

Summer 2007

Signing Statements and the New Supreme Court: The Future of Presidential Expression, 40 J. Marshall L. Rev. 1317 (2007)

Anne Skrodzki

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Constitutional Law Commons](#), [Law and Politics Commons](#), [Legislation Commons](#), and the [President/Executive Department Commons](#)

Recommended Citation

Anne Skrodzki, Signing Statements and the New Supreme Court: The Future of Presidential Expression, 40 J. Marshall L. Rev. 1317 (2007)

<https://repository.law.uic.edu/lawreview/vol40/iss4/17>

This Comments is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

SIGNING STATEMENTS AND THE NEW SUPREME COURT: THE FUTURE OF PRESIDENTIAL EXPRESSION

ANNE SKRODZKI*

I. INTRODUCTION

During a Senate Judiciary Committee hearing on presidential signing statements, Democratic Senator Patrick Leahy warned, “[we] are at a pivotal moment in our Nation’s history, where Americans are faced with a President who makes sweeping claims for almost unchecked Executive power.”¹ With parties as diverse as Senators,² the American Bar Association,³ newspaper editorial pages,⁴ and internet bloggers⁵ weighing in on the subject,

* Anne is a May 2008 J.D. candidate at The John Marshall Law School and a Lead Articles Editor of The John Marshall Law Review. She wishes to thank the Editorial Board of The John Marshall Law Review for their friendship and support, her friends Geraldine Gonzales and Erica Byrd for inspiration and encouragement, and her family for their guidance and love.

1. *The Use of Presidential Signing Statements: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Sen. Patrick Leahy, Ranking Member, Judiciary Comm.).

2. See, e.g., Senator Patrick Leahy, Remarks on the Nomination of Samuel A. Alito, Jr., to be an Associate Justice of the Supreme Court of the United States, at The Georgetown University Law Center (Jan. 19, 2006) (characterizing President Bush’s use of signing statement as a “power grab”); Senator Dianne Feinstein, Remarks to the Queen’s Bench Bar Association (May 30, 2006) (criticizing the current administration’s use of signing statements as “disrupting the checks and balances so fundamental to our particular form of democracy”).

3. See Report, American Bar Association, Task Force on Presidential Signing Statements and the Separation of Powers Doctrine (July 24, 2006) (calling for the elimination of signing statements that interpret legislation differently from the stated intent of Congress).

4. Walter Dellinger, Op-Ed., *A Slip of the Pen*, N.Y. TIMES, July 31, 2006, § A, at 17 (defending a President’s authority to issue signing statements in which he makes constitutional challenges to the validity of the relevant legislation); Nat Hentoff, Op-Ed., *Sweet Land of Liberty*, WASH. TIMES, July 10, 2006, § A, at 19 (warning that the President’s use of signing statements indicates that he has an expansive view of executive power and threatens to negate the power of Congress). Additionally, a series of stories covering President Bush’s use of signing statements was awarded the 2006 Pulitzer Prize for national reporting. David Mehegan, *Globe Writer Wins Pulitzer for National Reporting*, BOSTON GLOBE, Apr. 17, 2007, at A1.

President George W. Bush's signing statements are making news as never before.

While signing statements have defenders as well as detractors, most commentators have strongly criticized George W. Bush for both the frequency and the content of the statements he has issued.⁶ However, these critics have not considered that the challenges issued by President Bush may have little or no actual impact on the practical application of the relevant legislation. Additionally, signing statements have legitimate beneficial uses. As published records of a President's interpretation of legislation, they serve to clarify and communicate the executive branch's understanding of congressional action.⁷

In order to contextualize the current use and impact of signing statements, Part II of this Comment will address the history of the presidential signing statement, focusing on the last twenty-five years. Part II will also examine the recent attention paid to signing statements and their connection to the current U.S. Supreme Court. Part III will analyze two distinct issues that illustrate the impact that presidential signing statements have on the Supreme Court: affirmative action and subject matter jurisdiction over detainees. Legislation addressing both of these issues passed with George W. Bush attaching signing statements, and the Supreme Court has issued decisions addressing those statements. Finally, Part IV will propose that signing statements continue to be issued, and that courts use them as one of many tools of interpretation, with appropriate legislation providing for immediate judicial review in some circumstances. These measures will preserve the balance between the legitimate power of the President and proper deference to the other branches of government.

5. See Posting of Ask a Lobbyist to <http://www.wonkette.com/politics/ask-a-lobbyist/ask-a-lobbyist-ruining-our-country-201969.php> (Sept. 20, 2006, 14:44 EST) (contending that presidential signing statements are ineffective at promoting a specific position).

6. Editorial, *Presidential Signing Statements*, N.J. LAW., Aug. 21, 2006, at 6; Joe Wolverton II, *Presidential Power Grab: President Bush Has Been Quietly Attaching Pronouncements to the Bills He Signs Into Law*, NEW AM., Aug. 21, 2006, at 25; Editorial, *Signings of the Times: An ABA Task Force Warns of an Abuse of Power*, PITTSBURGH POST-GAZETTE, Aug. 6, 2006, § H, at 2.

7. Signing statements have been included in the "Legislative History" section of the United States Code Congressional and Administrative News since 1986. However, they have also been released in the *Weekly Compilation of Presidential Documents* by the White House Press Secretary since 1965. Harvard Law School Library, Notable Internet Resources, http://www.law.harvard.edu/library/services/research/nir/current_issue.php (last visited July 12, 2007).

II. BACKGROUND

A. Historical Context

James Monroe published the first presidential signing statement in the year 1817.⁸ When signing statements were initially issued, Presidents used them to “raise and address the legal or constitutional questions they believed were presented by the legislation they were signing.”⁹ Initially, Presidents used signing statements sparingly, and with a few notable exceptions the statements did not garner much attention.¹⁰ No President issued more than ten signing statements during his administration until President Hoover, who issued twelve.¹¹ However, every President since Hoover has released at least fifty signing statements, illustrating their rise in popularity during the mid to late twentieth century.¹²

8. Christopher S. Kelley, Dep’t of Political Sci., Miami Univ., A Comparative Look at the Constitutional Signing Statement: The Case of Bush and Clinton, Presentation to the 61st Annual Meeting of the Midwest Political Science Association (Apr. 3-6, 2003), at 6-7. This first signing statement issued by President Monroe concerned a law he had signed into effect which reduced the size of the army and dictated the procedure which the President would follow in selecting new officers. When he was criticized for not appointing officers as Congress had mandated, Monroe issued a statement which challenged the authority of Congress to dictate these procedures, instead arguing that the Constitution afforded the President the sole responsibility to appoint officers as he saw fit. *Id.*

9. Memorandum from Walter Dellinger, Assistant Attorney Gen., to Bernard N. Nussbaum, Counsel to the President (Nov. 3, 1993) (on file with the Department of Justice), *available at* <http://www.usdoj.gov/olc/signing.htm>.

