



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 1, 2007

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed responses to questions arising from the June 27, 2006, appearance before the Committee of Deputy Assistant Attorney General Michelle Boardman at the hearing entitled "The Use of Presidential Signing Statements." We hope that this information is of assistance to the Committee. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

A handwritten signature in dark ink, appearing to read "Richard A. Hertling".

Richard A. Hertling
Acting Assistant Attorney General

cc: The Honorable Arlen Specter
Ranking Minority Member

Chairman Patrick Leahy
Questions for the Record
for
Michelle Boardman
Deputy Assistant Attorney General
"Presidential Signing Statements"
June 27, 2006

1. In your testimony, you stated that many of the President's constitutional signing statements have sought to preserve the Appointments, Recommendations and Presentment clauses of the Constitution. You also stated that the President has issued numerous signing statements involving his foreign affairs and commander-in-chief powers, because of the significant increase in legislation involving national security since September 11, 2001.
 - (a) Has the Department cited or otherwise relied upon any of President Bush's signing statements in legal briefs or memoranda filed in court proceedings involving national security or other matters since January 2001? If so, please identify the cases in which these signing statements were cited or relied upon and the federal statutes involved.
 - (b) Please provide copies of any and all legal memoranda or briefs responsive to question 2(a).

ANSWER: The Department refers only rarely to signing statements in legal briefs or memoranda submitted in court proceedings. Of the several thousand briefs and memoranda the Department has submitted in court in the six years since January 2001, we were able to identify a total of only 26 briefs or memoranda in which the Department cited signing statements. Of those, only 3 involved signing statements issued by President George W. Bush; the balance were signing statements issued by former presidents. Those briefs and memoranda are described below and copies are attached. We understand that it is not practicable to search the innumerable briefs and memoranda filed by the 94 U.S. Attorney's Offices over the past six years, the vast majority of which were not subject to review by personnel at Main Justice. The briefs listed below therefore are those of which we are aware filed by lawyers within the Civil Division, the Civil Rights Division, the Criminal Division, the Environment and Natural Resources Division, the Tax Division, and the Office of the Solicitor General.

1. Gov't Brief, *Zivotofsky v. Secretary of State*, D.C. Cir. No. 04-5395, 444 F.3d 614 (2006) (citing Statement on Signing the Foreign Relations Authorization Act, 38 Weekly Comp. Pres. Doc. 1658 (Sept. 30, 2002))
2. Gov't Brief, *Al-Odah v. Bush*, D.C. Cir. No. 05-5064 (citing statements of principal sponsors of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680, 2739-45 (2005), as well as the President's signing

statement for the Act, 2005 WL 3562509 (Dec. 30, 2005))

3. Gov't Opposition to Petitioner's Emergency Motion, *Al-Adahi v. Bush*, No. 05-280 (D.D.C. Mar. 1, 2006) (citing statements of principal sponsors of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680, 2739-45 (2005), as well as the President's signing statement for the Act, 2005 WL 3562509 (Dec. 30, 2005))

Since January 20, 2001, the Department of Justice has filed approximately 23 briefs and memoranda citing signing statements made by previous Presidents. In the vast majority of these briefs, the Department cited the signing statements in order to help defend the constitutionality of congressionally enacted legislation, by citing the President's statements supporting relevant claims.

1. United States Response To WMATA's Motion To Dismiss On Eleventh Amendment Grounds, *Disability Rights Council v. WMATA*, No. 1:04-cv-00498 (D.D.C. July 17, 2006) (citing President George H.W. Bush's signing statement on Americans with Disabilities Act)
2. Brief for the United States As Intervenor, *Everybody Counts v. Northwest Indiana Regional Planning Commission*, No. 98-97 (N.D. Ind. Sept. 14, 2004) (citing President George H.W. Bush's signing statement on Americans with Disabilities Act)
3. Brief for the United States As Intervenor, *Lieberman v. Delaware*, No. 01-3540 (3d Cir. Feb. 28, 2003) (citing President Reagan's 1986 signing statement regarding Section 504 of the Rehabilitation Act)
4. Brief for the United States As Intervenor, *Thomas v. University of Houston*, No. 02-20988 (5th Cir. Jan. 29, 2003) (citing President Reagan's 1986 signing statement regarding Section 504 of the Rehabilitation Act)
5. Brief for the United States As Intervenor, *Danny R. v. Spring Branch Indep. Sch. Dist.*, No. 02-20816 (5th Cir. Dec. 11, 2002) (citing President Reagan's 1986 signing statement regarding Section 504 of the Rehabilitation Act)
6. Brief for the United States As Intervenor, *Boudreau v. Ryan*, No. 02-1730 (7th Cir. Nov. 25, 2002) (citing President Reagan's 1986 signing statement regarding Section 504 of the Rehabilitation Act)
7. Brief for the United States As Intervenor, *A.W. v. Jersey City Public Schools*, No. 02-2056 (3d Cir. Oct. 24, 2002) (citing President Reagan's 1986 signing statement regarding Section 504 of the Rehabilitation Act)
8. Brief for the United States As Intervenor, *Bowers v. NCAA*, Nos. 01-4226, 01-4492, 02-1789 (3d Cir. June 28, 2002) (citing President Reagan's 1986 signing

statement regarding Section 504 of the Rehabilitation Act)

9. Brief for the United States As Intervenor, *Wilson v. Pennsylvania State Police Department*, No. 02-1531 (3d Cir. Apr. 23, 2002) (citing President Reagan's 1986 signing statement regarding Section 504 of the Rehabilitation Act)
10. Brief for the United States As Intervenor, *Chisolm v. McMamimon*, No. 00-1865 (3d Cir. Nov. 2, 2001) (citing President Reagan's 1986 signing statement regarding Section 504 of the Rehabilitation Act)
11. Brief for the United States As Intervenor, *Koslow v. Commonwealth of Pennsylvania*, No. 01-2782 (3d Cir. Oct. 23, 2001) (citing President Reagan's 1986 signing statement regarding Section 504 of the Rehabilitation Act)
12. Petition For Rehearing And Rehearing En Banc for the United States As Intervenor, *Garrett v. University of Alabama*, Nos. 98-6069, 98-6070 (11th Cir. Sept. 27, 2001) (citing President Reagan's 1986 signing statement regarding Section 504 of the Rehabilitation Act)
13. Brief for the United States As Intervenor, *Lovell, Delmendo v. Chandler*, Nos. 98-16545, 98-16548 (9th Cir. July 10, 2001) (citing President Reagan's 1986 signing statement regarding Section 504 of the Rehabilitation Act)
14. Brief for the United States As Intervenor, *Vinson v. Thomas*, No. 00-15534 (9th Cir. June 12, 2001) (citing President Reagan's 1986 signing statement regarding Section 504 of the Rehabilitation Act)
15. Brief for the United States As Intervenor, *McAleese v. Pennsylvania Dep't Of Corrections*, No. 00-1875 (3d Cir. May 16, 2001) (citing President Reagan's 1986 signing statement regarding Section 504 of the Rehabilitation Act)
16. Brief for the United States As Intervenor, *Garcia v. SUNY*, No. 00-9223 (2d Cir. Apr. 13, 2001) (citing President Reagan's 1986 signing statement regarding Section 504 of the Rehabilitation Act)
17. Brief for the United States As Intervenor-Appellee, *Robinson v. Kansas*, No. 00-3315, 00-3332 (10th Cir. Feb. 5, 2001) (citing President Reagan's 1986 signing statement regarding Section 504 of the Rehabilitation Act)
18. Brief for Appellee, *Schneider v. Kissinger*, No. 04-5199, 412 F.3d 190 (D.C. Cir. 2005) (citing Statement on Signing H.R. 2092 (the Torture Victims Protection Act), 22 Weekly Comp. Pres. Doc. 465 (Mar. 16, 1992) (President George H.W. Bush))
19. Gov't Motion to Dismiss, *Schneider v. Kissinger*, No. 01-1902 (D.D.C. 2001) (citing Statement on Signing H.R. 2092 (the Torture Victims Protection Act), 22

Weekly Comp. Pres. Doc. 465 (Mar. 16, 1992) (President George H.W. Bush))

