

**U.S. House of Representatives  
Armed Services Subcommittee on Oversight and Investigations**

**Hearing:  
The President's Signing Statement Upon Signing  
The National Defense Authorization Act for Fiscal Year 2008**

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**Prepared Statement  
of**

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Mr. Chairman, Representative Akin, Members of the Subcommittee: I thank you for the opportunity to express my views about the President's statement upon signing the National Defense Authorization Act for Fiscal Year 2008.

In the past, I have testified about the propriety and utility of presidential signing statements generally, before both the House and Senate Judiciary Committees.<sup>1</sup> Today, I will discuss how those general points apply to the particular signing statement of interest here—the one issued by the President on January 28, 2008,<sup>2</sup> regarding the National Defense Authorization Act for Fiscal Year 2008.<sup>3</sup> That presidential signing statement reads, in full, as follows:

Today, I have signed into law H.R. 4986, the National Defense Authorization Act for Fiscal Year 2008. The Act authorizes funding for the defense of the United States and its interests abroad, for military construction, and for national security-related energy programs.

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,

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<sup>1</sup> See *Presidential Signing Statements Under the Bush Administration: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Nicholas Quinn Rosenkranz, Assoc. Prof. of Law, Georgetown University Law Center); *Presidential Signing Statements: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Nicholas Quinn Rosenkranz, Assoc. Prof. of Law, Georgetown University Law Center).

<sup>2</sup> Statement on Signing the National Defense Authorization Act for Fiscal Year 2008, 44 WEEKLY COMP. PRES. DOC. 115 (Jan. 28, 2008).

<sup>3</sup> Pub. L. No. 110-181, 122 Stat. 3 (2008).

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.<sup>4</sup>

I will begin with some general observations about the propriety of this signing statement, and then I will consider the specific sections of the bill that it mentions.

## I. Executive Interpretation

The most important word in this signing statement, the operative verb, is the verb “construe.” In this signing statement, as in virtually all of this President’s signing statements, this verb signals the primary function of the signing statement: to announce—to the Executive Branch and to the public—the President’s interpretation of the law.<sup>5</sup> The propriety of such an announcement should be obvious.<sup>6</sup> There is an oft-repeated canard that the President has no business interpreting federal statutes—his job is to *execute* the laws, and *interpretation* should be left to the courts.<sup>7</sup> A moment’s reflection reveals that

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<sup>4</sup> Statement on Signing the National Defense Authorization Act for Fiscal Year 2008, 44 WEEKLY COMP. PRES. DOC. 115 (Jan. 28, 2008).

<sup>5</sup> Virtually every paragraph of every signing statement by this President uses the word “construe,” emphasizing that the purpose of the statement is to interpret the statute. *See, e.g.*, Statement on Signing the USA PATRIOT Improvement and Reauthorization Act of 2005, 42 WEEKLY COMP. PRES. DOC. 423, 425 (Mar. 9, 2006) (“The executive branch shall *construe* the provisions of H.R. 3199 that call for furnishing information to entities outside the executive branch . . . in a manner consistent with the President’s constitutional authority to . . . withhold information the disclosure of which would impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive’s constitutional duties. . . . The executive branch shall *construe* section 756(e)(2) of H.R. 3199 . . . 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 he judges necessary and expedient.”) (emphasis added); Statement on Signing the Deficit Reduction Act of 2005, 42 WEEKLY COMP. PRES. DOC. 215 (Feb. 8, 2006) (“The executive branch shall *construe* section 1936(d)(2) of the Social Security Act . . . , which purports to make consultation with a legislative agent a precondition to execution of the law, to call for but not mandate 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.”) (emphasis added); Statement on Signing the Trafficking Victims Protection Reauthorization Act of 2005, 42 WEEKLY COMP. PRES. DOC. 39 (Jan. 10, 2006) (“The executive branch shall *construe* this reporting requirement in a manner consistent with the President’s constitutional authority as Commander in Chief and the President’s constitutional authority to conduct the Nation’s foreign affairs.”) (emphasis added).

<sup>6</sup> *See, e.g.*, Curtis A. Bradley & Eric Posner, *Presidential Signing Statements and Executive Power* 23 CONST. COMMENT. 307, 310 (2006) (noting that if the President misinterprets statutes in signing statements, the problem is “the underlying views expressed in the statements, not the statements themselves”); Marty Lederman et al., *Untangling the Debate on Signing Statements*, available at [http://gulcfac.typepad.com/georgetown\\_university\\_law/2006/07/thanks\\_to\\_the\\_p.html](http://gulcfac.typepad.com/georgetown_university_law/2006/07/thanks_to_the_p.html) (“There is nothing inherently wrong with signing statements as such—including those that contain constitutional objections.”).

