations have acted in this manner to minimize the risk of unnecessary constitutional confrontations because they have recognized that: (a) the separation of powers issues raised in signing statements are rarely justiciable in federal court; and (b) Congress has effective political weapons to compel the President to respect its policy preferences, even if that intention is set forth in a provision that contains a technical constitutional flaw. Taken together, these factors mean that in most instances, the President and Congress will be forced to reach a political

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6. Letter from Karen J. Mathis, President, Am. Bar Ass'n, to Harry Reid, Majority Leader, U.S. Senate, Mitch McConnell, Minority Leader, U.S. Senate, Nancy Pelosi, Speaker, U.S. House of Representatives, and John Boehner, Minority Leader, U.S. House of Representatives (Jan. 17, 2007), http://www.abanet.org/poladv/letters/aniterror/2007jan17_signingstmts_1.pdf.

resolution of their policy differences. The "narrow interpretation" and "accommodation" approaches followed by recent Presidents arethe first steps in the process of compromise.

Given the non-justiciable nature of many persistent separation of powers disputes, the Task Force should have asked whether the approach taken by recent Presidents has proved successful in accommodating Congress's institutional interests. Unfortunately, the Task Force had neither the time nor the mandate from ABA leadership to consider this issue. The Task Force, therefore, failed to generate the information necessary to answer the ultimate question of whether the approach followed by successive administrations has served the public interest by permitting the work of the government to continue, while deferring the need for the two Branches to face off over the question of their respective constitutional powers.

As the Task Force noted, most separation of powers concerns raised in signing statements involve formulaic objections to minor provisions of little policy consequence.[7] However, in a small number of cases involving the use of military force abroad or international diplomacy, separation of powers disputes are intertwined with policy issues of great significance.[8] The Task Force addressed the less significant part of the question by focusing on the raw number of instances where recent Presidents have articulated separation of powers concerns in matters of little policy import. It thereby failed to raise the critical questions that need to be answered to assess the use of signing statements in the national security realm: whether the positions taken by a particular President in a specific signing statement were substantively valid and whether they were consistent with the positions taken by his predecessors when similar issues arose.

In the final analysis, the Task Force Report illustrates the management consultant's adage that when you have a hammer, everything looks like a nail. Lawyers are trained to litigate, and the members of the Task Force were true to their training. They correctly identified in signing statements one manifestation of the recurring struggle between Congress and the President for primacy in national security matters and sought to recast the issue in a manner amenable to judicial resolution. The Task Force did not consider the messy, practical question of whether, despite their disagreement over the scope of their respective constitutional authorities,

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7. TASK FORCE REPORT, *supra* note 1, at 9, 17.

8. *See* TASK FORCE REPORT, *supra* note 1, at 15-16 (listing prominent examples of President Bush's refusals in signing statements to carry out laws dealing with Commander in Chief powers); Phillip J. Cooper, *George W. Bush, Edgar Allan Poe, and the Use and Abuse of Presidential Signing Statements*, 35 PRESIDENTIAL STUD. Q. 515, 524 (2005) (describing President Bush's assertions that he can ignore any act of Congress that seeks to regulate the military); Charlie Savage, *Bush Challenges Hundreds of Laws*, BOSTON GLOBE, Apr. 30, 2006, at A1.

the two Branches have been able to reach policy agreement in specific cases without the benefit of the Judiciary. It also did not address the consequences for our system of government if the courts assumed responsibility for deciding core issues of political authority through the backdoor mechanism of reviewing a presidential press release with no legal effect.

Congress should not follow the Task Force's recommendation for enactment of legislation that would purport to empower the courts to decide separation of powers issues without regard to normal justiciability requirements. The Task Force failed to make the case that such an approach would improve the longstanding system where the political branches grapple with each other to resolve most separation of powers issues. If a President issues a signing statement that objects to a provision on separation of powers grounds and thereafter does not respect the Legislative Branch's policy preferences, the better solution is for Congress to assert its institutional authorities in an aggressive manner and compel the President to recognize its coordinate policymaking role under the Constitution.

I. SALIENT CHARACTERISTICS OF SIGNING STATEMENTS

A. Legal Status of Signing Statements

A signing statement is a press release issued by the White House at the time the President signs a bill into law. Signing statements are developed by Presidential advisers as part of the "enrolled bill" process, where senior White House staff and Cabinet agencies advise the President whether he should sign or veto a bill that passed Congress. In that process, the President's advisers may suggest that he publicly present his views on the legislation, such as by remarks at a bill signing ceremony or issuance of a signing statement. On occasion, the White House staff will recommend that the President include a discussion of constitutional issues in a signing statement.

The President has unfettered discretion whether to issue a signing statement and as to its contents. Issuance of a signing statement is neither required nor limited by law. It is one of several mechanisms the President may use to communicate with the public, depending upon his policy judgment as to what approach would best serve his political interests. As such, a signing statement has no legal force or effect.[9] It has the same

9. *See* Cooper, *supra* note 8, at 519 (stating that signing statements are often viewed as "hortatory and ceremonial rather than substantive").

standing as other informal mechanisms the President may use to make his views known, such as remarks at photo opportunities or comments to reporters while boarding his helicopter.

The Task Force recognized that, to date, federal courts have given signing statements "little or no weight,"[10] but suggested that this practice might change in the future.[11] The Report provides no support for this concern. In a few instances, federal courts have quoted signing statements to describe the Presidents' views on the proper interpretation of a law.[12] Federal courts have not, however, treated these documents as having legal effect or given the interpretations they contain any deference. For example, the White House press release that accompanied the signing of the Detainee Treatment Act of 2005 stated that the Executive Branch would "construe section 1005 to preclude the Federal courts from exercising subject matter jurisdiction over any existing or future action, including applications for writs of habeas corpus, described in section 1005."[13] In *Hamdan v. Rumsfeld*,[14] the Supreme Court rejected, without citation to the signing statement, the Department of Justice's argument that section 1005 repealed federal jurisdiction over pending habeas corpus actions that challenge the President's authority to convene military commissions to try foreign prisoners charged with violating the laws of war.[15] The Court pointedly noted that "[w]e have not heretofore, in evaluating the legality of Executive action, deferred to comments made by such officials to the media."[16]