20. Brief for Appellee, *Gonzalez-Vera v. Kissinger*, No. 05-5017, 449 F.3d 1260 (D.C. Cir. 2006) (citing Statement on Signing H.R. 2092 (the Torture Victims Protection Act), 22 Weekly Comp. Pres. Doc. 465 (Mar. 16, 1992) (President George H.W. Bush))
21. Gov't Motion to Dismiss, *Gonzalez-Vera v. Kissinger*, No. 1:02-cv-02240 (D.D.C. 2003) (citing Statement on Signing H.R. 2092 (the Torture Victims Protection Act), 22 Weekly Comp. Pres. Doc. 465 (Mar. 16, 1992) (President George H.W. Bush))
22. Brief for Appellee, *United States v. 191.07 Acres of Land (Martinek)*, No. 04-35131 (9th Cir. 2005) (citing, in passing for background purposes, statement of President George H.W. Bush upon signing 1991 Interior Appropriations Act, 1990 U.S.C.C.A.N. 3283-4 to 3283-5 (Nov. 5, 1990))
23. Brief for the Appellees, *Marrita Murphy v. Internal Revenue Service*, No. 05-5139 (D.C. Cir. 2007) (responding to Appellant's opening brief, which cited President Clinton's signing statement upon signing the Small Business Job Protection Act, Pub. L. No. 104-188 § 1605(a), 110 Stat. 1755, 1838 (Aug. 20, 1996), by arguing that the "[appellant]'s reliance . . . on President Clinton's signing statement with respect to the 1996 amendment is misplaced")

In addition, although the briefing was not handled by the Department of Justice, the United States Trade Representative cited one of President Clinton's signing statements in *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (World Trade Organization # WT/DS285). See First Written Submission of the United States, ¶ 34 & n. 53 (Nov. 7, 2003) (citing President William J. Clinton, *Statement on Signing the Departments of Commerce, Justice, State, the Judiciary, and Related Agencies Appropriation Act, 2001*, 36 Weekly Comp. Pres. Doc. 3153, 3155-56 (Dec. 21, 2000)); Appellant Submission by the United States, ¶ 198 (Jan. 14, 2005) (citing First Written Submission and referring to signing statement). Copies of the relevant portions of those documents are attached.

2. **Has the Office of Legal Counsel developed any guidance on whether, and under what circumstances, federal agencies should rely upon Presidential signing statements in interpreting and enforcing the laws that are accompanied by these statements? If so, please provide a copy of this guidance.**

ANSWER: During the Clinton Administration, Walter Dellinger, then-Assistant Attorney General for the Office of Legal Counsel, issued a memorandum regarding presidential signing statements. See *The Legal Significance of Presidential Signing Statements*, 17 Op. O.L.C. 131 (1993) ("*Signing Statements*"), available at

<http://www.usdoj.gov/olc/signing.htm>. The memorandum explained that signing statements serve several “useful and legally significant functions,” including the “generally uncontroversial[] function” of “directing subordinate officers within the Executive Branch how to interpret or administer the enactment.” *Id.* at 131, 132. Assistant Attorney General Dellinger explained:

The President has the constitutional authority to supervise and control the activity of subordinate officials within the Executive Branch. *See Franklin v. Massachusetts*, 112 S. Ct. 2767, 2775 (1992). In the exercise of that authority he may direct such officials how to interpret and apply the statutes they administer. *Cf. Bowsher v. Synar*, 478 U.S. 714, 733 (1986) (“Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of ‘execution’ of the law.”). Signing statements have frequently expressed the President’s intention to construe or administer a statute in a particular manner (often to save the statute from unconstitutionality), and such statements have the effect of binding the statutory interpretation of other Executive Branch officials.

Id. at 132 (footnotes omitted); *see also Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 202 (1994), available at <http://www.usdoj.gov/olc/nonexecut.htm> (citing and discussing *Signing Statements* opinion). The memorandum does not, however, provide detailed guidance on how federal agencies should use presidential signing statements in interpreting and enforcing the laws that are accompanied by the statements.

3. **One criticism of Presidential signing statements is that they are essentially a tool used to give the President a line-item veto over provisions contained in laws that he does not like. Yet, the Supreme Court clearly rejected the idea of a line-item veto in *Clinton v. City of New York* as contrary to Article 1 of the Constitution. How do you reconcile the President’s signing statements with the plain ruling of the Supreme Court in the *Clinton* case?**

ANSWER: Presidents’ use of signing statements is plainly consistent with the holding of *Clinton v. City of New York*, 524 U.S. 417 (1998). There, the Court held that the President’s power under the Line Item Veto Act to “change the text of duly enacted statutes” and to “amend . . . Acts of Congress by repealing a portion of each” violated the Presentment Clause of the Constitution. *Id.* at 438, 447. A signing statement, however, neither changes the text of a statute nor amends a statute by repeal or otherwise.

To begin with, a signing statement does not mean that the President will not enforce the law as written. A signing statement provides guidance for members of the Executive Branch, and its binding effect is limited to the Executive Branch. Thus, “a bill that is signed by the President retains its legal effect and character, irrespective of any pronouncements made in a signing statement, and remains available for interpretation and application by the courts (if the provision is justiciable) and monitoring by Congress.” Congressional Research Service, *Presidential Signing Statements*:

Constitutional and Institutional Implications at CRS-24 (Sept. 20, 2006). By contrast, a line-item veto immediately would render the provision a legal nullity to be given no effect by courts, Congress, private litigants, and future Presidents. In addition, a President can exercise his veto power for any reason (including simple disagreement with a policy), or for no reason at all. By contrast, constitutional signing statements typically only embody concerns or issues that a newly enacted provision raises in light of fundamental law, the Constitution. Thus, as the Congressional Research Service explained, “[a] signing statement does not have the effect of a veto.” *Id.*

4. **The Supreme Court ruled in the *Hamdan* case that al Qaeda fighters captured in Afghanistan are entitled to the protections of Common Article 3 of the four Geneva Conventions signed in 1949. Common Article 3 guarantees humane treatment “in all circumstances”, and specifically prohibits “cruel treatment,” “torture,” and “outrages upon personal dignity, in particular humiliating and degrading treatment.” How do you reconcile the President’s statement upon signing the McCain Detainee Amendment with the Court’s ruling in *Hamdan*?**

ANSWER: The President’s signing statement regarding the Detainee Treatment Act (or “McCain Amendment”) is entirely consistent with the guarantees of humane treatment and the Supreme Court’s decision in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). The President’s signing statement is not an indication that the Government will fail to abide by the Act. On the contrary, as the President clearly stated in January 2006, “[n]o American will be allowed to torture another human being anywhere in the world. And I signed the appropriations bill with the McCain amendment attached on because that’s the way it is. . . . [M]ake no mistake about it, the McCain amendment is an amendment we strongly support and will make sure it’s fully effective.” See <http://www.whitehouse.gov/news/releases/2006/01/20060126.html>.

The President determined in February 2002 that members of al Qaeda and the Taliban are not entitled to the protections that the Geneva Convention provides to lawful combatants. He also determined that Common Article 3, which applies to conflicts “not of an international character,” would not apply to the conflict with al Qaeda, which involves a transnational terrorist movement with global reach and a proven record of targeting United States citizens and interests in multiple countries and is therefore decidedly a war of an international character. The Administration accepted the Supreme Court’s contrary conclusion in *Hamdan* and worked closely with Congress to enact the Military Commissions Act to resolve how Common Article 3 would apply going forward.

Senator Edward M. Kennedy
Questions for the Record
for
Michelle Boardman
Deputy Assistant Attorney General
"Presidential Signing Statements"
June 27, 2006

I. Constitutional Review Process

Question: Please explain in detail the process by which the Executive Branch identifies constitutional defects in legislation, and how these defects are collected and assembled into the president's signing statement. Can any agency raise constitutional objections? Do objections originate in the Office of Legal Counsel? Who has the final word on which objections make it into the signing statements?

ANSWER: The Office of Management and Budget coordinates the process by which the Executive Branch reviews legislation. Legislation is initially reviewed to analyze the potential legal and policy consequences of a bill, and the comments of the Executive Branch are embodied in testimony, views letters and Statements of Administration Policy that are submitted to Congress before enactment. As part of that process, the Department of Justice reviews legislation to determine its constitutionality, but anyone in the Executive Branch who participates in the legislative review process may comment on the constitutionality of a provision. Any analysis of pending or enrolled legislation is reviewed by the relevant agencies, as well as the White House staff and other staff within the Executive Office of the President and the Office of the Vice President. The President has the final authority to determine whether a signing statement is warranted and the content of any such statement.

