



**Statement of T.J. Halstead
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Before

**The Committee on Armed Services
Subcommittee on Oversight & Investigations
House of Representatives**

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on

**“The Impact of the Presidential signing statement on the Department of Defense’s
implementation of the National Defense Authorization Act for Fiscal Year 2008”**

Mr. Chairman and Members of the Subcommittee:

My name is T.J. Halstead. I am a Legislative Attorney with the American Law Division of the Congressional Research Service at the Library of Congress, and I thank you for inviting CRS to testify today regarding signing statements and National Defense Authorization Acts.

Presidential signing statements have been a significant source of controversy during the tenure of the current Administration, and the President’s most recent signing statement, issued in conjunction with the enactment into law of the National Defense Authorization Act for Fiscal Year 2008, has renewed congressional interest in this subject. Before addressing the provisions to which the President has specifically objected in that statement, it is useful to provide an overview of what signing statements are, with a specific focus on the constitutional and legal considerations that adhere to presidential issuance of, and congressional responses to, these instruments.

At their core, presidential signing statements are pronouncements issued by a President contemporaneously to the signing of a bill into law that, in addition to commenting on the law generally, may be used to forward the President’s interpretation of statutory language; to assert constitutional objections to 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.¹ While the history of presidential issuance of signing statements dates to the early 19th century, the practice has become the source of significant controversy in the modern era as Presidents have increasingly employed the statements to assert constitutional objections to congressional enactments.² President Reagan initiated this practice in earnest, transforming the signing statement into a mechanism for the assertion of presidential authority and intent. President Reagan issued 250 signing statements, 86 of which (34%) contained declarations objecting to one or more of the statutory provisions signed into law. President George H. W. Bush continued this practice, issuing 228 signing statements, 107 of which (47%) raised particularized objections. President Clinton's conception of presidential power proved to be largely consonant with that of the preceding two administrations. In turn, President Clinton made aggressive use of the signing statement, issuing 381 statements, 70 of which (18%) raised constitutional or legal objections. President George W. Bush has continued this practice, issuing 157 signing statements, 122 of which (78%) contain some type of challenge or objection. The significant rise in the proportion of constitutional objections made by President Bush is compounded by the fact that these statements are typified by multiple objections, resulting in over 1,000 challenges to distinct provisions of law.

The number and scope of such assertions in the George W. Bush Administration in particular has given rise to extensive debate over the issuance of signing statements, with the American Bar Association (ABA) declaring in a 2006 report that these instruments are "contrary to the rule of law and our constitutional separation of powers" when they "claim the authority or state the intention to disregard or decline to enforce all or part of a law...or to interpret such a law in a manner inconsistent with the clear intent of Congress."³

However, in analyzing the constitutional basis for, and legal effect of, presidential signing statements, it becomes apparent that no constitutional or legal deficiencies adhere to the issuance of such statements in and of themselves. Rather, it appears that the appropriate focus of inquiry in this context is on the assertions of presidential authority contained therein, coupled with an examination of substantive executive action taken or forborne with regard to the provisions of law implicated in a presidential signing statement. Applying this analytical rubric to the current controversy, it seems evident that the issues involved center not on the simple issue of signing statements, but rather on the view of presidential authority that governs the substantive actions of the Administration in question. Moreover, it should be noted that while there is no explicit constitutional provision authorizing the issuance of presidential signing statements, presidents have issued such statements since the Monroe Administration, and there is little evident constitutional or legal support for the proposition that the President may be constrained from issuing a statement regarding a provision of law.

¹ Philip J. Cooper, "George W. Bush, Edgar Allen Poe and the Use and Abuse of Presidential Signing Statements," *Presidential Studies Quarterly* 35, no. 3, at p. 517 (September 2005).

² Christopher N. May, "Presidential Defiance of 'Unconstitutional' Laws: Reviving the Royal Prerogative," 21 *Hastings Const. L.Q.* 865, 932 (1994).

³ American Bar Association, *Report of the Task Force on Presidential Signing Statements and the Separation of Powers Doctrine* at p. 5 (August 2006).

Irrespective of their presumptive constitutionality, signing statements have been criticized on the basis that the objections and challenges raised therein improperly circumvent the veto process delineated in the Constitution. According to this argument, the President, by refusing to veto a bill that contains provisions he does not intend to enforce, expands the presidential role in lawmaking beyond the constitutional parameters of “recommending ... laws he thinks wise and ... vetoing ... laws he thinks bad,”⁴ thereby depriving Congress of the opportunity to override a presidential veto.

While this position has a degree of intuitive appeal, it arguably misapprehends the nature of signing statements as presidential instruments as well as the substantive concerns that underlie their issuance. First, it is exceedingly rare for a President to make a direct announcement that he will categorically refuse to enforce a provision he finds objectionable. Instead, the concerns voiced in the statements are generally vague, with regard both to the nature of the objection and what circumstances might give rise to an actual conflict. Concerns relating to this point also seem to assume that the interpretation and application of congressional enactments is a black and white issue, when, in reality, inherent ambiguity in the text often allows for competing interpretations of what the provision at issue requires. Given this dynamic, it is not surprising that a President’s interpretation of a law, as announced in a signing statement, would be informed by a broad conception of executive authority. More fundamentally, a signing statement does not have the effect of a veto. A bill that is vetoed does not become law unless reenacted by a supermajority vote of the Congress. Conversely, a bill that is signed by the President retains its legal effect and character, irrespective of any pronouncements made in a signing statement, and remains available for interpretation and application by the courts (if the provision is justiciable) and monitoring by Congress.

A closely-related argument is that signing statements that raise objections to provisions of an enactment constitute the exercise of a line-item veto.⁵ In *Clinton v. New York*, the Supreme Court held that the Line Item Act violated the constitutional requirement of bicameralism and presentment by authorizing the President to essentially create a law which had not been voted upon by either House or presented to the President for approval and signature.⁶ Accordingly, this argument posits that when the President issues a signing statement objecting to certain provisions of a bill or declaring that he will treat a provision as advisory so as to avoid a constitutional conflict, he is, in practical effect, exercising an unconstitutional line-item veto. The counterpoints to this argument are similar to those adhering to the premise that signing statements constitute an abuse of the veto process. While an actual refusal of a President to enforce a legal provision may be characterized as an “effective” line-item veto, the provision nonetheless retains its full legal character and will remain actionable, either in the judicial or congressional oversight contexts.

Ultimately, both of these objections, as with the general focus of concern on signing statements as presidential instruments, may obscure the substantive issue that has apparently motivated the increased use of the constitutional signing statement by

⁴ *Youngstown*, 343 U.S. at 587.

