

LIBERTY AND SECURITY: RECOMMENDATIONS FOR THE NEXT ADMINISTRATION AND CONGRESS

A coalition of more than twenty organizations and over seventy-five individuals collaborated to create “Liberty and Security: Recommendations for the Next Administration and Congress.” The Constitution Project coordinated the production of the report, which was released in November 2008.

“Liberty and Security” indexes policy proposals across 20 different issue areas, including privacy, secrecy and surveillance; detention, interrogation, and trials of so-called “enemy combatants”; and discrimination in immigration and charities policy. It includes recommendations for congressional and executive action, and provides in-depth background information to support action by policy makers. It also includes lists of issue-based resources and experts in the community. The report includes the following chapters:

Charities, Foundations, and National Security

CHAPTER 1: Eliminate Unnecessary Barriers to Legitimate Charitable Work

Detention, Interrogation, and Trials of Suspected Terrorists

CHAPTER 2: Closing Guantánamo

CHAPTER 3: End Illegal Detention, Torture, and Rendition

CHAPTER 4: Prosecute Terrorist Suspects in Accordance with the Law

Immigration and National Security

CHAPTER 5: Failing to Protect Refugees and Asylum Seekers: Overly Broad Definition of Material support for Terrorism.

CHAPTER 6: Ending Immigration Enforcement Based on National Origin, Ethnicity, and Religion

CHAPTER 7: Misuse of Immigration Detention Laws in Counterterrorism Efforts

Secrecy, Surveillance, and Privacy

CHAPTER 8: Revising Attorney General Guidelines on FBI Investigations

CHAPTER 9: Updating the Law Governing the Privacy of Electronic Communications

CHAPTER 10: Fusion Centers and the Expansion of Domestic Intelligence

CHAPTER 11: Promoting Government Transparency

CHAPTER 12: National Security Letters and Section 215 of the USA PATRIOT Act

CHAPTER 13: Reform of the National Security Surveillance Laws and Procedures

CHAPTER 14: Preventing Over-Classification and Retroactive Classification and Promoting Declassification of Government Documents

CHAPTER 15: Reforming the State Secrets Privilege

CHAPTER 16: Reforming Watch Lists

Separation of Powers and Executive Authority

CHAPTER 17: Assertion of Executive Authority in National Security Matters

CHAPTER 18: Executive Privilege and Congressional Oversight

CHAPTER 19: Signing Statements

CHAPTER 20: War Powers Authority

The full report is available online at <http://2009transition.org/liberty-security/>, at www.constitutionproject.org, and on the websites of many members of the coalition.

For policy questions, please contact the individuals or organizations identified in the catalogue as allies. Please direct general questions to Daniel Schuman, Director of Communications and Counsel, the Constitution Project, at 202-580-6922.

APPENDIX

Chapter 19: Signing Statements

I. Jurisdiction

- A. **Legislative Branch:** Proposals 3 and 4 would likely be referred to the House and Senate Judiciary Committees, and possibly to the House Oversight and Government Reform Committee and the Senate Homeland Security and Government Affairs Committee. Proposals 1 and 2 do not require legislative action.
- B. **Executive Branch:** The President could implement proposals 1 and 2 through a presidential memorandum, without promulgating executive orders or regulations, and without agency involvement. Proposals 3 and 4 do not require executive action.
- C. **Judicial Branch:** Proposal 4 would confer jurisdiction to the judicial branch if a court concludes that the case presents a case or controversy and the plaintiff has standing as required under Article III of the Constitution.

II. Status of Actions in Legislative, Executive, and Judicial Branches

- A. **Legislative Branch:** There have been many hearings and proposed bills addressing signing statements.¹ Legislative activities over the past few years include:
 - On May 25, 2006, Representative Shelia Jackson-Lee (D-Tx) introduced H.R. 5486, which would prohibit the Executive from using funds to produce, publish or disseminate any statement made by the President contemporaneously with the signing of any bill or joint resolution. No action was taken on the bill after it was referred to the House Committee on Government Reform.
 - On May 25 and June 16, 2006, Representative Barney Frank (D-Ma) introduced H.J. Res. 87 and 89, respectively, both “[r]equiring the President to notify Congress if the President makes a determination at the time of signing a bill into law to ignore a duly enacted provision of such newly enacted law,” and “establishing expedited procedures for the consideration of legislation in the House of Representatives in response to such a determination.” Neither bill advanced after referral to the House Judiciary Committee and then to the House Rules Committee.
 - On June 27, 2006, the Senate Judiciary Committee held hearings on President Bush’s use of signing statements. Following those hearings, on July 26, 2006, Senator Arlen Specter (R-Pa) introduced S. 3731, to “regulate the judicial use of presidential signing statements in the interpretation of Acts of Congress.” In remarks upon introduction of the bill, Sen. Specter explained that the bill (1) “instructs courts not to rely on Presidential signing statements in construing an act;” (2) “permits the

Congress to seek a declaratory judgment on the legality of Presidential signing statements that seek to modify--or even nullify--a duly enacted statute;" and (3) "grants Congress the power to intervene in any case in the Supreme Court where the construction or constitutionality of any act of Congress is in question and a Presidential signing statement for that act was issued." The bill stalled in the Senate Judiciary Committee.