II. Statutory Reporting Requirements

Question: At the hearing, you indicated your willingness to provide an accounting of the existing statutes that the President has declined to enforce on constitutional grounds. Please provide a full and complete list of any existing statutes, rules, regulations, programs, policies or other laws that the President has declined to enforce on constitutional grounds since January 20, 2001. Has the Attorney General complied with the reporting requirements of 28 U.S.C. § 530D? Please provide a full accounting of all of the times that the Attorney General has complied with this statute, along with copies of any transmittals to Congress that have been issued thus far.

ANSWER: On January 18, 2007, the Department provided a response to identical questions submitted in connection with another hearing. Please see the answer to

questions 104 and 105 in the set of questions for the record the Committee submitted to the Attorney General after the Department of Justice Oversight hearing on July 18, 2006. Since January 18, the Department has issued another quarterly report regarding settlements in accordance with the provisions of section 530D(a)(1)(C). In addition, we have located a copy of the section 530D(a)(1)(C) report for the first quarter of 2004, which we had not located by the time we returned our response on January 18, 2007. Copies of both reports are attached.

III. Signing Statement Implementation

Much of your testimony focused on the use of signing statements to inform Congress, the courts and the public of the President's position – as distinct from indicating his intent not to enforce a law. Specifically, you stated that “[i]t's often not at all a suggestion that the president did not intend to completely enact the bill as written.” But it would seem from the text of these statements that the President, at minimum, is reserving the right not to enforce these statutes at his discretion.

Question: With respect to actual implementation, how many challenges in which the president reserves the right to refuse to execute a provision of law are actually carried out by Executive Branch officers? Who is responsible for oversight within the Executive Branch to ensure that officers within the Executive Branch are implementing the non-enforcement mandates of the signing statements? Please provide a list of all challenges that have actually been carried out by officers of the Executive Branch.

ANSWER: The fact that the President issues a signing statement with respect to a newly enacted statute is not an indication that the Executive Branch will fail to enforce the law as written. Indeed, ordinarily, such laws are enforced as written. We therefore do not agree that signing statements are “non-enforcement mandates.”

As we have noted, it is not practicable for the Department to identify and respond with respect to provisions of law enforced by other agencies, *see* Answer to Question 79, Questions for the Record (Jan. 18, 2007). The Department takes the reporting provisions of 28 U.S.C. § 530D very seriously. We are not aware of any Department of Justice policy adopted since January 20, 2001, to refrain from enforcing or applying any federal statute, rule, regulation, program, policy or other law within the responsibility of the Department on the grounds that such provision is unconstitutional.

The head of an agency or establishment that administers or enforces a statute is responsible, in the first instance, for implementation of that statute. The Constitution vests executive power in the President, who ultimately is responsible to take care that the law is faithfully executed.

Senator Feinstein
Questions for the Record
for
Michelle Boardman
Deputy Assistant Attorney General
"Presidential Signing Statements"
June 27, 2006

Questions for Ms. Boardman:

1. Background: In your written testimony you talk about extreme or unanticipated circumstances that "could raise the possibility of an unconstitutional application" of a statute. However, in the signing statements that I have seen President Bush is not making such a qualification. He does not say, only in the extreme or unanticipated circumstances will I not report to Congress, or whatever qualification he is making. And when it comes to the signing statement on the provision against the use of torture, Congress was specifically stating there is no circumstance where its use is allowed.

A. So, if the point of these statements is to reserve the President's authority in such rare and unanticipated situations, why not make that clear in the signing statement?

ANSWER: The signing statements issued by the President regarding possible, but unanticipated, unconstitutional applications of statutory provisions follow the practice of previous Presidents, who have issued virtually identical statements. For example, President Clinton issued a statement on signing the Department of Defense Appropriations Act of 2000 that he had some "concern[]" about a reporting requirement "that could materially interfere with or impede this country's ability to provide necessary support to another nation or international organization in connection with peacekeeping or humanitarian assistance activities otherwise authorized by law," and President Clinton therefore stated that he "will interpret this provision consistent with my constitutional authority to conduct the foreign relations of the United States and my responsibilities as Commander in Chief." *Statement by President William J. Clinton upon Signing the Department of Defense Appropriations Act of 2000*, 2 Pub. Papers of William J. Clinton 1981, 1981 (Nov. 4, 1999).

Please note that the President's signing statement respecting the Detainee Treatment Act (the "McCain Amendment") is not an indication that the President views the provision to be unconstitutional or that the Government will not abide by it. On the contrary, as the President clearly stated in January 2006, "No American will be allowed to torture another human being anywhere in the world. And I signed the appropriations bill with the McCain amendment attached on because that's the way it is. . . . [M]ake no mistake about it, the McCain amendment is an amendment we strongly support and will make sure it's fully effective." See <http://www.whitehouse.gov/news/releases/2006/01/20060126.html>.

B. In addition, aren't the signing statements of this President, in fact different, because unlike other Presidents President Bush is using these statements to expand executive authority under the theory of the unitary executive?

ANSWER: No. President Bush's signing statements indicating that he intends to construe a particular statutory provision consistent with his constitutional obligation to "supervise the unitary Executive Branch" are substantively indistinguishable from similar statements made by past Presidents. For example, President Reagan in 1987 issued the following signing statement:

I wish to make clear my understanding that sections 252(a)(1) and (2) of the amended Act—which direct the President to issue an order “in strict accordance” with the report submitted by the Office of Management and Budget—do not preclude me or future Presidents from exercising our authority to supervise the execution of the law by overseeing and directing the Director of OMB in the preparation and, if necessary, revision of his reports. If this provision were interpreted otherwise so as to require the President to follow the orders of a subordinate, it would plainly constitute an unconstitutional infringement of the *President's authority as head of a unitary Executive branch*.

Statement by President Ronald Reagan upon Signing H.J. Res. 324, 2 Pub. Papers of Ronald W. Reagan 1096, 1097 (Sept. 29, 1987) (emphasis added). See also, e.g., Statement by President William J. Clinton upon Signing the Balanced Budget Act of 1997, 2 Pub. Papers of William J. Clinton 1053, 1054 (Aug. 5, 1997) (“Section 4422 of the bill purports to require the Secretary of Health and Human Services to develop a legislative proposal I will construe this provision in light of my constitutional duty and authority to recommend to the Congress such legislative measures as I judge necessary and expedient, and to supervise and guide my subordinates, including the review of their proposed communications to the Congress.”) (emphasis added); Statement by President William J. Clinton upon Signing the Treasury and General Government Appropriations Act, 2 Pub. Papers of William J. Clinton 1339, 1340 (Oct. 10, 1997) (“Any broader interpretation of the provision that would apply to ‘nonwhistleblowers’ would raise substantial constitutional concerns in depriving the President and his department and agency heads of their ability to supervise and control the operations and communications of the executive branch. I do not interpret this provision to detract from my constitutional authority in this way.”) (emphasis added); Statement by President George Bush upon Signing H.R. 3792, 1 Pub. Papers of George H.W. Bush 239, 241 (Feb. 16, 1990) (“I shall interpret these provisions consistent with my authority as head of the unitary executive branch.”) (emphasis added); Statement by President George Bush upon Signing H.R. 5019, 2 Pub. Papers of George H.W. Bush 1561, 1562 (Nov. 5, 1990) (“This provision must be interpreted in light of my constitutional responsibility, as head of the unitary executive branch, to supervise my subordinates.”) (emphasis added).

Indeed, the Congressional Research Service recently issued a report in which it wrote that “it is important to note that the substance of [President George W. Bush’s] statements do

not appear to differ substantively from those issued by either Presidents Reagan or Clinton.” *Presidential Signing Statements: Constitutional and Institutional Implications*, CRS Reports, CRS-1, CRS-9 (Sept. 20, 2006); accord Prof. Curtis Bradley & Prof. Eric Posner, *Signing statements: It’s a president’s right*, Boston Globe, Aug. 3, 2006 (“The constitutional arguments made in President Bush’s signing statements are similar—indeed, often almost identical in wording—to those made in Bill Clinton’s statements.”).