10. Christopher S. Kelley, The Unitary Executive and the Presidential Signing Statement, at Appendix 3.1 (2003) (unpublished Ph.D. dissertation, Miami Univ. of Ohio) (on file with author), *available at* <http://www.ohiolink.edu/etd/send-pdf.cgi?miami1057716977>. Two prominent examples of early signing statements which were controversial at the time involve Presidents Jackson and Tyler. Jackson, unhappy about a bill involving internal road improvements, issued a statement that a road which was to connect Detroit and Chicago should not extend past Michigan Territory. Although Jackson was criticized, the road improvements were confined to Michigan. LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 128 (Univ. Press of Kan. 3d rev. ed. 1991) (1972). When President Tyler attached a statement to a Congressional Districting Act, he noted that he signed the bill in deference to Congressional authority rather than from having his own strong opinions on the subject. Tyler was publicly chastised by a Committee of the House of Representatives, which accused him of having ulterior motives for speaking on the subject and concluded that the statement was “a defacement of the public records and archives.” H.R. REP. NO. 909 (1842).

11. Kelley, *supra* note 10, at Appendix 3.1.

12. *Id.* Remember that Ford’s presidency lasted for only three years, and both Carter and George H.W. Bush served for only one term.

1. The Reagan Administration

While the signing statement was used more frequently by twentieth century Presidents, it was still a largely ceremonial and unheralded method of presidential expression.¹³ Then, during the presidency of Ronald Reagan, key members of the Administration began to explore the possibility of using signing statements to expand the President's influence over legislation by creating a "parallel legislative history."¹⁴ In February 1986, Attorney General Edwin Meese gave a speech to the National Press Club on gun control, during which he announced that all presidential signing statements would be included in the Legislative History section of the United States Code Congressional and Administrative News (U.S.C.C.A.N.).¹⁵ Although this statement was seemingly an afterthought, the inclusion of the signing statement in U.S.C.C.A.N. gave it a powerful political legitimacy, and allowed it to occupy a unique place in executive communication. This elucidated not only the President's position, but also extended the position of the entire executive branch – including the justice department.¹⁶

13. Neil Kinkopf, *Signing Statements and the President's Authority to Refuse to Enforce the Law*, AM. CONST. SOC'Y, June 2006, at 2.

14. See Memorandum from Samuel A. Alito, Jr., Deputy Assistant Attorney Gen., to The Litigation Strategy Working Group, U.S. Dep't of Justice (Feb. 5, 1986) (on file with the National Archives), available at <http://www.archives.gov/news/samuel-alito/accession-060-89-269> (go to box 6; then follow first hyperlink) (suggesting that signing statements be used in questions of interpretation, and claiming that "the President's understanding of the bill should be just as important as that of Congress"). This memorandum was produced as part of a lengthy brainstorming process between members of the justice department seeking to promote the principle of a "Unitary Executive." *Id.* Although that concept is far too detailed to include a complete discussion here, a general overview of the theory is that in a unitary executive system, Presidents have all-encompassing executive power, including over officers and agencies of the executive branch. Further, in a unitary executive system Congress has a limited ability to interfere with a president's control of the executive branch of the government, through legislation or other means. There are generally three basic elements to a unitary executive system: first, that the president has the power to remove bureaucratic policy-making officials; second, that the president has the power to dictate the subordinate's exercise of executive power; and third, that the president has the power to veto any discretionary exercise of executive power by any subordinate official. See Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL'Y 667, 668 (2003) (providing a lengthy and detailed analysis of the unitary executive theory, especially as it was implemented by several administrations in the second half of the nineteenth century).

15. Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statement as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J. ON LEGIS. 363, 367 (1987).

16. Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. LEGIS. 1, 87 (2002).

2. *The George H.W. Bush and Clinton Administrations*

George H.W. Bush continued the practice of using signing statements frequently, and issued only sixty-two fewer signing statements in his first term than Reagan had produced in two.¹⁷ The real test of the reach of signing statements, however, would come under President Clinton. After three terms of Republican leadership, Clinton proved that the signing statement was not a feature exclusive to conservative leadership.¹⁸ His Assistant Attorney General wrote a memo reaffirming that the executive office now considered signing statements a permanent fixture.¹⁹ Like Reagan and George H.W. Bush, Clinton used signing statements to challenge the constitutionality of legislation and to expand his executive power.²⁰ He relied heavily on executive actions after the midterm elections of 1994 gave Republicans control of both houses of Congress.²¹

3. *The George W. Bush Administration*

George W. Bush has become the most prolific issuer of signing

17. Kelley, *supra* note 10, at 110.

18. See Christopher S. Kelley, Letter to the Editor, *Correspondence*, NEW REPUBLIC, Sept. 11, 2006, at 4 (summarizing his scholarship in the history of signing statements in refuting an article which characterized the rise of signing statements as a conservative strengthening of executive power, and asserting that scholarly research shows that President Clinton used signing statements in much the same way as his conservative predecessors and follower).

19. See Dellinger, *supra* note 9 (discussing and supporting the President's authority to choose not to enforce statutes which he considers unconstitutional). Dellinger's memo, although ultimately in favor of the use of signing statements, cautions against the abuse of them. *Id.* He explicitly states that if a President has reason to believe that the Supreme Court would uphold the constitutionality of the disputed section of legislation, he should execute the statute despite his own opinion on the subject. *Id.* He also included a statement that although the President should give deference to congressional action, he should use "his independent judgment" in deciding whether or not a statute is unconstitutional. *Id.*

20. See Robert Pear, *The Presidential Pen Is Still Mighty*, N.Y. TIMES, June 28, 1998, § 4, at 3 (contending that, even though the Supreme Court had just ruled against the line item veto, Clinton had been expanding his executive power through "executive orders, regulations, proclamations, and other decrees"). One example of a Clinton signing statement that includes a direct constitutional challenge can be found in the statement issued with the National Defense Authorization Act of 1996. The bill included a provision that HIV-positive service members would be discharged regardless of medical necessity. Clinton signed the bill, but released a signing statement which declared that the section was unconstitutional, and directed the Attorney General to leave it undefended if the section was challenged. The Attorney General was never called to act upon the matter, since Clinton worked with Congress to repeal the section in question. Kelley, *supra* note 8, at 20.

