



U.S. Department of Justice
Office of Legal Counsel

ASF

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TO: The Litigation Strategy Working Group

FROM: Samuel A. Alito, Jr.
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SUBJ: Using Presidential Signing Statement to Make
Fuller Use of the President's Constitutionally
Assigned Role in the Process of Enacting Law.

At our last meeting, I was asked to draft a preliminary proposal for implementing the idea of making fuller use of Presidential signing statements. This memorandum is a rough first effort in that direction.

A. Objectives

Our primary objective is to ensure that Presidential signing statements assume their rightful place in the interpretation of legislation. In the past, Presidents have issued signing statements when presented with bills raising constitutional problems. OLC has played a role in this process, and the present proposal would not substantively alter that process.

The novelty of the proposal previously discussed by this Group is the suggestion that Presidential signing statements be used to address questions of interpretation. Under the Constitution, a bill becomes law only when passed by both houses of Congress and signed by the President (or enacted over his veto). Since the President's approval is just as important as that of the House or Senate, it seems to follow that the President's understanding of the bill should be just as important as that of Congress. Yet in interpreting statutes, both courts and litigants (including lawyers in the Executive branch) invariably speak of "legislative" or "congressional" intent. Rarely if ever do courts or litigants inquire into the President's intent. Why is this so?

Part of the reason undoubtedly is that Presidents, unlike Congress, do not customarily comment on their understanding of bills. Congress churns out great masses of legislative history bearing on its intent--committee reports, floor debates, hearings. Presidents have traditionally created nothing comparable. Presidents have seldom explained in any depth or detail how they

interpreted the bills they have signed. Presidential approval is usually accompanied by a statement that is often little more than a press release.

From the perspective of the Executive Branch, the issuance of interpretive signing statements would have two chief advantages. First, it would increase the power of the Executive to shape the law. Second, by forcing some rethinking by courts, scholars, and litigants, it may help to curb some of the prevalent abuses of legislative history.

B. Problems

I see five primary obstacles to the enhanced use of Presidential signing statements.

1. Resources. The most important problem is the manpower that will be required. One need only consider the size of the congressional staffs responsible for creating legislative history to appreciate the dimensions of the potential commitment that may be required if the Executive Branch were to undertake to issue interpretive statements regarding all important legislation touching on matters of federal concern. In all likelihood, it would be necessary to create a new office with a substantial staff to serve as a clearinghouse for statements furnished by the various departments and agencies. Each department and agency would also have to devote significant resources to the project.

2. Timing. Under the Constitution (Art. I, sec. 7), if Congress is in session, a bill must be signed or vetoed within 10 days after its presentation to the President. Since presidential signing statements have traditionally been issued at the time of the signing of legislation, very little time has been available for the preparation and review of such statements. These time constraints will become much more troublesome if presidential signing statements become longer, more substantive, and more detailed.

3. Congressional Relations. It seems likely that our new type of signing statement will not be warmly welcomed by Congress. The novelty of the procedure and the potential increase of presidential power are two factors that may account for this anticipated reaction. In addition, and perhaps most important, Congress is likely to resent the fact that the President will get in the last word on questions of interpretation.

Because of the anticipated reaction of Congress, it seems likely that some Executive Branch officers concerned about congressional relations may likewise oppose this effort. In the past, signing statements prepared by OLC have sometimes been substantially changed by the White House or OMB due to such concerns. As signing statements become more and more controversial, this problem is likely to get worse.

4. Acceptance by Executive Departments and Agencies. Once a clearinghouse unit is established or designated, it seems likely that there will be friction between that unit and the various departments and agencies wishing to insert interpretive statements into presidential signing statements. If the lines of authority are not clear, this inevitable friction may be magnified.

5. Theoretical problems. Because presidential intent has been all but ignored in interpreting the meaning of statutes, the theoretical problems have not been explored. For example:

- In general, is presidential intent entitled to the same weight as legislative intent or is it of much less significance? As previously noted, presidential approval of legislation is generally just as important as congressional approval. Moreover, the President frequently proposes legislation. On the other hand, Congress has the opportunity to shape the bills that are presented to the President, and the President's role at that point is limited to approving or disapproving. For this reason, some may argue that only Congressional intent matters for purposes of interpretation. If our project is to succeed, we must be fully prepared to answer this argument.

- What happens when there is a clear conflict between the congressional and presidential understanding? Whose intent controls? Is the law totally void? Is it inoperative only to the extent that there is disagreement?

- If presidential intent is of little or no significance when inconsistent with congressional intent, what role is there for presidential intent? Is it entitled to the deference comparable to that customarily given to administrative interpretations?

C. A Proposal.

In view of the concerns noted above, I would make the following recommendation.

- As an introductory step, the Department should seek to have interpretive signing statements issued for a reasonable number of bills that fall within its own field of responsibility. By concentrating at first on a small number of bills, we can begin without a commitment of resources that would necessitate major changes in staffing. And by concentrating on bills within our own field of responsibility and concern, we can begin without depending upon the cooperation of other departments and agencies, which may be skeptical at first. If our project is successful, cooperation may be more readily available.

- For use in this pilot project, we should try to identify bills that (a) are reasonably likely to pass, (b) are of some importance, and (c) are likely to present suitable problems of interpretation.

- Again, as an introductory step, our interpretive statements should be of moderate size and scope. Only relatively important questions should be addressed. We should concentrate on points of true ambiguity, rather than issuing interpretations that may seem to conflict with those of Congress. The first step will be to convince the courts that Presidential signing statements are valuable interpretive tools.

- It would also be very helpful, as pointed out in Steve Calabresi's memorandum of January 27, 1986, to include in each signing statement a section spelling out the grant of authority to the federal government on which the statute rests.

- The most important step will be approval of this project by the President. Obviously there can be no project unless the President wishes to sign interpretive statements of the type we envision. For the purpose of presenting this issue to the President, it may be helpful if we draft a sample of a new-style signing statement either for a bill that is now pending before Congress or one that was recently enacted. Also, as a first step, the proposal should be discussed with White House counsel.

- The Office of Legislative and Intergovernmental Affairs seems the logical unit within the Department to coordinate our efforts. In particular, OLIA should be able to identify appropriate bills as they proceed through Congress. The actual selection of the bills may then be done, in cooperation with OLIA, by this Group as a whole, a subgroup, or some other body. Once appropriate bills have been chosen, components of the Department with expertise regarding the particular bills selected should be asked for their views. For example, OLC should be consulted, as it now is, when constitutional questions are raised. OLIA should assemble and coordinate the responses of the various units.

- Because of the time problems previously noted, the drafting of our pilot signing statements should begin well before final passage of the bills. Moreover, if Presidential signing statements are ever to achieve much importance, I think it will be necessary to escape from the requirement of having to complete our work prior to the signing of the bill. Accordingly, after the first few efforts, the President could merely state when signing the bill that his signing is based on an interpretation to be set out in detail in a statement to be issued later. If this procedure is followed, it presumably would still be necessary to provide the President with an internal interpretive memorandum prior to signing, but the pressure to complete a formal statement

for public release would be relieved. This procedure would mirror the procedure followed by congressional committees, which vote out proposed legislation long before the committee report is issued.

- The Department should continue and should intensify its internal consideration of the theoretical problems posed by the proposed expanded role for Presidential signing statements. Once a few of signing statements of this new type have been issued, discussion in legal journals may be stimulated and should be encouraged.