Moreover, these statements explaining that the President is constitutionally obligated to supervise the Executive Branch in the execution of the law are uncontroversial and consistent with well-established law. The Supreme Court specifically has stated that the President has the authority to “supervise and guide [Executive officers’] construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone,” *Myers v. United States*, 272 U.S. 52, 135 (1926); accord *Administrative Procedure—Rulemaking—Department of the Interior—Ex Parte Communications—Consultation with the Council of Economic Advisors—Surface Mining Control and Reclamation Act* (30 U.S.C. § 1201 *et seq.*), 3 Op. O.L.C. 21, 23 (1979) (Carter Administration) (same). As the Supreme Court has explained, “Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of ‘execution’ of the law.” *Bowsher v. Synar*, 478 U.S. 714, 733 (1986).

2. Background. You argue that when it comes to the recommendations Clause President Bush’s statements are “indistinguishable from President Clinton’s.” However, as I read the statements you quoted to support of this argument it seems to me that they do in fact use very different wording.

President Clinton’s read: “I therefore direct executive branch officials to carry out these provisions in a manner that is consistent with the President’s constitutional responsibilities.”

President Bush’s read: “the executive branch shall construe such provisions in a manner consistent with the President’s constitutional authority to supervise the unitary executive branch and to submit for congressional consideration such measures as the President judges necessary and expedient.”

As I read it the last phrase in the Bush signing statement does seem distinguishable.

A. Are you arguing that the word choice was meant to convey the same message as previous Presidents?

ANSWER: Yes. As noted by the Congressional Research Service and scholars, the President’s signing statements are substantively identical to those of President Clinton. Some of President Clinton’s other signing statements demonstrate that point more clearly. Upon signing the Balanced Budget Act of 1997, President Clinton issued a signing statement that is virtually identical to the signing statement of President Bush’s quoted above: “I will construe this provision in light of my constitutional duty and authority to

recommend to the Congress such legislative measures *as I judge necessary and expedient*, and to supervise and guide my subordinates, including the review of their proposed communications to the Congress.” *Statement by President William J. Clinton upon Signing the Balanced Budget Act of 1997*, 2 Pub. Papers of William J. Clinton at 1053 (emphasis added); see also *Statement by President William J. Clinton upon Signing the Treasury and General Government Appropriations Act*, 2 Pub. Papers of William J. Clinton 1339, 1340 (Oct. 10, 1997) (“Any broader interpretation of the provision that would apply to ‘nonwhistleblowers’ would raise substantial constitutional concerns in depriving the President and his department and agency heads of their ability to supervise and control the operations and communications of the executive branch. I do not interpret this provision to detract from my constitutional authority in this way.”) (emphasis added).

B. If so, why use different language?

ANSWER: Each President speaks in his own voice, even while Presidents consistently use signing statements to note constitutional issues in newly enacted law and seek to preserve the authority of the Executive Branch. While President Clinton used the phrase “to supervise and guide my subordinates,” President Bush uses the phrase “to supervise the unitary executive branch.” The equivalence of the two phrases is demonstrated by the signing statements of President George H. W. Bush, who referred to his duty “as head of the unitary executive branch, to supervise [his] subordinates.” *Statement by President George Bush upon Signing H.R. 5019*, 2 Pub. Papers of George H.W. Bush at 1562. The fact that President Clinton “direct[ed] executive branch officials to carry out these provisions” in the manner he wished suggests that he considered himself to be the sole head of a unitary Executive Branch. A group of distinguished scholars noted, after comprehensively reviewing the practices of every President, that President Clinton was “quite committed to executive unitariness,” and took “extraordinary steps . . . to augment presidential control over the executive branch,” Christopher S. Yoo, Steven G. Calabresi, & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945-2004*, 90 Iowa L. Rev. 601, 716 (2005), including by “issu[ing] many more such directives” to “other federal officials about how they should exercise their discretionary authority across a wide range of areas,” than did “any of his predecessors,” including “both [Presidents] Reagan and Bush,” *id.* at 714.

C. Please explain what the phrase “to supervise the unitary executive branch” means to this Administration.

ANSWER: Because the Constitution directs that “[t]he executive power shall be vested in [the] President,” U.S. Const., art. II, § 1, the President has broad authority to direct the exercise of discretion by officials within the Executive Branch. As noted above, that principle is widely accepted. The Supreme Court specifically has stated that the President has the authority to “supervise and guide [Executive officers’] construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone,” *Myers v. United States*, 272 U.S. 52, 135 (1926).

As several scholars concluded after an exhaustive survey of historical practice, “each of the first thirty-two presidents—from George Washington up through Franklin D. Roosevelt—believed in a unitary executive” and “every president between 1945 and 2004 defended the unitariness of the executive branch.” Yoo, Calabresi, & Colangelo, 90 Iowa L. Rev. at 607, 730; *see also* Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 Case W. Res. L. Rev. 1451 (1997); Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 Harv. J.L. & Pub. Pol’y 667 (2003); Christopher S. Yoo, Steven G. Calabresi, & Laurence D. Nee, *The Unitary Executive During the Third Half-Century, 1889-1945*, 80 Notre Dame L. Rev. 1 (2004).

D. Please list any circumstances under which the President or Administration did not execute a statute because it was inconsistent with the President’s “power to supervise the unitary executive.”

ANSWER: As we have noted, it is not practicable for the Department of Justice to identify and respond with respect to provisions of law enforced by other agencies, *see* Answer to Question 79, Questions for the Record (Jan. 18, 2007). As we noted in the questions for the record returned to the Committee on January 18, *see id.*, we are not aware of any Department of Justice policy adopted since January 20, 2001, to refrain from enforcing or applying any federal statute within the responsibility of the Department on the grounds that the provision is unconstitutional, including on the ground that the statute is inconsistent with the President’s power to supervise his subordinates.

3. Background. In explaining the use of constitutional signing statements you argued that the President has issued statements to safeguard his “well-established role in the Nation’s foreign affairs and the President’s wartime power.” Your argument essentially boils down to the President is simply protecting his constitutional authority as Commander in Chief.

However, as you know, the Constitution gives the Congress Article I power: “to declare war... to raise and support armies... to make rules for the government and regulation of the land and naval forces... and for governing such part of them as may be employed in the service of the United States... And to make all laws which shall be necessary and proper for carrying into execution the foregoing powers.”

A. Is it, at a minimum, debatable as to whether Congress’s enactment of the ban on the use of torture falls under the Article I authority given to Congress or the Article II authority given to the President? Who should decide which constitutional authority trumps?

ANSWER: The President has not authorized torture and will not do so. As the President has reaffirmed: “I want to be absolutely clear with our people and the world: The United States does not torture. It’s against our laws, and it’s against our values. I have not authorized it, and I will not authorize it.” *President Discusses Creation of*

Military Commissions to Try Suspected Terrorists (Sept. 6, 2006), available at <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>; see also *Statement on United Nations International Day in Support of Victims of Torture* (June 26, 2005), available at <http://www.whitehouse.gov/news/releases/2005/06/20050626.html> (“[T]he United States reaffirms its commitment to the worldwide elimination of torture. Freedom from torture is an inalienable human right, and we are committed to building a world where human rights are respected and protected by the rule of law.”). It is strictly prohibited by United States law, and by the policies of the Administration. As noted above, far from stating that the Executive Branch will not abide by the Detainee Treatment Act, the President has stated that “we strongly support [it] and will make sure it’s fully effective.” In light of that, we do not anticipate that there would be a dispute that would require a resolution of the respective authority of Congress and the President in this area of the law. It is important to note, however, that signing statements do not change which Branch’s “constitutional authority trumps.”

As the Attorney General noted during his testimony before the Committee on January 18, 2007, “the framers clearly intended that during a time of war, that both branches of government would have a legitimate role to play.” As he noted, Congress has many powers relevant during wartime, including the power to declare war, and the authority to raise and support armies, and to provide and maintain a navy, among others. The Constitution vests the President with authority as Commander in Chief and makes him the sole organ of the Nation in foreign affairs. But as Justice Jackson noted, “[t]he actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

B. Can the President order the use of torture in violation of the language contained in the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006?

ANSWER: As noted above, the President has stated unequivocally that he has no intention to permit torture under any circumstance.

4. Background. You say “the President is *bound* to defer to the Constitution;” and that this responsibility may “arise most sharply when the President is charged with executing a statute, passed by a previous Congress and signed by a prior President” and is found to be unconstitutional under intervening Supreme Court precedent.

A. While I suspect we can agree that there are clearly times where the Congress will be wrong about the constitutionality of a statute, and there are times when the President and Congress will disagree. And if there is a disagreement, isn’t the proper place for the issue to be decided in the courts, and not unilaterally by the President?