21. Kelley, *supra* note 8, at 21.

statements in history, as well as the most controversial.²² Although to a certain extent he inherits the institutionalized structure of his predecessors, he has certainly further expanded the common usage of signing statements.²³ Exact figures documenting Bush's use of signing statements vary, but sources agree that as of June 2007, he has issued about one hundred and fifty signing statements, which contain over one thousand constitutional challenges.²⁴

President Bush issued one such statement on December 30, 2005, when he signed the Defense Department Budget into Law. An amendment to that bill, known as the Detainee Treatment Act, provided that enemy combatants under the control of the Justice Department anywhere in the world would be protected from mistreatment during interrogation.²⁵ Bush's signing statement, however, instructed the executive branch to construe this section as consistent with his own powers as Commander-in-Chief of the armed forces and as head of the executive branch.²⁶ In other words, Bush's statement contended that Congress did not have the authority to direct the actions of members of the executive branch, or to interfere with members of the military – a typical position expressed in his signing statements.²⁷

22. See, e.g., Charlie Savage, *Bush Challenges Hundreds of Laws*, BOSTON GLOBE, Apr. 30, 2006 (documenting hundreds of signing statements issued by the current administration, as well as sharply criticizing the way that they are issued and their content, which often contains constitutional challenges).

23. President Bush has issued signing statements on topics ranging from affirmative action and government employee whistleblowing to detainee torture and educational research. A recurring theme among Bush's signing statements emphasizes that he does not recognize congressional authority to direct his actions as head of the executive branch, and thus he objects to congressional action which might encroach upon the separation of powers. Charlie Savage, *Examples of the President's Signing Statements*, BOSTON GLOBE, Apr. 30, 2006.

24. Letter from the United States Government Accountability Office to Senator Robert C. Byrd and Representative John Conyers, Jr. (June 18, 2007) [hereinafter GAO Report]. The ABA task force cites a Boston Globe article that puts the number of constitutional challenges at over eight hundred in the first six years of the Bush Administration. Savage, *supra* note 22. Some of the confusion can be attributed to the fact that the President may challenge more than one section of a bill within one signing statement.

25. Detainee Treatment Act of 2006, Pub. L. No. 109-158, § 1002, 119 Stat. 2680 (2005).

26. Press Release, White House Office of the Press Sec'y, President's Statement on Signing of H.R. 2863, the "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006" (Dec. 30, 2005).

27. See GAO Report, *supra* note 24 (documenting President Bush's signing statements and reporting that constitutional challenges contained therein related to Congress's interference with the President's executive powers over foreign affairs, as commander-in-chief, and as head of the executive branch).

After a steady expansion in use over the course of almost one hundred years, signing statements have become an entrenched feature of presidential politics.²⁸ With a line-item veto unavailable, Presidents have used them in situations where the benefits of a bill have outweighed a small objectionable section.²⁹ Increasingly, though, Presidents have issued signing statements as a matter of course, publicly clarifying their position on legislation while attempting to present the judiciary with a possible alternate interpretation should any provision be challenged.

B. Signing Statements and the U.S. Supreme Court Nominee

President Bush's signing statements attracted scrutiny when he nominated Samuel A. Alito, Jr. to the U.S. Supreme Court.³⁰ Alito was one of the architects of the Reagan Administration's expanded usage of signing statements.³¹ This fact was not overlooked during the nomination process; several senators remarked upon the connection between Alito and signing statements, including one who theorized that as a member of the Supreme Court Alito would support "a new and radical expansion

28. Savage, *supra* note 22.

29. Signing statements have been connected to the idea of an "item veto" as early as the Jackson Administration. Fisher, *supra* note 10. However, most comparisons of the signing statement and the line-item veto come out of the Clinton Administration. The Line-Item Veto Act was passed in 1996, and was used by President Clinton eleven times to remove eighty-two items from the federal budget. National Archives and Records Administration, *Cancellation of Legislative Items Pursuant to Line Item Veto Act (Public Law 104-130)*, <http://www.access.gpo.gov/nara/nara004.html> (last visited Oct. 3, 2006). The Line-Item Veto Act was overturned by the Supreme Court in 1998. *Clinton v. City of New York*, 524 U.S. 417, 447 (1998). For two detailed accounts of the line-item veto and its connection to signing statements, see Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 30-33 (1995) (contending that expanded usage of executive orders and signing statements has been able to subvert the structure of the government, and that a line-item veto is needed to address the "omnibus" legislation that Congress passes without resorting to executive tools that allow the President to unilaterally dictate the interpretation of a particular act); Roy E. Brownell II, Comment, *The Unnecessary Demise of the Line Item Veto Act: The Clinton Administration's Costly Failure to Seek Acknowledgment of "National Security Recession"*, 47 AM. U.L. REV. 1273, 1338 (1998) (contending that Congress cannot dictate to the executive branch in certain areas of spending, and in the corresponding footnote arguing that Presidents have, at times, exercised a de facto line item veto over non-appropriations bills by issuing signing statements which limit the scope of the enacted legislation).

30. See, e.g., Elisabeth Bumiller, *For President, Final Say on a Bill Sometimes Comes After the Signing*, N.Y. TIMES, Jan. 16, 2000, § A, at 1 (reporting on the signing statement that President Bush attached to the McCain Torture Amendment, and then-nominee Alito's connection to signing statements).

31. See Alito, *supra* note 14.

of executive power.”³² Alito’s previous support of signing statements also garnered a wide variety of press coverage.³³ Justice Alito’s nomination was confirmed by the Senate on January 31, 2006.³⁴

C. The American Bar Association Investigation

1. Task Force Investigation and Report

After Alito’s confirmation to the U.S. Supreme Court, the American Bar Association (ABA) decided to convene a task force to investigate the current Administration’s use of signing statements.³⁵ The task force was comprised of, among others, the Dean of the Yale Law School, Harold Koh, and former Chief Judge of the U.S. Court of Appeals for the D.C. Circuit, Patricia Wald.³⁶

32. 152 CONG. REC. S145, 194 (daily ed. Jan. 26, 2006) (statement of Sen. Levin); see also 152 CONG. REC. S35, 50 (daily ed. Jan. 25, 2006) (statement of Sen. Kennedy) (opposing Alito’s nomination and arguing that a President’s role in the legislative process is merely to either sign a bill or veto it, and that the view that a president has an interpretational opinion of legislation that he signs is “a very bizarre view of Executive Authority and Executive Power”); 152 CONG. REC. S235, 245 (daily ed. Jan. 27, 2006) (statement of Sen. Dayton) (speaking against Alito’s confirmation and asserting that the practice of issuing signing statement goes against the “very clear language” of the Constitution). In addition to the debate of Alito’s nomination on the floor of the senate, some senators made public remarks regarding his history of supporting signing statements and the use of signing statements by the Bush Administration. Leahy, *supra* note 2; Feinstein, *supra* note 2.