The fact that signing statements have no legal force and effect highlights one of the principal problems with Senator Specter's bill—it would not work. The signing statement is simply a press release and constitutes one of the many means used by the President to communicate his views to the public. Even if the courts were to hold that Congress could enact a statute that made issuance of signing statements justiciable, the President could avoid application of the law simply by expressing his views on separation of powers issues through an alternative format, such as a letter to a constituent or a press conference. The President could also decide not to

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10. TASK FORCE REPORT, *supra* note 1, at 26.
11. *See id.* at 26-27 (listing several cases where courts have given attention to signing statements).
12. *See id.*; s*ee also* Cooper, *supra* note 8, at 519 (indicating that courts have concluded that signing statements were at least worthy of mention in the courts' interpretation of a statute).
13. Statement by President George W. Bush Upon Signing H.R. 2863, Pub. L. No. 109-148, 2005 U.S.C.C.A.N. S51.
14. 126 S. Ct. 2749 (U.S. 2006).
15. *Id.* at 2762-69.
16. *Id.* at 2792 n.52.

inform Congress and the public of his position and quietly ignore the provision to which he objects, thereby reducing the transparency of his actions.

The Task Force also overlooked the fact that the Executive Branch has long stated its views on constitutional issues presented by legislation pending before Congress without engendering concerns of presidential abuse of power. For decades, Assistant Attorneys General for Legislative Affairs have submitted letters to congressional committees drafted by the Office of Legal Counsel, and formally cleared by the White House, objecting to the constitutionality of provisions under consideration. The courts have occasionally considered, but not given deference to, the constitutional views expressed in these letters.

The recent media attention given to signing statements may reflect that, with the advent of the Internet, these documents are now easily accessible on-line, while the letters in which the Executive Branch traditionally has made the same points to Congress during the bill formulation process are not readily accessible. Presidential signing statements generally repeat, in compressed form, the constitutional views expressed in Department of Justice letters and testimony at earlier stages in the legislative process. The Committee Report may, but need not, inform the public of the Department of Justice's position. Further, the White House often restates its constitutional views in Statements of Administration Position, which are made available to members of Congress prior to the final vote on bills. These documents also are not collected systematically or published. The White House website, however, does contain a chronological file of public presidential statements, including signing statements.[17]

Thus, the apparent proliferation of separation of powers objections in signing statements may not be a reliable indicator of whether the Executive Branch overall, or a President in particular, has taken a more aggressive position concerning the scope of congressional authority under the Constitution. The reported numbers may represent nothing more than a change in the administration's external communications strategy.

B. Evolution of Signing Statements

Signing statements in their modern form are the product of two impulses that coalesced early in President Reagan's second term. First, the Administration was frustrated that, in interpreting statutes, federal courts relied heavily on legislative history generated by Congress, but largely ignored the Executive Branch's pre-enactment views as to what the law

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17. *See generally* The White House, Presidential News and Speeches, http://www.whitehouse.gov/news/ (last visited June 21, 2007).

meant.[18] To redress what was considered a form of unilateral disarmament, the Attorney General recommended that the President include a more detailed understanding as to how the new law should be interpreted in signing statements. This initiative has diminished in importance over time. With the appointment of more conservative Justices, the Supreme Court has emphasized a literal approach to statutory interpretation that downplays all extra-textual sources originating from both Congress and the Executive.

Second, as part of the Administration's initiative to reassert presidential power vis-à-vis Congress, the Department of Justice developed the theoretical basis for more aggressive assertions of executive authority and sought opportunities to advance those positions.[19] As part of that process, the Department emphasized separation of powers issues in its testimony and letters to Congressional committees during the bill drafting process. Where appropriate, these constitutional concerns were repeated in the Statements of Administration Position that were distributed to Members before the final vote on the bill.

On many occasions, Congress ignored the Executive Branch's position and included in the final text of the law provisions to whose constitutionality the Department of Justice had technical objections, notably committee veto provisions that were clearly unconstitutional after *Chadha*.[20] When the Department raised these constitutional objections in the enrolled bill process, the White House staff faced a dilemma. As a practical matter, the President could not veto important legislation where there was no policy disagreement based on constitutional flaws in minor provisions. At the same time, the White House did not want to discourage the Department of Justice from identifying and objecting to legislative provisions it believed infringed upon presidential authority, but needed to avoid having the Department delay presidential action routinely recommending vetoes due to technical flaws.

The White House's solution was to carry forward into a signing statement, in selected cases, a summary of the technical constitutional objections that the Administration previously had submitted to Congress.[21]

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18. *See* Cooper, *supra* note 8, at 517 (describing the Reagan Administration's efforts to provide an opportunity for the chief executive to participate more actively in the creation of legislation as part of a three-part strategy developed by President Reagan's Attorney General).

19. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 716 (1986) (holding unconstitutional the exercise of executive authority by an officer not appointed by the President); INS v. Chadha, 462 U.S. 919, 921 (1983) (declaring the legislative veto unconstitutional).

20. *See, e.g.*, Statement on Signing Legislation on the Codification of Public Buildings, Property, and Works, 38 WEEKLY COMP. PRES. DOC. 1427 (Aug. 23, 2002) (going beyond general statements to provide a kind of declaratory judgment).

21. William D. Popkin, *Judicial Use of Presidential Legislative History: A Critique*, 66 IND. L.J. 699, 701 (1991) (describing the components of signing statements and attaching an

In many cases, the President expressed an intention to interpret the objectionable provisions narrowly to avoid a possible constitutional problem. In this way, the Administration attempted to signal Congress that it sought to preserve the Executive Branch's formal legal position but was not seeking to create a policy impasse over the specific provision that included the challenged language. This approach appeared to address Congress's practical concerns and has been followed by subsequent Presidents of both parties.

II. SIGNING STATEMENTS INVOLVING "ROUTINE" SEPARATION OF POWERS DISPUTES

A. The Positions of the Two Branches on Potentially Unconstitutional Laws

The Legislative and Executive Branches have long disagreed about whether the President has authority to refuse to implement or defend a provision of law he believes to be unconstitutional. This recurring dispute is the point of departure for the controversy concerning signing statements.

