Presidential Signing Statements: The Constitutional Versus the New Government Models

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There are two ways (or what I call models) of thinking about American politics today. The first is the **constitutional model**. This is the way politics should be done according to the U.S. Constitution. The second is the **new government model**. This is the way politics often really exists in America today. I call it the new government model because it represents a totally new system of government, one that our country's founders did not envision when they wrote the Constitution.

Let us begin with a discussion of the constitutional model since it is the most familiar of the two models. Every textbook on American government notes that according to our Constitution, (1) the Congress or legislative branch passes our laws; (2) the president in the executive branch then makes sure that our laws are properly enforced or executed; and (3) in case of a disagreement over the meaning of a particular law, it is the courts that interpret the law.

What happens if Congress passes a bill that the president does not like? The Constitution provides a formal remedy. Article I, section 7 of the Constitution states, "Every bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated..." In other words, the president can veto any bill and, unless two-thirds of the members of both chambers vote to override the veto, it does not become a law. If two-thirds vote to override then it becomes a law, even if the president vetoed it.

Once a bill becomes a law, what is the president's responsibility? According to the presidential oath of office the president swears or affirms that he or she "will faithfully execute the Office of President of the United States and will to the best of my Ability, preserve, protect and defend the Constitution of the United States." This means that the president is bound to obey the Constitution by a solemn oath of office. In addition, the Constitution prescribes that the president "shall **take care that the Laws be faithfully executed**..." The key word here is "faithfully," which the *New Oxford Dictionary* defines as "in a loyal manner" and "in a manner that is true to the facts of the original." If we accept this definition of faithful, then presidents are required to enforce the law in a loyal manner that is true to the facts of the original legislation passed by Congress.

What else can a president do if he or she does not like a particular law? There is an additional constitutional remedy. A president can "recommend" to Congress' "consideration such Measures as he shall judge necessary and expedient..." Therefore, if a president disagrees with an existing law, the president can recommend that Congress enact or pass new legislation. This means that if a president did not agree with a law protecting the environment because it was considered to be too weak and ineffectual, that president can recommend new legislation to change or even replace the old law.

Therefore, presidents can (1) veto bills they do not agree with or (2) recommend that a law already on the books should be changed or repealed. They also are bound to (3) "faithfully" execute the law, (4) "faithfully execute the Office of the President," and (5) "preserve, protect and defend the Constitution of the United States."

One of the key characteristics of the constitutional model of American government is that it provides for a separation of power, as well as for checks and balances. This means that only the Congress has the power to pass a law. Likewise, only the president is given the power to sign or veto a law. Only the president is given the responsibility of enforcing the law. While the Constitution does not grant the courts the right to interpret the law, this has been an accepted practice since the presidency of Thomas Jefferson, when the Supreme Court in the case of *Marbury v. Madison* first invoked the idea of "judicial review." Under judicial review only the courts can find a law to be unconstitutional in full or in part.

Why did the founders create such a carefully constructed system of separated powers combined with selected checks and balances? The founders designed this system of government so that no one branch of the government would have too much power. Rather, it was their intent that each branch (legislative, executive, and judicial)

would be given sufficient power to check the power of the other branches. This balance of powers is therefore a critical component of the constitutional model, for without it any one of the three branches of government could attain too much power, a potentially dangerous development.

American politics generally followed the basic framework of the constitutional model for almost two centuries. While the powers of the three branches of government increased or decreased somewhat over time (for example, presidents generally become more powerful during war time), the essential balance was preserved until recently. Presidents in recent decades have made greater use of what are called "unilateral powers." These are powers that the president alone or unilaterally can invoke, without the need for action by the legislative or the judicial branches. Some of these powers long have been accepted as proper. For example, presidents since George Washington have made use of presidential proclamations rather than asking Congress to pass new laws. But most proclamations were for ceremonial purposes, though Lincoln famously used this power to declare the emancipation or freeing of the slaves with his Emancipation Proclamation. Presidents also have long used a technique called an executive agreement with other nations, rather than asking the Senate to ratify a treaty, and executive orders instead of asking Congress to pass a bill. What is new is that in recent decades, particularly since Ronald Reagan served as president in the 1980s, it has been common for presidents of both political parties to use their unilateral powers to make policy. As a result, presidents are less likely to recommend that Congress enact legislation. Instead, they unilaterally enact policy on their own. This development has expanded the power of the presidency at the expense of the legislative branch.

One of the most important developments in this regard is the ever-greater use of what has come to be known as the "**presidential signing statement**" (PSS). According to T. J. Halstead of the Congressional Research Service, "Presidential signing statements are official pronouncements issued by the President contemporaneously to the signing of a bill into law that, in addition to commenting on the law generally, have been used to forward the President's interpretation of the statutory language; to assert constitutional objections to the provisions contained therein; and, concordantly, to announce that the provisions of the law will be administered in a manner that comports with the Administration's conception of the President's constitutional prerogatives."