33. For a sampling of press coverage of Alito’s nomination and his connection with signing statements, see Adam Liptak, *Court in Transition: The Legal Context*, N.Y. TIMES, Jan. 14, 2006, § A, at 11. Liptak explains the background of Alito’s connection to signing statements and reports Alito distanced himself from that position during his confirmation hearings by noting that his memorandum was assigned while he was part of a government working group and did not necessarily reflect his personal opinions. *Id.* See also Editorial, *Still Time to Stop Alito Confirmation*, ITHACA J., Jan. 21, 2006, § A, at 8 (accusing the President of being “power hungry” and using Alito as a means to consolidate that power); John Jones, Op-Ed., *Alito Confirmation a Warning that Court is Moving Against Mainstream America’s Wishes*, ASHEVILLE CITIZEN-TIMES, Feb. 8, 2006, § A, at 7 (criticizing Alito’s confirmation and also containing a personal attack on the Justice, saying that his support of signing statements during the Reagan Administration displays “a deviousness not consistent with our generally accepted definition of ‘good’ character”).

34. 152 CONG. REC. S333, 385 (daily ed. Jan. 31, 2006) (record of daily confirmations).

35. ABA Task Force Report, *supra* note 3.

36. *Id.* at 29-34. Other notable members of the task force are former Dean of Stanford Law School and current head of the Stanford Constitutional Law Center Kathleen M. Sullivan, Harvard Law Professor Charles J. Ogletree, and former Justice Department attorney Bruce Fein. The task force was chaired by Neal R. Sonnet, a former Assistant U.S. Attorney for the Southern District of Florida and prominent Miami attorney who specializes in the defense of

The task force preliminarily released its findings and recommendations in July 2006, and Senator Arlen Specter read the full text of the news release into the Senate record.³⁷ Although the task force was careful to stress that their report was not a specific attack on the Bush Administration, its section documenting the Clinton Administration noted that Clinton and his advisors recognized and deferred to Congress' authority, while the following section documenting the Bush years sharply criticized that Administration.³⁸

The task force concluded that the President should neither release signing statements that contain challenges to the constitutionality of the legislation they accompany, nor indicate that he intends to interpret the legislation in any way that is inconsistent with the intent stated by Congress.³⁹ The constituency of the ABA adopted this recommendation at their annual meeting in August, 2006.⁴⁰

2. Legislation Introduced

Days after the ABA taskforce released its report, the Chairman of the Senate Judiciary Committee introduced legislation that would instruct courts to disregard presidential signing statements when interpreting legislation.⁴¹ The bill, if passed, would also provide that either house of Congress has

white collar criminals. *Id.*

37. 152 CONG. REC. S8122, 8123 (daily ed. July 24, 2006) (statement of Sen. Specter). The news release contained the primary conclusions and recommendations of the task force and background information about the members as well as the ABA. *Id.*

38. ABA Task Force Report, *supra* note 3, at 12-18.

39. *Id.* at 20.

40. Patricia Manson, ABA: Write Law on Signing Statements, CHI. DAILY L. BULL., Aug. 9, 2006, at 10001. The task force report contained a number of other recommendations which were also adopted. These include communicating any reservations he has about the constitutionality of a bill to Congress before the legislation is passed, using signing statements only to communicate the "meaning, purpose, or significance" of the legislation that he is signing, the passage of legislation that requires signing statements to be readily available to the public as well as officially delivered to Congress, and the passage of legislation that provides for immediate judicial review of issues raised in signing statements in certain circumstances. ABA Task Force Report, *supra* note 3, at 20-25.

41. S. 3731, 109th Cong. (2006). The bill contains a number of findings, including the contention that courts have begun to use signing statements as a source of authority when attempting to interpret legislation. *Id.* It also contends that the members of the Supreme Court are unable to agree on a position in order to declare a clear rule regarding judicial reliance on signing statements, and that this difference of opinion has the "unfortunate effect" of unpredictable court procedures for interpreting federal legislation. *Id.* Specter does not cite sources of authority for these findings, and has not thus far been able to attract any co-sponsors for this legislation. *Id.*

standing to obtain a declaratory judgment from the Supreme Court regarding any constitutional issue raised by a presidential signing statement.⁴²

While the Congress is mounting an unprecedented attack on the presidential signing statement, other commentators are calling it a “phantom target.”⁴³ And although many senators were quick to target Alito’s support of signing statements during his confirmation process, the legislation introduced by Senator Specter has thus far been unable to attract any co-sponsors.⁴⁴ With recent executives determined to consolidate presidential power, and Congress equally determined to dictate to the executive branch, a political showdown is in the making.

III. ANALYSIS

While the signing statement has been attracting the attention of many legislators, the U.S. Supreme Court justices have remained relatively silent on the issue. During Alito’s confirmation hearings, several senators directly questioned his involvement in shaping the Reagan Administration’s expansionist use of signing statements.⁴⁵ He responded by characterizing his authorship as “stating the position of the administration” rather than reflecting his own opinion or agenda.⁴⁶ When pressed to give his own opinion, he emphasized that his philosophy of statutory interpretation typically only involved looking to the text of the statute.⁴⁷

42. *Id.*

43. See Laurence H. Tribe, Op-Ed., ‘Signing Statements’ Are a Phantom Target, BOSTON GLOBE, § A, at 9 (Aug. 9, 2006) (indicating he believes that George W. Bush has used signing statements inappropriately, but that the objections to such a practice are not related to the constitutionality of the statements themselves, but rather to the President’s failure to use a veto when appropriate).

44. Levin, *supra* note 32; Kennedy, *supra* note 32; Dayton, *supra* note 32; Feinstein, *supra* note 2; Leahy, *supra* note 2; 152 CONG. REC. S8269 (daily ed. July 26, 2006) (introduction of legislation with sponsor, Sen. Specter).