<sup>7</sup> *See, e.g.*, Editorial, *Veto? Who Needs a Veto?*, N.Y. TIMES, May 5, 2006, at A22 (“[No former presidents] have used [signing statements] so clearly to make the president the interpreter of a law’s intent, instead of Congress, and the arbiter of constitutionality, instead of the courts.”); Bob Egelko, *How Bush Sidesteps Intent of Congress*, S.F. CHRON., May 7, 2006, at A1 (“The civics-book answer is clear: Congress passes the laws, the president carries them out, and the courts decide whether they’re constitutional.”).

this view is unsound. It is simply impossible, as a matter of logic, to execute a law without determining what it means.

Every execution of a statute implies an interpretation. And the President cannot simply flip a coin. He has a constitutional duty to “take Care that the Laws be faithfully executed,”<sup>8</sup> and this faithfulness inherently and inevitably includes a good faith effort to determine what “the Laws” *mean*. In short, as the Supreme Court has explained, “[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of ‘execution’ of the law.”<sup>9</sup>

Nor is the President obliged to leave the interpretive choices to the Department of Defense. It is entirely appropriate for the President to declare how “the executive branch shall construe”<sup>10</sup> the National Defense Authorization Act. The Supreme Court has rightly said that the President can and should “supervise and guide [executive officers’] construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone.”<sup>11</sup> And as Walter Dellinger, Assistant Attorney General for the Office of Legal Counsel under President Clinton, has explained, this is a “generally uncontroversial . . . function of presidential signing statements”—“to guide and direct executive officials in interpreting or administering a statute.”<sup>12</sup>

Of course, the President was not required to make his interpretation of the National Defense Authorization Act public; he could have quietly instructed the Secretary of Defense and have done with it. But there are many good reasons why, in most circumstances, a public statement of interpretation is desirable. First, if the President’s interpretation is public, then those who believe that his interpretation is erroneous can better and more quickly structure a challenge in court. Second, a public statement of interpretation reduces legal uncertainty; if people know the President’s interpretation, they are better able to organize their affairs accordingly.<sup>13</sup> Third, and

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<sup>8</sup> U.S. CONST. art. II, § 3.

<sup>9</sup> *Bowsher v. Synar*, 478 U.S. 714, 733 (1986).

<sup>10</sup> Statement on Signing the National Defense Authorization Act for Fiscal Year 2008, 44 WEEKLY COMP. PRES. DOC. 115 (Jan. 28, 2008).

<sup>11</sup> *Myers v. United States*, 272 U.S. 52, 135 (1926).

<sup>12</sup> The Legal Significance of Presidential Signing Statements, 17 Op. Off. Legal Counsel 131, 132 (1993).

<sup>13</sup> See Frank B. Cross, *The Constitutional Legitimacy and Significance of Presidential “Signing Statements”*, 40 ADMIN. L. REV. 209, 227-28 (1988) (arguing that the President’s decision to announce his interpretation of a statute in a signing statement beneficially increases the transparency of executive branch decision-making); Lederman et al., *supra* note 6 (“The signing statement is a *good* thing: a manifestation of the Executive’s intentions that helps us to understand the heart of the problem. . . . [I]t is much *better* that [the President] tell Congress and the public of his intentions, rather than keep it secret . . . .”); see also John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965 (1984) (analyzing the types of costs arising from uncertainty about legal rules); Michael P. Van Alstine, *The Costs of Legal Change*, 49 UCLA L. REV. 789, 822-36 (2002) (analyzing the costs that arise from uncertainty when new statutes are enacted and the importance of interpretive rules for reducing that uncertainty).

perhaps most important, a public statement informs Congress of the President's interpretation, and if Congress disagrees, it may pass a bill clarifying the matter.