⁵ ABA Task Force Report, n. 3, *supra*, at 18; *See also*, Bradley and Posner, n. 12, *supra*, at 339.

⁶ *Clinton*, 524 U.S. at 446.

President Bush: an expansive conception of presidential authority, coupled with a willingness to utilize fully mechanisms that will aid in furthering and buttressing that philosophy. Moreover, given the general and hortatory nature of the language that characterizes most signing statements, it seems apparent that President Bush is using this instrument as part of a comprehensive strategy to strengthen and expand executive authority generally, as opposed to a de facto line item veto.

Despite these factors, four bills have been introduced in the 110th Congress with the goal of restraining the issuance of signing statements. Section 3(a) of H.R. 264 provides that “[n]one of the funds made available to the Executive Office of the President, or to any Executive agency ... from any source may be used to produce, publish, or disseminate any statement made by the President contemporaneously with the signing of any bill or joint resolution presented for signing by the President.”⁷ This section does not give any indication as to when such a statement would cease to be “contemporaneous” with the signing of a bill, but, under a practical interpretation of the term, it seems unlikely that this section would impose a substantial impediment to the issuance of signing statements. This section would also not appear to prevent contemporaneous declarations by Executive Branch agencies. Section 4 of H.R. 264 goes on to state that “[f]or purposes of construing or applying any Act enacted by the Congress, a governmental entity shall not take into consideration any statement made by the President contemporaneously with the President’s signing of the bill or joint resolution that becomes such Act.” This command indicates that the first section may not necessarily prevent a President from issuing a signing statement. Furthermore, nothing in the bill would prevent a President from issuing memoranda or other declarations aimed at guiding agency interpretation and implementation.⁸

Additionally, two identical bills, S. 1747 and H.R. 3045, would attempt to prohibit any Federal or State court from relying on or deferring to a presidential signing statement as a source of authority “[i]n determining the meaning of any Act of Congress.” The bills further provide that both the House and the Senate, acting respectively through Office of General Counsel for the House of Representatives and the Office of Senate Legal Counsel, shall be permitted to participate as amicus curiae in any case arising in Federal or State court that involves the construction, constitutionality, or both, of “any Act of Congress in which a signing statement was issued.” Finally, the bills would establish that in any suit involving a signing statement, Congress may pass a concurrent resolution clarifying congressional intent or findings of fact, and that such a resolution shall be submitted “into the record of the case as a matter of right.” The potential effect and utility of a provision forbidding courts from relying on, or deferring to, presidential signing statement is unclear; apart from the potential constitutional issues adhering to congressional attempts to restrict courts from considering such information, there is little indication that signing statements have played any substantive role in influencing judicial rulings. Likewise, the impact of a provision allowing for the submission of a “clarifying”

⁷ H.R. 264, 110th Cong., 1st sess. (2007). Section 3(b) of H.R. 264 provides that section 3(a) “shall apply only to statements made by the President regarding the bill or joint resolution presented for signing that contradict, or are inconsistent with, the intent of Congress in enacting the bill or joint resolution or that otherwise encroach upon the Congressional prerogative to make laws.”

⁸ See Louis Fisher, “Signing Statements: What to Do?,” *The Forum*: Vol. 4: No. 2, Article 7 (2006).

⁹ S. 1747, § 4, 110th Cong., 1st Sess. (2007); H.R. 3045, § 4, 110th Cong., 1st Sess. (2007).

concurrent resolution is open to speculation. Any such clarification by Congress would not have the force and effect of law, and could be viewed by the judiciary as a species of post-enactment legislative history.¹⁰ Finally, section 6 of H.R. 3835 would attempt to vest either House of Congress with standing “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.”¹¹ It seems unlikely that this provision would satisfy either the “case or controversy” or standing requirements of Article III of the Constitution.¹²

Turning to signing statements issued in relation to National Defense Authorization Acts, it appears that the large majority of objections raised therein mirror the generalized and hortatory nature typical of signing statements in other contexts. For instance, a survey of signing statements relating to such Acts during the Clinton and George W. Bush Administrations reveals several instances where both Presidents raised vague objections on the basis of presidential authority to conduct foreign affairs, the Commander in Chief power, and presidential power under the Appointments Clause, among others.

While signing statements that raise constitutional objections or signal an intention to refuse to enforce a provision in law are usually generalized in nature, President Clinton's statement accompanying the National Defense Authorization Act for Fiscal Year 2000 provides a stark example of a substantive presidential directive being included within a statement itself. The act established the National Nuclear Security Administration (NNSA), a new, semi-autonomous agency within the Department of Energy to manage and oversee the operational and security activities of the Department's nuclear weapons laboratories.

In his signing statement, the President expressed misgivings with respect to structural arrangements within the new agency and the limitations on the Secretary of Energy's ability to direct and control the activities and personnel of the NNSA, but did not suggest that the legislation raised constitutional issues. In particular, the President objected to what he saw as the isolation of the personnel and contractors of the NNSA from direction by Department officials outside the new agency; the limitation on the Secretary's ability to employ his statutory authorities to direct the activities and personnel of the NNSA both personally and through designated subordinates; the uncertainty whether the Department's duty to comply with the procedural and substantive requirements of environmental laws would be fulfilled under the new arrangement; the removal of the Secretary's direct authority over certain sensitive classified programs; and the potentially deleterious effect of the creation of redundant support functions in the areas of procurement, personnel, public affairs, legal affairs, and counterintelligence. To ensure that these perceived deficiencies did not, in his view, undermine the Secretary's statutory responsibilities in the area, the President directed the Secretary to assume the

¹⁰ See *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n. 13 (1980) (stating “even when it would otherwise be useful, subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment.”).

¹¹ H.R. 3835, § 6, 110th Cong., 1st Sess. (2007).