Congress's traditional position is that under the Constitution, the President does not have a "dispensing" power to determine which parts of legislation to enforce. The entire statute becomes law upon his signature, and he is bound to apply all parts of it unless and until a court declares a provision to be invalid. These principles apply whether the President's objections are founded on separation of powers or policy grounds. If the President believes a provision is unconstitutional, his only recourse is to veto the entire bill. Having decided to sign the legislation, the President cannot selectively choose which provisions he will enforce.

Successive Presidents and their legal advisers generally have agreed with this position, subject to a limiting principle. The traditional Executive Branch position is that the President has a duty to enforce and defend all parts of a statute.[22] When there is a potential conflict between the Constitution and the provisions of a statute, it is almost always the case that the President can best discharge his duties by enforcing and defending the statute, so that there is a final judicial determination as to its validity. The President has no general privilege to disregard laws he deems unconstitutional. However, in exceptional cases, if he believes a statute is

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appendix, which lists more than one hundred instances of constitutional objections in signing statements).

22. *See* The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. Off. Legal Counsel 55 (1980) (responding to the Chairman's questions concerning the legal authority supporting the Justice Department's assertion that it can deny the validity of acts of Congress).

unconstitutional on separation of powers grounds and might alter the balance of forces between the Executive and Legislative Branches, the President may properly determine that he "could best preserve our constitutional system by refusing to honor . . . the Act, thereby creating, through opposition, an opportunity for change and correction that would not have existed had the Executive acquiesced."[23]

As the process for issuing signing statements has evolved, the current practice differs sharply from the original rationale. Recent Presidents have raised frequent separation of powers objections to Congress's inclusion of provisions in statutes that are technically objectionable under the Executive Branch's understanding of constitutional principles, without regard to whether their inclusion in a particular bill creates a significant policy issue. President Bush has followed this approach systematically and perhaps to its logical conclusion. There are two problems with the present approach. First, it ignores the "in exceptional cases" limitation that was part of the traditional Executive Branch position on when a President might refuse to enforce a law he believes to be unconstitutional. The assertion of unconstitutionality has become a matter of routine, without regard to the significance of the provision to which the White House objects.[24]

Second, the ritualistic and non-strategic invocation of separation of powers objections has trivialized the constitutional issues and bred congressional indifference to the President's positions, without generating public support for his views. Congress has continued to enact the same types of provisions to which the White House objects, no matter how frequently or forcefully it has expressed its constitutional position.

The Task Force concluded that the sheer number of separation of powers objections now being raised in signing statements "presents a critically important separation of powers issue."[25] An alternative interpretation is more plausible—that the signing statement process has assumed a defensive role, intended to forestall the possibility that a future Congress could assert that the Executive's failure to object to inclusion of such a provision in a particular law constituted a precedent that supports the constitutionality of such a provision. Having adopted this defensive use of the signing statement, the logic of the Executive Branch position may now require the President to raise such objections each time one of the standard objectionable provisions recurs, for fear of creating the precedent he seeks to avoid.

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23. *Id*. at 57.

24. *See* Note, *Context-Sensitive Deference to Presidential Signing Statements*, 120 HARV. L. REV. 597, 618 (2006) (concluding that in part because of the increase in the use of signing statements, they are to be accorded the status of post-enactment legislative history and only afforded *Skidmore* deference rather than *Chevron* deference).

25. TASK FORCE REPORT, *supra* note 1, at 26.

As set forth below, analysis of how the signing statement process has worked in practice supports the conclusion that, with a few significant exceptions, the signing statement process is defensive in purpose and effect. In light of congressional indifference to the views successive administrations have expressed in these documents, the White House and the Department of Justice may at some point wish to consider whether the current approach is actually serving its originally intended purposes.

B. Signing Statements and Non-Justiciable Separation of Powers Disputes

Many separation of powers disputes between the Legislative and Executive Branches have persisted for extended periods of time because the issues are rarely framed in a manner subject to judicial review.[26] Policy concerns with constitutional interpretations in signing statements are focused in this area.

There is little reason for policy concerns with constitutional interpretations in signing statements that involve areas where any resulting government action will be subject to judicial review. For example, as the Task Force noted, President Bush's signing statements have stated repeatedly that "[t]he executive branch shall construe provisions . . . relating to race, ethnicity, [and] gender . . . in a manner consistent with the requirement to afford equal protection of the laws . . . ."[27] Whether the President's unarticulated interpretation of the Equal Protection Clause is right or wrong, this statement does not threaten to upset the allocation of authority between Congress and the President. If an executive agency takes an action consistent with the President's construction of the law, then judicial review of the agency action will conclusively determine the validity of the President's position. The policy problems presented by signing statements involve separation of powers issues that are not amenable to judicial review.

Three factors may defeat review of a separation of powers issue raised in a signing statement. First, in many instances where the White House raises an abstract constitutional objection to a provision in a law the President signed, there may be no actual case or controversy because the administration ultimately will implement the law in a manner consistent with Congress's wishes. As discussed below, Congress has effective political tools with which it often can induce the Executive Branch to

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26. *See* Raines v. Byrd, 521 U.S. 811, 826-28 (1997) (noting that more than half a century after President Andrew Johnson was impeached for violating the Tenure of Office Act, the Supreme Court held in *Myers v. United States*, 272 U.S. 52 (1926), that a smaller scale version of that law was unconstitutional in a lawsuit filed by a postmaster whom the President had removed from office without obtaining the consent of the Senate).

27. Statement by President George W. Bush Upon Signing H.R. 2863, Pub. L. No. 109-148, 2005 U.S.C.C.A.N. S51; TASK FORCE REPORT, *supra* note 1, at 18.

follow its policy preferences, regardless of whether the provision is drafted in a manner that is technically unconstitutional. Even if the President believes that a provision impinges upon his authority, he may conclude that it is in his self-interest to comply with the measure. In these cases, the abstract constitutional disagreement becomes moot.

Second, especially in the national security field, if the Executive Branch were to ignore a provision that it believes violates separation of powers principles, there may not be a person with standing to sue. Members of Congress do not have standing to sue based on a claim that they have suffered an institutional injury from the President's implementation or non-implementation of a statute. In *Raines v. Byrd*,[28] the Supreme Court held that legislators lack standing under Article III based on allegations that an executive official has taken actions that damage all members equally, and where the claim is based on an alleged loss of political power by Congress as an institution, rather than on loss of a right that a member enjoyed personally.