45. *The Nomination of Judge Samuel A. Alito to the U.S. Supreme Court: Hearing Before the S. Judiciary Comm.*, 109th Cong. (2006) (questions specifically regarding signing statements posed by Senators Arlen Specter, Patrick Leahy, and Edward Kennedy). Though some of the questions were actually lengthy statements, they pressed Alito to account for his early opinions as well as explain what his current philosophy regarding the authority contained within presidential signing statements is, and how that might affect his decisions as a member of the Supreme Court. *Id.*

46. *Id.*

47. *Id.* Alito also pointed out that the memorandum he composed for the Reagan Justice Department raised a number of problems with the use of signing statements as legislative history, and he claimed that these theoretical problems would have to be addressed and resolved by the Supreme Court before signing statements could be used as a source of interpretive authority. *Id.* The theoretical issues that he identified in that memorandum included the

The rest of the Court has had opportunities to directly address the substance of several presidential signing statements in decisions issued during the course of the George W. Bush Administration. Their treatment of those signing statements reveals the degree to which presidential interpretation is treated as a source of authority by the judiciary.

A. Affirmative Action and the University of Michigan Cases

1. The Administration on Affirmative Action

President George W. Bush has issued at least fifteen signing statements dealing with affirmative action in the six years after taking office.⁴⁸ These signing statements have refused to recognize congressional authority to impose affirmative action policies in a myriad of governmental settings.⁴⁹ Typically, the statements challenge the constitutionality of affirmative action policies under the Equal Protection Clause of the Constitution.⁵⁰ According to one, “the executive branch shall construe the law in a manner consistent with a constitutional clause guaranteeing ‘Equal

very basic question of what role a President’s intent has in the interpretation of legislation, given that although his approval of legislation has always been equally important to that of Congress, he has traditionally had a very limited role in shaping legislation. *Id.* Alito also raised the difficulties inherent in the possibility of a direct conflict between congressional and presidential intent; surmising that if clear congressional intent were to always defeat a presidential interpretation, presidential power might be equivalent to the deference traditionally accorded to administrative interpretation. Nomination of Alito, *supra* note 45. Although Alito did not suggest a resolution to either of these issues, he does recommend that the administration embark on a “pilot program” of moderate scope where a small number of signing statements containing interpretive statements, along with a clear explanation of the authority upon which the administration depends, would be issued. Alito, *supra* note 14.

48. Savage, *supra* note 22.

49. *Id.*

50. Press Release, White House Office of the Press Sec’y, President’s Statement on the Intelligence Reform and Terrorism Prevention Act (Dec. 17, 2004). The bill at issue, a lengthy reformation of the intelligence community which, among other things, created the office of Director of National Intelligence, called in part for the hiring and promotion of women and minorities in the intelligence field. Part of the motivation to use a signing statement to address the small part of the bill that amounted to an implementation of affirmative action policies within the departments under the intelligence umbrella is that the President would otherwise have to veto a long, complicated and extremely popular piece of legislation in order to address his objections to a relatively minor provision. Continually vetoing complicated, multi-title legislation would effectively paralyze governmental operations. See Brownell, *supra* note 29 (discussing the modern context of complex legislation that presents the President with the difficult choice of approving a bill over his reservations or vetoing the entire package).

Protection' for all."⁵¹ In other words, the clear position of the Bush Administration is that Congress cannot implement affirmative action policies in governmental agencies, because equal protection is guaranteed under the Constitution. Even more generally, the Administration believes that any congressional attempt to create policies regarding federal employment is invalid because, as the head of the executive branch, the President has the sole authority to control the agencies of that branch.⁵² Thus, the President has two theoretically powerful constitutional arguments supporting his clearly defined opposition to all federal affirmative action policies.

In 2003, the Supreme Court heard the cases of *Gratz v. Bollinger*⁵³ and *Grutter v. Bollinger*.⁵⁴ These two cases involved affirmative action admissions policies at the University of Michigan. In the first case, Jennifer Gratz, a white, female, Michigan resident, applied to the University of Michigan's College of Literature, Science, and the Arts and was denied admission.⁵⁵ She was joined by a similarly qualified male student,⁵⁶ and together they represented other undergraduate applicants in a class action suit.⁵⁷ In the second case, Barbara Grutter, also a white, female, Michigan resident, was denied admission to the University of Michigan Law School.⁵⁸ She also represented a class of similar individuals.⁵⁹ In both of these cases, the plaintiffs sued

51. Press Release, *supra* note 50.

52. See generally Calabresi & Yoo, *supra* note 14 (containing a full treatment of the main principles of the Unitary Executive Theory, as well as an examination of the historical development of the theory). Several aspects of the Unitary Executive Theory govern the administration's opposition to congressional interference in federal hiring practices. *Id.* The Unitary Executive not only protects the President's power to control the Executive Branch, but also to either remove bureaucratic officials or veto their discretionary actions. *Id.* Although no President would have the practical ability to micro-manage all of the departments of the executive branch, he would theoretically be able to dictate the individual actions, including all hiring and firing decisions, of the employees of all government agencies. *Id.*

53. *Gratz v. Bollinger*, 539 U.S. 244 (2003).

54. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

55. Based on Gratz's adjusted high school GPA and ACT score, and her status as a Caucasian in-state resident, she was placed in a group whose admissions decision was initially postponed, and eventually denied. *Gratz*, 539 U.S. at 254. If she had been either an in-state or out-of-state minority applicant, she would have been placed in a group of immediately accepted applicants. *Id.* Gratz eventually enrolled at, and graduated from, the University of Michigan at Dearborn. *Id.* at 251.

56. *Id.*

57. Gratz was joined in her suit by Patrick Hamacher, a white male resident of Flint, Michigan, who was also denied admission to the University. After his admissions decision was first postponed, and then ultimately denied, he attended and graduated from Michigan State University. *Id.*

58. *Grutter*, 539 U.S. 306.

59. *Id.* at 317.

the University, alleging that the University had discriminated against them on the basis of race, in violation of the Equal Protection Clause and other federal statutes.⁶⁰ The Court consolidated the two cases for hearing.