In short, in the United States, we have a strong preference for sunlight in government.<sup>14</sup> Once it is clear that interpreting the law is essential to executing it, there can be no independent objection to the President making his interpretations public. This is the primary function of presidential signing statements, and President Clinton's Office of Legal Counsel was quite right to call this function "uncontroversial."<sup>15</sup>

## II. The Canon of Constitutional Avoidance

The President interprets statutes in much the same way that courts do, with the same panoply of tools and strategies. His lawyers carefully study the text and structure of Acts of Congress,<sup>16</sup> aided perhaps by dictionaries, linguistic treatises, and other tools of statutory interpretation. In addition, just like courts, they also apply well-established maxims of statutory interpretation, called canons.<sup>17</sup>

One canon in particular is of interest today. As Justice Holmes explained in 1927, "[T]he rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act."<sup>18</sup> This is known as the canon of constitutional avoidance,<sup>19</sup> and

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<sup>14</sup> Cf. *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam) ("Sunlight is said to be the best of disinfectants . . .") (quoting LOUIS DEMBITZ BRANDEIS, *OTHER PEOPLE'S MONEY* (1933)).

<sup>15</sup> The Legal Significance of Presidential Signing Statements, 17 Op. Off. Legal Counsel at 132.

<sup>16</sup> See, e.g., Statement on Signing the Miscellaneous Trade and Technical Corrections Act of 2004, 40 WEEKLY COMP. PRES. DOC. 2912, 2913 (Dec. 3, 2004) ("The executive branch shall construe the repeal, in section 1561(c) of the Act, of section 127 of the Treasury and General Government Appropriations Act, 2003, as contained in the Consolidated Appropriations Act, 2003 (Public Law 108-7) as repealing the amendments that were made to title 19 of the United States Code by section 127. Such a construction of section 1561(c) is *consistent with the text and structure* of amendments to title 19 made by section 1561.") (emphasis added); Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918 (Dec. 30, 2005) ("[N]oting that the text and structure of Title X do not create a private right of action to enforce Title X, the executive branch shall construe Title X not to create a private right of action.") (emphasis added); Statement on Signing the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, 41 WEEKLY COMP. PRES. DOC. 1273 (Aug. 10, 2005) ("The executive branch shall construe section 5305(g)(3) of the Act to be a statute to which section 552(b)(3)(A) of title 5, United States Code, refers, *as the text and structure of section 5305(g) indicate.*") (emphasis added). See also *Alexander v. Sandoval*, 532 U.S. 275, 289 n.7 ("[O]ur methodology is not novel, but well established in earlier decisions . . ., which explain that *the interpretive inquiry begins with the text and structure of the statute . . .*") (emphasis added).

<sup>17</sup> For example, compare Statement on Signing Communications Legislation, 40 WEEKLY COMP. PRES. DOC. 3013 (Dec. 23, 2004) (applying "the principle of statutory construction of giving effect to each of two statutes addressing the same subject whenever they can co-exist") with *Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.").

<sup>18</sup> *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.).

<sup>19</sup> See, e.g., *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 730 (9th Cir. 2003).

it “is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations.”<sup>20</sup>

This is the canon that the President is applying when he says that he will interpret the National Defense Authorization Act “in a manner consistent with the constitutional authority of the President.”<sup>21</sup> This is a very common form of signing statement,<sup>22</sup> and it is crucial to understand what this sort of signing statement does and does not say. This signing statement does not “reserve the right to disobey”<sup>23</sup> the law. It does not “amount to [a] partial veto[.]”<sup>24</sup> It does not “declare[ the President’s] intention not to enforce anything he dislikes.”<sup>25</sup> And it does not declare the National Defense Authorization Act, or any part of it, unconstitutional.

In fact, it declares exactly the opposite. As President Clinton’s Office of Legal Counsel has explained, these sorts of signing statements are “analogous to the Supreme Court’s practice of *construing* statutes, if possible, to *avoid* holding them unconstitutional . . . .”<sup>26</sup> What this signing statement says, in effect, is that if an ambiguity appears on the face of the National Defense Authorization Act or becomes apparent in the course of execution, and if one possible meaning of the statute would render it unconstitutional, then the President will presume that Congress intended the other, constitutional meaning—and he will *faithfully enforce the Act so understood*.<sup>27</sup>

Similarly, there is nothing portentous in the President’s declaration that “[p]rovisions of the Act . . . 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.”<sup>28</sup> Again, this is emphatically not a declaration that any part of the Act is unconstitutional. To the extent that this sentence makes a constitutional claim, it is a doubly contingent one. Provisions “purport”—on some conceivable interpretation—“to impose requirements,” and those requirements “could”—in some conceivable circumstances—impinge on the President’s constitutional

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<sup>20</sup> *Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991). See also *Ex parte Randolph*, 20 F.Cas. 242, 254 (C.C.D.Va. 1833) (No. 11,558) (Marshall, C.J.).