Further, members of the public may not have standing to challenge a separation of powers interpretation in a signing statement because they do not suffer any concrete and particularized injury from its issuance.[29] The injury that any one individual suffers from a separation of powers dispute between Congress and the President is often no greater or more particularized than that suffered by any other member of the public, and thus, it fails to satisfy Article III requirements.[30]

Third, even if a person could demonstrate individualized harm from a government action or inaction, that injury would not be redressable by an order invalidating a signing statement. In general, the harm suffered by an individual will not be caused by issuance of a press release articulating the President's views on separation of powers, but by application of that interpretation in a specific action by an Executive agency. In such cases, judicial review will address the legality of the agency action on the merits, not on the validity of a theoretical discussion in a signing statement that has no independent legal force and was not the direct cause of the harm allegedly suffered by the plaintiff.

The injury-in-fact and redressability problems highlight the second major flaw in the Specter bill.[31] A declaratory judgment invalidating a constitutional interpretation set forth in a signing statement would not rectify the harm suffered by the plaintiff, and thus, would constitute an advisory opinion that lies beyond the powers of an Article III court.

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28. 521 U.S. 811 (1997).
29. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 576 (1992).
30. *See* DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854, 1860-65 (U.S. 2006); United States v. Richardson, 418 U.S. 166, 170 (1974); Massachusetts v. Mellon, 262 U.S. 447, 488-89 (1923).
31. S. 3731, 109th Cong. § 5 (2006).

C. Use of Signing Statements to Object to Recurrent Separation of Powers Disputes of Little Practical Consequence

As the Task Force noted, most separation of powers objections in signing statements involve certain types of provisions that Congress enacts frequently, despite repeated Executive Branch objections.[32] Adoption of these provisions reflects an institutional, not partisan, disagreement. The Task Force calculated that President Bush had raised more constitutional objections in signing statements than any of his predecessors, without noting that his party controlled both Houses of Congress for most of this time.

The Task Force failed to look beyond newspaper accounts of the raw number of constitutional objections raised in President Bush's signing statements and did not consider their practical significance. In the vast majority of cases, his Administration's separation of powers objections are similar to those of his predecessors. They involve limited categories of provisions where the dispute between the two Branches is more theoretical than real, and where having preserved its position, the Executive Branch has often accommodated congressional intent.

1. Legislative Vetoes

The use of signing statements to raise separation of powers objections was prompted, to a substantial degree, by the struggle between Congress and the White House over the constitutionality of legislative veto provisions. Starting in the Wilson Administration, Presidents of both parties objected to the constitutionality of laws that purported to give one House of Congress authority to override an Executive Branch action, without concurrence by the other House or presentment to the President for his signature.

In 1975, the Department of Justice began a systematic search for a test case in which the courts would have jurisdiction to determine the constitutionality of these provisions. Two Administrations later, the Department of Justice found an appropriate vehicle, which involved the constitutionality of a law that purported to authorize one House of Congress to invalidate a decision by the Attorney General to suspend a deportation order.[33] The individual facing deportation had standing to challenge the congressional action, and the Executive Branch intervened to

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32. TASK FORCE REPORT, *supra* note 1, at 17 nn.60-61.

33. *See* INS v. Chadha, 462 U.S. 919, 925 (1983) (invalidating the Immigration and Nationality Act § 244(c)(2), 9 U.S.C. § 1254(c)(2) (1982)).

support his position.[34] The Supreme Court held that the legislative veto provision was unconstitutional for violation of the Bicameralism and Presentment Clauses of the Constitution.[35]

The decision in *Chadha* had little effect on congressional behavior. Congress continued to adopt unicameral veto provisions and has included them in hundreds of laws passed since 1983.[36] The Department of Justice quickly became frustrated with the refusal of Congress to acknowledge the Executive Branch's victory and its disregard of the many comment letters the Department submitted objecting to new legislative veto provisions. To address the congressional intransigence and preserve the fruits of the Supreme Court victory, the Department recommended that the President articulate his continuing objections to these provisions in signing statements.

After consideration by the White House staff, President Reagan adopted a policy of objecting via signing statements to the constitutionality of legislative vetoes, while simultaneously assuring Congress that as a matter of comity, the appropriate Executive official would notify the appropriate committees of any action taken. This approach reflected the Administration's recognition that, while not legally binding, these new legislative veto provisions were politically enforceable. Congress could effectively discipline an executive agency that failed to cooperate with the appropriate committees by adopting a bill to overturn the action, reducing the agency's appropriations, opposing other initiatives of the agency head, or refusing to confirm new appointees.

President Reagan's successors followed this general approach for responding to enactment of legislative veto provisions. Use of this template quickly spread to areas not covered by an explicit Supreme Court decision, in which Congress ignored the Executive Branch's views on separation of powers issues.

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34. In reaching the merits of Chadha's claim, the Supreme Court rejected an argument that he lacked standing "because a consequence of his prevailing will advance the interests of the Executive Branch in a separation-of-powers dispute with Congress . . . ." *Id.* at 935-36.

35. *See* U.S. CONST. art. I, §§ 1, 7 (stating that Congress will consist of a House and a Senate, and that all bills passed by the House and the Senate must be submitted to the President for his approval).

36. Testimony submitted by the Department of Justice at a January 2007 House Judiciary Committee hearing on Presidential Signing Statements reported that President Bush has objected to the constitutionality of legislative veto provisions in 55 of his 126 constitutional signing statements. *Concerning Presidential Signing Statements*, *Hearing Before the H. Comm. on the Judiciary*, 109th Cong. 9 (2007) (statement of John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel), *available at* http://judiciary.house.gov/media/pdfs/Elwood013107.pdf [hereinafter JUSTICE TESTIMONY].