- On January 5, 2007, Representative Shelia Jackson-Lee (D-Tx) introduced H.R. 264. The legislation is nearly identical to H.R. 5486 (introduced May 25, 2006) (described above). The bill has remained dormant since being referred to the House Committee on Government Reform.
- On January 31, 2007, the House Judiciary Committee conducted an oversight hearing on "Presidential Signing Statements under the Bush Administration." John Elwood, Deputy Assistant Attorney General, Office of Legal Counsel; Mickey Edwards, former Member of Congress from the State of Oklahoma; Karen Mathis, President of the ABA; Nicholas Rosenkranz, Professor of Law at Georgetown University Law Center; and Charles Ogletree, Professor of Law at Harvard Law School, provided oral and written testimony, *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:32844.pdf.
- On July 3, 2007, Senator Arlen Specter (R-Pa) introduced S. 1747, which would (1) instruct courts not to rely on Presidential signing statements in construing an act; and (2) give Congress the power to intervene in any case in any court (including the Supreme Court) where a presidential signing statement for that act was issued. The Judiciary Committee has taken no action on the bill. On July 16, 2007, Representative Carol Shea-Porter (D-NH) introduced a companion bill, H.R. 3045. The bill was referred to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Judiciary Committee, which has taken no action.
- On August 3, 2007, Senator Russ Feingold (D-WI) introduced S. Res. 303, to censure the President and Attorney General. The bill contains proposed findings concerning signing statements. The Senate Judiciary Committee has taken no action on the bill. On August 4, 2007, Representative Maurice Hinchey (D-NY) introduced a companion resolution, H.R. 626. No action was taken on the bill after it was referred to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Judiciary Committee.
- On October 15, 2007, Senator Ron Paul (R-TX) introduced H.R. 3835, which states that the "House of Representatives and Senate collectively shall enjoy standing to file a declaratory judgment action in an appropriate Federal district court to challenge the constitutionality of a presidential signing statement that declares the President's intent to disregard provisions of a bill he has signed into law because he believes they are

unconstitutional.” The Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Judiciary Committee has taken no action on the bill.

- On May 8, 2008, Representative Walter B. Jones (R-NC) introduced H.R. 5993, the Presidential Signing Statements Act, which would require that (1) the President to transmit copies of signing statements to congressional leadership within three days of issuance; (2) signing statements be published in the Federal Register; (3) executive staff testify on the meaning of presidential signing statements at the request of the House or Senate Judiciary Committee; and (4) no funds be authorized or expended to implement any law accompanied by a signing statement if any provision of the act is violated. The bill was referred to the House Committee on the Judiciary.
- On July 25, 2008, the House Judiciary Committee held an oversight hearing on “Executive Power and Its Constitutional Limitations.” Signing statements were among the issues addressed during the hearing, *available at* http://judiciary.house.gov/hearings/hear_072508.html.
- On August 20, 2008, the House Armed Services Committee released a four-page report entitled “Findings of the Subcommittee on Oversight and Investigations in Support of the Full Committee re: Presidential Signing Statements,” *available at* <http://armedservices.house.gov/pdfs/Reports/SigningStatements2008FINA L.pdf>.

B. Executive Branch: Several OLC opinions have addressed the subject of signing statements:

- Memorandum from Walter Dellinger, Assistant Attorney General, Department of Justice, to Honorable Abner J. Mikva, Counsel to the President, Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 U.S. Op. Off. Legal Counsel 199 (1994), *available at* <http://www.usdoj.gov/olc/nonexecut.htm>.
- Memorandum from Walter Dellinger, Assistant Attorney General, to Bernard N. Nussbaum, Counsel to the President, The Legal Significance of Presidential Signing Statements, 17 U.S. Op. Off. Legal Counsel 131 (1993), *available at* <http://www.usdoj.gov/olc/signing.htm>.
- Memorandum from Samuel A. Alito, Jr., Deputy Assistant Attorney General, to the Litigation Strategy Working Group, U.S. Department of Justice, Using Presidential Signing Statement to Make Fuller Use of the President's Constitutionally Assigned Role in the Process of Enacting Law (1986), *available at* <http://www.archives.gov/news/samuel-alito/accession-060-89-269/Acc060-89-269-box6-SG-LSWG-AlitotoLSWG-Feb1986.pdf>.

C. Judicial Branch: Relevant decisions include:

- *Myers v. United States*, 272 U.S. 52, 176-77 (1926) (sustaining the President’s view that a statute at issue was unconstitutional without any

member of the Court suggesting that the President had acted improperly in refusing to abide by the statute).

- *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring) (recognizing existence of President's authority to act contrary to a statutory command).
- *Freytag v. Commissioner*, 501 U.S. 868, 906 (1991) (four Justices addressing the issue agree that the President has "the power to veto encroaching laws . . . or even to disregard them when they are unconstitutional").
- *INS v. Chadha*, 462 U.S. 919, 942 n.13 (1983) ("it is not uncommon for Presidents to approve legislation containing parts which are objectionable on constitutional grounds").
- *Clinton v. New York*, 524 U.S. 417, 439-40 (1998) (holding line item veto unconstitutional).
- In his Dissent in *Hamdan v. Rumsfeld* (2006), Justice Scalia cited a signing statement by President Bush. In *Hamdan*, before striking down the military commission system established by President Bush's November 2001 order, the Supreme Court first concluded that the Detainee Treatment Act of 2005 had not stripped *habeas* jurisdiction for cases that had been filed prior to passage of the act. As part of his Dissent, Justice Scalia wrote that "Of course in its discussion of legislative history the court wholly ignores the president's signing statement, which explicitly set forth his understanding that the [Detainee Treatment Act] ousted jurisdiction over pending cases." Generally, however, courts do not rely upon signing statements as part of the legislative history, since presidents merely sign or veto laws and are not involved in drafting them. Most legal scholars agree that signing statements should not be considered as part of a legislative history analysis.

ⁱ A list of hearings and proposed legislation on signing statements from May 2006 to July 2008 has been compiled at <http://www.coherentbabble.com/signingstatements/FAQs.htm#A.%20Read%20Widely>.