What does this mean? First you will notice that presidents are the ones who issue pronouncements or statements at the time that they sign a bill. This means that

the president agrees that the bill should become a law. Otherwise, the president could veto the law. Halstead's definition also notes that the presidential signing statements allow the president to comment on their interpretation of the law. The initial idea was that a president, while signing a bill, could, for example, note that they did not like a particular section or provision in a bill, but considered the whole bill so important that they were willing to sign it anyway. Also, presidents could provide an opinion as to what they believed the law meant. This could be important if a law's meaning was ambiguous. The courts could then consider whether or not to accept the president's interpretation of the law. This gave the president an important voice in determining how a law was interpreted, and the Supreme Court has specifically cited presidential signing statements in deciding cases before the court.

The first president to use a presidential signing statement was our fifth president, James Monroe. It was not until Ronald Reagan became president in the 1980s, however, that it was used often and specifically to identify the president's interpretation of the law. To emphasize the importance of presidential signing statements, Ronald Reagan's second attorney general, Edwin Meese, even had one published in the *Legislative History of the U. S. Code, Congressional and Administrative News* (published by West Publishing Company) so that it "could be available to the court for future consideration of what that statute really means" (Kelley 2005, 27). The Supreme Court relied on presidential signing statements in deciding both *INS v. Chadha* (1983) and *Bowsher v. Synar* (1986). Their ruling in *Chadha* suggested that individual waivers to the immigration laws were inherently legislative functions and could not be ceded to the Department of Justice's understanding of such laws.

It is important to note that Reagan's innovative use of presidential signing statements was not controversial. In fact, except for lawyers writing in law journals, few people paid any attention to this development. When they did they generally considered it to be an appropriate use of presidential power. That is, it was believed presidents should have a say in how a law is interpreted by the courts. The constitutional balance, therefore, was not affected, since presidents still were expected to enforce the law, even those they did not personally like, and courts ultimately still interpreted the meaning of the law. Therefore, as presidents George H. W. Bush and Bill Clinton continued to use presidential signing statements, there was little concern that they threatened the balance of power.

Still, there was a trend that presidential scholars paid scant attention to. Following Reagan's lead, presidents were making vastly greater use of signing statements than did past presidents. As Christopher Kelley (2005, 30–31) writes:

> From the Monroe administration to the Carter administration, the executive branch issued a total of 75 signing statements that protected the presidential prerogatives and a total of 34 statements instructing the executive branch agencies of the interpretation of sections of the bill. From the Reagan administration through the Clinton administration, the number of both categories jumped drastically. The number of statements protecting the executive branch prerogatives went from 75 for all presidents up to Carter to 322, and the number of instructions to executive branch agencies on the interpretations of provisions of the law went from a total of 34 to 74. (2005, 30–31)

When George W. Bush became president in 2001, presidential signing statements were used even more often. He issued "435 statements, mostly objecting to encroachments upon presidential prerogative" during his first four years in office (Kelley 2005, 31). But not only were presidents using signing statements more often, the nature of the statements themselves also changed. Presidents have long wanted the line-item veto power. This is the power to veto parts or sections of a bill, rather than the entire law. Congress gave President Bill Clinton this power, but the Supreme Court ruled it unconstitutional, noting that the president must veto the entire bill, not just a part of it.

When George W. Bush became president, political observers noted something unusual. As Pulitzer–prize–winning *Boston Globe* journalist Charlie Savage writes:

> For years, political observers had puzzled about why Bush, who was so aggressive about exerting his executive prerogatives in every other respect, was not vetoing bills. As the full scope of Bush's use of signing statements became clear, so did the answer to the mystery: Bush's legal team was using signing statements as something better than a veto—something close to a line item veto. (2007: 231)

In a variety of signing statements, the Bush administration identified parts of laws that it intended to ignore—in essence announcing that it would not "faithfully" execute the law because it believed the section in question was unconstitutional. For example, President Bush signed a law that banned the torture of prisoners, but added a signing statement that the president, as commander in chief, can waive the

torture ban if he makes the decision that harsh interrogation techniques might assist in preventing a terrorist attack. In a report on signing statements issued in July 2006, the American Bar Association warned, "A line-item veto is not a constitutionally permissible alternative, even when the president believes that some provisions of a bill are unconstitutional" (quoted in Savage 2007, 245). Yet President Bush used presidential signing statements for this purpose, sometimes even announcing that although he was signing a bill he did not intend to enforce it at all.

What does this mean in terms of how our government operates? If we go back to the model I discussed at the beginning of this essay, you will remember that the constitutional model requires the president to "faithfully" execute the law. The idea of judicial review also provides the courts with the responsibility of interpreting the law. Presidential signing statements change this process. Now, presidents can sign laws that they do not agree with and then ignore the law or various parts of the law. In addition, under a new theory of presidential power called the **unitary executive** model, which is often cited by President Bush in his signing statements, the president can also decide how to interpret the law.