ANSWER: The President has an independent responsibility to consider the constitutionality of a provision in executing it. See Unpublished Memorandum of James Madison, *quoted in* Frank H. Easterbrook, *Presidential Review*, 40 Case W. Res. L. Rev. 905, 921 (1990) (“[E]ach [department] must in the exercise of its functions be guided by the text of the Constitution according to his own interpretation of it . . .”) (alterations in original); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv. L. Rev. 2085, 2088 n.7 (2002) (“Each branch has an independent obligation to read the Constitution in the best way it knows how.”). The Constitution requires the President to “take care that the laws be faithfully executed,” U.S. Const., art. II, § 3, and to “preserve, protect and defend the Constitution of the United States,” *id.* § 1. These provisions obligate the President to determine the constitutionality of a law that he is required to execute.

As Assistant Attorney General Walter Dellinger explained during the Clinton Administration: “The President’s office and authority are created and bounded by the Constitution; he is required to act within its terms. Put somewhat differently, in serving as the executive created by the Constitution, the President is required to act in accordance with the laws—including the Constitution, which takes precedence over other forms of law. This obligation is reflected in the Take Care Clause and in the President’s oath of office.” *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 200 (1994), available at <http://www.usdoj.gov/olc/nonexecut.htm>. See also *Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37, 46 (1990) (“Where a statute enacted by Congress conflicts with the Constitution, the President is placed in the position of having the duty to execute two conflicting ‘laws’: a constitutional provision and a contrary statutory requirement. The resolution of this conflict is clear: the President must heed the Constitution—the supreme law of our Nation.”). Thus, if a statute appears to conflict with the Constitution, the President “can and should exercise his independent judgment to determine whether the statute is constitutional.” *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. at 200. But in making that determination, “the President should give great deference to the fact that Congress passed the statute and that Congress believed it was upholding its obligation to enact constitutional legislation. Where possible, the President should construe provisions to avoid constitutional problems.” *Id.*

B. If the Court has not yet decided whether a law is or is not constitutional, what is the Department of Justice’s position on whether the President must enforce the law as passed?

ANSWER: As stated above, it has long been the view of the Executive Branch that, in executing a provision, the President has an independent responsibility to consider its constitutionality. See, e.g., *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. at 200 (“[W]hen a statute appears to conflict with the Constitution . . . [then] the President can and should execute his independent judgment to determine whether the statute is constitutional.”); see also Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 Law & Contemp. Probs.

7, 50 (2000) (former OLC Deputy Assistant Attorney General during Clinton Administration concludes that “[t]he Dellinger [memorandum’s] position is consistent with past executive branch policy and practice”). The President will, of course, presume that Congress has enacted constitutional legislation and will therefore construe provisions wherever possible to avoid constitutional problems. *See Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. at 200. Indeed, one purpose of presidential signing statements regarding constitutionally problematic provisions is to put forward a “saving” construction in order to give the greatest effect to Congress’s wishes while avoiding unconstitutional applications. *See The Legal Significance of Presidential Signing Statements*, 17 Op. O.L.C. 131, 133 (1993) (stating this practice is “analogous to the Supreme Court’s practice of construing statutes, where possible, to avoid holding them unconstitutional”).

C. You argued that these “constitutional concerns involve relatively minor provisions of major legislation.” Does that description apply statements issued with respect to:

- ✓ *Use of torture;*
- ✓ *Affirmative-action programs;*
- ✓ *Reporting requirements to Congress about immigration services;*
- ✓ *“Whistle-blower” protections;*
- ✓ *Safeguards against political interference in federally funded research*

If not, please explain the rationale and scope of what the statements were intended to convey, and whether these statutes are being enforced.

ANSWER: The statement in Ms. Boardman’s testimony referenced in your question simply observed that, for presidential signing statements, it “is often the case [that] the constitutional concerns involve relatively minor provisions of major legislation.” That is most definitely the case. For example, 67 of the President’s 126 constitutional signing statements involved provisions in which Congress simply directed the President, as parts of a broader bill, to submit legislative recommendations to Congress on particular subjects. In keeping with the consistent practice of recent past Presidents, *see, e.g., Statement on Signing the Shark Finning Prohibition Act*, 3 Pub. Papers of William J. Clinton 2782, 2782 (Dec. 26, 2000) (“Because the Constitution preserves to the President the authority to decide whether and when the executive branch should recommend new legislation, Congress may not require the President or his subordinates to present such recommendations (section 6). I therefore direct executive branch officials to carry out these provisions in a manner that is consistent with the President’s constitutional responsibilities.”), President Bush has noted that the Constitution provides him discretion to recommend such legislation “as he shall judge necessary and expedient,” U.S. Const., art. II, § 3. It is more common for presidential signing statements to address minor provisions such as directives for legislative recommendations than for the signing statements to address the sorts of significant legislative initiatives noted in your question.

As noted above, the mere issuance of a signing statement does not indicate that a statute will not be enforced as written. Frequently, signing statements simply reflect the

understanding that Congress enacted legislation against the backdrop of the President's well-understood duties and responsibilities.

Senator Arlen Specter
Questions for the Record
for
Michelle Boardman
Deputy Assistant Attorney General
"Presidential Signing Statements"
June 27, 2006

- 1) **For the McCain Amendment or the PATRIOT Act, if the President thinks that the legislation needs a provision added to make the Act constitutional, wouldn't the President be better off if he followed the Constitution, vetoed the Bill, and then asked the Congress to pass it in accordance with what he would accept?**

ANSWER: On January 18, 2007, the Department responded to an identical question submitted to the Attorney General after the Committee's July 18, 2006 Department of Justice oversight hearing. Please see the answer to question 15 in that set of questions for the record.

In addition, we note that the President's signing statement respecting the Detainee Treatment Act (the "McCain Amendment") is not an indication that the President views the provision to be unconstitutional or that the Government will not abide by it. On the contrary, as the President clearly stated in January 2006, "No American will be allowed to torture another human being anywhere in the world. And I signed the appropriations bill with the McCain amendment attached on because that's the way it is. . . . [M]ake no mistake about it, the McCain amendment is an amendment we strongly support and will make sure it's fully effective." See <http://www.whitehouse.gov/news/releases/2006/01/20060126.html>.

The President's signing statement regarding sections 106A and 119 of the USA PATRIOT Improvement and Reauthorization Act, involving audits on the use of Section 215 authorities to access certain records and on the use of national security letters ("NSLs"), is not an indication that the Government will fail to abide by those provisions. Inspector General Glenn A. Fine confirmed in his testimony before this Committee that "the FBI and the Department cooperated fully with our review" under the Act and even "agreed to declassify important aspects of the report to permit a full airing of the issues we describe in the report." Statement of Glenn A. Fine before the Senate Judiciary Committee, "The FBI's Use of National Security Letters and Section 215 Requests for Business Records" at 12 (Mar. 21, 2007), *available at* <http://www.usdoj.gov/oig/testimony/0703a/final.pdf>. Ms. Boardman also stated during her testimony before the Committee in June 2006 that the Department of Justice cooperated fully with the Inspector General's audits that were then ongoing. The first two audits, which cover 2002-2005 for Section 215 authorities and 2003-2005 for NSLs, were completed in March of this year. Both classified and unclassified versions of the audits have been provided to Congress; the unclassified versions are available at <http://www.justice.gov/>

oig/special/s0703b/final.pdf and <http://www.justice.gov/oig/special/s0703a/final.pdf>. The audits for 2006 are ongoing, and the Department is again cooperating. The IG's audit reports on 2006 use of these authorities are due December 31, 2007.

Nor is the President's signing statement with respect to section 756(e)(2) of the Act, which states that the President shall submit recommendations for legislation to Congress, an indication that he will fail to do so. It is simply an indication that the Constitution provides that the President shall "recommend to [Congress's] Consideration such Measures as *he shall judge necessary and expedient*." U.S. Const., art. II, § 3 (emphasis added).

2) Why didn't the President ask Congress to put the language that he wrote in his Patriot Act signing statement into the text of the Patriot Act?

ANSWER: Where an enrolled bill is constitutional on its face, there is no call for a President to ask Congress to change the bill before he signs it into law. It can be beneficial, however, for the President to use signing statements to remind the Executive Branch, the public, and Congress that information-sharing requirements do not alter the President's constitutional duty to oversee the appropriate disclosure of sensitive information.