The United States Justice Department filed an amicus brief on behalf of the petitioners in both cases.⁶¹ In its brief, the department repeated and elaborated on the Bush Administration's expressed views condemning affirmative action.⁶² The brief claimed that the justice department, and by extension the executive branch, had an interest in the case under two mandates: the responsibility to uphold the Equal Protection Clause in a public education setting, and also the responsibility to enforce Title IV of the Civil Rights Act of 1964, which prohibits recipients of federal financial assistance from discriminating on the basis of race, color, or national origin.⁶³ Additionally, the briefs called for a race-neutral admissions policy that would instead promote diversity by focusing on factors such as "overcoming disadvantage, geographic origin . . . volunteer and work experiences, [and] exceptional personal talents,"⁶⁴ citing models used by Texas, Florida, and California.⁶⁵

2. *The Court Responds to the Administration*

The Court directly addressed the Bush Administration's arguments in lengthy discussions in both cases, which resulted in a 6-3 decision abolishing the quota system employed by the undergraduate admissions office,⁶⁶ while a 5-4 majority upheld the law school's use of race as one factor in admissions decisions.⁶⁷

60. *Id.*; *Gratz*, 539 U.S. at 252.

61. Brief for the United States as Amicus Curiae Supporting Petitioners, *Gratz v. Bollinger*, 539 U.S. 244 (2003) (No. 02-516).

62. *Id.* The Solicitor-General and other attorneys within the justice department authored and filed the briefs with the input and endorsement of the General Counsel of the Department of Education. *Id.*

63. *Id.* at 1-2.

64. *Id.* at 14-15.

65. *Id.* at 13-14. The government's amicus brief listed its main legal arguments in opposition to the University's affirmative action policies. The brief argued that the University owed all "segments of American society" equal access to admission, and that the recruitment of highly qualified minority students is a valid way to guarantee adequate minority representation in a university population without creating an explicit preference in the admissions system, rendering the existing system unconstitutional because it was not necessary. *Id.* at 13. The brief also contended that the admissions system used race as a decisive factor rather than just one element that might benefit a candidate, and that the system had the effect of unduly burdening innocent third parties by requiring Caucasian applicants to meet higher objective qualifications than other groups. *Id.* at 22-24.

66. *Gratz*, 539 U.S. at 251.

67. *Grutter*, 539 U.S. at 343.

Both Courts explicitly rejected the Administration's contention that affirmative action policies violated the Equal Protection Clause, instead deciding that racial diversity was a compelling interest that justified the use of race as one aspect in an admissions decision.⁶⁸ Although the Court found that the overly mechanistic points system was equivalent to an unconstitutional quota,⁶⁹ both cases stand as a reaffirmation of affirmative action policies as not only constitutional but also beneficial if tailored narrowly enough to assure the achievement of a university's compelling interest in diversity. The Court was not influenced by the President's, and his Administration's, interpretation of the Equal Protection Clause and attacks on the constitutionality of affirmative action policies.

B. Detainee Treatment and Hamdan v. Rumsfeld

Three years later, after the addition of new Chief Justice John Roberts and new junior Associate Justice Samuel Alito to the bench, the U.S. Supreme Court heard another case that involved a signing statement authored by the Bush Administration.

1. The Detainee Treatment Act and the Administration

Congress proposed and passed the Detainee Treatment Act (DTA), also known as the McCain Amendment, as an Amendment to the Defense Department Budget of 2005.⁷⁰ In part, the Act provides that "no person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation."⁷¹ The bill was specifically meant to include prisoners being detained at Guantanamo Bay.⁷² It was a bi-partisan effort that was passed by a vote of 90-9 in December, 2005.⁷³

President George W. Bush signed the department budget into law at the end of 2005, but he concurrently issued a signing statement that presented his interpretation of the DTA, as well as

68. *Id.* at 328; *Gratz*, 539 U.S. at 268-69.

69. *Gratz*, 539 U.S. at 270-75.

70. Detainee Treatment Act of 2006, Pub. L. No. 109-158, § 1002, 119 Stat. 2680 (2005). Although after much public debate and controversy the substance of this enactment was replaced, the Act was current and valid from December, 2005 until September, 2006. The replacement Act is the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006).

71. Detainee Treatment Act § 1002.

72. *Id.*

73. United States Senate, U.S. Senate Roll Call Votes 109th Congress (2005), http://www.senate.gov/legislative/LIS/roll_call_lists/vote_menu_109_1.htm (follow vote number 249 hyperlink). The nine senators who voted against the bill were all Republicans. *Id.*

a Constitutional basis for his objections.⁷⁴ The signing statement reads in part:

noting that section 1005 does not confer any constitutional right upon an alien detained abroad as an enemy combatant, the executive branch shall 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 1005.⁷⁵

In other words, President Bush does not recognize the ability of the federal court system to hear cases brought by detainees under the control of the U.S. Justice Department because he believes that he has the sole authority to direct the actions of the members of the executive branch, including the military tribunals, which are in place for the purpose of hearing detainee complaints.⁷⁶

The text of this signing statement does not mean that the President intends to disregard the statute. An anonymous administration official told the Boston Globe that the President did recognize his obligation to enforce the amendment.⁷⁷ However,

74. Press Release, White House Office of the Press Sec'y, President's Statement on Signing of H.R. 2863, the "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006" (Dec. 30, 2005), *available at* <http://www.whitehouse.gov/news/releases/2005/12/20051230-8.html>. The signing statement does more than simply comment on the section of the bill that deals with detainee treatment. It begins with a general acknowledgment of its support of the bill and continues by addressing several of the fiscal provisions contained in other areas of the bill, as well as sections legislating the reorganization of the Department of Defense and the treatment of foreign intelligence. *Id.* Throughout the statement, the President reiterated that he would construe the specific provisions of the bill in a manner that was consistent with his own constitutional powers, and challenged the ability of Congress to legislate anything that might encroach on the presidential role under the separation of powers doctrine. *Id.* Although he instructed the executive branch to interpret the legislation as stripping jurisdiction from the federal court system, the statement did not claim power to influence the judiciary. *Id.*

75. *Id.*

76. This assertion of executive power as commander-in-chief of the military is consistent with the Unitary Executive. The traditional interpretation of that theory does not explicitly address the President's power over the armed forces, which is theoretically a separate constitutional grant, but the President's position as the head of the executive branch of the government. Calabresi & Yoo, *supra* note 14.

77. Charlie Savage, *Bush Could Bypass New Torture Ban*, BOSTON GLOBE, Jan. 4, 2006. This article went on to suggest that the administration issued a signing statement which purported to limit the scope and implementation of the Detainee Treatment Act only after unsuccessfully attempting to suppress the passage of the McCain amendment, or to convince Congress to soften the effect of the amendment by exempting the CIA from any provisions limiting interrogation tactics. *Id.* The article also claimed that President Bush had

the official also said that if the amendment conflicted with the President's responsibility to "defend and protect the country as commander-in-chief," he would have to reconcile those conflicting obligations.⁷⁸ Although the Administration tried to downplay the impact of the President's signing statement, it was meant as an assertion of the power to override the legislation if he should decide that it encroaches on his position as head of the executive branch.