<sup>21</sup> Statement on Signing the National Defense Authorization Act for Fiscal Year 2008, 44 WEEKLY COMP. PRES. DOC. 115 (Jan. 28, 2008).

<sup>22</sup> See Bradley & Posner, *supra* note 6, at 341-42 (“When presidents have constitutional concerns, it is rare for them to announce in a signing statement that they will decline to enforce a statutory provision. Instead, they frequently state that they will interpret the provision in a way that will avoid the purported constitutional problem.”). Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1217-20 (2006) (describing executive branch use of the avoidance canon).

<sup>23</sup> Charlie Savage, *Bush Challenges Hundreds of Laws*, THE BOSTON GLOBE, Apr. 30, 2006, at A1.

<sup>24</sup> Bob Egelko, *How Bush Sidesteps the Intent of Congress*, S.F. CHRONICLE, May 7, 2006, at A1.

<sup>25</sup> Editorial, *Veto? Who Needs a Veto?*, N.Y. TIMES, May 5, 2006, at A22.

<sup>26</sup> The Legal Significance of Presidential Signing Statements, 17 U.S. Op. Off. Legal Counsel 131, 133 (1993) (emphasis added).

<sup>27</sup> See Bradley & Posner, *supra* note 6, at 343 (“Many of the statements appear simply to be placeholders to preserve an executive viewpoint about the Constitution, not an indication that the Executive will decline to fully enforce a statute.”).

<sup>28</sup> Statement on Signing the National Defense Authorization Act for Fiscal Year 2008, 44 WEEKLY COMP. PRES. DOC. 115 (Jan. 28, 2008).

prerogatives. The statement simply declares that—if such circumstances should arise and an alternative, constitutional interpretation of the Act is available—the executive branch will choose the alternative, constitutional interpretation.

Again, this amounts to nothing more than a straightforward application of a canon of statutory construction that was already well established when Justice Holmes elaborated it in 1927,<sup>29</sup> a canon that finds its entire rationale in “a just respect for the legislature”<sup>30</sup> and the faithfulness of Representatives and Senators to their constitutional oaths.<sup>31</sup> If a statute is ambiguous, we—the President, the Court, the People—presume that Congress intended it to be constitutional.<sup>32</sup>

### III. The Particular Provisions Singled Out By The Signing Statement

So, there is nothing inherently objectionable in the fact, or in the form, of the President’s signing statement. Like many signing statements of this President and prior Presidents, it simply declares an intention to use the well-established canon of constitutional avoidance in interpreting the Act. It declares that if circumstances should arise in which a particular interpretation of certain provisions would be constitutionally problematic, and another interpretation is plausible, the President will choose the alternative, constitutional interpretation.

It remains to be seen precisely which provisions of the Act raised these (theoretical) constitutional concerns for the President. Again, he declared:

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.<sup>33</sup>

It is unfortunate that the President chose to give a *non-exclusive* list of the potentially problematic provisions of the National Defense Authorization Act—saying only that the

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<sup>29</sup> See *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J.).

<sup>30</sup> *Ex parte Randolph*, 20 F.Cas. 242, 254 (C.C.D.Va. 1833) (No. 11,558) (Marshall, C.J.).

<sup>31</sup> See U.S. Const. art. VI (“The Senators and Representatives before mentioned . . . shall be bound by Oath or Affirmation, to support this Constitution.”); 5 U.S.C.A. § 3331 (West 1966) (establishing the oath for all elected and appointed officials: “I . . . do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.”); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274 (1990) (“The Members of the . . . Legislative Branch[] are sworn to uphold the Constitution, and they presumably desire to follow its commands.”).

<sup>32</sup> See *Rust v. Sullivan*, 500 U.S. 173, 190-91 (1991).

<sup>33</sup> Statement on Signing the National Defense Authorization Act for Fiscal Year 2008, 44 WEEKLY COMP. PRES. DOC. 115 (Jan. 28, 2008) (emphasis added).

list “*includ[es]* sections 841, 846, 1079, and 1222.” But a careful reading of the provisions that he did specify may reveal the sort of constitutional concerns that he has in mind. Therefore, the remainder of this testimony will examine those four provisions.