The President's signing statement closely followed signing statements issued by previous Presidents involving similar provisions. When Congress passes a bill requiring the Executive Branch to produce information, Presidents routinely observe in signing statements that Congress has done so against the backdrop of what President Clinton, in a signing statement, called the "President's duty to protect classified and other sensitive national security information or his responsibility to control the disclosure of such information by subordinate officials of the executive branch." *Statement on Signing the National Defense Authorization Act for Fiscal Year 2000*, 2 Pub. Papers of William J. Clinton 1685, 1688 (Oct. 5, 1999); *see also Statement by the President upon Approval of Bill Amending the Mutual Security Act of 1954*, Pub. Papers of Dwight D. Eisenhower 549 (July 24, 1959) ("I have signed this bill on the express premise that the three amendments relating to disclosure are not intended to alter and cannot alter the recognized Constitutional duty and power of the Executive with respect to the disclosure of information, documents, and other materials. Indeed, any other construction of these amendments would raise grave Constitutional questions under the historic Separation of Powers Doctrine.").

3) The FISA Court has proven adept at maintaining the secrecy with which it was charged and it possesses the requisite expertise and discretion for adjudicating sensitive issues of national security. Given the FISA Court's expertise at safeguarding confidential information, can you please explain the President's opposition to submitting the NSA Program to the FISA Court for the FISA Court to determine the NSA Program's constitutionality?

ANSWER: As you are aware, on January 10, 2007, a judge of the Foreign Intelligence Surveillance Court ("FISC") issued orders authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that at least one of the communicants is a member or agent of al Qaeda or an associated terrorist organization. As a result of those orders, any electronic surveillance that was occurring as part of the Terrorist Surveillance Program is now being conducted subject to the approval of the FISC.

Senator Charles E. Schumer
Questions for the Record
for
Michelle Boardman
Deputy Assistant Attorney General
"Signing Statements"
June 27, 2006

- 1. The *Boston Globe* has reported that President Bush has “claimed the authority to disobey more than 750 laws enacted since he took office,” and that this is more than all previous presidents combined. You noted in your testimony that “Congress has no power to enact unconstitutional laws,” and when they do, “the President is bound to defer to the Constitution.” Do you believe that the Republican Congress routinely passes unconstitutional laws? Please identify all those portions of any enacted law that the Administration believes are unconstitutional.**

ANSWER: The issuance of a signing statement does not indicate that the law will not be enforced as written. Nor does it even necessarily indicate that the President believes that a bill is unconstitutional, and Ms. Boardman’s testimony should not be read to suggest otherwise. The testimony of Ms. Boardman’s that you quote simply noted the undeniable fact, recognized by the Supreme Court since at least *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that a statute that is inconsistent with the Constitution must yield to it. Finally, it is not practicable to survey the 120 volumes of United States Statutes at Large (and the many volumes of the Revised Statutes of the United States) to identify “all those portions of any enacted law” that may be unconstitutional.

In addition, please note that on May 3, 2006, the *Boston Globe* issued a correction, a copy of which is attached, that reads: “Because of an editing error, the story misstated the number of bills in which Bush has challenged provisions. He has claimed the authority to bypass more than 750 statutes, which were provisions contained in about 125 bills.” Although inartfully stated, this correction reveals that the *Globe* intends in these articles to refer to 750 *individual provisions* included in about 125 bills, and does not intend to refer to 750 individual bills or “laws enacted since he took office.” Many presidents, including President Clinton, have issued signing statements with respect to a comparable number of bills. See Christopher Kelley, A Comparative Look at the Constitutional Signing Statement 18 (2003) (available at <http://mpsa.indiana.edu/conf2003papers/1031858822.pdf>).

Counting the number of *individual provisions* referenced in signing statements is a misleading statistic, because President Bush’s signing statements tend to be more specific in identifying individual provisions than his predecessors’ signing statements. President Clinton, for example, routinely referred in signing statements to “several provisions” that raised constitutional concerns without enumerating the particular provisions in question. See, e.g., *Statement on Signing Consolidated Appropriations Legislation for Fiscal Year 2000*, 2 Pub. Papers of William J. Clinton 2156, 2160-62 (Nov. 29, 1999) (“to the extent *these provisions* could be read to prevent the United States from negotiating with foreign governments about climate change, it

would be inconsistent with my constitutional authority.”; “This legislation includes *a number of provisions* . . . regarding the conduct of foreign affairs that raise serious constitutional concerns. *These provisions* would direct or burden my negotiations with foreign governments and international organizations, as well as intrude on my ability to maintain the confidentiality of sensitive diplomatic negotiations. Similarly, *some provisions* would constrain my Commander in Chief authority and the exercise of my exclusive authority to receive ambassadors and to conduct diplomacy. *Other provisions* raise concerns under the Appointments and Recommendation Clauses. My Administration’s objections to *most of these and other provisions* have been made clear in previous statements of Administration policy and other communications to the Congress. Wherever possible, I will construe *these provisions* to be consistent with my constitutional prerogatives and responsibilities and where such a construction is not possible, I will treat them as not interfering with those prerogatives and responsibilities.”; “Finally, there are *several provisions* in the bill that purport to require congressional approval before Executive Branch execution of aspects of the bill. I will interpret *such provisions* to require notification only, since any other interpretation would contradict the Supreme Court ruling in *INS vs. Chadha*.) (emphasis added). It is noteworthy that for many years, academic literature on signing statements focused on the number of bills about which Presidents issued signing statements, rather than the number of provisions referenced by such statements, suggesting that that is the more relevant consideration. We are not aware of any commentator focusing on the number of *provisions* referenced in signing statements until just last year. The greater specificity of the President’s signing statements promotes their utility as a “useful device for transparent and open government.” *Signing Off*, Wash. Post, July 28, 2006, at A24.

- 2. One of Attorney General Meese’s main goals when he expanded the use of the signing statement under President Reagan was to influence future court decisions. However, it has been reported that courts rarely factor signing statements into their decisions. To what extent are signing statements issued to influence, or aid, courts in interpreting laws?**

ANSWER: Signing statements are not binding on courts and courts have rarely referred to signing statements in their opinions. The President principally issues signing statements to communicate with Congress, persons within the Executive Branch, and the American people, although courts sometimes choose to consider such statements in construing a provision. In 1993, the Assistant Attorney General for the Office of Legal Counsel, Walter Dellinger, wrote a memorandum that identified three uses of signing statements: (1) “explaining to the public, and particularly to constituencies interested in the bill, what the President believes to be the likely effects of its adoption”; (2) “directing subordinate officers within the Executive Branch how to interpret or administer the enactment”; and (3) “informing Congress and the public” of the President’s views of constitutional issues raised by the legislation. *See The Legal Significance of Presidential Signing Statements*, 17 Op. O.L.C. 131 (1993), available at <http://www.usdoj.gov/olc/signing.htm>. In that memorandum, Assistant Attorney General Dellinger also considered the arguments for and against consideration of presidential signing statements as a form of legislative history. The memorandum does not express a view about the appropriateness of that use of signing statements. But Assistant Attorney General Dellinger’s

memorandum does identify instances where courts cited and relied on signing statements when construing a law.

- 3. When Samuel Alito served in the Justice Department, he wrote a strategy memorandum on presidential signing statements, calling for President Reagan to “concentrate on points of true ambiguity, rather than issuing interpretations that may seem to conflict with those of Congress.” Do you agree that the President ought to limit his use of signing statements to the clarification of true ambiguities?**

ANSWER: We do not understand the memorandum of then-Deputy Assistant Attorney General Alito to call on the President to “limit his use of signing statements” to the clarification of ambiguities. That memorandum exclusively addressed what was then considered the “novel[]” idea “that Presidential signing statements be used to address questions of [statutory] interpretation.” Memorandum for the Litigation Strategy Working Group from Samuel A. Alito, Jr., Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Using Presidential Signing Statements to Make Fuller Use of the President’s Constitutionally Assigned Role in the Process of Enacting Law*, at 1 (Feb. 5, 1986). The statement quoted in your question was a measure that Deputy Assistant Attorney General Alito recommended only “as an introductory step,” not as a permanent measure. *Id.* at 4. Moreover, the memorandum noted that “[i]n the past, Presidents have issued signing statements when presented with bills raising constitutional problems,” and clearly stated that “the present proposal would not substantively alter that process.” *Id.* at 1.