¹² See, e.g., *Raines v. Byrd*, 521 U.S. 811 (1997). See also, Laurence H. Tribe, “Signing Statements are a Phantom Target,” *The Boston Globe*, Aug. 9, 2006.

duties and functions of the new office of Under Secretary for Nuclear Security and to “guide and direct” all NNSA personnel by using his authority, “to the extent permitted by law,” to assign any Departmental officer or employee to a concurrent office within NNSA. The Secretary was also directed to “mitigate” the risks to the chain of command between him and subordinate agency personnel presented by the legislation’s redundant functions “to the extent permissible under law.” The President indicated that he might not submit a nominee for Under Secretary for Nuclear Security until action was taken by Congress to remedy the identified deficiencies and to “harmonize” the Secretary’s authorities with those vested in the Under Secretary.¹³

Whereas signing statements almost exclusively raise generalized, passive objections to measures contained in a bill, President Clinton’s NNSA statement was uncharacteristically direct, laying out the specific actions that were to be taken in order to ensure the vitiation of the provisions President Clinton deemed objectionable. As noted by Professor Philip J. Cooper, this statement did not simply raise a generalized constitutional objection or signal an intent to refuse to enforce the provisions at issue, but, rather, constituted an “order to do that which the Congress had expressly rejected.”¹⁴

Turning to the current Administration, the language employed in signing statements issued by President Bush is similar, but, as has been his practice with these instruments, the Bush National Defense Authorization Act signing statements are typified by the voicing of general constitutional objections to several provisions within a given enactment. For instance, while the signing statement accompanying the Bob Stump National Defense Authorization Act for Fiscal Year 2003 raised general objections based on the President’s asserted authority to withhold information, to conduct the foreign affairs of the United States, and to “supervise the unitary executive branch,” the statement additionally identified approximately 40 specific provisions of law that were deemed problematic.¹⁵

President Bush’s most recent signing statement was issued contemporaneously with the enactment into law of the National Defense Authorization Act for Fiscal Year 2008 (P.L. 110-181). While the signing statement specifically identifies four provisions of law that the President deems constitutionally problematic, the objections voiced are typical of those raised in signing statements, consisting of a generalized declaration that “[p]rovisions of the Act, including sections 841, 846, 1079, and 1222, purport to impose requirements that could inhibit the President’s ability to carry out his constitutional obligations to take care that the laws be faithfully executed, to protect national security, to supervise the executive branch, and to execute his authority as Commander in Chief. Additionally, as in numerous other signing statements, the President declared that the executive branch “shall construe such provisions in a manner consistent with the constitutional authority of the President.” It is not clear whether the President intended for these objections to apply to the specified provisions respectively or in concert, and it

¹³ It should be noted that a combination of oversight hearings and legislative responses to the President’s signing statement ultimately resulted in President Clinton’s compliance with the law as written.

¹⁴ Phillip J. Cooper, “By Order of the President: The Use and Abuse of Executive Direct Action,” University of Kansas Press, at p. 228 (2002).

¹⁵ Pub. L. 107-314.

would likewise appear from the text of the statement that the President finds additional, unspecified provisions to be similarly problematic.

The vague nature of the objections raised in the statement is not clarified by analyzing the specific provisions at issue. First, section 841 establishes a legislative commission that is charged with various aspects relating to federal agency contracting activity pertaining to reconstruction, logistical support, and security functions in Iraq and Afghanistan. The commission is not vested with any powers that may be considered executive in nature, obviating any separation of powers concerns regarding the appointment of members of the commission or the exercise of any authority vested in the commission by its members. It is well settled that Congress may establish investigative legislative commissions of this type, and there does not appear to be any discernible basis upon which the President may argue that the commission composition or functions present concerns of a constitutional magnitude. Section 846 amends 10 U.S.C. § 2409 to provide additional protections from reprisals (such as discharge or demotion) for employers of contractors who disclose information that they reasonably believe evidences gross mismanagement or illegal activity. Just as with the establishment of legislative investigative commissions, there is ample precedent for the congressional imposition of statutory provisions that protect the right of persons to provide information to a Member or committee of Congress or another designated federal entity, and that such a right may not be interfered with or impeded.¹⁶

Section 1079 directs the Director of the National Counterterrorism Center, the Director of a national intelligence center, or the head of any element of the intelligence community, to make certain categories of intelligence information available to an authorized requesting committee within 45 days. To the extent that the President's objection to this provision rests on the assertion that such direct reporting requirements are constitutionally suspect, it is without any substantial merit. While numerous signing statements issued by President Bush assert such objections, they are unsupported by established legal principles governing Congress' authority to compel and receive information directly from Executive Branch agencies.¹⁷ Congress has imposed direct reporting requirements on Executive Branch officials since the first Congress. Legislation establishing the Treasury Department required the Secretary to report to Congress and to "perform all such services relative to the finances, as he shall be directed to perform."¹⁸ Additionally, the Supreme Court has long recognized the validity of reporting requirements,¹⁹ and in *INS v. Chadha*,²⁰ the Court explicitly affirmed Congress' authority to impose "report and wait" provisions, distinguishing them from the unconstitutional legislative veto provisions under review in that case. The Administration might argue that a congressional request for information under this provision could implicate national security concerns, despite the fact that it is generally recognized that Congress's authority

¹⁶ See, e.g., 5 U.S.C. § 7211; 5 U.S.C. § 2302; 10 U.S.C. § 1034.

¹⁷ See "Legal Substantiality of Direct Reporting Requirements," CRS Congressional Distribution Memorandum, by Morton Rosenberg (2006) (copy on file with CRS).

¹⁸ Act of Sept. 2, 1789, Ch. 12, §2, 1 Stat. 65, 66.

¹⁹ See, e.g., *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14-15 (1941).

²⁰ 462 U.S. 919, 935 n. 9 (1983).

to access classified information is of a constitutional magnitude.²¹ However, the potential impact of this requirement is ameliorated by the provision's implicit acknowledgment that a constitutionally based claim of presidential privilege may preclude congressional access to such information under certain circumstances.

Finally, section 1222 imposes limitations on the availability of funds for certain purposes relating to Iraq, prohibiting the obligation or expenditure of funds to establish any military installation or base for the purpose of providing for the permanent stationing of military personnel in Iraq or to exercise U.S. control of the oil resources of Iraq. While it may be difficult to ascertain what actions would run afoul of these restrictions, it appears that the President's objection to these provisions rests upon an expansive conception of his constitutional Commander in Chief powers. While the parameters of this authority are largely undefined in relation to the power of Congress to control military operations, Congress's power of the purse would appear to vest it with the prerogative to impose binding restrictions of this type on the use of appropriated funds.²²

Ultimately, the vast majority of presidential signing statements that have been issued in response to National Defense Authorization Acts appear to be characterized by extremely broad and generalized assertions of presidential authority that are typical of signing statements that have been issued in other contexts. Given the largely unsubstantive nature of the objections that have been raised in signing statements, including the most recent statement accompanying the National Defense Authorization Act for Fiscal Year 2008, it does not appear that presidents are using these instruments to formally negate provisions of law, but are instead employing them in an attempt to leverage power and control from Congress by seeking to establish these expansive claims of executive authority as a constitutional norm. While the voluminous challenges lodged by President Bush carry significant practical and constitutional implications for Congress in light of the broad claims of authority consistently forwarded therein, that increased usage does not render signing statements unconstitutional. By focusing its efforts on attempts to constrain the issuance of signing statements, Congress arguably risks leaving unaddressed the threats posed to its institutional power by the broad conception of presidential authority that motivates their issuance. It does not seem likely that a reduction in the number of challenges raised in signing statements, whether caused by procedural limitations or political rebuke, will necessarily result in any change in a President's conception and assertion of executive authority. Finally, it should be noted that these signing statements are arguably beneficial, in that they alert Congress to the universe of provisions that are held in disregard by the Executive Branch, in turn affording Congress the opportunity not only to engage in systematic monitoring and oversight to ensure that its enactments are complied with, but to assert its prerogatives to counteract the broad claims of authority that undergird the statements.