2. Appointments Clause

Beginning in the mid-1980s, successive administrations asserted that under the Appointments Clause, Congress could not impose experience qualifications or other requirements on the President's selection of officers who will exercise executive authority.[37] Congress nonetheless continues to adopt such restrictions. As with legislative veto provisions, recent Presidents have issued signing statements that inform Congress that their administration will interpret these requirements as advisory to avoid an unnecessary constitutional confrontation. This approach recognizes the reality that if the President declines to consider Congress's views as to the appropriate qualifications for a nominee, the Senate can simply refuse to confirm the nomination.

The Executive Branch position was heavily influenced by the experience of the Reagan Administration in dealing with the "executive" authority issue in litigation with Congress. Under President Reagan, the Department of Justice submitted many letters to congressional committees setting forth detailed constitutional objections to the inclusion of experience qualifications for appointees, but Congress disregarded the arguments and continued to adopt restrictions. Administration lawyers at first thought that the Legislative Branch's lack of response might reflect a failure in the persuasiveness of the constitutional analysis. The Department of Justice devoted substantial efforts to improving its presentation, without effect. In late 1985, passage of the Gramm-Rudman-Hollings budget reduction statute became a political inevitability.[38] Members of Congress who opposed the bill successfully negotiated for inclusion of a poison pill provision, which delegated responsibility for implementing the budget cuts to a Legislative Branch official—the Comptroller General. In the ensuing litigation, some of these members submitted an effective brief to the Supreme Court, which argued that the law should be declared unconstitutional on separation of powers grounds, in terms that mirrored the Department of Justice's analysis of Executive authority in its Appointments Clause letters. Administration lawyers then understood that the problem was not an inadequacy in their work, but that it normally was not in Congress's self-interest to acknowledge the legitimacy of the President's position about the constitutional nature of Executive authority.

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37. *See* U.S. CONST. art. II, § 2 (stating that the President "shall appoint . . . Officers of the United States"). President Bush has raised this objection in twenty-five signing statements. JUSTICE TESTIMONY, *supra* note 36, at 10.

38. *See* Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038 (codified as amended at 2 U.S.C. § 900).

In 1986, the Supreme Court declared that the Gramm-Rudman-Hollings law violated separation of powers principles by delegating executive authority to a Legislative Branch official.[39] Thereafter, Congress reverted to its prior institutional position of ignoring the Administration's objections under the Appointments Clause to the imposition of restrictions on the pool of nominees from which the President could choose. The White House responded by making this issue one of the standard grounds for objections in signing statements.

3. Requirements to Submit Legislative Recommendations

Successive administrations have interpreted the Constitution as providing the President with complete discretion on whether to propose legislation for consideration by Congress.[40] Accordingly, the Executive Branch has objected in comment letters and signing statements to provisions that require the President or the agency heads to submit legislative proposals. Despite Congress's awareness of this constitutional objection, Congress routinely adopts laws that require the President to submit draft legislation. Because the White House understands that its failure to comply will deprive it of influence over the contents of the resulting legislation, the White House inevitably responds in some manner to the congressional demand, either formally or informally, and either directly or through an agency.

4. Submission of Reports to Congress by Agencies Without Presidential Review

Congress repeatedly adopts provisions that purport to deny the White House authority to review or edit reports, budget requests, testimony and similar documents that executive agencies, especially the independent regulatory bodies, are required to submit to Congress. Successive presidents have objected in comment letters and signing statements to the constitutionality of these provisions, on the ground that they deny the President the authority vested in him by Article II of the Constitution to supervise officials in the Executive Branch.[41]

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39. Bowsher v. Synar, 478 U.S. 714, 736 (1986).

40. *See* U.S. Const. art. II, § 3, cl. 1 (stating the President "shall from time to time give to the Congress . . . such Measures as he shall judge necessary and expedient"); JUSTICE TESTIMONY, *supra* note 36, at 8 (noting that President Bush has raised this objection in sixty-seven signing statements).

41. *See, e.g.*, Statement by President George W. Bush Upon Signing H.R. 2744, Pub. L. No. 109-97, 2005 U.S.C.C.A.N. S37; Statement by President George W. Bush Upon Signing H.R. 3058, Pub. L. No. 109-115, 2005 U.S.C.C.A.N S42.

In reality, the White House has little alternative but to comply with these provisions. Congress inevitably will obtain copies of the agency's original submission to the President and can quickly determine what changes the White House has made. Therefore, the Administration's insistence on acting in accordance with its formal constitutional position would antagonize Congress, without producing any compensatory benefit. Despite its formal constitutional position, in reality the Executive Branch has developed various face-saving ways to avoid confronting its inability to persuade Congress to stop enacting such bypass provisions. For example, the Executive Branch has accepted a provision that permits the financial regulatory agencies to submit legislative proposals and testimony directly to Congress without prior White House review, as long as the submission states that views it expresses do not necessarily represent the views of the President.[42]

5. Congressional Earmarks

Several administrations have objected that Committee reports or other Congressional documents which purport to earmark appropriations for specific projects, but which were never formally adopted by both houses of Congress and were not presented to the President for signature, are not legally binding. For example, a signing statement issued by President Bush objected that certain provisions "purport to give binding effect to legislative documents not presented to the President. The [E]xecutive [B]ranch shall construe all these provisions in a manner consistent with the bicameral passage and presentment requirements of the Constitution for the making of a law."[43]

While the constitutional theory behind this position undoubtedly is well-founded, in practice the White House may be compelled to treat these earmarks as politically binding, for fear of antagonizing the Chairmen of the Appropriations Subcommittees and suffering retribution on its budget priorities. For example, during the Reagan Administration, one Director of

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42. *See, e.g.*, 12 U.S.C. § 250 (2000).

> No officer or agency of the United States shall have any authority to require the Securities and Exchange Commission, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Comptroller of the Currency, the Director of the Office of Thrift Supervision, the Federal Housing Finance Board, or the National Credit Union Administration to submit legislative recommendations, or testimony, or comments on legislation, to any officer or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress if such recommendations, testimony, or comments to the Congress include a statement indicating that the views expressed therein are those of the agency submitting them and do not necessarily represent the views of the President.

Id.

43. Statement by President George W. Bush Upon Signing H.R. 2863, Pub. L. No. 109-148, 2005 U.S.C.C.A.N. S52.

the Office of Management and Budget informed Congress in writing that the Administration would regard earmarks as non-binding. In response, several committee Chairmen declined to do business with him, and the Director's ability to advocate successfully for the President's policies was compromised.