2. *The Court's Response*

The DTA was at issue in the case of *Hamdan v. Rumsfeld*.⁷⁹ In that case, a Yemeni national, detained at Guantanamo Bay on terrorist related charges, petitioned the U.S. Supreme Court for a writ of habeas corpus.⁸⁰

In the decision, the U.S. Supreme Court examined the legislative history of the DTA in detail. While not specifically referencing the President's signing statement, the majority rejected the interpretation presented therein and found that the President's determination did not justify the departure from standard procedures governing courts-martial.⁸¹ The Court upheld subject matter jurisdiction, over the President's explicit statement to the contrary.⁸²

In his dissent, Justice Scalia, joined by Justices Thomas and Alito, specifically criticized the majority for its lengthy discussion of the DTA's legislative history that "ignor[ed] the President's signing statement, which explicitly set forth *his* understanding that the DTA ousted jurisdiction over pending cases."⁸³ However,

threatened to veto the legislation outright. *Id.*

78. *Id.*

79. *Hamdan v. Rumsfeld*, No. 05-184, 2006 U.S. LEXIS 5185, *30-34 (June 26, 2006).

80. *Id.*

81. *Id.* The Court did discuss the legislative history of the Detainee Treatment Act, and examined it in some detail, perhaps in part because an amicus brief was filed by Senators John Kyl and Lindsey Graham in support of the administration's position that detainees did not have the right of habeas corpus. Brief for Senators John Kyl and Lindsey Graham as Amicus Curiae for the Respondent, *Hamdan v. Rumsfeld*, No. 05-184, 2006 U.S. LEXIS 5185 (June 26, 2006). The senators claimed that Congress had been aware that the Detainee Treatment Act purported to strip the Supreme Court of jurisdiction in hearing cases brought by those detained at Guantanamo Bay, and had intended to produce that result with the legislation. *Id.* The majority did not agree with the Senators' position, and instead ruled that Congress had never intended to remove jurisdiction from the Supreme Court. *Hamdan*, 2006 U.S. LEXIS 5185, at *127.

82. *Id.*

83. *Id.* at 134. This part of Scalia's dissent, though, was not a serious endorsement of the President's signing statement, but rather a response to the majority's discussion of the legislative history of the act. In fact, Scalia's dissent, as consistent with his general judicial philosophy, relies first on the

even this dissent fell far short of indicating that the signing statement is a source of authority; rather, it merely showed that the Justices view it as one factor in determining the relevant legislative history.

Each of these case studies illustrate that the U.S. Supreme Court, and the judiciary in general, is fiercely independent. The President has the opportunity to try to publicize his legislative interpretation, but in the event that interpretation is challenged through the court system, it is unlikely that the judiciary will be influenced by the President's opinion unless his challenge to congressional authority is valid.

Even with the presence of new Justices John Roberts and Samuel Alito, the Supreme Court's philosophical approach to presidential signing statements has not significantly changed. Rather, the signing statement retains the same position that it has had in the past – as one of many possible arguments presented to the Court, but without the force or deference duly awarded to congressional actions.

IV. PROPOSAL

The rise of the presidential signing statement has been a steady growth over a period of seventy-five years. However, only the last four presidential administrations have used the signing statement so frequently that it is almost a matter of course.⁸⁴ The practical effect of the inclusion of the signing statement in U.S.C.C.A.N., as well as other public directories, has been to create a high degree of transparency in an administration's policies.⁸⁵

explicit text of the statute denying the Supreme Court's jurisdiction over the detainees, rather than supporting or even considering the legislative history in his analysis. This interpretation happens to match Congress's intent rather than the President's, although it does not explicitly contradict the signing statement. *Id.* at 156-68.

84. Kelley, *supra* note 10, at Appendix 3.1.

85. Presidential signing statements are widely available to the public, although not necessarily widely publicized. Each presidential signing statement is issued as a press release by the White House Office of the Press Secretary, and is available on the White House website. For a recent example, see Press Release, White House Office of the Press Secretary, President's Statement on Signing of H.R. 5122, the "John Warner National Defense Authorization Act for Fiscal Year 2007" (Oct. 17, 2006) (containing several constitutional objections to provisions in the legislation which, among other things, require the President to consult with foreign governments in developing and carrying out U.S. foreign policy). Additionally, the website Coherent Babble contains the full text of each signing statement issued by the Bush Administration along with annotations that provide links to the full text of the legislation in question, as well as links to other government documents related to the statements themselves. Coherent Babble, Signing Statements of George W. Bush, <http://coherentbabble.com/signingstatements/TOCindex.htm> (last visited Nov. 12, 2006). In print form, the full text of every

Without this regularly issued commentary, the public might not have access to an administration's interpretation of legislation, especially if a bill is not particularly newsworthy.⁸⁶ This beneficial function can be preserved if the President is encouraged to continue the practice of issuing signing statements, which can be used to both explain and interpret legislation. The judiciary should be able to look to a presidential signing statement as one tool of many in determining the legal interpretation of a statute, although the signing statement should not have, and does not now have, the force of law.⁸⁷ Additionally, legislation should be proposed in Congress that provides for immediate judicial review of the text of a signing statement in certain circumstances, in order to strengthen the checks and balances which exist between the branches of government.

A. Signing Statements as an Interpretive Tool

As analyzed above, the judiciary is sufficiently independent –

presidential signing statement is found in the Weekly Compilation of Presidential Documents, published by the Office of the Federal Register, National Archives and Records Administration. For example, to view the signing statement referenced above, see President's Statement on Signing of H.R. 5122, the "John Warner National Defense Authorization Act for Fiscal Year 2007," 42 WEEKLY COMP. PRES. DOC. 1836 (Oct. 23, 2006). Additionally, the full text of most signing statements is contained in U.S.C.C.A.N., which is issued monthly in pamphlet form and then reissued as a bound volume after each session of Congress. Although these sources may not be available in smaller libraries, certainly the variety of places in which the full text of each presidential signing statement is available indicates that interested parties should have no difficulty accessing that information.