A more effective option for Congress could be to focus on these claims of presidential power and the substantive actions taken to establish and embed that authority in the constitutional framework, as opposed to focusing on the instrument of the signing

²¹ See "The Protection of Classified Information: The Legal Framework," CRS Report RS21900, by Jennifer Elsea (2006).

²² See, e.g., "Congressional Authority to Limit U.S. Military Operations in Iraq," CRS Report RL33837, by Jennifer K. Elsea, Michael John Garcia and Thomas J. Nicola.

statement itself. A robust and sustained oversight regime of the type the Committee is undertaking today would allow Congress to assert its constitutional prerogatives more effectively and ultimately ensure compliance with its enactments.

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Mr. Chairman, that concludes my prepared statement. I would be happy to answer any questions that you or other Members of the Subcommittee might have, and I look forward to working with all Members and staff of the Subcommittee on this issue in the future.

Appendix: Provisions from Signing Statements Accompanying National Defense Authorization Acts That Object to One or More Provisions of Law, 1994-2008.

National Defense Authorization Act for Fiscal Year 1995:²³

“To the extent that section 1404 could be construed to require the President or other executive branch officers or employees to espouse or refrain from espousing certain substantive positions, it would be inconsistent with my constitutional authority for the conduct of foreign affairs. I will accordingly interpret the provision as not applicable to efforts that are diplomatic in nature.”

“In the Classified Annex, incorporated into S. 2182 by reference, section 101 directs that the Secretary of Defense provide a weekly National Operations Summary to the Committees on Armed Services of the House and Senate. Implementation of this provision must be consistent with my constitutional authority as Commander in Chief and my constitutional responsibility for the conduct of foreign affairs.”

“I also point out that section 232, relating to modifications to the Anti-Ballistic Missile Treaty, cannot restrict the constitutional options for congressional approval of substantive modifications of treaties.”

“Finally, I note that section 1304 could be interpreted as specifically directing the President how to proceed in negotiations with European countries regarding cost-sharing arrangements for U.S. military installations in host nations. I support the policy underlying section 1304 to encourage these countries to increase their contributions, direct and indirect, of the nonpersonnel costs described in the provision. However, my constitutional authority over foreign affairs necessarily entails discretion over these and similar matters.”

²³ Pub. L. 103-337.

National Defense Authorization Act for Fiscal Year 1996:²⁴

“...I am strongly opposed, as is the Department of Defense, to the provision requiring the discharge of military personnel living with the Human Immunodeficiency Virus (HIV), where such discharge is not required by any medical, public health, or military purpose. This provision is blatantly discriminatory and highly punitive to service members and their families. People living with HIV can and do lead full and productive lives, provide for their families, and contribute to the well-being of our Nation. The men and women affected by this provision are ready, willing and able to serve their country with honor and should be allowed to continue to do so.

Therefore, I strongly support the current efforts in the Congress to repeal this provision before a single service member is discharged from the armed forces.

Moreover, the Secretary of Defense and the Chairman of the Joint Chiefs of Staff have advised me that the arbitrary discharge of these men and women would be both unwarranted and unwise; that such discharge is unnecessary as a matter of sound military policy; and that discharging service members deemed fit for duty would waste the Government's investment in the training of these people and would be disruptive to the military programs in which they play an integral role.

I agree.

Consequently, I have concluded that this discriminatory provision is unconstitutional. Specifically, it violates equal protection by requiring the discharge of qualified service members living with HIV who are medically able to serve, without furthering any legitimate governmental purpose. As President Franklin D. Roosevelt said in 1943, explaining his decision to sign an important appropriations bill notwithstanding the fact that it contained a provision that infringed upon individual rights, ‘I cannot . . . yield without placing on record my view that this provision is not only unwise and discriminatory, but unconstitutional.’

In accordance with my constitutional determination, the Attorney General will decline to defend this provision. Instead, the Attorney General will inform the House and Senate of this determination so that they may, if they wish, present to the courts their argument that the provision should be sustained.

Further, to mitigate any unfair burden that this legislation could place on these service members and their families pending any repeal or judicial invalidation, I have directed the Secretaries of Defense, Veterans Affairs, and Transportation, in carrying out the provisions of this Act, to take all steps necessary to ensure that these service members receive the full benefits to which they are entitled—including, among other things, disability retirement pay, health care coverage for their families and transition benefits such as vocational education.”

²⁴ Pub. L. 104-106.

National Defense Authorization Act for Fiscal Year 1997:²⁵

“...[P]rovisions of the Act raise serious constitutional concerns. Provisions purporting to require the President to enter into or report on specified negotiations with foreign governments, as well as a provision that limits the information that could be revealed in negotiations, intrude on the President's constitutional authority to conduct the Nation's diplomacy and the President's role as Commander in Chief. I will interpret these provisions as precatory.”

“Further, the bill's method for appointing the National Ocean Leadership Council would violate the Appointments Clause of the Constitution. I urge the Congress to pass amendments at the earliest possible time to provide for a constitutional means of appointing this Council. Until this correction is made, the Council should not exercise significant governmental authority.”

“Another provision of the Act could be read to require intra-branch consultations before the Secretary of Defense could make recommendations to me regarding certain appointments. This provision is constitutionally questionable, and I therefore will construe it consistent with my authorities under the Constitution. I anticipate implementing the intent of the provisions with an Executive order.”

“The Act would overturn organizational arrangements in the Department of Energy's nuclear weapons complex that have served the Nation well for over 50 years. Because this micromanagement provision would severely limit the Secretary's ability to determine and control the best way to manage the Department's personnel, budget and procurement functions, I have directed the Secretary to study the provision's effects and to report to me and to the Congress on the study's results before implementing this provision. If reorganization is appropriate, the Secretary of Energy should use existing statutory authority to assure that the Department is organized in a way that is most efficient for carrying out the Department's business.”