As Assistant Attorney General Dellinger concluded, signing statements perform many legitimate functions besides simply clarifying ambiguities. *See Answer to Question 2, supra.*

- 4. Would you say that the President’s signing statements have been limited to the interpretation of ambiguities? It seems that many of President Bush’s signing statements go well beyond that limited purpose:**
- Last year, Congress passed an energy package that strengthened whistle-blower protections for federal employees at the Department of Energy and Nuclear Regulatory Commission. President Bush issued a signing statement claiming he could ignore those protections even though the intent of Congress was clear.
 - In 2004, Congress passed an intelligence bill that required the Justice Department to give oversight committees copies of memorandums outlining any new interpretations of domestic-spying laws. President Bush issued a signing statement saying that he could withhold that information despite clear congressional intent to the contrary.
 - In establishing the Department of Homeland Security in 2002, Congress required the department to provide oversight committees information about vulnerabilities at chemical plants and luggage screening at airports. President

Bush issued a signing statement asserting the right to withhold the information despite clear congressional intent to the contrary.

Are these uses of the signing statement appropriate? If the President had such strong objections to these bills, why did he not just veto them?

ANSWER: We disagree with the characterizations of the signing statements above, particularly that the *Statement on Signing the Energy Policy Act of 2005*, 41 Weekly Comp. Pres. Doc. 1267, 1267 (Aug. 8, 2005), “claim[ed] [the President] could ignore th[e] protections” of the Act. Each of the signing statements referenced closely follows the practice of other recent Presidents. The Congressional Research Service recently issued a report in which it wrote that “it is important to note that the substance of [President George W. Bush’s] statements do not appear to differ substantively from those issued by either Presidents Reagan or Clinton.” *Presidential Signing Statements: Constitutional and Institutional Implications*, CRS Reports, CRS-1, CRS-9 (Sept. 20, 2006) (“*Presidential Signing Statements*”); accord Prof. Curtis Bradley & Prof. Eric Posner, *Signing statements: It’s a president’s right*, Boston Globe, Aug. 3, 2006 (“The constitutional arguments made in President Bush’s signing statements are similar—indeed, often almost identical in wording—to those made in Bill Clinton’s statements.”).

A veto is very different from a signing statement. The fact that a President issues a signing statement about a bill does not mean he considers the measure to be unconstitutional or that he will fail to abide by it as written. A signing statement provides guidance for members of the Executive Branch, and any binding effect it has is limited to the Executive Branch during the term of the President who issued the statement. Thus, “a bill that is signed by the President retains its legal effect and character, irrespective of any pronouncements made in a signing statement, and remains available for interpretation and application by the courts (if the provision is justiciable) and monitoring by Congress.” *Presidential Signing Statements* at CRS-24. By contrast, a veto immediately would render the law a legal nullity to be given no effect by courts, Congress, private litigants, and future Presidents. In addition, a President can exercise his veto power for any reason (including disagreement on policy grounds), or for no reason at all. By contrast, constitutional signing statements typically are made solely when newly enacted legislation raises an issue under the Constitution. Thus, as the Congressional Research Service explained, “[a] signing statement does not have the effect of a veto.” *Id.*

In any event, as Assistant Attorney General Dellinger explained early during the Clinton Administration, “[i]n light of our constitutional history, we do not believe that the President is under any duty to veto legislation containing a constitutionally infirm provision.” 17 Op. O.L.C. at 135; accord *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 202-03 (1994) (opinion of Assistant Attorney General Dellinger).

- 5. Most of President Bush’s signing statements assert that a law “will be interpreted in a manner consistent with the constitutional authority of the President” but provide no details of what that interpretation is. If one goal of the issuance of signing statements is to clarify ambiguities, why does the Administration not make more clear what its interpretation actually is?**

ANSWER: Based on our review of the President's signing statements, we disagree that "[m]ost of President Bush's signing statements assert that a law 'will be interpreted in a manner consistent with the constitutional authority of the President'" without providing further details regarding that interpretation. When the President has used the phrase "consistent with the constitutional authority of the President," typically he has explicitly identified the relevant constitutional provision or doctrine. *E.g., Statement on Signing Communications Legislation*, 40 Weekly Comp. Pres. Doc. 3013, 3013 (Dec. 23, 2004) ("The executive branch shall construe the provision in a manner consistent with the constitutional authority of the President to *recommend for the consideration of the Congress such measures, including proposals for appropriations, as he judges necessary and expedient.*") (emphasis added) (quoting U.S. Const., art. II, § 3); *Statement on Signing the Department of Homeland Security Appropriations Act, 2007*, 42 Weekly Comp. Pres. Doc. 1742, 1743 (Oct. 4, 2006) ("The executive branch shall construe section 503(c)(4) in a manner consistent with the constitutional authority of the President to *require the opinions of heads of departments*") (emphasis added) (paraphrasing U.S. Const., art. II, § 2). The President thereby notifies Congress, his subordinates within the Executive Branch, and the public of the relevant constitutional provision or doctrine that must be considered in executing the law. As noted in response to question 4 above, the CRS and scholars have noted that the President's signing statements are quite similar to those of his predecessors, specifically including President Clinton. *Presidential Signing Statements* at CRS-1, CRS-9; accord Bradley & Posner, *supra*. Indeed, as noted in our response to question 1 above, the President's statements are more specific in that they identify the individual provisions at issue.

6. **Almost all of President Bush's signing statements are used to interpret a statute narrowly, rather than broadly. Why was there no contemporaneous statement from the President indicating how broadly the Administration would interpret, for example, the Authorization to Use Military Force, which it has subsequently used to justify the NSA warrantless wiretapping program, among other things?**

ANSWER: The President *did* issue a signing statement on signing the Authorization for Use of Military Force, see *Statement on Signing the Authorization for Use of Military Force*, 2 Pub. Papers of George W. Bush 1124 (Sept. 18, 2001). In signing the resolution, the President did note the breadth of his war powers, noting that "[i]n signing this resolution, I maintain the longstanding position of the executive branch regarding the President's constitutional authority to use force, including the Armed Forces of the United States and regarding the constitutionality of the War Powers Resolution." *Id.* at 1125.

Having carefully reviewed the President's signing statements, we do not agree that those statements are "used to interpret a statute narrowly, rather than broadly." Like the signing statements of the Presidents before him, President Bush's constitutional signing statements do not assert that he will interpret a provision "narrowly" or "broadly," but rather that he will do so consistent with the Constitution. And as both the Congressional Research Service and scholars have noted, the President's signing statements are quite similar to those of his predecessors, see Answer to Question 4, *supra*, reflecting the fact that they embody traditional views of the Constitution that were held by his predecessors.

7. **There has been much focus on the use of presidential signing statements relating to torture and other national security issues, but a major pattern of President Bush's statements is that they deny Congress's authority to demand oversight and fulfill its responsibility to provide a check on the President. Are you aware of any Presidential signing statement that includes an interpretation that *limits* Presidential power?**

ANSWER: We do not agree that the President's signing statements "deny Congress's authority to demand oversight and fulfill its responsibility to provide a check on the President." As noted by the Congressional Research Service and scholars, the President's signing statements closely follow those of his predecessors. One area in which presidential signing statements historically have embodied interpretations that reflect limits on presidential power involve individual rights and civil liberties. In some instances where an Act of Congress might be capable of being construed to authorize the President to deny persons their individual rights or civil liberties, Presidents have issued signing statements indicating that they would not construe the statute in that manner.

8. **What administration officials are involved in the decision whether to issue a presidential signing statement and how precisely is the decision made in any particular case?**

ANSWER: The Office of Management and Budget coordinates the process by which the Executive Branch reviews legislation. Legislation is initially reviewed to analyze the potential legal and policy consequences of a bill, and the comments of the Executive Branch are embodied in views letters and Statements of Administration Policy that are submitted to Congress before enactment. As part of that process, the Department of Justice reviews legislation to determine its constitutionality, but anyone in the Executive Branch who participates in the legislative review process may comment on the constitutionality of a provision. Any analysis of pending or enrolled legislation is reviewed by the relevant agencies, as well as the White House staff and other staff within the Executive Office of the President and the Office of the Vice President. The President has the final authority to determine whether a signing statement is warranted and the content of any such statement.