86. There is no other presidential form of communication that approximates the detail or the specificity of a signing statement. The other regular methods of communication are public remarks, which are reprinted and released by the White House office of the Press Secretary, presidential communications to Congress, which usually take the form of a letter, and the President's weekly radio address. Public addresses are not an appropriate forum for addressing the technical aspects of whatever legislation the President has most recently signed, and in the same way a weekly radio address is meant for public consumption of larger policy issues rather than a recitation of objections to specific clauses contained within legislation. Although news conferences may be used to flesh out an administration's policy, they occur infrequently and depend on the questions presented by reporters to investigate the President's views. See *id.* at 1823-65 (summarizing all official communications from the President during any particular week, including all public remarks, all communications to Congress and to federal agencies, proclamations, notices, executive orders, meetings with foreign leaders, and supplementary materials).

87. See *supra* notes 14-16 and accompanying text (describing the process by which the Reagan Administration developed a plan to expand the use of signing statements, and noting that even the members of the justice department at the time only foresaw the creation of an alternative interpretation of legislation and not a statement that carried the force of law).

and intelligent – to be able to objectively analyze a President's interpretation of specific legislation without being unduly influenced by any particular administration's political posturing. Signing statements should not be viewed as part of legislative history and should not be controlling when interpreting the meaning of legislative language, as the President's stated interpretation is not directly related to, or considered in, the legislative process, and his official involvement in the formation of legislation is limited to an approval or denial of the bill as a whole.⁸⁸

However, signing statements can and should be one legitimate factor in judicial interpretation, given the same weight by courts as a convincing piece of scholarship or an amicus brief. Although the courts are unlikely to agree with a President's alternate interpretation most of the time, as evidenced by their refusal to adopt the Bush Administration's viewpoint in either of the cases discussed above, there are circumstances in which a President's challenges may be valid. In these situations, a court should not be barred from considering a President's viewpoint any more than they should be forced to accept it. The inherent objectivity of the judiciary ensures that they are suited to serve as the final arbiter of constitutionality. Indeed, the function of the court system itself is to interpret the language of a statute whenever it is challenged. Therefore, the ability to use a presidential signing statement in making this interpretive decision is not an expansion of judicial power, nor does it increase the power of the executive branch beyond its existing capability to offer opinions to the court through the filing of a brief. Instead, it preserves a court's ability to consider all available interpretations while determining the powers and privileges of the legislative and executive branches.

B. Immediate Judicial Review

The possibility of abuse presented by signing statements occurs in the time period between the legislation's enactment and the conclusion of a legal challenge to the interpretation of the bill in question. During this time period, the President's interpretation

88. See Brownell, *supra* note 29, for a full description of the President's role in the implementation of legislation in today's political climate, including a discussion of the difficulties inherent in the tension between the President's role in approving or denying an entire piece of legislation and the practice of large, multi-section bills through Congress. Brownell argues that the President's inability to use a line-item veto hinders his ability to effectively object to legislation because Congress routinely passes "omnibus" legislation, which may be the result of months of political negotiation, therefore raising the stakes and increasing the cost of objecting to a small part of that legislation. *Id.*

directs the implementation of the legislation by the executive branch.⁸⁹ This could be seen as *de facto* veto power over any legislation that he opposes, because it would take, at minimum, a period of months for a challenge to work its way through the judiciary. Although the judiciary retains the ultimate power to arbitrate any dispute of constitutional authority, a President's ability to selectively enforce legislation cannot be allowed to remain unchecked while the court system remains powerless to resolve the conflict.

In order to prevent such an abuse of power, legislation should be proposed that provides for immediate judicial review of signing statements that indicate that the President interprets any section of a bill as unconstitutionally contrary to his powers as the head of the executive branch.⁹⁰ Any such legislation should provide that a majority of the members in either house of Congress may pass a resolution to immediately file a declaratory judgment action in the federal court system to challenge the content of the President's signing. The declaration from the court should specifically address the content of the President's signing statement, and provide a legislative interpretation. If the President's interpretation is found to be without merit, the Court would be able to immediately declare that the President must execute the legislation consistent with the court's interpretation. Such a provision would eliminate any time period during which the President's interpretation is executed exclusively, in conflict with the clear intent of Congress.

An added benefit of immediate judicial review would be that administrations would be less likely to make expansive claims of

89. See Bumiller, *supra* note 30 (arguing that President Bush's signing statements reinterpret congressional action without effective review, since he directs the actions of the executive branch without any governmental body having the ability to immediately oversee either that interpretation or course of action).

90. The legislation that has been introduced in the Senate by Senator Arlen Specter also contains a section which seeks to provide for judicial review of signing statements in the form of a declaratory judgment. However, that provision is rendered functionally irrelevant by the main section of the bill, which seeks to declare that the judiciary may not use a presidential signing statement in determining the interpretation of an act of Congress. If a statement cannot be used in this way, then the court system would have to declare any challenged signing statement invalid, unless it found that the two interpretations could co-exist. Furthermore, Senator Specter's proposed legislation would allow any member of Congress to challenge any signing statement issued by a President, and not only the ones which contain direct constitutional challenges or re-interpretations. This provision could lead to frivolous or politically motivated challenges to signing statements, providing an illustration that the political power struggle between the Presidency and Congress works both ways. This provision would also inevitably curtail a President's use of explanatory signing statements, limiting public access to information regarding his policies and interpretations. S. 3731, 109th Cong. (2006).

unconstitutionality or of encroachment on the principles of separation of powers. President Bush's signing statements are often repetitive, and react to legislation on a variety of topics in the same ways. If signing statements were subject to review, the courts would be able to settle some of the issues that are typically raised in signing statements expeditiously and preemptively. Additionally, any President would be hesitant to issue a constitutional challenge as a matter of course if he knew that such a challenge would likely be litigated. Any statement would likely be carefully considered before it was issued. In this way, immediate judicial review could promote a higher quality of signing statements while preventing an imbalance of power among the branches of government.

V. CONCLUSION

The expansive use of signing statements by every President since Reagan is seen by many critics as troubling.⁹¹ However, the recent media alarm that calls for the elimination of signing statements outright, coupled with the proposed legislation seeking to prevent courts from using signing statements as an interpretive tool,⁹² is equally troubling. Signing statements have an extensive history in this country, and that is because they have a legitimate, useful purpose. Clarification of their exact level of influence over judicial interpretation and reasoning, along with a system providing oversight in the form of a judicial review, would preserve the legitimate uses of signing statements and also limit their potential for abuse.

91. *See supra* notes 2-5 and accompanying text (providing examples of observations from a number of different sources, all of which express concern about the Bush Administration's frequent use of signing statements and criticize the content of the statements as being too broad).

92. S. 3731.