National Defense Authorization Act for Fiscal Year 1998:²⁶

“...[P]rovisions of H.R. 1119 raise serious constitutional issues. Because of the President's constitutional role, the Congress may not prevent the President from controlling the disclosure of classified and other sensitive information by subordinate officials of the executive branch (section 1305). Because the Constitution vests the conduct of foreign affairs in the President, the Congress may not dictate the President's negotiations with foreign governments (section 1221). Nor may the Congress place in its own officers, such as the Comptroller General, the power to execute the law (section 217). These provisions will be construed and carried out in keeping with the President's constitutional responsibilities.”

²⁵ Pub. L. 104-201.

²⁶ Pub. L. 105-85.

Strom Thurmond National Defense Authorization Act for Fiscal Year 1999:²⁷

“I am disappointed that the Congress, in a well-meaning effort to further protect nuclear weapons information, has included an overly broad provision that impedes my Administration's work to declassify historically valuable records. I am committed to submitting the plan required under this Act within 90 days. In the meantime, I will interpret this provision in a manner that will assure the maximum continuity of agency efforts, as directed by my Executive Order 12958, to declassify historically valuable records.”

“I am also concerned that several provisions of the Act could be interpreted to intrude unconstitutionally on the President's authority to conduct foreign affairs and to direct the military as Commander-in-Chief. These provisions could be read to regulate negotiations with foreign governments, direct how military operations are to be carried out, or require the disclosure of national security information. I will interpret these provisions in light of my constitutional responsibilities.”

National Defense Authorization Act for Fiscal Year 2000:²⁸

“The most troubling features of the Act involve the reorganization of the nuclear defense functions within the Department of Energy. The original reorganization plan adopted by the Senate reflected a constructive effort to strengthen the effectiveness and security of the activities of the Department of Energy's nuclear weapons laboratories. Unfortunately, the success of this effort is jeopardized by changes that emerged from the conference, which altered the final product, making it weaker in enhancing national security. Particularly objectionable are features of the legislative charter of the new National Nuclear Security Administration (NNSA) that purport to isolate personnel and contractors of the NNSA from outside direction, and limit the Secretary's ability to employ his authorities to direct—both personally and through subordinates of his own choosing—the activities and personnel of the NNSA. Unaddressed, these deficiencies of the Act would impair effective health and safety oversight and program direction of the Department's nuclear defense complex.

Other provisions of S. 1059 have been faulted by the Attorneys General of over 40 States as placing in question the established duty of the Department of Energy's nuclear defense complex to comply with the procedural and substantive requirements of environmental laws. Moreover, the Act removes from the Secretary his direct authority over certain extremely sensitive classified programs specified in the Atomic Energy Act, and establishes in the NNSA separate support functions—such as contracting, personnel, public affairs, and legal—that are redundant with those now within the Department. This redundancy even extends to the counterintelligence office reporting directly to the Secretary that was established in accordance with my Presidential Decision Directive 61, and which was designed to be the single authoritative source of counterintelligence guidance throughout the Department. The Act establishes a companion counterintelligence entity within the NNSA, compounding simple redundancy with the blurring of lines of authority that can too readily result because the NNSA is largely immunized from outside direction within the Department.

²⁷ Pub. L. 105-261.

²⁸ Pub. L. 106-65.

Experience teaches that these are not abstract deficiencies. As the Hoover Commission concluded half a century ago, the accountability of a Cabinet Department head is not complete without the legal authority to meet the legal responsibilities for which that person is accountable. The Act's provisions summarized above skew that authority. These provisions blur the clear and unambiguous lines of authority intended by Presidential Decision Directive 61, and impair the Secretary of Energy's ability to assure compliance at all levels within the Department of Energy with instructions he may receive in meeting his national defense responsibilities under the Atomic Energy Act.

The responsibilities placed by S. 1059 in the National Nuclear Security Administration potentially are of the most significant breadth, and the extent of the Secretary of Energy's authority with respect to those responsibilities is placed in doubt by various provisions of the Act. Therefore, by this Statement I direct and state the following:

1. Until further notice, the Secretary of Energy shall perform all duties and functions of the Under Secretary for Nuclear Security.
2. The Secretary is instructed to guide and direct all personnel of the National Nuclear Security Administration by using his authority, to the extent permissible by law, to assign any Departmental officer or employee to a concurrent office within the NNSA.
3. The Secretary is further directed to carry out the foregoing instructions in a manner that assures the Act is not asserted as having altered the environmental compliance requirements, both procedural and substantive, previously imposed by Federal law on all the Department's activities.
4. In carrying out these instructions, the Secretary shall, to the extent permissible under law, mitigate the risks to clear chain of command presented by the Act's establishment of other redundant functions by the NNSA. He shall also carry out these instructions to enable research entities, other than those of the Department's nuclear defense complex that fund research by the weapons laboratories, to continue to govern conduct of the research they have commissioned.
5. I direct the Director of the Office of Personnel Management to work expeditiously with the Secretary of Energy to facilitate any administrative actions that may be necessary to enable the Secretary to carry out the instructions in this Statement.

The expansive national security responsibilities now apparently contemplated by the Act for the new Under Secretary for Nuclear Security make selection of a nominee an especially weighty judgment. Legislative action by the Congress to remedy the deficiencies described above and to harmonize the Secretary of Energy's authorities with those of the new Under Secretary that will be in charge of the NNSA will help identify an appropriately qualified nominee. The actions directed in this Statement shall remain in force, to continue until further notice.”

“I intend to implement the China provisions of the bill in a manner consistent with this policy, including, where appropriate, combining several of the reporting requirements.”

“In order to avoid any confusion among our allies or elsewhere regarding the new NATO Strategic Concept, I feel compelled to make clear that the document is a political, not a legal, document. As such, the Strategic Concept does not create any new commitment or obligation within my understanding of section 1221(a) of the Act, and therefore, will not be submitted to the Senate for advice and consent.”

“I am concerned about section 1232, which contains a funding limitation with respect to continuous deployment of United States Armed Forces in Haiti pursuant to Operation Uphold Democracy. I have decided to terminate the continuous deployment of forces in Haiti, and I intend to keep the Congress informed with respect to any future deployments to Haiti; however, I will interpret this provision consistent with my constitutional responsibilities as President and Commander in Chief.”