9. **The *Boston Globe* has referred to the President's use of signing statements as a "concerted effort to expand his power at the expense of Congress." Do you agree with this characterization?**

ANSWER: No. As noted above, both the Congressional Research Service and scholars have "note[d] that the substance of [President Bush's] statements do not appear to differ substantively from those issued by either Presidents Reagan or Clinton." *Presidential Signing Statements* at CRS-9; accord Bradley & Posner, *Signing statements: It's a president's right*, *Boston Globe* ("The constitutional arguments made in President Bush's signing statements are similar—indeed,

often almost identical in wording—to those made in Bill Clinton’s statements.”). As we have previously explained, the President’s signing statements are entirely consistent with those of past Presidents. We are not aware that critics of the President’s use of signing statements have identified any signing statements that depart from the practice of his predecessors. Moreover, signing statements have no binding effect on the courts.

Signing statements do not and cannot expand Executive Branch authority with respect to Congress, because they do not alter the obligation of Executive Branch personnel to apply statutes in a manner consistent with the Constitution. Rather, signing statements merely inform Executive Branch personnel of the authoritative legal position on the proper and constitutional application of the law and remind them of their duty to apply statutes consistent with that position (and thus the Constitution). In this manner, signing statements promote transparency in the enforcement of federal law by informing Congress and the American public of the President’s position. If the President did not issue a signing statement in the face of a law that does not violate the Constitution in all instances but could raise the specter of unconstitutionality in some instances, Executive Branch personnel would nonetheless be bound to apply the statute in a manner consistent with the Constitution. The alternative to signing statements, then, is to have many Executive Branch personnel each having to do his or her own analysis of which applications of the statute might offend Constitutional mandates—undermining important interests in consistency in law enforcement and in transparency to Congress and the public.

- 10. Have President Bush’s signing statements been part of a deliberate strategy spearheaded by the Office of the Vice President to expand executive power, as has been reported?**
- 11. Has either Lewis “Scooter” Libby or David Addington internally advocated expanding the President’s use of signing statements?**
- 12. Is it standard procedure for the Office of the Vice President to review legislation for constitutionality?**
- 13. Are you aware of any internal debate over whether the President’s use of signing statements has been appropriate? If so, what was the nature of that debate?**

ANSWER for Questions 10-13: The Office of the Vice President (“OVP”), along with offices in the Executive Office of the President and the various Executive Branch agencies, participates in the routine process coordinated by the Office of Management and Budget for reviewing and commenting on legislation and for proposing signing statements. Like all entities participating in that process, OVP may offer constitutional comments. Although internal deliberative discussions during that process are confidential, as noted above, this Administration’s approach to signing statements does not represent an attempt to expand executive power, but rather is a continuation of the practice of prior Administrations. *See generally Legal Significance of Presidential Signing Statements*, 17 Op. O.L.C. 131.

14. Do you think the President should have the final word on deciding whether an act of Congress is constitutional?

ANSWER: Signing statements do not give the President “the final word on deciding whether an act of Congress is constitutional.” Signing statements are part of a respectful dialogue between co-equal Branches on statutory and constitutional matters, and Congress can respond to such statements in the passage of subsequent legislation and through numerous other mechanisms, formal and informal. That dialogue is a part of the system of checks and balances that the Founders provided under the Constitution. In addition, enforcement decisions implementing a signing statement may be subject to court challenge under appropriate circumstances, and under such circumstances, courts may address the legal issues involved.

15. The design of most of President Bush’s signing statements makes it very hard for anyone to challenge them in court because of standing and other procedural barriers. Are you aware of whether the Administration has deliberately designed its statements to prevent judicial review?

ANSWER: Signing statements are not themselves subject to challenge in court. That reflects the nature of signing statements rather than “the design of . . . President Bush’s signing statements.” As the Congressional Research Service concluded, “there is little evident support for the notion that signing statements have legal force and effect in and of themselves. If an action taken by a President in fact contravenes legal or constitutional provisions, that illegality is not augmented or assuaged merely by the issuance of a signing statement.” *Presidential Signing Statements* at CRS-14.

16. Do you believe a citizen adversely affected by a president’s decision not to follow an act of Congress ought to be able to challenge that decision in a court of law? How might a citizen do so?

ANSWER: Whenever the Government takes an action, either through legislation or executive action, the ability of a citizen to seek redress through the courts turns on whether the citizen can meet the constitutional requirements of standing and on whether the law allows for personal redress. Neither of those factors is affected by whether a President issues a statement upon signing a law.

17. What is to stop one President from declaring a law Constitutional, the next President to decide it is unconstitutional, and so on? Is not the possibility that Presidents will go back and forth on Constitutional interpretations – without the stabilizing force of *stare decisis* that binds the courts – asking for trouble?

ANSWER: It is precisely because Presidents hold the executive power in trust for the people and future Presidents that the Constitution requires each President to swear to “preserve, protect, and defend the Constitution,” U.S. Const., art. II, § 1, cl. 8. Presidents are responsible for ensuring that the manner in which they enforce acts of Congress is consistent with America’s

founding document. *See, e.g.*, 18 Op. O.L.C. at 200 (“[T]he President can and should exercise his independent judgment to determine whether the statute is constitutional.”). In fact, presidential signing statements tend to act as a “stabilizing force” by showing future Presidents how a prior President viewed a particular statutory provision in light of the Constitution. Indeed, it is noteworthy how consistently Presidents have employed signing statements for at least the past quarter-century.

18. If the founders wanted to promote the type of activity engaged in by this President – i.e., repeatedly issuing signing statements but choosing not to veto a bill when he believes a subpart of it is unconstitutional – why did they not provide for a line item veto in the Constitution?

ANSWER: In *Clinton v. City of New York*, 524 U.S. 417 (1998), the Court stated that the President’s power under the Line Item Veto Act to “change the text of duly enacted statutes” and to “amend . . . Acts of Congress by repealing a portion of each” violated the Presentment Clause of the Constitution. *Id.* at 438, 447. A signing statement neither changes the text of a statute nor amends a statute by repeal or otherwise.

As noted above, a signing statement does not *ipso facto* mean that the President considers a provision to be unconstitutional or that the law will not be enforced as written. A signing statement provides guidance for members of the Executive Branch, and any binding effect is limited to the Executive Branch. Thus, “a bill that is signed by the President retains its legal effect and character, irrespective of any pronouncements made in a signing statement, and remains available for interpretation and application by the courts (if the provision is justiciable) and monitoring by Congress.” *Presidential Signing Statements* at CRS-24. By contrast, a line-item veto immediately would render the provision in question a legal nullity to be given no effect by courts, Congress, private litigants, and future Presidents. In addition, a President can exercise his veto power for any reason (including disagreement on policy grounds), or for no reason at all. By contrast, constitutional signing statements typically are made solely when newly enacted legislation raises issues under the Constitution. Thus, as the Congressional Research Service explained, “[a] signing statement does not have the effect of a veto.” *Id.*

As Assistant Attorney General Dellinger concluded after an extensive review of the caselaw and historic practice, “[i]n light of our constitutional history, we do not believe that the President is under any duty to veto legislation containing a constitutionally infirm provision.” 17 Op. O.L.C. at 135. It has never been the case that the President’s only option when confronting a bill containing a provision that is constitutionally problematic is to veto the bill. Presidents Jefferson, Lincoln, Theodore Roosevelt, Wilson, Franklin Roosevelt, Truman, Eisenhower, Kennedy, Lyndon Johnson, Ford, Carter, George H.W. Bush and Clinton have signed legislation rather than vetoing it despite concerns that particular aspects of the legislation posed constitutional concerns. *See* 17 Op. O.L.C. at 132 nn.3 & 5, 134, 138; *see also INS v. Chadha*, 462 U.S. 919, 942 n.13 (1983) (“it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds”). Compared to vetoing a bill, giving constitutionally infirm provisions a “saving” interpretation through a signing statement gives fuller effect to the wishes of Congress by giving complete effect to the vast

majority of a law's provisions and the fullest possible effect to even constitutionally problematic provisions. This approach is not an affront to Congress. Instead, it gives effect to the established legal presumption that Congress did not choose to enact an unconstitutional provision. As Assistant Attorney General Dellinger explained, this practice is "analogous to the Supreme Court's practice of construing statutes, where possible, to avoid holding them unconstitutional." 17 Op. O.L.C. at 133. A veto, by comparison, would render all of Congress's work a nullity, even if, as is often the case, the constitutional concerns involve relatively minor provisions of major legislation. The value of this ability to preserve legislation has grown in step with the use of large omnibus bills in the last few decades.