### **A. Section 841**

Section 841 creates a Commission on Wartime Contracting in Iraq and Afghanistan.<sup>34</sup> This Commission is a somewhat odd hybrid, in that six of its members are to be appointed by members of Congress and two are to be appointed by the President.<sup>35</sup> But such an arrangement is probably not constitutionally problematic, so long as the Commission is purely advisory and exercises no executive power. This Commission does appear to be purely advisory, but it does have some powers that could potentially raise constitutional issues.

The Act provides:

The Commission may secure from . . . any . . . department or agency of the Federal Government any information or assistance that the Commission considers necessary to enable the Commission to carry out the requirements of this section. Upon request of the Commission, the head of such department or agency shall furnish such information expeditiously to the Commission.<sup>36</sup>

This provision could potentially raise constitutional issues, particularly if the Commission were to request privileged or classified information. As the Supreme Court has said:

The President . . . is the “Commander in Chief of the Army and Navy of the United States.” U.S. Const., Art. II, § 2. His authority to classify and control access to information bearing on national security . . . flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant. . . . This Court has recognized the Government’s “compelling interest” in withholding national security information from unauthorized persons in the course of executive business. . . . The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief.<sup>37</sup>

The Act attempts to address this issue with the following provision:

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<sup>34</sup> See National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 841 (2008).

<sup>35</sup> See *id.* at § 841(b)(1).

<sup>36</sup> *Id.* at § 841(e)(3).

<sup>37</sup> *Dep’t of Navy v. Egan*, 484 U.S. 518, 527 (1988) (citations omitted).

The appropriate departments or agencies of the Federal Government shall cooperate with the Commission in expeditiously providing to the Commission members and staff appropriate security clearances to the extent possible pursuant to existing procedures and requirements, except that no person shall be provided with access to classified information under this section without the appropriate security clearances.<sup>38</sup>

This provision certainly ameliorates the President's constitutional concern for classified information, but, depending on how it is interpreted, it may not obviate the concern altogether. This provision holds that the Federal Government "shall cooperate" in "expeditiously" providing security clearances "to the extent possible." If this language were read to require the President to issue security clearances where he would otherwise deny them, then this provision—coupled with the Commission's power to demand information from the executive branch<sup>39</sup>—would arguably impinge on the President's power and duty to control the flow of classified information, and thus "inhibit [his] ability . . . to execute his authority as Commander in Chief."<sup>40</sup> Moreover, this section makes no exception for (non-classified) privileged information. Thus, the President's reference to this section in his signing statement probably signals only this: He will interpret this subsection to leave untouched his constitutional executive privilege and his constitutional discretion to control the flow of classified information.

The point is one of principle, and it is the sort of thing that Presidents point out in order to preserve their constitutional prerogatives. But the Subcommittee is probably most interested in how the point would play out on the ground. In practice, the signing statement is unlikely to have any effect on the implementation of this provision. Nothing in this statement suggests that the President will deny the Commission any appropriate security clearances or classified information. Indeed, nothing in the signing statement suggests that he will give anything but complete cooperation to the Commission on Wartime Contracting in Iraq and Afghanistan.

## **B. Section 846**

This section provides increased protection for government contractors from reprisal for disclosure of certain information.<sup>41</sup> Complaints of such reprisals are, as before, to be submitted to an Inspector General in the first instance. But section 846 increases the power of the Inspector General in the handling of such complaints. Under this provision, when the Inspector General submits a report concerning such a complaint, the report triggers an *obligation* in the head of the relevant agency. As amended by

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<sup>38</sup> National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 841(e)(6) (2008).

<sup>39</sup> *See id.* at § 841(e)(3) (2008).

<sup>40</sup> Statement on Signing the National Defense Authorization Act for Fiscal Year 2008, 44 WEEKLY COMP. PRES. DOC. 115 (Jan. 28, 2008).

<sup>41</sup> *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 846 (2008).

section 846, the relevant provision provides: “Not later than 30 days after receiving an Inspector General report pursuant to subsection (b), the head of the agency concerned *shall* determine whether there is sufficient basis to conclude that the [complaint is meritorious] and *shall* either issue an order denying relief or *shall*” order the contractor to take one of three possible actions.<sup>42</sup> And if a person fails to comply with such an order, “the head of the agency *shall* file an action for enforcement of such order in . . . United States district court.”<sup>43</sup>

The President perhaps singled out this provision in part because of this increase in the power of Inspectors General. The Office of Legal Counsel long ago opined that Inspectors General are constitutionally permissible only the extent that they serve “as . . . executive officer[s] subject to the supervision of the agency head and subject to the ultimate control of the Chief Executive Officer.”<sup>44</sup> Empowering Inspectors General to compel the action of the head of a department might be thought to unconstitutionally elevate an inferior officer above a principal officer.