“A number of other provisions of this bill raise serious constitutional concerns. Because the President is the Commander in Chief and the Chief Executive under the Constitution, the Congress may not interfere with the President's duty to protect classified and other sensitive national security information or his responsibility to control the disclosure of such information by subordinate officials of the executive branch (sections 1042, 3150, and 3164). Furthermore, because the Constitution vests the conduct of foreign affairs in the President, the Congress may not direct that the President initiate discussions or negotiations with foreign governments (section 1407 and 1408). Nor may the Congress unduly restrict the President's constitutional appointment authority by limiting the President's selection to individuals recommended by a subordinate officer (section 557). To the extent that these provisions conflict with my constitutional responsibilities in these areas, I will construe them where possible to avoid such conflicts, and where it is impossible to do so, I will treat them as advisory. I hereby direct all executive branch officials to do likewise.”

Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001:²⁹

“I am concerned with two provisions of H.R. 4205 relating to the Department of Energy. First, the Act would limit to 3 years the term of office for the first person appointed to the position of Under Secretary for Nuclear Security at the Department of Energy and would restrict the President's ability to remove that official to cases of ‘inefficiency, neglect of duty, or malfeasance in office.’ Particularly in light of the sensitive duties assigned to this officer in the area of national security, I understand the phrase ‘neglect of duty’ to include, among other things, a failure to comply with the lawful directives or policies of the President.”

“...I am deeply disappointed that the Congress has taken upon itself to set greatly increased polygraph requirements that are unrealistic in scope, impractical in execution, and that would be strongly counterproductive in their impact on our national security. The bill also micromanages the Secretary of Energy’s authority to grant temporary waivers to the polygraph requirement in a potentially damaging way, by explicitly directing him not to consider the scientific vitality of DOE laboratories. This directs the Secretary not to do his job, since maintaining the scientific vitality of DOE national laboratories is essential to our national security and is one of the Secretary’s most important responsibilities. I am therefore signing the bill with the understanding that it cannot supersede the Secretary’s responsibility to fulfill his national security obligations.”

“The Act also raises other constitutional concerns. The constitutional separation of powers does not allow for a single Member of Congress to direct executive branch officers to take specified action through means other than duly enacted legislation. Thus, I

²⁹ Pub. L. 106-398.

will instruct the Secretaries concerned to treat congressional members' requests for the review and determination of proposals for posthumous or honorary promotions or appointments as precatory rather than mandatory. Another provision establishes a Board of Governors for the Civil Air Patrol. Insofar as this Board is an office of the Federal Government exercising significant authority, the provision for the appointment of the Board's members would raise concerns under the Appointments Clause. Accordingly, I will instruct the Secretary of the Air Force, in issuing the regulations authorized by this provision, to retain a degree of control over the Board that appropriately limits its authority. Finally, because the Constitution vests in the President the authority and responsibility to conduct the foreign and diplomatic relations of the United States, the Congress cannot purport to direct the executive branch to enter into an agreement with another country, and thus I will treat such language as advisory only."

"With respect to Government Information Security Reform, the Act directs the Director of the Office of Management and Budget to delegate certain security policy and oversight authorities to the Secretary of Defense, the Director of Central Intelligence, and another agency head. The policies, programs, and procedures established by the Secretary of Defense, the Director of Central Intelligence, and other agency heads will remain subject to the approval of and oversight by the President and by offices within the Executive Office of the President in a manner consistent with existing law and policy."

National Defense Authorization Act for Fiscal Year 2002:³⁰

"Several provisions of the Act, including sections 525(c), 546, 705, and 3152 call for executive branch officials to submit to the Congress proposals for legislation. These provisions shall be implemented in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to recommend to the Congress such measures as the President judges necessary and expedient."

"Section 1404 vests in the Secretary of Defense authority to appoint a chief operating officer for the Armed Forces Retirement Home, but purports to limit the qualifications of the pool of persons from whom the Secretary may select the appointee in a manner that rules out a large portion of those persons best qualified by experience and knowledge to fill the office. The Secretary shall implement section 1404 in a manner consistent with the Appointments Clause of the Constitution."

"Under section 1002 of the Act, the Congress has stated that it incorporates a classified annex into the statute. That annex contains authorizations of appropriations for specified classified programs. My Administration discourages enactment of secret law as part of annual defense authorization acts and instead encourages appropriate use of classified annexes to committee reports and the joint statement of managers that accompanies the final legislation."

³⁰ Pub. L. 107-107.

Bob Stump National Defense Authorization Act for Fiscal Year 2003:³¹

“A number of provisions of the Act establish new requirements for the executive branch to furnish sensitive information to the Congress on various subjects, including sections 221, 1043, 1065 (enacting 10 U.S.C. 127b(f)(2)(C)(ii) and (iii)), 1205, 1206, 1207, and 1209 (enacting section 722 of Public Law 104-293). The executive branch shall construe such provisions in a manner consistent with the President's constitutional authority to withhold information the disclosure of which could impair foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties.”

“Many provisions of the Act call for executive branch officials to submit recommendations and plans to the Congress, including sections 112(b), 142(c), 221(c), 231 (enacting 10 U.S.C. 196), 234(c), 241(c)(3)(D), 366, 404(c), 513(e), 534(c), 582, 721 (enacting 38 U.S.C. 8111(c)(4) and (f)(2)(C) and (F)), 723, 813, 924, 1043(b)(2), 1061 (enacting 10 U.S.C. 113a), 1207, 1208 (enacting section 1503(b)(8) of Public Law 103-337), 3141(e), 3143, 3176(b)(4) and (d), and 3504(c)(4). The executive branch shall construe such provisions in a manner consistent with the President's constitutional authority to supervise the unitary executive branch. In addition, with respect to provisions that purport to require executive branch officials to submit legislative proposals to the Congress, including sections 513(e), 813, 1061, and 3143, the executive branch also shall construe such provisions in a manner consistent with the President's constitutional authority to submit for the consideration of the Congress such measures as the President judges necessary and expedient.”

“The executive branch shall construe section 133(2)(B) of the Act as requiring only notification to the Congress and not any form of congressional approval following notification, as any other construction would be inconsistent with the constitutional principles enunciated by the Supreme Court in 1983 in *INS v. Chadha*.”

“The executive branch shall construe section 2308(e)(1) of title 10 of the United States Code, as enacted by section 801 of the Act, as neither giving the force of law to any quantity set forth in a table, chart, or explanatory text in a joint explanatory statement of a House- Senate committee of conference or in any congressional committee report, nor requiring the exercise of waiver authority under section 2308 to acquire more than a quantity specified in such a table, chart, or explanatory text. Construing the section otherwise would not be consistent with the bicameralism and presentment requirements of the Constitution for the making of a law.”

“The executive branch shall implement section 2323 of title 10 of the United States Code, as extended through fiscal year 2006 by section 816 of the Act, in a manner consistent with the equal protection requirements of the Due Process Clause of the Fifth Amendment to the Constitution.”