Christopher Kelley (2005, 5) notes, "The unitary executive rests upon the *independent* power of the president to resist encroachments upon the prerogatives of his office and to control the executive branch." The president alone is responsible for making the determination, not the courts. Kelley (2005, 6) writes that the unitary executive "largely draws from two sources within the Constitution—the 'Oath' and 'Take Care' clauses of Article II."

Why is this important? As of spring 2005, George W. Bush referenced the unitary executive model 95 times in various signing statements and **executive orders** (Kelley 2005, 1). For example, in its October 4, 2006, signing statement on the Department of Homeland Security Appropriations Act, the Bush White House states, "The executive branch shall construe such provisions in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch" (The American Presidency Project, americanpresidency.org). This means that the president reserves the right to enforce the law as he sees fit, based on his own interpretation of the law.

This results in the new government model. Now, while Congress enacts the laws, it is the president who decides whether to enforce them and how to interpret them. This means that presidents have acquired vast new power that is not mentioned in the Constitution.

What can be done about it? Congress can reassert its power by challenging the president's right to issue presidential signing statements. Though Congress has held hearings on the subject, there has been no attempt to limit this power as of yet. Likewise, the Supreme Court could rule the practice unconstitutional. Thus far, in the few cases that have mentioned presidential signing statements, the courts have refused to do so. Presidential signing statements therefore provide presidents with greater power, while threatening to undermine the carefully separated powers and checks and balances that are fundamental to the constitutional model.

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Study Information

Key terms:

1. **Constitutional model**: Sets up a system where Congress passes the laws, the president in the executive branch makes sure that the laws are properly carried out, and in case of a disagreement over the meaning of a particular law, the courts interpret the law.

2. **Executive orders**: Directives issued by the president, usually to U.S. executive officers to help direct their operation. Executive orders are normal tools of presidential leadership, but they also can have major policy implications.
3. **New government model**: A system where although Congress enacts the laws, it is the president who decides whether to enforce them and how to interpret them. This means that presidents have acquired a vast new power not mentioned in the Constitution.
4. **Presidential signing statements**: Pronouncements issued by the president when bills are signed into law that might comment on the law generally but also explain the president's interpretation of the law's language. Pursuant to that interpretation, presidents may announce that the provisions of the law will be administered according to the president's views and not necessarily according to legislative intent. In short, they announce what parts of a law the president might choose not to enforce.
5. **"Take care that the laws are faithfully executed"**: A core element of presidential authority mentioned in the oath of office, requiring the enforcement of laws in a manner that is true to the facts of the original legislation passed by Congress.
6. **Unitary executive model**: Rests upon the independent power of the president to resist encroachments upon the prerogatives of his office and to control the executive branch. Under this interpretation, the president alone is responsible for making his determination, not the courts.

Sample free-response question:

The president of the United States is charged with the faithful execution of the laws. In your essay, do the following:

(a) Discuss what the "constitutional model" is and the president's role in the "faithful execution" of the laws.
(b) Discuss what the "new government model" is and how it might be furthered with signing statements.
(c) Explain how the new government model might jeopardize traditional interpretations of checks and balances.

Sample free-response question:

Of all the decisions government makes, none has a greater impact than the decision to enter armed conflict. In your essay, do the following:

(a) Discuss a way in which the War Powers Resolution might limit foreign wars.
(b) Identify why the legislative veto aspect of the resolution might jeopardize the legality of the resolution.
(c) Identify one advantage the president has over Congress and identify one advantage Congress has over the president in war making.
(d) Discuss how unilateral and multilateral approaches to war making illustrate presidential discretion in war powers.

Study Information

Key terms:

1. **Commander in chief:** The constitutional power of the president to manage and deploy troops in military conflict. This power means that the president is largely responsible for carrying out war strategy once war has begun.
2. **Power to declare war:** The constitutional power of Congress to make the decision regarding whether the nation should enter a war. This power is designed as a way to make certain that the decision to enter war is not made lightly or by one executive leader.
3. **Legislative veto:** A congressional technique that provisionally grants the president authority to engage in government conduct ordinarily reserved for Congress with the provision that if the Congress does not approve of the presidential action, it might veto that action. The legislative veto is an inherent part of the War Powers Resolution, but it is of questionable constitutional status since the Supreme Court ruling in *INS v. Chadha*.
4. **Multilateral strategy:** Utilizing international structures in conducting international wars, often including working with the United Nations or numerous nations in the international community before deciding to enter a war. President George H. W. Bush used such a strategy in the 1991 Persian Gulf War.
5. **Unilateral strategy:** Engaging in a war without relying on international coalitions to carry out the war. President George W. Bush pursued such a strategy in waging the war in Iraq, arguing that in combating terrorism, multilateralism was not a necessary precondition for entering conflict.
6. **War Powers Resolution:** An action in Congress intended to set limitations on the presidential power to make war. While it set limits on undeclared wars, it really never functioned as designed. However, it remains a guide by which the decision to enter war is measured.