And this provision raises another issue as well. To the extent that it could be interpreted to forbid reprisals for the unauthorized disclosure of classified information, this provision would be in significant tension with the principle that “[t]he authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief.”<sup>45</sup> As the Office of Legal Counsel has opined in an analogous context, “a congressional enactment would be unconstitutional if it were interpreted to divest the President of his control over national security information in the Executive Branch by vesting lower-ranking personnel in that Branch with a ‘right’ to furnish such information to a Member of Congress without receiving official authorization to do so.”<sup>46</sup> If executive branch personnel cannot be vested with such a right, then government contractors probably cannot either.

Again, however, these constitutional concerns seem somewhat theoretical. After all, under the terms of this section, the head of the agency still appears to have full discretion to issue an order denying relief to someone complaining of such reprisals.<sup>47</sup> So, again, it seems that the presidential signing statement is unlikely to affect the implementation of this provision to any great degree.

### C. Section 1079

Section 1079(a) requires certain executive branch officials to provide “any existing intelligence assessment, report, estimate, or legal opinion” to certain congressional committees upon demand. To the extent that these committees may

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<sup>42</sup> 10 U.S.C.S. § 2409(c)(1) (2008) (emphasis added).

<sup>43</sup> 10 U.S.C.S. § 2409(c)(4) (2008) (emphasis added).

<sup>44</sup> See *Memorandum Opinion for the Attorney General Re: Inspector General Legislation*, 1 Op. Off. Legal Counsel 16 (1977). See also 5 U.S.C.A. § 3 (1978) (“Each Inspector General shall report to and be under the general supervision of the head of the establishment involved.”).

<sup>45</sup> *Dep’t of Navy v. Egan*, 484 U.S. 518, 527 (1988) (citations omitted).

<sup>46</sup> *Access to Classified Information*, 20 Op. Off. Legal Counsel 402 (1996) (internal quotations omitted).

<sup>47</sup> 10 U.S.C.S. § 2409(c)(1) (2008).

demand classified information under this section, it potentially raises the same constitutional concern discussed above.<sup>48</sup> Again, the Supreme Court has made clear that the President has constitutional authority to control the dissemination of classified information.<sup>49</sup> Thus, in certain circumstances, the President might find that this provision would “inhibit [his] ability . . . to execute his authority as Commander in Chief.”<sup>50</sup> Likewise, to the extent that congressional committees might demand internal executive branch deliberations under this provision, it might “inhibit the President’s ability to carry out his constitutional obligations to take care that the laws be faithfully executed [and] to supervise the executive branch.”<sup>51</sup> These concerns are probably what led the President to single out section 1079 in his signing statement.

True, subsection 1079(b) greatly ameliorates these concerns. It provides an exception, if “the President determines that such document or information shall not be provided because the President is asserting a privilege pursuant to the Constitution of the United States.”<sup>52</sup> But this provision might not entirely obviate the constitutional concerns, because even the disclosure of information that is not strictly “privileged” might, in some circumstances, impair the President’s exercise of his core executive functions.<sup>53</sup>

Again, however, the point is largely theoretical. In practice, the relevant committees will presumably demand only appropriate information under this section, with appropriate solicitude for the President’s constitutional authority. Likewise, Congress will presumably respect any reasonable assertion of privilege under subsection 1079(b). If so, no constitutional issue will arise under this section, and the signing statement probably will not affect the implementation of the provision. To be perfectly clear, nothing in this signing statement suggests that the President intends to withhold any relevant and appropriate information whatsoever from the Armed Services Committees.

#### **D. Section 1222**

The final section singled out by the President provides:

No funds appropriated pursuant to an authorization of appropriations in this Act may be obligated or expended . . .  
(1) [t]o establish any military installation or base for the

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<sup>48</sup> See *supra* Part III-A.

<sup>49</sup> See *Dep’t of Navy v. Egan*, 484 U.S. 518, 527 (1988).

<sup>50</sup> Statement on Signing the National Defense Authorization Act for Fiscal Year 2008, 44 WEEKLY COMP. PRES. DOC. 115 (Jan. 28, 2008).