“Section 242 of the Act vests authority to direct the provision of funds for designated projects, and to select certain projects for funding, in an official who is to be designated by the Under Secretary of Defense for Acquisition, Technology, and Logistics. Under the

³¹ Pub. L. 107-314.

Constitution, such authority should be exercised only by officers of the United States appointed in accordance with the provisions of the Appointments Clause. Accordingly, the Secretary of Defense shall ensure that the official designated by the Under Secretary under this section is a duly appointed constitutional officer or that the official's exercise of the authority vested is supervised and reviewed by the Under Secretary or another appropriate constitutional officer.”

“Finally, the executive branch shall construe sections 3155, 3156, and 3160, which purport to require executive branch officials to conduct programs with a foreign country, in a manner consistent with the President's constitutional authority to conduct the foreign affairs of the United States.”

National Defense Authorization Act for Fiscal Year 2004:³²

“Section 541(a) of the Act amends section 991 of title 10 of the United States Code to purport to place limits on the number of days on which a member of the Armed Forces may be deployed, unless the Secretary of Defense or a senior civilian or military officer to whom the Secretary has delegated authority under section 541(a) approves the continued deployment. Section 1023 purports to place restrictions on use of the U.S. Armed Forces in certain operations. The executive branch shall construe the restrictions on deployment and use of the Armed Forces in sections 541(a) and 1023 as advisory in nature, so that the provisions are consistent with the President's constitutional authority as Commander in Chief and to supervise the unitary executive branch.”

“Section 903 amends section 153 of title 10 to require the Secretary of Defense to provide for a report to the Congress by the Chairman of the Joint Chiefs of Staff of a plan for mitigating risks identified by the Chairman. The executive branch shall construe this provision in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and as Commander in Chief.”

“Section 924 places restrictions upon the exercise of certain acquisition authority by the Director of the National Security Agency (NSA). The reference in section 924(b) to section 2430 of title 10, United States Code, authorizes the Secretary of Defense to exclude from the scope of section 924(b) highly sensitive classified programs as determined by the Secretary of Defense. Moreover, the exercise by the Under Secretary of Defense for Acquisition, Technology, and Logistics of authority described in section 924 remains subject to the statutory authority of the Secretary of Defense to exercise authority, direction, and control of the Department of Defense under section 113(b) of title 10. The executive branch shall construe and execute section 924 in a manner consistent with these statutory authorities of the Secretary of Defense, the authority of the Director of Central Intelligence under section 103(c)(7) of the National Security Act to protect intelligence sources and methods from unauthorized disclosure, and the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief.”

“Section 1442(b)(2)(C) requires executive agency heads to furnish certain reports to the chairman and ranking minority member of “[e]ach committee that the head of the

³² Pub. L. 108-136.

executive agency determines has legislative jurisdiction for the operations of such department or agency to which the information relates." The executive branch shall, as a matter of comity and for the very narrow purpose of determining to whom a department or agency will submit a report under this provision, determine the legislative jurisdiction of congressional committees."

"Section 3622 purports to establish an interparliamentary working group involving up to 40 Members of Congress and the legislature of the Russian Federation on nuclear nonproliferation and security. Consistent with the President's constitutional authority to conduct the Nation's foreign relations and as Commander in Chief, the executive branch shall construe section 3622 as authorizing neither representation of the United States nor disclosure of national security information protected by law or Executive Order."

"Several provisions of the Act, including sections 320(b)(5) and (e), 335, 528, 647(c)(2), 923(d)(1)(F), and 1051, call for executive branch officials to submit to the Congress proposals for legislation. These provisions shall be implemented in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to recommend for the consideration of the Congress such measures as the President judges necessary and expedient."

"A number of provisions of the Act, including sections 111(c), 903, 924, 1202, 1204, 1442(b)(2)(C), 1504(b), and 2808, require the executive branch to furnish information to the Congress or other entities on various subjects. The executive branch shall construe such provisions in a manner consistent with the President's constitutional authority to withhold information the disclosure of which could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties."

Ronald Reagan National Defense Authorization Act for Fiscal Year 2005:³³

"Section 326 of the Act, amending sections 3551, 3552, and 3553 of title 31, United States Code, purports to require an executive branch official to file with the Comptroller General a protest of a proposed contract for private sector performance of agency functions previously performed at higher cost by Federal employees, whenever a majority of those Federal employees so requests, unless the official determines, free from any administrative review, that no reasonable basis exists for the protest. The executive branch shall construe section 326 in a manner consistent with the President's constitutional authority to supervise the unitary executive branch, including the making of determinations under section 326."

"Section 574 of the Act amends sections 3037, 5046, 5148, and 8037 of title 10, United States Code, to prohibit Department of Defense personnel from interfering with the ability of a military department judge advocate general, and the staff judge advocate to the Commandant of the Marine Corps, to give independent legal advice to the head of a military department or chief of a military service or with the ability of judge advocates assigned to military units to give independent legal advice to unit commanders. The executive branch shall construe section 574 in a manner consistent with: (1) the

³³ Pub. L. 108-375.

President's constitutional authorities to take care that the laws be faithfully executed, to supervise the unitary executive branch, and as Commander in Chief; (2) the statutory grant to the Secretary of Defense of authority, direction, and control over the Department of Defense (10 U.S.C. 113(b)); (3) the exercise of statutory authority by the Attorney General (28 U.S.C. 512 and 513) and the general counsel of the Department of Defense as its chief legal officer (10 U.S.C. 140) to render legal opinions that bind all civilian and military attorneys within the Department of Defense; and (4) the exercise of authority under the statutes (10 U.S.C. 3019, 5019, and 8019) by which the heads of the military departments may prescribe the functions of their respective general counsels.”

“The executive branch shall construe section 1021, purporting to place restrictions on the use of the U.S. Armed Forces in certain operations, and sections 1092 and 1205, relating to captured personnel and to contractor support personnel, in a manner consistent with the President's constitutional authority as Commander in Chief and to supervise the unitary executive branch.”

“Section 1203 of the Act creates a Special Inspector General for Iraq Reconstruction, under the joint authority of the Secretaries of State and Defense, as a successor to the Inspector General of the Coalition Provisional Authority under title III of Public Law 108-106. Title III as amended by section 1203 shall be construed in a manner consistent with the President's constitutional authorities to conduct the Nation's foreign affairs, to supervise the unitary executive branch, and as Commander in Chief of the Armed Forces. The Special Inspector General shall refrain from initiating, carrying out, or completing an audit or investigation, or from issuing a subpoena, which requires access to sensitive operation plans, intelligence matters, counter-intelligence matters, ongoing criminal investigations by administrative units of the Department of Defense related to national security, or other matters the disclosure of which would constitute a serious threat to national security. The Secretary of State and the Secretary of Defense jointly may make exceptions to the foregoing direction in the public interest.”