6. Effects of Routine Separation of Powers Disputes and Their Resolutions

The vast majority of provisions to whose constitutionality recent Presidents have objected on separation of powers grounds falls into one these five categories. With isolated exceptions, these technical constitutional objections have not involved provisions raising policy matters of independent significance. Rather, the Executive Branch's activity has constituted one aspect of the ongoing test of strength between Congress and the President over their respective political authorities. Since these issues generally cannot be resolved through litigation, the Legislative and Executive Branches have had no other recourse except to work out their disagreements on political grounds. The White House understands that Congress has effective political weapons to force the Administration to honor its policy preferences. Out of respect for that institutional authority, many signing statements couple a formal objection with a commitment to interpret the provisions in a manner that carries out Congressional intent, without violating the Executive Branch's understanding of the Constitution.

The Task Force misinterpreted the raw number of separation of powers objections as an indicator that successive administrations have followed an aggressive policy designed to alter the current constitutional balance. Considered against the backdrop of de facto Executive Branch compliance with Congressional enactments that raise constitutional concerns, much of the White House's current approach to signing statements appears to represent a defensive effort to preserve the ability of future Presidents to raise similar constitutional objections on matters of real import, while avoiding political confrontation with a co-equal Branch that appears indifferent to the Executive Branch's stated concerns. Congress plainly has not been intimidated by the Executive Branch's use of signing statements, as evidenced by its recurrent adoption of types of provisions to which it knows the White House will object.

III. USE OF SIGNING STATEMENTS IN THE NATIONAL SECURITY AREA

By its uncritical attention to the large number of routine separation of powers objections, the Task Force failed to focus on the important policy issue within its mandate—the small number of instances in which the Bush Administration has used signing statements to articulate broad constitutional interpretations on questions of vital importance in the

national security area. Having dissipated its time and resources on low priority matters, the Task Force was unable to ask the right questions or generate the information necessary to make an informed judgment as to whether the Bush Administration has pursued an overly expansive conception of its authority at the expense of Congress's institutional prerogatives.

The Constitution provides Congress and the President with certain specific powers concerning national security, but does not attempt to define with specificity the scope of their respective authorities. When theoretical issues about their overlapping responsibilities have arisen in litigation, the Supreme Court has in many instances declined to resolve the questions on justiciability, standing, and political grounds. As in the domestic context, the inability of Congress and the President to obtain judicial determination of their respective authorities in the national security area has forced them to reach a political resolution of their policy disputes.

The process of working out these institutional differences has often been protracted and contentious. Here, as elsewhere, Congress possesses effective tools that can compel the Executive Branch to respect its policy preferences. On issues of great national significance, however, the political consequences of utilizing those institutional powers can be substantial, both for individual members of Congress and for their parties.

In the national security area, the Task Force again erred by focusing on the mechanism by which various Presidents have communicated their views to Congress and the public, rather than analyzing the substance of the constitutional positions set forth in signing statements. Further, in light of the infrequency with which these issues arise and the lack of judicial precedent, it is particularly important in the national security area to understand whether the current President's positions on separation of powers issues differ materially from those taken by his predecessors and whether, despite his formal protestations, the President in practice has been willing to accommodate the will of Congress as expressed in legislation. Unfortunately, the Task Force did not ask these questions, and the Report cannot help answer them.

The Task Force also failed to appreciate the consequences of the Bush Administration's willingness to assert unilateral presidential authority, without specific congressional authorization, in areas that directly affect the rights and liberty of individuals. In several instances, the Supreme Court has exercised jurisdiction to review presidential actions justified under the Commander in Chief power and has rejected the Executive Branch's

interpretation of the scope of the President's authority.[44] The Court's willingness to decide cases involving the most sensitive type of separation of powers disputes, when jurisdiction and standing are present under traditional Article III principles, undermines the policy rationale for the Task Force's recommendation that Congress should seek to establish a novel basis on which federal courts could exercise jurisdiction to review constitutional interpretations in signing statements.

A. Presidential Control over Disclosure of Privileged Information

Virtually all recent Presidents have asserted "constitutional authority to withhold information the disclosure of which could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties" that may not be overridden by statute.[45] This objection covers two types of information:

(1) Deliberative materials that reflect communications from Executive Branch officials to the President concerning policy alternatives and information generated in government investigations, similar to that which various Presidents have refused to release in other contexts by invoking executive privilege.[46]

(2) Information related to international negotiations or national security that typically can be disclosed only to persons with appropriate security clearances and on a need-to-know basis. Starting with George Washington, the Executive Branch has consistently refused to produce documents to Congress that relate to ongoing negotiations with foreign countries and whose disclosure might interfere with the success of those

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44. *See, e.g.*, Hamdan v. Rumsfeld, 126 S. Ct. 2749 (U.S. 2006) (holding that the President lacked authority to convene a military commission to try a Yemeni national under procedures that did not comply with the Uniform Code of Military Justice); Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (rejecting Executive Branch argument that out of respect for separation of powers and the limited institutional capability of judges, federal courts should not review the facts concerning individual cases of U.S. citizens held as enemy combatants, but should review only the legality of the overall detention scheme); *see also* Rasul v. Bush, 542 U.S. 466 (2004) (establishing jurisdiction of federal courts over petitions for habeas corpus filed by aliens captured abroad and detained as enemy combatants at the Guantanamo base leased from Cuba); Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007) (determining the same issue under the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600), *cert. denied*, 127 S. Ct. 1478 (2007), *cert. granted*, 75 U.S.L.W. 3707 (U.S. June 29, 2007) (No. 06-1195). On June 29, 2007 the Supreme Court took the highly unusual step of granting a petition for rehearing and granted certiorari on *Boumediene v. Bush*, 75 U.S.L.W. 3707 (U.S. June 29, 2007) (No. 06-1195).

45. Statement by President George W. Bush Upon Signing H.R. 1815, Pub. L. No. 109-163, 2005 U.S.C.C.A.N. S56; *see* JUSTICE TESTIMONY, *supra* note 36, at 10 (noting that President Bush has raised this objection in sixty-three signing statements).

46. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 706 (1974) (rejecting invocation of executive privilege concerning audio tape recordings and documents relating to conversations between the President and his advisors); 40 Op. Att'y Gen. 45, 46 (1941).

> negotiations.[47] Further, recent Presidents have refused to disclose national security information to members of Congress and their staffs on an unrestricted basis, on the ground that the government has a compelling interest in withholding such information from unauthorized persons and that the power to protect this information rests with the President in his roles as head of the Executive Branch and Commander in Chief.[48]

Despite the Executive Branch's categorical position that it can refuse to disclose information to Congress on separation of powers grounds, the Legislative Branch has proved repeatedly that it has effective political tools—including the oversight, confirmation, and appropriations processes—to compel the President to provide the information it needs to carry out its constitutional functions. The Executive Branch often has been able to delay disclosure for some time, until the issue has been raised to a sufficiently high political level and the demands for information narrowed. But in important cases, the Executive Branch ultimately has been forced to respond to congressional demands for information and has negotiated access agreements on a case-by-case basis, to determine what information will be made available to whom, under what conditions, and how the universe of information can be narrowed.

For example, for an extended period President Bush refused to disclose highly sensitive national security information to Congress concerning the program conducted by the National Security Agency, without a warrant from the court established by the Foreign Intelligence Surveillance Act (FISA), to monitor international telephone conversations when the government believed that one party was a member of a terrorist group. When Congress persisted in its demands for information about the program after the 2006 elections, the Administration sought a warrant from the FISA court and agreed to make information about the program available to thirty-six members and staff from the House and Senate Judiciary and Intelligence Committees.[49]

The critical question in this area, not addressed by the Task Force, is whether, notwithstanding their nominal separation of powers position, recent administrations have, in practice, provided Congress with sufficient information, under negotiated terms and conditions, so that it may carry out its oversight and lawmaking functions.

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47. *See, e.g.*, United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936) ("Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.").

48. Dep't of the Navy v. Egan, 484 U.S. 518, 527 (1988).

49. Dan Eggen, *Records on Spy Program Turned Over to Lawmakers*, WASH. POST, Feb. 1, 2007, at A2.

B. Presidential Control over the Conduct of International Relations

Successive administrations have resisted on separation of powers grounds attempts by Congress to dictate either the process by which the Executive Branch discusses problems with foreign governments and multilateral bodies or the substantive positions that the United States will take in those negotiations. In the Bush Administration's formulation of this objection, the authority vested in the President by the Constitution to conduct the foreign relations of the United States prohibits Congress from enacting laws that "purport to direct the conduct of communications, negotiations, and other relations with foreign governments and international organizations" or "by directing the Executive Branch to collaborate with other entities in the development of foreign policy."[50]

The Executive Branch traditionally takes the position that the Constitution vests the President with plenary authority to conduct foreign affairs and that Congress may not require the President or subordinate Executive Branch officials to enter into negotiations or discussions with foreign countries.[51] In practice, however, successive Presidents have understood that, despite the textual commitment of the foreign relations authority to the Executive Branch, Congress has authority over international relations that must be accommodated. The Senate's rejection of the Versailles Treaty, in response to President Wilson's failure to respect congressional concerns, remains the leading object lesson of the potential consequences of the President ignoring the Legislative Branch.

Thus, despite its formal separation of powers position, the Executive Branch has developed multiple techniques for assuring congressional input into negotiating strategies, feedback on the course of the discussions, and possible revisions in substantive positions. For example, the Incompatibility Clause prohibits the President from appointing a member of Congress as a formal member of the United States delegation to a foreign negotiation.[52] Nonetheless, on many occasions the White House has asked members of Congress to serve as observers, especially in trade negotiations, so that the Legislative Branch viewpoint can be factored into the Administration's position on a continuing basis.

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50. Statement by President George W. Bush Upon Signing H.R. 6, Pub. L. No. 109-58, 2005 U.S.C.C.A.N. S17; Statement by President George W. Bush Upon Signing H.R. 3057, Pub. L. No. 109-102, 2005 U.S.C.C.A.N. S38.

51. *See Curtiss-Wright*, 299 U.S. at 316 (noting that the authority over foreign affairs passed from the Crown, not to the colonies as separate entities, but to the United States as a whole).

52. U.S. CONST. art. I, § 6, cl. 2.

C. The President as Commander in Chief of the Armed Forces

The Commander in Chief Clause goes for long periods with little notice and then becomes "one of the most highly charged provisions of the Constitution" in time of hostilities.[53] The traditional Executive Branch position is that the Constitution vests the power to command the armed forces in the President and that Congress may not abrogate that authority by affirmatively directing how the military will be employed.[54] Rather, if Congress wishes to control the use of the armed forces, it must do so through the establishment of broad policy parameters within which the President may exercise his authority to command the troops or by invocation of its negative power to withhold funds under the Appropriations Clause.[55]

In particular, the ability of Congress to control the use of the armed forces through its control over appropriations is clearly established by our constitutional history, dating back to the correspondence of General Washington with the Continental Congress.[56] Many of the persons involved in that correspondence were members of the Constitutional Convention. There is, of course, a fine line between what may be considered creation of an appropriately broad policy framework for the Executive and impermissible micromanagement of the mechanism by which the President controls the armed forces.[57]

Withholding appropriations when U.S. military forces are engaged in armed combat creates substantial political risks for members who vote for such a measure, as demonstrated by the disappearance of the Whig Party after many of its members opposed appropriations for the Mexican War.[58] The desire of members to avoid exposing themselves to attack in election campaigns creates incentives for Congress to try to impose substantive

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53. EDWIN S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1984, at 264 (Randall W. Bland et al. eds., 5th ed. 1984).

54. *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139-40 (1866) ("But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President . . . . Congress cannot direct the conduct of campaigns . . . .").

55. U.S. CONST. art. I, § 9, cl. 7.

56. *See, e.g.*, JOSEPH J. ELLIS, HIS EXCELLENCY: GEORGE WASHINGTON 126-27 (Alfred A. Knopf ed., 2004); DAVID HACKETT FISCHER, WASHINGTON'S CROSSING 144-45, 369 (2004).