<sup>51</sup> *Id.* See also Memorandum for Robert M. McNamara, Jr., General Counsel, Central Intelligence Agency, from Todd D. Peterson, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Legal Authority to Withhold Information from Congress* at 3 (Sept. 9, 1988) (“application of [statutory] reporting requirements . . . is limited by a constitutional restraint—the executive branch’s authority to control the disclosure of information when necessary to preserve the Executive’s ability to perform its constitutional responsibilities.”).

<sup>52</sup> National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1079(b)(1) (2008).

<sup>53</sup> See, e.g., *Authority of Agency Officials to Prohibit Employees from Providing Information to Congress*, Op. Off. Legal Counsel, 2004 WL 3554702 (2004) (suggesting that even the disclosure of non-privileged information to Congress might, in some circumstances, raise constitutional concerns).

purpose of providing for the permanent stationing of United States Armed Forces in Iraq [or] (2) [t]o exercise United States control of the oil resources of Iraq.<sup>54</sup>

This provision implicates the relationship between Congress's appropriations power and the President's power as Commander in Chief. Of course, Congress possesses broad power over appropriations,<sup>55</sup> but this power is not unlimited. The power to withhold an appropriation altogether does not necessarily imply the power to appropriate money subject to limitless conditions. For example, Congress probably cannot trench upon the core functions of the executive branch with overly specific spending restrictions.<sup>56</sup> As the Office of Legal Counsel has opined, "Broad as the spending power of the legislative branch undoubtedly is, . . . Congress may not deploy it to accomplish

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<sup>54</sup> National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1222 (2008).

<sup>55</sup> See U.S. Const. Art. I, § 9 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

<sup>56</sup> While the Court has only alluded to this point, *see* *United States v. Lovett*, 328 U.S. 303, 313 (1946); *South Dakota v. Dole*, 483 U.S. 203, 207 (1987) ("The spending power is of course not unlimited, but is instead subject to several general restrictions articulated in our cases. . . . [W]e have noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds."), the Executive Branch has taken this position clearly and consistently for more than 70 years, *see* *Constitutional Issues Raised by Commerce, Justice and State Appropriations Bill*, 2001 WL 34907462 (O.L.C.) ("[I]t is unconstitutional for Congress to place conditions, whether substantive or procedural, on the President's exercise of his constitutional authority."); 20 Op. Off. Legal Counsel 232 (1996) ("While Congress has broad authority to grant, limit, or withhold appropriations, that power may not be used . . . to circumvent the steps required by the Constitution for Congress to enact a law or regulation binding on persons outside the legislative branch."); 20 Op. Off. Legal Counsel 189 (1996) ("The past practice of the Executive branch demonstrates its refusal to comply with unconstitutional spending conditions that trench on core Executive powers."); 19 Op. Off. Legal Counsel 123 (1995) ("[I]t does not matter in this instance that Congress has sought to achieve its objectives through the exercise of its spending power, because the condition it would impose on obligating appropriations is unconstitutional."); 16 Op. Off. Legal Counsel 18, 28 (1992) ("That section 503 was enacted as a condition on the appropriation of money for the State Department does not save it from constitutional infirmity."); 14 Op. Off. Legal Counsel 37, 41 n.3 (1990) ("Nor can section 102(c)(2) be viewed as a legitimate exercise of congressional power over the appropriation of public funds. Congress may not use that power to attach conditions to executive branch appropriations requiring the President to relinquish his constitutional discretion in foreign affairs."); 13 Op. Off. Legal Counsel 258 (1989) ("[T]he fact that Congress appropriates money for the army does not mean that it can constitutionally condition an appropriation on allowing its armed services committees to have tactical control of the armed forces. Nor does it follow from Congress' legislative establishment of executive branch departments and its appropriation of money to pay the salaries of federal officials that Congress can constitutionally condition creation of a department or the funding of an officer's salary on being allowed to appoint the officer."); 4B Op. Off. Legal Counsel 731, 733 (1980) ("It is well established that Congress cannot use its power to appropriate money to circumvent general constitutional limitations on congressional power."); 41 U.S. Op. Att'y Gen. 507, 508 (1960) ("Congress cannot by direct action compel the President to furnish to it information the disclosure of which he considers contrary to the national interest. It cannot achieve this result indirectly by placing a condition upon the expenditure of appropriated funds."); 37 U.S. Op. Att'y Gen. 56, 61 (1933) ("Congress may not, by conditions attached to appropriations, provide for a discharge of the functions of Government in a manner not authorized by the Constitution."). *See also* Symposium, *The Appropriations Power and the Necessary and Proper Clause*, 68 WASH. U. L.Q. 623, 628-29 (1990) (William Barr) ("[The] appropriations power cannot be used to circumvent or intrude on the President's inherent authority.").