“The executive branch shall construe as advisory section 1207(b)(1) of the Act, which purports to direct an executive branch official to use the U.S. voice and vote in an international organization to achieve specified foreign policy objectives, as any other construction would impermissibly interfere with the President's constitutional authorities to conduct the Nation's foreign affairs and supervise the unitary executive branch. The executive branch also shall construe the phrase "generally recognized principles of international law" in sections 1402(c) and 1406(b) to refer to customary international law as determined by the President for the Nation, as is consistent with the President's constitutional authority to conduct the Nation's foreign affairs.”

“The executive branch shall construe section 3147 of the Act, relating to availability of certain funds if the Government decides to settle certain lawsuits, in a manner consistent with the Constitution's commitment to the President of the executive power and the authority to take care that the laws be faithfully executed, including through litigation and decisions whether to settle litigation.”

“Several provisions of the Act, including sections 315, 343(2) amending section 391 of Public Law 105-85, 506(b), 517(c), 571(b), 574(d)(8), 576(c), 577(c), 643(c) and (e), 651(g)(2), 666(c), 841(c), 3114(d)(2), and 3142(c) call for executive branch officials to submit to the Congress proposals for legislation. The executive branch shall implement

these provisions in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to recommend for the consideration of the Congress such measures as the President judges necessary and expedient. Also, the executive branch shall construe section 1511(d) of the Act, which purports to make consultation with specified Members of Congress a precondition to the execution of the law, as calling for, but not mandating such consultation, as is consistent with the Constitution's provisions concerning the separate powers of the Congress to legislate and the President to execute the laws.”

“A number of provisions of the Act, including sections 112(b)(6), 213(c), 513(e)(1), 912(d), 1021(f), 1022(b), 1042, 1047, 1202, 1204, 1207(c) and (d)(2), 1208, 1214, and 3166(a) amending section 3624 in Public Law 106-398, call for the executive branch to furnish information to the Congress, a legislative agent, or other entities on various subjects. The executive branch shall construe such provisions in a manner consistent with the President's constitutional authority to withhold information the disclosure of which could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties.”

National Defense Authorization Act for Fiscal Year 2005:³⁴

“Several provisions of the Act, including sections 352, 360, 403, 562, 818, and 2822, call for executive branch officials to submit to the Congress proposals for legislation, including budget proposals for enactment of appropriations, or purport to regulate or require disclosure of the manner in which the President formulates recommendations to the Congress for legislation. The executive branch shall implement these provisions in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to recommend for the consideration of the Congress such measures as the President judges necessary and expedient. Also, the executive branch shall construe section 1206(d) of the Act, which purports to regulate formulation by executive branch officials of proposed programs for the President to direct, in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to require the opinions of heads of executive departments. In addition, the executive branch shall construe section 1513(d) of the Act, which purports to make consultation with specified Members of Congress a precondition to the execution of the law, as calling for but not mandating such consultation, as is consistent with the Constitution's provisions concerning the separate powers of the Congress to legislate and the President to execute the laws.”

“A number of provisions of the Act, including sections 905, 932, 1004, 1212, 1224, 1227, and 1304, call for the executive branch to furnish information to the Congress on various subjects. The executive branch shall construe such provisions in a manner consistent with the President's constitutional authority to withhold information the disclosure of which could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties.”

“Section 1222 of the Act refers to a joint explanatory statement of a committee of conference on a bill as if the statement had the force of law. The executive branch shall

³⁴ Pub. L. 109-163.

construe the provision in a manner consistent with the bicameral passage and presentment requirements of the Constitution for the making of a law.”

John Warner National Defense Authorization Act for Fiscal Year 2007:³⁵

“Several provisions of the Act call for executive branch officials to submit to the Congress recommendations for legislation, or purport to regulate the manner in which the President formulates recommendations to the Congress for legislation. These provisions include sections 516(h), 575(g), 603(b), 705(d), 719(b), 721(e), 741(e), 813, 1008, 1016(d), 1035(b)(3), 1047(b), and 1102 of the Act, section 118(b)(4) of title 10, United States Code, as amended by section 1031 of the Act, section 2773b of title 10 as amended by section 1053 of the Act, and section 403 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (Public Law 108-375) as amended by section 403 of the Act. The executive branch shall construe these provisions in a manner consistent with the President's constitutional authority to supervise the unitary executive branch and to recommend for the consideration of the Congress such measures as the President deems necessary and expedient.”

“The executive branch shall construe sections 914 and 1512 of the Act, which purport to make consultation with specified Members of Congress a precondition to the execution of the law, as calling for but not mandating such consultation, as is consistent with the Constitution's provisions concerning the separate powers of the Congress to legislate and the President to execute the laws.”

“A number of provisions in the Act call for the executive branch to furnish information to the Congress or other entities on various subjects. These provisions include sections 219, 313, 360, 1211, 1212, 1213, 1227, 1402, and 3116 of the Act, section 427 of title 10, United States Code, as amended by section 932 of the Act, and section 1093 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (Public Law 108-375) as amended by section 1061 of the Act. The executive branch shall construe such provisions in a manner consistent with the President's constitutional authority to withhold information the disclosure of which could impair foreign relations, the national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties.”

“The executive branch shall construe as advisory section 1011(b)(2) of the Act, which purports to prohibit the Secretary of the Navy from retiring a specified warship from operational status unless, among other things, a treaty organization established by the U.S. and foreign nations gives formal notice that it does not desire to maintain and operate that warship. If construed as mandatory rather than advisory, the provision would impermissibly interfere with the President's constitutional authority to conduct the Nation's foreign affairs and as Commander in Chief.”

“The executive branch shall construe section 1211, which purports to require the executive branch to undertake certain consultations with foreign governments and follow certain steps in formulating and executing U.S. foreign policy, in a manner consistent

³⁵ Pub. L. 109-364.

with the President's constitutional authorities to conduct the Nation's foreign affairs and to supervise the unitary executive branch.”

National Defense Authorization Act for Fiscal Year 2008:³⁶

“Provisions of the Act, including sections 841, 846, 1079, and 1222, purport to impose requirements that could inhibit the President's ability to carry out his constitutional obligations to take care that the laws be faithfully executed, to protect national security, to supervise the executive branch, and to execute his authority as Commander in Chief. The executive branch shall construe such provisions in a manner consistent with the constitutional authority of the President.”

³⁶ Pub. L. 110-181.