57. *See* TERRY GOLWAY, WASHINGTON'S GENERAL: NATHANIEL GREENE AND THE TRIUMPH OF THE AMERICAN REVOLUTION 196-97 (Oxford Univ. Press 2004) (noting that in the winter of 1778-1779, the Continental Congress impeded General Washington's ability to prosecute the war by barring the use of wheat for forage and by requiring that all supplies for the Continental Army be sent by land, rather than by water).

58. *See* JOHN S.D. EISENHOWER, SO FAR FROM GOD: THE U.S. WAR WITH MEXICO 1846-1848, at 286-87 (1989); BERNARD SCHWARTZ, FROM CONFEDERATION TO NATION: THE AMERICAN CONSTITUTION 1835-1877, at 109-10 (1973).

restrictions on the Executive's use of force without having to resort to this device. One manifestation of this impulse was the War Powers Resolution.[59] It purports automatically to terminate the President's authority to utilize the military within sixty days after he reports the outbreak or imminence of hostilities, unless Congress thereafter adopts an affirmative authorizing resolution.[60] Successive administrations have objected to the constitutionality of this provision on the ground that Congress may not disapprove of the President's use of the armed forces by inaction.

As the Task Force noted, President Bush has raised constitutional objections on numerous occasions to statutory provisions that might be interpreted as restricting the conditions under which he may utilize the armed forces. For example, § 502(a) of the Intelligence Authorization Act for Fiscal Year 2005 authorized use of funds designated for intelligence purposes to assist and support the Government of Colombia in a campaign against terrorists. Section 502(c) further provided that "[n]o United States Armed Forces personnel . . . may participate in any combat operation in connection with assistance made available under this section, except for the purpose of acting in self-defense . . . ."[61] In approving the bill, the President issued a signing statement which stated that "[t]he executive branch shall construe the restrictions [on use of the U.S. Armed Forces in certain operations] as advisory in nature, so that the provisions are consistent with the President's constitutional authority as Commander in Chief, including for the conduct of intelligence operations . . . ."[62] The Administration thus followed the familiar pattern of preserving its theoretical separation of powers position while announcing an intention in practice to treat the statute as "advisory" and thereby avoid a direct conflict with Congress.

To assess the actual significance of the President's position, it would be necessary to understand: (1) the basis for the President's constitutional objections to this provision and the extent, to which it departs from the interpretation of the Commander in Chief power followed by his predecessors; and (2) whether the Executive Branch in fact accommodated congressional concerns.

The Task Force Report does not help answer these questions, either for the Colombian anti-terrorist campaign or other statutes where the Bush Administration has raised separation of powers concerns. The required

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59. H.R.J. Res. 542, 93d Cong. (1973).
60. Veto Message, H.R. Doc. No. 93-171, at 2 (1973).
61. Pub. L. No. 108-487, 118 Stat. 3939, 3951 (2004).
62. Statement by President George W. Bush Upon Signing H.R. 4548, Pub. L. No. 108-487, 2004 U.S.C.C.A.N. S55.

analysis certainly would have been difficult for the Task Force to perform, in light of the deliberate opacity of the signing statement. The President's top-line summary of his position, without explanation of his reasoning, makes it impossible to tell whether the objections to the provision governing use of force against Colombian terrorists were based, for example, on the potentially expansive reach of the critical term "combat operation." This term signifies an expansive notion of the Commander in Chief power, a belief that the underlying appropriations statute did not contain the limitations that were set forth in this authorizing statute and, therefore, permitted a broader range of activities. Accordingly, it is not possible to determine by reviewing the signing statement alone whether the President's constitutional interpretation differed from that of his predecessors, and if so to what extent and on what basis. On its face, however, the signing statement begs for further analysis, because at least one plausible construction would conflict with the historic understanding of the scope of congressional power to control military operations through use of its appropriations power.

In addition to ignoring the historical context of separation of powers disputes in the national security area, the Task Force did not consider whether the Bush Administration has in fact accommodated Legislative Branch concerns on these issues. For example, information about how the Executive Branch has used force in Colombia is likely highly confidential, and its dissemination is limited to a relatively small number of members of Congress and senior staff. Unless a member subsequently chooses to raise the issue, it may be impossible for the public to determine whether the President and Congress reached a quiet political accommodation on this sensitive question, or whether the President disregarded Congress's wishes and its members chose to duck a policy or institutional confrontation on the issue. The Colombian terrorist case is not unusual in this regard. In many instances, it is difficult for outsiders to determine if the differences in the two Branches' theoretical positions on their respective national security powers result in an actual institutional conflict. When there is a live dispute, Congress may prefer to quietly threaten to utilize its arsenal of powers to compel the Executive to recognize its coordinate role in the determination of national security policy.

CONCLUSION

Substantial effort may be necessary to determine whether a position announced in a signing statement generated an actual separation of powers dispute between the Branches.[63] The Task Force had neither the time nor

63. *See* Letter from Gary L. Kepplinger, Gen. Counsel, U.S. Gov't Accountability Office, to Robert C. Byrd, Chairmen, Comm. on Appropriations, U.S. Senate and John

the resources necessary to conduct that analysis. Thus, even in the area where the most significant separation of powers disputes potentially may arise, it failed to make a case that would support enactment of legislation to make signing statements reviewable. In any event, the demonstrated willingness of the Supreme Court to decide cases involving application of the President's national security powers, at the behest of individuals who demonstrate standing under established Article III precedents, suggests that there is no justification for creation of a special review mechanism to determine the validity of constitutional interpretations set forth in a presidential press release for persons who suffered no particularized injury from its issuance.

For these reasons, Congress should not follow the ABA's recommendation. Instead, it should focus on the substantive constitutional positions taken by the President and announced in signing statements. In cases where the Administration announces a constitutional objection but thereafter fails to honor the Legislative Branch's policy preferences, the proper response is for Congress to exercise its institutional authorities to force the President to respect its coordinate role for formulating policy.

Conyers, Jr., Chairman, Comm. on the Judiciary, U.S. House of Rep. (June 18, 2007), *available at* http://www.gao.gov/decisions/appro/308603.htm (reviewing provisions in the Appropriations Act to which the President objected in signing statements and determining whether the agencies responsible for their execution had in fact carried out the provisions as enacted).