unconstitutional ends.”<sup>57</sup> Thus, “Congress cannot use the appropriations power to control a Presidential power that is beyond its direct control.”<sup>58</sup>

And in particular, Congress arguably may not trench upon the power of the President as Commander in Chief with a spending restriction that amounts to a tactical battlefield decision. Just as Congress cannot make specific, tactical, military decisions by law, it arguably lacks the power to achieve the same result indirectly with a cunningly crafted spending restriction.<sup>59</sup> According to the Office of Legal Counsel: “Congress cannot . . . place impediments on the President’s ability to deploy United States forces abroad for purposes he deems vital to the national security.... The fact that ... Congress is placing a condition on the President’s exercise of his constitutional authority indirectly, through the appropriations process, rather than as a direct mandate, does not change our conclusion.”<sup>60</sup>

Now, it must be said that this last constitutional point is debatable, and many scholars would disagree. My own view is that a spending restriction which amounts to a tactical battlefield order would indeed impermissibly trench upon the President’s Commander-in-Chief power. But it is admittedly difficult to find the limit of that principle. Under ordinary circumstances, it might be thought that Congress may forbid spending money on the establishment of permanent military bases abroad or on the control of foreign oil resources. But on the other hand, it is not difficult to imagine military exigencies in which spending money on such things is absolutely essential to our national security. In such circumstances, the President’s constitutional point might be well taken indeed.

And the President’s signing statement makes no claim about quite how extreme those military exigencies would need to be. The President has not declared this provision unconstitutional on its face, in all circumstances. And he has certainly expressed no intention to spend money in any manner inconsistent with it. It is safe to assume that no President would lightly spend money in the face of such a statutory spending restriction. All the President has done here is flagged a *potential* constitutional concern—one which the facts on the ground in Iraq might never actually present—and signaled that, if necessary, he will interpret the provision in light of this constitutional constraint.

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<sup>57</sup> *Presidential Certification Regarding the Provision of Documents to the House of Representatives Under the Mexican Debt Disclosure Act of 1995*, 20 Op. Off. Legal Counsel 253, 266 (1996).

<sup>58</sup> *Id.* at 267 (internal quotation omitted).

<sup>59</sup> See Reid Skibell, *Separation-of-Powers and the Commander in Chief: Congress’s Authority to Override Presidential Decisions in Crisis Situations*, 13 GEO. MASON L. REV. 183, 195 (2004) (“[S]ome scholars have argued that appropriations are an all-or-nothing grant: Congress can decide what to fund, but it cannot use funding as an excuse to dictate how items bought with those funds are utilized. They contend that although Congress provides the money for a tank, it shouldn’t necessarily decide where that tank should be located.”)

<sup>60</sup> *Constitutional Issues Raised by Commerce, Justice and State Appropriations Bill*, 2001 WL 34907462 (O.L.C.) (2001).

## Conclusion

In conclusion, the President's statement upon signing the National Defense Authorization Act is unremarkable in both form and substance. Formally, it merely signals an intent to apply the well-established canon of constitutional avoidance—a canon born of “a just respect for the legislature”<sup>61</sup>—when interpreting the Act. Countless signing statements by many Presidents have taken precisely this form.

Substantively, the statement flags a few provisions of the National Defense Authorization Act that raise a number of potential constitutional issues. But it does not declare any of those provisions unconstitutional. Rather, the President merely states that these constitutional concerns will inform the executive branch's *interpretation* of the Act.

Moreover, for the most part, the constitutional issues identified are both contingent and theoretical. So there is nothing particularly portentous in the President's declaration that “[t]he executive branch shall construe [the Act] in a manner consistent with the constitutional authority of the President.”<sup>62</sup> In practice, this signing statement is unlikely to affect substantially the implementation of the National Defense Authorization Act.

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<sup>61</sup> *Ex parte Randolph*, 20 F.Cas. 242, 254 (C.C.D.Va. 1833) (No. 11,558) (Marshall, C.J.).

<sup>62</sup> Statement on Signing the National Defense Authorization Act for Fiscal Year 2008, 44 WEEKLY COMP. PRES. DOC. 115 (Jan. 28, 2008).